(1960) 12 MP CK 0014

In the Madhya Pradesh High Court

Case No : C. Rev. No. 74 of 1959

Saraswatibai APPELLANT

Vs

Govindrao RESPONDENT

Date of Decision : 07-12-1960

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 11(2)(j), 63, 73

Citation : (1961) JLJ 166

Hon'ble Judges : P.V. Dixit, C.J;P.K. Tare, J;K.L. Pandey, J

Bench : Full Bench

Advocate : B.L. Seth and S.L. Golchha, for the Appellant; R.S. Dabir and V.S. Dabir, for the Respondent

Final Decision : Allowed

Judgement

K.L. Pandey, J.—This revision has come up before us in pursuance of the following order of Bhutt C. J. -

"As the decision of a Division Bench of this Court in Balaji Vs Gopal 25 N. L. R. 49. is likely to come up for consideration, this revision shall be heard by a Full Bench."

2. The facts of the case giving rise to the question, which necessitated a reference to a Full Bench, may be briefly stated. In Execution Case No. 435 of 1955 pending in the Court of the First Civil Judge, Burhanpur, a house of the judgment-debtor was attached and put to sale. The auction-purchaser paid the price on 20 August 1957. Before that date, three other execution applications against the same judgment-debtor were made in that Court. In two of these cases (No. 14 of 1955 and No. 436 of 1955), there is a prayer only for rateable distribution of the assets held in Execution Case No. 435 of 1955 in the third case (No. 2070 of 1955), the relief claimed is attachment of immoveable property of the judgment-debtor and rateable distribution of the assets held in Execution Case No.435 of 1955. Pursuant to the provisions of section 63 of the

Code of Civil Procedure, the sale proceeds and the four execution cases were transferred to the Court of the Additional District Judge Khandwa, where another execution application against the same judgment-debtor was also pending. Relying upon Balaji Vs. Gopal 25 N.L.R 94, the Additional District Judge held that the applications in Execution Cases Nos. 14, 436 and 2070 of 1955 were not valid applications for execution and could not furnish any basis for rateable distribution of assets u/s 73 of the Code.

3. On a question which did not arise out of the facts of Balaji Vs. Gopal (cit. sup.) but which was specifically referred to a Division Bench, it was held that a creditor claiming rateable distribution on the strength of a money decree must himself ask for attachment and sale of the property or for execution of his decree by one of the modes, not including rateable distribution, specified in Order 21 Rule 11 (2) (j), of the Code of Civil Procedure.

4. The question for consideration here is whether an otherwise good application for execution can be regarded, for the purposes of section 73 of the Code of Civil Procedure, to be one made in accordance with law even if the only mode in which the assistance of the Court stated to be required is rateable distribution of the assets to be received in another execution case pending in the same Court. As indicated earlier, Balaji Vs. Gopal (cit sup.) is a direct authority for the contrary view, thougth the decision of that case is supportable on the ground that there was, unlike the case before us, no execution application and only an application for rateable distribution of assets had been filed. Some support for that view was sought to be derived from Gopal Parsharam Namjoshi Vs. Damodar Janardan Bhagwat, . The test of an application for execution being in accordance with law, as laid down in that case, is whether it is possible for the Court to issue execution upon it, that is, whether it is within the power of the Court to grant the kind of relief asked for. In our opinion, the three applications in this case fulful that test. A view different from the one in Balaji Vs. Gopal (cit. sup.) was taken in Gobardhan Das Vs. Jang Bahadur ILR 1 Luck 569, Abdul Salam Vs. Veerabhadra Raju I.L.R-52 Mad 760, Deorajo Kuer Vs. Jadunandan Rai ILR 53 All. 125, Kanahaiya Lal Vs. The Punjab National Bank, Limited I. L. R. 14 Lah 6; Moka Jambanna Vs. Kopparam Honnappa , and Debi Dutt Vs. T. Bellan AIR 1959 Cal 566. The Calcutta High Court and the Allahabad High Court expressly dissented from the view taken in the Nagpur case.

5. In our opinion, the Nagpur view is not correct. An application for execution must be in the form prescribed by Order 21 Rule 11, Civil procedure Code, setting out inter alia the mode in which the assistance of the Court is required, namely, whether:-

"J. (i) by the delivery of any property specifically decreed;

(ii) by the attachment and sale, or by sale without attachment, of any property;

(iii) by the arrest and detention in prison of any person;

(iv) by the appointment of a receiver;

(v) otherwise, as the nature of the relief granted may require."

The words of clause (j) (v) "otherwise as the nature of the relief granted require" are wide, may As the Calcutta High Court pointed out in the case referred to above, they cannot be construed ejusdem generis with other clauses because there is no common genus. Also, the relief granted in each of the three cases here was a money decree and the mode of the assistance of the Court sought was recovery of the decretal amount by rateable distribution. Order 21 Rule 30 of the Code is not exhaustive of the modes in which a money decree may be executed. The Code itself provides for another mode of execution of a money decree, namely, rateable distribution. That being so, we are of the view that recovery of the money decreed by rateable distribution of assets, being a permissible mode of execution, is within the ambit of clause (i) (v) of Order 21 Rule 11 (2) of the Code and an execution application which specifies it as the mode in which the assistance of the Court is required is one in accordance with law for purposes of section 73 of the Code. We are supported in this view by the cases we have mentioned at the end of the last paragraph.

6. There is another aspect of this case which perhaps escaped the notice of the lower Court. Since, as contended for, the only defect in these three applications was in the specification of the mode in which the assistance of the Court was required, that defect was not such as could preclude the decree-holders from obtaining relief Jugalkishore Saraf Vs. Raw Cotton Co. Ltd., , When the three applications for execution were made, the Court had to scrutinize the applications as required by Order 21 Rule 17 of the Code and, if they were found to be defective, the Court should have either rejected the application or allowed the defect to be removed there and then or within a time to be fixed by the Court. When neither of the two courses was followed and the applications were duly registered, they cannot be subsequently discarded as not being in accordance with law without giving to the decree-holders an opportunity to remedy the defects. In a similar situation, the Supreme Court treated a subsequent execution application specifying the proper mode as curing the defect though it was made beyond time: Jugalkishore Saraf vs. Raw Cotton Co Ltd- (cit sup.). It follows that even on the view taken by the lower Court, the decree holders should have been permitted to remove what were regarded as defects by amending their execution applications.

7. In the view that we have taken, this revision succeeds and is allowed. The lower Court''s order dated 24 December 1958 is set aside and the case is remitted to that Court for rateable distribution of the assets. The applicants shall have their costs of this revision. Counsel''s fee Rs. 50/-.

