

(1998) 08 AHC CK 0143
In the Allahabad High Court
Case No : Writ Petition No. 2319 (M/S) of 1997

Smt. Mahmooda

APPELLANT

Vs

District Judge, Bahraich and others

RESPONDENT

Date of Decision : 05-08-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 90, 151, 47
Criminal Procedure Code, 1973 (CrPC) — Section 145
Transfer of Property Act, 1882 — Section 54, 60

Citation : (1998) 4 AWC 362 : (1998) AWC 362

Hon'ble Judges : S.H.A. Raza, J

Bench : Single Bench

Advocate : S.P. Shukla and R.P. Shukla, for the Appellant; C.S.C., M. Afzal, A.N. Shukla, A.A. Zaidi and F.A. Khan, for the Respondent

Final Decision : Dismissed

Judgement

S.H.A. Raza, J.—Besides the other questions which are involved in the present writ petition, which I will deal later on, it will be necessary to dwell into the scope and ambit of the provisions contained in Order XXI. Rule 90, C.P.C. which read as under :

90. Application to set aside sale on ground of irregularity or fraud.--(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon

any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation.--The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule.

2. A perusal of the aforesaid provisions indicates that any person who has a share in a rateable distribution of assets, or whose interest is affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it, meaning thereby the scope and ambit of Rule 90 of Order XXI, to set aside the sale is confined only to the ground of material irregularity or fraud in publishing or conducting it. The question as to whether the property in question is saleable or not cannot be looked into within the four corners of Rule 90 of Order XXI. The objection for setting aside the sale must, pertain to any material irregularity or fraud in publishing or conducting the sale.

3. In the present case, the petitioner/objector before the Court of execution as well as revisional court, had taken up a plea that the house in question by means of an oral "Hiba" "Bayawaz Dein Mehr" (oral gift in lieu of dower money) was gifted to her by her former husband Bashir Ahmad. It was stated in the objection that Mr. Bashir Ahmad, her former husband who had divorced her later on, had delivered the possession of the house in question to the petitioner/objector and she enjoyed peaceful possession over the said house, since then.

4. The petitioner also asserted that proceedings u/s 145, Cr. P.C. were also initiated pertaining to the said house in which the second party was Mr. Bashir Ahmad and the Magistrate passed an order to the effect that on the date of preliminary order passed u/s 145, Cr. P.C. the petitioner was in possession. Mr. Bashir Ahmad did not file a civil suit (as it was provided u/s 145, Cr. P.C. prior to its amendment to get his right of possession adjudicated upon by a competent civil court) and due to the passage of time she perfected her right by way of adverse possession. The property in question which was the subject-matter of a decree passed by the civil court against Bashir Ahmad, could not be sold in pursuance of that decree, because the property belonged to the petitioner/objector.

5. In *Pokhar Singh Vs. Tula Ram*, , two eminent Judges of Allahabad High Court. Chief Justice Mr. Suleman and Mr. Justice Mulla observed :

"The right to object to the sale of a non-saleable property arises after such a sale has taken place. The objection that a certain property is not saleable is obviously not an objection which would fall within the scope of Order XXI. Rules 89 and 90, but is an objection to the execution of the decree governed by Section 47, C.P.C. There is no time-limit prescribed for raising such an objection and so long as the Court is functioning and has not become functus officio after the confirmation of sale and the satisfaction of the decree, it cannot be too late for the judgment-debtor to invite the attention of the Court to its statutory duty u/s 60 to see that

a property which is not saleable should not be sold."

6. A similar view was taken by a Hon"ble single Judge of Nagpur in Maroti Vithoba v. Kisanlal Sheonarain AIR 1938 Nag 558 wherein it was observed :

"Order XXI, Rule 90 applies only to irregularities or fraud in publishing or conducting a sale, not to questions of saleability. The objection as to saleability comes u/s 47. If the Legislature had intended that no objection to the saleability of property could lie unless taken before the drawing up of the proclamation of sale, it would have said so in the Rules under Order XXI.

It was further held :

"Where objection to saleability of property is not taken on the date fixed for the proclamation and issue of sale warrant, the judgment-debtor is not barred on the principle of res judicata from raising it afterwards and the objection raised before the sale takes place is maintainable."

6A. In Gauri v. Ude and others AIR 1942 Lah 153 a Full Bench of Lahore High Court held :

"Under Order XXI, Rule 90 a sale can be set aside only on the ground of a material irregularity or fraud in publishing or conducting it. It does not cover any objections to the sale on the ground that the property in question was not liable to be sold u/s 60. The word "conducting" has been used with reference to the proceedings of the officer conducting the sale and cannot be construed so widely as to cover objections relating to saleability of property."

7. From the aforesaid observations, it is evident that no objection pertaining to the saleability of the property can be raised in an objection purporting to be under Order XXI, Rule 90, C.P.C. and such an objection can be raised even after the attachment of the property, but must be filed before the sale had taken place. In the present case, the objection was filed not only when the sale had taken place but in pursuance of the sale, the sale certificate was granted to the decree-holder, which was registered in the office of the Sub-registrar.

8. Mr. R.P. Shukla, learned counsel for the petitioner relying upon the dictum of the Hon"ble Supreme Court asserted that the authorities which have been cited in the foregoing paragraphs have been impliedly overruled, after the dictum of the Hon"ble Supreme Court in Raghunath Pradhani Vs. Damodra Mahapatra and Others, .

9. Before dealing with the ratio decidendi of the observations of Hon"ble Supreme Court, it would be relevant to dwell into the factual matrix of that case. In that case respondent Damodra Mahapatra obtained a money decree on August 18, 1962, against respondent No. 3 and his mother respondent No. 4. On June 28, 1963 respondent No. 1 filed an execution petition for recovering the decretal amount and prayed therein for attachment of the immovable property belonging to respondent No. 3. The property was attached by an order passed by the

executing court on July 13, 1963. On November 27, 1963 respondent No. 1 filed an application in the executing court praying that permission be obtained of the Revenue Divisional Officer for sale of the property since respondent No. 3 to whom the property belonged was a member of the Scheduled Tribe. The permission was considered necessary by reason of the provisions contained in clause 6 of the "Orissa Scheduled Areas Transfer of Immovable Property by Scheduled Tribes Regulation No. 2 of 1956".

10. Respondent No. 3 who was in the meantime negotiating for the private sale of the property moved the R.D.O., Nowrangpur on June 18, 1963 for permission to sell the property to a non-Scheduled Tribe person. He obtained the requisite permission by an order dated October 23, 1963 for the sale of the property for Rs. 4,000. On the strength of the aforesaid permission, respondent No. 3 sold the property to the appellant on January 2, 1964 by a registered deed of sale. A copy of the order passed by the R.D.O. was produced by respondent No. 1 in the executing court whereupon, on May 15, 1964 the property was put to sale. Respondent No. 2, who is the son of respondent No. 1 purchased the property in the auction sale.

11. On June 22, 1964 the appellant filed an application under Order XXI. Rules 89 and 90 and Sections 47 and 151 of the CPC praying that the auction sale should be set aside on the ground that the attachment and the auction sale were void since they were effected without obtaining the permission of the competent authority under Orissa Regulation No. 2 of 1956. The appellant also alleged that the decree-holder had played a fraud on the Court by inducing it to put the property to sale on the strength of the order dated October 23, 1963 which was passed by the competent authority at the instance of the appellant.

12. From the facts narrated above, it is evident that an objection was made for setting aside the sale on the ground of fraud because the property was already attached in contravention of the statutory provisions of Orissa Scheduled Areas Transfer of Immovable Property by Scheduled Tribes Regulation No. 2 of 1956, which provided that in execution of money decree against a member of a Scheduled Tribe, no right, title or interest held by him in any immovable property within any Scheduled area shall be liable to be attached and sold except as and if prescribed and Rule 4 provided that there shall be no attachment or sale of immovable property in execution of a money decree against a member of a Scheduled Tribe within any Scheduled area without the written permission of the competent authority. The property at such a sale shall be sold only to a member of a Scheduled Tribe unless otherwise specifically directed in writing by the competent authority. An application was preferred for setting aside the sale by the transferee before the sale. In the circumstances of that case, it was held that the auction sale was bad and must be set aside.

13. In that regard, Hon"ble Chandrachud speaking for the Bench observed :

"The property was purchased by C from B on January 2, 1964. Prior to that sale

the property was undoubtedly attached in execution proceedings, but the order of attachment was void being contrary to the express inhibition contained in clause 6 of Regulation No. 2 of 1956 read with Rule 4 made thereunder. Under the registered sale executed by B in favour of C, the title to the property vested in C. C having become owner of the property on account of the aforesaid private sale, B had no saleable interest left in the property which could be put to sale in the court auction. It is elementary that what can be brought to sale in a court sale is the right, title and interest of the judgment-debtor and therefore the auction purchaser can get nothing more than that right, title and interest. The judgment-debtor not having any saleable interest in the property at all on the date of the auction sale, there was nothing that auction purchaser could get in the auction sale which was held in execution of the money decree. The auction sale therefore, cannot displace the title of C which is the same thing as saying that as between the title of the C and the so-called title of the auction purchaser, C's right must prevail,"

14. The ratio decidendi of the observations of the Hon'ble Supreme Court in the case of Raghunath Pradhani (supra), thus is only this much that the auction was bad for the reason that the attachment and sale of the immovable property was contrary to the provisions of Orissa Scheduled Areas Transfer of Immovable Property by Scheduled Tribes Regulation No. 2 of 1956.

15. In the present case, the house in question was attached and sold in pursuance of a decree passed by a competent civil court. It cannot be said that the attachment or the sale of the property in question was against the statutory provisions of any Act. The only contention of the petitioner in this petition is that the petitioner was the holder of the property in view of an oral gift made by her former husband in lieu of dower. This plea itself was contrary to law because a Full Bench of this Court in Ghulam Abbas Vs. Mt. Razia Begum and Others, , held that an oral transfer of immovable property worth more than Rs. 100 cannot be validly made by a muslim husband to his wife by way of gift in lieu of dower-debt which also exceeds Rs. 100. Such a transaction is neither a gift nor a combination of gifts which can be made orally ; it is a sale which can be effected by means of a registered instrument only.

16. The observation of the Full Bench of this Court in Ghulam Abbas (supra) was relied upon by a Hon'ble single Judge of this Court in Shamshuddin v. Ameer Jahan Begum 1995 ACJ 108. In para 25 of the report, it was observed :

"In the aforesaid circumstances, there can be no manner of doubt that a transfer of an immovable property by a Muhammedan husband in favour of his wife discharging the dower-debt does not involve two reciprocal gifts but is only one contract. Such "Hiba-Bil-Iwaz" as recognised in our country is a sale within the meaning of Section 54 of the Transfer of Property Act and unless made by a written instrument duly registered, it cannot convey title to the person in whose favour it is made. Consequently an oral conveyance of an immovable property worth more than Rs. 100 by Muhammedan husband in favour of his wife in lieu

of dower cannot be held to be valid. In this connection, it may further be noticed that transfer of property by the debtor to the creditor in payment of the debt constitutes a sale and this principle equally applies to the transfer of a property by a Muhammedan husband in favour of his wife towards a payment of her ascertained dower-debt."

17. Besides the above, the perusal of the objection preferred by the petitioner under Order XXI, Rule 90, C.P.C. does not indicate as to in which month and on what date and time Mr. Bashir Ahmad, the former husband of the petitioner made the alleged oral gift in favour of the petitioner. It also does not indicate that what was the occasion on which he made the oral gift. It is also not stated as to in whose presence the alleged gift was made.

18. In view of the aforesaid reasons. I am constrained to hold that the objection of the petitioner under Order XXI, Rule 90, C.P.C. does not fall within the scope and ambit of the said provisions, inasmuch as, in such objections the question of saleability of the property cannot be raised. For arguments' sake if it is presumed that such objection regarding saleability of the property in question could be raised, the contention of the petitioner that her husband made an oral gift in her favour transferring the possession of the house to her in lieu of dower-debt, cannot be accepted as a valid gift. It was a sale pure and simple, u/s 54 of the Transfer of Property Act, because the consideration for the said sale is the dower and by means of an oral gift such property could not have been transferred to the petitioner, as admittedly its valuation was above Rs. 100.

19. Sri R.P. Shukla next contended that the right, if any, of Bashir Ahmad, had extinguished in the property after he delivered the possession of the house in question to the petitioner. The petitioner perfected the right of adverse possession by remaining in possession for more than 12 years and in that regard, he referred to the proceedings u/s 145, Cr. P.C. which were in between the petitioner and her former husband Bashir Ahmad, in which the Magistrate has observed that on the date of preliminary order the petitioner was in possession. As Bashir Ahmad did not file a civil suit against the order passed in the said proceedings and the petitioner continued to remain in possession of the house in question, she has perfected her right by adverse possession, hence the house in question cannot be sold in pursuance of a decree in which Bashir Ahmad was the judgment-debtor. The contention is totally misconceived.

20. The proceedings u/s 145, Cr. P.C. and police proceedings which are not binding on any competent civil court. If it is assumed that the finding of the criminal court is binding, then it would be binding between the parties who were first and second party to the proceedings u/s 145, Cr. P.C. Her former husband Mr. Bashir Ahmad was the second party in the proceedings u/s 145. At the most it can be said that he would be bound by the order if he had not challenged those findings, but the decree-holder who had obtained a money decree against Mr. Bashir Ahmad cannot be bound by the order of the criminal court and no hostile possession can be claimed or asserted by the petitioner against M/s. Ghanshyam

Das Banwari Lal, who were the decree-holders.

21. It was also asserted that in accordance with the provisions contained in Order XXI, Rule 90, no permission was sought by M/s. Ghanshyam Das from the Court to participate into the proceedings of sale and hence, the sale in favour of Ghanshyam Das was non-est and contrary to rules. This contention is totally misconceived. In the present case, the decree was in favour of the firm Ghanshyam Das Banwari Lal. Ghanshyam Das participated in the sale proceedings in his individual capacity. It was never the case of the petitioner before the executing court that Ghanshyam Das had purchased the property as Benami, meaning thereby he purchased the property from the funds of the firm. Hence Ghanshyam Das in his individual capacity was competent to participate into the sale proceedings and being the highest bidder, the property was purchased by him.

22. Placing the order-sheet of the case, Mr. R.P. Shukla vehemently argued that the case was not listed for final hearing when it was decided. I have gone through the proceedings of the case which have been filed by the petitioner himself, which indicate that the case was fixed for hearing and after hearing the arguments of the counsel for the parties, judgment was reserved and it was later on pronounced.

23. The Court of execution has very clearly indicated in its order that no evidence was led by the petitioner to prove that any material irregularity or fraud in publishing or conducting the sale was committed. In absence of any such evidence, it cannot be said that the sale was bad on account of any material irregularity or fraud in publishing or conducting it.

24. The revision which was filed against the order passed by the Court of execution was dismissed. The Court below has given cogent reasons, based on the decisions of this Court, while dismissing the objection of the petitioner. I find no infirmity in the order passed by the Courts below.

25. The writ petition is devoid of merit. It is accordingly dismissed. However, considering the fact that the petitioner is a lady, who is alleged to have been divorced by earlier husband, the award of special costs of Rs. 5,000 is modified to the extent of Rs. 500 only.