

(1959) 09 P&H CK 0029

High Court Of Punjab And Haryana At Chandigarh

Case No: Ex. Second Appeal No. 276 of 1958

Balwant Rai Kumar

APPELLANT

Vs

Smt. Amrit Kaur

RESPONDENT

Date of Decision: Sept. 1, 1959

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 66(2), 47

Citation: AIR 1961 P&H 495

Hon'ble Judges: D.K. Mahajan, J

Bench: Single Bench

Advocate: Rajinder Sachar, for Bhagirath Das, for the Appellant; Rup Chand, for the Respondent

Final Decision: Allowed

Judgement

D.K. Mahajan, J.

In execution of a decree obtained by Amrit Kaur against Balwant Rai Kumar, land belonging to Balwant Rai Kumar was sold by auction. The land was purchased by the decree-holder on the 14th June, 1956. This sale was confirmed on the 21st July, 1956, and a sale certificate was granted on the 11th, October, 1956. The decree-holder obtained possession on the 21st February, 1957.

2. On the 27th November, 1956, an application was made by the judgment-debtor under section 47 of the CPC for setting aside the sale. The principal grounds are that the sale is vitiated as fraud was practised by the decree-holder on the executing Court and that no notice under Order 21 Rule 66 (2) of the Code was issued to the judgment-debtor and he was totally kept in the dark so far as the sale in dispute is concerned. It is claimed that the sale is a nullity and confers no title on the decree-holder.

3. This application was opposed by the decree-holder on a number of grounds. It is not necessary to set down all of them. The ground which prevailed with the Courts

below related to the maintainability of the objection petition u/s 47 of the CPC for setting aside the sale. The only issue framed is in these terms:-

"Whether the objection petition u/s 47 is maintainable?"

4. The executing Court held that after the confirmation of the sale a petition u/s 47 of the Code to set aside the same is not maintainable and accordingly it dismissed the petition. An appeal was preferred against this decision to the Senior Sub-Judge, Amritsar who by his judgment dated the 30th December, 1957, affirmed the decision of the trial Court. The present appeal is directed against the decision of the learned District Judge.

5. The contention raised by Mr. Rajinder Sachar, the learned counsel who appears for Mr. Bhagirath Das, is that the Courts below are in error in holding that the application by the judgment-debtor to set aside the sale after its confirmation is not maintainable u/s 47 of the Code. The contention of the learned counsel is that as the sale was confirmed after practising fraud on the executing Court, it is a nullity, and once it is set aside the parties would be relegated to the same position which they occupied before the sale. He further contends that as no notice of the sale as required by Order XXI, Rule 66 (2) of the Code was served on his client the sale is a nullity. For this he relies on the decision of the Bombay High Court reported as [Dada Narayan Thakre Vs. Jaichand Nagorao and Another,](#)

6. After hearing the learned counsel for the appellant I am of the view that there is substance in his contention. Section 47 of the Code is in "these term? --

"(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit or a suit as a proceeding and may, if necessary, order payment of any additional Court-fee.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation.-- For the purposes of this section, a plaintiff whose suit has been dismissed, a defendant against whom a suit has been dismissed and a purchaser at a sale in execution of the decree are parties to the suit."

7. On the plain reading of the section it is clear that the question, whether the sale should or should not be set aside, is one relating to the execution, discharge and satisfaction of the decree and as it is between the parties to the suit it can only be decided by the executing Court. If the sale is set aside on either of these grounds

alleged, it is set aside because it is treated as a nullity and as such has no existence in the eye of law.

In this situation it cannot be said that in fact there was any sale which could be confirmed or that the decree is fully satisfied as a result of such a sale. It has been held in a number of decisions of the various High Courts that an application to set aside a sale on the ground that it is nullity is maintainable u/s 47 of the Code. In this connection, in addition to the decision of the Bombay High Court referred to above, reference may be made to -

(1) Ashutosh Sikdar v. Behari Lal ILR Cal 61 ; (2) Baleshwar Chaubey Vs. Ram Ranavijaya Prasad Singh and Others, (3) Phoolchand and Another Vs. Badri Prasad, and (4) Siri Bhan v. Jit Singh AIR 1956 PeP 77.

8. Mr. Roop Chand learned counsel for the respondent, has drawn my attention to a Full Bench decision of the Lahore High, Court, reported as Gauri v. Ude AIR 1942 Lah 153. This decision has no application to the facts of the present case. In the Full Bench case the judgment-debtor had notice of the sale and the objections to sale were those which were open to him before the confirmation of the sale, and it was rightly held that those objections were not entertainable u/s 47 of the Code.

The other decisions relied upon by Mr. Roop Chand are Nusrat AH v. Sakina Begam AIR 1919 Lah 16, Firm Wasti Ram v. Mt. Ganeshi AIR 1939 Lah 405 and Sohan Singh v Shamsher Singh 1950 PLR 345. In AIR 1919 Lah 16, an objection was preferred by the wife of the judgment-debtor on the ground that the judgment-debtor was away from the country. The objections were rejected on the ground that she had no locus standi to raise them.

The other observations in this decision are, in the circumstances, merely in the nature of an obiter dictum. In AIR 1939 Lah 405, an objection was open to the judgment-debtor before the confirmation of the sale and all that was held was that that objection could not be raised after the confirmation of the sale. In 1950 PLR 345 Mr. Justice Kapur, as he then was, was dealing with a case of a decree for possession. The decree-holder had obtained possession of the land and the decree was consigned to the record room as fully satisfied.

Later on, the decree-holder lost possession of part of the property and applied for restoration of that possession and in these circumstances it was held that as the decree had been fully satisfied it could not be revived and that the application u/s 47 was not maintainable. As I have already indicated, none of these decisions is applicable and the matter seems to be settled by the decisions of the Calcutta, Bombay and Patna and other High Courts referred to in the earlier part of this judgment. No decision to the contrary has been cited by the learned counsel for the respondent.

9. In view of the aforesaid discussion, the present appeal succeeds and is allowed. The decisions of the Court below are set aside and the case is remanded to the executing Court for a fresh decision according to law. I may indicate that in case the Court comes to the conclusion that the sale is not a nullity it should dismiss the application on the short ground that the same is not maintainable after confirmation in view of the provisions of Section 47 of the Code. The Court will also go into the question whether the application u/s 47 is within limitation.

The decree-holder will be entitled to get the costs of these proceedings from the judgment-debtor in the event of his succeeding. In case he fails, the parties will bear their own costs throughout of the proceedings up to today. If the judgment-debtor succeeds in establishing that the sale is a nullity, it will be set aside, otherwise, as I have already said, the sale will stand. The parties are directed to appear before the trial Court on the 6th October, 1959.