

(1970) 02 MP CK 0003

Madhya Pradesh High Court

Case No: M. P. No. 31 of 1967

Nathuram Mahajan

APPELLANT

Vs

District Co-operative
Bank Ltd., Shivpuri and
others

RESPONDENT

Date of Decision: Feb. 11, 1970

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 146
- Constitution of India, 1950 - Article 226
- Criminal Procedure Code, 1898 (CrPC) - Section 435(1)
- Madhya Pradesh Co-operative Societies Act, 1960 - Section 80, 96(2)
- Transfer of Property Act, 1882 - Section 55

Citation: (1975) ILR (MP) 807 : (1970) JLJ 385 : (1970) MPLJ 398

Hon'ble Judges: Bishambhar Dayal, C.J; K.L. Pandey, J

Bench: Division Bench

Advocate: R. S. Dabir, for the Appellant; Y. S. Dharmadhikari, for Respondents No. 6, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

K. L. Pandey, J.

This petition under Article 226 of the Constitution is mainly directed against an order dated October 18, 1966 whereby, purporting to revise an earlier order of the Registrar of Co-operative Societies, Madhya Bharat, passed on September 4, 1953, u/s 72 of the United State of Gwalior, Indore and Malwa (Madhya Bharat) Co-operative Societies Adaptation Act, 1949 (hereinafter called the Act), the State Government set aside that order and affirmed the confirmation of an auction sale made in favour of Chhatram :

(respondent No. 6) on October 30, 1950. By the Registrar's order which was set aside by the State Government, that auction sale had been set aside.

The material facts that gave rise to this petition may be shortly stated. The petitioner had borrowed money from the District Co-operative Bank Ltd., Shivpuri (respondent No. 1), in the years 1943 and 1944. For the amount that remained unpaid, the respondent No. 1 secured on April 5, 1945 an award for Rs. 8,360-9-3. For recovery of that amount, two houses belonging to the petitioner, which had been attached earlier, were sold by auction. It is common ground that, to this attachment and sale, the provisions of the CPC applied as provided by rule 46 (4) (a) of the Rules framed under the adopted Act and then in force. That provision is as follows:

46. (4) (a) Save as otherwise provided, the Government Inspector, Co-operative Societies, shall follow the provisions of the CPC for the time being in force, for the purpose of attachment, sale and delivery of movable or immovable property.

One of the houses sold was purchased by one Chhapulal, but there is now no dispute about it and it is unnecessary to refer to it. The other house was auctioned on October 30, 1950 and the bid of Chhatram (respondent No. 6) for Rs. 6,425 was accepted. However, he deposited the one-fourth amount not immediately but on November 1, 1950.

Thereafter, about a year later, the sale was confirmed on October 20, 1951 and then the respondent No. 6 paid the remaining purchase price. Being aggrieved, the petitioner filed on November 1, 1950 an application complaining of several irregularities. Not having obtained any redress, he appealed to the Deputy Registrar who perhaps under a misapprehension allowed to the petitioner time to deposit the auction price and interest thereon at 5% per annum by a certain date. Thereafter, the petitioner moved the Registrar of Co-operative Societies u/s 72 of the Act. That section reads :

72. The Minister-in-charge and the Registrar may call for and examine the record of any inquiry or the proceedings of any officer subordinate to them for the purpose of satisfying themselves as to the legality or propriety of any decision or order passed and as to the regularity of the proceedings of such officer. If, in any case, it shall appear to the Minister-in-charge or the Registrar that any decision or order or proceedings so called for should be modified, annulled or reversed, the Minister-in-charge or the Registrar, as the case may be, may pass such order thereon as to any of them, may deem fit.

The Registrar, by his order dated September 4, 1953, set aside the sale for the various reasons therein stated. The auction-purchaser Chhatram (respondent No. 6) then moved the State Government for revising u/s 72 ibid the order of the Registrar and, thereupon, the State Government passed the impugned order dated October 18, 1966 by which the Registrar's order was set aside and the order of confirmation of sale was restored.

The first question we have to consider is which authority, if any, could deal with the application for revision that was filed on December 16, 1953. On that date, the

Co-operative Societies Adaptation Act (45 of 1949) of Madhya Bharat was in force. By that Act, the Co-operative Societies Act, Gwalior State, Samvat 1997 had been, with certain modifications not material here, applied to the State of Madhya Bharat. The Adaptation Act continued to remain in force till it was repealed by section 84 of the Madhya Bharat Co-operative Societies Act, 1955. This new Act contained inter alia the following saving provision in sub-section (2) of section 3 :

(2) All actions taken, all appointments, rules and orders made, all notifications and notices issued, all transactions entered into and all suits and other proceedings instituted under the Acts, mentioned in sub-section (1), shall be deemed, so far as may be, to have been respectively taken, made, issued, entered into or instituted under this Act.

Finally, that Act too was repealed by the M. P. Co-operative Societies Act, 1960, which likewise contained the following saving provision in section 96(2): "(2) Notwithstanding such repeal-

(ii) all appointments, rules and orders made, notifications and notices issued and suits and other proceedings instituted under any of (he said enactments shall so far as may be, be deemed to have been respectively made, issued and instituted under this Act.

It is obvious that, in view of the saving clauses in the two Acts, reproduced above, the application u/s 72 of the Gwalior Act was to be deemed "so far as may be" to have been made under the two repealing Acts. Now the expression "so far as may be" qualifies the word "deemed" by which a fiction has been created. The purpose of creating the fiction obviously is to enable the proceeding instituted earlier to be treated as a proceeding instituted under an analogous provision of the repealing Act and to be disposed of in accordance therewith. We are of the view that the qualifying expression "so far as may be" means only so far as it is possible or so far as the provisions of the repealing Act permit. While it inhibits the use of the fiction to imagine the existence of a provision in the repealing Act, that has not been enacted, it enables the previously instituted proceeding to be regarded as instituted under a substantially analogous provision notwithstanding certain verbal changes necessitated by the altered circumstances. The very fact that a legal fiction has been employed can only mean that the earlier proceeding, though not in reality instituted under any provision of the repealing Act, is required by that Act to be treated as if it were so instituted. It is further implicit in the fiction that the inevitable corollaries must be given effect to, though the fiction must not be extended beyond the purpose for which it was enacted. For all these reasons, we are of opinion that the application must be disposed of u/s 80 of the 1960 Act, which reads:

The State Government or the Registrar may call for and examine the record of any enquiry or the proceedings of any subordinate officer for the purpose of satisfying itself or himself as to the legality or propriety of any decision or order passed and as to the regularity of the proceedings of such officer. If in any case it appears to the State Government or the Registrar that any decision or order or proceedings so called for

should be modified, annulled or reversed, the State Government or the Registrar, as the case may be, may pass such order thereon as to it as he may deem fit:

Provided that no order under this section shall be made to the prejudice of any party unless such party has had an opportunity of being heard.

It follows that the State Government were not incompetent to dispose of the application, which was pending from the year 1953, u/s 80 of the 1960 Act.

The further submission that the Registrar and the State Government exercised concurrent jurisdiction in the matter and that, when one of them had done so, the power was exhausted and could not thereafter be called in aid for revising the order of the other is, we think, not well founded. No doubt, the principle applies when the two tribunals are of co-ordinate rank, but it has no application when one is the superior authority and the other of an inferior rank. An example which comes readily to the mind is section 435(1), Criminal Procedure Code. In our opinion, the fact that the Registrar had already revised the order did not stand in the way of the State Government entertaining a further application for revision against the Registrar's order.

Our attention was also drawn to rule 48 of the Rules framed under the relevant Act for the purpose of showing that no further revision lay to the State Government. That rule reads:

An appeal against the order passed by the Government Inspector, Co-operative Societies, in respect of attachment and sale proceedings may be filed with the Registrar within thirty days from the date of the order provided the said order or orders are appealable according to the provisions of the CPC for the time being in force. The decision (award) of the Registrar shall be final and conclusive and no revision shall be admitted.

The appeal referred to in this rule was disposed of by the Deputy Registrar presumably under delegated powers. It is, however, well established that the rule cannot be regarded as limiting the powers of revision conferred by the statute itself.

Shri Dharmadhikari raised a preliminary objection against the maintainability of this petition. According to him, the petitioner had sold away the disputed house by a deed dated November 16, 1953 and, therefore, he had no subsisting interest in that house to be entitled to file a petition like the one here. In answer, it was not disputed before us that the house was sold to one Mannoolal on that date. It was, however, submitted that that was done after the auction sale had been set aside, that the auction-purchaser Ghhatram (respondent No. 6) was aware of the sale but he did not implead the purchaser as a party non-applicant in the application for revision he subsequently made to the State Government and that, even thereafter, the petitioner continued to have, in view of the covenants contained in section 55 of the Transfer of Property Act, sufficient interest in the disputed house to be able to maintain this petition. The position here is, in our opinion, not different from the one in a suit in which a party thereto has made a transfer of the

disputed property during the pendency of the suit but the transferee has not been brought on record. The party against whom the decree is passed does not cease to be entitled to challenge the decree only because of the transfer made pendente lite and the enabling provision made in section 146 of the CPC does" not make any difference in this position. We think also that, in view of section 55 of the Transfer of Property Act, the petitioner continues to have sufficient interest in the house.

It is next contended that rule 46 (4) (a) reproduced in paragraph 2 of the order did not apply the provisions of the CPC in regard to deposit of purchase money, confirmation of sale or making application for setting aside the sale and it applied by reference only the provisions relating to "attachment, sale and delivery of movable or immovable property. We are unable to accept this ingenious argument if only because a glance at the Relevant provisions of the Code will show that all the rules from rule 82 to rule 96 of Order XXI relate to "sale of immovable property.

It is further submitted that the petitioner ought to have made, though he did not make, an application under Order 21, rule 90 of the Code for setting aside the sale on the ground of alleged irregularities. The petitioner alleged that he had duly made an application like Annexure A. That fact is disputed and we do not propose to pursue the matter further. For purposes of this order, we would assume that no such application was made. However, the petitioner's grievance is that, in the sale proceedings, the provisions of Order 21, rules 84 and 85, were disregarded. If so, it was not necessary to make any application under Order 21, rule 90 of the Code. So in [Ramchandra Spg. and Wvg. Mills Vs. Bijli Cotton Mills and Others](#), , the Supreme Court stated :

In [Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another](#), this Court has held that rules 84 and 85 of Order XXI being mandatory if they are not complied with, there would be no sale at all and the Court is bound to order a re-sale. That decision also held that since there would be no sale and the purported sale is a nullity, there would be no question of a material irregularity in the conduct of the sale and rule 90, would, therefore, not apply. An application under rule 90 as held by the High Court, therefore, would not lie.

The only other point which survives for consideration is whether, in the proceedings for sale, the mandatory provisions of the aforesaid rules 84 and 85 of Order 21 were not complied with. Admittedly, the sale was held on October 30, 1950 but the purchaser deposited the one-fourth amount of purchase money on November 1, 1950. This was not noticed by the Registrar. However, he found that the remaining amount was deposited, not on the fifteenth day but long afterwards, on October 22, 1951 to be more precise, and that too after confirmation of the sale.

The Registrar took the view that, in the circumstances, the petitioner ought to have made an application under Order 21, rule 90 of the Code. However, upon other grounds, he set aside the sale and its confirmation on certain conditions set out in its order dated

September 4, 1953. In the further revision to the State Government, it was noticed that the three-fourths of the purchase price was not paid on the fifteenth day but long afterwards on October 22, 1951 after the sale was confirmed on October 20, 1951. Even so, the auction-sale and its confirmation were regarded as valid for the reason that the petitioner had not challenged the sale by means of an application under Order 21, rule 90 of the Code made within the prescribed time. So it was stated:

The point in issue is whether the cancellation of the auction and its confirmation by the Registrar was in order. The house was auctioned on 30-10-1950 and this auction could be set aside by the judgment-debtor by taking action under Order XXI, rule 89, by depositing the necessary amount, or if he felt aggrieved due to any material irregularity, by instituting action under Order XXI, rule 90 of the CPC within 30 days of the sale. Nathuram did not take recourse to either. Instead he filed an appeal to the Deputy Registrar and then a revision to the Registrar, Co-operative Societies. The sale became absolute with effect from 23-11-1951 with the issue of the sale certificate after confirmation. His default in adopting the legal course could not thus be made good in appeal or revision." (Paragraph 8.) It is plain enough that, in the facts found by these tribunals, there was in law no sale at all and, therefore, there could be no question either of making an application under Order 21, rule 90 of the Code for setting it aside, or of confirming it or of conditionally setting it aside as the Registrar endeavoured to do. The purported sale was a nullity and, therefore, resale should have been ordered. In these circumstances, the order dated October 20, 1951 confirming the auction-sale, the Registrar's order conditionally setting it aside and the State Government's order reversing the Registrar's order cannot be sustained.

In the result, the petition succeeds and is allowed. The order dated October 20, 1951 confirming the auction sale, the Registrar's order dated September 4, 1953 and State Government's order dated October 18, 1966 are quashed. The respondent No. 6 shall bear his own costs and pay those incurred by the petitioner to whom the security amount shall be refunded. Other respondents too shall bear their own costs. Hearing fee Rs. 150.