Raj Kishore Prasad Jaiswal and Others Vs Subak Narain Singh and Another

Court: Patna High Court

Date of Decision: July 13, 1957

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Order 21 Rule 22, Order 21 Rule 22(2), Order 21 Rule 22(3), Order 21 Rule 90, 11
Evidence Act, 1872 â€" Section 101, 102, 103, 104, 114
Limitation Act, 1908 â€" Article 181
Registration Act, 1908 â€" Section 2(7)
Transfer of Property Act, 1882 â€" Section 107

Citation: AIR 1959 Patna 89

Hon'ble Judges: Kanhaiya Singh, J; K. Ahmad, J

Bench: Division Bench

Advocate: Lal Narayan Sinha, Awadh Kishore Prasad and P.P. Varma and A.G. in A.F.O.D. No. 208/1949 and P.R. Das, R.S. Chatterji, K.K. Sinha and Rameshwar Prasad Sinha, in A.F.O.D. No. 191/1949, for the Appellant; P.R. Das, R.S. Chatterji, K.K. Sinha and Rameshwar Prasad Sinha, in A.F.O.D. No. 208/1949 and Lal Narayan Sinha, Awadh Kishore Prasad and P.P. Varma, in A.F.O.D. No. 191/1949, for the Respondent

Final Decision: Dismissed

Judgement

K. Ahmad, J.
Both these appeals arise from the same judgment and decree, dated 24-2-1940, given by Mr. Bhagwan Prasad,

Subordinate Judge, 1st Court Monghyr, First Appeal No. 208 of 1949 is by the defendants and is directed against that part of the decree which

grants relief to the plaintiff as to his prayer for declaration of title and recovery "of possession while the other appeal, First Appeal No. 191" of

1949, is by the plaintiff and is directed against that part of the decree whereby the learned Subordinate Judge has dismissed his claim for mesne

profits.

2. Originally there were two plaintiffs. The second plaintiff was the receiver of Raj Banaili estate. Subsequently on an application made by Raj, he

was permitted to withdraw and the suit was allowed to proceed on behalf of plaintiff No. 1 alone; while on the other side there have been all long

two sets of defendants -- defendants first party, a joint Mitakshara family represented by defendant No. 1 as their karta and manager and the

defendant second party one Amarendra Bhusari Banerji, who, as alleged by the defendants first party and admitted by him, is only their farzidar.

Thus, the controversy in this case is mainly between plaintiff No. 1 on one side and the defendants first party on the other.

3. The subject-matter of dispute is an agricultural holding having an area of 34.47 acres equivalent to 60 bighas, 14 kathas and 8 dhurs recorded in

the survey record-of-rights in khata Nos. 205, 109 and 239 of mouza Karhariya in the district of Monghyr and the controversy centres round the

point as to who is the present raiyat of that holding, or, more precisely and correctly, as to whether the plaintiff is the raiyat of it and is as such

entitled to a declaration of his title and recovery of possession.

4. It is the admitted case of the parties that at all relevant time before the vesting of the estate in the State of Bihar, wherein the holding; lies, its

landlord was Raj Banaili and that originally the holding had been settled by the Raj with the defendant second party Amarendra Bhusan Banerji

though with this difference, which I think on the facts of this case is not of any vital importance, that according to the plaintiff he was the real settlee

while according to the defendants first party he was their farzidar only.

That means, at the inception, of the tenancy the plaintiff No. 1 had no interest in it. But his case is that after that settlement the rent of the holding

fell into arrears and, therefore, the Raj had to institute a suit for rent (Rent Suit No. 1050 of 1936) against the defendant second party which was

decreed on 9-10-1936, and in execution of that decree in Rent Execution Case No. 42 of 1938, which was also directed exclusively against the

defendant second party, the holding was sold and auction purchased on 6-4-1938, by the landlord decree-holder himself for a sum of Rs. 736-

15-0 and odd.

So the landlord, it is said on the basis of that sale, which was confirmed on 6-5-1938, got delivery of possession on 29-2-1940, and thereafter

having remained in possession for sometime ultimately settled the same with the plaintiff on a rental of Rs. 121-4-0 besides cess and a nazarana of

Rs. 875-5-3 under a registered kabuliat dated 21-6-1943, executed by plaintiff No. 1 alone.

The claim of the plaintiff is that he thus came in possession of the same but while he was in pos- session as such the defendants first party begjan

interfering with his possession which ultimately led to a proceeding u/s 144 of the Code of Criminal Procedure but the order passed thereunder on

8-2-1944, was unfortunately against him and so he was thereafter dispossessed completely from the holding and hence the suit by him on 12-6-

1946, for declaration of title and recovery of possession as also for mesne profits.

5. All these claims have been strongly contested by the defendants first party as also by the defendant second party, though by the latter not in the

form of any written statement but only in his evidence which he gave as D.W. 2. Their specific case is that both the rent decree as well as the rent

execution sale were void and nullity and the same had been obtained fraudulently by suppression of notices and summonses issued therein as also

that the so-called settlement claimed by the plaintiff is neither valid nor legal and that neither the Raj nor the plaintiff has ever been in possession of

it; on the contrary, the same has been all along in their possession without any break or interruption.

6. But so far as the invalidity of the decree is concerned, that has further been supported in the written statement on two more grounds firstly, that

no rent was ever due and so any claim for rent in the aforesaid suit was fictitious and fraudulent and secondly that the person impleaded therein as

defendant was only the defendant second party, namely, Amarcndra Bhusan Banerji and not any of the members of the defendants first party and

so the defendants first party are not bound by it. At the trial, however, it appears that this part of the defence as to the invalidity of the decree has

been founded on the last ground alone.

In my opinion, though it is true, as found by the trial Court that on the records of this case, especially in view of what has been admitted by P.W.7

and D.W.2 as also in view" of what has been elicited in the cross-examination of D.W.9, who is the only contesting defendant in this case, it is

difficult to come to any other conclusion than this that defendant No. 2 was nothing but the farzidar of the defendants first party but even without it

the defendants first party on their admission alone cannot now be allowed to turn round and say that they are not bound by the decree" as they

were not impleaded therein, for it is a well-established rule of law that unless there is an allegation of fraud or collusion which is not the case here,

the real owner is as much bound by a decree passed in a suit by or against a farzidar as the farzidar himself. Therefore, the trial Court has rightly

found that :

The onus to prove fraud was on the defendant and, in my opinion, he has failed to adduce satisfactory evidence to show that the decree in the rent

suit was fraudulently obtained."7 and as this finding has not been challenged in appeal, I need not go further into this matter and take it as finally

concluded between the parties.

7. Now, comes the question as to the invalidity of the rent execution sale. The main and the only point raised in regard thereto is that the notice

under Order 21, Rule 22, though issued was not served on the judgment-debtor and, therefore, the entire sale is void and nullity and as such not

binding on any of the defendants.

8. The order-sheets of the execution case, which is exhibit 5 on the record, show that the execution case was filed on 7-1-1938. On that date the

order passed was :

Application for execution of decree filed and admitted. Register. Issue notice under Order 21, Rule 22, fixing 1-2-1938 for return.

And as it appears from its records, the notice referred to in this order was given for service to one Arjun Singh Peon (D.W.5). His statement at the

trial, which is the only short statement made by him, is :

I am a Peon in the Civil Court here, Ext. B-is the report on the back of notice under Order 21, Rule 22 written by me.

And this went in without any cross-examination and so far as the report (exhibit B), which is dated 29-1-1938 is concerned, that reads as follows :

1. Babu Amarendra Bhusan Banenee.

2. Dated 29-1-38, at 9 O''clock at Kora Maidan, Monghyr,

3. I "did not -''meet the judgment-debtor. I came to know that he lived at Allahabad.

I met his father Tara Bhusan, pleader. He stated that the judgment-debtor did not live there. He was in service at Allahabad. He (Tara Bhusan)

had nothing to do with him. Therefore, I became unable to hung up the notice. I am returning back the notice along with the report. (Sd. Arjun

Singh, Peon.) fsd) Illegible. 29-1-.

4. Identified by the process-server himself,

5. (Illegible).

6. Witness -- Paras Mian, resident of Ban"" Bazar, Monghyr. He refused to sign as a witness.

Thereafter on 1-2-1938, the court accepted the service and passed inter alia the following order :

Notice served and service report satisfactory."" Further, it has to be noted that though according: to this report (exhibit B) Tara Bhusan Banerji is

said to have said that he had nothing to do with the judgment-debtor but the judgment-debtor himself (D.W.2) in his evidence at the trial stated :

I was joint with my father and I always obeyed him. My father was the karta of the family. He was my well-wisher.

Therefore, on these materials it has to be seen as to whether the provision of law as originally laid down under Order 21, Rule 22 of the CPC

before its amendment made by this Court in 1947 was or was not complied with as contemplated thereunder and even if there was some

irregularity in compliance of the same that irregularity-amounted to any negation of that provision or only a defect as to make it voidable and not

void. It is conceded that if the notice under Order 21, Rule 22 is a question of jurisdiction and if there has been no issue of it then the sale is void

and nullity but it is argued on behalf of the plaintiff that in case the notice under Order 21, Rule 22 is not a question of jurisdiction at all or that even

if it be so but in the compliance thereof there has been only some irregularity and not any omission in the issue of it then the sale is only voidable

and cannot be impeached collaterally, may it be by way of suit or by way of defence.

9. This raises the old and familiar controversy as to the implication and scope of Order 21, Rule 22 in the matter of jurisdiction of an executing

Court which as it appears from the arguments advanced before us is as if even now open to doubt and dispute in spite of the weighty and

voluminous literature already piled upon it which dominantly if not uniformly lays down that the rule as it stood before its amendment in 1947 did

constitute the question of jurisdiction though with this reservation that the absence of jurisdiction lay not in any irregularity of the service of notice

thereunder but only in the issue of it.

But speaking for myself, I cannot say that this anxiety on the part of the Bar to reopen the matter over and over again is after all not without

jurisdiction for though the matter appears to have been settled for all practical purposes by the weighty de- cisions yet it cannot be denied that the

judicial conscience on this point has not yet been quietened down peacefully and even now traces may be found in decisions here and there of an

attempt to explain and whittle down the rigour and implication of it in some form or the other, thus still leaving some scope for fresh thinking if not

on the ground of any weakness in the binding character of those authorities but at least on the ground" of some conflict in principles which prima

facie appear to be underlying some of those cases and perhaps it is the result of this disquietness and constant fresh thinking that finally the law has

now been made to be what it ought to have been though technically it is true not as a result of any decision but by fresh enactment. This change,

however, does not by its terms cover those cases which relate to a period prior to it like the one before us and hence the anxiety on the part of the

decree-holder to save those cases as well if possible and in that anxiety the attempt to raise the old points again.

10. In the Code of 1882 the provision as to notice for execution was given in Section 248. That ran as follows :

"""The Court shall issue a notice to the party against whom execution is applied for, requiring him to show cause, within a period to be fixed by the

Court, why the decree should not be executed against him -

(a) if more than one year has elapsed between the date of the decree and the application for its Execution, or

(b) "if the enforcement of the decree be applied for against the legal representative of a party to the suit in which the decree was made :

Provided that no such notice shall be necessary in consequence of more than one year having elaps- ed between the date of the decree and the

application for execution, if the application be made within one year from the date of any decree passed on appeal from the decree sought to be

executed, or of the last order against the party against whom execution is applied for, passed on any previous application for execution, or in

consequence of the application being, against the legal representative of the judgment-debtor if upon a pre- vious application for execution against

the same person the Court has ordered execution to issue against him.

On the terms of the section it appears that the initial reaction of Courts in India was that the section constituted a question of jurisdiction and the

non-issue of the same made the sale void and nullity.

11. Then while the section was still applicable to cases arising under that section, it came to be interpreted thereafter on two occasions by the Privy

Council, the one in the case of Malkarjun v. Narahari 27 Ind App 216 and the other in AIR 1914 129 (Privy Council) . In the former the

representatives of the mortgagor had brought an action for redemption and therein the chief defence taken by the successor of the mortgagee was

that in a suit originally instituted against the mortgagor by a creditor of his a decree had been obtained, in execution on which his interest in the

property was put up for sale and the same was purchased by the defendant.

Unfortunately, there was no mention of it anywhere in the plaint, though in the written statement it was specifically pleaded that the plaintiff might

possibly contend that the sale was illegal because it took place without the plaintiffs being joined in the certificate as heirs but according to the

defendant that was of no consequence as the legality of the sale could not be impeached in the suit as framed. What had happened in the previous

suit brought by the creditor of the mortgagor was that by the time the decree passed therein was put under execution the mortgagor had thed.

So in the execution proceeding the name of the person against whom execution was sought was given as ""the estate of the deceased Nagappa

(who was the original mortgagor) and the names of the parties as ""first Nagappa, deceased, by his heir (Ramlingappa, and, secondly,

Wyankappa."" Accordingly notices were served upon Ramlingappa and Wyankappa but none of them was the heir of the deceased Nagappa, his

real heirs being his daughters. Further it appears that Ramlingappa in answer to the notice stated in Court :

As Nagappa separated from my father even during (my lather''s) life-time I am not Nagappa''s heir. His heirs are his dauthers"" (and he named

them, meaning to name the plaintiffs). ""I have not with me any estate of the deceased nor did I receive it. Therefore, this decree should not be

executed against me.

But in spite of it the court held that he was the heir and no notice was issued against any of the daughters. In those circumstances, a question arose

as to what was the effect of non-service of the notice on the daughters in the matter of sale held in execution of the decree. In answer thereto their

Lordships observed :

The Code goes on to say that the Court shall issue a notice to the party against whom execution is applied for. It did issue notice to Ramlingappa.

He contended that he was not the right person, but the Court, having received his protest, decided that he was the right person, and so proceeded

with the execution. In so doing the Court was exercising its jurisdiction. It made a sad mistake it is true; but a Court has jurisdiction to decide

wrong as well as right.

If ft decides wrong the wronged party can only take the course prescribed by law for setting matters right; and it that course is not taken the

decision, however wrong, cannot be disturbed. The real complaint here is that the execution Court construed the Code erroneously. Acting in its

duty to make the estate of Nagappa available for payment of his debt, it served with notice a person who did not legally represent the estate, and

on objection decided that he did represent it. But to treat such an error as destroying the jurisdiction of the Court is calculated to introduce great

confusion into the administration of the law.

And finally they held that the sale was operative against the heirs though liable to be set aside if proper steps were taken for it. But as no step was

taken to get the sale set aside that could not be ignored as nullity.

Since then the trend of opinion that came to prevail in Indian Courts was that the question of issue of notice under the aforesaid section did not go

to the root of jurisdiction. In other words, the violation of that procedure made the sale only voidable and not void. Then came the second decision

of the Privy Council in AIR 1914 129 (Privy Council) . Therein their Lordships distinguished the case reported in 27 Ind App 216 (PC) and

observed :

Their Lordships'' attention was called in this connection to the case of 27 Ind App 216 (PC), but in their opinion there is nothing in that case which

has any bearing upon the present appeal. As laid down in Gopal Chunder Chatterjee v. Gunamoni Dasi ILR 20 Cal 370 a notice u/s 248 of the

Code is necessary in order that the court should obtain, jurisdiction to sell property by way of execution as against the legal representative of a

deceased judgment-debtor.

In the ease In 27 Ind App 216 (PC) such a notice had been served, and the Court had determined, as it had power to do for the purpose of the

execution proceedings, that the party served with the notice was in fact the legal representative. It had, therefore, jurisdiction to sell though the

decision as to who was the legal representative was erroneous. There being jurisdiction to sell and the purchasers having no notice of any

irregularity, the sale held good unless or until it was set aside by appropriate ''proceedings for the purpose. The present case is of a wholly different

character. No proper notice was served under the section, and the respondents had full notice of, and indeed were responsible for, the

irregularities of the procedure adopted.''''

And so finally it was held therein that the sale was void as the official assignee of the judgment-debtor''s estate had not been properly brought on

the record and no order binding on him had been obtained. The result was that thereafter the Courts in India, again reverted to the old view,

namely, that the notice under that section went to the root of jurisdiction and any sale held in the absence of notice was void and nullity.

It has, however, to be noted that though this decision was given in the year 1914, but in the meantime the Code of 1882 had been repealed and its

place taken by the present Code of 1908 with the corresponding provision for a notice in execution in its Rule 22 of Order 21. But as the case

under discussion AIR 1914 129 (Privy Council) was one which related to a period, period prior to 1908, therefore the decision given therein was

based on the old Code and not on the new one. That new provision as initially enacted read as follows :

(1) Where an application for execution is made :

(a) more than one year after the date of the decree, or

(b) against the legal representative of a party to the decree,

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be

fixed, why the decree should not be executed against him :

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the

application for execution if the application is made within one year from the date of the last order against the party against whom execution is

applied for, made on any previous application for execution, or in consequence of tile application being made against the legal representative of the

judgment-debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall ba deemed to preclude the Court from issuing any process in execution of a decree without issuing the

notice thereby prescribed, if, for reason to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat

the ends of justice.

This shows that barring the provision provided in Sub-rule (2) of it, there was no subtantial change in the law as it existed before. But Mr. Das

appearing for the plaintiff has argued that though there was no other change in the new Code as to a notice excepting the provision as given in sub-

rule (2) but that by itself was sufficient to indicate that the state of law as a result thereof had changed and since then the provision as to notice

under Order 21, Rule 22, howsoever mandatory in its terms-did not remain a question of jurisdiction, and therefore, the non-compliance of the

same could not have the effect of making the sale void but only voidable.

In support of this contention reliance has been, placed by him on a number of decisions in Levenia Ashton v. Madhabmoni Dasi 11 CLJ 489

Barhamdeo Narayan v. Saligram Sahay 6 Pat LT 67: AIH 1925 Pat 384 and certain casual observations made in Ajab Lal Dubey and Another

Vs. Hari Charan Tewari @ Hari Tewari and Others, and in F.E. Chrestien Vs. Jaideo Prasad Rai, as also perhaps on the so-called analogy

between that provision and the one provided in English law under the process of scire facias. It has, however, to be noted that this part of the

argument of Mr. Das is exactly the same which he advanced in regard to Order 21, Rule 22 before the Full Bench in Ajab Lal Dubey and Another

Vs. Hari Charan Tewari @ Hari Tewari and Others, .

Therefore, instead of going in detail into this, contention, as raised before us, on the basis of Sub-rule (2) I would better fruitfully quote here the-

exact conclusion arrived at in that case by Chatterji, J. with whom Sinha, J. (as he then was) agreed though I must say with the same feeling of

helplessness as expressed therein by Chatterji, J. The learned Judge in the course of his discussion there has reviewed practically all the relevant

authorities-on the point and finally on a reference to the decision in AIR 1914 129 (Privy Council) holds

This observation of their Lordships has always been, as it must be, regarded by the Courts in India as an authority for the view that the absence of

notice under Order 21, Rule 22 renders the execution sale void. But it is to be observed that in Section 248 of the Code of 1882 which their

Lordships had to consider there was no provision corresponding to Sub-rule (2) of Order 21, Rule 22 of the present Code. This sub-rule gives the

Court a discretion, in the circumstances mentioned therein, to dispense with the notice required by Sub-rule (1) which corresponds to Section 248

of the old Code.

The question naturally arises whether a notice which the Court may in its discretion dispense with if occasion arises, can be regarded as the

foundation of the Court''s jurisdiction to execute the decree. The provision in Sub-rule (1) of Order 21 Rule 22 for the issue of notice is no doubt

mandatory, because there is the word"" shall", but as pointed out by Mooker-jee J., in 11 CLJ 489 the mandatory language of the provision is by

no means conclusive, and one test of its real character is whether the notice can in any circumstances be dispensed with.

However, notwithstanding Sub-rule (2), the notice required by Sub-rule (1) of Order 21 Rule 22 has been held by different High Courts, on the

authority of AIR 1914 129 (Privy Council) to be the-foundation of the Court"s jurisdiction to execute the decree, Sub-rule (2) being interpreted to

mean that it only gives the Court jurisdiction in certain, cases in which without it the Court would have none. This is also the view taken by the Full

Bench of five Judges in Kanchamalai Pathar Vs. Ry. Shahaji Rajah Sahib (deceased) and Others, , already referred to. Speaking for myself, I feel

inclined to think that the addition of Sub-rule(2) in Order 21, Rule 22 can hardly be reconciled with the view that the notice required by Sub-rule

(1) goes to the jurisdiction of the Court.

But haying regard to the long course of decisions in which different High Courts including our own have accepted the rule laid down in AIR 1914

129 (Privy Council) as applicable to Order 21 Rule 22 of the new Code, in spite of the addition of Sub-rule (2), I am not prepared to depart from

those decisions, particularly when Sub-rule (1) as it stands after the amendment by our High Court requires the notice to be given in all cases. Now

that the notice is necessary in all cases, it is possible to regard sub-rule (1) as laying down the general rule to which Sub-rule (2) provides an

exception.

So the principle laid down in AIR 1914 129 (Privy Council) has been accepted here as the cursus curiae of this Court. That being so, I think, iÃ¯Â¿Â½

is too late for me to express any of my views even if the same be in any way different to what has been unlimately accepted in the aforesaid Full

Bench decision, especially in view of the fact that there is no decision brought to our notice of a period subsequent to it wherein any view different

to it has been taken. On the contrary, thereafter that view has been not only uniformly acted upon but again fully affirmed and accepted

immethately thereafter in another Full Bench in Ramlal Sahu and Others Vs. Mt. Ramia and Another, .

In the latter case, it is true, the question was not as to any absence of notice under Order 21 Rule 22 but one which related to the irregularity of

service. But all the same, the two questions were so mixed up that opinion had to be given even on the former question. The leading judgment in

that case was that of Das, J. (as he then was). Therein he observes :

It is now well settled that after the death of a judgment-debtor in a pending execution proceeding, the decree-holder may proceed either by

presenting a fresh application for execution or asking for leave to continue the same proceeding after substituting the legal representative; in either

case notice would be required under Order XXI, Rule 22, Civil Procedure Code; see T. Smith and Another Vs. Kailash Chandra Chakravarty

and Others, and : Ajab Lal Dubey and Another Vs. Hari Charan Tewari @ Hari Tewari and Others, .

There is no doubt, therefore, that Musarnmat Ramia as the legal representative of the deceased judgment-debtor Bhagirath was entitled to a notice

under Order XXI, Rule 22, Civil Procedure Code, and on the authority of the decision of their Lordships of the Judicial Committee in AIR 1914

129 (Privy Council) such "a notice was necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against

the legal representative of a deceased judgment-debtor."

Whatever doubt there may have been previously as to the effect of a failure to issue such a notice, the question has now been settled, so far as this

Court is concerned, by the Full Bench decision in : (Ajab Lal Dubey and Another Vs. Hari Charan Tewari @ Hari Tewari and Others,). In the

case before us, there has been no failure to issue a notice under Order XXI, Rule 22, Civil Procedure Code. Such a notice was issued and served,

but not properly served on Musarnmat Ramia.""

And both these two Full Bench cases have fully approved the previous decisions of this Court in Das Narain Singh v. Mir Mohammad Yusuf 6

PLJ 319 : AIR 1921 Pat 145 Fakhrul Islam v. Bhunesh-wari Kuer, ILR 7 Pat 790 ; Fakhrul Islam and Others Vs. Bhubaneshwari Kuar, ,

Rajendra Prasad Vs. Debi Parsad and Others, , Shyamnandan Sinha and Others Vs. Naurangi Singh and Others, and Bachoo Prasad Singh and

Others Vs. Gobardhan Das and Others, , as also those of other Courts in Shyam Man-dal v. Satinath Banerjee ILR 44 Cal 954 : AIR 1917 Cal

728 Manindra Chandra Nandi Vs. Rahatannessa Bibi and Others, , Chandi Prasad Vs. Mt. Jumna , Rajagopala Aiyar by guardian Ramachandra

Aiyar Vs. Ramanujachariar and Another, and ILR 59 Mad 461: Kanchamalai Pathar Vs. Ry. Shahaji Rajah Sahib (deceased) and Others, , which

all relate to sales that were held after 1908 and in doing the same they clearly lay down that there is. a clear distinction between an irregularity of

service on one side and the non-issue of it on the other and that while in the case of the former the sale held is-only voidable, in the latter it is void.

Therefore, it cannot be accepted, as contended by Mr. Das that as a result of incorporation of a new Clause (2) in Order 21 Rule 22 of the Code

of 1908 any change was brought about in the law as it stood before in the matter of making the notice contemplated thereunder a question of

jurisdiction.

12. Mr. Das, however, has not confined his this part of the argument only on the ground of Clause (2) of Rule 22. His second argument is that if in

fact the notice under Order 21, Rule 22 were a question of jurisdiction, its issue would have been? essential and the sale held in the absence of its-

issue void even if the judgment-debtor had put in appearance and contested the execution case. But the authorities like those in : Fakhrul Islam and

Others Vs. Bhubaneshwari Kuar, , Balmakund Vs. Firm Pirthiraj Ganesh Das, ; Chandra Nath Bagchi Vs. Nabadwip Chandra Dutt and Others, ;

T. Smith and Another Vs. Kailash Chandra Chakravarty and Others, ; and Karu Mahto v. Emperor, AIR 1932 Pat "244, as also certain

observations made to that effect in Ramlal Sahu and Others Vs. Mt. Ramia and Another, , say otherwise.

They lay down that if the judgment-debtor has put up in appearance even without the issue of any notice under Order 21, Rule 22 and has placed

his objections against the execution then it is no more open to him to challenge the sale on the ground that it is void and without jurisdiction as the

notice under Order 21, Rule 22 had never been issued to him, In my opinion, whatever may be the prima facie conflict of the principle underlying

them with-the one as laid down in Ajab Lal Dubey and Another Vs. Hari Charan Tewari @ Hari Tewari and Others, , it appears that they have

been always regarded as a class of their own and they are quite understandable on the ground that though the issue of that notice under Order 21,

Rule 22 as originally provided in the Code of 1908 was a question of jurisdiction but the point of jurisdiction there essentially lay in the fact that the

judgment-debtor should have a knowledge about the proceeding.

Therefore, if it is established by an admission that such an information has been conveyed to the judgment-debtor and he in compliance thereof has

already surrendered himself to the jurisdiction of the court and thus has become a party to the proceeding though without any issue of the notice-

under Order 21, Rule 22 then it is not open to him to say that he is not bound by it or that the same is void for lack of jurisdiction over his person.

That means, in this case the compliance of form as to the issue of notice, as provided in Order 21, Rule 22, is no more necessary. And it is obvious

that this principle cannot apply to those cases where neither the notice has been issued nor the judgment-debtor has put in appearance. Therefore,

the second argument of Mr. Das also fails.

13. His third argument in this respect is based on the amendments made by the Patna High Court in Order 21, Rule 22 firstly in the year 1936,

which came-into effect from 1-4-1930, and secondly in the year 1947 which came into effect from 8-5-1947. By the former the original Sub-rule

(1) with its entire proviso was deleted and in its place a new sub-rule has been brought which says:

Where an application for execution is made in writing under Rule 11 (2) the Court executing the decree shall issue a notice to the person against

whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him.

By the second a completely new Sub-rule (3) has been added which reads as follows:

Proceedings held in execution of decree shall not be invalid solely by reason of any omission to issue or failure to serve a notice under Sub-rule

(1) or to record reasons where such notice is dispensed with under Sub-rule (2) unless the judgment-debtor has sustained substantial injury

thereby.

It is true that by the incorporation of Sub-rule (3) in the year 1947 the question of notice under Order 21, Rule 22 is no more a question of

jurisdiction Shyamnandan Sinha and Others Vs. Naurangi Singh and Others, and Bechu Misser and Others Vs. Sir Kameshwar Singh Bahadur

and Others, , but the contention of Mr. Das is that Sub-rule (3) of Rule 22 does not lay down any new law but it only serves to declare what has

been the law all along since the incorporation of .Sub-rule (2) in Rule 22 in the Code of 1908 and further that it gives statutory recognition to what

is laid down in the Full Bench case of : (Ramlal Sahu and Others Vs. Mt. Ramia and Another,), and to support this contention he has laid special

reliance on the decisions in Balmakund Vs. Firm Pirthiraj Ganesh Das, .

His argument is that the decision in the Full Bench case of : (Ramlal Sahu and Others Vs. Mt. Ramia and Another,), was given on 28-3-1947 and

as the decision was interpreted to mean that the provision of law laid down in Order 21, Rule 22 does not constitute a question of jurisdiction

therefore the amendment of 1947 was brought in soon thereafter on 8-5-1947 in order to give statutory recognition to that view. In my opinion,

there is no substance in the contention at all.

It has been made very clear in that case by Das J., (as he then was) that the principal question of law which arose for decision in that case was the

effect of an irregularity in the service of a notice under Order 21, Rule 22, CPC (as distinct from failure to issue, or want of, such a notice) that is,

whether such irregularity goes to the root of the jurisdiction of the Court executing the decree and makes a sale held in execution wholly ineffective

and void or is a mere irregularity which does not affect jurisdiction but renders the sale only voidable. Therefore, it cannot be accepted that the

case meant to lay down that the question of jurisdiction did not arise even in those cases where no notice under Order 21, Rule 22 was issued at

all.

If that is so, then the very premise on which his argument is based fails. Hence the amendment of 1947 cannot be said to have given any statutory

recognition to what is laid down in : Ramlal Sahu and Others Vs. Mt. Ramia and Another, . So far as the decision in Balmakund Vs. Firm Pirthiraj

Ganesh Das, is concerned, it is I think enough to say that though there are certain observations made therein by Narayan J., in support of that view

but the other learned Judge who was sitting with him, namely, Imam J., (as he then was) did not express any opinion on that point and then it

appears that it is obiter and lastly that this part of the observation of Narayan J., has not been accepted in a subsequent Division Bench of this

Court in Ramdhari Singh and Others Vs. Saligram Singh and Others, , where Das J. (as he then was) observes:

In Balmakund Vs. Firm Pirthiraj Ganesh Das, there are certain observations in the judgment of Narayan J., which appear to exnress the view that

the new sub-rule inserted in May, 1947, has retrospective effect. How- ever, his Lordship himself said that the decision of the case under

consideration before his Lordship rested on other grounds, and the observations with regard to the retrospective effect of new Sub-rule (3) were in

the nature of obiter dicta.

Imam J., (now my Lord the Chief Justice), who agreed to the order that the appeal be dismissed in that case, specifically reserved his opinion on.

the effect of new Sub-rule (3) of Order 21, Rule 22, Civil P. C.

Therefore, that decision is of no avail to Mr. Das, as for the other case, namely, 1957 BLJR 45: (AIR 1957 Pat 431), the main point for

consideration therein was as to what was the effect of the non-issue of a notice under Order 21, Rule 22 on the sale held in an execution if the

judgment-debtor had already put in appearance and contested it on grounds taken by him. I have already stated above that in such a case it has

been held that the absence of notice will not make the sale void and, therefore, that ground alone was sufficient to dispose of that case as is

evidence from the following observation made by the learned Chief Justice himself:

The reason was that the judgment-debtor had knowledge of the executing proceeding and put forward all possible objections for defeating the

execution case. In the course of tie judgment Narayan J-, referred to the following observations oF Kulwant Sahay J., in Fakhrul Islam and Others

Vs. Bhubaneshwari Kuar, :

''All that Order 21, Rule 22, requires is that an opportunity should be given to the judgment-debtors against whom execution is taken out more

than a year after the decree to show cause why execution should not proceed.''

* * * * *

It is also relevant to make a reference to the observations of Das J., in a Full Bench case in Ramlal Sahu and Others Vs. Mt. Ramia and Another, .

At pages 351 -52 (of ILR Pat): (at p. 459 of AIR) Das J., said:

''It is no doubt the duty of every Court to see that a notice issued by it is served in the manner required by law. This, however, is not a matter of

jurisdiction: it is a matter between the Court and its officers. If there is any irregularity of ser vice, the person aggrieved is not without remedy and it

cannot be said that the object of the rule is frustrated. The person affected by the irregula rity may apply for setting aside the sale by taking

appropriate proceeding within the time allowed by law.

There may be a case where the party entitled to a notice under Order 21, Rule 22, comes to know of the execution & appears to contest it in spite

of a defect in the method of service. Can it be said in such a case that the object of the rule is frustrated and that the notice must again be served

properly? As Rankin C. J., had observed in Chandra Nath Bagchi Vs. Nabadwip Chandra Dutt and Others, , to hold so would be to push the

abstract logic of the case of AIR 1914 129 (Privy Council) to the ridiculous extreme, and would be piling unreason upon technicality.''

Counsel for the appellant referred to the decision of the Privy Council in AIR 1914 129 (Privy Council) and the decisions in Ajab Lal Dubey and

Another Vs. Hari Charan Tewari @ Hari Tewari and Others, and Mazharul Haq and Others Vs. Raghuber Singh and Others, .

But all these cases are distinguishable from the present case where the judgment-debtor did appear in the course of the execution proceeding,

raised objections to the execution proceeding and succeeded in his attempt in persuading the court to release some of the properties from

attachment and sale.

The learned Chief Justice, however, has not disposed of that case on that ground alone but has further added that-

It is also important to notice that Order 21, Rule 22, as it stood after the amendment of Sub-rule (1) by the Patna High Court made on 1-4-1936,

was as follows:

''(1) Where an application for execution is made in writing under Rule 11 (2) the court executing the decree shall issue a notice to the person

against whom execution is applied for requiring him to show cause, on a: data to be fixed, why the decree should not be executed against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any pro- cess in execution of a decree without issuing the

notice thereby prescribed, if for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat

the ends of justice''.

The original Sub-rule (1) of Rule 22 was as follows: (1) Where an application for execution is made-

(a) more than one year after the date of the decree, or,

(b) against the legal representative of a party to the: decree, the Court executing the decree shall issue a notice to the person against whom

execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than one year having elapsed between the date of the decree and the

application for execution if the application is made within one year from the date of the last order against the party against whom execution is

applied for, made on any previous application being made against the legal representative of the judgment-debtor, if upon a previous application

for execution against the same person the Court has ordered execution to issue against him."

In view of amended Sub-rule (1) of Order 21, Rule 22, as it stood after the 1st April, 1936, it appears to us that the issue of notice under Order

21, Rule 22, Code of Civil Procedure, by the executing court is not a matter of jurisdiction, because Rule 22, Sub-rule (2) permits the court in

exceptional cases to issue a process in execution of a decree if, for reasons to be recorded, it considers that the issue of such! notice would cause

unreasonable delay or would defeat the ends of justice. As a matter of construction of the rule, therefore, we think that the issue of a notice under

Order 21, Rule 22, under the amended rule after 1-4-1936 was not a matter of jurisdiction.

In my opinion, the reasoning given here is "based on the wrong assumption that Sub-rule (2) came in as a result of the amendment made in Sub-

rule (1) in the year 1936. Perhaps that must have been the argument advanced before the learned Chief Justice, and hence the error. It is on the

very face of it wrong because Sub-rule (2) had already been introduced long ago in 1908 and if in fact the result of the incorporation of Sub-rule

(2) was that the notice under Order 21, Rule 22 did not remain a question of jurisdiction then it should have been so not only since the year 1936

but since its very inception in the year 1908. But, as already stated, this view was not accepted in the Full Bench decision of Ajab Lal Dubey and

Another Vs. Hari Charan Tewari @ Hari Tewari and Others, .

I, therefore, think that in view of the aforesaid Full Bench decision, this interpretation of Sub-rule (2) based on the misapprehension that it was

introduced in 1936 cannot be accepted as binding.. Accordingly, it is difficult for me to accept either] that the amendment made in 1947 is the

declaration of the law as it existed before or tnat it has given any statutory recognition to the law as laid down in Ramlal Sahu and Others Vs. Mt.

Ramia and Another, .

14. It is, however, necessary to mention here that Mr. Sinha appearing for the defendants in order to meet this part of the plaintiff"s case has gone

to the other extreme, and besides raising other points has contended that the very amendment made in 1947 is ultra vires and unconstitutional. His

argument is that the sale of property of any judgment-debtor in an execution case without any notice of the same to the judgment-debtor is

contrary to the rule of natural justice and as such the amendment is void and to support it he relies on Province of Bombay Vs. Kusaldas S. Advani

and Others, , Bibi Nazma Khatoon and Another Vs. R.P. Sinha, Custodian, Evacuee Properties and Another, and Gobardhan Joshi and Another

Vs. The State of Bihar and Others, , though he concedes that in proper cases, as laid down in Jayantilal Lar-mishankar v. State of Saurashtra AIR

1952 SS 59 this principle may be waived and according to him the cases covered by Sub-rule (2) of Rule 22 are cases of such exceptions as in

their case the rule of natural justice is not likely to be contravened.

In my opinion, this argument is based on fallacy for it is a well-established rule of law that the rule of natural justice is implied only where the law

itself is silent and is not inconsistent with what it provides, but where any provision as to the rule of natural justice is expressly or by necessary

implication nagatived by the law that cannot be a ground for holding that the enactment giving that law is ultra vires or unconstitutional.

The law of procedure as contemplated in the Constitution is a procedure prescribed by the law of the State (A.K. Gopalan Vs. The State of

Madras,) and if that is so then all the rules of natural justice, even if there be any such defined set of rules, apart from there being any general or

vague notion about them, they are always subject to the law of the land as enacted by the Sovereign Legislature. That is so is also evident from the

decisions in Local Government Board v. Arlidge 1915 AC 120 and Rule v. Brighton and Area Rent Tribunal All 1950 ER 946.

15. Therefore, I hold that the notice under Order 21, Rule 22., as it stood before the amend-ment of 1947 did go to the root ot jurisdiction and!

the non-issue of the same had the effect of making the execution proceedings void and not only voidable excepting no doubt those cases where the

judgment-debtor had voluntarily put in appearance without any notice under Order 21 Rule 22.

But it must be stated that it was void not in the sense of complete nullity but only in the sense that it was not valid and operative against the

judgment-debtor. (ILR 23 Pat 528 : AIR 1945 Pat 1 and (Balmakund Vs. Firm Pirthiraj Ganesh Das,)); that means, the invalidity which in such a

case arose was not due, to any inherent lack of jurisdiction in the executing court either over the subject-matter or the nature of the proceeding but

because of the fact that the judgment-debtor was not a party to it either in law or in fact, that is to say, the jurisdiction of the Court over his person

was still lacking and, therefore, it was open to the judgment-debtor to say that he was not bound by the decision given therein.

16. Now in the present case it is not denied and is evident from the order-sheet that a notice under Order 21, Rule 22, was issued by the executing

court against the defendant second party but the grievance is that it was not served on him. Therefore, the other main branch oÃ¯Â¿Â½ the argument

that has been advanced in this case relates to the implication and import of the words:

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to

be fixed, why the decree should not be executed against him,"" as used in Order 21, Rule 22, Civil P. C.

The contention of Mr. Das is that this contemplates only an order given by the Court to issue, a notice and thereupon the issue of the same and

nothing beyond that while Mr. Sinha appealing for the defendants contends that that by itself is not sufficient to give jurisdiction to the court over

the person of the judgment-debtor unless two further conditions are fulfilled : (1) that the notice when issued is taken to the place whereto it is

addressed, and (2) that on its destination there it is served on the judgment-debtor as provided in law.

In my opinion the contention as to the first condition is no doubt correct for what the law requires is the issue of the notice to the judgment-debtor

and not a mere issue of it. But the difficulty lies in accepting the second at least in the form in which it is worded for, in my opinion, all that is

necessary at that stage to complete the jurisdiction of the court over the judgment-debtor is that the peon entrusted with the notice on reaching its

destination should convey to the judgment-debtor either directly meaning thereby personally or in his absence in the manner provided in law that

there is a notice issued in the name of the judgment-debtor and the same relates to a proceeding pending in the court of law.

That means what is essentially required to constitute jurisdiction is that the judgment-debtor either directly or in the manner provided in law should

have the knowledge that there is a proceeding pending in the court where he is a party. Once that knowledge is communicated, as contemplated in

law, the implication underlying the words

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to

be fixed, why the decree should not be executed against him

is, in my opinion, fully complied with a""d thereafter there will be no ground left for the judgment-debtor to say that he had no knowledge of the

proceeding or that the proceeding was taken at his back or that he was taken by surprise when he came to know for the first time as to the ultimate

result of that proceeding.

If that is so then anything else that is laid down in law as to the mode and manner of the service on the judgment-debtor is nothing but a matter of

evidence meant to evince and to satisfy the court that the necessary information has been communicated to the judgment-debtor and as such that is

a question between the court and its officers. Therefore, the defect, if any, in the compliance of the same will result only in an irregularity of the

service and not in any absence of it.

Therefore, if the notice is taken to the place-whereto it is addressed and there the factum of the notice is communicated to the judgment-debtor

either directly or indirectly as provided in law but the same is refused to be accepted or to be acted upon then the execution will proceed in law as

if the judgment-debtor is a party to it, and similarly if the notice on its issue is not at all taken to the place whereto it is addressed either through the

negligence, of the peon or as a result of any collusion or concert between him and the decree-holder then that will not amount to any issue of the

notice to the judgment-debtor.

Therefore, the notice under Order 21, Rule 22, as it stood previously in order to constitute jurisdiction to proceed against the judgment-debtor

required three conditions (1) that the notice is issued, (2) that the notice on its issue is taken to the place whereto it is addressed and (3) that there

the judgment-debtor either directly or indirectly as provided in law is informed that there is a notice for him as to a proceeding. And I think it is in

this sense that the issue of notice to the judgment-debtor has been understood and interpreted in the following case.

17. In 27 Ind App 216 (PC) their Lordships of the Privy Council observe :

. ""It is not disputed that if the Court took pro ceedings wholly without jurisdiction the plaintiffs would remain unaffected by them, and two of the

learned Judges below go to the whole length of affirming that the execution Court had no jurisdiction. But a decree had been made, and partially,

though to a minute extent, executed against Naga- ppa, and his estate was liable to make good the balance. To enforce this liability was within the

jurisdiction of the Court. If a judgment-debtor thes before full execution of a decree the creditor may apply for execution against his legal

representative. To receive that application is part of the Court''s- jurisdiction.''

* * * * *

The Code goes on to say that the Court shall issue a notice to the party against whom execution-is applied for. It did issue notice to Ramlingappa.

He contended that he was not the right person, but the Court, having received his protest, decided that he was the right person, and so proceeded

with the execution. In so doing; the Court was exercising its jurisdiction. It made a sad mi take it is true; but a Court has jurisdiction to decide

wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right; and if that

course is not taken the decision, however wrong, cannot be disturbed.

18. Similarly in the case of AIR 1914 129 (Privy Council) their Lordships say :

In their Lordships'' Opinion this could only be done by obtaining an order for the issue of, and'' by serving him with a notice u/s 248 of the Code

of Civil Procedure, 1882, which was the Code then in force.

But as in that case the notice served on the official assignee was one relating to substitution alone and not to execution as contemplated by Section

248, therefore, it was held there that the sale in the absence'' of any notice u/s 248 was altogether irregular and inoperative.

19. The same is the principle laid down in : (Ramlal Sahu and Others Vs. Mt. Ramia and Another,). Therein the notice had been taken to the

place of the judgment-debtor and the information as to it had been conveyed to the family members as contemplated in law but in the course of its

report the peon had made certain mistake in giving the name of the judgment-debtor. In those circumstances Das, J. (as he then was) held that it

was not a case of non-service but a case of irregular service and observed as follows :

In the case before us, there has been no failure to issue a notice under Order XXI, Rule 22, Civil Procedure Code. Such a notice was issued and

served, but not properly served on Musammat Ramia. The-question of the effect of the irregularity in service of a notice under Order XXI, Rule

22, CPC has been considered by this Court more than once.

20. To the same effect is the observation made in Ramdhari Singh and Others Vs. Saligram Singh and Others, . But as in that case there was

complete absence of service, their Lordships held:

There is a concurrent finding of the courts below that the notice under Order 21, Rule 22, Civil P. C., was not served on the appellants. What is

the effect of this non-service? This is the crucial question in this appeal.

The contention of learned counsel for the appellants is that total non-service or fraudulent suppression of the notice under Order 21, Rule 22, Civil

P; C., goes to the root of the jurisdiction of executing court and deprives that court of jurisdiction to execute the decree against the judgment-

debtors. His contention is that the sale held in the absence of such jurisdiction is a nullity, so far as the judgment-debtors are concerned.

Learned counsel has distinguished the Full Bench decision in Ramlal Sahu and Others Vs. Mt. Ramia and Another, , on the ground that the

question decided in that Full Bench decision was that a mere irregularity in service did not make the sale wholly ineffective and void. In the Full

Bench decision, in which I happened to give the leading judgment, I made it perfectly clear that the question of law which arose for decision in that

case was the effect of an irregularity in the service of a notice under Order 21 Rule 22, Civil P. C. as distinct from failure to issue or want of such a

notice.

It is obvious that when Order 21 Rule 22, Civil P. C. states that the court executing the decree shall issue a notice to the person against whom

execution is applied for requiring; him to show cause why the decree should not be executed against him, the object of the rule is to give the

judgment-debtor an opportunity to object to the execution of the decree if he so desires.

21. On the same line is the observation of Manohar Lall, J. in the unrcported decision, in Misc. Section A. No. 886 of 1946, decided on the 6th

May, 1947, where he says :

The relevant provision in Order 21, Rule 22 is that the court executing the decree shall issue a notice to the person against whom execution is

applied for requiring him to show cause on a date to be fixed that the decree should not be executed against him. It seems to me clear that the

mere issue of a notice without it being served upon the judgment-debtor cannot meet the requirements of the rule as unless the notice is served

upon him, how can he show cause? On the plain reading of the provision it is clear to me that Rule 22 requires not only issue of the notice but

service upon the person before the Court gets jurisdiction to sell apart from jurisdiction to entertain and take other steps therein.

And perhaps the same is the sense in which Harries, C. J. made the following observation in Durga Singh and Others Vs. Sugambar Singh, :

In my view mere issuing a notice is not sufficient. The Court must be satisfied that the notice has been served on the person whom the court

regards as the proper recipient of the notice. In the present case as no notice was served at all, the case clearly cnmes within the decision in AIR

1914 129 (Privy Council) to which I have already made reference, and, therefore, the sale was wholly ineffective against the plaintiff.

In : F.E. Chrestien Vs. Jaideo Prasad Rai, , a notice under Order 21 Rule 22 was served on the judgment-debtor by hanging the notice on a

residential house as described therein. The objection raised was that the judgment-debtor did not live there but in a village different to it though in

the decree his ad- dress was the same as was given in the execution petition. In those circumstances Dhavle, J. after a review of a number of

decisions held that it was a case of irregular service and not of non-service, And that has been the basis of distinction drawn between a void

service and voidable service in 6 Pat LJ 319 : AIR 1921 Pat 145: ILR 19 Pat 393 : (Rajendra Prasad Vs. Debi Parsad and Others,),

Shyamnandan Sinha and Others Vs. Naurangi Singh and Others, . Lachmi Narayan Lal and Others Vs. Bhupendra Prasad Shukul and Others,

and Sir Kameshwar Singh Vs. Bishwanath Jha and Others, .

22. If that is the law then judged from" that point of view the case before us is a case of irregular service, and not one of non-service. There :s no

evidence here as to any fraud or collusion between the decree-holder and the peon in the matter of service nor there is any finding to that effect in

the judgment under appeal. The only lacuna that is pointed, out in this case is that though the peon did reach the house of the defendant second

party and though on reaching there he did inform the father of the defendant second party that there was a notice of an execution case against his

son yet he finally returned the same to the court without tendering it to the father or affixing the same on the house for the reason that the father in

reply to an enquiry made by the peon stated that he had nothing to do with his son. Can it be said on the principle stated above that it is a case of

non-service?

I think not. The evidence shows that the son was not present in the house, rather it is admitted that he was at that point of time in some employment

at Allahabad. Further it is not claimed that he had any agent to receive service on his behalf in his absence. Therefore, as provided in Rule 5, Order

5 of the Code of Civil Procedure, the information as to notice could be conveyed to any adult male member of the family who normally resided

with him. In his case the normal place of his residence was the address given in the notice. Therefore, the peon was perfectly justified in, informing

the father that there was a notice in the name of his son.

It is stated that in answer thereto the father refused to accept the same. It may be so. But for that reason it cannot be said that tKe information as

to the notice was not conveyed to the father and, therefore, as contemplated in law, through him to the judgment-debtor; rather the implication of

law in such circumstances is that the necessary knowledge as to notice was conveyed to the party con-cerned and thereafter it was bis- look out to

take any action if he so liked in the proceeding and not to lie by otherwise to suffer the consequences as if he was a party to it.

It is true that the full compliance of law required that the peon should have hung the notice on the house and should not have returned it giving

therein the report that the father refused to take the same. But if he failed to do that, that can at best amount to an irregularity in the service of the

process but not to any omission on the part of the peon to convey the necessary information to the judgment-debtor as contemplated in law. For

these reasons I think that the sale held in that execution proceeding was not void but only voidable and thus binding on the judgment-debtor unless

avoided by him as provided in law.

23. Then Mr. Das has also raised the contention as to the effect of the order recorded by the court on 1-2-1938, namely, that ""Notice served and

service report satisfactory."" His argument is that this order by itself was sufficient to bind the j"udg-ment-debtor and to give to the court a

jurisdiction to sell the property in that proceeding, In my opinion, the proposition as placed by Mr. Das is rather too wide and cannot be accepted.

On principle, the entry of service in the order-sheet is never a proof of service of notice, Radhay Kocr v. Ajodhya Das 7 CLJ 262 and Karali

Prasad Roy Vs. Probodh Chandra Mitra and Others, .

And in ultimate analysis this point also I think reduces itself to the enquiry as to whether the judg-ment-debtor was a party to the proceeding or

not. If he was a party to the proceeding then all orders passed therein including the order for sale as also the order for its confirmation are binding

on the judgment-debtor and that cannot be challenged by nun collaterally in a suit. But if he was not a party to the proceeding then no order passed

therein can be said to be effective as against him.

In other words, if the notice was not served on him in the sense as stated above then the position or"" the judgment-debtor is the same as if there

was no p roceeding against him but if it was served then he as to suffer all the consequences which a party in law has to suffer and if any authority

is needed for this proposition, I may cite here the decision in Kumar Ganganand Singh and Others Vs. Maharaja Sir Rameshwar Singh Bahadur

and Another, , Therein it is observed;

Mr, Sultan Ahmed on behalf of the defendant contends that the learned Subordinate Judge had jurisdiction to pass that order and that the order

cannot be regarded as a nullity. The question, however, is not whether the order is a nullity, but whether Ganganand is bound by it. Now it seems

to me that, in order to bind Ganganand by the order of 11-12-1916, it must be shown that Ganganand was party to the order or that the order

was passed with notice to him. , . . .Now in so far as the Court acted on .the hypothesis that Ganganand had attained his majority, the order of 11-

12-1916 was passed not only ex parte but without any notice to Ganganand, since Ganganand did not become a party to the suit until summons

was actually served on him.

The learned Subordinate Judge himself took the view that Ganganand was not a party to the suit at the date of the order of 11-12-1916, since a

week later he himself directed that summons should be served on Ganganand. In my opinion, Ganganand was not a party to the order of the 11th

December and is not bound by that order.

24. And so finally in that case it was held that the mere passing of such an order could not have any binding effect on the judgment-debtor. As for

the cases relied upon by Mr. Das, in sup-port of his contention that once such an order is passed in the proceeding that by itself is sufficient to bind

the judgment-debtor, as to the effect of such a proceeding, it is enough to say that in all of them service of notice under Order 21, Rule 22 was

held to be voidable and not void and as such the orders passed therein were binding on the judgment-deotor. In fact, there is no case cited by him

where an order was held to be binding against the judgment-debtor even when the service of notice under Order 21, Rule 22 was void. Therefore,

this contention of Mr. Das also is without substance.

25. Then two more points are left for consideration in these appeals. The first relates to the remedy available to a judgment-debtor in cases where

the sale held in an execution proceeding is void. The contention advanced on behalf of the plaintiff is whether the sale in an execution pro-ceeding

is void or voidable, the remedy available to the judgment-debtor against it is only one and that is provided in Section 47 of the Code of Civil

Procedure, In my opinion, on the facts of this case this does not arise for consideration but as it has been argued at some length, I touch it briefly.

The relevant part of Section 47 says:

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.

I think that this section presupposes a valid I execution proceeding. If, therefore, a proceeding in execution is not valid as against the judgment-

debtor but completely void, then the section cannot apply. It is true that even in cases where the sale is void, remedy by way of an application

under Order 21, Rule 90 read with Article 181 of the Limitation Act has been held to be available to a judgment-debtor but that does not mean

that if the judgment-debtor fails to avail himself of that summary procedure within that period of limitation then it is no more open to him to establish

his title by way of suit or to defend the same in case it is attacked on the ground that it has been extinguished.

In Bhagwat Narain Singh Vs. Mahadeo Prasad Bhagat and Another, , the sale was attacked on the ground that the same was void and it was

done by a separate suit. It is another matter that in that case finally it was held that the sale was voidable & not void but no contention was raised

on the ground that even if it was void such a question could not be raised in an independent suit. Similar was the case in : (Durga Singh and Others

Vs. Sugambar Singh,), as also in 41 Ind App 251: AIR 1914 129 (Privy Council) .

And it is a well-established rule of law that in a case fully fought out between the parties and well represented by eminent counsel on both sides if a

point available on the face of it is not argued or pressed then the presumption is that that point is without substance. And so far as the decision in

Beni Madhab Mandal Vs. Rai Charan Abi and Others, , relied upon by the plaintiff is concerned, that is distinguishable" on the very face of it.

There, as it appears from the placitum, the property was sold in execution of a decree against representatives of P as belonging to the estate of P,

In a subsequent suit for possession of that property, by the auction-purchaser, against the representatives they took the defence that the property

did not belong to the estate of P but to them per-sonally. In those circumstances their Lordships held that

all questions between the parties to the suit or their representatives, relating to the execution, discharge or satisfaction of the decree, must be

raised and determined in execution proceedings as provided by the Code and not otherwise; and that the parties or their representatives are

precluded from raising or canvassing any such question in any separate suit or proceeding, except by way of defence in a separate suit, when the

defendant has been kept out of knowledge of the execution proceedings, until after the suit has been brought, by the fraud of the decree-holder or

judgment-creditor.

That means, in that case the representatives of P being parties to the execution proceedings were bound by the order passed therein and so they

could not challenge the proceeding in a separate suit on the ground that the same was void against them.

26. The last point raised on behalf of the defendants is that even if the sale be held valid, the plaintiff cannot succeed in the present action as the title

relied upon bv him has not been established in law. The claim of the plaintiff, as already stated, is that after the sale the holding was settled with him

under a registered kabuliat dated 21-6-1943 and he as such came in possession of the same and thereafter the landlord realised rent from him

firstly under the rent receipt (Exhibit 3), which was for the year 1350 Fasli, and then by a decree for rent (Exhibit 3). But the trial Court has come

to the conclusion that though the settlement was made with the plaintiff but he never came in possession thereof and in coming to that conclusion it

says-

I am unable to believe that the plaintiff got possession over the lands in suit after the settlement in his favour.

Therefore, it has been argued on behalf of the defendants that in the absence of any delivery of possession by the lessor to the lessee a kabuliat

alone though registered cannot in the eye of law be sufficient to create any title in the lessee and in support of this contention reliance has been

placed mainly ""on the decision in Mohammad Hanif and Another Vs. Khairat Ali and Others, . In that case the relevant facts as stated by Fazl All

J., (as he then was) in his judgment were these:

The case of the plaintiff was that the disputed land had been settled with him by the Rani by means of a hukumnamah, being unregistered had been

held to be- inadmissible in evidence. It has also been found by both the learned Judges that the plaintiff never obtained possession under this

hukumnamah and that a person who cannot be put in possession of the demised land cannot be a tenant witnin the meaning of the Tenancy Act or

liable for rent''. The learned Judges have further held that the doctrine of interesse termini is not applicable to the present case.

Meredith, J. was, however, of the opinion that a person may be a holder of a valid agricultural lease without actually being a tenant, that on general

principles a valid lease of agricultural land can be created orally and can be proved by oral evidence, and that nothing more is necessary than a

valid leasehold interest to give the plaintiff a right to sue, when it has been proved that his lessor had title and was in possession at the time of the

lease. In short he held that in spite of the fact that the plaintiffs lessor did not give possession to him, a complete and valid lease was orally created

in his favour and this entitles him to recover possession of t!ie land. Agar-wala, J. expressed his disagreement with this view in these words.

I agree except as to one point, namely, whether, in the case of a written unregistered lease of agricultural land, the lessee to whom possession has

not been delivered by the lessor, is entitled to maintain an action in ejectment against a person in possession and not claiming under the lessor.''

27. In meeting this authority Mr. Das has contended that apart from the question as to whether a registered kabuliat by itself can or cannot create

an agricultural tenancy under the Tenancy Act, this much is fully established by authorities that if the same has been acted upon by the landlord,

then thai} in any case is sufficient to constitute such a tenancy. In support of this contention, reliance has been placed by the learned Counsel on the

decisions in Rai-moni Dassi v. Mathura Moban ILR 39 Cal 1016 Loknath Singh and Others Vs. Chhotan Barhi and Another, ,. Court of Wards

representing Narhan Estate through W.W.M. Murray Vs. Sumrit Rai and Others, , Akram Ali v. Durga Prosanna Roy, 14 Cal LJ 614 and Jangal

Singh and Others Vs. Mukund Kumar and Others, .

In my opinion, it cannot be denied here that the agricultural tenancy created under the registered kabnliat dated 21-6-1943 was acted upon by the

landlord firstly in the form of acceptance of rent directly from the lessee and thereafter by realising the same through court under a decree for rent

which is exhibit 2 on the record. Further, it cannot be denied that Raj Banaili was originally a co-plaintiff in the suit and had accepted the entire

claim of the present plaintiff as pleaded in the plaint. Therefore, it is too difficult to be asserted that the registered kabuliat was not acted upon by

Raj Banaili

It is true that subsequently Raj withdrew from the case but that withdrawal cannot amount to a denial on its part that the landlord had not acted

upon the lease created under the registered document. On the contrary, it appears that that with-drawal was done under the influence of the

defendants, for exhibit C(2) shows that soon after the, settlement with the plaintiff, the defendants began to hobnob with the servants of the

landlord and thereafter perhaps a stage arrived when the landlord thought it more profitable to retire from the suit than to remain a party thereto;

otherwise in view of what transpires from exhibit C(l) and D it is difficult to understand this sudden change in the attitude of the landlord on any

other reasonable hypothesis.

Therefore, if the landlord acted upon the lease then the decision given in Loknath Singh and Others Vs. Chhotan Barhi and Another, is much more

near to the present case than the one in Mohammad Hanif and Another Vs. Khairat Ali and Others, . It is true that in the former case the lessee

was in possession but the rule of law laid down therein is not based on that consideration but on the consideration that there was a registered

Kabuliat and the same had been acted upon by the landlord. Therein Pande, J, observes:

It has long been the common practice in this country, where no patta is ordinarily executed, to treat a kabuliyat, accepted by the lessor, as the in

strument creating a tenancy, and there is no question that before the passing of the Transfer of Property Act a lease could bo affected by an

instrument sign ed by the lessee only and registered in cases where registration was compulsory; Ajam Sahib v. Madura Sree Meenatchi

Devastanam 21 MLJ 202: 14 Cal LJ 614, ILR 39 Cal 1016 and Dinanath Kundu and Others Vs. Janaki Nath Roy and Others, . These cases

further held that a registered kabuliyat signed by the lessee arid accepted by the lessor is sufficient to constitute a lease within the meaning of

Section 107, T. P. Act.

A Full Bench of this Court in Ramkrishna Jha Vs. Jainandan Jha dissented from this view. In this case it was held that Section 107 read with

Section 105 of the Act clearly implies that the registered instrument must be executed by the lessor who is the transferor and as such registered

kabuliyat executed by a lessee in favour of the lessor and accepted by t"ie latter either orally or by means of an unregistered document does not

constitute a lease u/s 107, T. P. Act, 1882. This was a case of lease of three villages to which the Transfer of Property Act applies.

But the present case is one of agricultural lease to which the Transfer of Property Act has no application. Section 117 of the Act clearly provides

that none of the provisions of Chap. 5 (which includes Ss. 105 and 107) apply to leases for agricultural pun poses. Khaja Mohammad Noor, J.,

one of the Judges of the Full Bench, in his judgment stated: "Agricultural leases are also not affected by the point raised before us, inasmuch as they

are not governed by the Transfer of Property Act." Therefore, the Full Bench decision does not in my opinion in any way affect the authority of the

cases cited above in regard to agricultural leases.

The present lease being an agricultural lease is governed by the Bihar Tenancy Act. There is no provision in the Act which defines a lease or

prescribes the mode for the creation of an agricultural lease. Therefore the long standing practice prevailing in this country to treat a kabuliyat,

executed by ""the lessee and accepted by the lessor, as the instru-ment creating a tenancy has not in any way been affected by the Transfer of

Property Act."" With this, if I may say so, I respectfully agree. It gets full support from the reasoning; given in ILR 39 Cal 1016. It is true that the

law as laid down in that case is in general terms covering not only an agricultural lease but also a lea. e under the Transfer of Property Act and for

that reason to the extent to which it applies to a lease under the Transfer of Property Act it has been rightly dissented from in the Full Bench case

of Ramkrishna Jha Vs. Jainandan Jha . But in taking that view Khaja Mohammad Noor, J. in that case made it clear, as is evident from the

quotation given above, that what he said there was confined to a case of tenancy under Transfer of Property Act.

Therefore, to the extent to while; the decision reported in ILR 39 Cal 1016 refers to an agricultural lease, it applies on all fours to the facts of this

case. Then this view gets support also from the cases reported in Court of Wards representing Narhan Estate through W.W.M. Murray Vs.

Sumrit Rai and Others, . Therefore, I have no hesitation to hold that in the case of an agricultural lease a registered kabuliyat coupled with the

acceptance of "the same by the landlord is sufficient to constitute a lease in the eye of law.

That being so, there is no substance in the contention that the title claimed by the plaintiff has not been established. Further I may mention here that

this aspect of the case as to the title of the plaintiff"has not been in clear terms pleaded in the written statement nor there is any issue framed to that

effect. Therefore, now in view of what I have just said, it is too late for the defendants to raise it for the first time in appeal, specially when the same

is not a pure question of law but mixed with facts, as well.

28. In the result, therefore, I agree with the trial Court, that the right, title and interest of the defendants in the holding in suit were extinguished as a

result of the sale held in the execution case and that thereafter the holding was settled with the plaintiff, and as such he is entitled to declaration of

title and recovery of possession of the same.

29. This leaves us with the other appeal which relates to mesne profits as claimed by the plaintiff. I have already referred to a part of the trial

Court"s finding on the point of possession. The other part is in these words :

Thus, in my opinion, the plaintiff has failed to prove his case of posses.ion and dispossession as alleged.

And on that ground it has further held that the plaintiff is not entitled to any mesne profits. Mr. Das in challenging this findings, has taken us through

the entire evidence on the point of possession deposed to by P.Ws. 1, 2, 4. 5 and 6.

The trial court has rejected the evidence of P. W. 1, who is a patwari of Banaili Raj, on the ground that he, in support of his evidence, did not

produce any account paper, and that of P. Ws. 3, 4, 5 and 6 on the ground that their evidence is conflicting as to who cultivated the holding after

the aforesaid execution sale, and if the same was cultivated by Biranchi Dusadh and Satrohan Singh as is claimed on behalf of the plaintiff, then

their evidence is not consistent as to whether it was on behalf of Raj Or on behalf of any other person.

Personally I think that the grounds on which the evidence of these witnesses, especially that of P. Ws. 3. 4, 5 and 6, has been rejected, are "rather

too technical and narrow and had I been free to assess their evidence independent of the appreciation made by the trial court, possibly I might

have come to some other conclusion. But sitting as I do on the appellate side, I cannot say that the appreciation made by the trial court is

completely perverse. Therefore I accept it as it stands and agree with the trial Court that on that finding the plaintiff is not entitled to any mesne

profits.

30. Accordingly, the decree and judgment of the trial court are affirmed and both the appeals are dismissed but with this difference that the former

namely, First Appeal No. 208 of 1949 with costs, while the latter, namely, First Appeal No. 191" of 1949, in the circumstances of that case

without costs.

Kanhaiya Singh, J.

31. I agree.