Arjun Dass Vs Gunendra Nath Basu Mallick

Court: Calcutta High Court

Date of Decision: June 1, 1914

Judgement

1. We are invited in this Rule to set aside an order of the District Judge, who, in concurrence with the Court of first instance, has refused an

application for reversal of an execution-sale. The facts, as they appear on the face of the record, may be briefly recited. One Gunendra Nath Basu

Mallik brought a suit for recovery of arrears of rent against Sitanath Banerjee, the recorded tenant of an occupancy-holding which comprised 17

bighas of land and is said to have been worth at least Rs. 300. The decree was made ex parte on the 4th July 1909 for a sum of about Rs. 63

together with costs about Rs. 9. On the 27th May 1911 the Petitioner Arjun Dass, who had previously purchased the holding from Sitanath

Banerjee, made a deposit of Rs. 67 in satisfaction of the judgment-debt. By some oversight, the amount deposited did not cover the whole of the

costs decreed. On the 25th October 1911, the decree-holder applied for execution of his decree against Sitanath Banerjee for recovery of the

balance still due, which amounted to a sum of about Rs. 5. Sitanath Banerjee had, however, died on the 17th May 1910. Execution was yet taken

out against the dead man. On the 2nd November 1911, the Court ordered execution to proceed against the judgment-debtor on record and notice

under r. 22 of Or. 21 of the Code was directed to issue upon him, as more than one year had elapsed from the date of the decree. A return was

filed that the notice had been duly served on Sitanath Banerjee on the 28th November 1911. Subsequently writ of attachment and sale

proclamation were issued with the name of Sitanath Banerjee thereon. Returns were filed in usual course that the processes had been served in

accordance with law. On the 12th January 1912 the holding was put up to auction ; there was no bidder present, and the decree-holder purchased

the property for Rs. 50. On the 8th April 1912, the Court delivered possession to the decree-holder in his capacity as auction-purchaser. On the

7th May 1912, the Petitioner applied to the Execution Court for reversal of the sale. He alleged that he had purchased the holding several years

before the sale, that he was in possession by payment of rent to the landlord, and that the decree-holder had managed to buy the property for a

very small price at a sale held in the course of proceedings taken against a dead man. The Court of first instance refused to set aside the sale, and

that order has been on appeal confirmed by the District Judge. In our opinion, the proceedings initiated and carried on against the dead judgment-

debtor were infructuous, and the Courts below have failed to exercise a jurisdiction vested in them, namely, to annul a sale held in the course of

such a proceeding. Or. XX, r. 22, provides that where an application for execution is made more than one year after the date of the decree or

against the legal representatives 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. In the case before us, more

than one year had elapsed from the date of the decree and the judgment-debtor had died in the interval. There was consequently a two fold reason

for the issue of the no ices contemplated by r. 22, but such notice could be issued only upon the legal representatives of the judgment-debtor

against whom alone execution could proceed under sub sec. 1 of sec. 50. The decree holder, however, initiated the proceeding and carried it on

throughout against the dead man as if he were still alive. The Court was not only not apprised that the proceedings were taken against a dead man,

but untrue returns were repeatedly filed to show that the processes had been duly served. It is difficult to conceive a graver abuse of the process of

the Court, and the question inevitably arises, is a sale deliberately brought about under such circumstances to be treated as valid and operative ? In

the case of Livinia Ashton v. Madhabmoni Dasi 11 C. L. J. 489 : s. c. 14 C. W. N. 560 (1910) this Court was called upon to consider the effect

of a sale held without notice to the judgment-debtor, under sec. 248 of the Code of 1882. In that case, the judgment-debtor was alive, but

although more than a year had elapsed since the date of the decree, no notice under sec. 248 was served upon her. This Court held on the

authority of the decision of the Judicial Committee in Malkarjun v. Narahari L. R. 27 I. A. 216 : s. c. I. L. R. 25 Bom. 337 (1900) that although

the sale could not be treated as a nullity and ignored by the party whose property had been sold as if it had never taken place, yet it was voidable,

as the omission to issue the prescribed notice was a serious irregularity. It was pointed out that the omission to serve the notice was not a material

irregularity in publishing or conducting the sale within the meaning of sec. 311 of the Code of 1882, but was a good ground for reversal of the sale

upon an application under sec. 254, which could be made under Art. 178 of the second schedule to the Limitation Act of 1877, within three years

from the date of sale. It was also explained that the object of a notice under sec. 248 is not merely to give the judgment-debtor opportunity to

show cause why the decree should not be executed, because, for instance, it is time-barred or has been adjusted, but also to give him an

opportunity to satisfy it before execution is issued. The principles thus enunciated in Livinia Ashton v. Madhabmoni Dasi 11 C. L. J. 489 : s. c. 14

C. W. N. 560 (1910) have been adopted and applied in the cases of Lakshmicharan v. Srischandra 13 C. L. J. 162 (1910), Kumed Bewa v.

Prosunna Kumar Roy I. L. R. 40 Cal. 45 (1912) and Shamsundar v. Jhumal Shah 11 Ind. Cases 893 (1911). Tested in the light of these

principles, the sale in the case before us cannot possibly be sustained. There was no notice under Or. XXI, r. 22, upon the legal representatives of

the judgment-debtor ; the Court could not issue such notice, though it was incumbent upon the Court to do so, because the decree-holder never

intimated to the Court that the judgment-debtor was dead A sale held under these circumstances must be set aside on the ground of grave

irregularity in the proceedings. But the present case is really much stronger than the one before this Court in Livinia Ashton v. Madhabmoni 11 C.

L. J. 489 : s. c. 14 C. W. N. 560 (1910). Here the execution proceeding was initiated and carried on throughout against a dead man. The cases of

Stowell v. Ajudhia Nath I. L. R. 6 All. 255 (1884) and Sheo Prasad v. Hira Lal I. L. R. 12 All. 440 (1889) are of no assistance to the decree-

holder-auction-purchaser. In those cases, the execution-proceeding had been commenced against the judgment-debtor and his property had been

attached during his life-time ; the sale took place after his death without notice to his legal representatives. It was ruled that the property, when

sold, was as the result of the attachment, validly in the custody of the Court, and that consequently the sale was not a nullity, but could be set aside

on the ground of material irregularity in the publication of the sale proclamation. The case before us is of an essentially different description ; it is not

the case of a man who after due notice of the execution-proceeding defaults to pay the judgment-debt and as a result has his property brought to

sale, it is the case of a man who is dear, and whose property is sold because he fails to respond to the notice issued by the Court on him at the

instance of the judgment-creditor [see Debi Baksh v. Habib Shah I. L. R. 35 All. 331 (1913).]

2. The question of the legality of an execution sale held in course of proceedings initiated and carried on against a dead judgment-debtor has been

repeatedly considered in cases of the highest authority. In Chick v. Smith 8 Dowling 337 (1840) it was ruled that in the case of death of the

judgment-debtor, even a few hours before execution issued, the execution was invalid [see also the notes to Jefferson v. Morton 2 Saunders Rep.

6 at p. 12; substantially to the same effect are the decisions in Rameswari v. Durgadass I. L. R. 6 Cal. 103 (1880), Imamunnessa v. Liakal I. L. R.

3 All. 424 (1881), Gopal v. Gunamani I. L. R. 20 Cal. 370 (1892)]. No doubt, there has been some divergence of Judicial opinion upon the point,

whether the sale should be treated as void or voidable, but the Courts are unanimous that if the sale is directly impeached, it cannot be sustained.

The question has been repeatedly examined in the Courts of the United States and the authorities almost unanimously hold that if execution issues

after the death of the judgment-debtor, the sale is void, only a small minority hold that it is voidable (Freeman on Executions, sec. 35 ; Freeman on

Void Judicial Sales, sec. 24 ; Klebar on Void Judicial and Execution Sales, sec. 280; Rover on Judicial Sales, sec. 827) The point has been

elaborately investigated by the Supreme Court of the United States on more than one occasion [Erwin v. Dundas [1846] 4 Howard 58; Taylor v.

Doe [1851] 13 Howard 287; Ransom v. Williams [1864] 2 Wallace 317 ; Mitchell v. Maxent [1866] 4 Wallace 237], and it has been uniformly

ruled that an execution commenced after the death of the judgment-debtor named therein is void and that the purchaser at a judicial sale held in

such a void proceeding is not protected ; but it is otherwise, where an execution is regularly issued and is levied on the land of the judgment-debtor

during his life-time ; in the latter case the sale is regarded as a completion of the previous execution by which the property had been expropriated in

accordance with law. The matter may be put briefly in the words of the judgment in Brown v. Parker 15 III. 307 : ""Judicial proceedings cannot be

carried on in the name of a dead mans there is as much necessity for a Plaintiff as for a Defendant ; the proceedings in either case are as much

arrested by the death of one as of the other."" We hold accordingly that the sale held on the 12th January 1912 must be set aside on the basis of the

application, dated the 7th May 1912, treated as one made under sec. 47 of the Code. No question of limitation arises, not withstanding the

comprehensive language of Art. 166 of the First Schedule of the Limitation Act of 1908 which is wider in its terms than the Article it replaces,

namely, Art. 166 of the Limitation Act of 1877. The case is plainly one for the application of sec. 18 ; no notices had ever been issued upon any

person interested in the property sought to be sold ; false returns were, on the other hand, filed to the effect that the processes had been duly

served on the judgment-debtor who had, as a matter of fact, died more than a year before the proceedings were commenced against him ; besides

this, the decree-holder-auction-purchaser did not take delivery till after more than a month had expired from the date of the sale and the Petitioner

came into Court within one month from the date of such delivery. There is nothing to show that the Petitioner had any previous knowledge of the

sale, and as their Lordships of the Judicial Committee observed in Rahimbhoy v. Turner L. R. 20 I. A. 1: s. c. I. L. R. 117 Bom. 341 (1892), the

burden would lie upon the decree-holder to show that the Petitioner had, on any date earlier than the 8th April 1912, knowledge of the sale held in

the course of proceedings of which no notice had been given to any living man. We also observe that the objection was taken in the Court below

that the Petitioner had no locus standi, as he had failed to prove that the holding was transferable by custom. It was proved, however, that rent was

received from the Petitioner after his purchase, though his name was apparently not formally registered as tenant. We are of opinion that the

Petitioner was competent to make the application and that the decision in Prosunno Kumar v. Bama Churn 13 C. W. N. 652 (1909) does not

govern this case.

3. We may finally add that although the application must be deemed to have been made under sec. 47 of the Code of 1908, a second appeal may

at first sight seem barred under sec. 153 of the Bengal Tenancy Act, as the claim in the suit for rent was under Rs. 100 [Shyama Charan v.

Debendra Nath I. L. R. 27 Cal. 484 (1900)]; but a second appeal does apparently lie in this case on the authority of the decision of the Full Bench

in Kali Mandal v. Ram Sarbeswar I. L. R. 32 Cal. 957 : s. c. 9 C. W. N. 721 (1905), the effect of which, as explained in Benimadhab v.

Bisseswar 16 C. L. J. 542 : s. c. 17 C. W. N. 84 (1911), has not been completely nullified by the explanation added to sec. 153. The view that a

second appeal lies to this Court in the present case, does not, however, create any difficulty in the way of the Petitioner, because the petition on

which this Rule was granted may be treated as a memorandum of appeal, as no question of limitation or court-fees arises. The result is that the

orders of the Courts below are discharged, the application to set aside the sale is granted, and the sale is cancelled. The Petitioner will be re stored

to possession in execution of the order of this Court. The Petitioner will also receive his costs in all the Courts We assess the hearing fee in this

Court at five gold mohurs.