Dayanand Pandurang Nerkar and Others Vs Daji Narayan Nerkar and Others

Court: Bombay High Court

Date of Decision: June 21, 1926

Acts Referred: Civil Procedure Code, 1908 (CPC) â€" Section 35

Citation: AIR 1926 Bom 548(1)

Hon'ble Judges: Madgavkar, J; Fawcett, J

Bench: Full Bench

Judgement

Fawcett, J.
This suit arises out of two decrees obtained against the plaintiffs'' father Pandurang. He and his brothers, Defendants Nos. 1

and 5, formed a joint Hindu family, at any rate, till about 1902. The decrees were against the plaintiffs'' father alone, without his sons being made

parties to the suit. The plaintiffs are those sons. In execution of those decrees the properties mentioned in Schedule A and B to the plaint were put

up for sale. The plaintiffs'' father, admittedly, had a half-share in these properties, his larger share being due to the fact of his having been given in

adoption to his uncle. But, under Hindu law, his sons were joint with him in regard to that half share. Defendants Nos. 8 and 9 were the auction-

purchasers, and Defendant No. 10 now holds the rights of Defendant No. 9.

2. The plaintiffs sued to recover their separate share by partition in those sold properties on the ground that only the share of their father,

Pandurang, actually passed to the auction-purchasers. The First Glass Subordinate Judge has held that the sons interest was also auctioned by the

Court and passed to the auction-purchasers. The plaintiffs have appealed. It is not disputed that under Hindu law the sons'' interest could have

been also auctioned, although the decrees had been passed against Pandurang alone. Nor is there any allegation of the debts being for immoral

purposes or otherwise not binding on the sons. The sole question really is one of fact, namely, whether the Court did intend by its proceedings that

the interest of the sons should be auctioned as well as that of the father, and also whether the conduct of the persons concerned shows that the

sons'' interests was in fact auctioned.

3. The main contention on the part of the appellants is based on the High Court Civil Circular No. 69, i (vii), at p. 99 of the Manual of Civil

Circulars, which, in effect, says that the proclamation of sale should show the name of any other member of a Hindu family whose interest it is

desired to sell. It runs as follows:

If in the case of a Hindu judgment-debtor it is desired to sell the interest of any other member of the family (e.g., that of a minor son or brother),

the name of such member and the fact that his interest is being sold must be stated in the proclamation, or otherwise his interest will not pass to the

purchaser.

4. It is contended by Mr. Thakor that, as the Court did not comply with that circular, so as to show that the sons'' interest was also being

auctioned, the result is that only the father''s interest passed. Mr. Thakor at one stage of his ''arguments contended that the circular has the force of

law. But, in my opinion, that is a position that cannot be set up. In fact it has been disapproved already by this Court in Amolakchand v. Motilal

AIR 1925 Bom. 497. At page 440 the Chief Justice says:

But the circular has not been incorporated in the proclamation of sale and therefore we have to apply the ordinary law as laid down in the decided

cases, in order to ascertain what passed to the purchaser; for the Circular cannot be considered as laying down the law by which we are bound; so

that we must hold that the interest of the sons were not purchased, because they were not mentioned in the proclamation.

5. The Circulars are not on the same footing as rules which are passed in accordance with the prescribed procedure in Part X of the Civil P.C. At

any rate, a large number of circulars, embodied in the Manual of Civil Circulars, are not such rules, and it is not shown that this particular Circular

69 was issued as a rule under the Civil P.C. Unless it is passed under some enactment, which gives it the force of law, obviously the mere fact that

a Circular is issued under, the authority of this Court is not sufficient to give it that force. And, it seems to me, with great respect, that the Circular

goes too far when it says ""as otherwise his interest will not pass to the purchaser. It would be better, I think, if the Circular were altered by

substituting the word ""may"" for ""will,"" or by inserting the word ""probably"" between ""will and"" not,"" or in some other way so as to make it less

categorical than it at present is. It is quite clear from the decisions of the Privy Council and High Courts that, although the proclamation of sale may

not state that the sons interests are being put up for sale, yet the circumstances may be such as to fully justify a Court in holding that those interests

were actually sold. In Shankar Govind Joshi Vs. Parashram Janardan Gokhale, , the question of this circular was also considered by this Court,

and Heaton, J., who was probably mainly responsible for its issue, in his judgment states the considerations which led to the issue of a circular,

namely, the laxity and confusion in connexion with Court sales of joint properties of Hindus. He goes on to say (p. 973):

It was in order to introduce some precision and care in these matters ill at the High Court laid down Rule 69(vii).

6. He says (p. 973):

This rule called general attention to the circumstance that if in the case of a Hindu judgment-debtor it was desired to sell the interest of other

members of the family, the names of those members should be stated.

7. But he does not say that the omission to comply with that Circular would have the effect of making the father"s share alone pass, and, in fact, the

Chief Justice, Sir Norman Macleod, in his judgment distinctly held the contrary. At p. 972 he says:

A slip was added to the proclamation of the sale that the interests of the sons of the judgment-debtor were not sold. If it had not been for that slip,

no doubt under the ruling of the Privy Council in Sripat Singh v. Mahaiaja Sir P.K. Tagore [1977] 44 Cal. 524 the sale of the right, title and

interest of Govind would have included other interests which the judgment-debtor himself might have sold.

8. Therefore, the case is one to be decided upon the evidence, and it seems to me that the Subordinate Judge was quite right in his decision. The

fact that the property to be sold is mentioned as one half, which is a larger share than the father, apart from his sons, could claim as his own, clearly

supports the view that the intention was to include the interest of the sons. The prices given were also substantial and would seem to have bean

offered on the same footing. No circumstance has been brought to our notice, apart from this Circular, which would justify the contrary view. The

only other ground put forward for our interfering with the lower Court"s decree is in regard to the question of costs, which has been raised by the

cross-objections of Defendants Nos. 8 and 10. The Subordinate Judge ordered each party to bear his own costs although the auction-purchasers

in question had succeeded. He did not follow the requirement in Section 35 of the CPC of stating reasons for any departure from the ordinary

principle that the. party succeeding should get his costs. Probably, his reason for ordering each party to bear his own costs was the fact of the

Circular, not having been properly observed. But that cannot be considered a circumstance for which the auction-purchasers, or those who stand

in their shoes, should be penalized. It was an act. of the Court rather than of the parties, and the ordinary rule is that the act of the Court shall injure

no one. Therefore, I think, the cross-objections of Respondents Nos. 8 and 10 should be allowed and the decree of the lower Court should be

varied by adding after the direction that each party should bear his own costs the words ""except Defendants Nos. 8 and 10, whose costs should

be borne by the plaintiffs."" Defendant No. 9 asks for his costs of appearance in this appeal. No doubt, he has now no interest in the subject-matter

of the suit, as he has sold that interest to Defendant No. 10. But, on the other hand, had he not appeared, and had the appeal succeeded, he might

have, been held responsible for carelessness in not appearing to support the. respondents who object to the appeal. I think, therefore, that he

should foe allowed his costs of the hearing.

9. The result is, in my opinion, the appeal should be dismissed with costs. including those of Respondent No. 9, and, that the lower Court''s decree

in regard to the direction of costs should be varied as already stated. Costs of Defendants No. 8''s and 10''s cross-objections to be borne also by

the appellants. Separate sets of costs are allowed for (a) Defendants Nos. 1-7; (b) Defendant No. 8; and (e) Defendant Nos. 9 and 10, i.e., three

separate sets of costs of this appeal The appellants omitted to state what was the valuation of the claim in appeal for pleaders fees. In the

circumstances, for the purpose of calculating pleaders sees, we allow the valuation as appearing in the plaint, namely. Rs. 6,000.

Madgavkar, J.

10. The only question in appeal which remains is comprised in. Issues Nos. 2 and 4 of the lower Court as to whether, under the two darkhasts-

mentioned therein, the properties sold comprised merely the right, title and interest therein of Pandurang, the father of the plaintiffs-appellants, or

whether they also included the interest of the appellants. It is undoubted that in respect of a debt not tainted by immorality such as Pandurang''s, the

decree-holder is entitled to attach not only the right, title and interest of the father, but also the interest of the joint sons as well : Sripat Singh v.

Tagore [1917] 44 Cal. 524 and Brij Narain v. Mangal, Prasad AIR 1924 P.C. 50.

11. But the question in a suit such as the present is not what the judgment-creditor could have attached, but what the Court intended to and did

actually sell at the Court sale. This must in each case be a question of fact, on 7/hich it would be impossible for the Courts to lay down any rule of

law. And, therefore, without disrespect to the numerous authorities cited at the Bar, this question, in my opinion, on the present facts, must be

decided mainly on a balance of two points. In favour of the appellants, it may be said that their right, title and interest, was not expressly mentioned

as being included. In favour of the respondents, it might be urged that the sons'' share was not excluded, nor was the High Court Circular No. 69,

with the slip therein mentioned, attached to the proclamation and the share mentioned, one-half, is far greater than the father''s own share would

be, if the interest of his sons, the appellants, were separated.

12. I entirely agree with the view of my learned brother that that Circular has not the force of law, however binding it may be on the Subordinate

Courts, as a direction laid down so as to leave no scope for ambiguity as to the intention of the Court on this point. I also agree with the

amendment of it proposed by my learned brother. It is needless to repeat the observations of Heaton, J., in Shankar Govind Joshi Vs. Parashram

Janardan Gokhale, . One can but regret that, in spite of these circulars, the Subordinate Courts occasionally neglect to make the point clear and

thus leave the way open to a litigation such as the present.

13. However that may be, in the present case, there is no doubt in my own mind that the Court intended to include the share of the appellants, sons

of the judgment-debtor. Half, which is more than the portion to which the father alone would be entitled, was expressly mentioned, the fact that the

price paid corresponded to the half share, the fact that, during all these years, neither the father nor sons raised any objection, but allowed the

auction-purchaser and the purchasers through him, to be in possessions-all these facts-in my opinion, show clearly that the appellants'' share also

was intended to be sold and was sold, In regard to costs, whatever sympathy one might have for the appellants, it is clear that, having in reality an

honest claim in regard to the partition of property C, they needlessly included therein properties A and B, sold to auction-purchasers and their

successors. They are thus responsible for the additional costs, and, I agree that three separate sets of costs should be allowed to the respondents.