

Jayarabai Vs. Bindo Ganesh

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SooperKanoon Citation : sooperkanoon.com/340872

Court : Mumbai

Decided On : Dec-13-1945

Reported in : (1946)48BOMLR598

Judge : Macklin and ;Rajadhyaksha, JJ.

Appeal No. : Civil Revision Application No. 142 of 1945

Appellant : Jayarabai

Respondent : Bindo Ganesh

Judgement :

Macklin, J.

1. The appellate Court has reversed the decision of an executing Court and has held that a certain auction-purchaser is entitled to have a sale set aside under Order XXI, Rule 91, on the ground that the judgment-debtor had no saleable interest in the property. The other side now comes to us in revision, and apart from the merits of the case the question for us to determine is whether this Court has jurisdiction to interfere, since a preliminary objection has been taken that it has no jurisdiction. On behalf of the petitioners reference was made to the decision of the Privy Council in Balkrishna Udayar v. Yasudeva Aiyar (1917) L.R. 44 I. A. 281 : 19 Bom. L.R. 715. The case has been interpreted by the Patna High Court and by other High Courts, and the interpretation adopted has led to these High Courts

holding that a Court of revision has power to interfere with a decision on a question which goes to the root of the jurisdiction of the Court. On the other hand, there are decisions not only of this Court but of other High Courts also which are to the effect that a decision will not be subject to the High Court's revision merely because it decides a question which involves jurisdiction. It will be subject to revision by the High Court only if it decides a question which itself is a direct question of jurisdiction.

2. This matter came before Mr. Justice Weston sitting alone; and though he had himself no doubts as to the powers of the High Court in a matter like this, holding in effect that this Court had no power to interfere, he thought it better to refer the matter to a division bench. There can be no doubt that an erroneous decision upon a direct question of jurisdiction gives rise to an application in revision. If for example the Court of a First Class Subordinate Judge considers the question of its own jurisdiction in a particular matter according to the construction of a statute as compared with the jurisdiction of, say,, the District Court and wrongly comes to the conclusion that according to the true construction of the statute jurisdiction is with the one Court but not with the other and that decision is wrong and in the result it has wrongly exercised or not exercised jurisdiction, then its action is open to revision by the High Court; because it has decided what is a pure question of jurisdiction wrongly. Of that there can be no possible doubt, and no authority is needed for the proposition.

3. But the question is whether this Court has power to interfere with a decision which affects jurisdiction but is not itself a decision as to jurisdiction. What happened in the case now before us is that the appellate Court held on a construction of the situation before it that the judgment-debtor had no saleable interest in the property sold at a Court auction; and having held that, it did what it was bound to do under Rule 91 and set aside the sale. We are told that if its decision as to the judgment-debtor having no saleable interest in the property was wrong, then we are entitled to interfere in revision because that wrong decision resulted in the Court exercising a jurisdiction which it did not in fact possess to set aside the sale, since a sale under Rule 91 can be set aside only if the judgment-debtor has in fact no saleable interest in the property. In support of this contention

we were referred to the decision of the Patna High Court in *Musammatt Dhanwanti Kuer v. Sheo Shankar Lal* (1919) 4 P. L. J. 340. This decision is typical of a class of decisions. It arose out of an order under Rule 89 of Order XXI, and the application in revision was based upon an alleged error in deciding a question involving a construction of the rule and whether or no the person presenting the application fulfilled the character required by the rule. The High Court held that the Court's decision upon the point whether the applicant had the necessary legal character was clearly a question involving jurisdiction; and it said that, though an erroneous decision on a question of law or fact after jurisdiction has been once legally assumed would not be a ground for interference under Section 115 of the Code, still it would at once come within the purview of the section if the decision were the very basis and foundation of jurisdiction; and their Lordships went on to say that the judgment of the Privy Council in *Balkrishna v. Vasudeva* was an authority in support of that new. With all respect we find ourselves unable to accept the suggestion that *Balkrishna v. Vasudeva* is an authority for the view expressed by the Patna High Court. The Privy Council was there deciding a question arising out of the interpretation of Section 10 of the Religious Endowments Act of 1863. Section 10 prescribes the procedure to be followed in the case of a vacancy occurring in the Committee there referred to, and the District Judge is given certain powers in that connection. The section provides that in the case of a vacancy on the Committee the persons interested may elect, a person to the vacancy under rules for election framed by the local Government, and, if that is not done within three months after the occurrence of the vacancy, the civil Court on application made by any person whatever may appoint somebody to fill the vacancy or may 'order the vacancy to be filled up by the remaining members of the Committee, with which order it shall then be the duty of such remaining members to. comply'. Orders were passed in that connection, and the vacancy was duly filled; and in due course applications were made to the District Judge to confirm the vacancy or to set it aside or to take other action with which we are not now concerned. Orders were passed on the applications and the matter eventually came before the High Court in revision. The High Court interfered in revision. What the District Judge had done was to interpret the words 'may order that the vacancy be filled up by the remaining members of the Committee' as if he were en-powered

under the section to order them to fill up the vacancy by means of an election, whereas the section is silent as to the means by which the Committee might fill up the vacancy on the orders of the District Judge. In other words, the District Judge had exercised a jurisdiction not vested in him owing to his having misinterpreted the section as giving him that jurisdiction. In short, the District Judge had wrongly decided what was a direct question of jurisdiction. He had not decided the prerequisites of his jurisdiction. What he had done was to say that the section gave him jurisdiction to direct an election as the means by which the Committee was to fill the vacancy, whereas the section did not in fact give him any such jurisdiction. That surely is a very different thing from deciding that a person holds a certain legal character and therefore the Court is entitled to exercise jurisdiction in a certain matter because the holding of that character is an essential basis for the exercise of its jurisdiction. In the latter case the Court is deciding whether or no circumstances exist which, if they do exist, would undoubtedly give the Court jurisdiction. In the former case the Court is deciding whether certain circumstances, assuming that they exist, would give the Court jurisdiction. There is a subtle but obvious distinction between the two positions, and we are firmly of opinion that the decision in Balkrishna's case affords no authority for the decision in the Patna case. As an illustration of this distinction I may refer to the case of *Mithalal Banchoddas v. Maneklal Mohanlal* (1940) 43 Bom. L.R. 480. That was a case arising out of a decision on a question of limitation. An application under Rule 95 of Order XXI had been dismissed by the trial Court on the ground that it was barred by limitation, with the result that the Court refrained from exercising the jurisdiction which it would have exercised if it had held that the application was in time. The bench (of which I was a member) held that the finding of the lower Court on a question of limitation, whether right or wrong, was a finding on a point of law which the Court had jurisdiction to decide and therefore it did not come within the ambit of Section 115. Reference was made to *Veerappa v. Iratappa* (1937) 40 Bom. L.R. 152, where it was pointed out that a Judge who dismisses an application by actually disregarding the plain words of the provisions of the Indian Limitation Act may be said to exercise his jurisdiction illegally and with material irregularity, so that the Court can interfere under Section 115. But the position is different where the Court has considered the question of limitation and disposed of

the case in accordance with its interpretation of the law. There again the Court considered the existence of circumstances which, if proved to exist, would give it jurisdiction; and even if the result of a wrong decision as to the existence of those circumstances would inevitably result in the wrong exercise or non-exercise of jurisdiction, that would not entitle the High Court to interfere under Section 115.

4. I find it impossible to distinguish, the principle underlying *Mithalal v. Maneklal* from the principle underlying the present case. In each case in effect we have to consider only the existence, in law or in fact, of circumstances which, if existent, would give jurisdiction. A similar view was taken by this Court as long ago as 1887 in *Amritav Krishna Deshpande v. Balkrishna Ganesh Amratpurkar* I.L.R (1887) Bom. 488. The Court was there concerned with the question of a wrong decision for a decision which was alleged to be wrong) on a question of res judicata; and it was held that the decision, even though wrong on a question of res judicata, was not a failure or cause of failure to exercise jurisdiction and did not warrant the interference of the High Court in revision. That again is an illustration of exactly the same principle. We are told that there have been a number of decisions by this High Court on questions arising out of Section 73 of the Civil Procedure Code and that the High Court has interfered in such cases upon the ground in effect that there had been a wrong decision upon circumstances which would be the basis of the Court's jurisdiction. But we have not been referred to any such case where the Court actually considered its powers under Section 115. So far as we can gather powers were assumed to exist. Those cases are therefore of no assistance. We have also been referred to the decision in *Mulchand Dagadu v. Govind Gopal* I.L.R (1906) Bom. 573 : 8 Bom. L.R. 578, which was concerned with an alleged error of jurisdiction under what is now Rule 89 of Order XXI. The executing Court had held that the rule was not applicable to a purchaser after attachment and before sale under that attachment. But that again was not a decision as to the existence of circumstances which were the basis for the Court's jurisdiction. It was a decision as to the nature of the jurisdiction of the Court on a construction of the rule. In other words it was a decision upon a pure question of jurisdiction, since the decision in effect was that the Court had no jurisdiction to interfere if certain circumstances did exist-not that certain circumstances did or did not exist which would or would not give the Court jurisdiction. This case is of no assistance to the

applicants here; on the contrary it reinforces the opinion which I have already expressed.

5. The only decision of this High Court coming to our notice which seems to express views to the contrary is *Nandlal v. Kisanlal* : AIR1928 Bom548 , where Mr, Justice Patkar said:- 'The question of law in this case involves, a question of jurisdiction and we have power to interfere under Section 115 of the Civil Procedure Code.' That suggests that in the opinion of the learned Judges this Court would have power to interfere merely because a question of jurisdiction was ultimately involved. But that dictum cannot be reconciled with such decisions as those to which I have referred and in particular with the decisions of this Court as to limitation and *res judicata*, and with respect it does not seem to us to be a correct decision. We are told that it receives support from a remark of the Privy Council in *Balkrishna Udayar v. Vasudeva Aiyar*, where at p. 267 their Lordships say: 'The section [meaning Section 115] is not directed against conclusions of law or fact in which the question of jurisdiction is not involved. We are asked to read that sentence as if it were 'the section is directed against conclusions of law or fact in which the question of jurisdiction is involved"; but for obvious reasons we are unable to do anything of the sort.

6. The divergence between the two sets of authorities is clearly set out in Sir Dhishah Mulla's Civil Procedure Code, 11th edition, at p. 420, under the Note 'What is not illegality or material irregularity' to Section 115. The learned author says: .

The substantial point of difference between these two divergent views is that the Patna and the Madras High Courts treat the refusal by the lower Court to entertain the application as a refusal to exercise a jurisdiction vested in it by law, while the High Court of Allahabad regards the refusal as no more than a decision, though erroneous, on a point of law in the exercise of the lower Court's jurisdiction;

and he goes on to say:

There is no difference of opinion between these Courts on the point that, where the lower Court assumes jurisdiction or refuses jurisdiction on an erroneous

construction of a statute, the High Court can interfere in revision.

Those words 'erroneous construction of a statute' clearly mean an erroneous construction of a statute defining the Court's jurisdiction. The difference, he says, arises on the question 'is it a case of refusal to exercise jurisdiction or a case merely of a wrong decision on a point of law in the exercise of the Court's jurisdiction?' According to the Patna and Madras High Courts, it is the former; according to the Allahabad High Court, it is the latter. We are satisfied that in this case we have no jurisdiction to interfere, since the point giving rise to the application is a decision on a point of law which the Court had jurisdiction to decide before considering whether it had jurisdiction to set aside the sale.

7. The question referred to us by Mr. Justice Weston for an answer was framed in these words:

Whether a revision application can lie from a decision in appeal on an application made under Order XXI, Rule 91, of the Code of Civil Procedure, when the decision is that the judgment-debtor had no saleable interest in the property sold and the sale therefore has been set aside.

We answer that question in the negative.

8. We are asked not to dispose of the application ourselves, since in terms all that has been referred to us is a question for an answer. With this answer we send the case back to the referring Court.