

Phoolchand and anr. Vs. Badri Prasad

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Court : Rajasthan

Decided On : Aug-19-1952

Reported in : AIR1953Raj51

Judge : Wanchoo, C.J. and; Ranawat and; Sharma, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 - Order 21, Rule 92;
[Constitution of India](#) - Article 133(1)

Appeal No. : Ref. in Misc. Case No. 77 of 1951

Appellant : Phoolchand and anr.

Respondent : Badri Prasad

Advocate for Def. : C.L. Agarwal, Adv.

Advocate for Pet/Ap. : D.M. Bhandari, Adv.

Disposition : Application dismissed

Judgement :

Wanchoo, C.J.

1. This is an application for leave to appeal to the Supreme Court under Article 133(c) of the Constitution. It has been referred to this Full Bench for decision, because some of the points involved in this case are the same which arise in Civil

Miscellaneous Case No. 5 of 1952 (Mst. Gulab Bai v. Mst. Manphul Bai) in which certain questions were referred to a Full Bench.

2. The present application has arisen in the following circumstances:

A decree was passed in August 1927 by the District Judge of Alwar in favour of one Gbvindi and against the present applicants Phulchand and Surajmal for about Rs. 7,000/-. It was put into execution, and a compromise was then arrived at by which a certain sum was to be deposited in cash and the rest of the decretal amount was to be paid in annual instalments of Rs. 600/-. In 1931, another execution application was made, and a house was attached, and was sold on the 13th May, 1940. Thereafter, there were certain objections under Order XXI, Rule 90, Civil P. C., which were dismissed, and the sale was confirmed on the 8th September 1943, and the sale certificate was issued on the 6th September 1944. It appears however that another objection was taken in August, 1943, and that objection was finally decided by the Rajendra Shashan of the former covenanting State of Alwar in April, 1949. Possession of the house barring a certain portion in the occupation of the mother of the judgment-debtors applicants was also made over to the decree-holder. Thereafter, after the decision of the Rajendra Shashan in April 1949 an application was filed on the 18th July, 1949, by the applicants contending that the sale was void ab initio, as the mandatory provisions of Order XXI, Rr. 84 and 85, Civil P. C. had been disregarded, and the applicants prayed for restoration of possession. This application was dismissed on the 28th September 1949. There was an appeal by the judgment-debtors, which was allowed and possession was ordered to be restored to them. Then there was a second appeal to this court, which was heard by a Division Bench. The second appeal was allowed. The present application is for leave to appeal against the decree of this Court.

3. The first point which arises for consideration is whether leave can be granted under Article 133(1)(c) ,of the Constitution in a case in which the point in dispute is measurable in terms of money, and the valuation is less than Rs. 20,000/-. This was the first question which was referred to the Full Bench in Miscellaneous case No. 5 of 1952. The answer we have given in that case is that even though the

point in dispute is measurable in terms of money, and the valuation is less than the minimum amount, it is open to the High Court to grant a certificate under Article 133(1)(c) if the High Court is of the opinion that the question involved is of general public importance. The objection therefore of the opposite party that the High Court cannot give leave under Article 133(1)(c) of the Constitution because the point in dispute is measurable in terms of money, and the valuation is less than Rs. 20,000/- has no force.

4. The second question is whether we should grant leave in this particular case and whether the point in dispute is of general public importance. The point in dispute is whether it is open to the judgment-debtor to come to Law Court and ask it to declare that the sale is a nullity after the court has already confirmed the sale. Learned counsel for the opposite party admits that the point is of general public importance; but his contention is that the point is settled by the decision of Their Lordships of the Privy Council in -- 'Ganapathy Mudaliar v. Krishnamachariar', 45 Ind App 54 (PC), and therefore the law being settled the case is not a fit one for appeal to the Supreme Court. Learned counsel for the applicants concedes that if the law is settled by a decision of the highest Court, it would not be proper for this court to grant a certificate under Article 133(1)(c), but his contention is that the law in this case is not settled. What we have therefore to see is whether the law on this point is settled or not.

5. The earliest case on the point is --'Bhiram Ali v. Gopi Kanth', 24 Cal 355. In that case it was held that Section 244 of the Code of Civil Procedure (which is equivalent to Section 47 of the present Code) barred a suit for the determination of certain questions specified therein, but did not bar the trial of any issue involved in those questions if the issue was raised at the instance of a defendant in a suit brought against him. The question arose in a suit by a decree-holder who had obtained the sale certificate but had failed to obtain possession which remained with the judgment-debtors.

6. The next case, to which reference may be made, is -- 'Ashutosh v. Beharilal', 35 Cal 61, decided by a five judge Full Bench. In that case, the property of the judgment-debtors was sold, and the sale was confirmed. Thereafter, an application

was made under Section 244 of the Code of Civil Procedure (which is equivalent to Section 47 of the present Code) by the judgment debtors to have the sale set aside on the ground that it was in contravention of the terms of Section 99 of the Transfer of Property Act. The application was rejected, and it was held that such an application must be made before confirmation of the sale, unless the applicant proved that owing to fraud or other reasons he was kept in ignorance of the sale proceedings preliminary to sale.

7. Then we come to -- 'Ganapathy Mudaliar v. Krishnamachariar', 45 Ind App 54 (PC). In that case property had been sold, and the sale was confirmed. The decree, however, in which the property was sold did not comply with Sections 86, 88 and 89 of the Transfer of Property Act. Later, a suit was brought by the judgment-debtor's heirs for redemption of the mortgage. It was held that the suit could not be maintained, because under Section 244 of the Code of Civil Procedure of 1882, (equivalent to Section 47 of the present Code), the validity of the sale could not be questioned by a fresh suit, but only by an application before confirmation to the court executing the decree. The following observations appeared at page 60:

'This Board decided in -- 'Prosunno Kumar v. Kali Das', 19 Ind App 166 (PC) that Section 244 had been rightly held in India to apply in a case in which the question raised concerned the auction purchaser at an auction sale as well as the parties to the suit. In this case the vakil was the auction purchaser and was also a party to the suit. The questions raised in the present suit could have been raised before the sale was confirmed, and, if so raised, would have been determined by the court which was executing the decree of the November 15, 1886.'

8. Learned counsel for the opposite party urges that this case confirms the view that was taken in -- 'Ashutosh Sikdar's case', (35 Cal. 61), and that ever since the decision in --'Ganapathy Mudaliar's case', (45 Ind App 54 PC), the courts in India have held that once a sale is confirmed, it cannot be challenged by the judgment-debtor except on the ground of fraud,

9. Learned counsel for the applicants wants to draw a distinction between the facts of the present case and the facts in -- 'Ganapathy Mudaliar's Case', (45 Ind App 54

PC). He urges that he has not brought a suit, but has made an application under Section 47, Civil P. C. But -- 'Ashutosh Sikdar's case', (35 Cal 61), was a case of an application under Section 244 and not of a suit. In any case, the distinction that the learned counsel for the applicants wants to draw does not appear to us to have any force for the principle of -- 'Ganapathy Mudaliar's case' has been applied not only to suits, but to applications under Section 47, Civil P. C. We would refer to a few cases in this connection.

10. In -- 'Firm Wasti Ram Gurditta Mal v. Mt. Ganeshi', AIR 1939 Lah 405, it was held that an objection under Section 47 cannot be taken after confirmation of sale. The same view was taken by a Special Bench of the Patna High Court in -- 'Baleshwar Chaubey v. Ram Rana vijaya Prasad Singh', AIR 1947 Pat 461 (SB). It was held in that case that where a court has jurisdiction to sell, a sale held in contravention of some provision of law can be avoided before its confirmation by an application under Section 47. But after confirmation, the sale can only be avoided if the applicant establishes that owing to fraud or other reason he was kept in ignorance of the sale proceedings preliminary to the sale.

11. A review of these authorities shows that the law on the question whether a sale can be avoided after confirmation by a suit or by an application under Section 47 is settled, and where the court, which made the sale, has jurisdiction to sell the property, the sale cannot be challenged either by a suit or by an application under Section 47 after it has been confirmed, except on the ground of fraud.

12. We may also notice certain cases which have been cited on behalf of the applicants to show that the point is not settled. In -- 'Mahomed Ali v. Kiberia Khatun', 9 Ind Cas 66 (Cal), a Bench of the Calcutta High Court held that where the sale price was not paid at all, the sale could not be treated to be a sale under the Code. They therefore decreed the suit against the auction purchaser. It is enough to say that this case is in direct conflict with the cases of -- 'Ashutosh Sikdar', (35 Cal 61 FB) and -- 'Ganapathy Mudaliar', (45 Ind App 54 PC), which we have mentioned above. It further appears that the learned Judges were not very sure of what they were deciding, for they made the following observations at the end of their judgment.

'We may add that the point is a new one in this court, and it is possible that facts, which are not before us, might give a very different aspect to the defendant's contention if he had raised it at an earlier stage of the litigation.'

13. Then we come to -- 'Sm. Annapurna Dasi v. Bazley Karim', AIR 1941 Cal 85. In this, a learned Single Judge held, following Munshi Mohomed Ali Mia's case, that where the balance of money is not paid under O. XXI, Rule 85, the purchaser forfeits all claim to the property, and the sale becomes a nullity. The point arose in a suit brought by one of two joint decree-holders, we must say that the decision in this case is directly against the view taken in cases of Ashutosh Sikdar and Ganapathy Mudaliar, which were binding on the learned Judge but to which no reference has been made on the judgment.

14. Then we come to -- 'Haji Inam Ullah v. Mohammad Idris', AIR 1943 All 282. It is enough to say that in this case, the objection was taken before the confirmation of sale, though the application in which that objection was taken was mixed up with an application under Order XXI, Rule 90, and the judgment-debtor withdrew the application under Order XXI, Rule 90 in order to proceed with his application under Order XXI, Rule 89. The case, however, proceeds on the assumption that the objection relating to Order XXI, Rule 85 had been taken before the confirmation.

15. The next case is -- 'Satdeo Koeri v. Suraj Ball Singh', AIR 1948 All 16. In this case it was held that the court making the sale had no jurisdiction. The case is therefore clearly distinguishable because in the cases of 'Ashutosh Sikdar', (35 Cal 61 FB) and --Ganapathy Mudaliar', (45 Ind App 54 PC), it is presumed that the court making the sale had jurisdiction to sell the property.

16. The last case is -- 'Necharuddi Safui v. Ayod Ali', AIR 1951 Cal 319. Here also the balance of the purchase price had not been paid, and a learned Single Judge held, following --'Annapurna Dasi's case', that the sale was a nullity, and could be set aside on an application under Section 47 even after confirmation of sale. All that need be said about this case is that it is directly against the five-judge Full Bench decision in Ashutosh Sikadar's case, and also against the principle laid down in -- 'Ganapathy Mudaliar's case', (45 Ind App 54 PC), neither of which have

been considered.

17. Barring therefore a few cases of the Calcutta High Court here and there which are, in our opinion, directly against the five-judge Full Bench case of -- 'Ashutosh Sikdar', (35 Cal 61 FB), there is a consensus of opinion in the High Court which have considered the matter that a sale made by a court which has jurisdiction, and which has once been confirmed, cannot be challenged either by a suit or by an application under Section 47 after such confirmation, unless fraud is proved. We are therefore of opinion that the law on the point which is in dispute in this case is well settled. Therefore, even though the question is of general public importance, we feel that leave to appeal to the Supreme Court must be refused.

18. The application for leave to appeal is hereby dismissed with costs to the opposite party.

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