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Court : Rajasthan

Decided On : Sep-17-2000

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Judge : Rajesh Balia, J.

Appeal No. : S.B. Civil Writ Petition No. 1162 of 1995

Appellant : Mahendra Kumar and ors.

Respondent : State of Rajasthan and ors.

Disposition : Petition allowed

Judgement :

Rajesh Balia, J.

1. This case has a very chequered history.

2. It concerned recovery proceedings commenced somewhere in 1965 against respondent No.4 Dau Dayal Mohta by the Mining Engineer of the State of Rajasthan. In response to Notification dated 29th March, 1950 by submitting a tender for grant of mining rights in respect of mica in Udaipur and Bhilwara districts said Dau Dayal had submitted his tenders. In the said proceedings, respondent No.4 was put in possession of Block No. 3 in part 'A' as a result of sanctioning of the mining lease in favour of the applicant on terms contained in the order of

sanction. Thereafter, he had submitted another application for grant of mining lease for an area 3 square miles on 4.6.1952 which was allowed vide communication dated 10.9.1957. In respect of demand on account of royalty payable under the two grants, some dispute was there about the liability to pay dead rent under the first grant. This led to filing of a writ petition No. 1197 of 1983 for the following reliefs:

(1) an appropriate writ, direction or order be issued restraining the respondents from recovering the amount of the dead rent from the petitioner in respect of Block No. 3 of the mining area covered by Notification dated 6.2.1951.

(2) the respondents be restrained from proceeding against the petitioner's immovable property at Bikaner for the recovery of the said dead rent under the provisions of the Rajasthan Land Revenue Act, 1956.

3. This petition came to be allowed on 4th November, 1993 holding that the existing demand against the said Dau Dayal cannot be sustained. The respondents in the said petition were restrained from claiming the amount as due against Dau Dayal (petitioner in the aforesaid writ petition) in respect of Block No. 3 Part 'A' in mica mineral track at Bhilwara as arrears of dead rent or other accounts in pursuance of demand dated August 4, 1965. However, it was left open to the competent authority to re-determine the amount that was payable by the petitioner to the department in accordance with law keeping in view the observations made in that judgment. That judgment, it is informed by learned Counsel for the parties, was appealed against by the State and made subject matter of Special Appeal No. 657 of 1996 which was dismissed on 5.3.1997. Update, in this regard has been placed on record by the learned Counsel for the petitioner vide his application dated 15.12.1998 by placing on record the communication from the Mining Engineer, Bhilwara to Mining Engineer, Bikaner that in pursuance of decision of this Court in Writ Petition No. 1197/1983 dated 4.11.1993. On 13.8.1998, a fresh demand for Rs. 96,448 has been raised. Since under the amnesty scheme dated 31st March, 1996 on deposit of the amount within time after raising of the demand interest is to be waived, the entire amount has been deposited on 25.5.1998 and there is no due against the said respondent

No. 4 Dau Dayal now. He also informed to withdraw attachment against said Dau Dayal. These facts are not in dispute that since 4.11.1993 until raising of the demand dated 13.8.1998, no executable demand existed against the said Dau Dayal which could be subjected to recovery proceedings at all and that after 13.8.1998 when the demand was raised afresh, the has been fully met within time and no amount is outstanding in respect of the aforesaid mining grants, recovery of which could be made against properties of Dau Dayal.

4. The other facet of the dispute which is relevant for the present purposes is that in pursuance of demand raised in 1965 recovery proceedings have been commenced against the allottee of aforesaid mining grant, respondent No. 4 by attaching one property situated in Bikaner which is referred to as house in question. On the attachment of the said house by the recovery officer, an objection has been raised before the SDO, Bikaner on behalf of the present petitioner and others that since the said Dau Dayal against whom the demand has been raised (hereinafter referred to as 'the debtor') had only 1/3 share in the house in question, entire house is not liable to be attached and sold in recovering the amount due from the said debtor by the Mining Department. That objection was upheld by the Sub-Divisional Officer, Bikaner by his order dated 14.4.1972 (Ex.2) that only 1/3 share of the debtor in the house in question is liable to recovery proceedings for which necessary proceedings may be taken. Vide Annx. 3 dated 30th March, 1987, the Mining Engineer (Recovery) noticing the decision given by the SDO, Bikaner, referred to above, ordered for continue with the proceedings of recovery against Dau Dayal from the 1/3 share of Dau Dayal in the house in question by transferring Dau Dayal's share to State Govt. However, the sale proclamation has been issued putting the entire property in question, without specifying that it is only against 1/3 share of Dau Dayal Mohta, for auction of the property in question on 29.10.1990 in which the highest bid was given by Shri Basant Kumar Daga, the respondent No.5. Objection was filed on 30th Nov., 1990 before the Assistant Mining Engineer (Recovery) drawing his attention to the earlier proceedings and pointing out that the debtor has only 1/3 share in the property in question and the balance 2/3 is held by the objectors, therefore, the full house could not be put to auction for effecting recovery against the debtor who had only 1/3 share in the house. This objection found favour with the recovery officer and he by his order

dated 15.1.1991 upheld the objection and set aside the auction proceedings and directed for issuing fresh proclamation in respect of only 1/3 share of the debtor in the attached property. He was also of the view that the maximum offer is much below the fair price of the auction property. This order dated 15.1.1991 passed by recovery officer was challenged by Basant Kumar, auction purchaser, before the Board of Revenue, by way of revision. However, he did not implead the petitioners-objectors named in the order dated 15.1.1991 in his revision petition. However, it is stated by the learned Counsel for the respondents that during the pendency of the said revision the objectors, including the present petitioners moved an application Under Order 1 Rule 10 CPC for being impleaded as party respondents which was allowed and they were ultimately made party to that petition. However, the name of present petitioners Mahendra Kumar and Gopi Krishna do not find mention in the order of the Board.

5. Be that as it may, the said revision by the Board of Revenue came to be allowed on 3.9.1993 accepting the contention raised by the petitioner before it that no notice was given to him before setting aside the auction proceedings. The Board also found that for mere irregularities a sale, which has been conducted, cannot be set aside. However, from the perusal of the order. It is apparent from the perusal of the two orders viz. passed by the recovery officer and the Board that the Board has not taken notice of the principal ground on which the order dated 15.1.1991 has been passed namely that the debtor had only 1/3 share in the property attached and auctioned and the property of other share holders could not be sold in the execution proceedings for the recovery against debtor and sent the case back to proceed further in accordance with law.

6. After remand, a copy of the order passed by this Court on 4.11.1993 in Writ Petition No. 1197/1983 quashing the demand against debtor Dau Dayal was placed before the recovery officer vide Annx. 11 on 14.12.1993 pointing out that since no demand is in existence which could be recovered as on that date, sale may not be confirmed, and recovery proceedings may be dropped and attachment be withdrawn. However, inspite of that, without taking notice of the fact that no demand was there for the recovery of which the recovery proceedings could be sustained, the sale was confirmed on 24th December, 1993 by the recovery officer

directing the auction purchaser to be put in possession. When the petitioner were sought to be dispossessed in pursuance of the confirmation of sale, the present writ petition was filed by the petitioners-objectors challenging the order of the Board of Revenue.

7. The aforesaid facts, which are matter of record, are also not in dispute.

8. It has been contended that the Board has apparently erred and passed the impugned order of the Board dated 3.9.1993 without application of mind and ignoring the principal reason for the order passed by recovery officer on 15.11.1991 viz. the debtor has undeniably only 1/3 share in the property in question which alone could be subjected to attachment and sale as per orders made in those very proceedings as far as back as on 14.4.1972 by the SDM, which was not challenged at any stage and that also reflected in the order of AMC (Recovery) made on 20.3.1987 in furtherance of which sale proclamation was issued, erroneously without confining the proclamation to 1/3rd share of Dau Dayal in the house. This was not mere an irregularity but was a case of substantial error resulting in failure of substantive justice by subjecting the property of persons other than debtor to recovery proceedings.

9. Learned Counsel for the petitioner had also contended that after 4th Nov., 1993 at no point of time there was any demand outstanding against Dau Dayal, respondent No.4 which could be subjected to the execution proceedings afresh in continuation of pending execution proceedings inasmuch as the demand for the recovery of which those proceedings had been instituted itself has been set aside and there was nothing to be recovered through execution. It was not a case of demand having been satisfied which needed recording of a satisfaction by the Executing authority on an application being made Under Section 246 of the Rajasthan Land Revenue Act nor a case of setting aside a sale due to irregularity in sale proceedings Under Section 247, but of proceeding with a recovery proceeding for a non-existent demand, touching the very validity of it.

10. It has been strenuously contended by the learned Counsel for respondent No.5 that since as on the date auction took place, there was a subsisting demand and thereafter no objection was raised within 30 days of the date of auction, no

objection could be sustained thereafter and the sale having been confirmed in favour of the said respondent who is in a position of the bonafide purchaser, without notice the sale remains unaffected, the petitioner is only entitled to get money deposited by him as sale price with the State Govt. in lieu of his property.

11. Learned Addl. Advocate General while does not dispute the aforesaid facts that no demand was existing as on the date the sale was confirmed in completion of execution proceedings and that the subsequent demand raised has been satisfied within the time allowed, urged that the entitlement of the petitioners or the respondents to get back the amount from the State Govt. of the consideration deposited by the auction purchaser or the amount deposited by the petitioner during these proceedings under the directions of the Court are to be litigated by the parties in civil courts and until then no order can be made for return of money. My attention was also invited to Sections 246, 247 and 248 of the Rajasthan Land Revenue Act.

12. Having considered the rival contentions, I am of the opinion that since as on the date the recovery officer was seized of the matter for considering the confirmation of sale in pursuance of auction which took place on 20th April, 1990 and on 14th Dec, 1993 the recovery officer was apprised of the fact that the demand for the recovery of which the recovery proceedings had been instituted had been set aside and no demand was in existence in furtherance of which the proceedings could continue, he had no other option but to have refused the confirmation of sale and release the property from execution. Section 246 or 247 for that reason would not operate in such situation. Sections 246 and 247 both operate in a field where a debt is subsisting which is recoverable through such execution proceedings but same is sought to be set aside either by satisfying the debt or by pointing out some irregularity in the procedure in sale proceedings affecting the interest of the party substantially. However, we are in a situation where there was no foundation for continuing with the execution proceedings, because with witherance of the debt itself on setting aside of the demand in question by the order of High Court dated 4.11.1993 the question of subjecting it to the continued recovery proceedings by confirming the sale and depriving the judgment-debtor or other persons of their property after that by transferring the

property in question to the auction purchaser, more so after it was brought on record of such proceeding that debt for the recovery of which the proceedings are continuing has ceased to exist after the order of High Court was wholly without jurisdiction and uncalled for. The recovery officer had no jurisdiction to proceed in furtherance of non-existing demand by confirming the sale and transferring the property in those recovery proceedings. In such event, the order of confirmation deserves to be ignored.

13. It is evident that the order of High Court setting aside the demand in question was placed on record of the recovery proceedings which were continuing with proceedings for confirmation of sale after demand from the Board, to which auction purchaser has become party. He cannot claim to have no notice of this fact. He cannot be treated a bonafide purchaser for value without notice when the fact about non-existence of any demand for sustaining the execution proceedings was brought on record prior to confirmation. Unquestionably, the auction purchaser was a party to confirmation proceedings.

14. It is to be noticed that in such event, the sale is not to be set aside on the ground of satisfaction of the debt Under Section 246 of the Land Revenue Act nor on the ground of material irregularity in the procedure of conducting the sale Under Section 247 of the Land Revenue Act but it is a case analogous to abatement of proceedings because of the decree itself having been set aside. This position, in my opinion, in the chronology of events was clearly existing as on 24th Dec, 1993 when the recovery officer was considering confirmation of the sale.

15. It is further to be noticed that even if at any time before confirmation of sale, a judgment debtor satisfies the decretal amount alongwith deposit of cost of auction, it is not at the discretion of the executing court or the recovery officer still to confirm the sale, and pass a valid title to the auction purchaser. The only option in such event is to set aside the auction and return the money to the auction purchaser deposited in pursuance of such auction. The rights of the debtor in immovable property cannot be transferred once before completion of sale proceedings the debt stands satisfied and fact is brought to the notice of the authority. If that be the position in respect of the satisfaction of the debt by the

judgment debtor before confirmation of sale, the instant case stands on a higher footing where the order creating a demand for the recovery of which those proceedings could at all continue has been set aside. Question for recovering any amount from Dau Dayal would have arisen only if subsequent thereto any demand were to be raised afresh in accordance with law and such demand remained unsatisfied. As noticed above, subsequent demand has also when raised was satisfied fully within time. After 4th Nov., 1993 at any point of time there was no occasion where the property of debtors Dau Dayal could be subjected to recovery proceedings in pursuance of demand in question.

16. Learned Counsel for the respondent Basant Kumar has contended that order dated 24.12.1993 having not been challenged separately, no relief can be given to the petitioners. This objection too is not well founded. Firstly the confirmation of sale is not by independent order but follows in given state of affairs shown to exist after the conduct of auction Under Section 248 of the Land Revenue Act. If the proceedings in furtherance of which the order of auction has been conducted fails, confirmation automatically fails.

17. Secondly it is apparent from record that it is not a case that objections to attachment and sale of property in question in furtherance of recovery proceedings against Dau Dayal in respect of property in question had not been raised in time. In fact such objection were raised as far back as in 1972 and the same were determined as per Annexure 2 & 3 in favour of the objectors. That determination became final and binding at all subsequent proceedings. The recovery proceedings could not have continued in violation of such order requiring the objectors to raise such objections successively. While determination of objections was a quashi judicial function, the issuance of sale proclamation in pursuance of order made in pursuance of such order was only a ministerial act, which could not be sustained contrary to such orders at any stage, when such mistake was pointed out. It is also not a case in which the petitioners are once again required to raise objection to sale proclamation, when once their objection already stood determined. The principle of res judicata governs the execution/recovery proceedings also is well established. Reference in this connection may be made to Mohanlal Goenka v. Binoy Kishna : [1953]4SCR377 and a recent decision of this

Court in D.B. Special Appeal No. 15/1981 Barkat Ali and Ors. v. Badrinarain (decided on 26th July, 2000)

18. It would be an traversity of justice if a person is compelled to raise the very same objection again and again at different stages of proceedings, once such objections have been raised and decided in his favour at the earlier stage.

19. The principle of law is also well settled that in a sale conducted by Court in execution proceedings, for recovery a sum from the debtor/judgment-debtor, only the saleable interest of such debtor can be put to sale and is transferred to auction purchaser. Even in the absence of any specification, the transferee does not acquire any interest in the property which does not belong to judgment-debtor against whom the recovery is to be made. In other words, an auction purchaser does not acquire anything more than saleable interest of judgment-debtor. In the present case, it was decided by executing Court in 1972 that Dau Dayal has only 1/3 share in the house in question. That is to say that judgment-debtor did not have any saleable interest in 2/3 of the said property. That finding is binding between the parties viz. the objector, the State (principle creditor) and the debtor. The auction purchaser who steps in the shoes of judgment-debtor does not get better rights than him and is as much bound by decision as it binds the person whose interest he acquires. Thirdly, Under Section 144 of C.P.C. when the decree/order is varied or reversed in appeal or revision, the right of parties to be restituted to position which they would have occupied but for such decree or order from those who have derived any benefit from the decree/order so varied or reversed. The principle is well settled that Section 144 does not confer any new right to restitution but otherwise flow from general law and part of inherent powers of the Court to order restitution. The jurisdiction, to make restitution is inherent in every court, and is to be exercised wherever the justice of the case demands.

20. The right of restitution arises once benefit is transferred in furtherance of an operative decree/order before its variance or reversal. Present case is on much higher footing. A confirmation of sale whether in execution proceedings under CPC Under Order 21 Rule 92 or in proceedings or for recovery under Land Revenue Act for arrears of land Revenue, Under Section 248 of Land Revenue

Act, the transfer of property under sale by auction becomes complete and absolute only on issuance of confirmation of sale by the Court and issue of sale certificate. If prior to such confirmation of sale and issue of sale certificate, the decree is reversed or demand is set aside for the enforcement of which the proceedings are instituted, such proceedings come to an end and cannot be proceeded further for enforcement of a non-existing order. Worst in the present case, the fact about setting aside of demand by High Court was brought on Record on 14.12.1993 yet the recovery officer has chosen to ignore the same and confirm the sale inspite of it, to complete the proceedings for recovery of a non-existing demand on that date, and that too was within the knowledge of the auction purchaser. In such circumstances, neither the recovery officer was left with any jurisdiction to proceed in the matter, nor the auction purchaser could claim the benefit of a bonafide purchaser for value without notice. Truly speaking it is not a case of restitution of benefit derived in furtherance of recovery proceedings which have been completed while the demand was in operation or in ignorance of setting aside of such demand. It is a case of invalidity of execution proceedings at the root, at least since the date demand for the recovery of which the proceedings were instituted, was set aside and it was brought to the notice of concerned recovery officer by placing the order of High Court dated 4.11.1993 on record of proceedings. No benefit can be derived from proceedings conducted thereafter on technicalities of procedure.

21. It is one of the fundamental principle of administration of justice that no prejudice be caused to suitors by any act of the Courts. In the words of Lord Cairns in Rodger v. Comptoir d' Escompte de Paris (1871) LR 3 PC 465.

One of the first and highest duties of all courts is to take care that the act of the Court does no injury to any of the suitors and when the expression 'act of any Court' is used it does not mean merely the act of primary Court or of any intermediate Court of Appeal, but the act of the Courts as a whole from the lowest Court which entertains jurisdiction over the matter upto the highest Court which finally disposes of the case.

22. In Thakoor Barmha v. Jiban Ram (1914) 41 Cal 590, the Privy Council considered a case in which property put to auction was encumbered share as described in the application for execution but ultimately sale was confirmed and sale certificate issued in respect of unencumbered share, relying on some later orders after the sale proclamation was issued in pursuance of the orders issued by the execution court to attach and sale the property described in schedule to execution applications. Finding variance between the property ordered to be attached and sold and property described in sale certificate, the Board set aside the sale notwithstanding the same has been confirmed price paid and possession handed over to the auction purchaser. It was held:

If by a mistake the wrong property was attached an order made to sell it the only course open to decree holder on the discovery of the mistake was to commence the proceedings over again. They could not turn an authority to sell one property into authority to sell another and a different one.

It further clarified:

This will of course have the effect of setting aside all subsequent proceedings on the part of auction purchaser based thereon.

Ratio is nearer home. In the present case the SDM by its order dated 14.4.1972 ordered that the debtor had only 1/3 share in the property, which only is saleable and directed to put to sale only 1/3 share of Dau Dayal in the said recovery proceedings. After said order which became final, the recovery officer was left with no authority to issue sale proclamation for full house and effectively conduct the sale of whole property. On mistake being pointed out, the only course open was to commence the sale proceedings once again. The order made by recovery officer on 15.1.1991 on discovering that auction had been conducted contrary to order dated 14.4.1972 by the SDO, had directed to set aside the said auction proceedings and hold auction proceedings afresh was correct course as envisaged in Thakoor Barmha's case (supra). The Board of Revenue, without noticing the effect of order made by SDO, has erroneously upturned the order dated 15.1.1991 by treating it to be a case of mere irregularity. It deserves to be corrected. There is no impediment in setting aside the order of Board of Revenue because as a result of setting aside the order of Board of Revenue have the effect of setting aside all subsequent proceedings founded thereon.

23. There was a sequel, to aforesaid decision. When in pursuance of aforesaid order by the Board in appeal the judgment-debtor demanded restoration of possession, the auction purchaser resisted the claim and demanded restitution of consideration paid by them by depositing the same in Court. The executing Court over-ruled the objection of auction purchaser and ordered restitution of possession only in pursuance of the order of Board. However, on appeal, the High Court of Patna ordered for corresponding restitution of sale price after adjusting mesne profits of the property in question to which judgment-debtor was entitled. This order of High Court was challenged by judgment-debtors before the Privy Council. The Board in its decision reported in Jai Berham v. Kedar Nath (1922 PC 269) upheld the order of High Court. Quoting with approval the opinion of Lord Cairns in Rodger's case (supra), said:

It is the duty of the Court Under Section 144 of the Civil Procedure Code to place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed.

Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to circumstances towards all parties involved.

24. The above principle is nearer home. The recovery proceedings had commended prior to 1972. The persons having independent interest in the property raised objection against attachment of their interest in recovery of debt as an arrears of land revenue, which was due from Dau Dayal only and such objection was sustained holding that debtor Dau Dayal had only 1/3 share in the property in question in 1972. The Recovery Officer ordered to proceed against share of Dau Dayal only way back in 1987. Yet sale proclamation and auction took place without disclosing that debtor had only 1/3 saleable Interest in property in question. Before auction sale could be pursued, the order of demand creating a recoverable debt was reversed by High Court on 4.11.1993. It is a case on better footing than before the Board in Thakoor Berham's case (supra). In the said case

discharge of debt even subsequent to confirmation and issue of sale certificate and delivery of possession was found to be sufficient for setting aside sale and restoration of possession. In the present case, the Court was apprised of non-existence of any recoverable debt prior to making the sale complete by confirming and issuing sale certificate. The confirmation of sale in favour of auction purchaser in the present circumstances has come in existence by act of Court, which was to the detriment of interest of owner of the parties who all were before the Court confirming the sale. Therefore, when the order holding the validity of auction sale by the Board is not sustained, all subsequent proceedings founded on it also ought to go.

25. Moreover, the confirmation of sale by the Recovery Officer after the debt under recovery ceased to exist was wholly unjustified independent of the order of Board even otherwise.

26. In the facts of the instant case, the contention of the learned Counsel for the respondent No.5 that this petition has been filed after about two years of the order passed by the Board of Revenue dated 3.9.1993, in my opinion, also cannot be sustained. From the facts stated above, it is apparent that the petitioners objectors are consistently objecting to disposal of their interest in the property in question in the recovery proceedings against Dau Dayal. Their objection was sustained as back as in 1972 by the SDM and the direction was to acquire, attach and sale only of the interest of Dau Dayal in the property in question. In fact, there was no foundation for issuing the sale proclamation in respect of the entire property in the face of the direction of the SDM sustaining the objection of the present petitioners and direction of the recovery was only to issue a sale proclamation in respect of the 1/3 share of Dau Dayal. It is not a case of mere irregularity but a case of acting contrary to the orders passed by the competent authorities and to the detriment of the persons in whose favour the orders at earlier stage has been made affecting their rights substantively which has resulted in failure of substantial justice also. As the petitioners have been consistently coming forward as and when their rights have been sought to be affected by putting their share in the property in question to auction, which has consistently been sustained by the authorities, they cannot be held guilty of laches when inspite of placing on record before the competent

authority the fact that now no recovery proceeding could continue because no demand exists, they have chosen to file writ petition only when their possession was sought to be disturbed, else the order dated 24th Dec, 1993 was liable to be ignored as it was void ab-initio.

27. As a result, this petition is allowed, the auction proceedings dated 24th Oct., 1990 and all consequential orders made for confirmation are quashed, the petitioners alongwith respondent No.4 are entitled to return of their property. However, respondent No. 5 shall be entitled to refund of entire amount deposited by him with 12% interest w.e.f. 1st Jan., 1994 until the date of repayment inasmuch as after order dated 4.11.1993 passed by this Court in S.B. Civil Writ Petition No. 1197/1983, the State Govt. at no time was entitled to retain any sum to itself. Neither the demand against Dau Dyal existed, nor the property sold belonged to State.

28. In the circumstances, there shall be no orders as to costs.