Mt. Gauri Misrani Vs. Mt. Nilabati Misrani,

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Court : Orissa

Decided On : Oct-27-1952

Reported in : AIR1953Ori51

Judge : Jagannadha Das, C.J. and ;Narasimham, J.

Acts : Code of Civil Procedure (CPC) , 1908 - Order 40, Rules 1 and 2 - Order 46, Rule 1

Appeal No. : Civil Reference No. 1 of 1951

Appellant : Mt. Gauri Misrani

Respondent : Mt. Nilabati Misrani,

Judgement :

Jagannadha Das, C.J.

1. This is a reference by the Munsiff of Sambalpur under Order 46, Rule 1, C.P.C., and arises in connection with certain execution proceedings before him. The decree-holder who is a widow, obtained a decree for maintenance in T. S. No. 201 of 1946, against her husband's brother and has started the present execution proceedings for recovery of the arrears of maintenance due under the decree. The opposite party in the execution is the widow of the original judgment-debtor. In execution of the decree, land of the extent of 11.49 acres was attached, but the execution became infructuous, because, according to the provisions of the Central Provinces Tenancy Act the said land was not saleable. There being no other mode of execution available, the decree-holder applied to the executing Court for the appointment of a receiver in respect of the said land to realise the arrears.

Various objections were taken on behalf of the judgment-debtor, but the executing Court overruled the same and appointed the present judgment-debtor herself as the receiver. As against that order she took up an appeal to the Subordinate Judge which was dismissed. The judgment-debtor was thereafter called upon to furnish personal security for a sum of Rs. 2000 in order that she may function as a receiver under the Court. But she took no steps to furnish security, nor even to appear in Court. In these circumstances, the learned Munsiff thought that the only course available would be to appoint some person other than the judgment-debtor as the receiver, taut appears to have felt some doubt as to the legality of such a course. He has accordingly referred the case to the High Court for its opinion under Order 46, Rule 1.

2. I must state at the outset that this reference to the High Court on a matter of this kind is not a proper use of the provisions of Order 46, Rule 1. A reference to the High

Court under that provision must only be in cases of exceptional nature where the question involved is beyond the normal capacity and resources of the subordinate Courts; for instance, where it raises a difficult constitutional point or a point of great public importance on which there is considerable conflict of opinion andso forth. This provision is not meant to relieve the subordinate Courts of their responsibility to apply their minds to and to come to their own conclusions on the questions of law that may ordinarily arise in any case. Any Court must decide a question of law that is presented before it to the best of its knowledge and ability and must leave the aggrieved party to their remedies by way of an appeal or revision.

As will be seen presently, the question involved is one that is fairly covered by authority. If only the Munsiff took care to read the judgment of his predecessor in this very case, at an earlier stage, he would have been referred to the case in -- 'Banwari Lal v. Bal-deo Sah', AIR 1942 Pat 240, which directly covers the point that he has raised and which he was bound to follow in the absence of any other case of this Court or that Court overruling the same. This Court cannot be called upon to answer every doubt about a question of law which the subordinate judicial officers may feel. In the present case, the reference is all the more regrettable, because, obviously the execution has been held up for over a year and a half by the pendency of these proceedings in this Court.

3. The doubt that the Munsiff felt and which occasioned this reference may be stated in his own words : 'I entertain doubt whether this Court has,power to remove the judgment-debtor fromthe property when the decree-holder has nopresent right to remove her.' The learned Munsiff has not stated clearly whether he had in view the inalienability of the lands, or the provisions of Order 40, Rule 1, Sub-rule (2). If it is the former, it is sufficient to say that in these very execution proceedings, his predecessor by order dated 14-1-1950 overruled that objection and the same has been upheld in appeal. It was, therefore, not open to the learned Munsiff to reopen that matter and feel any doubt thereupon. But very probably what the learned Munsiff had in mind, was only the provision of Sub-rule (2) of Rule 1 of Order 40, though he does not in terms refer to it, and the reference is accordingly answered on that footing. It must be noticed, at this stage, that neither party has appeared on the reference and we answer the reference unaided by arguments at the Bar.

4. Order 40, Rule 1, Sub-rule (2), is as follows :

'Nothing in this rule shall authorise the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove.'

Presumably the doubt felt by the Munsiff is that since the decree-holder in the case has no present right to remove the judgment-debtor from the possession of the land, how can a receiver be appointed in respect of the property which has the effect of removing the judgment-debtor from possession of the land. The answer to it is not altogether difficult. This provision has to be understood with reference to Clause (b) of Sub-rule (1) of Order 40, Rule 1. That clause authorises the Court to appoint a receiver of any property and remove any person from the possession or custody of any property. The obvious meaning, therefore, of these provisions taken together is that while by Clause (b) of Sub-rule (1), Rule 1 of Order 40, authority to remove 'any person' is given, an exception is made by Sub-rule 2 in favour ofpersons, whom any party to the suit has no present right to remove.

This cannot be taken to cover the case where the decree-holder has no present right to remove the judgment-debtor. To such a contingency, it seems to me that Sub-rule (2) does not apply. Both the parties are before the Court and under its jurisdiction the Court can, on general principles, pass any order binding on either or both of them, with reference to what is found to be just and convenient. But the underlying idea of Sub-rule (2) appears to be that jurisdiction can be exercised in respect of persons not before the Court only to the extent that one or the other of the parties to the suit has the present right to step into possession.

In such a case the Court exercises the power of removal which the party himself has got, even though it be against a person who 'eo nomine' is not before it. Considered in this light, there is no difficulty, on principle, in holding that the mere fact that the decree-holder has no present right to remove the judgment-debtor from possession is not by itself a reason which deprives the Court of its jurisdiction to appoint a receiver in a case where the judgment-debtor is directly in possession. As has been pointed out in some of the decided cases, if this was not so, the provision for appointment of a receiver would practically be a dead-letter. There are innumerable cases occurring in daily practice, in which a receiver is appointed, depriving one or the other of the parties, of their possession, without the validity of the same being challenged.

5. I am aware that there has been some conflict of opinion as to whether the words 'any person' in Order 40, Rule 1, Sub-rule (2) refers only to the persons other than the parties or includes the parties. I notice that in a Full Bench case in -- 'Anandi Lal v. Ram Sarup', AIR 1936 All 495 (FB), that question has been elaborately discussed and the learned Chief Justice in that Full Bench case while recognising that such a construction of Order 40, Rule (1), Sub-rule (2) renders the provision almost nugatory, still maintains the view that Order 40, Rule 1, Sub-rule (2) must be construed so as to include the parties to the case also within its scope. In a later case in that High Court the correctness of this decision appears to have been doubted and the question was referred for reconsideration to the Full Bench in -- 'Mt. Tulsha Devi v. Shah Chironju Lal', AIR 1943 All 1 (FB).

That Pull Bench on the facts of that case, did not feel called upon to answer the question so raised. The Full Bench suggested an amendment of the rule, which appears to have been carried out so far as Allahabad High Court is concerned, by insertion of the words 'not being a party to the suit' immediately after the phrase 'any person' in Sub-rule (2) of Order 40, Rule 1. But I must say with respect that the view taken by the learned Chief Justice in the Full Bench case in AIR 1936 All 495 (FB) does not commend itself to me. In that case the learned Chief Justice criticises the dictum of the judges on this matter in --'Mohd. Ishaq v. Om Prakash', AIR 1933 All 227 to the contrary. That dictum is as follows:

'All that Sub-rule (2) means is that where any of the parties who are subject to the jurisdiction of the Court has no right to remove a third party from possession that third party shall be allowed to remain in possession.

The parties to the suit being subject to the jurisdiction of the Court, can raise no objection whatsoever to its order for the appointment of a receiver.'

The learned Chief Justice in AIR 1936 All 495 (FB) criticises this as an over-statement, apparently by too much stress on the word 'whatsoever'. It appears to me however with respect that the acting Chief Justice in AIR 1933 All 227, intended only

to lay down that no objection whatsoever, on the ground of jurisdiction, could be raised and not that no objection on the merits could at all be raised. Indeed, to take Sub-rule (2) of Order 40, Rule 1 as meaning that the Court cannot appoint a receiver, at the instance of one of the parties unless he has the present right to remove the other party from possession, is to read more into that sub-rule than is actually to be found in it, if I may say so with sincere respect.

It must be noticed that Sub-rule (2) is in the nature of an exception to Sub-rule (1), Clause (b), and cannot be construed so as virtually to nullify it. The main question which arose for consideration in AIR 1936 All 495 (FB) was with reference to the power of the Court to appoint a receiver in execution of a simple mortgage decree when the mortgagor was in possession. That is a question on which there has been considerable difference of opinion and it is not before us in this case. However, apart from the doubt that may have been raised by the Full Bench in AIR 1938 All 495 (FB) the view taken by the other High Courts seem to be fairly unanimous, gee -- 'Satya Narain Singh v. Keshabati Kumari', 18 Cal WN 537; -- 'Ajapa Natesa Pandara v. Ramalingam Pillai', 24 Mad LJ 658; -- 'Amarnath v. Mt. Tehal Kuar', AIR 1922 Lah 444 and -- 'Sree Iswar Radha Ballav Jew v. Bibhuti', AIR 1945 Cal 298.

6. I may also notice that the Privy Council in -- 'Rajindra Narain v. Mt. Sundar Bibi', 47 All 385 (PC) has adopted the course of appointing a receiver in respect of the property in the possession of the judgment-debtor when that property was not attachable or saleable. The question has been fairly fully discussed in -- 'Shanti Devi v. Khodai Pra-sad Singh', AIR 1942 Pat 340, which I would respectfully adopt. In this High Court itself, we have assumed that a receiver can be appointed in such cases: vide my judgment in --'Province of Orissa v. Venkata Rangamma', AIR 1950 Orissa 220. I have therefore., no doubt that a receiver can be appointed in execution of the decree in this case, which may have the effect of removing the judgment-debtor from, possession. Whether the decree-holder or a third party is to be appointed or whether any receiver is to be appointed at all, has to be decided on the merits of the case.

7. The reference is answered accordingly.

Narasimham, J.

8. I agree.