

Mathai Varkey and anr. Vs. Varughese Chacko

LegalCrystal Citation : legalcrystal.com/719748

Court : Kerala

Decided On : Mar-15-1974

Reported in : AIR1974Ker185

Judge : K. Bhaskaran, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Order 21, Rule 85

Appeal No. : Second Appeal No. 1205 of 1972

Appellant : Mathai Varkey and anr.

Respondent : Varughese Chacko

Advocate for Def. : T.K. Kurien, Adv.

Advocate for Pet/Ap. : S. Subramonia Iyer, Adv.

Disposition : Second appeal dismissed

Judgement :

K. Bhaskaran, J.

1. Sri S. Subramonia Iyer, the learned counsel for the appellants, has raised a rather interesting question of law to attack the judgment of the first appellate court reversing the order that was passed by the execution court.

2. The facts leading to this second appeal are not in dispute and could be briefly stated as follows:-- The decree schedule property was purchased by the decree-holder in auction in execution of the decree on 7-12-1965. After disposing of a petition filed by the judgment-debtors under Order 21, Rule 90 of the Code of Civil Procedure, the execution court confirmed the sale on 30-6-1966 C.M.A. No. 56 of 1966 was filed in the District Court by the appellant on 27-5-1966 questioning the correctness of the order passed on the petition for setting aside the sale filed by him. That C. M. Appeal was ultimately dismissed. Thereafter, I. P. No. 3 of 1966 was filed by the creditors of the appellant, and during the pendency of those proceedings the execution of the decree was stayed till December 1966. Against the decision in the I. P. proceeding an appeal in A. S. No. 120 of 1968 was filed in the District Court and during the pendency of that appeal there was again a stay of the execution of the decree till 26-3-1969. On the motion of the respondent the stay granted in A. S. No. 120 of 1968 was vacated, and that gave rise to C. R. P. No. 602 of 1969 filed by the appellants before this Court. During the pendency of that civil revision petition this Court had granted stay till 30-6-1969. Thereafter on 23-12-1971 the respondent filed E. A.

1.621/71 for condonation of delay and acceptance of the stamp paper for sannad (sale certificate). This petition was dismissed by the execution court, but was allowed by the first appellate court; hence this second appeal,

3. The main point urged by the learned counsel for the appellant is that Order 21, Rule 85 requires that the amount required for the general stamp paper for the certificate under Rule 94 shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the date of the sale of the property, and that this being a mandatory provision the confirmation granted by the execution court on 30-6-1966 is a nullity, and therefore there is in effect no sale and the judgment of the first appellate court directing the issue of sale certificate is illegal and is bound to be set aside.

4. Order 21, Rule 85 as it stood on 7-12-1965 (the date of the sale) read as follows:--

'85. Time for payment in full of purchase-money.-- The full amount of purchase money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property : Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under Rule 72.'

It has to be noticed that it did not require the auction-purchaser to pay the amount required for the general stamp paper for the certificate mentioned in Rule 94. The amended rule which came into force on and from 1-1-1966 reads as follows:--

'85. Time for payment in full of purchase money :

The full amount of purchase money payable together with the amount required for the general stamp paper for the certificate under Rule 94 shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the date of the sale of the property;

Provided that, in respect of the purchase money, the purchaser shall have the advantage of any set-off to which he may be entitled under Rule 72.'

In support of his contention that failure to comply with any part of the mandatory provisions contained in Rule 85 of Order 21, C.P.C. would render the sale a nullity, the learned counsel for the appellants has cited the decision of the Supreme Court in Manilal Mohanlal v. Sayed Ahmed, (AIR 1954 S'C 349) wherein it is laid down as follows:--

'The provisions of Order 21, Rules 84, 85 and 86 requiring the deposit of 25 per cent of the purchase money immediately, on the person not being a decree-holder, and the payment of the balance within 15 days of the sale, are mandatory and upon non-compliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a stranger purchaser without depositing 25 per cent of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of those rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the court is bound to resell the property (Rule 66) in the event of a default shows that the previous proceedings for sale are completely wiped

out as if they do not exist in the eye of law.'

It has to be noticed that the Supreme Court decision did not relate to a case in which there was default in the matter of production of the amount required for the purchase of the general stamp paper for the sale certificate. It is not clear whether it was a case in which there was any requirement on the part of the auction-purchaser to produce the amount for the stamp paper. As already noticed, in the instant case the sale took place at a time when under Order 21, Rule 85, as it stood then, there was no requirement at all to produce any amount for the general stamp paper for the sale certificate. That being the position, the decision of the Supreme Court referred to above does not appear to have any direct application to the facts of this case.

5. It is argued by Sri T. K. Kurien, the learned counsel for the respondent, that the law as it stood on 7-12-1965 did not require the auction-purchaser to produce the amount for the general stamp paper for the sale certificate, and therefore it was the legitimate right of the respondent to get the sale confirmed without any formality. To meet this argument it is submitted by the learned counsel for the appellants that the amendments to procedural law will operate with retrospective effect, and as such, pending proceedings also would be governed by the amended provisions in the law of procedure. In an attempt to substantiate his contention the decision of the Supreme Court in *Anant Gopal Sheorey v. State of Bombay*, (AIR 1958 SC 915) has been cited by the learned counsel for the appellants. The passage relied on by him reads as follows:--

'No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner prescribed for the time being by or for the Court in which the case is pending and if by an Act of Parliament the mode of procedure is altered he has no other right than to proceed according to the altered mode. In other words a change in the law of procedure operates retrospectively and unlike the law relating to vested right is not only prospective.'

The learned counsel for the appellants, I am afraid, seeks to apply the dictum laid down by the Supreme Court in the decision referred to above without bearing in mind the context and circumstance in which it could be applied. In the present case, when the sale took place, there was no obligation on the part of the respondent to pay the amount required for the general stamp paper for the sale certificate. He had the right to get the sale confirmed by the court without being required to do anything further in the matter. Even the passage from the Supreme Court decision quoted above makes it clear that the respondent has the right to make prosecution or defence in the manner prescribed for the time being by or for the court in which the case was pending. If that be so, he had the right to get the sale confirmed without requiring him to do anything further in the matter inasmuch as the amended procedure would have application only to the further stages of the prosecution or defence in the pending proceeding. The argument of the appellants, if accepted, would at times, lead to absurd consequences as it can presently be seen from the facts of this case. As has already been found, the provision, as it now stands, requires that the amount for the general stamp paper for the sale certificate has to be produced in court within 15 days from the date of the sale; and that means, it should have been produced on or before the 22nd December 1966 (when there was no need for such production in accordance with Rule 85 of Order 21, C.P.C., as it stood then), and if that was insisted upon as a condition precedent to the confirmation of sale, the court would be asking the auction-purchaser not only to do something which he was not expected to do, but

also to do something not capable of performance, as the petition filed by the appellant under Order 21, Rule 90 was disposed of on 30-6-1966, and the confirmation could have been granted only thereafter, whereas the 15 days' time from the date of sale expired by 22-12-1965. It is then argued by the learned counsel for the appellants that in that case at least the respondent could have been called upon to produce it within a reasonable time. I do not think there is any justification for taking such a view. The learned counsel has cited the decision of the Andhra Pradesh High Court in Raghavalu v. Venkamma. (AIR 1962 Andh Pra 334) in support of this contention. The facts in the Andhra Pradesh case are different from the facts in the present case. That apart, the respondent was entitled to have the sale confirmed even before the coming into force of the amendment to Rule 85 of Order 21, C.P.C., and merely for the reason that the passing of the order of confirmation was delayed on account of the pendency of the appellants' petition under Order 21, Rule 90, C.P.C., it cannot be reasonably held that stages in the proceedings already passed are to be reopened for compliance in accordance with a procedure which has application only to the further stages of the proceedings. Where the proceeding had reached the stage of confirmation even before the coming into force of the amended rule, all that the court need do is to confirm the sale without requiring the past steps to be retracted.

6. Sri Kurien also argued that in the peculiar circumstance that obtained in this case a reasonable construction may be adopted, as otherwise it would result in great hardship and injustice by the denial of the rights which had already accrued in favour of the respondent. A passage in N. Thevar v. G Raja Nainar, (1959) 1 SCA 424 at p. 432 = (AIR 1959 SC 422) which reads as follows has been relied on by the learned counsel to press this contention :

'.....It is a sound rule of construction that procedural enactments should be construed liberally and in such manner as to reader the enforcement of substantive rights effective.'

I think, the above quoted observation by the Supreme Court has to be applied to the present case in order to obviate injustice as well as absurd consequences. The following passages appearing at page 219 of Maxwell on Interpretation of Statutes (11th Edition) also lends support to this view :

'But a new procedure would be presumably inapplicable, where its application would prejudice rights established under the old, or would involve a breach of faith between the parties.'

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Where rights and procedure are dealt with together, the intention of the legislature may well be that the old rights are to be determined by the old procedure, and that only the new rights under the substituted section are to be dealt with by the new procedure.'

7. It was only by way of abundant caution that the respondent filed a petition for condonation of delay and had along with it produced the amount for the general stamp paper for the sale certificate, after the final orders on the I. P. proceedings were passed. The first appellate court has held that inasmuch as the respondent was entitled to get the confirmation without depositing the amount for the stamp paper in accordance with the law as it stood on the date of the sale, the production of the

amount for the stamp paper was really unnecessary, and at any rate that was a fit case to condone the delay and accept the stamp paper assuming such production was necessary. I do not think that it is necessary to go into this question as I am clear in my mind that where before the coming into force of the amendment to Rule 85 of Order 21, C.P.C., the auction-purchaser was not expected to deposit the amount for the general stamp paper for the sale certificate, and that the court was bound to confirm the sale without insisting on the production of the amount for the stamp paper, even though the order of confirmation was passed only after the coming into force of the amended Rule. In this view, the judgment of the first appellate court has to be upheld. For the same reason I do not propose to deal with the argument of the learned counsel for the respondent that at this distance of time the appellants are not entitled to question the correctness of the order of confirmation passed as early as on 30-6-1966, particularly in the context that C. R. P. No 602 of 1969 filed by him was dismissed by this Court.

8. In the result, the second appeal is dismissed, but in the circumstances of the case I direct the parties to bear their respective costs.

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