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MANU/BH/0074/1940

Equivalent Citation: AIR1940Pat264

IN THE HIGH COURT OF PATNA
FULL BENCH

Decided On: 06.03.1940

Appellants: **Babu Upendra Nath Basu**
Vs.
Respondent: **Pandaya Gulab Sarkar**

Hon'ble Judges/Coram:
Wort, Sankara Balaji Dhavle, Varma, Manohar Lall and Chatterji, JJ.

JUDGMENT

Wort, J.

1. The question referred to this Full Bench is, whether the amendment made to Order 21, Rule 90, Civil P.C., making the deposit of 12 1/2 per cent, of the amount of the sale proceeds or the furnishing of security as a condition of the admission of the application under the rule is ultra vires the High Court under Section 120(2) of the Code? The matter was referred to a Full Bench by reason of a decision of two Judges of this Court, dated 19th April 1939, by which the Court confirmed the decision of the lower Court declining to dispense with the deposit as provided by the rule. Having regard, however, to a decision of the Full Bench of the Rangoon High Court in O.N.R.M.M. Chettyar Firm v. Central Bank of India Ltd.AIR (1937) Rang 419 to the effect that a rule not dissimilar to the one before us was beyond powers of the rule-making authority of the High Court at Rangoon, the question which I have stated has arisen for the determination of this Full Bench. Order 21, Rule 90, Civil P.C., as amended, provides in Sub-clause (1):

> Provided that no application to set aside a sale shall be admitted unless (a) it discloses a ground which could not have been put forward by the applicant before the sale was concluded, and (b) the applicant deposits with his application such amount, not exceeding 12 1/2 per cent, of the sum realized by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit.

2. It was contended by the learned advocate appearing on behalf of the judgment-debtor that the amendment of the rule put an obstacle in the way of his exercising his common law right to have the sale of his property set aside. The argument is fallacious. No such common law right exists. Had it not been for the rules under the Civil Procedure Code, apart always from questions of fraud, there would be no such right in the judgment-debtor. It would be immaterial whether his property is sold at a high or low price and the ground of material irregularity arises only by reason of directions of the Legislature that the property should be sold subject to certain rules and conditions. Again it was argued that the amendment placed an obstacle in the way of a judgment-debtor exercising his rights under Order 21, Rule 90 that the making of the rule which provides for the deposit of money or security as a condition precedent to his application was a power which was beyond the rule making authority, as it would affect substantive rights and not merely questions of procedure.

Section 122, Civil P.C., provides:

> High Courts established under the High Courts Act, 1861, or the Government of India Act, 1915....may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules annul, alter or add to all or any of the rules in Schedule 1.

3. It will be seen that the amendments of the rules allowed are as regards "regulating their own procedure and the procedure of the Civil Courts." This argument to some extent depends upon a construction of the amendment which was decided against in the Full Bench decision of this Court in Brij Behari Lal v. Firm Srinivas Ram Kumar MANU/BH/0218/1939 : AIR (1939) Pat 248. There the judgment-debtor had made an application, but had omitted to make the deposit with the application. That deposit was made at a subsequent date. The original application was within the period of limitation, i.e. thirty days, but the deposit was beyond that period. The question which arose in that case was, whether the application was barred by limitation. This Court held that it was not so barred; that the question of the deposit was within the discretion of the executing Court, and that Court must exercise its discretion either in favour or against the applicant and that it was not necessary, as a condition precedent to and at the time of filing of an application, for the judgment-debtor to make the deposit.

4. Therefore it can no longer be argued that the deposit is a condition precedent to the filing of such an application. To that extent it cannot be said that the rule is anything more than placing the judgment-debtor on terms. Reliance as I have said has been placed on the Full Bench decision in O.N.R.M.M. Chettyar Firm v. Central Bank of India Ltd. AIR (1937) Rang 419, but in my judgment that decision does not support the contention of the appellant. The amendment made by the Rangoon Court is different from that which we have under consideration. The proviso to the amendment made by the Rangoon Court was to this effect:

> Provided that no application to set aside a sale shall be admitted unless (a) it discloses a ground which could not have been put forward by the applicant before the sale was conducted, and (b) the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to the amount realized by the sale whichever is less, and in case the application is unsuccessful the costs of the opposite parties shall be a first charge on the amount so deposited.

5. There is a further proviso regarding irregularity or fraud' with which we are not concerned. The Chief Justice of the Rangoon Court in delivering the judgment made this observation:

> The effect of Rule 90B is that an application made under the rule never comes before the Court unless and until the deposit of money referred to therein has been made by the applicant. It is not a rule to regulate procedure but lays down an indispensable preliminary before any proceedings take place at all. Although the Rule Committee has wide powers and can, provided any new rule it seeks to lay down is not inconsistent with the body of the Code, abrogate existing rights of the subject, it can only do so in matters of procedure. It purports to shut out any applicant, who fails to deposit the amount required from proceeding with his application.

It will be seen that the question which arose in the Full Bench decision of this Court in Brij Behari Lal v. Firm Srinivas Ram Kumar MANU/BH/0218/1939 : AIR (1939) Pat 248 was incidentally decided. The Rangoon Court came to the conclusion that the proviso to their rule was a condition precedent, whereas on the construction placed by the Full Bench decision of this Court in Brij Behari Lal v. Firm Srinivas Ram Kumar MANU/BH/0218/1939 : AIR (1939) Pat 248 upon the amendment, the application could be filed without the deposit, the question of deposit being decided later. Taking the matter in steps, it will therefore be seen that the construction placed by this Court upon the amendment

> does not purport to shut out an applicant, who fails to deposit the amount required, from proceeding with his application at all.

6. Further, it is to be observed that the Chief Justice, in delivering the judgment in the Rangoon case,1 made this statement, after saying:

> Although the Rule Committee has wide powers and can, provided any new rule it seeks to lay down is not inconsistent with the body of the Code: hence a rule which directed that upon an application being heard the Court might require the deposit of moneys, or put the applicant upon terms (though stringent) as part of the procedure in the hearing of the application, would seem to be valid.

Strictly construed, the proviso, which is before this Bench for consideration, is nothing more than a rule which places the applicant on terms as to the hearing of the application. Roberts C.J. in support of his view of the Rangoon rules, has referred to Broom's Legal Maxims, and observes: "It has long been a received rule that no one is to be deprived of his property in any judicial proceedings unless he has an opportunity of being heard" and refers to Capel v. Child (1882) 2 Cr & J 558. Capel v. Child (1882) 2 Cr & J 558, how-ever, was a case in which, under an Act of George III, the Bishop was entitled to require an incumbent to nominate a curate with a stipend. No nomination was made and the Bishop being of the opinion that owing to the negligence of the incumbent the duties of the church were inadequately performed and having exercised that power by appointing a curate in the events which had happened charged the incumbent with the stipend and took out the process of sequestration.

7. It was pointed out that the requisition calling upon the incumbent to nominate a curate was in the nature of a judgment and without giving the incumbent an opportunity of being heard was invalid. This state of affairs is very far from the case which is before us, and indeed, if I may be allowed to say so with respect to the Chief Justice of the Rangoon Court, far removed from the case which was before that Court. There was no question there, nor is there any question here of determining a matter in the absence of the interested party.

Reference was also made to Madurai Pillai v. Muthu Chetty MANU/TN/0033/1914 : AIR (1914) Mad 287. There under Section 9, Presidency Small Cause Courts Act (15 of 1882) the High Court was empowered to make rules for the Presidency Small Cause Courts. Such powers were with regard to rules relating to matters of procedure and practice.

8. Under the Rules of the Presidency Small Cause Courts it was necessary, at the time of presenting an application for a new trial, either to deposit in Court the amount of the decree or to give security for the due performance of the decree. It was decided

that the rule was in conflict with Section 38 of the principal Act, and was therefore ultra vires. It was held that the rule under consideration was a rule that affected a substantive right i.e. a new trial, and could not be said to relate to practice or procedure. Reference in that case was made to the decision in Colonial Sugar Refining Co. v. Irving (1906) AC 369 where Lord Macnaghten said:

> To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure.

9. But Sir Charles White in the Madras case in delivering the judgment of the Court, made this observation--an observation similar to that made by the Chief Justice of the Rangoon Court:

> Of course, there is no objection to the Small Cause Court, if they think fit, making it one of the terms which they are entitled to impose when they make an order for a new trial, that the condition imposed by Order 41, Rule 2 should be satisfied before they grant the application.

The treatment of the question by the Rangoon Court and by Sir Charles White is a matter of degree. If, as Sir Charles White stated, there was a right to impose conditions on the hearing (that is what I understand him to mean) of an application for a new trial, it seems to me to be difficult to hold that what the Court could do without a rule, could not be done if there were a rule in that sense; in other words, if the Court is entitled to impose conditions on the hearing of an application, it seems to me necessarily to follow that that right would not be abridged by a rule entitling the Court to impose such conditions.

10. It would appear that the appellant can get no substantial assistance either from the Rangoon case O.N.R.M.M. Chettyar Firm v. Central Bank of India Ltd.AIR (1937) Rang 419 or from the Madras case. Madurai Pillai v. Muthu Chetty MANU/TN/0033/1914 : AIR (1914) Mad 287

Again in Queen v. Bird: Ex parte Needes (1898) 2 QBD 340, to which reference was made, under Section 43, Licensing Act, 1872, in England, any person who opposes before licensing Justices the grant of a new license, may oppose the confirmation of the grant by the confirming authority. The same Section gave power to the Justice in Quarter Sessions to make rules as to the proceedings to be adopted for confirmation of new licenses. Under the rules made by a Court of Quarter Sessions, every person intending to oppose the confirmation of any provisional license before the County Licensing Committee must, within seven days after the grant of the provisional license, give notice to the applicant and to the Clerk of the Peace of his intention to oppose the confirmation.

11. It was held that such a rule was ultra vires the Justices in Quarter Sessions. Wills J. in his judgment, said:

> I think the sounder view is that the right of the Justices to make rules however wide may be the area that they cover, cannot affect the privilege of the objector to be heard in opposition to the confirmation, and that these particular rules really do impose fresh conditions upon the exercise of the objector's right,
>
> and later:

> The rule imposes as a necessary preliminary to the right to oppose the confirmation something which is not to be found in the statute; it is therefore in my opinion ultra vires.

Further the learned Judge says:

> It is clearly within their (Justices') power to say that if adequate notice of opposition to the confirmation of the license has not been given the costs of any adjournment thereby rendered necessary, or any other costs thrown away, must be paid by the objector; nothing could be more reasonable.

Kennedy J. in the same case said:

> To make an absolute rule which has the effect of debarring a man from the exercise of an absolute statutory right unless he complies with a number of requirements is, in my opinion, clearly ultra vires.

12. This case does not assist the appellant, as it will be seen from the observations of Kennedy J. that its effect was to debar a man from exercising an absolute statutory right unless he complies with a number of requirements. In the matter before us, by reason of the decision of the Full Bench of this Court the imposition of the condition is a matter of discretion and is nothing more than putting the applicants on terms. But the real question we have to decide is whether this is a matter of procedure, and therefore within the powers granted by Section 122, Civil P.C. This question is I think concluded by the decision in Sabitri Thakurain v. Savi MANU/PR/0008/1921 : AIR (1921) PC 80. Under Order 41, Rule 10, Civil P.C.:

> the Appellate Court may in its discretion, either before the respondent is called upon to appear and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both.

Under Clause (2) of that rule:

> where such security is not furnished within such time as the Court orders the Court shall reject the appeal.

13. In Sabitri Thakurain v. Savi MANU/PR/0008/1921 : AIR (1921)PC 80 an appeal was preferred in the High Court at Calcutta under Section 15 of the Letters Patent of 1865 against the rejection by the Court in its original civil jurisdiction of a petition under the Probate and Administration Act (5 of 1881). There was a failure to comply with the order to give security for costs. The High Court acting under the rule to which I have referred dismissed the appeal, after certification by the Registrar that the order for security had not been complied with. The appellant filed a petition asking for three months further time which was rejected. Later, the appellant sought to proceed in forma pauperis and this application was also rejected. Lord Sumner, in delivering the judgment of the Judicial Committee of the Privy Council, made this statement at page 80 of the Report:

> The appellant further contended broadly that the orders and rules made under the Code of Civil Procedure 1908, have no application to appeals brought under the Letters Patent of 186S. This contention again is too wide. The real question is, whether Order 41, Rule 10, applies to such appeals, as the High Court thought that it did, and to this question alone their Lordships

will proceed to address themselves.

Then later at page 82:

> There is a fallacy involved in the appellant's argument that the Letters Patent right of appeal is limited and to a certain extent taken away by orders and rules, which prevent the High Court from permitting the continuance of such an appeal in forma pauperis at any stage, for there is of course a marked difference between a right of appeal on ordinary terms and without special indulgence, and a power to relieve the appellant in the exercise of that right from the burden of the ordinary terms. The High Court order as to security for costs is not a limit on the right to appeal, nor does it take the right to appeal away, but it is a rule of procedure now applicable to the appeal under the Letters Patent under the words "any law for the time, being in force," which are contained in Section 104.

14. Their Lordships therefore were of the opinion that Order 41, Rule 10, which gave the Court power to order security for costs, is nothing more than a rule of procedure. On the construction of the proviso, i.e. the amended rule at present under consideration, and, according to the decision of the Full Bench of this Court to which I have made repeated reference, this is nothing more than putting the party, on terms. It is not an obstacle in the way of the applicant as was the rule in the Rangoon Court, the rule there allowing no discretion on the part of the Judge, being an absolute bar to the application. Here it is merely placing the party upon terms. It is on the same footing as an order as to security for costs under Order 41, Rule 10, being merely a condition imposed upon the applicant: and being, as their Lordships of the Judicial Committee stated in Sabitri Thakurain v. Savi MANU/PR/0008/1921 : AIR (1921) PC 80, a matter of procedure, it is within the powers of this Court under Section 122, Civil P.C. With this opinion I would direct that the case be remitted to the Judges of this Court for final disposal.

Sankara Balaji Dhavle, J.

15. I agree.

Varma, J.

16. I agree that Order 21, Rule 90 Civil P.C., as it stands at present, is not ultra vires of the rule-making powers of the Patna High Court. The chief argument advanced against this view was based upon a decision of the Rangoon High Court; but looking at the rule as it stands in Rangoon it is quite clear that the provisions of that rule are different from those of the Patna rule. The provisions of the Patna rule have been explained by the Full Bench of this Court in Brij Behari Lal v. Firm Srinivas Ram Kumar AIR (1939) Pat 327. In the light of that decision it cannot be said that by this rule the applicant is shut out from seeking his remedy before the Court. Under the present rule it will be for the Courts to decide in each case whether to insist upon the 12 1/2 per cent, deposit being made or any amount less than that, or not to require any deposit at all. The matter is left entirely in the judicial discretion of the presiding officers of the Courts.

Manohar Lall, J.

17. I have had the advantage of seeing in advance the judgment prepared by my brother Wort J. I entirely agree with his. reasons and the conclusion at which he has

arrived. I only wish to impress upon the subordinate Courts that the amended rule which is being held intra vires of the High Court should not be allowed to be used in practice as an engine of oppression on the litigants. This danger can easily be avoided by deciding whether security should be demanded and if so in what form from the applicant on exercising a sound judicial discretion keeping in view the circumstances of each applicant and the facts of each application.

Chatterji, J.

18. The question for the decision of which this Full Bench has been constituted is whether the proviso (i)(b) which has been added to Order 21, Rule 90, Civil P.C., by this Court in exercise of its rule making power is ultra vires. The proviso runs thus:

> (i) Provided that no application to set aside a sale shall be admitted unless,
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> * * * * *
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> (b) the applicant deposits with his application such amount not exceeding 12 1/2 per cent, of the sum realized by the sale or such other security as the Court may in its discretion fix, unless the Court, for reasons to be recorded, dispenses with the deposit;

19. On 9th December 1937 the appellant filed an application in the Court below under Order 21, Rule 90, to set aside a sale held in execution of a mortgage decree on 10th November 1937. At the same time he made an application supported by an affidavit stating that on account of the present depression he was unable to arrange for the security money required to be deposited under the amended rule, and praying that the security might be dispensed with. On 11th December 1937, the Court after hearing his pleader rejected the prayer for dispensing with the security and ordered that if Rs. 1329 representing 12 1/2 per cent, of the purchase money was not deposited by 8th January 1938 the application under Order 21, Rule 90 should stand dismissed. On 8th January, he filed a petition praying that he might be allowed to offer security in property. This prayer was refused and no

> further steps being taken, the application under Order 21, Rule 90 was rejected on the same day. Against this order the present appeal is directed. The appeal was at first heard by Mohammad Noor and Row-land JJ., before whom the contention was raised that the amendment to Order 21, Rule 90 made by this Court in exercise of its rule making power was ultra vires. The question being of great importance was referred by them to a larger Bench. The amendment to Order 21, Rule 90 was made by this Court in exercise of its power conferred by Section 122, Civil P.C. That Section is as follows:
>
> High Courts (constituted by His Majesty by Letters Patent and the Chief Court of Oudh) may, from time to time after previous publication, make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence, and may by such rules, annul, alter or add to all or any of the rules in Schedule 1.

20. The point taken by Mr. S.N. Bose on behalf of the appellant is that Section 122 gives the High Court power only "to make rules regulating their own procedure and the procedure of the Civil Courts subject to their superintendence." But, it is said, the amendment to Order 21, Rule 90 which imposes a condition upon the applicant to deposit security is not merely a rule of procedure but is a rule which takes away the

substantive right conferred by Order 21, Rule 90 as framed by the Legislature, and therefore such amendment was in excess of the powers conferred by Section 122. Mr. Bose attempted to argue that the right to set aside a sale is a right possessed by a litigant under common law, but he had to concede that the right to set aside a sale held under the Civil Procedure Code does not exist apart from the provisions of that Code. Order 21, Rule 90 itself, in my opinion, is a rule of procedure and prescribes one of the modes in which an auction sale may be set aside. Strictly speaking, it does not create any right but provides a remedy. The amended rule made by the High Court does no more than lay down a procedure to be adopted when an application under Order 21, Rule 90 is presented. It may be assumed without conceding that something might perhaps be said in favour of the appellant's contention if the effect of the amended rule had been to make the security required by it a condition precedent to the presentation of the application under Order 21, Rule 90.

21. But it has been held by a Full Bench of this Court in Brij Behari Lal v. Firm Srinivas Ram Kumar MANU/BH/0218/1939 : AIR (1939)Pat 248 that no such condition is imposed by the amended rule. The true position is that a person aggrieved by a sale is quite at liberty to present an application under Order 21, Rule 90. But before his application is admitted he may be put on terms as to furnishing security. The security, it should be mentioned, is meant to secure payment of the costs to the opposite party in the event of the application being unsuccessful as will appear from the following clause which also was added by the same rule made by this Court:

> (2) In case the application is unsuccessful the costs of the opposite party shall be a first charge upon the deposit referred to in proviso (i)(b), if any.

22. It is to be remembered that the Code of Civil Procedure itself, as its Preamble shows, relates to the procedure of the Courts of Civil Judicature. The wording of Section 122 also suggests that the rules in Schedule 1 all relate to procedure; otherwise the last portion of the Section which says "may by such rules annul, alter or add to all or any of the rules in Schedule 1" will hardly fit in with the context. This passage in the Section to my mind affords a complete answer to the contention raised. Mr. Bose relies on a Full Bench decision of the Rangoon High Court in AIR 1937 Bang 4191 in which it was held that a proviso to Order 21, Rule 90, in some respects similar to proviso (i)(b) which we are here considering, was ultra vires the rule-making powers of that High Court. The proviso there was as follows:

> Provided that no application to set aside a sale shall be admitted unless:
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> (b) the applicant deposits with his application the amount mentioned in the sale warrant or an amount equal to the amount realized by the sale, whichever is less, and in case the application is unsuccessful, the costs of the opposite parties shall be a first charge on the amount so deposited.

23. The learned Judges in that case took the view that the proviso could not be regarded as a rule regulating procedure but in fact it was designed to prevent proceedings being instituted. In the first place, it is to be observed that though there is some apparent similarity between the Rangoon rule and our rule, the two rules are in substance essentially different. The Rangoon rule requires deposit of the entire decretal amount or the purchase money, whichever is less, and the deposit is imperative; whereas our rule leaves a discretion to the Court (1) to fix the amount of security which must not exceed 12 1/2 per cent, of the purchase money, (2) to

determine whether the security should be in cash or in property and (3) to dispense with the security altogether, if a proper case is made out. Thus, the effect of the Rangoon rule is practically to shut out the applicant from proceeding with his application unless he makes the deposit which in many cases may not be possible. Our rule on the other hand gives him an opportunity to be heard in the matter of security. In the said Rangoon case Leach J. observed:

> I can well understand a rule stating that once a litigant has been heard the Court shall have the right to say that he shall carry the matter no further unless he complies with certain conditions, but before putting a litigant on terms the Court must first hear him, and if proviso (b) were allowed to stand, he might never be able to obtain a hearing.

24. The proviso (b) of our rule exactly falls within this observation because its object is merely to put the applicant on terms before he can be heard further in the matter. In the second place, the Rangoon decision seems to have proceeded to this view:

> The right which exists is not, I am persuaded, conferred upon the person interested by Order 21, Rule 90, which is in this respect declaratory of the common law.

With all respect to the learned Judges I am unable to agree that in India a litigant has a right under the common law to set aside a Court sale. The right to set aside such sale, in my opinion, does not exist apart from the provisions of the Statute under which the sale is held. In my view therefore the Rangoon decision cannot be regarded as an authority for the contention raised by the appellant. The next case relied upon by Mr. Bose is Maduri Pillai v. Muttu Chetty MANU/TN/0033/1914 : AIR (1914)Mad 287 which was decided by a Full Bench of the Madras High Court. In that case the question was whether Order 41, Rule 2, Presidency Small Cause Court Rules, made by that High Court was ultra vires. That rule provided that no application (for a new trial) should be entertained unless the applicant at the time of presenting the application either deposited in Court the amount due from him under the decree or order, or gave security to the satisfaction of the Court or the Registrar for the performance of the decree or order in respect of which the application was made.

25. It was held that the right to apply for a new trial was a substantive right and could not be taken away by any rules made by the High Court. In that very case White C.J. who delivered the judgment observed:

> But if by statutory enactment a power is given to a rule-making authority to make rules, the rules, as it seems to me if they were within the power given, would be good even if they purported to abridge the rights given by the statute.

As I have already held that the amended rule under Order 21, Rule 90 made by this Court is a rule relating to procedure and not taking away any substantive right, this Madras decision is of no assistance to the appellant. On the other hand, Sir Sultan Ahmad on behalf of the respondent has drawn our attention to the decision of the Privy Council in Sabitri Thakurain v. Savi MANU/PR/0008/1921 : AIR (1921) PC 80 Their Lordships while dealing with the provisions of Order 41, Rule 10, Civil P.C., observed that that rule was a rule of procedure. Lord Sumner who delivered the judgment said:

> The High Court order as to security for costs is not a limit on the right to

appeal, nor does it take the right to appeal away, but it is a rule of procedure.

26. Order 41, Rule 10 provides that if the security for costs which is demanded is not furnished the Court shall reject the appeal. If therefore Order 41, Rule 10 is to be regarded as a rule of procedure there is no reason why the amended proviso to Order 21, Rule 90 which requires security to be furnished should not be so regarded. In my opinion, the question referred to us should be answered in the negative, in other words, the proviso (i)(b) to Order 21, Rule 90, Civil P.C., which ha3 been added by the rules made by this High Court under Section 122, Civil P.C., is not ultra vires.

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