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MANU/BH/0186/1919

Equivalent Citation: 49Ind. Cas.617

IN THE HIGH COURT OF PATNA
FULL BENCH

Civil Revision No. 71 of 1918

Decided On: 09.01.1919

Appellants: **Bhubaneswar Prasad Singh**
Vs.
Respondent: **B. Tilakdhari Lal**

Hon'ble Judges/Coram:
Atkinson, W.S. Coutts and Manuk, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Lalit Mohan Ghose and Hari Das

For Respondents/Defendant: Naresh Chandra Sinha

JUDGMENT

Atkinson, J.

1. The facts in connection with the reference referred to us for decision are as follows:--

> The plaintiffs in Original Suit No. 694 of 1914 obtained a rent-decree on the 25th of August 1915 against the petitioners' father, as defendant, for the sum of Rs. 500 for arrears of rent due in respect of a tenure containing 186 bighas of land.

2. After judgment the original defendant, father of the present petitioners, died.

3. The rent-decree, obtained by the decree-holders, was executed as against the minor petitioners by their mother as guardian, on a petition for leave to issue execution, dated the 30th January 1917.

4. Leave was granted as claimed, and the execution proceeded as against the minors' property.

5. Notices of attachment, sale and proclamation were all duly served on the mother of the minor petitioners as their guardian.

6. No appearance was entered in the execution proceedings at any time by the guardian on behalf of the minors.

7. No objection was at any time taken by the mother of the minors that she was nominated guardian of her minor children, even though she was not in fact duly appointed a guardian in accordance with the rules provided by the Civil Procedure Code.

8. The date of the sale of the property in respect of which execution was being levied

was fixed for the 8th May 1917.

9. On the 8th May 1917 the aforesaid tenure, in the execution proceedings, was sold for Rs. 4,000, and purchased by the decree-holders as auction-purchasers.

10. In due course the sale so effected was confirmed.

11. Subsequent to the confirmation of the sale as aforesaid, an application by the guardian of the minors was filed on the 6th June 1917 under Order XXI, rule 90, seeking to have the sale set aside on the following grounds:

(1) That no notice of the execution proceedings or sale had been served.

(2) That the property was sold for an inadequate price, and

(3) that no guardian was properly appointed by the Court to duly represent the minors in such execution proceedings.

12. After due notice to all parties the hearing of this application was fixed for the 19th January 1918.

13. On the 19th of January the petitioners by their guardian applied for an adjournment of the said application so instituted, as aforesaid, on their behalf.

14. The application for adjournment was rightly and properly refused, in our opinion, by the learned Munsif.

15. After the application for adjournment which was made by a subordinate or junior Pleader on behalf of the petitioners was dismissed, the said Pleader left the Court to require the attendance of the senior Pleader who was retained in the case, and who happened to be in or about the Court compound, and also to endeavour to secure the attendance of some witnesses who were in attendance and within the precincts of the Court.

16. By the time the senior Pleader appeared in Court, he ascertained that the application under Order XXI, rule 90, on behalf of the minors had been called on after the adjournment had been refused and was dismissed for default.

17. Forthwith, on the very same day, viz., the 19th June, an application was filed on behalf of the minors by their guardian, seeking to have restored for hearing and disposal the application under Order XXI, rule 90, which had been dismissed as aforesaid, under the provisions of Order IX, rule 9 of the Civil Procedure Code.

18. The hearing of this application was fixed for the 28th of January 1918.

19. The learned Munsif held that Order IX, rule 9, had no application to a proceeding under Order XXI, rule 90, and accordingly be held that he had no power or jurisdiction to grant the application for restoration, rehearing and disposal of the petition filed on the 6th June 1917 under Order XXI, rule 90.

20. An application in civil revision was admitted for the purpose of challenging and testing the validity of the order of the learned Munsif dated the 28th January 1918, which came for hearing before our learned brothers Roe and Coutts, JJ. Our learned brothers considered it advisable to refer the point requiring decision to a Full Bench of this Court, owing to the conflict of authority prevailing in other High Courts of

India, but notably in the High Court of Calcutta, touching the matter immediately arising for our determination.

21. Shortly stated, the legal point presented to us for final decision in this Court now is whether the provisions of Order IX, rule 9, apply to a proceeding instituted under Order XXI, rule 90?

22. We are unanimously of opinion that Order IX, rule 9, has no application to a proceeding in execution institutes under Order XXI, rule 90, and consequently that the order of the learned Munsif, dated the 28th January 1918, sought to be impugned is right and unassailable in point of law.

23. In support of the arguments addressed to us on behalf of the petitioners and the opposite party respectively numerous authorities have been cited on either side.

24. In our unanimous opinion the true legal principles, which are applicable and ought to be applied in determining the matter arising for decision, are deducible through the current of authority commencing with the decision of the Privy Council reported as Thakur Prasad v. Fakir Ullah MANU/PR/0025/1894 : 17 A. 106 (P.C.) : 5 M.L.J. 3 : 22 I.A. 44 : 6 Sar. P.C.J. 526 : 8 Ind. Dec. (N.S.) 393 and followed subsequently in the following oases of Asim Mandal v. Raj Mohan Das 11 Ind. Cas. 385 : 13 C.L.J. 532, Hari Charan Ghosh v. Manmatha Nath Sen MANU/WB/0001/1913 : 19 Ind. Cas. 83 : 41 C. 1 : 18 C.W.N. 343, A. Balasubramania Chetti v. Swarnammal MANU/TN/0084/1913 : 21 Ind. Cas. 32 : 38 M. 199: (1918) M.W.N. 685 : 14 M.L.T. 196 : 25 M.L.J. 367, Gunraj Koer v. Lakhan Koer 35 Ind. Cas. 337, Bharat Chandra Nath v. Yasin Sarkar MANU/WB/0131/1917 : 41 Ind. Cas. 586 : 21 C.W.N. 769, Krupasindhu Roy v. Mahanta Balbhadra Das 47 Ind. Cas 47 : 3 P.L.J. 367, Somasundaram Pillai v. Chekkalinga Pillai MANU/TN/0227/1916 : 38 Ind. Cas. 806 : 40 M. 780 : 5 L.W. 267 and Ritu Kuer v. Alakhdeo Narain Singha 47 Ind. Cas. 154 : (1918) Pat. 265 : 6 P.L.W. 208.

25. It will be noted that two of the herein. before recited authorities are decisions of Division Benches of this Court and to which, in one case, one of us was a party, and in the third case reported as Gunraj Koer v. Lakhan Koer 35 Ind. Cas. 337 a careful and reasoned judgment was delivered by Mr. Justice Roe sitting alone, to a like effect. Consequently, therefore, since the inception of this High Court, the principles of law laid down by the Privy Council ruling reported as Thakur Prasad v. Fakir Ullah MANU/PR/0025/1894 : 17 A. 106 (P.C.) : 5 M.L.J. 3 : 22 I.A. 44 : 6 Sar. P.C.J. 526 : 8 Ind. Dec. (N.S.) 393, followed and enunciated with clearness and precision in the judgment of Sir Lawrence Jenkins reported as Hari Charan Ghosh v. Manmatha Nath Sen MANU/WB/0001/1913 : 19 Ind. Cas. 83 : 41 C. 1 : 18 C.W.N. 343, have been applied, and by this line of authority we conceive we are bound as exponents of the law, as applicable to the matter now referred to us for decision.

26. On the other hand comparatively recent authorities are to be found in which a different view has been taken and different principles applied, to those enunciated by the antecedent authorities cited.

27. The following are the oases referred to:--

> Krishna Chandra Pal v. Protap Chandra Pal 3 C.L.J. 276, Safdar Ali v. Kishun Lal MANU/WB/0177/1910 : 7 Ind. Cas. 241: 12 C.L.J. 6, Charu Chandra Ghosh v. Chandi Charan Roy 27 Ind. Cas. 492 : 19 C.W.N. 25, Subbiah Naicker v. Ramanathan Chettiar MANU/TN/0238/1914 : 22 Ind. Cas. 899 : 37

M. 462: 26 M.L.J. 189 : (1914) M.W.N. 205: 1 L.W. 251, Diljan Mihha Bibi v. Hemanta Kumar Roy MANU/WB/0232/1915 : 29 Ind. Cas. 395 : 19 C.W.N. 758, Bhuben Behari Nag Mazumdar v. Dhirendra Nath Banerjee MANU/WB/0311/1916 : 33 Ind. Cas. 581 : 20 C.W.N. 1203, Kali Kanta Chuckerbutty v. Shyam Lal Das Basu MANU/WB/0353/1916 : 38 Ind. Cas. 598: 25 C.L.J. 163, Bepin Behari Saha v. Abdul Barik MANU/WB/0030/1916 : 36 Ind. Cas. 613 : 21 C.W.N. 30 : 24 C.L.J. 446 : 44 C. 950 and Satya Narayan Lal v. Gobind Sahay 43 Ind. Cas. 951 : 3 P.L.J. 250 : 4 P.L,W. 102.

28. With the authority of these decisions we find ourselves unable to agree. In our opinion these authorities are not based on any sound legal principle, nor are they founded upon a sure and reliable foundation, nor do they lay down any sure or definite rule of practice deducible from the true principles of law applicable to cases such as the present. Each of the last set of cases cited above depend for their decision upon the inherent facts of each case itself, and from them, as a whole, no decided and governing rule of practice is deducible.

29. Accordingly with great respect to the learned Judges whose aforesaid decisions are now under review, we desire to express our disapproval with the last series of cases cited, and to record our opinion that they do not enunciate a correct or accurate interpretation of the law applicable to the facts of this case or to similar cases in pari materia therewith.

30. We have been asked and urged to exercise inherent powers vested in us under section 151 of the Civil Procedure Code in granting relief in the present application.

31. We are of opinion that there are no materials before us on which we could properly exercise our inherent powers, even if we felt willing to do so, which we do not.

32. The case has been argued exclusively on the basis that the order of the learned Munsif, dated the 28th January 1918, was made without jurisdiction, and this point only was referred to us for decision by our learned brothers Roe and Coutts, JJ., and consequently we do not feel at liberty, nor are we entitled, to go outside the terms of the reference made to us and decide the question arising for determination upon the assumption that this Court ought to exercise its inherent powers even if willing to do so, and set aside the order impugned and restore the proceedings, more especially as an alternative remedy is open to the petitioners by way of miscellaneous appeal against the original order of dismissal of the petitioners' application, and which the petitioners have already availed themselves of and which application is still pending and awaiting decision.

33. Accordingly we think the order of the learned Munsif was right and correct in point of law and that this application in revision must be dismissed, but under the circumstances, without costs.

W.S. Coutts, J.

34. I concur.

Manuk, J.

35. I concur.

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