SHIV PRASAD A

v.

DURGA PRASAD & ANR.

February 12, 1975

[P. N. BHAGWATI, A. C. GUPTA AND N. L. UNTWALIA, JJ.]

Code of Civil Procedure, 1908—*O.* 21, *rr.* 89(2) *and* 90—*Scope of.* B

Rule 89(2) of O. 21 C.P.C. states that where a person applies under r. 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under the Rule. The appellant in the execution of his decree, purchased certain properties of the judgment debtor. Respondent no. 1 who had purchased the properties earlier, thereupon filed an application on December 12, 1967 under O. 21 r. 90 for setting aside the sale. Later, he filed an application under O. 21 r. 89 stating that he "withdraws the application under O. 21, r. 90 and does not want to C press the same". The Court, however, did not record an order of withdrawal of the respondent no. 1's application but posted it for directions regarding service of notice etc. and thereafter respondent no. 1 took steps for service of notice on the appellant and respondent no. 2. Eventually on March 9, 1968 respondent no. 1 made an application that he did not want to prosecute his application filed under O. 21 r. 90. The Court accordingly dismissed it.

The Execution Court thereafter allowed application under O. 21 r. 89 and set aside the sale. The appellant's appeal against this order was dismissed by the D High Court.

In appeal to this Court it was contended that respondent no. 1 was not entitled to make an application under O. 21 r. 89 unless he effectively withdrew his application under O. 21 r. 90 and an order of the Court to that effect was passed.

Dismissing the appeal,

HELD: 1(a) The words used in the sub-rule are 'make or prosecute.' If it E were to be held that the applicant is not entitled merely to prosecute his application under r. 89 unless he withdraws his application under r. 90, then, the word 'make' would become redundant. In order to bring about the true intention of the Legislature, effect must be given to both the words. [529C]

(b) If a person has first applied under r. 90 to set aside the sale, then, unless, he withdraws his application, he is not entitled to make and prosecute an application under r. 89. The application even if made, will be deemed to have been made only on withdrawal of the previous application. If, however, a person has F filed an application under r. 89 first and thereafter another application under r. 90 he will not be allowed to prosecute the former unless he withdrew the latter. [529D]

(c) Every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting him to withdraw his application. The Court may make a formal order disposing of the application as withdrawn but the withdrawal is not dependent on the order of the Court. The act of withdrawal is complete as soon as an appli- G cant intimates the Court that he withdraws the application. [530B-C]

In the instant case respondent no. 1 had withdrawn his application not only by mentioning in his application under r. 89 that he was withdrawing his application under r. 90 but also by filing a separate application to that effect. The steps taken by him did not nullify the withdrawal made by respondent no. 1 of his application under r. 90 and did not make the withdrawal merely on that account ineffective. It was only after respondent no. 1 had intimated that he was not pursuing his application under r. 90 that a formal order recording its dismissal was H made. This order of the Court had the effect of merely recording the withdrawal of the application under r. 90. Even without that order, the withdrawal was effective on that date. [530C-E]

A

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 998 of 1971.

Appeals by Special leave from the Judgment & Order dated the 20th January, 1971 of the Allahabad High Court in F.A.No. 443 of 1968.

Hardayal Hardy, Janardan Sharma and *Jitendra Sharma,* for the
B appellant.

Sultan Singh and *R. P. Agarwala,* for the respondents.

The Judgment of the Court was delivered by

UNTWALIA, J. In this appeal by special leave of this Court is involved the interpretation and true meaning of subrule (2) of Rule 89 of Order 21 of the Code of Civil Procedure, 1908—hereinafter called the
C Code. The decreeholder is the appellant. The first respondent is the purchaser of a major portion of the property sold in execution of the appellant's decree against respondent no. 2. The appellant had filed a suit in the year 1951 against the husband of respondent no. 2 for realization of certain sums of money due on a Promisory note. The suit was dismissed by the Trial Judge of Saharanpur. The appellant filed First Appeal No. 122/1954 in the Allahabad High Court.
D Certain properties belonging to the husband of respondent no.2 were directed to be attached before judgment by the High Court. In spite of the attachment, he sold the properties in two lots. The first lot was sold for a sum of Rs. 7,580/- on 30-7-1956 to one Smt. Subadhara Devi. The remaining attached properties were sold in the second lot to the first respondent on 30.11.57 for Rs. 70,000/. The original defendant died during the pendency of the first appeal in the High
E Court. His widow was substituted. The first appeal was allowed and the suit was decreed against the substituted defendant respondent on 25.3.1966.

The appellant filed Execution No. 12/-1967 in the Saharanpur Court for realization of Rs. 11,795/- the amount due under the decree, Rs. 3,528.10p. the costs in the suit and the appeal together with the
F costs of the execution. In the said execution, the attached properties were sold and purchased by the appellant on 29.11.1957 for Rs. 16,000/- with the leave of the Execution Court. The first-respondent filed on 12.12.1967 an application under Order 21 Rule 90 of the Code for setting the sale aside. This application was registered as Miscellaneous Case No. 3/1967 in Execution Case No. 12/1967. The period of 30 days from the date of sale expired during holidays.
G Respondent no. 1 on the re-opening date i.e. on 1.1.1968 instituted Miscellaneous Case No. 1/1968 by an application made under Order 21 Rule 89 of the Code. The amount as was necessary to be deposited for the setting aside of the sale under Rule 89 was deposited in the Execution Court by respondent No.1 In his application under Order 21 Rule 89 of the Code a statement was made by respondent no. 1 "The applicant has also given an application under Order 21 Rule 90
H and the applicant withdraws the same." On the same date, i.e. on 1.1.1968 respondent no. 1 also filed a separate application stating therein that he had filed an application under Order 21 Rule 90 of the Code for cancellation of the auction held on 29-11-1967 which was

pending and that he had filed an application under Order 21 Rule 89 of the Code also. The further statement was that the applicant "now withdraws the application under Order 21, Rule 90, and does not want to press the same." A sum of Rs 2,000/- by way of security had been deposited by respondent no.1 while making that application. The prayer in this petition was also for the return of the said sum of money.

A

B

It appears, however, that the Court did not record an order of withdrawal in Miscellaneous Case No. 3/1967. In the usual course that case was put up on 6.1.1968 when respondent no. 1 and his counsel were present. A direction was given to do *Pairevi* for fresh service of notice on the opposite party, namely, the decree holder and the Judgment debtor. Steps were taken; but on 10.2.1968 it was found that service of notice on the Judgment debtor (opposite party no.2) was not sufficient. On that date further steps were taken by respondent no.1 for service of notice on the opposite parties. Eventually on 9.3.1968 the Advocate for respondent no.1 made an endorsement on the back of the application filed under Order 21 Rule 90 of the Code : "Sir, In view of application dated 1.1.68 in our proceeding No.1 of 1968 the applicant does not want to prosecute it." It was only then that Miscellaneous Case No. 3/1957 was dismissed by Execution Court on 9.3.1968. Miscellaneous Case No. 1/1968 proceeded to disposal. In substance the only objection taken by the appellant to resist the said application was a plea of its non-maintainability in view of the provision of law contained in sub-rule (2) of Rule 89.

C

D

The Execution Court allowed the application of respondent no. 1 under Order 21 Rule 89 of the Code and set aside the sale. The appellant's appeal against the said order was dismissed by a learned single Judge of the Allahabad High Court. On grant of special leave by this Court the present appeal was presented.

E

At the outset we may reject a new plea taken by the appellant in this Court that the amount deposited by respondent no.1 was not sufficient, as pondage fee in accordance with Rules 365 and 371 framed by the Allahabad High Court was not deposited. We did not examine the correctness of this point as it involved investigation of new facts which for the first time could not be permitted in this Court.

F

The only question for determination in this appeal is whether the application of respondent no.1 under Order 21 Rule 89 of the Code was not maintainable and liable to be dismissed as such, and whether it has wrongly been allowed by the Courts below.

G

Mr. Hardayal Hardy, learned counsel for the appellant, strenously contended that respondent no.1 was not entitled to make an application under Order 21 Rule 89 of the Code unless he effectively withdraw his application under Order 21 Rule 90 and an order of the Court to that effect was passed. Counsel further submitted that instead of asking the Court to make an order permitting the withdrawal of his application under Rule 90, on two dates he took steps to prosecute that application. Ultimately the case was not proceeded with on 9-3-1968. In the eye of law, therefore, the application under Rule 89 should be

H

A deemed to have been filed only on 9-3-1968 on which date it was hopelessly barred by limitation.

On the correct interpretation of sub-rule (2) of Rule 89 and on determination of its true scope it will be noticed that on the facts and in the circumstances of this case respondent no. 1's application under Rule 89 has rightly been allowed.

B Order 21 Rule 89(2) reads as follows :

> "Where a person applies under Rule 90 to set aside the sale of his immoveable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this Rule."

C The words used in the sub-rule are "make or prosecute". If it were to be held that the applicant is not entitled merely to prosecute his application under Rule 89 unless he withdraws his application under Rule 90, then the word "make" would become redundant. In order to bring about the true intention of the Legislature, affect must be given to both the words. If a person has first applied under Rule 90 to set aside the sale, then, unless he withdraws his application, he is D not entitled to make and prosecute an application under Rule 89. The application even if made will be deemed to have been made only on withdrawal of the previous application. If, however, a person has filed an application under Rule 89 first and thereafter another application under Rule 90, he will not be allowed to prosecute the former unless he withdrew the latter.

E Section 310A was added in the Code of 1882 by Act 5 of 1894. This section corresponds to Order 21 Rule 89 of the Code of 1908. The proviso to section 310A which corresponds to sub-rule (2) merely used the words "he shall not be entitled to make an application under this section". In the case of *Rajendra Nath Haldar and others* v. *Niltatan Mitter and others,*(1) an application under section 310A of the Code of 1882 was first made and on the following day appli- F cants presented an application under section 311 (corresponding to Order 21 Rule 90). In view of the proviso the application under section 310A failed. The argument put forward on behalf of the applicants was that if an application under section 311 was filed after the filing of the application under section 310A the proviso did not apply. It was rejected by the Bench consisting of Petheram, CJ and Rampini, J. thus : "We consider that the words "he shall not be entitled to make an application under this section" in the proviso cannot mean merely G "he shall not be entitled to present an application" under the section, but the word "make" here must mean "carry on" or "prosecute". The Legislature, it appears, to make the position of law certain, added the words "or prosecute" after the word "make" in sub-rule (2) of Rule 89 of Order 21 of the Code.

In our judgment, an application under Rule 89 validly made on H the date of its presentation cannot be allowed to be prosecuted until the subsequent application filed under Rule 90 is withdrawn. But it

(1) I. L. R. 23, Calcutta, 958.

cannot be allowed to be made or be deemed to have been made unless the prior application filed under Rule 90 is withdrawn. A

Even on the interpretation of Rule 89(2) which we have put we are not prepared to accept the contention put forward on behalf of the appellant that an application under Rule 90 does not stand withdrawn until an order to that effect is recorded by the Court. The applicant merely has to convey to the Court that he is withdrawing his application under Rule 90 which he had filed prior to the making of the application under Rule 89. Thereupon he becomes entitled to make the latter application. Every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting him to withdraw the application. The Court may make a formal order disposing of the application as withdrawn but the withdrawal is not dependent on the order of the Court. The act of withdrawal is complete as soon as the applicant intimates the Court that he withdraws the application. Respondent no. 1 has clearly done so here not only by mentioning in his application under Rule 89 that he was withdrawing his application under Rule 90 but also by filing a separate application to that effect, in which not only the statement as to the withdrawal of the application under Rule 90 was made but a prayer for the refund of Rs 2,000 was also made. The steps taken on behalf of the respondent No. 1 in Miscellaneous Case No. 3/1967 even after the filing of Miscellaneous Case No. 1/1968 were clearly superfluous and of no effect. The steps taken did not nullify the withdrawal made by respondent no. 1 of his application under Rule 90 and did not make the withdrawal merely on that account ineffective. Even if any ambiguity was created by the taking of such steps, later on 9-3-1968 in clearest language it was intimated on behalf of respondent no. 1 that he was not pursuing his application under Rule 90. It was only then that the Court made a formal order recording its dismissal. In our judgment on the facts and in the circumstances of this case, the order of the Court made on 9-3-1968 had the effect of merely recording the withdrawal of the application under Rule 90 which was already effectively made on 1-1-1968. Even without that order, the withdrawal was effective on that day. B C D E F

We, therefore, hold that the application filed by respondent No. 1 under Order 21 Rule 89 of the Code has rightly been allowed. The appellant pursued his remedy even to this Court on a mere technicality to grab the properties purchased by respondent no. 1 for a sum of Rs. 70,000/- which the appellant had purchased along with other portion of the property for a sum of Rs. 16,000/- only. The appeal is accordingly dismissed with costs in favour of respondent no. 1. G

P.B.R. *Appeal allowed.*