GANPAT GIRI

v.

IIND ADDITIONAL DISTRICT JUDGE, BALIA & ORS.

JANUARY 7, 1986

[E.S. VENKATARAMIAH AND R.B. MISRA, JJ.]

Code of Civil Procedure (Amendment) Act 1976 - S. 97 - Scope of - Amending Act - Effect of - On entire Code of Civil Procedure, 1908.

Order 21 Rule 72 (as in force in State of U.P.) - Whether ceases to operate on commencement of the Code of Civil Procedure (Amendment) Act, 1976.

Code of Civil Procedure prior to its amendment by Code of Civil Procedure (Amendment) Act 1976, by sub-rules (1) and (3) of Rule 72, Order 21 laid down that no holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property and that where a decree-holder pruchases, by himself or through another person, without such permission, the court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale. In the State of Uttar Pradesh, the High Court of Allahabad, by an amendment made to the aforesaid Rule, deleted sub-rules (1) and (3). The result was that in the case of a decree-holder the need for obtaining the express permission of the executing court before offering the bid for or purchasing the property put up for sale under sub-rule (1) was not there and the power of the court to set aside the sale under sub-rule (3) of Rule 72 in the absence of such permission had also been taken away.

By the Amending Act, 1976 several amendments were carried out to the Code on the basis of the recommendations of the Indian Law Commission in its 54th Report in 1973. Since there were in force in different parts of India several amendments to the code which had been effected by the State Legislatures or by the High Courts, the Law Commission recommended that a new Rule 72-A may be added to Order 21 in which there was reference to sub-rules (2) and (3) of Rule 72

A in sub-rule (3) of Rule 72-A. Hence, even though Rule 72 was not amended by the Amending Act, its retention in the form in which it was in the code had been recommended by the Law Commission. Section 97(1) of the Amending Act provides that "any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before B the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed."

Respondent No.3 obtained a decree for recovery of money on July 29, 1977 against the appellant. In execution of the said decree, the immoveable property belonging to the C appellant was brought to sale by court on August 4, 1978 and at that court sale respondent No.3 was declared as the successful bidder. Before the sale was confirmed, the appellant filed an application for setting aside the sale on the ground that the decree holder had not obtained prior permission of the executing court under Rule 72(1) of Order 21 D of the Code. The executing court set aside the sale, since admittedly no such permission had been obtained by the decree-holder.

The District Judge affirmed the aforesaid order in a revision petition filed by respondent No.3 - Decree-holder on the ground that on the commencement of the Amending Act by E virtue of section 97(1) thereof the local amendment made to Rule 72 of Order 21 of the Code prior to that date ceased to operate and the Code as amended by the Amending Act applied to the case. Aggrieved by the decision of the District Judge, respondent No.3 filed a petition under Art.226 before the High Court of Allahabad. The High Court allowed the Writ Petition F holding that since the amending Act had not made amendment of any kind in so far as Rule 72 of Order 21 was concerned, the amendment made by the High Court of Allahabad to Rule 72 of Order 21 of the Code prior to the commencement of the Amending Act remained intact.

Allowing the appeal to this Court,

G HELD: 1. The High Court was in error in holding that the amended Rule 72 of Order 21 which was in force in the State of Uttar Pradesh prior to February 1, 1977 continued to be in force after that date and that the court sale held in which the decree-holder had purchased the property without the express permission of the executing court was unassailable H under sub-rule (3) of Rule 72. Therefore, the order passed by the High Court is set aside and the order passed by the

District Judge affirming the order of the executing court is restored. [24 C; 24 F]

2.1 The object of section 97 of the Amending Act appears to be that on and after February 1, 1977 throughout India wherever the Code was in force, there should be same procedural law in operation in all the Civil Courts subject, of course, to any future local amendment that may be made either by the State Legislature or by the High Court, as the case may be, in accordance with law. Until such amendment is made the code as amended by the Amending Act alone should govern the procedure in civil courts which are governed by the Code. [19 F-G]

2.2 The effect of section 97(1) is that all local amendments made to any of the provisions of the Code either by a State Legislature or by a High Court which were inconsistent with the Code as amended by the Amending Act stood repealed irrespective of the fact whether the corresponding provision in the Code had been amended or modified by the Amending Act and that was subject only to what was found in sub-section (2) of section 97. Moreover, sub-section (3) of section 97 sets at rest doubts, if any, by making the Code as amended by the Amending Act applicable to all proceedings referred to therein subject to sub- section (2) of section 97. [23 G-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 18 of 1986.

From the Judgment and Order dated 9.4.1985 of the Allahabad High Court in C.M.W.P. No. 2754 of 1981.

S.N. Kacker (Amicus curie) and B.S. Chauhan for the Appellant.

Sunil K. Jain for the Respondents.

The Judgment of the Court was delivered by

**VENKATARAMIAH, J.** We are principally concerned in this case with the effect of section 97 of the Code of Civil Procedure (Amendment) Act, 1976 (104 of 1976) (hereinafter referred to as 'the Amending Act') on any amendment made or any provision inserted in the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') by a State Legislature or a High Court prior to the commencement of the Amending Act, i.e., prior to February 1, 1977 in the different local areas in India where the Code is in force if they be inconsistent with the provisions of the Code as amended by the Amending Act.

Section 97(1) of the Amending Act reads thus:-

> "any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions of the principal Act as amended by this Act, stand repealed."

The above provision is however subject to sub-section (2) of section 97 of the Amending Act which provides that notwithstanding that the provisions of the Amending Act have come into force or the repeal under sub-section (1) of section 97 of the Amending Act has taken effect, and without prejudice to the generality of the provisions of section 6 of the General Clauses Act, 1897, the provisions in clauses (a) to (zb) of that sub- section would prevail. Sub-section (3) of section 97 of the Amending Act provides that save as otherwise provided in sub-section (2), the provisions of the principal Act, as amended by the Amending Act, shall apply to every suit proceeding, appeal or application pending at the commencement of the Amending Act or instituted or filed after such commencement, notwithstanding the fact that the right, or cause of action, in pursuance of which such suit, proceeding, appeal or application is instituted or filed, had been acquired or had accrued before such commencement.

The principal Act referred to in section 97 is the Code. By the Amending Act several amendments were carried out to the Code on the basis of the recommendations of the Indian Law Commission which had considered extensively the provisions of the Code before it submitted its 54th Report in 1973. By the time the Law Commission took up for consideration the revision of the Code, there were in force in different parts of India several amendments to the Code which had been effected by the State Legislatures or by the High Courts. The subject of civil procedure being in Entry 13 of List III of the Seventh Schedule to the Constitution, it is open to a State Legislature to amend the Code insofar as its State is concerned in the same way in which it can make a law which is in the Concurrent List. Section 122 of the Code empowers the High Courts to make rules regulating the procedure of civil courts subject to their superintendence as well as rules regulating their own procedure. These rules no doubt must not be inconsistent with the body of the code. But they can amend or add to rules in the First Schedule to the Code. Section 129 of

the Code which is overlapping on section 122 of the Code to some extent confers power on the Chartered High Courts to make rules as to their original civil procedure. As mentioned earlier, before the Amending Act came into force on February 1, 1977 many of the provisions of the Code and the First Schedule had been amended by the State Legislatures or the High Courts as the case may be and such amended provisions had been brought into force in the areas over which they had jurisdiction. When the Amending Act was enacted making several changes in the Code Parliament also enacted section 97 providing for repeals and savings and the effect of the changes on pending proceedings.

There are three sub-sections in section 97 of the Amending Act. A reading of section 97 of the Amending Act shows that it deals with the effect of the Amending Act on the entire Code both the main part of the Code consisting of sections and the First Schedule to the Code which contains Orders and Rules. Section 97(1) of the Amending Act takes note of the several local amendments made by a State Legislature and by a High Court before the commencement of the Amending Act and states that any such amendment shall except insofar as such amendment or provision is consistent with the provisions of the Code as amended by the Amending Act stands repealed. It means that any local amendment of the Code which is inconsistent with the Code as amended by the Amending Act would cease to be operative on the commencement of the Amending Act, i.e., on February 1, 1977. The repealing provision in section 97(1) is not confined in its operation to provisions of the Code including the Orders and Rules in the First Schedule which are actually amended by the Amending Act. The object of section 97 of the Amending Act appears to be that on and after February 1, 1977 throughout India wherever the Code was in force there should be same procedural law in operation in all the civil courts subject of course to any future local amendment that may be made either by the State Legislature or by the High Court, as the case may be in accordance with law. Until such amendment is made the Code as amended by the Amending Act alone should govern the procedure in civil courts which are governed by the Code. We are emphasising this in view of the decision of the Allahabad High Court which is now under appeal before us.

This appeal by special leave is filed against the judgment dated April 9, 1985 in Civil Miscellaneous Writ Petition No. 2754 of 1981 on the file of the High Court of Allahabad.

Jamuna Chaubey, respondent No. 3 herein obtained a decree for recovery of money of July 29, 1977 against the appellant Ganpat Giri in Original Suit No. 359 of 1973 on the file of the Munsiff East, Balia. In execution of the said decree the immovable property belonging to the appellant was brought to sale by court on August 4, 1978 and at that court sale respondent No.3 was declared as the successful bidder. Before the sale was confirmed, on August 12, 1978 the appellant filed an application for setting aside the sale under Rule 90 of Order 21 of the Code on several grounds. Later on he made an application stating that the sale was liable to set aside as respondent No. 3 who was the decree holder had not obtained the permission of the executing court under Rule 72(1) of Order 21 of the Code. The delay in filing that application was condoned. The executing court upheld the plea of the judgment debtor, the appellant herein, relying upon sub-rule (3) of Rule 72 of Order 21 of the Code and set aside the sale by its order dated February 20, 1979, since admittedly no such permission had been obtained by the decree holder. The application under Rule 90 of Order 21 of the Code was dismissed as not pressed. Another prayer made under Rule 89 of Order 21 of the Code was rejected on the ground that it had become infructuous. Aggrieved by the decision of the executing court respondent No. 3 filed a revision petition before the District Judge, Balia under the provisions of section 115 of the Code (as amended by section 3 of the Code of Civil Procedure (Uttar Pradesh Amendment) Act 1978 with effect from August 1, 1972). The District Judge dismissed the revision petition on October 13, 1980. Against the decision of the District Judge respondent No. 3 filed a petition under Article 226 of the Constitution before the High Court of Allahabad. The petition was allowed by the High Court holding that the case was governed by Rule 72 of Order 21 of the Code as it was in force in the State of Uttar Pradesh before the Amending Act came into force. It may be stated here that both the executing court and the District Judge had upheld the contention of the judgment debtor that on the commencement of the Amending Act by virtue of section 97(1) thereof the local amendment made to Rule 72 of Order of the Code prior to that date ceased to operate and the Code as amended by the Amending Act applied to the case. The High Court however took the view that since the Amending Act had not made amendment of any kind in so far as Rule 72 of Order 21 was concerned, the amendment made by the High Court of Allahabad to Rule 72 of Order 21 of the Code prior to the commencement of the Amending Act remained intact.

The High Court did not say anything on the question of condonation of delay in making the application under Rule 72(3) of Order 21 of the Code. It however stated that the application under Rule 89 of Order 21 of the Code could still be considered by the executing court. In this appeal by special leave the order of the High Court is questioned.

For purposes of ready reference Rule 72 of Order 21 as it is in the Code and as it was in the State of Uttar Pradesh prior to the commencement of the Amending Act are set out below:

**"Order 21 Rule 72 as it is in the Code.**

72. Decree-holder not to bid for or buy property without permission. - (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property

Where decree-holder purchases, amount of decree may be taken as payment. - (2) Where a decree holder purchases with such permission, the purchase money and the amount due on the decree may, subject to the provisions of Section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

(3) Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expense attending it, shall be paid by the decree-holder."

**"Order 21 Rule 72 as it was in force in the State of Uttar Pradesh prior to the commencement of the Amending Act.**

Where a decree-holder purchases the property sold, the purchase money and the amount due on the decree may, subject to the provisions of section 73 be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly."

A The difference between the Code and the rule as it was in force in State of Uttar Pradesh prior to the commencement of the Amending Act was that in the State of Uttar Pradesh sub-rules (1) and (3) of Rule 72 of Order 21 had been completely deleted and sub- rule (2) had been renumbered as Rule 72 with the modification that for the words "with such permission" the words "the property sold" had been substituted. The result was that in the case of a decree-holder the B need for obtaining the express permission of the executing court before offering the bid for or purchasing the property put up for sale under sub-rule (1) was not there and the power of the Court to set aside the sale under sub-rule (3) of Rule 72 in the absence of such permission had also been taken away.

C The question whether Rule 72 of Order 21 of the Code required any modification was considered by the Law Commission before it made its recommendation in its 54th Report. Its observations at pp 182-183 of the Report are as follows:

> "Order 21, rule 72
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> 21.36. With reference to Order 21, rule 72, a point was considered in the earlier Report. A recommendation had been made in the Fourteenth Report to the effect, that a decree-holder should be allowed to purchase property unless the court has prohibited him from doing so. The object of the recommendation was to avoid the delay that is frequently caused when the warrant of sale is returned unexecuted in the absence of bidders. An amendment carrying out this recommendation was proposed in the draft Report on the Code which had been circulated. Comments received thereon, however, emphasised the need for the court being aware of any proposal by the decree holder to bid. The earlier Commission thought that there was force in this approach and a decision was taken not to disturb the existing rule.
>
> We have considered this matter further, and have come to the conclusion that the approach in the earlier Report on the Code was correct. Hence no change is recommended.
>
> Order 21, rule 72

D E F G H

21. 36-A. We have considered the more fundamental question if rule 72 should be retained at all. The object behind this provision is to ensure fairness in the auction. The decree holder, if interested in purchasing the property himself, can conceivably, keep back or discourage (or even mislead) prospective purchasers. Ordinarily, the fetching of a higher purchase price would be in his interest (as likely to satisfy his claim without further execution). But it should not be forgotten that when he is the purchaser this consideration takes leave, and he like every purchaser would like the price to be low. To a certain extent, he has a hand in initiating, the sale, though not so in theory. It is he who obtains the proclamation of sale; and, though the rules in Order 21 do not so require, it is he who is expected to assist, and even to guide, the process serving staff in various matters concerning execution e.g., affixation of the proclamation etc. He also estimates the price. For these reasons, it is better to keep the existing safeguard."

Having observed this, it proceeded to recommend that a new rule 72-A may be added to Order 21 in which there was reference to sub-rules (2) and (3) of Rule 72 in sub-rule (3) of Rule 72-A.

It is thus seen that even though Rule 72 was not amended by the Amending Act its retention in the form in which it was in Code had been recommended by the Law Commission for the reasons given by it.

Now reverting to section 97(1) of the Amending Act, the High Court was in error in holding that because no amendment had been made to Rule 72 by the Amending Act, section 97(1) had no effect on the Rule as it was in force in the State of Uttar Pradesh before the commencement of the Amending Act. As observed earlier, the effect of section 97(1) is that all local amendments made to any of the provisions of the Code either by a State Legislature or by a High Court which were inconsistent with the Code as amended by the Amending Act stood repealed irrespective of the fact whether the corresponding provision in the Code had been amended or modified by the Amending Act and that was subject only to what was found in sub-section (2) of section 97. Sub-section (3) of section 97 provides that save as otherwise provided in sub- section

(2) the provisions of the Code as amended by the Amending Act shall apply to every suit, proceeding, appeal or application pending at the commencement of the Amending Act or instituted or filed after such commencement notwithstanding the fact that the right or cause of action in pursuance of which such suit, proceeding, appeal or application is instituted or filed had been acquired or had accrued before such commencement. Sub-section (3) of section 97 sets at rest doubts, if any, by making the Code as amended by the Amending Act applicable to all proceedings referred to therein subject to sub-section (2) of section 97.

The High Court was therefore in error in holding that the amended Rule 72 of Order 21 which was in force in the State of Uttar Pradesh prior to February 1, 1977 continued to be in force after that date and that the court sale held in which the decree holder had purchased the property without the express permission of the executing court was unassailable under sub-rule (3) of Rule 72.

We do not in the circumstances of the case find any merit in the contention of the respondent No. 3 that the prayer made under Order 21, Rule 72(3) of the Code was barred by time particularly because of the doubts about its applicability in the State of Uttar Pradesh being there. At this stage we find it unjust to consider the plea of limitation when the High Court and the Subordinate Courts below have not found it proper to reject the application on that ground.

The order passed by the High Court is, therefore, set aside and the order passed by the District Judge affirming the order of the executing court is restored.

The appeal is accordingly allowed. No costs.

We thank Shri S.N. Kacker, Senior Advocate, who assisted us in this case at our request as amicus curiae.

M.L.A. Appeal allowed.