

Mangal Prasad (dead) by LR.s. and another

Vs

Krishna Kumar Maheshwari and others

Civil Appeal No.236 of 1977

(M. H. Kania, K. Ramaswamy, M. M. Punchi JJ)

14.11.1991

### JUDGMENT

1. The appellants in this appeal are the judgment-debtors, the respondent No. 3 is the auction-purchaser and respondent No. 1 is the decree-holder. The facts leading up to this appeal are as follows:

The respondent No. 1 obtained a money decree against the appellants for Rupees 28,585.85 paise. A house and shop belonging to the appellants were sold at an auction sale in execution of this decree and was purchased by respondent No. 3. On February 4, 1976 the appellants filed objections under S. 47 of the Code of Civil Procedure and prayed to set aside the auction sale. On February 6, 1976 the appellants deposited the entire decretal and other requisite amounts in Court and prayed for setting aside the sale under O. 21, R. 89 of the said Code. On 17th April, 1976 the appellants had their objections under S. 47 of the said Code dismissed on the ground that the same was not pressed. On May 1, 1976 the learned Civil Judge rejected the application of the appellant under O. 21, R. 89 of the said Code on the ground that that was in effect an application under O. 21, R. 90 of the said Code and the present one was not maintainable on the ground that such an application could not have been made when the aforesaid objection dated February 4, 1976 was pending and that the said application under S. 47 of the said Code was in effect an application under O. 21, R. 90 of the said Code. This decision was confirmed by the High Court on an appeal preferred by the appellants.

2. It is contended by the learned counsel for the appellants before us that the High Court as well as the learned Civil Judge erred in law in treating the application under S. 47 of the said Code as an application under O. 21, R. 90 of the said Code. It has been pointed out that some of the grounds of the objections set out in the said application under S. 47 are such as are not covered by O. 21, R. 90 of the said Code. This is clear from a perusal of the said objections and the provisions of Rule 90 of O. 21 of the said Code. In these circumstances, in our opinion the learned Civil Judge and the High Court were not justified in treating the said application under S. 47 of the said Code as an application under O. 21, R. 90 thereof. Hence the bar prescribed under sub-rule (2) of O. 21, R. 89 did not come into play at all. Merely on the reason of the pendency of the objections under S. 47 of the said Code it could not be said that the application under O. 21, R. 89 of the said Code was necessarily barred. In our view, therefore, there is considerable substance in the contentions of the appellants. However, merely setting aside the sale without giving any equitable relief to the auction purchaser would appear to us, in the facts and circumstances of the case, to be unfair. By reason of such events, as transpired the respondent No. 3 the auction-purchaser has been put in a position where a sum of money namely Rs. 1,44,000/-, probably more than what was required by the decree, has remained blocked as far as he is concerned for a substantial number of years.

3. Taking these factors into account we direct that the auction sale of the said properties shall be set aside on the appellants paying to respondent No. 3 the auction purchaser a sum of Rs. 1,44,000/- together with interest at the rate of 12% per annum from the date of deposit of the said amount till the date of payment. The said amount on calculation by the executing Court be paid by the appellants within a period of four months failing which the appeal shall stand dismissed with no order as to costs. In calculating the amount payable by the appellants to respondent No. 3 credit shall be given to the appellants for the sum deposited in Court and interest earned thereon, if any. The executing Court to calculate the actual amount payable by the appellants to respondent No. 3 within four weeks of an application being made to the executing Court for this purpose. The appeal is disposed of accordingly.

4. No order as to costs.                      Order accordingly.

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