

Tasaddug Hussain Khan

Vs

Shiv Nath Sahu (deceased) through LRs. and Another

(G. N. Ray, G. B. Pattanaik JJ)

26.03.1998

ORDER

1. This appeal is directed against the order passed by the Allahabad High Court on April 17, 1980 in Second Appeal No. 2269/1968 being connected with Second Appeal No.2270/1968. By the impugned judgment, the High Court disposed of the Second Appeal and the cross objection filed by the parties, inter alia, holding that the judgment-debtors respondents were entitled for the restitution of possession of the property purchased by the appellant in auction in execution proceeding and also for a sum of Rs.20,309/- from the auction purchaser-appellant by way of damages and mesne profits subject to payment of Rs.8,000/- by the said judgment debtors to the auction purchaser.

2. It may be stated here that the appellant purchased the property belonging to the predecessor-in-interest of the judgment-debtors in auction in execution of money decree passed against the judgment-debtors. After such auction purchase, the property was again put to auction in execution of the another money decree obtained by a different decree holder and the judgment-debtor in order to save the property had put the decretal amount in order to avoid further sale in execution of the said decree. An application for restitution of the said property was made by the judgment-debtors. Such application was opposed but ultimately the order to restitution under Section 144 of the Code of Civil Procedure was passed in favour of the judgment-debtors. An appeal was taken by the appellant auction purchaser against such order and the appeal was allowed by order dated October 31, 1952 and the case was remanded. After the remand, auction purchaser filed objection to the judgment-debtors' application for restitution, inter alia, contending that the auction purchaser was entitled not only to the payment of Rs.8,000/- being the sale price but also Rs.17,254/- and odd which the auction purchaser had deposited to prevent further sale of the said property in execution of another decree passed against the judgment debtors. The auction purchaser also claimed Rs.3500/- as cost of repairs and Rs.50/- per annum for such repairs since 1942. The restitution application was allowed and the executing court directed for delivery of possession of the disputed property to the judgment-debtors together with a sum of Rs.65,565/- on account of mesne profits and cost to be payable by the auction purchaser-appellant.

3. Being aggrieved by such order of the executing court, the auction purchaser-appellant preferred an appeal and the judgment-debtors also filed appeal against the said order. Both the appeals were disposed of by the Civil Judge by order dated 21st May, 1968. The Civil Judge allowed the appeal of the auction purchaser and directed that the judgment-debtors should pay Rs.8,000/- along with interest which comes to Rs.22,400/- and also a sum of Rs.19,723/- and odd but no direction was given for payment of interest on the aforesaid amount. The appeal of the judgment-debtors was dismissed. The judgment-debtors and acution purchaser both filed appeal and cross-objections before the High Court and the impugned judgment has been passed in such proceeding.

4. During the pendency of this appeal, unfortunately, at the instance of the appellant, the names of the respondent Nos.1/2, 2/1 and 2/2 being heirs of one of the judgment-debtors were deleted from the array of parties at the risk of the appellant. Subsequently, a further order was passed by this Court directing that the attention of the Court should be drawn about such deletion and consequences flowing therefrom.

5. When the appeal was taken up for hearing, Mr. Mehrotra, the learned senior counsel appearing for the respondents, took a preliminary objection that the decree passed by the High Court in the restitution application which is the subject matter of challenge in the instant appeal, cannot be maintained in the absence of some of the judgment-debtors whose names were deleted at the risk of the appellant. The said judgment-debtors jointly obtained the said decree for restitution together with order for payment of certain sums of money by the appellant auction purchaser. Therefore, in the absence of some of the decree holders, no effective order can be passed in this appeal. The decree obtained by the judgment-debtors is a joint decree and not divisible. Therefore, if any order is passed today in favour of the auction purchaser altering the decree passed by the High court the same will bring inconsistent position vis-a-vis the respondents on record and decree holders not on record.

6. Mr.Ray, the learned senior counsel appearing for the appellant, however, has strenuously contended that in equity, the order passed by the High Court is unreasonable and the auction purchaser has been fastened with the liability which was not payable by the auction purchaser. Mr.Ray has contended that it has not been held that there was any illegality or fraud practised by the auction purchaser in the auction sale proceedings. The judgment-debtors although had no liability to pay the amount to satisfy the other money decree passed against the judgment-debtors, but in order to prevent further auction of the said property, in the event of non payment of decretal amount by the judgment debtors, the auction purchaser had to pay the decretal amount on behalf of the judgment debtors. Mr.Ray has submitted that judgment debtors in the first execution proceeding are on record. Therefore, this appeal is maintainable even if other judgment debtors in whose favour order of restitution was made, are not on record in this appeal.

7. We are, however, unable to accept the said submission of Mr.Ray. The question of claim and counter claim of the parties need not be considered on merit because the impugned decree passed in the restitution proceeding has been made in favour of the judgment-debtors whose appeals were allowed by the High Court. Therefore, any variation of the said decree is not possible in the absence of some of the judgment debtors in whose favour impugned decree was passed by the High Court. In our view, Mr. Mehrotra has rightly contended that the decree in the instant case, is indivisible and such decree cannot be interfered with unless all the parties in whose favour such decree was passed are before this Court. This appeal is, therefore, dismissed but without any order as to costs.