ALLAHABAD HIGH COURT

Inamullah Khan

Vs

Lala Shambhu

(Sulaiman, J.)

10.04.1930

JUDGMENT

Sulaiman, J.

1. This is really a first appeal from an order refusing to set aside a sale which has taken place in execution of a mortgage decree. The preliminary decree was passed on 19th April 1927, and the final decree on 2nd December 1927. The mortgagor became an insolvent in September 1927, but the case proceeded against him without impleading the Official Receiver. The auction sale took place on 27th April 1928. In the application which was originally filed the only ground that was taken was as to the gross inadequacy of the price. No specific irregularity of fraud in publishing or conducting the sale was set forth. By a subsequent application the judgment-debtor took the plea that the sale had been put down as No. 23 in the list, but the property was sold first and that in consequence a number of bidders could not be present as they had gone away for Friday prayers. It was also objected that the receiver was a necessary party and should have been impleaded. It was further pleaded that notice under Order 21, Rule 66, had not been served on the judgment-debtor. Last of all it was urged that the value of the property was between Rs. 16,000 and Rs. 17,000, but it was sold for the inadequate price of Rs. 1,975 only. All these objections have been overruled by the Court below.

2. In order to succeed it was incumbent on the judgment-debtor to show in the first instance that there was a material irregularity or fraud in publishing or conducting the sale. Ho cannot be allowed to go outside the scope of Order 21, Rule 90, in these proceedings. The learned advocate for the appellant is unable to show to us any rule which requires that sales of properties should take place in the exact order in which they are entered in the list by the sale officer. According to the sale officer's report his practice always has been to sell first the non-ancestral properties before proceeding to sell the ancestral properties. In the absence of any rule requiring him to follow the order strictly it cannot be said that there has been any material irregularity within the meaning of Rule 90. On this ground alone the application is liable to be dismissed.

3. The oral evidence to show that the objector was in the village on the day when the notice under Order 21, Rule 66, was sent out to be served on him has been believed by the Court below. No serious discrepancies have been pointed out to us and the statement of the judgment-debtor as to his absence on 29th January 1928, when the notice was served, is uncorroborated by any other evidence. In any case the notice was affixed on the door of his house which was occupied by the other members of his family and there was thus good substituted service.

4. The learned advocate for the appellant has next contended that the Official Receiver was a necessary party to the mortgage suit and in his absence the sale cannot bind the mortgaged property. We find that this interpretation of the provisions of Sections 16 (4) and (5), Provincial Insolvency Act, 1907, has been laid down by their Lordships of the Privy Council in the case of *Kala Chand Banerji v. Jagannath Marwari*[1] The language of the corresponding Section 28 of the new Act is practically identical. But this can only moan that the right of the Official Receiver to redeem the property has not been extinguished by the sale, It may be open to him still to sue for redemption, and it may be possible for him to object to the mortgagee's name being entered in the schedule of creditors if the security is not given up; but it is quite clear that the judgment-debtor cannot get the sale set aside on that ground. It is not for an execution Court to decide that the decree passed against the appellant does not bind him or that it is not capable of execution. So far as the appellant is concerned he is bound by the sale unless he can satisfy the Court that there has been a material irregularity in consequence of which he has suffered substantial injury. In our opinion he has failed to establish that. The appeal is accordingly dismissed with costs.