

ALLAHABAD HIGH COURT

Hira Lal

Vs.

Champa

Second Appeal No. 900 of 1951

(Malik, C.J. and Gurtu, J.)

03.04.1951. 24.09.1954

JUDGMENT

Malik, C.J.

1. This case has had a chequered history. One Badri Prasad had obtained a decree against Smt. Champa, Ram Kishen and Gaya Prasad. Gaya Prasad being a lunatic and Ram Kishen being a minor, they were sued under the guardianship of Smt. Champa, wife of Gaya Prasad. The suit was decreed and in execution of the decree, a house fetching a rent of Rs. 25/- per mensem was sold at auction on 28-8-1940. The highest bid of Rs. 2,425/- was of the appellants, Hira Lal and two others. The property was sold through a firm of auctioneers and not through the court Amin. The auction-purchasers deposited 25 per cent. on the amount of the purchase-money with the auctioneers appointed by the court. On 11-9-1940, they gave a cheque for the balance to the same auctioneers. The auctioneers, however, did not deposit the amount in court till 14-9-1940. On 5-9-1940, the judgment-debtors filed certain objections under Order 21, Rule 90, Civil Procedure Code It was alleged that the property had been sold for a grossly inadequate price and the house was worth at least Rs. 12,000/- to Rs. 15,000/-. It was also alleged that there were other irregularities in the publication and the conduct of the sale. These objections were dismissed by the executing court on 25-1-1941 and the sale was confirmed. The auction-purchasers filed an appeal which was dismissed on 15-7-1941 by the lower appellate court. There was an execution second appeal filed in this Court which was allowed on 7-10-1949. The order dated 25-1-1941 was set aside and the case was sent back to the trial court for consideration of the objection under Order 21, Rule 90, Civil Procedure Code

On 19-11-1949 the judgment-debtors made an application that they came to know on 16-11-1949, while inspecting the record, that the auction-purchasers had not deposited the balance of the purchase-money within 15 days of the auction sale as required under Order 21, Rule 85 of the Code and submitted that this objection could not be taken on 5-9-1940 when the previous objections were filed but the objection could be urged even without a former written application

and they, therefore, prayed that the sale be set aside and this objection may be considered along with the other objections which had already been filed in court. On 24-2-1950, the lower court considered the objections of the judgment-debtors and as regards the applications dated 19-11-1949, the learned Munsif held that it should have been filed within 30 days under Article 166, Limitation Act, that it was barred by time and it could not, therefore, be taken into consideration. As regards the other objections contained in the application of 5-9-1940, the learned Judge was of the opinion that the house was not worth more than Rs. 4,000/- at the time when it was sold and it could not, therefore, be said that the price of Rs. 2,425/- which it fetched was grossly inadequate. The other pleas of irregularity in the publication and conduct of the sale, it was held, were not proved and the application was dismissed on 24-2-1950. The judgment-debtors appealed. The lower appellate court did not go into the objections contained in the application of 5-9-1940 but held that the balance of the sale consideration not having been paid within 15 days and the provisions of Order 21, Rule 85 being mandatory, there was no sale which could be now confirmed and allowed the appeal and set aside the order of the trial court. Against this order dated 3-4-1951, this second appeal has been filed.

2. A preliminary objection was taken by learned counsel for the judgment-debtor respondents that no second appeal lies. Learned counsel has relied on the provisions of Section 104, sub-section (2) of the Code. Section 104(2) is to the following effect:

"No appeal shall lie from any order passed in appeal under this section."

The appeal before the lower appellate court, it is urged, was under Order 43, Rule 1(j) of the Code. Learned counsel has developed this argument further and has pointed out that the trial court refused to entertain the application of the 19-11-1949, on the ground that it was barred by limitation and the order appealed against was passed under Order 21, Rule 92, dismissing the application dated 5-9-1940, filed under Order 21, Rule 90, and no second appeal would, therefore, lie by reason of the provisions of Section 104(2) of the Code. The lower appellate court, however, did not consider the objections under Order 21, Rule 90 and allowed the appeal on the ground that the sale consideration was not deposited within 15 days as required by Order 21, Rule 85. An objection under Order 21, Rule 85 has been held to be not an objection relating to the publication and conduct of the sale. The point is concluded by the decision of a Full Bench of this Court in -- '*Sita Ram v. Janki Ram*'¹, Learned counsel has to admit that in the appeal that he filed before the lower appellate court, he raised both the objections again and the lower appellate court gave no decision on the first group of objections which fell under Order 21, Rule 90, and decided the appeal on the other objection that the sale consideration not having been deposited within the time allowed, there was no sale which could be confirmed by the learned Judge. In the case of 'AIR 1922 Allahabad 200' the Full Bench quoted with approval the earlier decision of this Court in - '*Ram Dial v. Ram Das*'², which was under the Civil Procedure Code of 1859, as amended by Act 23 of 1861.

The portion quoted in the judgment reads as follows:

"The judgment-debtor and (if his claim be not satisfied out of the proceeds of the re-sale) the original decree-holder stand in the position of decree-holders who have obtained judgment against the defaulting purchaser for damages occasioned by his default. The defaulting purchaser stands in the position of a judgment-debtor against whom a decree for such damages has been passed. They are parties to the proceeding which is substituted for the suit..... and the rule relating to

¹ AIR 1922 Alla 200

²1 All 181

appeals must be applied, 'mutatis mutandis', equally with any other of the rules governing executions of decrees."

The Full Bench then proceeded as follows:

"In effect the view taken was that the adjudication, in a case like the present, between the judgment-debtor and the defaulting purchaser, amounts to a decree and that appeals lie under the provisions governing regular appeals from decrees. The position does not seem to be altered by any changes which have since been made in the law; if anything, the case in favor of the maintainability of an appeal is made a little stronger by the definition of the word 'decree'

in the Code of 1908....."

The facts of that case were that the property had been sold but the person who had made the highest bid failed to deposit 25 per cent. of the purchase-money as required under Order 21, Rule 84 of the Code with the result that the property was directed to be re-sold and on re-sale there being a big deficiency in the price fetched, proceedings were taken to realize the balance from the previous auction-purchaser under the provisions of Order 21, Rule 86 of the Code. It was held by the learned Judges that the order of the lower court amounted to a decree and an appeal lay as an appeal from a decree.

3. If an objection, that the provisions of Order 21, Rule 85 of the Code had not been complied with, is not an objection relating to the publication and conduct of the sale, O.21, Rules 90 and 92, will not apply to it and Section 104 (2) of the Code will not bar a second appeal.

4. Coming now to the merits of the case, learned counsel for the appellants has urged that there was substantial compliance with the provisions of Order 21, Rule 85, inasmuch as the cheque was handed over to the auctioneers within 15 days of the date of the sale. A comparison of Rules 84 and 85 will make it clear that while the deposit of 25 per cent. on the amount of the purchase-money has to be made to the officer or other person conducting the sale, the balance of the

purchase-money has to be paid by the purchaser into court. The handing over of the cheque, therefore, to the auctioneers was not payment into court, nor could it be said that the handing over of the cheque was a deposit of the balance of the purchase-money. We are, therefore, satisfied that the provisions of Order 21, Rule 85, were not complied with.

5. The question then arises whether non-compliance with the provisions of R.85, will make the sale a nullity. On the face of it, the rule appears to be too harsh and technical. But an examination of the authorities makes it clear that R.85 has been interpreted strictly and wherever a deposit has not been made within the time allowed it has been held that the court has no option but to re-sell the property under Rule 86. Under the previous Code of 1882, on default of payment of the balance of the sale price within the period mentioned in R.85, the deposit was forfeited to the Government. If one-fourth of the purchase-money was forfeited to the Government and the Court had no option in the matter, the property had to be re-sold and the previous sale could not be confirmed, The Act of 1908 has now given a discretion to the Court and it is for the Court to decide whether the amount shall or shall not be forfeited to the Government. The rest of the rule remains mandatory and has continued to be interpreted in the same way. The rule provides that:

"The property shall be re-sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold".

6. In a case where the decree-holder and the judgment-debtor agree that it was not necessary to put up the property to auction again and that the property be transferred to the defaulting auction-purchaser and that is done, the sale has been treated as a 're-sale' of the property and not as a confirmation of the previous auction-sale.

7. In - *Nawal Kishore vs. Buttu Mal³*, default had been made by the auction purchaser in paying into court the full amount of the purchase-money within the time allowed under Order 21, Rule 85. After the expiry of the period, the auction-purchaser obtained the permission of the court to deposit the balance of the purchase money which he did on 27-7-1931, i.e., long after the 15 days had expired. This matter was brought to the notice of the learned Judge in the lower court but he dismissed the objection and confirmed the sale. This Court held in appeal that

"rule 85 requires that the full amount of the purchase-money shall be paid by the purchaser into court before the court closes on the 15th day from the sale of the property. That R.86, also requires that in default of payment within the period mentioned in the last preceding rule, the deposit may, if the court thinks fit, after defraying the expenditure, be forfeited to Government and the property shall be re-sold".

and held that the discretion was confined to the forfeiture and not to the re-sale of the property. The appeal was allowed and the lower court was directed to re-sell the property.

The learned Judges relied on an unreported decision of this Court in - *Lala Lachmi Narain v.*

*Chattar Singh*⁴, decided by Sen and Niamat Ullah, JJ. They had held

"It is left to the discretion of the court either to direct or not to direct the forfeiture of the deposit but the rest of the rule namely that in all cases of deficiency of deposit the property shall be resold has been maintained and that the said rule is imperative".

The same view was taken by a learned single Judge in - *Haji Inam Ullah v. Mohammad Idris*⁵, and it was held that Order 21, Rule 86, laid a duty upon the Court to resell the property if the purchase-money had not been deposited in full within the period prescribed by R.85, and the performance of this duty is quite irrespective of any application being made by any party to the proceedings.

8. In - *Kalipada Mukerji v. Basanta Kumar*⁶, the judgment-

³ AIR 1935 All 243

⁵ AIR 1943 All 282

⁴ E.S.A. No.1393 of 1928 (All)

⁶ AIR 1932 Ca126

debtor had agreed that the property be not re-sold and that it be sold to the auction-purchaser even though he had not deposited the rest of the purchase-money within 15 days. The learned Judges held that:

"Section 148 of the Code would not authorize the Court to enlarge the period because the period is fixed by the statute and is not fixed or granted by the Court. But the effect of the consent, in our opinion, is to waive the irregularity in the procedure, and the proper view in our judgment to take of the transaction is to hold that the old sale was equivalent to a resale".

9. In - *Subramanyan Nambudri Karnavan v. V.K.V. Kammathi*⁷, Spencer and Ramesam, JJ. took the view that where the decree-holder, the auction-purchaser and the judgment-debtor are all agreed that the property be not re-sold and it be transferred to the auction-purchaser, the transaction amounted, in effect, to a "re-sale" of the property. It was held that the sale would not be a nullity and it would be deemed that the parties concerned had waived the irregularity.

10. The facts in - *Nathu Mal v. Malawa Mal*⁸, were entirely different and that case is distinguishable. There the balance of the purchase-money was tendered in court within the time but the court directed the auction-purchaser not to deposit the money and the money was deposited within an extended period allowed by the court. The full amount having been tendered within time, it could be treated as payment into court.

11. In - *A.R. Davar v. Jhinda Ram*⁹, it was held that the failure to deposit 75 per cent. of the sale price within a fortnight as required by Order 21, Rule 85, could not be said to be an irregularity in publishing or conducting the sale within the meaning of Order 21, Rule 90, that the Court had no jurisdiction to extend that time beyond 15 days allowed under Rule 85 and the learned Judges agreed with the decision of the Court in AIR 1935 Allahabad 243.

12. The next point raised by learned counsel for the appellants is a question of limitation. It is urged that the application dated 19-11-1949, could be filed within 30 days, if Article 166, Limitation Act, applied or, within three years, if Article 181, applied. In either case, it was said that the application was barred by limitation. Article 166, applies to an application to set aside a sale in execution of a decree. That article does not apply to a case of this kind where it is alleged that there was no sale and the law itself provides that on a default having been made, the defaulting purchaser shall forfeit all claim to the property and the property shall have to be re-sold. Learned counsel has not insisted on the application of Article 166 and has relied on Article 181, which is the residuary article. The argument is supported by reference to a Full Bench decision of the Madras High Court in - '*Rajagopala Aiyar v. Ramanujachariyar*¹⁰', In that case, the sale was held to be invalid as notice of the sale had not been issued to the third defendant in accordance with the provisions of Order 21, Rule 22 of the Code. It was held that the third defendant had a vested interest in the property and the omission to give notice to him rendered the sale void. Then the question arose about the period of limitation applicable to an application by the defendant third party to have the sale set

⁷ AIR 1923 Mad (48)

⁹ AIR 1938 Lah 198

⁸ AIR 1931 Lah 15

¹⁰ AIR 1924 Mad 431

aside on the ground that it was void. The learned Judges were of the opinion that not Article 166 but Article 181, the residuary article, would apply and the application was held to be within time.

13. The same view was taken by Young and Rachhpal Singh, JJ., in - '*Narotam Das v. Bhagwan Dass*¹¹', In that case, the sale had been held by the civil court, while the Collector alone was authorised to sell the property. The sale was held to be void and an application to set it aside was said to be governed not by the provisions of Article 166 but by the provisions of Article 181. In this case also, the application was made within three years.

14. There is therefore, some authority for the view that even in a case where the sale is void if an application is made to have it set aside, the provisions of Article 181, Limitation Act, would apply, that being the residuary article.

15. The position in this case is, however, slightly different. Here the sale had been confirmed by the executing court on 15-7-1941. On 7-10-1949, the High Court had set aside the order of confirmation and had directed the lower court to consider the objection under Order 21, Rule 90 of the Code. On the disposal of those objections, the court had, therefore, to pass a fresh order of confirmation of the sale. If on that date the court knew that the provisions of Rule 85 of Order 21 had not been complied with, and under Rule 86 the property had to be resold, it could not ignore the provisions of the Code and confirm the sale on the ground that neither the decree-holder, nor the judgment-debtors had made an application within time. There is a difference between an application to set aside an order confirming a void sale to which Article 181 might apply, and a

case where the sale has not yet been confirmed and the notice of the court is drawn to certain facts, of which the court is bound to take cognizance, before passing an order confirming a sale. After the High Court had set aside the order of confirmation on 7-10-1949, the court had to reconsider the question whether the sale should or should not be confirmed and if certain facts came to its knowledge, no matter whether on an application filed by the judgment-debtors or 'suo motu', the court could not shut its eyes to them and to the breach of the provisions of R.85 and pass an order confirming the sale in disregard of the provisions of Rule 86 of Order 21.

16. The result, therefore, is that the lower court appears to have taken a correct view and we dismiss this appeal with costs.

Appeal dismissed.

¹¹ AIR 1934 All 314