

ALLAHABAD HIGH COURT

Nand Lal

Vs.

Siddiquan

Civil Revn. No. 941 of 1954, against decision of Munsif, North Faizabad
(V.D. Bhargava, J.)

31.07.1954. 24.04.1957

ORDER

V.D. Bhargava, J.

1. This is an application in revision under section 115 C. P. C. by an auction-purchaser.
2. On 4-11-53 it was ordered that sale should take place on 23-12-53 of the property in dispute. On 23-12-53 sale of the property was held and it was purchased by the auction-purchaser applicant. On that day he deposited 25 per cent. of the purchase money under Order 21 rule 84. The balance of the purchase money he had to deposit within fifteen days from the date of the sale, i.e. the deposit should have been made by 7-1-54 at the latest, as required by rule 85 of Order 21. On 6-1-54, instead of depositing the money, the auction-purchaser prayed for further extension of time to deposit the money till 23-1-54. The court extended the time only by ten days. On 15-1-54 the remaining amount was deposited. On 23-1-54 the sale was confirmed and the sale certificate was granted. On 29-1-54, i.e. after the confirmation of the sale, an application was moved that since the money had not been deposited within the statutory period of fifteen days, as required under Order 21 rule 85 the sale should be set aside, and it is this application which has given rise to this application in revision. The court below held that the sale was a nullity as the 75 per cent. had not been deposited and, therefore, it set aside the sale and ordered resale of the property. Against that order the auction-purchaser has come to this Court.
3. There is a preliminary ground taken by the opposite party that no application in revision lies, for the sale has been set aside under Order 21, rule 92. There is an appeal provided and the applicant should have gone in appeal, under Order 43 rule 1 (j). I asked the learned counsel for the applicant as to whether he treated this order under Order 21, Rule 92 or an order under section 47. In either event there would be a right of appeal whether the sale is set aside under Order 21 rule 92 or on an objection in execution proceeding by the judgment debtor under section 47. In my opinion, in the circumstances the applicant should have gone in appeal against that order and not in revision, and since the order is of the Munsif, the applicant should have

gone to the District Judge.

4. Apart from this fact, I do not see any merits in the case itself and, therefore, I will discuss the case from that point of view also.

5. Learned counsel for the applicant argues that when once a sale has been confirmed under Order 21 rule 92 it cannot be set aside except by means of a separate suit. It is true that if a sale has been confirmed it cannot be set aside except under Order 21 rule 89, unless the application has been made under Order 21 rule 90. Rule 90 applies only when there is valid sale. If there is no valid sale there can be no confirmation of an invalid sale. If confirmation of an invalid sale has been made, it will be an invalid confirmation. So what we have to see is whether the sale was a valid one or not. If it was a valid sale, then it may be that in the present circumstances the application for setting aside the sale may not lie. There are numerous cases in which even after the confirmation of the sale the courts have interfered and have allowed the sale to be set aside. Thus, under section 18 of the Limitation Act when an applicant seeking the setting aside of a sale has by means of fraud been kept from the knowledge of his right, he will be entitled to have the limitation run from the date when he became aware of the fraud, and in spite of the fact that the sale had taken place and had been confirmed he will have the right to challenge it. This has been held by this Court in *Sheo Ram Koeri v. Ikramunnissa Bibi*¹, and *Nazir Hussain v. Kanhaya Lal*², Other Courts have also held the same view. So it is not that in no case a sale can be set aside after the confirmation.

6. It was contended that the article prescribing the period of limitation in the Limitation Act is Article 166. It prescribes thirty days from the date of the sale and there cannot be any extension of the period. In this case it is really not a prayer for the setting aside of the sale on the ground of any illegality or material irregularity and consequent loss. But here the sale is desired to be declared a nullity for which there is no period prescribed in the Limitation Act.

7. Further it was argued that the executing court had no jurisdiction to set aside the sale. The sale, if at all, could have been challenged by means or a separate suit, and reliance was placed on *Harindra Nath v. B. Bhola Nath*³, wherein it was held;

"Where a person other than the decree-holder is the auction-purchaser and the sale is a nullity, the sale can be set aside only on a suit being instituted for the purpose and the executing court cannot set aside the sale on the ground that it is a nullity."

In that case actually this point did not arise and it was only by way of an obiter that this observation had been made, and consequently with great respect I feel I am not bound by this observation.

8. On the other hand in a recent case, *Manilal Mohanlal Shah v. Sardar Sayed Ahmad Sayed*

Mahamad,⁴ the Supreme Court permitted the setting aside of a sale in execution proceeding itself when the purchaser

¹ AIR 1923 All 282

³ AIR 1937 All 407

² AIR 1916 All 184

⁴ AIR 1954 SC 349

was not the decree-holder himself. Therefore I think that executing court had perfect jurisdiction to declare that the sale was a nullity.

9. There is another reason why I think it is only the executing court in such cases which can declare a sale a nullity. In other cases of sale being declared a nullity some questions may arise which may need investigation, and it may be that a separate suit is the proper remedy. But in a case where an auction purchaser fails to deposit the money within fifteen days, there is an imperative duty cast upon the executing court itself to set aside that sale and to order resale of the property. If this could be done by a separate suit only, how would the property be put to resale again? Reading rules 85 and 86 of the Code of Civil Procedure, it is clear that if the sale is to be declared as a nullity or is to be set aside on the ground of the want to deposit the 75 per cent. under rule 85 it is only the executing court which can do it, not by a separate suit.

10. Learned counsel for the applicant laid great stress on section 148, C. P. C. for the purpose that the court had jurisdiction to grant time under that section. This court in *Nawal Kishore v. Buttu Mal*⁵, had held that the Court had no jurisdiction to extend the time and there was no discretion left in the Court. It was observed therein by the Bench :

"Order 21 rule 85 requires that full amount of the purchase money shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property, 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 the Government and the property shall be resold. When the default is made in depositing the balance of the amount as required by R. 85, the Court ought to order the resale of the property. The discretion under Rule 86 is confined to the forfeiture and not to resale of the property".

11. In another case, *Inam Ullah v. Mohammad Idris*⁶, a learned single Judge of this court had also held a similar view. In that case it was further held that it was not necessary for any party to make any application for that purpose. It was observed therein :

"Rule 86 of O. 21 lays a duty upon the Court to resell the property if the purchase money has not been deposited within the period prescribed by the preceding R. 85. The performance of this duty is quite irrespective of any application being made by any party to the proceeding." It was further held :

" Where an auction purchaser fails to deposit the full amount of purchase money payable by him on the 14th day from the sale of the property, then under Rule 86 the sale by which the auction purchaser purchased the property is automatically cancelled and he can have no interest in the property which was the subject of the sale".

I respectfully agree with the observation of the learned Judge. If there is no interest

⁵ AIR 1935 All 243

⁶ AIR 1943 All 282

which is acquired by the applicant there is no question of any confirmation of the sale.

The sale could only be confirmed if there was any interest acquired by the auction purchaser. Under section 148, C. P. C. power is vested in the court to grant time. But it does not authorize the court to extend the period which is already fixed by the provision of the statute itself. Section 148, C. P. C. reads as follows :

"Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, from time to time enlarge such period, even though the period originally fixed or granted may have expired."

12. The section is clear. It is only the period which has been fixed or granted by the court which can be enlarged and not the period which is fixed by the statute. Here a period of fifteen days is fixed by the Code of Civil Procedure and the court had no jurisdiction to extend that time and the extension of time granted by the court was wholly erroneous and without jurisdiction.

13. There is another reason why in this particular case, at least, the court had no jurisdiction to extend the time. The period mentioned has been fixed by Rule 85 and the mandatory provision of rule 86 is

"In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be resold, 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".

The rule does not say if the default is made within the period mentioned in the last preceding rule or such extension as may be granted. It is confined to the period of fifteen days; and if within these fifteen days the deposit is not made the court is to resell the property. The word used is "shall" and not "may" and therefore, the court has no other alternative except to resell the property. If the intention of the Legislature particularly in this case was that time of fifteen days could be extended, rule 86 would not have been worded in the language in which it has been worded.

14. Though this question did not directly arise in the recent decision of the Supreme Court AIR 1954, SC 349, the observations of their Lordships are to the same effect. They have observed :

"If the payment is not made within the period of fifteen days, the Court has discretion to forfeit the deposit and there the discretion ends; but the obligation of the Court to resell

the property is imperative. A further consequence of non-payment is that the defaulting purchaser forfeits all claim to the property. Now if a purchaser, by virtue of section 86, has forfeited all claims to the property there is no right left in him".

15. In the same Supreme Court decision their Lordships have also held that even the inherent powers of this Court cannot be invoked for this purpose. They have observed;

"The inherent powers of the Court cannot be invoked to circumvent the imperative provisions of the Code and relieve the auction-purchasers of their obligation to make the deposit of the purchase money under Order 21 rule 85".

16. Lastly it was contended on behalf of the applicant that on equitable grounds this Court should interfere and maintain the sale. If the sale is a nullity this Court cannot allow the sale to stand on mere equitable grounds. Secondly, there are no inequities in favor of the auction-purchaser. He had failed to deposit the money within fifteen days and, according to himself, he had no money to pay within that time. If he had no money to pay within time he should not have gone near the sale; and if he had purchased the property when he had no money and later on the sale is set aside, he has to thank himself.

17. In the result, I see no force in this application in revision. It is accordingly dismissed with costs.

Revision dismissed. .