

CALCUTTA HIGH COURT

New Birbhum Coal Co., Ltd

Vs

Surendra Nath Laik

(Mitter ,J.)

28.04.1933

JUDGMENT

Mitter, J.

1. This is an appeal on behalf of the decree-holder auction-purchaser against an order of the Subordinate Judge of Asansol dated 10th October 1931 by which he set aside a sale of certain coal lands in execution of a decree.

2. I cannot say that I have found this case free from difficulty or that my opinion has not been in suspense during a considerable part of the argument. For a long time during the course of the argument I had relected whether I should be justified in upholding an execution sale which has fetched a very inadequate price, but after full consideration of the evidence and the authorities I have come to a conclusion satisfactory at least to my own mind. I am constrained to arrive at the conclusion that the sale must be upheld and the order of the lower Court set aside for reasons which are detailed below:

3. It appears that on 1st August 1904 a lease was granted by the New Birbhum Coal Co., who are the appellants before us to the Laiki in respect of certain coal lands. A suit was brought by the Company against Jugal Kishore, widow of one of the Laiks and Ashutosh, Surendra and Fakir Laiks for recovery of the royalty. In 1923 the judgment debtors brought a suit (No. 79) against the decree-holders for Rs. 2,80,240 for damages for extracting fire clay. On 21st September 1926 the Company obtained decree in their suit. On 4th January 1927 there was a compromise between Jugal Kishore and the Company in Suit No. 79. It is necessary to refer to this suit as it is one of the contentions of the judgment-debtors that feelings were considerably strained between the Company and the other Laiks for their not joining in the compromise in the damage suit and the Company wanted to get hold of the leased lands by fraudulent means by suppressing the sale proclamation and other sale processes, a matter to which I shall return hereafter.

4. On 6th June 1927 the first application for execution was made but was struck off. On 7th July

1927 a fresh application for attachment and sale of immoveable properties was made, and the order-sheet of 25th July records that the writ was served. On 29th July the judgment-debtors wanted time to object. On 8th August 1927 the decree-holder applied for issue of the sale proclamation. The judgment-debtors' objection to attachment was numbered as Case No. 61. On 7th January 1928 the objection of the judgment-debtors to the attachment which was numbered as Execution Case No. 61 was dismissed. The Court on the same date directed the issue of notices under Order 21, Rule 66. On 2nd April 1928 notice under Order 21, Rule 66 for settlement of price in the sale proclamation was directed to be issued. On 14th May 1928 the order-sheet records that notice was served. On 26th April 1930 the proclamation of sale was issued. On 23rd May a vernacular news paper known as the Burdwan Bani which contained advertisement of the sale was sent to the judgment-debtor; a fresh proclamation was directed to issue on the 5th September, and on 26th September 1930 Burdwan Bani was sent to the judgment-debtors. A third proclamation of sale was issued on 3rd September 1930 fixing the sale for 5th January 1931.

5. On 22nd December 1930 the judgment-debtors applied to stop the sale on the following amongst other grounds: (1) the attachment not effected, (2) sale proclamation not served, and (3) the valuation given in the sale proclamation excessively low. On this a proceeding is started and on 23rd December 1930 the Nazir's report is submitted regarding the attachment (P. II, p. 66) and on 5th January 1931 the judgment-debtors' objection regarding the stopping of the sale is heard and the clerks of the execution department were heard and examined.

6. On 6th January 1931 the judgment-debtors put in a petition in which they waive the irregularities in the service of the writ of attachment and sale proclamation, and on this the sale is adjourned to 2nd March, and on 2nd March an application for adjournment of sale for a month is refused and the adjournment is granted till 6th March 1931 and on 6th March 1931 the sale was held and the leasehold property was purchased by the decree-holder Company. On 31st March 1931 the judgment-debtors made the application to set aside the sale under Order 21, Rule 90, Civil P. C., on several grounds which are detailed at p. 74 of the paper-book. It is only necessary to refer to four of them for the purposes of the present appeal. The sale is attacked on these grounds amongst others: (1) no attachment of the properties in accordance with law; (2) for that the properties have been grossly under valued in the sale proclamation and that by itself is an irregularity sufficient to set aside the sale ; (3) for that there was no proper publication of the sale proclamation; (4) for that there was no service of notice under Order 21, Rule 66 of the Code and that these irregularities have led to extreme inadequacy of price, i.e., to substantial injury within the meaning of Order 21, Rule 90. The decree-holder company on the other hand maintained that the processes of attachment and (she notice under Order 21, Rule 66 and the sale proclamation were duly served, that there has been waiver of irregularities even if there are any, and there has

been no substantial injury, and evidence was led in respect of the respective contentions of the parties.

7. The Subordinate Judge reached the following conclusions: (1) that there was no attachment of the property; (2) that the sale proclamations were not duly published; (3) that the judgment-debtors have not waived their right to impeach the sale on the ground of fraud; (4) that the valuable property has been sold for Rs. 7,000, a grossly inadequate price, and the petitioners have sustained substantial injury as the result of material irregularity and fraud and set aside the sale. Against this order the decree-holders have brought the present appeal and Mr. S. M. Bose, the learned counsel appearing for them, has in an able argument challenged both the conclusions of law and fact reached by the Subordinate Judge. (After examining the evidence, His Lordship held that attachment was effected and that notice under Order 21, Rule 66 for settlement of price in the sale proclamation was served. The judgment then proceeded). The next and most important irregularity complained of and that which appeared to me of some difficulty is that the gross undervaluation in the sale proclamation was itself evidence of fraud and is sufficient to vitiate the sale if it has led to substantial injury. So far as the value of the property is concerned, I agree with the Subordinate Judge that at the lowest computation its value cannot be less than Rs. 12,000 and it may be much more. There is no doubt therefore that there has been substantial injury.

8. The question is whether this irregularity had led to substantial injury. There is no direct evidence in this case that this irregularity had led to the low price fetched at the sale. The judgment debtors-respondents have relied on the decision of their Lordships of the Judicial Committee in the case of *Sadatmant v. Phul Koer*¹ in support of the contention that this understatement is more than a mere irregularity in the ordinary sense of the term and by itself is sufficient to vitiate the sale. On the other hand the case of *Sadatmant* has been distinguished on the ground that; the judgment-debtor in that case had no notice of the gross undervaluation, whereas in the present case the judgment-debtors had full notice of the undervaluation, and while they raised' objection on this score they ultimately withdrew the same. On the same ground the decision of the Judicial Committee in the case of *Krishna Prasad v. Moti Chand*² to which the attention of the learned counsel for appellant was drawn, by me, is sought to be distinguished. I think the present case is distinguishable from the two cases on this ground. It appears, in the case last cited that the judgment-debtor was dead and although the decree-holder applied for issue of notice on the heir of the deceased judgment-debtor nothing was done. The permission to bid was obtained by the decree-holder on the day of the sale and on that day the property was purchased for an extremely inadequate value, and further as appears from p. 144 of the report, that it does not appear that any of the proceedings in the attachment was served on any person representing the infant.

9. In the case of Sadatmant Khan (1898) 20 All 412 (SUPRA) also all the proceedings were taken behind the back of the judgment-debtors and it was held that the sale could not stand. It is much to be regretted that the Subordinate Judge, when he settled the sale proclamation, did not care to notice the statement in the petition for execution that the judgment-debtors have a right to receive annually from the decree-holder the sum of Rs. 1,222.6.0 on account of Mouzas Belrui and Lalbazar and this itself would have shown that the value of the 16 annas of the property, eight annas of which was sold, would be about Rs. 24,000 and the value of the eight annas would be Rs. 12,000. In these proceedings it is the duty of Subordinate Court to settle the value of the property sought to be sold as accurately as possible, for the misstatement of the value of the property is calculated to mislead possible bidders and to prevent them from offering adequate prices or from bidding at all. Merely because the judgment-debtors do not appear it does not relieve the Court from ascertaining the true value from such materials on the record as were available. The Court had this statement of the decree-holders themselves before it and if it had paid slight attention to it the value would not have been stated at the low figure at which it was put by the decree-holders. Such a misstatement of value where the discrepancy between the real value and that statement of value in the sale proclamation is glaring is calculated to excite suspicion of something wrong with the title and so to deter bidders. It is desirable to draw attention to what was said in Sadatmant case (1898) 20 All 412. Their Lordships said: It is something more than the kind of irregularity which is commonly alleged, for it is a misstatement of the value of the property which is so glaring in amount that it can hardly have been made in good faith and which, however it came to be made was calculated to mislead possible bidders and, to prevent them from offering adequate prices or from bidding at all; and I would have affirmed the order of the Subordinate Judge if it could be shown that this order was made without notice to judgment-debtors and behind their back. A different situation arises however when the judgment-debtors having had notice of the statement of value in the sale proclamation lie by and do not take any steps to have the sale proclamation rectified and the principle of the cases to which I will refer presently becomes applicable. It was open to the judgment-debtors to move the High Court against the ex parte order under Order 21, Rule 66 and to get the Court to fix the proper price and to state the same in the sale proclamation, but nothing of the kind was done and in my opinion this is a circumstance which renders it difficult for the judgment-debtors to contend that the sale should be set aside on the ground of the misrepresentation of value in the sale proclamation. In a case where a judgment-debtor had notice of a misdescription of the property advertised to be sold their Lordships of the Judicial Committee said this: It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtors could lie by and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knew well but of which the execution creditor or decree-holder might be perfectly ignorant that they should take no

notice of that and allow the sale to proceed and' then come forward and say that the whole proceedings were vitiated. This in their Lordships' opinion cannot be allowed: see *Arunachellam v. Arunachellam*³

10. This principal applies also to the case where the misrepresentation in the sale proclamation is regarding the value of the property. The judgment-debtors after raising objection to the undervaluation afterwards withdrew the same as appears from the order-sheet and in such circumstances they cannot be permitted to complain after the sale that there was misrepresentation of value and the sale must be set aside on that ground. For the foregoing reasons I would allow the appeal and hold that the order of the Subordinate Judge should be set aside and the sale confirmed. We are not prepared however to allow any costs to the decree-holder company seeing that if they had seen the proper value put in the sale proclamation perhaps all these protracted proceedings would not have taken place and seeing further that they had purchased at an inadequate price and they would not be any loser if they have to bear the costs of this litigation. Let the records be sent down as speedily as possible.

M.C. Ghose, J.

11. This is an appeal by the decree-holder, the New Birbhum Coal Co. Ltd., in a case of setting aside an auction-sale in Court. The facts in brief may be stated: The decree was obtained in September 1926, the case having been brought in 1922. The present application for execution was brought on 7th July 1927 praying for attachment and sale of the property in dispute. The judgment-debtors raised various objections and carried the matter twice in appeal to the High Court with the result that the sale was not held till 6th March 1931 when the decree-holder company purchased the property in auction. Thereafter on 31st March 1931 the judgment-debtors applied under Order 21, Rule 90 to set aside the sale. The learned Subordinate Judge has set aside the sale. Hence the appeal by the decree-holder auction-purchaser.

12. The learned Court below found that the decree-holder fraudulently suppressed the attachment notice and sale processes and by reason of such fraud the property was sold at a very low price causing substantial injury to the judgment-debtors. In appeal it is urged that the findings of the learned Subordinate Judge are erroneous. The decree was obtained against one Jugal Kishori Debi as well as the judgment-debtors. It was argued on behalf of the judgment-debtors that the decree-holder company having compromised the case with Jugal Kishori Debi are trying to have the petitioners' interest in the property by means fair or foul. The learned Subordinate Judge accepted this allegation. It is urged on behalf of the appellant company that the learned Subordinate Judge made a wrong conclusion and thereby prejudiced himself in the consideration of the evidence, that there is nothing on the record to show that the decree-holder company is actuated by any malicious or unfair motives against the judgment-debtors. It is urged that they

only wanted to execute their decree and in proof of their fairness, on 8th October 1931, during the hearing of the present case in the Court below, they filed an application stating that they were ready and willing to give up the property purchased in the execution case if the money due to the decree-holder be paid by the judgment-debtors. I am of opinion that it is right to discard all allegations of bad motives and fairly consider the evidence of both sides.

13. In order to bring about the sale three processes were necessary: (1) a process of attachment of the property; (2) a notice under Order 21, Rule 66; and (3) a sale proclamation. All the evidence was fully read and commented upon by the learned advocates of both sides. (After discussing the evidence His Lordship held that the attachment and sale proclamation were duly served. The judgment then proceeded.) The last and most important argument on behalf of the judgment-debtors is that their valuable property was stated by the decree-holders to be worth only Rs. 2,000 and that this undervaluation has led to a low bid and the judgment-debtors have thereby suffered substantial loss.

14. It is admitted by the learned counsel for the appellant that the value stated in the sale proclamation was too low. He urged however that there was another bidder besides the decree-holder at the auction and the decree-holder purchased the property at Rs. 7,000 which having regard to all the circumstances was not 1934 C/27 & 28 a low bid. It is urged on behalf of the judgment-debtors that the Court below should have ascertained the proper value of the property before putting it up for sale. For the appellant it is urged that the description of the property was correct in all particulars except the valuation and that the description including the valuation as stated in the sale proclamation was identical with the schedule to the petition of execution which was filed on 7th July 1927. It is Urged by the appellant that the judgment-debtors may be presumed to have known in 1927 about the value stated by the decree-holder. For in 1927 they obtained a copy of the execution petition and filed it in the High Court in an appeal which they preferred against the execution. On 22nd December 1930 in a petition to the Court below the judgment-debtors stated that their property worth about 20 lacs of rupees was advertised for sale at a very nominal sum. Afterwards on 6th January 1931 they came to an arrangement with the decree-holder for adjournment of the sale for two months and withdrew their objection to the execution. It is urged that by waiving their objection to the execution they in effect withdrew their objection to the valuation and they cannot now be permitted to ventilate the same objection.

15. As to the correct valuation of the property a witness on behalf of the judgment-debtors has stated that he would have bidden Rs. 20,000 for the property. On behalf of the appellant it is urged that the said witness Kanti Ram Bandopadhyaya is a common person whose evidence in this respect should not be believed; he was a contractor who once purchased some land at an auction-sale for Rs. 125 only. He pays no income-tax and he gave up the contract business about two

years ago. There is no other direct evidence on the side of the judgment-debtors as to the value of the property. It appears however that the Patni estate of which the property in dispute is a half share was bought in 1904 at Rs. 24,000. It may be taken therefrom that the property in dispute was then worth about Rs. 12,000. In the circumstances I am of opinion that on fair valuation the property would be worth more than Rs. 7,000 at which the decree-holder purchased it. It is how ever well-known that properties seldom fetch their market value in a Court auction-sale for the auction-purchaser has to take account of the fact that the judgment-debtors in most cases prefer objection to set aside the sale and the matter may drag on for years keeping the auction-purchaser out of possession and entailing legal expenses. Many reported cases have been cited on both sides. On the side of the judgment-debtors reliance has been specially placed on the case of *Sadatmand Khan v. Phul Kuar* (1898) 20 All 412 (Supra). In that case their Lordships of the Privy Council held that an understatement of the value of the property in a sale proclamation was a material irregularity. In that case the judgment-debtor was a pardanashin lady who was kept in entire ignorance about the sale processes and property worth Rs. 8,000 was purchased by the decree-holder at Rs. 670. They also quoted the case of *Krishna Prosad Singh v. Moti Chand* (1913) 40 Cal 635 where the original judgment-debtor had died and the decree-holders did not take steps to serve the sale processes on any person representing the infant heir of the judgment-debtor.

16. The annual profit was over Rs. 4,900 but the decree stated the value as being Rs. 2,000. The main point in both the above cases was that the judgment-debtor was kept in entire ignorance of the sale. In this case the judgment-debtors were vigilant for a period of 4 years up to the date of the sale. The appellant quoted the cases of *R. Olpherts v. Mahabir Pershad Singh⁴ and T.R. Arunachellam Chetti v. V.R.R.M.A.R. Arunachellam Chetti* (1888) 12 Mad 19 (supra). In both those cases their Lordships of the Privy Council upheld the sale in the circumstances of those cases. It was held that irregularity alone is not a ground for setting aside the sale. It must be proved by the applicant that there was some substantial injury in consequence of the irregularity. That the judgment-debtors knowing the misdescription of the property in the proclamation cannot be allowed by law to keep quiet for a long time and afterwards make a grievance of it. Much reliance was placed on behalf of the appellant in the case of *Maharaj Bahadur Singh v. Sachindra Nath Ray* where the judgment-debtor knowing of the undervaluation did not make his objection in proper time and their Lordships dismissed the judgment-debtor's appeal.

17. In this case the judgment-debtors knew of the undervaluation in 1927. They made various objections and carried them up to the High Court but did not make any objection as to the undervaluation till December 1930 and even those objections were withdrawn by them in January 1931. It was only after the sale had been effected that they made a grievance of the undervaluation. In the circumstances, having regard to the principles of the cases noted above, I

am of opinion that there is force in the argument on behalf of the appellant that the judgment-debtors cannot at this late stage be allowed to make a grievance of the undervaluation. Also there is no evidence that it was the undervaluation which led to a low price at the sale. Order 21, Rule 90 provides that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the appellant has sustained substantial injury by reason of such irregularity or fraud. The judgment-debtors did not themselves give evidence. The witnesses who were examined on their behalf deposed that the sale processes had not been served and it was that fact which led to a low price at the sale. None of them stated that it was the undervaluation of the property which led to a low price at the sale. In the circumstances I am of opinion that this appeal should be allowed and the sale should be upheld. I agree in the order which my learned brother proposes to make.

Cases Referred.

1(1898) 20 All 412

2(1913) 40 Cal 635

3(1888) 12 Mad 19

4(1884) 9 Cal 656