

# CALCUTTA HIGH COURT

Rabindra Nath Banerjee

Vs.

Harendra Kumar Chakravarty

Suit No. 2933 of 1953

(P.B. Mukharji, J.)

13.01.1956

## ORDER

### **P.B. Mukharji, J.**

1. This is an application on chamber summons by Sunil Kumar Mukherjee of No. 4/5, Hem Kar Lane, Calcutta for an order setting aside the sale of premises Nos. 21/B and 31, Gokul Mitra Lane, Calcutta, held by the Sheriff on 24-8-1955 in execution of the decree passed in this suit.

2. The application is on summons to the plaintiff decree-holder, the defendant judgment-debtor and the two purchasers. The plaintiff states that his decree has been satisfied by the applicant. The defendant has not appeared. Of the two purchasers one Ranjit Ghose appearing through an attorney has neither supported nor opposed this application and his only submission is that in case the Court set aside the sale he should be allowed to withdraw the deposit that he had made without a further application, a course to which there is no objection from any of the parties. The opposition is from the other purchaser Kanak Ghose who is himself an advocate of this Court and who has appeared in person.

3. The chamber summons was taken out on 21-11-1955 on the reopening of the Court after the long vacation on which date the applicant obtained the following ex parte order :

"Application noted as made today. Leave granted to the applicant to deposit Rs. 637-8-0 with the Registrar being the 5% of the purchase price for payment to the auction purchasers. The Registrar to act on a signed copy of the fiat. This order is without prejudice to any objection that may be taken later."

4. The summons was returnable on 29-11-1955.

5. The facts of the case are few. The decree in this suit was made on 28-4-1954 directing the defendant to pay to the plaintiff the sum of Rs. 8696/- with interest and three-fourths of the taxed costs. In execution of the decree the said premises were attached in 1954 and thereafter the

Sheriff on 24-8-1955 sold the said premises. Respondents Ranjit Ghose and Kanak Ghose became the highest bidders and purchasers respectively on 21/B, Gokul Mitra Lane for Rs. 2,200/- and 31, Gokul Mitra Lane for Rs. 10,550/-. The sale proclamation issued by the Sheriff shows that the amounts for which the sale was ordered were the sum of Rs. 8,696/- being the principal of the decree with interest and the sum of Rs. 1371-12-9 being the three-fourths share of the taxed costs. The interest came up to Rs. 816-3-0 and the approximate costs of execution proceedings about Rs. 500/-.

6. On 11-7-1955 while the said premises were under attachment the judgment-debtor entered into an agreement for sale with the applicant in respect of No. 31, Gokul Mitra Lane. It is stated in the petition that the price fixed under that agreement for sale was Rs. 13,000/- and that Rs. 5001/- was paid as earnest money on 11-7-1955. The sale by the Sheriff took place thereafter on 24-8-1955. Then what the applicant did was to pay to the defendant the said purchase price in two installments one of Rs. 6,000/- on 20-11-1955 and the balance with interest and costs on 21-11-1955 being the date on which the present application was made.

7. The applicant's contention is that what remained to be paid thereafter was only the sum of Rs. 637-8-0 being 5% of the purchase price as solatium to the purchaser. It was this amount of money which was deposited in Court with the Registrar on 21-11-1955. The applicant submits that he is entitled to make this application and set aside the sale under the provisions of Order 21, Rule 89, Civil Procedure Code.

8. Two objections have been urged by the respondent purchaser Kanak Ghose. The first objection is that the applicant has no locus standi to make this application. The second objection is that Order 21, Rule 89 has no application to the present case and therefore the application is incompetent.

9. Taking up the first objection, the argument is that the applicant has no interest to set aside the sale. The language of Order 21, Rule 89 states that any person "holding an interest therein" (property sold in execution) "by virtue of a title acquired before such sale" may apply to have the sale set aside. On a construction of that language it is clear that the applicant must be a person, who answers two requisite qualifications. One is that he must be a person who holds "an interest" in the property sold in execution of the decree. The other is that his "title" must be such as was acquired before such sale. It is contended that the applicant does not satisfy these two qualifications.

10. If title is acquired by the full payment of the purchase price then it must be recalled that the payment of the purchase price in this case was not made complete until 21-11-1955 being a date after the sale had been held by the Sheriff on 24-8-1955. To that contention the answer is that the word "title" does not necessarily mean a complete and perfected title but also includes an inchoate title or a title in process of maturity. The argument on behalf of the applicant is that he acquired an interest in the property sold in the execution when he entered into an agreement for sale with the judgment-debtor on 11-7-1955 which was prior to the date of sale by the Sheriff.

11. In support of that contention the applicant's counsel relied on an unreported decision of Mukherjee and Sen, JJ. in the Civil Appellate Jurisdiction in '*Dhirendra Nath Roy v. Harsukdas Balkissendas*', from the order of the Subordinate Judge of 24 Parganas in title execution case

No. 82 of 1939. In that decision Mukherjee, J. is reported to have said

<sup>1</sup> A.F.O. No. 253 of 1940 (Cal)

"After all it is enough For the executing Court that there was prima facie an agreement for sale between the parties which was subsisting at the date of the contract which would give the appellant sufficient interest to protect the property by depositing the decretal dues."

12. My attention was also drawn to the case of '*Gostha Behari v. Sankar Nath*', reported in<sup>2</sup> where a Division Bench of this Court came to the conclusion that a transferee from the judgment-debtor of immovable property attached in execution of a decree for money becomes the owner of the property and is competent to make an application under Rule 89 Order 21, Civil Procedure Code for cancellation of the sale in execution, of the decree. The basis of that judgment is that the effect of Section 64, Civil Procedure Code was not to invalidate, for all purposes, a transfer of property by the judgment-debtor after it had been attached in execution of a decree against him. The ratio of that decision is stated in these terms :

"We must hold accordingly that the transferee from the judgment-debtor after attachment became the owner of the property and undoubtedly acquired an interest therein within the meaning of Rule 89 and was competent to apply under that section."

13. Reliance was also placed on behalf of the applicant on a decision of the Patna High Court in '*Mundrika Singh v. Nanda Lal Singh*', reported in<sup>3</sup> where Monoharlal, J. came to the conclusion that where attached property had been sold by auction and a third person within SO days made an application under Order 21, Rule 89, Civil Procedure Code on the strength of a contract of sale executed in his favor by the judgment-debtor before the auction sale, he should be allowed to do so as he had 'locus standi' to make the application under Order 21, Rule 89.

14. These decisions 'prima facie' support the applicant's contention that he is a person of sufficient interest within the meaning of Order 21 Rule 89 to make the present application.

15. But the difficulty with these decisions is that they do not go far enough in their analysis to show how such a conclusion is reached. I am of the opinion on the point of construction that the word "title" in Order 21, Rule 89, Civil Procedure Code includes not merely completed and perfected title but a title in process of maturity. But even then the question remains, whether an agreement or a contract for sale creates an interest in the immovable property sold in execution after attachment. The mere right to sue for specific performance of a contract for sale may not be decisive, because it has been held that right to sue for specific performance is a personal right to call for execution of a conveyance and not itself an interest or charge on immovable property, although when the conveyance would be executed that would create interest and title in immovable property. None of these decisions appears even to refer to the most relevant section which is Section 54, Transfer of Property Act. That section provides 'inter alia'

"A contract for the sale of immovable property is a contract that a sale of such

<sup>2</sup> AIR 1917 Cal281

<sup>3</sup> AIR 1941 Pat 204

property shall take place on terms settled between the parties. It does,, not of itself create any interest in or charge on such property."

In other words, a contract for sale by itself does not create either an interest or a charge on the property. The language of Order 21, Rule 89 insists that the applicant must be a person holding "an interest" in the property sold in execution. The question therefore is, can it be said that the agreement for sale in this case on 11-7-1955 created an interest in the property ?

16. The answer to this question depends on the nature of the agreement for sale in each case. The language of Section 54 emphasizes that "of itself" a contract for sale does not create any interest or charge on the property. But very often a contract for sale does not stand by itself where there is a part payment of the purchase price or payment of what is called the earnest money. In that event Section 55(6)(b), Transfer of Property Act would be attracted and it will be treated as though the ownership of the property had passed and there is a charge for part of the purchase money paid. In this case the applicant paid Rs. 5001/- as earnest money on 11-7-1955, the date of the agreement, and this date was prior to the date of the sale which was 24-8-1955. That shows that such a purchaser under an agreement for sale has an interest and even a charge in the immovable property sold in execution. That being so I hold that he answers the requirements under Order 21, Rule 39, Civil Procedure Code of a person holding an interest in the property and having acquired a kind of title, may be only a charge, before the sale held by the Sheriff. Having regard to the fact that the applicant has in this case actually a charge for the earnest money in the property sold it becomes unnecessary to decide the debatable controversy appearing in '*Baidyanath v. Ra-dharani*', namely, Whether the Calcutta amendment of Order 21, Rule 89, Civil Procedure Code by using the word "interest" and omitting the word "title" has so enlarged its meaning as to include pecuniary, or possessory or personal or other interest apart from proprietary interest. I therefore express no opinion on the Calcutta Amendment on this point.

17. Another objection on this branch of the case was raised on the ground that the premises sold were under attachment at the time of the agreement for sale. It was contended that a private alienation of attached property was void under Section 64, Civil Procedure Code. This objection cannot be sustained because it fails to take note of the fact that attachment does not make a subsequent transfer void for all purposes but void only as against "all claims enforceable under the attachment". That is the express limitation provided in Section 64, Civil Procedure Code. Here in this case the transfer far from being against any claim enforceable under attachment goes to effectuate the very purpose of attachment, namely, payment of decree-holder's dues. Order 21, Rule 54, Civil Procedure Code prohibits the judgment-debtor from transferring or charging the attached property and all persons from taking any benefit from such transfer or charge. A breach of that prohibition does not render the transfer or charge void against the whole world but only against "claims enforceable under the attachment" as provided in Section 64, Civil Procedure Code. As the agreement for sale in this case has not defeated any claim under the attachment, I hold such agreement to be valid.

18. The next serious objection is that this application is incompetent under Order 21, Rule 450 Cal. W, N. 394 (397)

89 on the ground not that the applicant has no locus standi but that such an application is only permissible where both the deposits, one for the payment of solatium of 5% to the purchaser and the other for the payment of the decree-holder, are made in Court and not where the whole of the decretal amount has been paid outside the Court by means of a private arrangement between the

Judgment-debtor and the third party the applicant.

19. On a plain reading of the language of Order 21, Rule 89, Civil Procedure Code it is clear that such an applicant may apply to set aside the sale on his "depositing in Court" (1) a sum equal to 5% of the purchase-money for payment to the purchaser and (2) the amount specified in the proclamation of sale less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder, for payment to such decree-holder. The words "depositing in Court" qualify both these sums. The question now is that where nothing remains due to the decree-holder can the benefit of this rule be had by the applicant by depositing only the 5% statutory compensation for the purchaser? In this view Order 21, Rule 89 is normally said to contemplate a case where something remains to be paid to the decree-holder and not the case where nothing remains to be paid to the decree-holder.

20. The Privy Council decision in '*Nanhelal v. Umrao Singh*' reported in<sup>5</sup> is called in aid of this interpretation. That decision lays down the proposition that the Court has no jurisdiction to set aside a sale on an application by the decree-holder between the sale and its continuation, that a full adjustment of the decree arrived at between himself and the judgment-debtor out of Court may be recorded and certified. Sir George Lowndes delivering judgment of the Judicial Committee of the Privy Council at pages 35-33 observed :

"The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in it. 89, viz., by depositing in Court the amount for the recovery of which the property was sold, together with 5 per cent on the purchase money, which goes to the purchaser as statutory compensation, and this remedy can only be pursued within 30 days of the sale under Article 138 Schedule I, Limitation Act, 1908."

21. That dictum appears to require deposit of both the sums in Court as an essential condition to attract Order 21, Rule 89.

22. A Division Bench on the Civil Revisional Jurisdiction of this Court in '*Jotish Chandra v. Bireswar Halder*', reported in<sup>6</sup> decided that there was no authority for the proposition that in every case of an application under Order 21, Rule 89, Civil Procedure Code, for setting aside a sale, there should be a cash deposit in Court of the amount specified in the sale proclamation. This decision is also an authority on the point that payments to the decree-holder need not necessarily be made before the sale or through the Court. It was held there that the amount received by the decree-holder since the sale proclamation being deductible under Rule 89(1)(b) of Order 21, such payments could be made after the sale proclamation and either before or after sale and if so made so that nothing remained due to the decree-holder, then the application, accompanied only by a Court deposit of the compensation money payable to the auction-purchaser was in order. So long as the Court

<sup>5</sup> AIR 1931 PC 33

<sup>6</sup> 39 Cal. W. N. 829

was satisfied about the payment to the decree-holder and with respect to which payment, the Court might accept the admission of the decree-holder it should rightly allow the application and set aside the sale.

23. The Privy Council decision was distinguished on very cogent grounds at page 832 by S.K. Ghose, J. who delivered the judgment explaining the point of distinction at page 832 in these terms :

"There was no question as to whether any amount had been previously received by the decree-holder and so the latter provision 'less any amount which since the date of such proclamation have been received by the decree-holder' in clause (b), sub-rule (1), R. 89, Order 21 was not considered at all."

24. In fact it is pointed out by S.K. Ghose, J. that the Privy Council was concerned with a Question of adjustment and certification under Order 21 Rule 2 but the payment of the amounts specified in the sale proclamation which is a necessary condition under Rule 89 of Order 21 was a different thing from payment and adjustment of a decretal amount out of Court, contemplated by Order 21, Rule 2, the latter coming at an anterior stage before the interests of a third party like the auction-purchaser intervened.

25. McNair, J. who was a party to that decision, subsequently sitting singly on the Original Side, expresses the same view in '*National Insurance Co. Ltd. v. Ezekiel Aaron, reported in*<sup>7</sup> that the expression "received by the decree-holder" in Order 21 Rule 89 Civil Procedure Code does not mean 'received through the Court'. The decision of another learned single Judge, Henderson, J. in revision in '*Mahendra Chandra Das v. Parashmani Dasya*', *reported in*<sup>8</sup> ' takes the same view.

26. I respectfully agree with this view. It seems to me that both on technical grounds of construction as well as on the common sense view of the matter, this view is the sounder view. When the language of Order 21 Rule 89 (1)(b) expressly mentions the words "less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder", then if the whole of the decretal money has been received by the decree-holder, the payment on this count becomes nil and deposit in Court- on that count need not be made any more- Technically and from the point of view of construction, the word "received" in Order 21 Rule 89(1)(b) is not limited by any qualification such as 'received through the Court' and I see no reason why the word "received" should be so limited when the Statute does not expressly say so. Also from the common sense point of view, after all what is this money intended for? It is intended for payment of the decree-holder's dues for which the property was being sold and if the decree-holder receives his money, whether through the Court or outside the Court, it satisfies the decree nevertheless and that being so. I do not see why in such a case there should be a ceremonious deposit of the decretal amount over again in Court, in order to attract the provision of Order 21 Rule 89, Civil Procedure Code. After all, if the decree-holder has once received the money, he cannot receive it over again. The only point that the Court should be careful about in such cases is that it must have proof before it that the decree-holder has been fully satisfied. It is true that ordinarily an uncertified adjustment or payment cannot be

<sup>7</sup>41 Cal WN 998

<sup>8</sup> AIR 1938 Cal 252

recognized by an executing Court by reason of Order 21 Rule 2(3), Civil Procedure Code but that is when the contest is as between the decree-holder and the judgment-debtor or their respective representatives or assigns. But here the decree-holder is a party to the summons and has appeared before me and has admitted through his Attorney that he has been fully paid and nothing remains due under the decree and the judgment-debtor does not contest this fact either

and further the applicant himself says that he has paid this money in full satisfaction of the decree. I hereby record these admissions and am satisfied that such payment was made.

27. I am also satisfied in this case that there was no such delay as to hit this application by limitation. The sale was held on 24-8-1955. The limitation of 30 days for making the application expired on or about 22-9-1955 which was during the long vacation of this Court. The present application For the deposit was made on the very re-opening day of this Court, on 21-11-1955, and it was expressly noted as having been made on that day.

28. For reasons stated in my judgment, I hold that, a person who had entered into an agreement of sale with the judgment-debtor of an immovable property already under attachment, and who had paid earnest money before any proclamation for sale, and who thereafter paid the balance of the purchase price to the judgment-debtor subsequent to the sale held under the proclamation, and with which money the judgment-debtor fully paid off the decree-holder at whose instance the sale under the proclamation was held, is a person competent to apply under Order 21 Rule 89, Civil Procedure Code and that he is a person holding "interest" in such property by virtue of a title acquired before sale within the meaning of that provision. Secondly I hold that in such a case the applicant has to deposit in Court only 5% of the purchase price as statutory compensation ,and the fact nothing is deposited in Court For the decree-holder because the decree-holder had been paid off outside the Court does not make Order 21 Rule 89, Civil Procedure Code , inapplicable to such a case.

29. I, therefore, set aside the sale and make an order in terms of clause (1) of the Summons.

30. By consent of parties, I permit the other purchaser Ranjit Ghosh to withdraw his deposit without a fresh application.

31. I direct that the applicant will pay the costs of this application to the respondent-purchaser Kariak Ghosh only. As the other respondent purchaser Ranjit Ghosh is excused from making another application for withdrawal of his deposit, I make no order for costs in his favor in this application.

Order accordingly.