

**PATNA HIGH COURT**

Gopi Lal

Vs

Jamuna Prasad

Civil Revn. No. 716 of 1950 and A. F. O. O. No. 381 of 1950

(Ramaswami and Jamuar, JJ.)

17.04.1953

**ORDER**

**Jamuar, JJ.**

1. This application in revision is preferred on behalf of the judgment-debtors against an order of the Subordinate Judge, 2nd Court, Patna, dated 26-6-1950, in an execution case.
2. An appeal has also been filed against the same order as a matter of precaution.
3. On 18-9-1926, the opposite party decree-holders obtained a mortgage decree which was later confirmed by the High Court in appeal. Several execution cases were taken out; but the last execution case was instituted in the year 1942. This was Execution Case No. 27 of 1942 in which the decree-holders claimed the sum of Rs. 2,749 and odd from the judgment-debtors concerned. The judgment-debtors preferred objections under Section 47, Civil Procedure Code on the ground that the execution of the decree was barred by limitation, and that no valuation was fixed under the Money-Lenders Act. The objections were overruled by the executing Court. Against this order, the judgment-debtors filed Misc. Appeal No. 31 of 1943 in the High Court. While the appeal was pending in the High Court, the properties were sold in execution on 14-5-1943, for a sum of Rs. 1,383/-. On 15-12-1944, the miscellaneous appeal was taken up for hearing in the High Court. On that date, the following order was passed :

"By consent of parties, the decree under execution will be executable for Rs. 2,200/- only which includes interest and costs up-to-date. In default of payment, this amount will carry interest of 6 p. c. p. a."

It is important to state that, on 26-2-1946, the decree-holders obtained delivery of possession through the Court of the properties which had been sold. It appears that, on 29-11-1948, the

judgment-debtors deposited the money according to the terms of the consent order dated 15-12-1944. Shortly after, that is, on 22-2-1949, the judgment-debtors applied to the executing Court for being restored to possession of the lands which had been sold and of which the decree-holders had taken possession by a writ. This application was rejected by the Subordinate Judge, 2nd Court Patna, on 26-6-1950.

4. When the argument commenced, Mr. Lalnarayan Sinha conceded that the order passed by the Subordinate Judge was not an order under Section 144, Civil Procedure Code, nor was it an order under Section 47, Civil Procedure Code. Counsel very properly, conceded that the order was one passed by the learned Subordinate Judge in exercise of his inherent jurisdiction under Section 151, Civil Procedure Code. In this view of the matter, it must be held - and learned Counsel conceded this point - that the appeal is incompetent, and must, therefore fail.

5. As regards the revision application, the point taken by Mr. Lalnarayan Sinha is that the consent order dated 15-12-1944, has not been rightly construed by the learned Subordinate Judge. The contention of learned Counsel is that, as a matter of necessary implication, it ought to have been held that, by virtue of the consent order, the decree-holders agreed that the sale of the properties which had taken place on 14-5-1943, would be set aside, and the judgment-debtors, on their part, agreed that they would pay the sum of Rs. 2,200/- which included interest and costs up to 15-12-1944, on which date the consent order was passed. There is a provision in the compromise order that, in default of payment, the judgment-debtors would be liable to pay interest at six per cent. per annum on the amount of Rs. 2,200/-. The contention of Mr. Lalnarayan Sinha on this point has great force; but, for the reasons which we shall presently state, we do not propose to decide this question as to the interpretation of the order dated 15-12-1944, in the present case. We also refrain from commenting on the question whether the judgment-debtors were entitled to make the deposit of the amount due under the terms of the compromise on 29-11-1948, several years after the passing of the consent order. These matters should be left for being determined in a proper suit which the petitioners may institute.

6. It was pointed out by Mr. T. P. Sinha on behalf of the opposite party in the course of the argument that, on 10-5-1948, the opposite party had sold to Raghunath Mahto and others by a registered 'kebala' an area of 7.65 acres out of the lands in dispute for a sum of Rs. 3,745/-. It is not said on behalf of the petitioners that this transfer is not 'bona fide' or that Raghunath Mahto and the other purchasers had not paid the consideration on account of the sale deed. This is a very important circumstance which must be kept in view in deciding whether the petitioners ought to be granted an order for restitution even on the assumption that the construction of the compromise order, for which Mr. Lalnarayan Sinha contends, is correct. The doctrine of restitution is based on the equitable principle that, on the reversal or modification of the previous order, the party affected should, as far as possible, be placed in the same position which he would have occupied but for such a decree, because it is the duty of the Court to act rightly and fairly according to circumstances towards all the parties involved. But this principle cannot be applied

in a case where it conflicts with another rule of equity, namely, that a 'bona fide' purchaser for value should not be allowed to suffer on account of the mistakes or irregularities committed in a Court of law. In the present case, there is nothing to show that Raghunath Mahto and the other purchasers were aware of the order of compromise passed by the High Court on 15-12-1944. This point has not been dealt with in the lower Court, and the parties have not approached the question from this aspect. In our opinion, there can be no order of restitution passed in this case, since a portion of the property had already gone into possession of third parties, and there is no material on the record to suggest that the third parties concerned were not 'bona fide' purchasers for value or that they had notice of the compromise order passed on 15-12-1944, by the High Court. Our view on this question is supported by the decisions in - '*Chota Nagpur Banking Association v. Smith*', - '*Zain -Ul-Abdin Khan v. Muhammad Asghar Ali Khan*', and - - '*Rewa Mahton v. Ram Kishen Singh*'<sup>3</sup>,

7. In this view of the matter, this application must be rejected. It will be open, however, to the petitioners to file a proper suit for recovery of the lands in dispute after impleading the third party purchasers, namely, Raghunath Mahto and others, in which the questions, such as the question of construction of the compromise order, the question of limitation, the question of notice and the question as to the 'bona fide' character of the sale, may be properly gone into and dealt with.

8. For the reasons we have expressed, we think that the appeal and the application in revision must both be dismissed; but, in the circumstances, we do not propose to make any order as to costs.

Appeal and revision dismissed.

Cases Referred.

<sup>1</sup> AIR 1943 Pat 325

<sup>2</sup>10 All 166 (PC)

<sup>3</sup> 14 Cal 18 (PC)