

**(1921) 03 AHC CK 0008**

**Allahabad High Court**

**Case No:** None

Harbans Nath Tewari and Others

APPELLANT

Vs

Achraj Nath and Others

RESPONDENT

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**Date of Decision:** March 30, 1921

**Citation:** 65 Ind. Cas. 16

**Hon'ble Judges:** Walsh, J; Ryves, J

**Bench:** Division Bench

**Final Decision:** Allowed

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### **Judgement**

Walsh, J.

This is an appeal raising a question which also governs Appeals Nos. 113 and 114, Nice questions are raised by the appeal, but we do not think it necessary to express any opinion about them, it is one of those cases where possibly not entirely owing to the feelings of the parties themselves, the parties have been engaged for some years" in a technical quarrel during which the real substance between them has been lost sight of and, we propose, as far as in us lies, to make an end of this technical dispute and to endeavour to make an order which will eventually dispose of the litigation and decide the rights of the parties finally. The present application was brought before the Subordinate Judge on the 11th of July 1919. The whole matter arose out of a decree on three mortgage-bonds. On a petition to the High Court by one of the transferees of the judgment-debtors, the High Court held that one sale was objectionable and that each properly separately mortgaged ought to have been separately sold. Before the High Court delivered judgment, the sale of all the properties together had already taken place. It had been confirmed and, on the face of it, the purchasers were the absolute owners and entitled to possession. The High Court did not push its own order to a logical conclusion and say what was to be done with the proceedings which had taken place since the order which it overruled, and the decree-holder, who was also the auction-purchaser, applied by this application to the Court below for possession as auction-purchaser and absolute

owner, ignoring the direction of the High Court that the properties ought to be re sold separately. The objectors objected to the applicant being given possession, but asked that a separate sale should take place in accordance with the directions of the High Court, The lower Court agreed with the view of the objectors and we agree with its view. To hold otherwise would be to ignore the two Bench decisions of this Court, but the lower Court having, in our view, rightly taken that view of the position of the parties, ought to have allowed the decree-holder, who was obviously held up in his proceedings, if this view is correct, to pursue his alternative remedy in accordance with the judgment of the High Court which the lower Court held was binding upon it or, in other words, to apply alternatively; by way of amendment of his application, for an order for re sale of the properties separately in accordance with the High Court's direction. We think that that is the order which the lower Court ought to have made. It is the order that we "are prepared to make to day. This appeal, therefore, must be, to that extent, allowed, although we are not deciding any point in favour of any party, and the application must be remanded to the lower Court with directions to allow the decree-holder to amend it and to hear the amended application for re-sale of the properties. The application will not be a new application but merely a continuation of the application originally made on the 11th of July 1919, I am clearly of opinion that no question of limitation can arise or ought to be listened to for a moment. In my view, time began to run as against the decree-holder from the date of the High Court's decision, the 7th of March 1917, up to which date the decree holder had obtained everything that he could possibly have obtained, but my learned brother will give detailed reasons for his view, which I share.

Ryves, J.

2. I agree. The decree-holders applied for the sale of the properties decreed to them on their suit and the 12th of July was fixed. Before that date one of the judgment-debtors applied to the Court executing the decree to disallow the sale, on the ground that it was not being carried out according to the directions in the decree. On the 19th of July 1916 the Court disallowed this objection and the sale was held as advertised on the 20th of July 1916, The decree-holders themselves purchased the property. On the 1st of August 1913 the objector, in the Court below, filed an appeal to this Court, urging the same objection as he had in the Court below. This he was steady entitled to do. On the 20th of August 1916 the sale was confirmed. On the 7th of March 1917 this Court allowed the appeal of the objector, and in the decree which it passed the operative words are as follows: "It is ordered and decreed that the case be and it is hereby sent back to the Court of the Subordinate Judge aforesaid with direction that the property of the objector-appellant shall be sold for the decretal amount in respect of the mortgage under which his property is mortgaged." It follows that the objection of the objector, which was disallowed on the" 19th of July, ought to have been allowed and if the Court had come to a right decision, the sale fixed for the 20th of July would not have

taken place as arranged and a fresh sale in accordance with what was subsequently directed by the High Court would have been necessary. The fact that the sale was confirmed on the 20th of August seems to me, must depend for its validity on the decision of the High Court. Of course if the High Court had dismissed the appeal, nothing more would have remained to be said, but the sale clearly was held subject to the objection of the objector and, it seems to me, it must be held that the sale and its confirmation were both dependent on the final result of that objection. It must be remembered that the decree holders them-selves were the purchasers and they were before this Court in both capacities when that appeal was heard and decided and, it seems to me that they should have, in accordance with that judgment, applied not for possession given under the certificate of sale which they received after the confirmation of the sale giving the go-by entirely to the High Court's decree, but should have applied in accordance with the High Court's decree for re-gale, This was the position taken up by the respondents even in the lower Court. The Court has recorded in its judgment: They (the persons whose properties have been sold) object that the decree-holder auction-purchaser should not be given possession but should be directed to sell the properties separately again as directed by the Hon"ble Court." It seems to me they cannot be heard to say that this should not be done for any reason and, therefore, I agree in thinking that this application for possession, dated the 11th of July 1919, should be amended as suggested by my brother, and as that was filed on the 11th of July 1919 within three years of the date of the decree of this Court, I cannot see how any plea of limitation can be let up. Up to the 7th of March 1917 the decree-holders had obtained execution to the full. They had not only purchased the property but the sale had been given to them. It was only when this Court directed a re-sale and, therefore, inferentially get aside the previous sale, that any right to apply for execution arose.

3. The order of the Court is that we allow this appeal to this slight extent, that the application will be remanded to the lower Court with directions to allow the decree-holder to amend the same by adding an alternative claim, as from the 11th of July 1919, for re-sale in accordance with the High Court's direction of the 7th of March 1917 and to dispose of it according to law. If there is any such application already on the file, it must be consolidated with this and disposed of along with it. In the event of a re-sale being ordered, the costs of these proceedings must be borne rateably by the three separate properties and the resultant proportion added to the amount of the decree; otherwise each party will pay their own costs.