(1880) 03 AHC CK 0004

Allahabad High Court

Case No: None

Karim-un-nissa — APPELLANT

Vs

Hira Lal — RESPONDENT

Date of Decision: March 23, 1880

Citation: (1880) ILR (All) 780

Hon'ble Judges: Straight, J; Oldfield, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

Oldfield, J.

Hira Lal, defendant, the appellant before us, caused five bighas, fifteen biswas of land to be attached in execution of his decree against Khadim Husain and Isri Husain, as property belonging to the judgment debtors. One Wilayat Husain objected to the attachment and sale on the ground that the property did not belong to the judgment-debtors but was endowed property; his objections were disallowed, and the property was sold by auction, and purchased by the plaintiff for Rs. 505 on the 20th July 1875, and the money paid over to the defendant, and the sale was confirmed on the 11th September 1875. Wilayat Husain, however, brought a suit to set aside the sale, on the ground that the judgment-debtors had no right and title in the property, which was an endowment, and he obtained a decree on the 18th August 1876, and the sale was set aside. The plaintiff has now brought this suit to recover from the decree-holder the purchase-money with interest, and the Courts below have decreed the purchase-money with interest at six per cent. It is contended in second appeal that no suit will lie for refund of purchase-money, that plaintiff''s proper remedy was to proceed in the execution department under the provisions of Section 315, Act X of 1877, and that interest should not be allowed.

2. In my opinion, the first plea is valid. The sale took place under the provisions of Act VIII of 1859, and, although Section 258 directs that, whenever a sale of Immovable property is set aside, the purchaser shall be entitled to receive back his

purchase-money, this provision applies only to cases in which the sale has been set aside for irregularities or the like under Sections 257 and 258 of the Act, and not when a third party succeeds in establishing his title to the property. This view of the law has been held in a course of decisions of the Calcutta Court--Rajib Lochun v. Bimalamani Dasi 2 B.L.R. A.C. 83 : 10 W.R. 365 and Sowdamini Chowdhrain v. Krishna Kishor Poddar 4 B.L.R. P.B. 11 : 12 W.R. F.B. 8, and I am not aware of any by this Court opposed to it. The case of Makundi Lal v. Kaunsila ILR 1 All. 568, proceeded on the ground that the decree-holder had fraudulently executed a decree against a person not bound by the decree, and had caused the sale of his property, and is not in point, nor are the two cases referred to by the Munsif. In Neelkunth Sahee v. Asmun Matho H.C.R. N.W.P. 1871 p. 67, there was no power to bring the judgment-debtor''s property to sale under the decree; and in Doolhin Hur Nath Koonweree v. Baijoo Oojha H.C.R. N.W.P. 1867 p. 50, the decree-holder had caused property to be sold which though belonging to the judgment-debtor was not saleable in execution of a decree.

3. The terms of Section 315, Act X of 1877, are different to those of Section 258, and by Section 315, when it is found that the judgment-debtor had no saleable interest in the property which purported to be sold, and the purchaser is for that reason deprived of it, the purchaser shall be entitled to receive back his purchase-money from any person to whom the purchase-money has been paid. But it is unnecessary to determine whether plaintiff could succeed under this section, as its provisions cannot have retrospective effect, and it will not apply to a sale which has taken place before the Act came into operation; and I am unable to take the view on this point of the learned Judges who decided the case of Mulo, petitioner, decided the 7th May I.L.R 1879 All. 299, which was brought to our notice at the hearing.

4. The liability of a decree-holder must be decided according to the conditions of the sale in force when he caused the property to be sold, and any warranty of title in the judgment-debtor is not ordinarily given by the judgment-creditor in judicial sales held under the Civil Procedure Code; nor can it be held that the decree-holder undertook to warrant the title of the judgment debtor in the property sold in the case before us. The rule of law in respect of sales in execution of decrees has been declared by the Privy Council in Borah Ali v. Abdul Aziz ILR 3 Cal. 806 : L.R. 5 IA116. Their Lordships observe: "Now it is of course perfectly clear that when the property has been so sold under a regular execution, and the purchaser is afterwards evicted under a title paramount to that of the judgment-debtor, he has no remedy against either the Sheriff or the judgment-debtor;" and again: "The Sheriff may be held to undertake by his conduct that he has seized and put up for sale the property sold in exercise of his jurisdiction, although when he has jurisdiction he does not in any way warrant that the judgment-debtor had a good title to it, or guarantee that the purchaser shall not be turned out of possession by some person other than the judgment-debtor."

5. The sale in the case before us not having been set aside in favour of the judgment-debtor on the ground of want of jurisdiction or other illegality or irregularity affecting the sale, and there being no question of fraud or misrepresentation on the part of the decree-holder, I am of opinion that the plaintiff cannot succeed in this suit, and it should be dismissed, and the appeal decreed, with all costs, and the decrees of the lower Courts reversed.

Straight, J.

6. I am of the same opinion as my honourable colleague. It does not appear to me that the provisions of Section 315 of Act X of 1877 are applicable to a sale which took place in July 1875, and the relief now afforded to auction-purchasers is not open to the plaintiff. Were there not a Full Bench decision of the Calcutta Court in Sowdamini Chowhdrain v. Krishna Kishor Poddar 4 B.L.R. F.B. 11 : 12 W.R. F.B. 8, as to the construction to be placed upon Section 252 of Act VIII of 1859, I should have had no difficulty in holding that the setting aside of sale contemplated therein is governed by Sections 256 and 257, which gave the Court summary powers to set aside sales on the ground of material irregularity in "publishing or conducting them." In the present case no allegation of that kind is made, but the plaintiff bases her claim to a refund of the purchase-money paid by her, because the consideration for that payment has totally failed. It is not alleged that any fraud or misrepresentation was used at the time of the auction-sale, which took place through the Court, and it is clear that no warranty of title or guarantee of undisturbed possession can be implied to a purchaser.

7. The following rule of law laid down by Lord St. Leonards in Vendors and Purchasers, 14th edition, p. 1, is relevant:--"If at the time of the contract the vendor himself was not aware of any defect in the estate, it seems that the purchaser must take the estate with all its faults and cannot claim any compensation for them." And in the same work the following passage occurs:--"If the conveyance has been actually executed by all the necessary parties, and the purchaser is evicted by a title to which the covenants do not extend, he cannot recover the purchase-money either at law or in equity (at p. 549)." In the present case, so far from there being any evidence of mala fides on the part of the judgment-creditor, the sale did not take place until Wilayat Husain''s objections had been heard and disposed of. There was, therefore, the strongest reason for his believing that the judgment-debtor had a saleable right, title, and interest in the property brought to sale.

8. Had the provisions of Section 315, Act X of 1877, been applicable, I think that the objection taken in the first ground of appeal by the appellant would have been fatal to the plaintiff''s claim, and that, instead of instituting a regular suit, the proper course for an auction-purchaser to pursue, under circumstances such as those which have arisen in the present case, is to apply u/s 312 in the execution department. This appeal must, therefore, be decreed with costs.