

(1938) 08 CAL CK 0017

Calcutta High Court**Case No:** Appeal from Appellate Order No. 33 of 1937

Gorakhnath Singh

APPELLANT

Vs

Narayan Chandra Dalapati and
AnotherRESPONDENT

Date of Decision: Aug. 3, 1938

Judgement

Edgley, J.

The decree-holder is the Appellant in this case. It appears that he instituted a mortgage suit against the Respondents in 1933 for the recovery of a sum of money on a mortgage bond, amounting to about Rs. 700. He obtained an ex parte decree against the Respondents in 1934 for Rs. 752-0-3. A sale was held in execution of this decree and the decree-holder purchased the property of the judgment-debtors on the 18th July, 1934, for the sum of Rs. 1,500. On the 9th August, 1931, the judgment-debtors filed two applications. The first was to the effect that they might be allowed to have the sale set aside on making a deposit under Or. 21, r. 89 of the CPC and in the second application they asked that the ex parte decree might be set aside. On the 20th August, 1934, the first application was allowed by the Court with a direction to the judgment-debtors to deposit the decretal amount of Rs. 752-0-3 together with the amount of compensation due to the auction-purchaser amounting to Rs. 75. In due course, the decree-holder withdrew the compensation money Rs. 75 due to him as auction-purchaser but the sum of Rs. 752-0-3 remained in deposit with the Court. The question of setting aside the ex parte decree was then taken up and finally, on the 17th November, 1934, the ex parte decree was set aside. On the 17th May, 1935, the mortgage suit was decreed on contest in favour of the decree-holder Appellant. Later on, the judgment-debtors applied for a refund of the sum of Rs. 75 as compensation which they had deposited under the order of the Court in August, 1931. The first Court rejected their application, but the Lower Appellate Court reversed the decision of the first Court and directed that this sum should be refunded. It is argued by the learned Advocate for the Respondents in this case that the judgment-debtors are entitled to a refund of the sum of Rs. 75 by

virtue of the provisions of sec. 144 of the Code of Civil Procedure. That section provides that "the Court shall on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed." Having regard to the language of the section it would appear to have been the intention of the legislature that the right to restitution should be directly connected with the decree which has been varied or reversed and the further question would arise with regard to this section as to whether or not a person applying for restitution under sec. 144 of the Code is "entitled to any benefit by way of restitution." In the case with which we are concerned I am of opinion that, having regard to the circumstances of the case, it cannot be held that the judgment-debtors are entitled to any benefit by way of restitution. Admittedly they were ill-advised in making two simultaneous applications on the 9th August, 1934, the first of which was to have the sale set aside under Or. 21, r. 89 of the Code while the second was to have the ex parte decree set aside. All that they need have done in the circumstances of the case was to have made an application under Or. 9, r. 13 of the Code for setting aside the ex parte decree. Apparently for reasons best known to themselves they were anxious to obtain an immediate reversal of the Civil Court sale without waiting for a decision with reference to the application to set aside the ex parte decree and for this purpose they availed themselves of the special procedure under Or. 21, r. 89 of the Code by which a sale may be automatically set aside provided the sums of money mentioned in that section are deposited by the person making the application. The deposit of these amounts is a condition precedent to an order being granted under Or. 21, r. 89 of the Code and, as far as payment of the compensation money to the auction-purchaser is concerned, this payment may be regarded partly as a solatium to him for the loss of what may have been a good bargain and partly as compensation to him for the trouble and loss of time which he may have incurred in attending the sale. Admittedly the compensation is payable to the auction-purchaser under Or. 21, r. 89 of the Code whether such auction-purchaser is the decree-holder or a stranger and, in my view, if a judgment-debtor chooses to avail himself of the special privilege which is given to him under the provisions of Or. 21, r. 89 of the Code and he afterwards obtains a reversal of the decree under which the execution sale was held, he would not be entitled to claim a refund of the amount which he had deposited as the auction-purchaser's compensation. Such a deposit is not made by him directly in connection with the decree which has been passed against him but is made in order that he may obtain a special privilege which the law provides. This being the case, in my opinion, he is not entitled to a refund of such compensation money as a benefit by way of restitution within the meaning of sec. 144 of the Code of Civil Procedure.

2. In this view of the case the judgment of the Lower Appellate Court cannot be supported. It is, therefore, set aside and the order of the Court of first instance is

restored with costs in this Court and in the Lower Appellate Court, the hearing-fee being assessed at one gold mohur.