

(1938) 12 CAL CK 0025

Calcutta High Court

Case No: Civil Rev. Cases Nos. 351 and 450 of 1938

Guru Charan Namasudra

APPELLANT

Vs

Mahendra Chandra Pal and
Others

RESPONDENT

Date of Decision: Dec. 22, 1938

Final Decision: Dismissed

Judgement

Mukherjea, J.

C.R. No. 450 of 1938.

1. This Rule is directed against an Appellate order made by the District Judge of Dacca passed in Miscellaneous Appeal No. 210 of 1937 confirming the order of the Munsif, 3rd Court, Narayanganj passed in a proceeding to set aside an execution sale. The Petitioner before me is the judgment-debtor whose property was attached and sold in execution of a money decree obtained by Opposite Party No. 1. The sale was held on 2nd June, 1937, and the Petitioner thereupon made an application to set aside the sale under Or. "21, r. 90, C. P. Code. This application was dismissed for non-appearance of the Petitioner on 21st August, 1937, and by a subsequent order passed on 11th November, 1937, the sale was confirmed. The Petitioner preferred an appeal in the Court of the District Judge at Dacca, and the memorandum of appeal was actually presented on 29th November, 1937. The District Judge has dismissed the appeal on the ground that it was filed out of time, more than thirty days having elapsed from the date of the order dismissing the application for setting aside the sale. It is against this order that the present rule has been obtained.

2. Mr. Das who appears for the Petitioner has argued before me that under Or. 43, r. 1, cl. (j) it is the order confirming the sale that is appealable, and not the order dismissing the application for setting aside the sale, whether the dismissal be on merits, or for default of the parties. As in this case the order confirming the sale was

passed only on 11th November, 1937, and the appeal was filed within thirty days from that date, it was well within time.

3. To appreciate this contention it is necessary to turn to the relevant provisions of the Civil Procedure Code.

4. When an application is made for setting aside an execution sale under Or. 21, r. 90, C. P. Code, and the application is allowed by the Court, Or. 21, r. 92, sub-sec. (2) provides that the Court in that event shall make an order setting aside the sale. If on the other hand the application is disallowed it is incumbent upon the Court, as directed by sub-sec. (1) of the Rule, to make an order confirming the sale. Or. 43, r. 1, cl. (j) which contains the provision for appeal against orders passed under Or. 21, r. 92, C. P. Code, is worded as follows:--" An order under.... r. (92) of Or. 21, setting aside or refusing to set aside a sale."

5. The 1st part of this clause obviously contemplates an order passed under sub-sec.(2) of Or. 21, r. 90, C. P. Code; the 2nd part does not specifically mention an order confirming the sale but provides for appeal against an order refusing to set aside a sale. Mr. Das argues that the only order that comes within the purview of Or. 21, r. 92 (1) is the order confirming the sale, and unless and until that order is passed, the mere dismissal of the application for setting aside the sale is not an order which is appealable in law.

6. This argument, though somewhat plausible, cannot in my opinion be accepted.

7. When an application for setting aside an execution sale is rejected by the Court, the order of rejection is undoubtedly an order refusing to set aside the sale, and it does come within the purview of Or. 21, r. 92, C. P. Code, for that rule contemplates the disallowing of the application in the first place which is to be followed by an order confirming the sale. It is this disallowing of the application under Or. 21, r. 92 which corresponds to the order refusing to set aside the sale as laid down in Or. 43, r. 1, cl. (j) of the Civil Procedure Code. Vide *Ansari v. Bhim Shankar* I. L. R. 56 Cal. 969 at p. 9741 S.C 33 C. W. N. 392 (1929).

8. For purposes of appeal it is enough therefore that an order refusing to set aside the sale is made. The legislature has obviously treated such order as not differing in essence from an order confirming the sale, the formal order of confirmation being ancillary to and following as a matter of course the order of dismissal. As has been pointed out by Mr. Justice Mukerji in the decision above referred to, cl. (16), sec. 588 of the old Code, provided for appeals against orders passed under sec. 312 " for confirming or setting aside or refusing to set aside a sale of immovable property," but in cl. (j) of Or. 43, r. (1) the words " for confirming " have been dropped. The legislature thus intended that a party would have a right of appeal as soon as there is an order refusing to set aside a sale, no matter whether a formal order of confirmation of sale has been passed or not.

9. In many cases the sale is confirmed by the very order which dismisses the application [e.g., *Narendra Nath Chatterjee v. Rakhal Das Tarafdar* 41 C. L. J. 286 (1924)] and such cases present no difficulty. It is now settled that even if no distinct order confirming the sale is passed, the order of dismissal itself is appealable [*Ansar Ali v. Bhim Shankar* I. L. R. 56 Cal. 969 at p. 9741 S.C 33 C. W. N. 392 (1929)]. The fact that confirmation of sale is made subsequently by a separate order does not in my opinion make any difference. The order of dismissal itself being an order refusing to set aside the sale, an appeal would lie against it and not against the order of confirmation passed later on. Mr. Das in support of his argument has relied upon a decision reported in *Benarsi Das v. Ram Chand* 141 I. C. 421, 422 (1932). There an application was made under Or. 21, r. 89, C. P. Code, but no proper prayer for setting aside the sale was made. The Court held that in the absence of a prayer like that, it had no other alternative but to confirm the sale and the sale was confirmed. It was held, and in my opinion rightly, that an appeal would lie against the order confirming the sale. Here the order confirming the sale amounted to an order refusing to set aside the sale and in substance by confirming the sale the application under Or. 21. r. 89 was dismissed.

10. In my opinion, therefore, the view taken by the Court of Appeal below is right and this Rule must be discharged with costs, hearing-fee, 1 gold mohur.

C. R. No. 351 of 1938.

The Petitioner in this Rule is the same as in Civil Rule 450 of 1938, and the point involved is also the same. Here the application for setting aside the sale was made on 2nd May, 1937, and it was dismissed for default on 14th August, 1937. The sale was confirmed on 16th August, 1937. The memorandum of appeal was presented to the Court of the District Judge on 18th September, 1937 and the District Judge held it to be barred by limitation, inasmuch as more than thirty days elapsed from 14th August, 1937, which was the date of dismissal of the application for setting aside the sale. It is contended by the Petitioner that time would run from 16th August, 1937, when the sale was confirmed and in that case the appeal would be in time. For the reasons given by me in Civil Rule 450 of 1938, this contention in my opinion cannot succeed. This Rule is discharged. No order as to costs.