(1925) 02 CAL CK 0040

Calcutta High Court

Case No: None

Matiur Rasul		APPELLANT
	Vs	
Abdul Said		RESPONDENT

Date of Decision: Feb. 25, 1925

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 90, 47

Citation: AIR 1926 Cal 109 : 89 Ind. Cas. 765

Hon'ble Judges: Mukerji, J; Ewart Greaves, J

Bench: Division Bench

Judgement

Mukerji, J.

This appeal arises out of an order passed by the Subordinate Judge of My mensingh refusing to set aside a sale held in execution of a mortgage-decree The appellant was one of the judgment debtors against whom the said decree was passed. A preliminary decree was passed on the 27th December 1922 and. the final decree on the 23rd January 1923. The sale took place on the 15th March 1924, the decree-holder being the auction-purchaser at the sale. The application on which the order which forms the subject-matter of this appeal was passed was made by the appellant on the 15th April 1924. The application purported to be one u/s 47 of the C.P.C. and also under Order XXI, Ruler 90 of the came Code. The objections that were put forward on behalf of the appellant in the said application in order-to bring it u/s 47 were mainly to the effect that the properties were not liable for the decree inasmuch as they belonged to the mother of the appellant and the decree had been passed not for the debts of the mother but for those of her husband; and that the father had no legal necessity to mortgage the properties and consequently the properties of the applicant were not liable for the mortgage. The same objection is also to be found in another application which was filed on behalf of the appellant previously on the 7th January 1924 and which was dismissed for non-prosecution on the 8th February 1924. It appears also that this objection was raised in the suit itself

and the decree was passed on deciding the same against the applicant. This objection is really one which can hardly be considered as falling u/s 47, C.P.C. and the order that has been passed by the Subordinate Judge against which the present appeal has been preferred really comes under Order XXI, Ruler 90 of the C.P.C. That being so, the mere fact that in the application Section 47 was mentioned would not enable the appellant to save, limitation if, as a matter of fact, the application was not filed within 30 days of the sale. The respondent put forward a contention before us to the effect that the application was filed beyond 30 days from the date of the sale and that no reasons have been given by the appellant such as would enable him to get an order extending the period of limitation provided for an application under that rule. The learned Subordinate Judge in his judgment states that the application for setting aside the sale was made on the last dale of limitation. But looking at the dates on which the sale took place and the application was filed it will appear that it was filed a day too late. It should have been filed on the 14th April 1924 on which date, it appears, the Court was not closed and, therefore, as a matter of fact it was filed a day too late, and the application, therefore, should have been dismissed as not having been filed within time. As, however, it was not so dismissed but was dealt with on the merits, and as the learned Vakil appearing on behalf of the appellant has argued the appeal before us on the merits, I propose to deal with the case on its merits as well.

2. The objections put forward on behalf of the appellant are mainly three. The first is that before the preliminary decree was passed on the 27th December 1922 one of the judgment-debtors, namely, Masturi Khatoon, had died and that no substitution had been made of her heirs in her place before the said decree was passed and that it was only when the final decree was about to be passed on the 27th January 192; that is to say, about sixteen months after the date of her death that her heirs were brought on the record. It is contender that the decree that was passed was parte, having regard to the fact that the judgment-debtor''s heirs were not brought on the record within the time allowed b law. In our opinion, this is not an objection which can be taken either on an application u/s 47 of the C.P.C. or h an application made under Order XXI, Ruler 90 o that Code. The Executing Court is on competent to go behind the decree am enquire into the question, thereby, in effect: challenging the validity of the decree it self. The final decree that was passed was the decree that was the subject-matter c the execution proceedings and it was passed against the heirs of the decease Masturi Khatoon. If it had been wrong passed against those heirs that may be ground for setting aside the decree. Bu it is certainly not open to the Execution Court to go into that question and to say as to whether the decree was validly pass against those heirs. That objection is no therefore, at all tenable.

3. The second ground put forward on b half of the appellant is that there was irregularity in publishing and conducting the sale and that in consequence of such irregularity the properties were sold at an ii adequate price. The decretal amount WElis. 20,258 and the properties were sold Rs. 15,435. The learned Subordinate

Judge has found upon the evidence that the pre perties consisted of some taluqs and son: khamar lands and that the value of tltaluqs would be Rs. 12,500 and that the khamar lands would be valued at Rs. 3,80 In his opinion, the total value of the parties at the highest figure cannot exceed Rs. 16,300. The appellant in these proceedings examined himself and, other witnesses in order to prove the real value of the properties will much more Plaintiff as obtained at the "sale." The appellant himself was "not in position to give any clear evidence as the value of these properties. He ''state that the net income of the properties of Rs. 600 from which the Sudder rent to got to be deducted and that such properties sell at 40 times the annual income. As the khamar lands he stated that they we about 22 kanis in area of which about 19 kaniswere culturable lands. In cross-examination, however, he stated he was not able to state the value of any of the taluqs or their income nor was he in a position to say what the profits of any particular taluq were, but that his Sarkar knew all about it. This Sarka r was not examined as a witness in the case. Witness No. 2 for the appellant states that there are 22 kanis of khamar land and that each kani sells for Rs. 700 or Rs. 800 and that the taluqs sell at 30 or 35 times their annual profits. He, however, is a man who is a servant of the appellant. The only other witness examined in the case on behalf of the appellant is witness No. 3 who states that he does not know if any sale proclamation had been served or if there had been any beating of the drums. He states that each kani of land sells for Rs. 600 to Rs, 700 and that the taluqs sell at 30 times their annual income. He states that he himself purchased a taluq at 32 times its annual income. As the learned Subordinate Judge has pointed out, it is well-known that small properties are sold at much higher values proportionately than large ones. On behalf of the decree-holders several witnesses were examined and they prove that as a matter of fact taluqs are sold at 25 times their annual income and even upon the deposition of the appellant the total income of his properties would not exceed Rs. 500 and, therefore, the value of the taluqs would be about Rs. 12,500. As. to the khamar land, upon the evidence adduced on behalf of the decree-holder it would appear that on an average the price is about Rs. 200 per kani. On behalf of the appellant copies of some Cadastral Survey khatians were filed, and it was only at the very last stage of the case that an application was made on his behalf for time to have them certified. This application was rejected and in our opinion rightly rejected. Moreover what were riled were mere fragments and afford no real assistance to this appellant.

4. the position there is that the appellant has failed to prove the value of the properties, while upon the evidence on the record it cannot be said that the price fetched, at the sale was inadequate.

5. Then as to the service of notices, beyond the negative evidence given by witness No. 3 examined on behalf of the appellant to the effect that there was no publication of notices there was no other evidence on his side. On the other hand, the decree-holder has examined two peons, a Tahsildar, a drummer who took part in the service, of the notices and three other persons who were present at the time

when the proclamation and notice were served and upon their evidence it has been satisfactorily established that, as a matter of fact, the notice and the sale-proclamation were duly and properly served. It is, therefore, not established that there was any irregularity in publishing or conducting the sale; far less that there was any inadequacy in the price that was fetched at the sale, consequent upon any irregularity.

6. The next ground taken on behalf of the appellant is to the effect that the notices of execution in connection with the issuing of sale-proclamation were served not upon the minors'' guardian but were served upon the minor judgment-debtors. It is contended that Babu Debendra Prosad Roy who was appointed guardian ad litem of the minors in the suit was not appointed as such guardian in the execution proceedings and that inasmuch as there was no such appointment the service of notices on him cannot be said to have been proper service in the eye of law. It is true that, there was no fresh order appointing a guardian for the minor judgment-debtors in the execution proceedings and it is also true that the guardian does not appear to have entered appearance in the course of such proceedings. It also appears that after the sale he made an application before the Court, stating that he was informed that the sale which had taken place was vitiated by irregularities and was fit to be set aside and he asked for permission for making an application to set aside the sale and that no order was passed upon his application beyond the order that it should be filed. This, however, only amounts to an irregularity. As has been laid down by the Judicial Committee in the case of Mdlkarjun v. Narhari 25 B. 337 : 27 I.A. 216 : 5 C.W.N. 10 : 2 Bom. L.R. 927 : 10 M.L.J. 368 : 7 Sar. P.C.J. 739 (P.C.). where a sale took place after the notice had been wrongly served upon a person, who was not a legal representative of the judgment-debtorls estate and where the Executing Court had erroneously decided that he was to be treated as such representative the sale was not a nullity and should not be treated as invalid notwithstanding the irregularity even though a material one, for the jurisdiction of the Court to execute the decree had been complete throughout. This irregularity can not be taken to have vitiated the sale. As an authority for such a proposition reference may also be made to the case of Fan Bhusan Bhuian v. Surendra Nath Das 61 Ind. Cas. 25 : 35 C.L.J. 9. where it has been held, that non-representation of an infant by a guardian in execution proceedings is not itself a sufficient ground for avoiding an execution sale and that such matter stands on a different footing from a cause where the provisions of Order XXXII of the Code have not been observed in a suit by or against minors.

7. For these reasons we think that the appeal fails and must be dismissed with costs.

8. We assess the hearing-fee at three gold mohurs.

Greaves, J.

9. I agree.