Gopal Saran Narain Singh, Decree-holder Vs Sheikh Md. Ahsan Auction-purchaser

Court: Calcutta High Court

Date of Decision: May 30, 1910

Final Decision: Dismissed

Judgement

1. This appeal arises out of an application made by the present Respondent under Order XXI, Rule 91, of the Code of Civil Procedure, to have a

sale set aside on the ground that the judgment-debtors had no saleable interest in the property sold and recover the amount which he had paid in

order to purchase the property at that sale. It appears that the Opposite Party, the present Appellant, obtained two decrees against Mussammat

Fakhmunessa Begum and others, who were his tenants under a mokurari lease. One of the decrees was for arrears of rent for 1308 and 1309 and

the other was for arrears for 1312 and 1313 In satisfaction of the second decree, 24 villages appear to have been sold on the 10th September

1907 for fifteen thousand rupees, and purchased by Mahomed Siddique. Subsequently, the Opposite Party attached 3 out of those 24 villages in

satisfaction of the first decree. Those villages were sold on the 17th September 1907 for nine thousand rupees, and were purchased by the present

Respondent. There was an application made in the proceedings in which Mahomed Siddique had made his purchase to have the sale set aside, and

order was passed setting aside that sale on the I7th September 1907. The second sale, at which the Respondent purchased, appears to have been

held after the order setting aside the first sale had been passed. There was an appeal against the order of the 17th September 1907 setting aside

the sale with the result that that order was reversed by the High Court and the execution proceedings were sent back in order that the judgment-

debtors, if so advised, might make any other application under sec. 311, C. P. C. After the return of the record from the High Court, such an

application was made with the result that on the 28th August 1909, a compromise was arrived at by which the sale to Mahomed Siddique held on

the 10th September 1907 was accepted, and, on the same day, it was confirmed by the Court. It appears that, after the High Court had set aside

the order of the lower Court setting aside the sale to Mahomed Siddique, the present Respondent, on several occasions, applied to the lower

Court to have the sale to him set aside and for a refund of the purchase-money of nine thousand rupees paid by him and, on those occasions, he

was told that his applications were premature; and it was not till after the compromise had been arrived at and the sale to Mahomed Siddique had

been confirmed on the 28th August 1909 that the application of the Respondent was dealt with. The application out of which the present appeal

arises was filed on the 24th September 1909, that is to say, within thirty days of the date of the confirmation of the sale to Mahomed Siddique.

Various objections were taken to the application of the Petitioner by the present Appellant, and three issues were raised in the lower Court. The

first issue raised was one of limitation and the lower Court held that, as the application had been filed within thirty days of the confirmation of the

sale to Mahomed Siddique, Art. 166 of Sch. I of the Limitation Act did not bar the application. The second point raised was whether the sale after

its confirmation could be set aside and the lower Court held that, under sec. 151 of the new Code of Civil Procedure, the Court was empowered

to pass such an order. The third point raised was whether the title to the property sold vested in Mahomed Siddique from the date when the sale

was confirmed or from the date when the property was sold. The learned Judge held that, under sec. 65 of the Code it was clear that the title

vested from the date when the property was sold. The learned Judge, therefore, held that, on the 17th September 1907 when the three villages

were sold to the present Respondent, Fakhmunessa Begum and others, the judgment-debtors, had no saleable interest in them and, therefore, the

applicant was entitled to have the sale set aside and to recover his purchase-money.

2. The decree-holder, the Opposite Party, has appealed and his case stated broadly appears to be that he is entitled under the law after having

sold the 24 villages and recovered fifteen thousand rupees as their price, to put up again to sale three of the villages which had already been sold

and to retain the price (Rs. 9,000) realized from them, though admittedly, at the time of the sale, the judgment-debtors had no saleable interest in

the property. In support of the appeal, it has first been argued that the sale of the 10th September 1907 being for rents due for years antecedent to

the decree in execution of which the sale was held on the 17th September 1907 it must be held that, under the law, the tenure was sold subject to

the claim of the landlords for the rents of 1308 and 1309. In the judgment of the lower Court, there is nothing to show that, at the sale of the 10th

September 1907, it was stated that the property was sold subject to any charge and the learned Counsel for the Appellant, when we asked him

whether any such notice was given, informed us that he was unable to say whether any such notice had been published at the time. In those

circumstances, what was sold on the 10th September 1907 was not merely the right, title and interest of the tenure-holders in the tenures but the

tenures themselves and they passed in their entirety to the purchaser, subject to no charge whatever for previous rents. The learned Counsel for the

Appellant has, in support of his contention, referred us to the provisions of sec. 65 of the Tenancy Act which lays down that rent is a first charge

on a holding or tenure; but that provision of the law would not support the contention which he now advances that, after a tenure has been sold out

and out for the satisfaction of certain arrears, a portion of the same tenure can after-wards be sold for a second time for recovery of rents which

had previously accrued. In our opinion, the point taken by the learned Counsel cannot be maintained.

3. Then it has been contended in support of the appeal that the lower Court was wrong in the view which it has taken on the question of limitation.

The argument of the learned Counsel would appear to amount to this that, as under the law it is stated that the limitation for an application to set

aside a sale in execution of a decree must run from the date of the sale, therefore in the present case, if limitation be taken to run from that date, it

would be impossible for the applicant to succeed in his present application. We do not think that this view of the law is correct nor do we think that

the lower Court was right in the view which it took that Art. 166 of Sch. I of the Limitation Act should be held to apply to the present case. That

article lays down the period of limitation which would run from the date of the sale which it is sought to set aside whereas the learned Judge of the

Court below has taken limitation to run for the purposes of the present suit from the date when the right of the applicant to have the sale set aside

accrued. In our opinion, in a case like the present, the limitation for au application under Order XXI, Rule 91, C. C. P., must be taken to run from

the date when the right to make the application accrues. In the present case, the right to make the application certainly did not accrue until the sale

to Mahomed Siddique had been confirmed. The previous application to set aside the sale was not entertained by the lower Court and could not

have been dealt with until that event had happened. On confirmation of the sale, the right accrued to the present Respondent to have the sale in

execution of which he had purchased the villages set aside and his right also accrued to obtain a refund of the money which he had paid for the

properties in which the judgment-debtors had no saleable interest and in which by the sale no title was conveyed to him as purchaser. In our

opinion, in a case like the present, the limitation provided in Art. 181 of Sch. I of the Limitation Act applies, especially as in the present case the

main object of the applicant is to obtain a refund of the money which has been wrongly paid by the purchaser and received by the decree-holder

rather than to have the sale set aside. The result, therefore, is that the judgment and order of the lower Court are confirmed and the appeal is

dismissed with costs. We assess the hearing-fee at five gold mohurs.