

(1922) 08 CAL CK 0053

Calcutta High Court

Case No: Appeal from Original Civil Jurisdiction No. 96 of 1922

Nirode Nath Bannerjee and
Another

APPELLANT

Vs

Amullya Dhone Bannerjee and
Another

RESPONDENT

Date of Decision: Aug. 24, 1922

Judgement

Woodroffe, J.

The point before us is whether the application to set aside the sale falls within the terms of Or. "21, r. 89. Mr. Justice Greaves was of opinion that this was not a sale in execution of a decree because it was a sale by consent and the mere fact that the Court was invited to carry out the sale did not make it a sale in execution of a decree. The decision is however not sought to be supported on this ground. As a matter of fact there could be no consent because infants were concerned in the orders of 26th January 1912 and 11th August 1920. In the first mentioned order it is recited that the Defendants did not appear either in person or by Counsel and on the second occasion the attorney for the Defendants stated that he had received no instructions from his clients. Further the award was not in my opinion by consent. The award recited a consent to the sale of the dwelling-house which was one of the motives or reasons actuating the arbitrators in making the award in the terms in which it was given. The objection before us is that there cannot be said to be a decree-holder and judgment-debtor within the meaning of the section and that the amount must be specified in the proclamation of sale as that for the recovery of which the sale was ordered. This, it is said, is not the case here. The case of *Virjibun Dass v. Bissesswar Lal* I. L. R. 48 Cal.69: s. c. 24 C. W. N. 1032 (1920) supports, it is claimed, the Appellants so far as it goes. That is true so far as it holds that a decree is executed where the order for sale is contained in the judgment itself where there is no attachment as also that r. 89 applies in a case where there has been no proclamation of sale but a notification at a Registrar's sale. There is here a decree and in a partition suit after decree all share-holders are decree-holders and

judgment-debtors as against one another. It must, I think, be taken that the sale, was ordered for the recovery of the sums payable by the award to the Plaintiff and the making over to each of the parties of their share of the sale-proceeds in terms of the award. It is conceded that the section would apply in the case of a sale in execution of a partition decree awarding compensation to one sharer and enforcing payment of such compensation against the share of another sharer. Does it then make any difference that in the present case that the money payable to the Plaintiff is to come out of the whole estate in which both the Plaintiff and the Defendants are interested? I think not, and that we ought not to take a narrow view of the section. Though the Plaintiff's money is to be recovered from the total sale-proceeds in which he has a share, in substance the transaction is one in which the Plaintiff's rights under the award are enforced-for execution means that. I am of opinion then that Or. 21, r. 89 applies to the present case.

2. But then the objection is taken that if that be so, an application under this section is only maintainable on the applicant first depositing in Court the amount payable to the purchaser. The facts upon this point are contested and have not been dealt with in the judgment under appeal, possibly because having regard to the view that the learned Judge took of the law, viz., that the section was not applicable, it was not necessary to decide whether its conditions had been carried out.

3. Therefore the case must be remanded for the determination of the issue whether the provisions of Or. 21, r. 89 as regards the deposit of the money payable to the purchaser have been complied with.

4. As the Appellant has succeeded on the question whether the order and rule were or were not applicable. I think, he is entitled to costs of this appeal. As regards the costs in the Original Court I think that the order which we should make is that they do follow the result of the bearing on remand.

Suhrawardy, J.

5. I should like to proceed on the facts of this particular case for it is conceivable that there may be a sale by or through the agency of Court to which the provisions of r. 89. Or. 21, C. P. C, may not apply. In this case the facts are that in 1909 the Plaintiff brought a suit for partition which was with the consent of the parties referred to arbitration. The arbitrators made an award in 1912 by which they directed inter alia that the family dwelling-house of parties, premises No. 127, Boitakhana Road, should be sold by private treaty, and if not sold privately within a year, by the Court and that out of the sale-proceeds a sum of Rs. 100 was to be paid to Plaintiff for his share in the moveables and Rs. 200 by way of mesne profits and the balance should be divided into four parts one of which should go to the Plaintiff and the remaining three to the Defendants-Appellants. That award was confirmed by a decree of the Court, dated the 26th January 1912. In 1920, the Plaintiff took out a master's summons and an order was passed by Greaves, J., in the following terms :-

It is ordered that the premises No. 127, Boitakhana Road be sold by the Registrar of this Court by public auction to the best purchaser or purchasers that can be got for the same and the money to arise by such sale be paid to the said Registrar. And it is further ordered that the said Registrar do after deducting from the said sale-proceeds his own commission, pay the balance to the Controller of Currency for the time being of the Government of India and the Secretary and Treasurer for the time being of the Bank of Bengal with the privity of the Accountant-General of this Court to be by them placed to the credit of this suit subject to the further order of this Court.

6. The property was accordingly sold by the Registrar and knocked down to the Respondent Hem Chandra Mullick. Subsequently and within the statutory period the Appellants applied to have the sale set aside on their depositing a certain sum which the Plaintiff had agreed to take in full acquittance of his claim. That application was made under r. 89 of Or. 21, C. P. C. The learned Judge from whose judgment this appeal is made was of opinion that as the sale was "by consent" or "which had been agreed to by the consent of the parties," r. 89 did not apply. That point of view has not been placed before us by the learned Counsel for the Respondent and for obvious reasons.

7. The only ground on which the order of the lower Court is defended is that the sale was not held "in execution of a decree" and hence r. 89 is not applicable, and I propose to examine that question on the facts of this case as above set forth and which are not disputed.

8. The decree passed by Fletcher, J., on 26th January 1912 is described as a decree in suit No. 183 of 1909 and I am of opinion that it is a decree of Court for all intents and purposes giving effect to the award of the arbitrators and it is the final decree in the suit. It was on the application of one of the parties that this decree was enforced or in other words executed. If this view is correct, it follows that r. 89, Or. 21 is applicable to this case. But it is argued that as the execution is not sought on the forms prescribed by the C. P. C, or as there was no sale proclamation with reference to which the amount to be deposited is to be calculated it was not a sale under the Code. Apart from the authority referred to by my learned brother, it seems to me that any defect or irregularity in the procedure or the act of the Court in not issuing proper processes should not destroy the right of any party to adopt any of the courses provided by the CPC for setting aside a sale held by Court. To hold otherwise would be to defeat the right of a party to set aside a sale even on the ground of fraud or irregularity by omitting to observe the procedure laid down by the Code. The crux of the matter is whether the property is sold in execution of a decree. From the statement of facts as above, I have no doubt that the property was sold "in execution of a decree" and that r. 89, Or. 21 is applicable. The result is that the order of the learned Judge so far as it holds that the Appellants are not entitled to apply under r. 89, Or. 21, C. P. C, for setting aside the sale must therefore be set

aside. I agree with my learned brother in his reasoning and conclusions and in the order he has proposed to pass remanding the case and as to costs.