
Sashi Bhusan Mitra and Others Vs Ramlal Mitra

Appeal From Original Order No. 1062 of 1975

Court: Calcutta High Court

Date of Decision: Sept. 1, 1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) – Order 21 Rule 90, Order 34 Rule 5

Citation: AIR 1977 Cal 351 : 81 CWN 18 : (1977) 2 ILR (Cal) 121 : (1976) 2 ILR (Cal) 501

Hon'ble Judges: Nirmal Chandra Mukherji, J; Bankim Chandra Ray, J

Bench: Division Bench

Advocate: S. Das and Manula Chowdhri, for the Appellant; Saktinath Mukherjee, Rathindra Kumar Dey, Shyamal Sen and Asoke Kr. Sengupta, for the Respondent

Final Decision: Dismissed

Judgement

N.C. Mukherji, J.

This is an appeal against an order dated 5th May, 1975 passed by Shri M. M. Das, 4th Subordinate Judge, Alipore in

Title Execution Case No. 1 of 1971 dismissing the application filed by the appellant under Order 34, Rule 5 of the Code of Civil Procedure.

2. The facts of the case may briefly be stated as follows:--

The property in suit is 75. Chakraberia North, Calcutta, comprising 10 cottahs of land with two storied (buildings). The property was sold at Rs.

41,600 to the decree-holder in execution of a mortgage decree. The appellant, who is the judgment-debtor filed an application under Order 21,

Rule 90 of the Code for setting aside the sale. A Miscellaneous Case was started and the same was dismissed for default. Thereafter the appellant

filed an application u/s 151 of the Code for setting aside the order of dismissal. That application was also dismissed. The appellant also filed an

application u/s 36 of the Bengal Money Lenders Act and obtained order staying execution proceedings till the disposal of the case. The appellant

preferred an appeal to this Court against order dated 16th June 1973 by which the application under Order 21. Rule 90 was dismissed. The

appeal was numbered at F.M.A.T. 2827 of 1974. On 11th January 1975 the appellant made an application under Order 34, Rule 5 of the Code

and deposited Rs. 19,625 for decretal amount, costs and interest and also 5% of the purchase money on Rs. 41,600. The application under the

Bengal Money Lenders Act was not pressed and the same was dismissed for non-prosecution in view of the application under Order 34, Rule 5 of

the Code. The application under Order 34, Rule 5 was dismissed by the Court below on the ground that the sale was deemed to be confirmed on

16th of June 1973 when the application under Order 21, Rule 90 was dismissed although the court omitted to pass an order confirming the sale,

and also on the ground that there was no appeal from the order of dismissal dated 16th of June 1973 and there was no order of stay. Being

aggrieved by the aforesaid order, the judgment-debtor has preferred the present appeal.

3. Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the respondent, raises a preliminary objection about the maintainability of

the appeal. Mr. Mukherjee submits that the suit for the enforcement of the mortgage decree and recovery of dues was valued at Rs. 13,000, and

that being so any proceeding in connection with that suit should be similarly valued and as such the learned District Judge was the proper court

where the appeal ought to have been filed. As the valuation of the subject-matter falls within the jurisdiction of that court the appeal has been

wrongly filed in this Court. Mr. Mukherjee submits that the valuation of the suit determines the forum of the appeal. In support of his contention he

refers to several decisions. He first cites a case reported in Kiran Singh and Others Vs. Chaman Paswan and Others, . In this case it was held that

the decree passed without jurisdiction is a nullity. It was further held ""The words "unless the over-valuation or under valuation thereof has

prejudicially affected the disposal of the suit or appeal on its merits" in Section 11 clearly show that the decrees passed in such cases are liable to

be interfered with in an appellate court, not in all cases and as a matter of course, but only if prejudice such as is mentioned in the section results

and that the prejudice contemplated by the section is something different from the fact of the appeal having been heard in a forum which would not

have been competent to hear it on a correct valuation of the suit as ultimately determined"". We do not see how the- principle laid down in this case

applies to the fact of the present case.

4. Mr. Mukherjee next refers to a decision reported in Harihar Das Chowdhury Vs. Raj Kumar Mukherjee and Others, . In this case it has been

held that ""When Section 21 of the Bengal Civil Courts Act refers to the value of the original suit, the reference is to the valuation as made by the

plaintiff, subject to such amendment as may have been made under the orders of the trial court. The Legislature did not intend that the expression

"the value of the original suit" in Section 21 means the real value of the subject-matter of the original suit, regardless of what may have happened in

the trial court." In this case the plaintiff filed a suit for redemption and valued the same at Rs. 3,600. The plaintiff got a decree. The defendant at

the trial did not challenge the valuation. After the defendants have been defeated they sought to change the forum of appeal by the assertion that the

value of the subject-matter of the suit exceeds Rs. 10,000. It was held that the defendants should not be permitted to take recourse to such a

procedure. In the present case the suit was valued at Rs. 13,000. But the total decretal dues and costs were much higher and the appellant

deposited a sura of Rs. 19,625 for decretal amount, costs and interest and also 5% of the purchase money on Rs. 41,600. The judgment-debtor

previously filed F.M.A.T. No. 2827 of 1974 in this Court against the order dismissing his application u/s 151 of the Code. The present appeal has

been valued by the appellant at Rs. 16,000. Dr. Das contends that though the original suit was for Rs. 13,000 as the decretal amount was much

higher he has rightly filed the appeal in this Court. It is submitted by Dr. Das that in a mortgage suit the valuation for the purpose of the suit and the

valuation for the purpose of an appeal may vary.

5. Mr. Mukherjee also refers to a decision reported in Priya Nath Roy Vs. Sridhar Chandra Roy and Others, . In this case it was held "In a suit for

partition the decision of the trial court as to valuation of the subject-matter of the suit for the purposes of jurisdiction must be taken as final and

conclusive during all the stages of the suit irrespective of what the parties might agree later on to be the actual market value of the suit properties

and must determine the right of appeal u/s 21". The principle laid down in this case does not apply to the facts of the present case.

6. The last case referred to by Mr. Mukherjee on this point has been reported in Deonath Missir and Others Vs. Chandraman Missir and Others, .

In this case a suit for partition was valued at Rs. 5,000. It was held that "For the purpose of determining the forum of the appeal u/s 21 of the Civil

Courts Act, the value of the suit as given in the plaint, not challenged by the defendants and accepted by the trial court, must be deemed to be the

only value of the suit, and the appeal against the final decree in the suit would lie to the District Judge". This principle also does not apply to the

facts of the present case. Considering the facts and circumstances of the case, we are of the opinion that though the mortgage suit was valued at

Rs. 13,000 the present appeal has been rightly valued and that being so, this appeal is maintainable. The objection raised by Mr. Mukherjee is

negatived.

7. Now with regards to the merits of the appeal. Dr. Das submits that after the judgment-debtor's application under Order 21. Rule 90 of the

Code was dismissed for default no order was passed by the court confirming the sale, and as such the judgment-debtor's application under Order

34, Rule 5 was maintainable. The learned Judge wrongly dismissed the application holding that the sale was confirmed on 16th June 1973 when

the application under Order 21, Rule 90 was dismissed for default although it is the admitted position that no order was passed by the learned

Judge confirming the sale. In support of his contention Dr. Das has placed before us several decisions. The first case referred to by Dr. Das has

been reported in Chhogan Lal Bagri Vs. Behari Lal Saha Ray and Others, . This case dealt with the period of limitation for filing an application for

setting aside a sale after the same was confirmed. It was further held in that case that the order was passed by the court u/s 47 rejecting the

application for delivery of possession by the decree-holder auction-purchaser and as such the appeal was competent. This is not an authority on

the point whether when an application under Order 21, Rule 90 is dismissed the sale automatically becomes absolute or the sale cannot be

considered to be absolute when a formal order was not passed by the court.

8. The next case relied on by Dr. Das has been reported in (1896) 23 Ind App 45 (PC) "(Bajinath Sahai v. Ramgut Singh). In this case their

Lordships were of the opinion that there was no final, conclusive and definitive order confirming the sale while the question whether the sale should

be confirmed was in litigation or until the order of the Commissioner became definitive and operative by the final judgment of the Board of

Revenue. The facts of this case are completely different from the facts of the present case.

9. The next case referred to by Dr. Das has been reported in 38 CWN 901 : AIR 1934 134 (Privy Council) . In this case it was held ""When an

appeal has been taken from an order made under Order 21, Rule 92 disallowing an application for setting aside a sale, the sale does not become

absolute within the meaning of Article 180 of the Limitation Act until the disposal of the appeal, even though the first court may have confirmed the

sale"". In this case their Lordships were deciding the question of limitation and it was held ""The period provided for in Article 180 for an application

for delivery of possession should be computed, when there has been an appeal from an order refusing to set aside the sale, from the date of the

final disposal of the appeal"".

10. Dr. Das next refers to a decision reported in Mandi Mia Vs. Sekander Mea and Others, . In this case it has been held that ""In the absence of

an order setting aside a sale, it is the duty of the Court to confirm the sale and there is no provision in the CPC for an application to be made by

the auction purchaser for confirmation of the sale"". At page 412 it has been observed ""Under Order 21, Rule 92 Civil Procedure Code, the sale

has got to be confirmed when there is no application under Order 21, Rule 89, 90 or 91 CPC or when such application is made and disallowed :

in the absence of an order setting aside a sale, it is the duty of the court to confirm the sale and there is no provision in the CPC for an application

to be made by the auction purchaser for confirmation of the sale. We do not see how this decision helps the appellant. It has been clearly laid

down that when an application is made and disallowed it is the duty of the court to confirm the sale. Their Lordships have not laid down that it is

necessary for the court to pass a formal order confirming the sale. Dr. Das also relies on a decision reported in Janak Raj Vs. Gurdial Singh and

Another, . In this case in execution of an ex parte money decree a house property was sold. The judgment-debtor did not apply for setting aside

the sale but applied for setting aside the decree, but the decree was reversed. After reversal, the auction-purchaser filed an application under

Order 21, Rule 92 for confirmation of sale. It was held that the sale must be confirmed notwithstanding reversal of decree after sale. Title of

purchaser related back to date of sale and not to that of its confirmation. This case also, in our opinion, does not help the appellant. Dr. Das next

refers to a decision reported in Sm. Priti Rekha Mitra Vs. Narayan Chandra Dutta, . In this case it has been laid down that ""In a mortgage suit for

sale the equity of redemption can be claimed by the mortgagor when an application by the purchaser himself is pending for confirmation of the sale.

The equity of redemption in such cases is not extinguished by the final decree for sale nor by the actual sale itself but survives until the sale is

confirmed and made absolute under Order 21, R 92 of the Civil Procedure Code"". This proposition of law is not disputed by Mr. Mukherjee

appearing on behalf of the respondent.

11. The next case cited by Dr. Das has been reported in Baruram Kalowar Vs. Upendra Nath Das and Others, . In this case it was held ""Under

Order 34, Rule 5, C.P.C. if the judgment-debtor pays into Court the amount due from him after the disallowance of an application under Order

21, Rule 90 and before it has been possible to confirm the sale (as when the record has not arrived to the Court which held the sale from the

Appellate Court which dealt with the application for setting the sale aside), the sale must be set aside, although such payment may be long after the

sale and although the delay may have been caused by action of the judgment-debtor"". The facts of the present case are not such that it can be said

that it became impossible to confirm the sale. The contention of Dr. Das is that in the absence of an order passed by the Court for confirmation of

the sale, the sale was not made absolute while Mr. Mukherjee contends that rejection of the application under Order 21, Rule 90 is confirmation of

the sale. In such cases the confirmation is automatic and no formal order need be passed. Dr. Das also refers to a decision reported in Chellappa

Chettiar and Others Vs. T.P. Kalyanasundaram and Others, . In this case it was held ""The right conferred by Order 34, Rule 5 is a substantive

right and it should not be whittled down by any considerations of the judgment-debtor being responsible for the delay in passing the order of

confirmation of the sale"". We are not required in the present case to come to a decision about the question of delay caused by the judgment-

debtor.

12. Mr. Saktinath Mukherjee, learned Advocate appearing on behalf of the respondent, very strongly contends that when an application for setting

aside a sale under Order 21, Rule 90 is dismissed, the automatic consequence is that the sale becomes confirmed and that being so, it is not at all

necessary that a formal order need be passed by the court confirming the sale. In support of his contention Mr. Mukherjee cites before us several

authorities. The first case cited has been reported in ILR (1897) 24 Cal 682 (Khetter Nath Biswas v. Faizuddin AH). In this case the court below

set aside the sale upon payment by the applicant of the mortgage due with interest and costs. It was held by this court that ""Inasmuch as u/s 312 of

the CPC the auction-purchaser was entitled to have an order confirming the sale unless the sale were set aside u/s 310A, or Section 311 of the

CPC and as the sale was not set aside under either of these sections, the court below had no jurisdiction to set aside the sale upon payment by the

applicant of the mortgage money with interest and costs"".

13. Mr. Mukherjee next refers to a decision reported in Narendra Nath Chatterji Vs. Rakhal Das Tarafdar and Others, . In this case though the

point before their Lordships was whether the High Court has jurisdiction to interfere in revision with an order dismissing an application under Order

21, Rule 90 for default, their Lordships held that ""The effect of the dismissal of an application under Order 21, Rule 90 even for default is to

confirm the sale under Rule 92 and hence an appeal lies against the order and the High Court has no jurisdiction to interfere with the order in

revision"".

14. Mr. Mukherjee next refers to a decision reported in Mt. Rahela Khatun and Others Vs. Amburennessa Choudhurani and Others, . In this case

it has been held by a Division Bench that ""The sale certificate is no more than evidence of title. Absence in the record of a sale certificate of of a

formal order confirming the sale, does not affect the purchaser's title when in substance and in fact the Court did confirm the sale"". In this case

there was no formal order by the court confirming the sale and that being so, the facts are similar to the facts of the present case. Reference has

also been made by Mr. Mukherjee to a decision reported in Banshidhar Durga Das Dutta Vs. Ishan Chandra Chatterji, . In this case their

Lordships have laid down. ""When no formal order has been recorded confirming the sale and the application under Order 21, Rule 90 has been

dismissed for default for non-appearance of both parties to the proceeding, the order of dismissal passed under those circumstances is open to

appeal"". It has been further held that ""It is the disallowing of the application made under Order 21, Rule 90 which corresponds to the order

refusing to set aside a sale. The fact that a distinct order has not been recorded confirming the sale does not alter the character of the order

disallowing an application under Order 21, Rule 90.

15. Mr. Mukherjee next refers to a decision reported in AIR 1958 Mad 317 (Veda Goundar v. Arunachalam Chettiar).

It has been held in this case that ""Confirmation of sale under Order 21, Rule 92 does not require an application by the auction-purchaser.

Confirmation is a statutory obligation imposed on the court, if the requirements of Order 21, Rule 92 are satisfied"". Mr. Mukherjee also draws our

attention to the findings of their Lordships in the case reported in Hukamchand Vs. Bansilal and Others, . Their Lordships found that ""Under Order

21, Rule 92 the Court was bound to confirm the sale at once when it dismissed the application under Order 21, Rule 90"". We find that a Privy

Council decision reported in AIR 1931 33 (Privy Council) very much helps the respondent. At page 383 it has been observed by Lord Macmillan

that ""It would be idle to contend that because in this case there was, technically, no confirmation of the sale, it could be set aside. It could not be

set aside except on payment of 5% under Rule 89. The purchaser has an absolutely vested interest in the property, although there is a divesting

power in the Court under Rule 89 and 90. But if a party fails to avail himself of the appropriate provision the sale shall be confirmed; see Rule 92.

The fact that in this case a distinct order has not been recorded confirming the sale, is quite immaterial"". In order to come to this decision their

Lordships relied on the case reported in Banshidhar Durga Das Dutta Vs. Ishan Chandra Chatterji, . Relying on the decision referred to above and

considering the facts and circumstances of the case we negative the contention raised by Dr. Das that an express order for confirmation of sale is

absolutely necessary. We also negative the argument advanced by Dr. Das that an application by the auction-purchaser for an order for

confirmation of sale is necessary.

16. Dr. Das next contends that even if the order is passed confirming the sale, the sale will not be absolute until the disposal of the appeal. The right

to redeem mortgage under Order 34, Rule 5 will remain open till the sale becomes absolute. As we have held that the sale has already become

absolute after the application under Order 21, Rule 90 was dismissed we negative this contention of Dr. Das. We also negative the contention that

the sale does not become absolute till the disposal of the appeal.

17. For all the reasons stated above this appeal is dismissed. The order passed by the court below is confirmed. Considering the facts and

circumstances of the case we, however, do not pass any order for costs.

B.C. Ray, J.

18. I agree.

ORDER

19. On the prayer of the learned Advocate for the appellant let the operation of the order remain stayed for a period of two weeks from date.