124 Ind. Cas. 481

Calcutta High Court

Case No: None

Abdul Gofur Mulla and Another		APPELLANT
	Vs	
Kalidhan Mondal and Others		RESPONDENT

Date of Decision: Aug. 7, 1929

Citation: 124 Ind. Cas. 481

Hon'ble Judges: S.K. Ghose, J; B.B. Ghose, J

Bench: Division Bench

Judgement

B.B. Ghose, J.

This is an appeal by the judgment-debtor against an order of the District Judge reversing the order of the Subordinate Judge setting aside a sale in execution of a rent decree on the ground that the judgment-debtor had deposited the amounts necessary u/s 174 of the Bengal Tenancy Act. The facts are these: A decree was obtained by the landlord for about Rs. 2,430. The sale was held on the 11th August, 1928, and a third party purchased the property in question for Rs. 5,400 and odd. On the 22nd August, the judgment-debtor deposited the sum mentioned in the sale proclamation together with 5 per cent, of the purchase money and on the 18th September, the Court made an order setting aside the sale. It was found afterwards that the amount which was necessary to be deposited for having the sale set aside fell short by Rs. 60 or Rs. 80. The reason for the error apparently was that the judgment-debtor deposited the sum given in the sale proclamation which only was necessary to be deposited if the application fell within Order XXI, Rule 89 of the Civil Procedure Code. u/s 174 of the Bengal Tenancy Act the judgment-debtor was bound to deposit the entire money which the decree-holder was entitled to recover. The amount which fell short was apparently on account of the interest that had to be calculated since the date of the sale proclamation and the date of deposit. The decree-holder subsequently made an application for review of judgment before the Subordinate Judge and he also preferred an appeal against the order of the Subordinate Judge to the District Judge. The Subordinate Judge refused to re-consider the order

setting aside the sale. The learned Judge, however, on appeal preferred by the decree-holder has directed the order for setting aside the sale to be vacated and for confirming the sale. The appeal is preferred against that order of the learned District Judge. It is necessary to state that the auction-purchaser did not appeal against the order of the Subordinate Judge setting aside the sale. In this Court the decree-holder does not appear the auction-purchaser appears and he takes a preliminary objection to the maintainability of the appeal here. The learned Advocate for the appellant answers by saying that there was no appeal before the District Judge against the order of the Subordinate Judge and he has made an application in the alternative for setting aside the order of the District Judge on appeal on the ground that he had no jurisdiction to entertain the appeal. The same objection was raised by the judgment-debtor before the learned Judge but he overruled the objection on the authority of the case of Sital Rai v. Nandalal 1 IC 304 : 11 C.L.J. 202 :13 C.W.N. 591 and he held that the appeal to him was competent u/s 47 of the Code. If the learned Judge was right in his view that Section 47 governed the proceedings, then there can be no question that there would be a second appeal. But the learned Advocate for the respondent-auction-purchaser contends that this is not a matter falling u/s 47 of the Code but there was an appeal before the learned Judge under Order XLIII, Rule 1(j) of the CPC and he relies in support of his contention on the case of Banshibadan Mandal Vs. Chhaunat Bibi and Others, : In my opinion, this contention is untenable because the provision of Order XXI, Rule 89 has no application to sales under the Bengal Tenancy Act (see Section 170 of the Act). The order of the trial Court was not made under Order XXI, Rule 22 of the Code on which the case cited was decided. It was made u/s 174 of the Bengal Tenancy Act and, therefore, this argument on behalf of the respondent has no force whatsoever.

2. We have next to consider whether the matter in question falls within the provision of Section 47 of the Code as it has been argued on behalf of the respondent that it does not. The case of Sital Rai v. Nandalal 1 I C 304 : 11 C.L.J. 202 :13 C.W.N. 591 to which the learned District Judge has referred as supporting the proposition that the matter in controversy falls within Section 47 of the CPC does not appear to support the proposition in its entirety. What the learned Judges say there is this: "It cannot be affirmed as a general proposition of law either that an order u/s 174 of the Bengal Tenancy Act or u/s 310-A of the CPC is or is not appealable. Whether an order made under either of those sections is appealable, must depend upon the circumstances of the individual case before the Court." It seems to me with great respect that the learned Judges proposed a problem in each case to be solved by the Court whenever a question arises u/s 174 of the Bengal Tenancy Act with which only we are now concerned. That problem seems to have been solved by the learned Judges in that case and in some other cases by holding that where the decree-holder was the purchaser the matter falls u/s 47 of the Code and an appeal lies. That has been held in some cases previous to this and also in subsequent cases. I must add again with the greatest respect that this decision seems to me to be fallacious having regard to the view of the Privy Council in the case of Prosunno Kumar Sanyal v. Kali Das Sanyal 19 I.A. 166 : 19 C. 683 : 6 S. P.C.J. 209 (P.C.). There has,

however, been a series of cases which lay down that rule. In my judgment, an order u/s 154 of the Bengal Tenancy Act does not fall within Section 47 of the CPC in any case and, in my opinion, the true rule was laid down in the case of Subh Narain Lall v. Goroke Prosad 3 C.W.N. 344 although all the reasons stated there do not commend themselves to me. If all proceedings for setting aside a sale are considered to be questions falling u/s 47, then by what sort of reasoning can it be said that an order passed under Rule 92 of Order XXI of the Code for setting aside the sale on the ground of irregularity, fraud or otherwise is not a question falling u/s 47 of the Civil Procedure Code? This, however, has never been contended in any Court nor can it be contended that proceedings under Rule 92 of Order XXI can, by any stretch of language, be brought within the purview of Section 47 of the Code. I might have considered it necessary to refer this question to the Full Bench but having regard to the fact that this question has been solved by the new amendment of the Bengal Tenancy Act, I do not think it necessary to do 60. Under the new Section 174, Sub-section 5, an appeal has been allowed against an order setting aside or refusing to set aside a sale. I content myself by following the case of Subh Narain v. Goroke Prosad 3 C.W.N. 344 referred to above. In my opinion, therefore, the appeal to the learned Judge was not competent and on that ground the order of the learned Judge is liable to be set aside and that of the Subordinate Judge restored.

3. In disposing of this matter, I may refer to one other fact. This matter of short deposits on account of mistake in calculation is not infrequent. What the parties usually do is to apply to some Court official to make the calculation as to the amount which it is necessary for them to deposit in order to set aside a sale either under Order XXI, Rule 89 of the CPC or u/s 174 of the Bengal Tenancy Act. As a matter of practice and it is also to be found in this case, a calculation is made on the back of the petition for execution presented by the decree-holder and the calculation is made with reference to the application. Then chalans are filed and those chalans are passed by the Sheristedar according to the General Rules and Circular Orders, Civil, of this Court. Now, in this case also it was the duty of the Sheristedar to see as to the correctness of the amount to be deposited under Rule 20, Chap. IX of the Court''s Rules, and Circular Orders, (Civil). The Sheristedar in this case signed the chalans and evidently he was of opinion that the exact amounts required to be paid to the different parties were deposited by the judgment-debtor. That being so, it seems to me that it falls within the observations of Mr. Justice Jenkins, as he then was, in the Full Bench case of Chundi Charan Mandal v. Banke Behary Lal Mandal 26 C. 449 : 3 C.W.N. 83 (F.B) where that learned Judge stated that in order to succeed, the judgment-debtor must establish that he was prejudiced by the act of the Court and that the mistake that was made was attributable to that act. Mr. Justice Jenkins was careful to point out that what constituted act of the Court must depend upon the circumstances of each case. When the judgment-debtor deposits the money, if by some mistake a short deposit is made and that deposit is accepted by the Court official as the correct amount and when the mistake is discovered the judgment-debtor pays in the fall amount, it would hardly be consistent with common sense or justice to say that the judgment-debtor has not con-plied with the provisions of

Section 174 of the Bengal Tenancy Act and that he must lose the property. The only thing that can be done in such a case is that at the most he should be made liable to pay interest for the few days that the mistake was not discovered and the money was not paid. It seems to me to be still worse when the Court of first instance sets aside the sale on the ground that the full amount has been deposited and the Appellate Court reverses that decision and deprives the judgment-debtor of his property although the decree-holder has been satisfied in full. The position in this case is again worse because in the lower Court it was the decree-holder who was fighting the judgment-debtor. The auction-purchaser was satisfied with his 5 per cent, and did not want to take the property. Here the decree-holder is not taking any interest but the auction-purchaser is resisting the appeal and the application for revision. Under these circumstances, the proper order to make is to dismiss the appeal, to allow the application in revision, to set aside the judgment of the lower Appellate Court and to restore the order of the Subordinate Judge.

4. Having regard to the fact that the judgment-debtor gave the wrong rule in his petition under which he professed to deposit the amount of the decree, there will be no order as to costs in any of the Courts, each party bearing his own costs throughout.

S.K. Ghose, J.

5. I agree.