
(1916) 08 AHC CK 0009
In the Allahabad High Court

Balbir Prasad and Another

APPELLANT

Vs

Karan Singh and Another

RESPONDENT

Date of Decision : 01-08-1916

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5

Citation : AIR 1917 All 40 : 37 Ind. Cas. 752

Hon'ble Judges : Piggott, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Piggott, J.—This is an application of an unusual character. The position of the parties is as follows:

2. The applicants are judgment-debtors and the opposite party are decree-holders.

3. Under a certain decree for sale on a mortgage, it is common ground that the decree directed the sale of some share in a particular mahal. It so happened that the decree was ambiguous. A difficulty arose on the execution side as to whether it was a 1/4th share of this mahal or a 1/8th share which was to be sold. The question must be determined primarily on the wording of the decree, though the surrounding circumstances may have to be taken into consideration.

4. The Court below has ordered a 1/4th share of the mahal to be sold, and the sale has already taken place, but an appeal against that order has been admitted, and is pending before this court, raising the question whether it was 1/4th share and not 1/8th share which should have been sold. Now the judgment-debtor has presented this application praying for an order directing the Court below not to confirm the sale pending the disposal of this appeal, I must make it clear that in the sale held under the decree the decree-holder purchased the property so that no question could arise of the rights of third parties. The question at issue will be decided between the parties to the decree itself.

5. There has been considerable argument before me as to the precise provisions of the CPC applicable to the present application.

6. Personally I have no doubt that the application is under Order XLI, Rule 5, and has to be dealt with as such. On behalf of the decree-holders it is argued that this Rule is not applicable, as the execution proceedings terminated with the sale and continuation cannot be regarded as a step-in-aid of execution.

7. The provisions of Order XLI, Rule 5, are only applicable mutatis mutandis to applications on the execution side. The Rule as it stands presupposes a regular application in a suit, the decree in which is sought to be executed during the pendency of the appeal.

8. Here the appeal is before this Court on the execution side and the applicant is asking for an order to restrain the Court of first instance from taking any steps in the matter pending the disposal of the appeal.

9. I am satisfied that such an application is entertainable, being subject to the provisions of Order XLI, Rule 5, of the CPC in so far as they can be made applicable.

10. Looking at the matter from this point of view, I do not think this application should be granted. So far as the papers before me are concerned they show that no security has been furnished or tendered. The position taken up by the applicants-judgment-debtors is that, in the case of an order postponing the confirmation of the sale being passed, the property itself will remain available to meet the claims of the decree-holders-respondents in the event of the appeal failing.

11. This argument overlooks the fact that as matters stand the decree-holders are entitled to the possession of the property and the enjoyment of its profits. An order postponing the confirmation of the sale would certainly deprive them of this advantage and put them to undeserved loss in case the appeal is dismissed.

12. This view of the case being pointed out to the applicants they said they might be required to furnish security.

13. I do not think they are entitled to this indulgence and I am further of opinion that considerable difficulty might be felt by the decree-holder in obtaining compensation in the event of the appeal failing.

14. On behalf of the applicants it was contended that confirmation of the sale would leave them without any remedy in the event of the appeal succeeding, and it was sought to invoke the inherent jurisdiction of the Court in order to stay further proceedings in order to prevent the prosecution of the appeal from becoming purposeless or futile. I am quite unable to accede to this view of the case.

15. At the hearing of the appeal this Court will be sitting on the execution side, and fully seised of the case. If the appeal succeeds it will be upon a finding that

the decree directed the sale only of 1/8th of the mahal. If this Court arrives at that conclusion I have no doubt that it can set aside the sale.

16. The Court below is bound to confirm the sale, provided the conditions of Order XXI, Rule 92, have been satisfied. Its order of confirmation will necessarily be subject to the result of the appeal.

17. For these reasons I do not think that the order applied for would be equitable and justified.

18. I dismiss the application. The interim order is discharged.