
(1937) 11 PAT CK 0032

In the Patna High Court

Balmakund Marwari

APPELLANT

Vs

Firm Pirthiraj Ganeshdas and Others

RESPONDENT

Date of Decision : 30-11-1937

Acts Referred:

Citation : AIR 1938 Patna 240

Hon'ble Judges : Varma, J; Mohamad Noor, J

Bench : Full Bench

Judgement

Mohamad Noor, J.—This is an appeal against an order of the Special Subordinate Judge of Ranchi rejecting an application for setting aside a sale in execution of a decree on the ground of the appellant not making the deposit required by law. The appellant judgment-debtor's property was sold on 3rd September 1936, and an application for setting aside the sale was filed on 2nd October 1936.

2. The application was registered and the appellant was ordered to deposit the necessary cash security. On 3rd October the appellant applied that he was a poor man and was unable to deposit cash and prayed that immovable property be taken as security. The learned Subordinate Judge ordered as follows: "The applicant's petition is rejected as it is simply to undo the effect of the amended Rule"; thereafter the application for setting aside the sale was rejected on 5th October 1936. It appears from his order that the learned Judge thought that accepting security other than cash deposit was in contravention of the Rule. But the Rule itself has deliberately provided that the Court may accept security other than cash as the circumstances justify. The Rule has been framed to eliminate frivolous applications and not to shut out genuine ones. It fixes 12 per cent, as the maximum security which can be required from an applicant for setting aside a sale. Within this limit, the Courts have been given ample power to fix such amounts as they think fit or to take any security other than the cash depositor; to dispense with any deposit or security altogether. The rule, as it stands, means that the Court is to fix the amount and the nature of the security and then the order is to be complied with; if not, the application is to be rejected.

3. The first order of the learned Subordinate Judge directed the applicant to deposit the "necessary security". The order perhaps meant that the Court wanted the deposit of the maximum amount provided in the Rule, but it is unfortunately not clear. It ought to have been clear as to what amount was to be deposited. However when the applicant applied for permission to offer immovable property as security the Court ought to have considered the application on its merits and if it thought that there was no ground for granting it, it could reject it but not on the ground that it defeated the Rule. The framers of the Rule had in their minds cases in which discretion can be exercised in accepting landed property as security instead of cash. The learned Subordinate Judge did not apply his mind to the facts of the case and his order and the consequential order refusing the application for setting aside the sale must therefore be set aside.

4. Now, the judgment-debtor's appeal was at first both against the order dated 3rd October 1936, refusing to accept landed property as security and of 5th October 1936, rejecting the application for setting aside the sale. The office objected that there could not be one appeal against two orders and the learned advocate for the appellant scored through the date "5th October 1936" and left the date "3rd October 1936". An objection has been raised on behalf of the respondent that this appeal is incompetent on the ground that no appeal lies against the order refusing to accept landed property as security.

5. That contention, so far as it goes, is well founded. An appeal against an order can only lie if it is specifically provided. But long before the filing of the appeal; the application itself has been rejected and that order is appealable. In fact, the appeal expressly mentions Order 43, Rule 1(j) which refers to appeals against an order setting aside or refusing to set aside a sale. The confusion has arisen on account of the fact that the learned advocate scored through "5th October" instead of "3rd October". This mistake has been corrected under our order and the appeal is against the order refusing to set aside the sale on the ground that the applicant did not deposit cash security. Apart from this, this is a case in which interference in revision will be justified on the simple ground that the Court did not exercise a jurisdiction vested in it by law inasmuch as it did not fix the amount of security and did not judicially determine the application for permission to give landed property in security.

6. In the end the order of rejecting the application for permission to give landed property in security and refusing to set aside the sale and the order of confirmation of sale are set aside.

7. The case is remanded to the learned Subordinate Judge with a direction that he will judicially dispose of the application of the appellant about furnishing security in landed property, and then dispose of the application for setting aside the sale according to law. If the application is ultimately rejected, the sale will stand confirmed. Otherwise, it will follow the result of the order on the application. There will be no order for costs.

Varma, J.

I agree.