

(1923) 05 PAT CK 0034

In the Patna High Court

Case No : A.A.O. No. 188 of 1922, with Civ. Rev. No. 209 of 1922

Banwari Rai

APPELLANT

Vs

Chethru Lal Rai

RESPONDENT

Date of Decision : 29-05-1923

Acts Referred:

Citation : (1923) 05 PAT CK 0034

Judgement

Dawson Miller, C.J.—These two appeals are brought from two decisions of the District Judge of Bhagalpur, reversing an order of the Munsif setting aside a sale. The facts which give rise to the present dispute may be shortly stated.

2. The Banaili Raj are the proprietors of an estate named Kharna. Held under them is a ghatwali tenure belonging to Chatru Lal Rai and Banwari Rai, the former having a 12 annas interest in the Ghatwali tenure and the latter a four annas interest. The landlords in the year 1920, obtained a decree for rent against their tenants and in August of that year applied for execution of the decree by a sale of the tenure. On the 27th of December the property having been previously attached and a sale proclamation issued, the tenure was sold for a sum of Rs. 1451 and purchased by one Satish Chandra Rai, a grandson of Chatru Lal Rai one of the judgment debtors. Subsequently on the 12th of February 1921, an order for delivery of possession to the purchaser was given. On the 14th March 1921, Banwari Rai one of the judgment debtor applied to set aside the sale alleging that he had only a few days earlier come to know of the sale. His application which was headed as an application under Order 21, rule 90 sought to have the sale set aside both on the ground of material irregularity and fraud in publishing and conducting the sale and on the ground that the tenure had been purchased by one of the judgment debtors himself and therefore under the provisions of S. 173 of the Bengal Tenancy Act it was competent to the Court in such a case to set aside the sale on that ground.

3. It would appear that there is some dispute or antagonistic feeling between Banwari Rai and his fellow tenant Chatru Lal Rai and the suggestion made,

supported by evidence before the Munsif, was that Chatru Lal Rai in collusion with the decree-holders or persons acting on their behalf had suppressed the service of notices, had got the sale brought about in the absence of any notice to the other judgment-debtor Banwari Rai and had in fact purchased the property himself through his grandson Satish Chandra Rai. That was the allegation upon which the application for setting aside the sale was mainly based. The learned Munsif who heard the application came to the conclusion that there had been fraud and material irregularities in the publication and conduct of the sale and that Banwari Rai, one of the judgment-debtors, had suffered material injury thereby, the property having been sold for considerably less than its worth. He accordingly set aside the sale both on the ground of fraud and material irregularity and on the ground that the property had been purchased by the other judgment-debtor Chatru Lal Rai through his grandson.

4. From that decision there were two appeals to the District Judge, one by the decree-holders and the other by Satish Chandra Rai the purchaser. The learned Judge without going into the merits of the case, in consequence of a point which was taken before him in appeal, remanded the case to the Munsif in order that he might come to a conclusion upon certain issues which had not been put forward. The point which was raised before the learned District Judge was that the application for setting aside the sale presented on the 14th March 1921, had been presented by a pleader whose vakalatnamah had not been properly signed in accordance with the provisions of the CPC and that therefore there was no proper application before the Court, for setting aside the sale and the Munsif had no jurisdiction to act in the matter.

5. It appeared that Banwari Rai when he first received some information that the property had been sold was not very certain as to whether it was true or not, and thereupon he instructed one Tilakdhari Rai his nephew to proceed to Banka and find out for a fact whether the sale had really taken place, and instructed him that if the sale had taken place then to file a petition for setting it aside. Tilakdhari having arrived at Banka and having ascertained that the sale had taken place then proceeded to take necessary steps for filing a petition to have the sale set aside. Under the Rules in the CPC it is provided in Order 3, rule 1, that "any appearance, application or act in or to any Court, required or authorised by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognised agent, or by a pleader duly appointed to act on his behalf". Now Tilakdhari was not a party within the meaning of that rule, nor was he the recognised agent of the party, because by rule 2 of the same order the recognised agents by whom appearances and applications may be made are persons holding powers of attorney authorising them to make such applications and persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which the appearance or application is made. The only other way therefore of properly presenting the application for setting aside the sale

was to engage a pleader for that purpose. Tilakdhari accordingly engaged a pleader and he signed a Vakalatnamah authorising the pleader to act on behalf of his uncle Banwari Rai. He signed the Vakalatnamah in the name of Banwari Rai by the pen of Tilakdhari Rai, and acting upon the instructions given the pleader duly filed the application to set aside the sale. As already stated no objection to this was taken before the learned Munsif. The question was raised for the first time when the matter came on appeal before the learned District Judge that the vakalatnamah was not properly executed by or on behalf of Banwari Rai and therefore the appointment of the pleader was bad and the Court had no jurisdiction to hear the application, and rule 4 of Order 3 C.P.C. is relied upon. That rule provides that "the appointment of a pleader to make or do any appearance, application or act for any person shall be in writing, and shall be signed by such person or by his recognised agent or by some other person duly authorised by power of attorney to act in his behalf". It is contended and not disputed that Tilakdhari was not the recognised agent, nor was he a person duly authorised by power of attorney to act in the matter; but it is contended on behalf of the appellant that the Vakalatnamah was, in the circumstances which have been proved, signed by the party himself, or, at all events, that the circumstances were such that it must be taken to have been signed by him. Even if there were some irregularity in the actual execution of the vakalatnamah it was merely such an irregularity as did not in any way go to the merits of the case and it was one which came within the provisions of S. 99 of the CPC and the order of the learned Munsif ought not to be set aside on that ground. The learned Munsif, after the case was remanded to him to consider this question and to take evidence upon it, had the parties before him and Banwari Rai and Tilakdhari gave evidence. The evidence of Banwari Rai which the Munsif accepted was to this effect that he asked his nephew to go to Banka, as I have already stated, and make enquiries, and if the sale had been held then to file a petition for setting it aside. In these circumstances the learned Munsif considered that the vakalatnamah was a proper one and binding and that in any event if there was an irregularity then it was not such an irregularity as went to the merits of the case and came within the purview of S. 99 of the Code and ought not to be treated as sufficient to permit of the sale being set aside. The learned District Judge on appeal on the other hand came to the conclusion that the provisions of the CPC were imperative and as they had not been complied with there was no proper presentation of the petition in the execution Court. He therefore set aside the order of the learned Munsif the effect of which had been to set aside the sale with the result that the sale in fact became valid. From that decision in both the appeals Banwari Rai the judgment debtor has appealed to this Court.

6. A preliminary point was taken that no appeal lay to this Court but that was not persisted in and was abandoned as it was realised that in one or other of these cases at all events an appeal would lie.

7. It is quite true that under Order 3 rule 4 a vakalatnamah must be signed either by the party himself or by his recognised agent or some other person duly

authorised by power of attorney to act on his behalf. The circumstances show that it was not literally signed by him although it was signed by his name, and I have DO hesitation in coming to the conclusion, upon the facts found and accepted by the learned District Judge, that Tilakdhari was authorised to sign the vakalatnamah instructing the pleader because he was authorised to file an application in order to have the sale set aside. He could not file the application himself : the only way in which he could put it before the Court was by instructing a pleader and therefore it must be taken that the authority given to him to file the petition included the authority to instruct a pleader. Banwari Rai from the start has always accepted the authority given to his pleader to file a petition and has never from the first challenged it: in fact when he was called as a witness before the Munsif he offered there and then to sign the vakalatnamah in order to cure the defect, although the Munsif thought at that time that he had no power to allow him to do so as the case had been sent back to him on remand merely to come to certain findings after taking evidence. There can be no doubt whatever in my mind that what was done by Tilakdhari in this case was done with the full knowledge and acquiescence and under the instructions of Banwari Rai who has accepted it and acted upon it. It is true, as I have already said, that the vakalatnamah which had on it Banwari's name was not in fact signed by that person, but it seems to me from the facts of this case that irregularity was clearly one which comes within the purview of S. 99 of the Civil Procedure Code. The rule with regard to entering appearance and Sling applications and with regard to the appointment of pleaders for that purpose are no doubt salutary rules and certain formalities have to be performed. The rules are more or less strict and they are made no doubt with a view to prevent fraud. But at the same time when it is clearly proved that no fraud has been committed and that what has been done has been done with full knowledge and acquiescence of the party himself, I do not think that it was ever intended by these rules where some mere formal matter has not been complied with of where there has been some irregularity, such as in the present case, in presenting the case before the Court and where such formality or irregularity in no way affects the merits of the case that that should be taken as a matter of vital importance and it seems to me that it was for this very reason that S. 99 of the CPC was passed. I have no hesitation in coming to the conclusion that in this case the irregularity was a trivial one and as regards the actual facts of the case was one within the meaning of S 99 and that the learned District Judge ought not to have allowed it to affect his judgment in this case.

8. The result is that his order will be set aside, the case will be referred back to the learned District Judge to come to a conclusion upon the facts which up to the present have not been considered by him.

9. There are two appeals in this case and two applications in revision as the parties apparently were uncertain as to the right of appeal. Appeal No. 137 is an appeal from the decision of she District Judge in the appeal presented by the decree-holder and Civil Revision No. 210 is a revision application in that appeal.

Appeal No. 188 is an appeal from the decision of the District Judge in the case in which the auction purchaser was the appellant before him and Civil Revision No. 209 is a revision application in that appeal. It is only necessary that one of these appeals should go back for re-hearing, that is Appeal No. 137. With regard to the other appeal that is to say the appeal in the case in which the auction purchaser was the appellant before the District Judge, Appeal No. 188, it seems clear that there was no appeal on his behalf from the decision of the Munsif to the District Judge but as there is a Civil Revision application asking that the decision of the District Judge should be set aside on the ground that he had no jurisdiction to hear that appeal we think that that application should be granted.

10. The appellant is entitled to his costs against the respondents who have appeared in Appeal No. 137 and Civil Revision No. 209. With regard to the other appeal that is to say appeal No. 188 and Civil Revision No. 210 there will be no order as to costs in this Court.

Kulwant Sahay, J.

11. I agree.