
(1958) 02 PAT CK 0015
In the Patna High Court
Case No : A.F.A.D. No. 709 of 1949

Basant Lal

APPELLANT

Vs

Bala Misra and Others

RESPONDENT

Date of Decision : 20-02-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 92
Registration Act, 1908 — Section 47
Transfer of Property Act, 1882 — Section 54

Citation : AIR 1958 Patna 312

Hon'ble Judges : V. Ramaswami, C.J; R.K. Choudhary, J

Bench : Division Bench

Advocate : Lal Narain Singh and Ram Nandan Singh, for the Appellant; N.P. Agarwala, Shivanugraha Narain, Phani Bhushan Prasad, Medini Prasad Singh and S.P. Srivastava, for the Respondent

Final Decision : Allowed

Judgement

1. In the suit which is the subject-matter of this appeal the defendant second party had purchased the disputed properties in an auction sale in Execution Case No. 165 of 1942. The execution was with respect to a money decree obtained by defendant No. 13 in Money Suit No. 52 of 1940 against the defendant first party for a refund of the consideration of a sale-deed. Defendant No. 13 obtained a decree in that suit and assigned the decree to defendant second party, who instituted the execution case.

In the course of execution, the properties were sold and purchased by the defendant second party. On 18th March, 1944, the plaintiff purchased the disputed properties from the defendant second party. It appears that on 22nd March, 1944, defendant No. 2 made an application under Order 21, Rule 90, Code of Civil Procedure, for setting aside the sale. The application was allowed ex parte on 16th June, 1944, and the sale was set aside.

The plaintiff was not made a party in Miscellaneous Judicial Case No. 164 of

1944. He has instituted the present suit on the allegation that the order of setting aside the execution sale was not binding upon him and that he had title to the disputed properties and he is entitled to recover possession of the same. Defendant No. 2 was the main contestant in the suit. The ground upon which he contested the suit was that the plaintiff had knowledge of the execution proceeding and that the order of setting aside the sale was binding upon him.

The lower appellate Court has found that, the plaintiff was bound by the order of the executing Court in Miscellaneous Judicial Case No. 104 of 1944, dated 16th June, 1944, on the ground that the plaintiff was not a necessary party to the Miscellaneous Judicial Case and also upon the ground that the sale in favour of the plaintiff dated 18th March, 1944, became effective against third parties only on 24th March, 1944, when the registration proceedings were complete.

2. In support of this appeal on behalf of the plaintiff the learned Government Advocate has submitted that the lower appellate Court has committed an error of law in holding that the plaintiff was bound by the order passed in Miscellaneous Judicial Case No. 164 of 1944. In the first place it was contended on behalf of the appellant that the plaintiff was a necessary party in Miscellaneous Judicial Case No. 164 of 1944 and notice should have been served upon him under the provisions of Order 21, Rule 92, Code of Civil Procedure, which is in the following terms ;

""92. (1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute.

(2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of this application has been given to all persons affected thereby.

3. No suit to set aside an order made under this rule shall be brought by any person against whom such order is made." In support of this submission learned Counsel referred to the decision of the Calcutta High Court in *Menajuddi Biswas v. Toam Mandal* ILR Cal 88i (A), where it was pointed out that a transferee from the execution purchaser was a necessary party to a proceeding for reversal of the execution sale, when such proceeding was commenced after the transfer had been affected.

It was pointed out by Mookeree, J. in the course of his judgment in that case that the effect of the order of cancellation of the sale was to affect the interest of the purchaser behind his back, and the elementary principle was that no person was to be deprived of his property in any judicial proceeding unless he had had an opportunity of being heard. In our opinion, the argument is well founded, and in the express language of Order 21, Rule 92, the plaintiff was entitled to a notice

of the proceeding, because he was a person who would be affected by the order of the cancellation of the sale.

In the present case the finding of the lower appellate Court is that the plaintiff had not even the knowledge of the proceeding of the execution case. On this ground we think that the order of the executing Court in Miscellaneous Judicial Case No. 164 of 1944, dated 16th June, 1944, does not bind the plaintiff and that the title of the plaintiff is not affected by the order of the executing Court in that case. As regards the second ground given by the lower appellate Court in support of its order, the argument of the learned Government Advocate is that though registration was complete only on 24th March, 1944, the order of registration taken effect from the date of execution under the provisions of Section 47 of the Registration Act.

That is the view expressed by the Privy Council in AIR 1927 42 (Privy Council) , and followed by this High Court in Faiyazuddin Khan Vs. Mt. Zahur Bibi, , where a deed of baimokasa in respect of certain property was executed which required registration, but before the deed was registered, the property was attached and the document was subsequently registered. It was held in these circumstances by this High Court that the document prevailed against the attachment as the document when registered took effect from the date of execution. In the present case deed in favour of the plaintiff was executed on 18-3-1944, and it is clear that as soon as the registration was complete on 24-3-1944, the registration would take effect from the date of execution, namely 18-3-1944.

The reasoning of the lower appellate Court on this point is, therefore, not correct, and the plaintiff should have been made a party to Miscellaneous Judicial Case No. 164 of 1944 which was filed by defendant No. 2 under Order 21, rule 90, Code of Civil Procedure, for setting aside the execution sale. On behalf of the respondents our attention was drawn to the Judgment of B. K. Ray, J. Ambika Prasad Singh v. Ramdeva Singh, Civil Revn. No. 880 of 1945, D/-22-1-1947 (Pat) (D) holding that a transferee from a purchaser was not entitled to notice under the provisions of Order 21, Rule 92, Code of Civil Procedure.

In our opinion, this decision is erroneous in law, as it is inconsistent with the view taken by the Calcutta High Court in ILR Cal 881 (A), which we consider, lays down the correct law on this point. We are accordingly of opinion that this appeal should be allowed, the decree of both the lower courts should be set aside and the plaintiff should be granted a decree for a declaration of his title and recovery of possession of the disputed land together with; mesne profits to be subsequently ascertained in a separate proceeding. The plaintiff is also entitled to costs of both the lower Courts & also in the High Court. We accordingly allow this appeal with costs throughout.