(1940) 12 PAT CK 0011

In the Patna High Court

Bhan Kumar Chand and Another — APPELLANT

Vs

Lachmi Kanta Rai Naik Kalia and Others — RESPONDENT

Date of Decision : 23-12-1940

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 9 Rule 13, 47

Citation : AIR 1941 Patna 466

Hon'ble Judges : Meredith, J;Dhavle, J

Bench : Full Bench

Judgement

Meredith, J.—These are two appeals from orders of Babu Kshetra Nath Singh, Subordinate Judge of Arrab, dated 6th April 1939. The appellants in each case are the same. They are husband and wife, and are defendants 18 and 19 in a suit for rent. This suit was decreed ex parte in the case of these defendants, and they subsequently filed two applications. The application to which appeal No. 135 relates purported to be under Order 21, Rule 90, Civil P.C., and was to set aside the auction sale held in execution of the decree, on the ground that there were irregularities in conducting the sale, and also that the property in the hands of the applicants was sold, in contravention of the decree. The application with which appeal No. 137 is concerned was under Order 9, Rule 13, Civil P.C., to set aside the ex parte decree on the ground that there was no service of summons in the suit, the ex parte decree was obtained without the applicants'' knowledge and though the decree was obtained on 8th May 1937, the applicants heard of it for the first time on 10th November 1938. Both these applications failed before the learned Subordinate Judge. Hence these appeals.

2. I shall deal first with No. 137 as the matter is simple. The learned Subordinate Judge held that the service of summons upon the applicants had been satisfactorily proved by the examination of the Court peon who served the processes on both the applicants and of the identifier who accompanied him. Applicant 2, a pardanashin lady, was examined on commission. The learned Subordinate Judge held that her evidence was not straightforward, and could not

be Relieved. The other applicant, the husband, examined himself.

3. The learned Subordinate Judge formed the opinion that the witness was malingering in the witness box, and that his evidence was false throughout. With regard to the date of knowledge, he pointed out that the applicant''s contention 4hat he had heard of the decree only on 10th November 1938 was plainly false, because Ex. A, dated 2nd November 1938 contained clear admission of his about the ex parte decree. Hence he held that the application was time-barred and also failed on the merits.

4. In my opinion, there is nothing in the case which would justify an appellate Court upsetting these findings by the Court which saw and heard the witnesses. It is pointed out that the learned Subordinate Judge himself found that the evidence of the peon was unsatisfactory in some respects but there is really nothing to discredit the peon except that he asserted that he had paid Rs. 15 for the hire of a taxi to get in from his home to the witness box in time, and that story was difficult to believe, and probably told merely to support a heavy bill for expenses against the decree-holders. Nevertheless there was nothing justifying the rejection of the peon''s evidence with regard to the service of process, which was supported by the identifier. It was a local service in Arrah town, and there was no real reason why the plaintiffs should attempt any suppression of the processes. In my opinion Appeal No. 137 fails, and must be dismissed with costs.

5. Appeal No. 135 raises questions of consider, able difficulty, and it is necessary to state the facts in some details. The decree-holders respondents, who may be briefly referred to as the Kailas, brought the suit on 14th September 1935, for rent for the years 1839 to 1342 Fasli payable for a mukarrari tenure of village Sonedihara upon the basis of a kabuliat, dated 9th August 1872 executed by the ancestors of defendants 1 to 17. The rent payable under this kabuliat was Rs. 1601 per annum, and there was a stipulation that as security for the rent a six pies share of village Dandwa and a three pies share in village Danialpur Korah were mortgaged. There was a further recital by the executants that if they failed to pay two successive instalments of the rent they would be liable to be dispossessed. By partition the entire mukarrari interest has been allotted to defendants 1 to 6.

6. In these circumstances the suit was at first brought for the following reliefs: (1) That a decree for Rs. 9495-10-9 on account of the rent for 1339 to 1342 Pasli might be passed in favour of the plaintiffs against the defendants under Order 34, Civil P.C. (2) That the decretal amount with costs and interest up to the date of realization be recovered by sale of the mortgaged properties and the balance be ordered to be realized from the person and property of defendants 1 to 6. (8) That on dispossession of the defendants, khas possession of the mukarrari properties might be delivered to the plaintiffs. (4) That costs might be awarded against defendants 1 to 6.(5) That such other reliefs as might be deemed proper might be granted to the plaintiffs. Though it was said that defendants 1 to 6 were alone interested, and in possession, it was stated that as a prayer was being

made for a mortgage decree also defendants 7 to 17 were also impleaded with a view to avoid subsequent disputes.

7. On 14th December 1985, the Kalias applied to have the present appellants added as defendants, as they had come to know that those persons had purchased the mukarrari interest in Sonedihara in execution of a decree for money on 9th May 193S, that is to say, some months before the institution of the suit. They were accordingly added as defendants 18 and 19. No amendment was, however, made as regards the claim for relief so as to include any explicit claim for relief against the added defendants.

8. On 8th May 1937, the pleader for defendant 1 appeared and said that he would not contest the suit if the plaintiffs gave up their prayer for ejectment. The plaintiffs'' pleader then said that the claim for ejectment would not be pressed. Eventually there was only a formal contest by the guardian ad litem of the minor defendants, and it was ordered that the suit be decreed modifiedly ex parte for Rs. 9495-10-9 on account of arrears of rent besides proportionate costs and future interest at 6 per cent, per annum, The decree money will be realizable by sale of the properties specified in schedule of the plaint and in case the properties proved insufficient, defendants 1 to 6 would be personally liable for the same.

The decree passed was in the following terms:

The suit... in the presence...pleader guardian ad litem for defendants 1 to 6 and 6 pleader for defendants 10 to 12, 16 and 17 and in the absence of the other defendants is ordered and decreed ex parte against the major defendants and inter parte against the minor defendants to the effect that a modified ex parte decree is passed for Rs. 9595-10-9 with proportionate costs on account of arrears of rent. Future interest is allowed at the rate of 6 pec cent, per annum The decretal amount will be realized by sale of the properties mentioned in schedule. A of the plaint (i.e., the mortgaged properties). If the decretal amount be not realized by this, the same will be realized from the person and other property of defendants 1 to 6.

9. It so happened that the mortgaged properties had already been sold in execution of a previous rent decree, though subsequently to the institution of the present suit. Therefore, the Kalias could not proceed against these properties, but instead they put up for sale the mukarrari tenure, and on 27th October 1938, the property was sold, and was purchased by the decree-holders for Rs. 11,000 odd. The learned Subordinate Judge found that no irregularities justifying setting aside the sale under Order 21, Rule 90 had been established. That finding is not challenged in appeal, and we are no longer concerned with the application so far as it falls under Order 21, Rule 90.

10. The additional point taken was that the decree was not a rent decree and did not provide for the sale of the mukarrari interest, nor was any relief either asked for or granted against the applicants-defendants 18 and 19. Hence the mukarrari

property in the hands of the applicants could not be sold in execution of the decree. The learned Subordinate Judge in dealing with this contention did not express himself very clearly. He seems to have been of opinion, however, that the decree which was passed by his predecessor-in-office should be construed as a rent decree against all the defendants, coupled with a mortgage decree against defendants 1 to 0 and a personal decree against defendants 1 to 6 if the mortgaged properties proved insufficient. In this view he dismissed the application holding that the property could be sold under the terms of the decree.

11. It is argued in appeal that though the application purported to be under Order 21, Rule 90 and the sale had taken place, though it had not been confirmed, the point that the property was not liable to be sold under the decree could be taken in the application, treating it as one u/s 47, Civil P.C. The questions which arise upon this argument are as follows: (1) Could a rent decree be passed in the suit upon the terms of the plaint, and was the decree passed in fact a rent decree justifying the sale of the tenure in the hands of the applicants? (2) If not, whether a point like this can be raised by the judgment-debtor, after the sale, u/s 47, Civil P.C., and whether the sale can be set aside upon such an application?

12. The second question is one of considerable-difficulty and one upon which authority does not seem to be clear. It is no doubt settled that where a sale is wholly without'' jurisdiction and consequently void as op. posed to voidable, an application by the judgment-debtor to have it declared void will lie u/s 47. In such a case it is; clear that no actual setting aside of the sale is really necessary. The question is however whether a similar application will lie where the sale is merely voidable, and not wholly void; where the sale, for example, is vitiated by an irregularity but was not wholly without jurisdiction, and whether, if it be held that the execution Court could not sell the tenure in this case, the sale wag void or voidable.

13. In the view which I take with regard to the nature o? the decree, a decision upon these questions is not essential for the determination of the appeal. My learned brother Dhavle J. has dealt with them at length, and I will merely say that upon the whole I am in agreement with his view. Upon the first question my view is that the learned Subordinate Judge''s construction of the decree was correct. It was a rent decree against all the defendants-coupled with a mortgage decree and a personal decree against defendants 1 to 6. A rent decree was certainly asked for against the defendants generally, vide relief 1 in the plaint and relief 5, such other reliefs as might be deemed proper." It is true that sale of the tenure was not expressly asked for, but that was unnecessary, and is explained by the fact that there was a prayer for dispossession, which was dropped at the last moment. A decree was passed against all the defendants "on account of arrears of rent." There was nothing to prevent this being a rent decree in the full sense, since-both the former tenure-holders and the present tenure holders were ajlimpleaded. The decree was in the presence of the

present: tenants and for rent both for a period before they had acquired the tenure, and after they had acquired it. A rent decree could be passed, and in fact the decree passed being against all the defendants "on account of arrears of rent" was a rent decree. The other reliefs granted against defendants 1 to 6 were in addition to, and not in lieu of, the ordinary reliefs given in a suit for rent. There is nothing in the terms of the kabuliyat of 1872 which could deprive the landlord of the right to sell the tenure for arrears of rent. Such a right exists even if not expressly given: Surbo Lal v. J.M. Wilson (05) 32 Cal. 680 In this view of the matter this appeal also fails.

14. I would accordingly dismiss both appeals with costs.

Dhavle J.

15. I agree. In First Appeal No. 137, no good reason has been made out for plaintiffs to suppress the processes, and there is also no good reason why we should disbelieve the peon whom the lower Court has believed. In First Appeal No. 135 it was not urged that there was any case for set-ting the sale aside under Order 21, Rule 90, but it was urged that the sale should be set aside because it was not authorized by the decree which was claimed to be "explicit." The decree purports to be a decree for arrears of rent and contains the directions that the decretal amount is to be realized by sale of the properties mentioned in schedule. A of the plaint and that if the decretal amount be not realized by the sale, it will be realized from the person and other properties of defendants 1 to 6.

16. Notwithstanding repetition, the decree is by no means clearly expressed so as to bar execution as a rent decree under chap. 14, Ben. Ten. Act. When we turn to the plaint in order to clear up the point, we come across a certain amount of confusion there also. Neither the body of the plaint nor the reliefs claimed in it were amended after the addition of defendants 18 and 19, the appellants before us. Paragraph 7 of the plaint states that though the mukarrari property "whereof rent is sought to be recovered" has been allotted under a private partition to defendants 1 to 6, defendants 7 to 17 are also impleaded with a view to avoid objection and disputes of every sort "as a prayer is being made for a mortgage decree also." This last word "also" strongly suggests that some other decree was first contemplated by the plaint, and it is obvious that this could only be a rent decree. In para. 8 it is claimed that the plaintiffs'' duos payable by defendants 1 to 8 on account of arrears of rent of the mokarrari properties come to Rs. 9495 10-9 and it is added "now this suit is instituted for recovery of the same."

17. The first relief prayed for is a decree for this amount "on account of the rent for 1339 Pasli to 1342 Pasli" "in favour of the plaintiffs against the defendants under Order 34, Civil P.C." When defendants 18 and 19 were added, it was beyond question that defendants 1 to 6 could not be liable for the entire rent claimed and that defendants 18 and 19 were liable for that part of the rent which had accrued due since their purchase. The point does not seem to have been expressly attended to at the time the decree was passed in the absence of the

major defendants. The question raised before us, however, is not whether the appellants were properly liable for the entire rent or even whether they were so liable for any part of it; and indeed, such a question could not be raised in execution, provided the decree did as a matter of fact make them liable for the rent, for recovery of which the mukarrari was sold in execution. The appellants being among the major defendants on record against whom the decree was passed, the fact that para. 8 of the plaint was not amended so as to include them seems immaterial, and the real question is whether the first relief prayed for, which I have quoted, taken with the usual prayer for "such other reliefs as may be deemed proper" and para. 7 of the plaint which spoke of "a mortgage decree also" does not imply an ordinary rent decree besides a decree under Order 34, Civil P.C.

18. In my opinion, the answer to this question must be in the affirmative, and there is nothing inconsistent with this in the decree actually drawn up. The decree for arrears of rent, apart from the mortgage decree which was specially asked for and granted, was a decree in favour of the 16 anna landlords against all the tenants of the mukarrari in suit, and the decree-holders were, therefore, entitled to proceed in execution under chap. 14, Ben. Ten. Act. The Court was not really asked to give the plaintiffs relief under Order 34, Civil P.C., only. Nor did-it have the power in a claim for arrears of rent to decree relief under that order only and withhold from the plaintiffs the execution under Chap. 14, Ben. Ten. Act, to which they were entitled in the circumstances. The decree does not, moreover, clearly withhold from the plaintiffs this relief. I, therefore, agree with my learned brother in rejecting the contention of Dr. Mitter that under the decree the plaintiffs had no right to bring the mukarrari to sale as under a rent decree.

19. No question of limitation arises in the case as the appellants'' application was made within 30 days of the sale. In the view that we have taken of the decree, the question which was argued at the Bar, namely, whether a sale in execution in contravention of the terms of a decree is void or voidable does not arise; but the arguments have led to an examination of several reported decisions and brought out some points regarding which confusion often arises, and upon which it may be of some use to make some observations. I propose, however, to confine myself as much as possible to such important decisions of our own Court as I have been able to find. Several provisions of Order 21, Civil P.C., and Article 166, Limitation Act, deal with the setting aside of execution sales. It is clear that they affect voidable sales only, for void sales do not require to be set aside. But many distinctions besides that between voidable and void sales have to be made. Rule 90 of Order 21 which taken with the three Sub-rules of Rule 92, gives the general ground on which the executing Court, and that Court alone, is specifically empowered and required to set aside a sale, is confined to "the ground of a material irregularity or fraud in publishing or conducting it."

20. As regards material irregularities or fraud committed otherwise than in publishing or conducting an execution sale, fraud would (generally speaking)

make the sale voidable only, and if the question should arise in the conditions laid down in Section 47, Civil P.C., it would be under this section, and under this section alone, that the sale would be set aside: see Bhuban Mohun Pal v. Nunda Lal Dey (96) 26 Cal. 324 and Pahlad Singh v. Sajiwan Ram AIR 1921 Pat. 54. Irregularities in the sense of breaches of specific rules or of other requirements of the law, falling outside Order 21, Rule 90, will not, however, be all on the same footing, for some of them may be taken to go to the jurisdiction of the Court and render the sale void: these are often distinguished as illegalities. Another set of distinctions is introduced by Article 166, Limitation Act, as amended and enlarged in 1927, for it is confined to applications under the Code of Civil Procedure, while there are provisions in other Acts also which (like Order 21, Rule 72) make sales voidable on application, e.g., Section 173, Ben. Ten. Act, and Section 227, Orissa Tenancy Act; and the view taken in this Court is that such applications are governed by Article 181, Limitation Act: Chandrama Rai v. Maharaja of Dumaraon AIR 1916 Pat. 30 and Ananta Charan v. Nimai Bahubalendra AIR 1927 Pat 177. But if a voidable sale raises a question within Section 47 and the application to set it aside is made under the CPC Article 166 will apply, notwithstanding the mention of Section 47, for as Dawsoruf Miller, C.J. said in Ramdhuri Chowdhuri v. Deo Nandan Prasad Singh AIR 1922 Pat. 507:

All applications to set aside a sale in one sense come within Section 47 of the Code as that section provides that all questions arising between the parties and relating to the execution of the decree shall be determined by the executing Court. The effect, however, of Article 166, Limitation Act, cannot be evaded merely by stating in the application itself that it is brought u/s 47 as well as under Order 21, Rule 90.

21. This will be so notwithstanding this fact that the auction purchaser who is interested in the result of the application to set the sale aside may not have been a party to the suit.

22. In Prosunno Kumar Sanyal v. Kali Das Sanyal (92) 19 Cal. 683 a suit was brought by some of the judgment-debtors, long after the confirmation of an execution sale, to have it set aside on the ground of fraud and collusion on the part of the other cosharer defendants in the suit, the judgment-creditor and the auction purchasers. Section 811, Civil P.C., then in force, which has since been replaced by our Order 21, Rule 90, did not cover any fraud at all. The High Court has held that as against the decree-holders the suit; was barred by Section 244, corresponding to the present Section 47, and that as against the auction purchasers no case was made out at all upon the allegations in the plaint (as was pointed out by Banerji and Rampini JJ. in Motilal v. Russik Chandara (96) 26 Cal. 326) Their Lordships of the Judicial Committee, in holding that the suit was barred by Section 244 altogether, overruled the contention advanced on behalf of the appellants by Mr. Doyne that though the question at issue was one "relating to the execution, discharge or satisfaction of the decree," it could not properly be described as a question "arising between the parties to the suit in which the

decree was passed"; and they endorsed the construction which they took the Courts in India to have uniformly placed on Section 244 in so far as the fact that the purchaser, who was no party to the suit, was interested in the result had never been held a bar to the application of the section.

23. No point was made in that case out of the fact that the sale had been confirmed before the suit; but the express view of the Full Bench in Mohendro Narain v. Gopal Mondul (90) 17 Cal. 769 , that the confirmation of a sale ought not to be used as a shield for the fraud by which the Court has been induced to make the sale itself has been followed in later cases. It has sometimes been pointed out that on the terms of Order 21, Rule 92, confirmation only implies that none of the grounds exists on which the sale could have been set aside under the three Rules--rules 89 to 91--specified in that section; and though the Full Bench in Lakshan Chandra Naskar Vs. Ramdas Mandal, , accepted the view that confirmation implies a judicial determination that none of the objections exists upon which the validity of a sale could have been questioned, it will, I conceive, be difficult to apply this to cases governed by Article 181, Limitation Act. No such difficulty need arise where Article 166 applies, but only because the article prescribes the same period of limitation for the applications specified in Order 21, Rule 92(1) as for all other applications under the CPC to set aside execution sales.

24. Whether the breach of an express rule or other requirement of the law constitutes a mere irregularity, such as might make a sale voidable (it need not even do this if the irregularity be held to be immaterial), or an illegality which makes the sale null and void, can in my opinion hardly be laid down in an exhaustive manner. In a number of cases the Privy Council decision in Raghu Nath Das v. Sundar Das Khetri AIR 1914 P.C 129 has been taken as an authority for holding that a failure to take out the notice required by Order 21, Rule 22 renders the execution sale a nullity. Such a sale does not, of course, really require to be set aside, nor can confirmation make valid what is a nullity: Wazir Narain Singh v. Bhikari Ram AIR 1923 Pat. 45 But the sale may nevertheless be questioned on an application u/s 47, Civil P.C., and it has been held that such applications are governed by the three years limitation prescribed by Article 181. If the decree should have been satisfied by the sale, the application will still have to be entertained if made in time, and this on the principle recognized in Gopal Rai v. Rambhajan Rai AIR 1922 Pat. 166, that an application to recover property which had been improperly sold in excess of the decretal amount was a matter relating to the execution, satisfaction or discharge of the decree and that the executing Court was the proper Court in which to have the matter decided notwithstanding that the decree had already been executed some time before.

25. In Bihari Lal v. Tanuk Lal AIR 1926 Pat. 397, an execution sale was attacked after the expiry of more than 3 years, and though the applicant succeeded in establishing that no notice under Order 21, Rule 22, had been served, he failed to make out any fraud such as might enable him, with the help of Section 18,

Limitation Act, to get rid of the time bar. The application was therefore dismissed, but the learned Judges were apparently prepared to concede that it may be that a suit for recovery of possession will lie within 12 years from the date of delivery of possession, a position which may require examination on a suitable occasion.

26. In Sheikh Abdul Rahim Vs. Gujeshar Mahto and Others and Jadu Thakur and Others, a landlord had obtained a rent decree against two tenants of a raiyati holding and had the whole holding sold in execution proceedings taken against one tenant alone. The other tenant then brought a suit with the main object of having the sale set aside. He alleged that the processes had been suppressed, but this was negatived. It was nevertheless held that the question whether his interest in the holding could be sold in proceedings to which he was not a party was a question within Section 47, Civil P.C., and that the District Judge was right in directing the plaint to be dealt with as an application under that section. The learned Judges did not say whether so far as this tenant was concerned, the sale was void or voidable; and it may be rather a nice question how far an execution sale can be regarded as void in part, for in respect or the interest of the other tenant the executing Court clearly had jurisdiction

27. In Pahlad Singh v. Sajiwan Ram AIR 1921 Pat. 54 a Munsif had confirmed a sale notwithstanding a deposit u/s 174, Bengal Tenancy Act. He had done so through a mistaken view of the law as to the necessity of service of notice to the auction purchaser as under Order 21, Rule 92. It was held that the sale was not a nullity, doubtless on the principle laid down in Malkarjan v. Narhari (01) 25 Bom. 337.

18. I do not consider it necessary to deal with many other cases, whether decided in this or in other Courts. Several difficult questions about jurisdiction have been discussed in the reported decisions; but though the point may not always be very clear, it may, I think, be safely said that in performance of its duty of executing a decree the executing Court has no jurisdiction to hold a sale in contravention of the terms of the decree.

29. In Firm Ramanand Ganpat Rai v. Rakhal Mandal AIR 1936 Pat. 496 a sale of the property of some of the individual members of a firm in execution of a decree obtained against the firm was taken to be void as being entirely beyond the jurisdiction of the Court.

30. In a more recent case, Nirode Kali Roy Choudhury and Another Vs. Rai Harendra Nath Choudhury and Another, , where the property brought to sale was the property not of that defendant who should have been proceeded against but of another defendant, it was held that a suit brought under Order 21, Rule 63 was incompetent, but that the matter fell with in Section 47, Civil P.C., and Article 181, Limitation Act, and it was decided that the sale did not affect in any way the interest of this party.

31. Had the decree in the case before us not been a rent decree in addition to a

mortgage decree, I should have found it very difficult to uphold the sale of this tenure.

