(1931) 04 PAT CK 0002

In the Patna High Court

Bindeshwari Narain Singh APPELLANT

Vs

Raja Kirtyanand Singh Bahadur and Others RESPONDENT

Date of Decision : 20-04-1931

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 73

Citation : AIR 1931 Patna 359

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

Bench : Full Bench

Judgement

Dhavle, J.—This is an appeal from an order of the Subordinate Judge of the 2nd Court, Monghyr, holding that the appellant was not entitled to execute as against the respondents a certain order for rateable distribution. It appears that the appellant obtained a money decree against Kumar Kalikanand and others, which he put into execution in Execution Case No. 494 of 1923 before the Subordinate Judge, 1st Court, Monghyr. The respondents also had a rent decree against the same judgment-debtors, which was put in execution in Rent Execution Case No. 113 of 1923 before the Subordinate Judge, 2nd Court, Monghyr. In this rent execution the respondents on 19th May 1924 purchased several properties of the judgment-debtors after leave taken from the Court to bid at the auction sale. They were also as appears from the order-sheet, permitted to deposit the poundage fee, and upon their doing so, a set-off was allowed to them in respect of the purchase-money, and the case was adjourned to 19th June 1924 for confirmation of sale. On 13th June 1924 the appellant who as I have already said had in the previous year started an execution case in connexion with his money decree in the 1st Court applied to the Subordinate Judge of the 2nd Court, for rateable distribution. Owing to certain reasons into which it is not necessary to enter at present this application of the appellant was only disposed of on 31st March 1926, the order of the Subordinate Judge being passed on the order sheet of rent execution case No. 113 of 1923 and being in these terms:

The application for rateable distribution is allowed. The sale certificate will not be issued unless the sum payable to the other creditor is paid. Execution case dismissed on part satisfaction. Sale confirmed.

2. An account was subsequently prepared showing that the appellant was to get Rs. 10,220-6-0 out of the sale proceeds, the rest going to the respondents as their share in the rateable distribution. When the appellant applied for execution of this order, the respondents contended that he was not entitled to realize the money in execution. This contention was accepted by the Subordinate Judge on the ground that as the order of rateable distribution did not contain anything directing realization by execution and as it had become final, the executing Court had no power to execute the order as a decree. The learned Subordinate Judge observed that his predecessor in 1926:

instead of directing that the amount be deposited in Court or that the present judgment-debtors, namely (the respondents in this Court) do pay the amount directly to the decree-holder of Case No. 491 of 1923 or instead of directing that the decree-holders would be entitled to realize the said amount by execution chose to lay down a condition that a sale certificate will not be issued unless the sum payable to the other creditor is paid.

a condition which failed to bring any satisfaction to the appellant because the properties were subsequently sold in execution of a prior mortgage decree obtained by another party, making it perfectly useless for the respondents to apply for and obtain a sale certificate. He distinguished Bijoy Kumar Addya v. Rama Nath Barman [1917] 43 I.C. 715, as a case where the order for a refund was passed by the High Court on a rule issued against the order refusing the grant of rateable distribution.

3. The first question that arises in this appeal, though it was not argued in the beginning, is whether an appeal at all lies in the case. The learned Government Pleader who appears for the respondents has cited Mt. Harmoozi Begum v. Mt. Ayesha [1920] 5 Pat. L.J. 415 and other decisions from almost every other High Court in the country in support of the proposition that there is no appeal against an order passed u/s 73, Civil P.C. This contention is met on behalf of the appellant by pointing out that the appeal is really directed not against an order refusing rateable distribution but against an order refusing to execute an order for a rateable distribution. The terms of the order have been set out already, and it is clear that the appellant''s contention is right, as will be seen below. Madden v. Chappani [1887] 11 Mad. 356 is an authority in favour of the appellant''s contention that as against the respondents, he is entitled to enforce the order for a rateable distribution by summary execution.

4. It has been urged on behalf of the appellant that the amount bid by the respondents at the execution sale formed "assets held by the Court" within the meaning of Section 73, Civil P.C., until the confirmation of the sale and that the order for a set-off in favour of the respondents was subject to the provisions for rateable distribution contained in that section. Both these propositions are

supported by the decision in Madden v. Chappani [1887] 11 Mad. 356 and the second is also now supported by express provision, namely the words "subject to the provisions of Section 73" in Sub-rule 2, Order 21, Rule 72, .of the Code of 1908. The case cited is also an authority for the further contention that the Court has power to enforce an order for rateable distribution by summary process in execution.

5. The learned advocate for the respondents has sought to meet these contentions by urging that the amount bid by them represents what the properties were worth to them, and that they were entitled to the option of a resale as an alternative to a refund of the amount found due to the appellant according to a rateable distribution of the purchase money. It is however clearly too late now to claim this option, the order for a rateable distribution being really non-appealable and in any case having become final by lapse of time. The learned advocates has also urged that the order for a rateable distribution (which has been quoted above in extenso) should be read as a whole, and that so read, it only means that the respondents are to derive no benefit from the sale unless they pay the appellant his share. Stress has been laid on the fact that there was in fact no order for a refund and it is urged that the executing Court cannot go behind the terms of the order in question. It seems to me however that once it is held that the purchase money which was allowed to be set off continued to be "assets held by the Court" until the order for a rateable distribution, no express order directing a refund by the respondents was at all necessary, for the order of rateable distribution was by its very nature capable of being enforced by summary process in execution. The set-off was statutorily subject to the provisions of Section 73, and the order for a rateable distribution was a necessary consequence of two undisputed facts, viz., (1) the Court holding assets, and (2) the appellant having applied for the execution of his money decree against the same judgment-debtor as the appellant had done and not having obtained satisfaction thereof before the receipt of such assets as a consequence of the execution sale held at the instance of the respondents. It may or may not have been open to the Court to direct that no sale certificate would be issued to the respondents unless the sum payable to the appellant was paid, but the Court had no power to deprive the appellant of his ordinary remedy of realization by summary process in execution, and I can see nothing in the terms of the order of 31st March 1926 from which it can be gathered that the Court purported or even intended to do so. In Bijoy Kumar Addya v. Rama Nath Barman [1917] 43 I.C. 715, referred to by the learned Subordinate Judge, also it was pointed out that "a refund of this sort might be enforced by process in execution."

6. I would therefore give effect to the contentions of the appellant and decree this appeal with costs.

Macpherson, J.

7. I agree. As usual with orders of Babu N.N. Chakravarti, Subordinate Judge,

the order of 31st March 1926, is difficult to interpret. Apparently by the second sentence he merely meant to put pressure upon the Banaili Raj to pay the present appellant without compelling him to resort to his ordinary remedy of execution of the order already made for rateable distribution. It is just conceivable, though not probable that he contemplated that the Raj should pay nothing if it decided not to take out a sale certificate at all. That may indeed have been in the minds of the representatives of the Raj, with their greater knowledge of the position when they accepted or possibly even suggested or pressed for an order in such terms, but one prefers to hold that it was not the intention of the Judge or the contemporaneous interpretation of the appellant.