

(1980) 01 AHC CK 0044
In the Allahabad High Court
Case No : Second Appeal No. 4099 of 1965

Chhedi Lal

APPELLANT

Vs

Haji Abdul Majid and Others

RESPONDENT

Date of Decision : 09-01-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 92(5)

Citation : AIR 1980 All 140 : (1980) AWC 203

Hon'ble Judges : A.N. Verma, J

Bench : Single Bench

Advocate : Kashi Nath Gupta and Rajendra Kumar, for the Appellant; Sankatha Rai and R.N. Singh, for the Respondent

Final Decision : Dismissed

Judgement

A.N. Verma, J.—This is a decree holder's execution second appeal. It arises in the following circumstances.

2. The appellant filed a suit for recovery of a certain sum of money against Mohd. Amin and Mohd. Idris (respondents Nos. 4 and 5 respectively). In the suit the appellant got a house bearing Municipal No. B-16/127 Malti Bagh, Vara-nasi attached before judgment. The suit was decreed on 24-11-1952. The appellant made an application for execution by sale of the aforesaid house. Before the house could be sold Smt. Amina Bibi and Smt. Asiya Bibi-- respondents Nos. 2 and 3 in this appeal-- instituted a suit under Order 21 Rule 63 of the CPC for a declaration that the house in question was not liable to be sold. However, during the pendency of this suit the house was sold to Haji Abdul Majid respondent No. 1 for Rs. 2,160/-. The sale was confirmed in favour of Haji Abdul Majid on 24-2-1955 and in pursuance of the auction sale possession was delivered to him on 31-5-1956. The suit of Smt. Amina Bibi and Smt. Asiya Bibi was decreed on 16-8-1956. It was declared that the house in dispute was not liable to be sold in execution of the decree passed against the aforesaid respondents Nos. 4 and 5. Thereupon, Smt. Amina and Smt. Asiya Bibi applied for restitution claiming

possession over the house as well as damages for use and occupation at the rate of Rs. 10/- per month. Haji Abdul Majeed the auction purchaser filed an objection against the restitution application. The learned Munsif allowed the application for restitution and directed the auction purchaser to deliver the possession of the house to the aforesaid two ladies and to pay damages at the rate of Rs. 2/- per month. Aggrieved by the decision of the learned Munsif the auction purchaser filed an appeal. While dismissing the appeal, the lower appellate court has directed that the auction purchaser shall deliver possession to the aforesaid two ladies while the decree-holder (appellant in this second appeal) shall refund the amount of sale consideration to the auction purchaser.

3. It is against the aforesaid order passed by the appellate court that this second appeal has been filed by the decree-holder.

4. In support of the appeal only one point was urged. The argument was that the auction purchaser had no right to claim refund of the sale consideration inasmuch as, according to settled law there was no warranty of title in an execution sale. In support learned counsel for the appellant placed reliance on a decision of this court in the case of Har Narain Sahu v. Bechu Lal reported in (1979 All LJ 550).

5. Learned counsel for the auction purchaser on the other hand urged that while allowing an application u/s 144 of the CPC or principle analogous thereto, the court must be held to have power to pass all such orders which are properly consequential on the reversal or setting aside of a decree. The submission was that while directing the auction purchaser to deliver possession to the successful third party claimant in restitution proceedings the court must be held to have power also to direct the refund of the auction sale money to the auction purchaser under the same restitution proceedings in the interest of justice and in order that the parties may be placed in the same position which they had occupied before the passing of the decree of reversal. Learned counsel contended that the aforesaid decision referred to by the learned counsel for the appellant did not lay down that the court itself could not direct refund of the auction sale money to the auction purchaser.

6. Having heard learned counsel for the parties. I find no merits in this appeal. The controversy involved in the present appeal stands concluded by the provisions of Sub-rules (4) and (5) of Rule 92 of Order 21 of the CPC which have been added by the CPC (Amendment) Act, 1976. These sub-rules read as follows :--

Sub-rule (4) "Where a third party challenges the judgment-debtor's title by filing a suit against the auction purchaser, the decree holder and the judgment-debtor shall be necessary parties to the suit."

Sub-rule (5) "If the suit referred to in Sub-rule (4) is decreed the Court shall direct the decree holder to refund the money to auction-purchaser, and where such an order is passed the execution proceedings in which the sale had been

held shall, unless the court otherwise directs, be revived at the stage at which the sale was ordered."

7. The aforesaid provisions are applicable in terms to the facts of the present case. Sub-rule (5) clearly confers jurisdiction on the court to direct the decree-holder to refund the money to the auction purchaser. Even if under the law as it stood prior to the in section of the aforesaid provisions in Order 21 Rule 92 of the CPC there was some doubt on the question whether the court could direct the refund of the sale money, the legal position as regards the power of the court to direct the decree-holder to refund the money to the auction purchaser has been put beyond the pale of controversy in view of the provisions of Sub-rule (5) of Rule 92 of Order 21, which are express and unambiguous. In my judgment, therefore, the court clearly has power to direct the refund of the sale consideration to the auction purchaser in a case where as a result of a challenge made by a third party to the title of the judgment debtor is upheld. The view of the lower appellate court, therefore, that the auction purchaser is entitled to the refund of the money from the decree-holder is correct.

8. Coming to the case cited by the learned counsel for the appellant, I find that the Bench was dealing with a situation which is materially different from the one with which I am concerned. In that case, the auction purchaser had instituted a suit for recovery of the sale consideration. At the instance of the third party it had been declared that the judgment debtor had no saleable interest in the property sold to the auction purchaser at a court auction. The Division Bench held that inasmuch as, there was no warranty of title in execution sale, the auction purchaser could not claim the legal right to recover the sale consideration, I agree with the learned counsel for the respondent that a distinction must be drawn between the right of an auction purchaser to recover the sale consideration paid by him at a court auction and the power of a court to give direction while granting restitution under Sections 144/151 of the CPC calling upon the decree holder to refund the money to the auction purchaser with a view to placing the parties in the same position which they occupied before the reversal of the decree giving rise to the restitution proceedings. In any case, in view of the amendments made in Rule 92 of Order 21 of the CPC conferring express power on the court to direct the decree holder to refund the money to the auction purchaser, the decree passed by the lower appellate court is perfectly correct in law.

9. There is, therefore, no force in this second appeal which is accordingly dismissed. There will however, be no orders as to costs.