(2003) 04 PAT CK 0073

In the Patna High Court

Case No : Civil Revision No. 2178 of 2001

Dilip Kumar Singh @ Dilip Kr. Sinha and Another APPELLANT

Vs

Mostt. Sakuntala Devi and Others RESPONDENT

Date of Decision : 07-04-2003

Acts Referred:

Citation : (2003) 04 PAT CK 0073

Judgement

Nagendra Rai, J.—The judgment-debtors/ petitioners have filed the present civil revision application against the appellate order dated 18th October, 2001 passed by AddI. District Judge-X. Patna in Miscellaneous appeals setting aside the order dated 3rd May, 1995 passed by Sub-Judge II, Patna in Misc. Case No. 3 of 1992 by which he has set aside the sale of the property belonging to the petitioners for realisation of cost on the ground of fraud. The appellate Court held that the application filed by the petitioners was filed beyond limitation and no fraud was committed in the sale of the property and accordingly allowed the appeals of the decree holders and auction purchaser.

2. The facts leading to the filing of the present application are that the decree holder/Opposite party 1st Set filed a suit for declaration of title and recovery of possession with regard to portion of land of plot Nos. 234 and 946, Circle No. 247, Ward No. 34 holding 238/233situate in Mauza Rajapur Hassan. P.S. Digha, District-Patna against the judgment-debtors/petitioners and their father Ram Pratap Singh. The said suit was decreed on 23-11-1986 by the trial Court and the appeal filed by the judgment-debtor was dismissed on 18-8-1988 and Second Appeal No. 515 of 1988 was also dismissed by this Court on 17-3-1989.

3. After passing of the decree by the trial Court, Execution Case No. 1 of 1987 was levied by the decree-holders/Opposite Party 1st Set for delivery of possession and realisation of the cost, total amount being Rs. 930.35 P. The delivery over the said property was effected on 17-3-1989 and D.P. was confirmed on 26-6-1989.

4. In the said Execution case itself the decree holders prayed for sale of two

Kathas, 12 dhurs and 16 dhurki of land of Plot No. 234 for realisation of the costs and the details of the same were given in Schedule II of the Execution petition. On 24-9-1990 the Judgment-debtors/petitioners filed an application in execution for rateable distribution. On 26-2-1991 the decree-holders filed a petition for attachment of the property and sale for realisation of the cost. On 4-3-1991 the order of attachment was passed in presence of both the parties and the attachment was published on 7-3-1991. The petition filed by the judgment debtors for rateable distribution was rejected by the Court on 29-6-1991 and it was held that these petitioners were liable to pay 21 3rd of the cost but they do not want to pay the same and therefore, the execution proceeding should proceed ahead against the judgment- debtors/petitioners and their father for realisation of the cost of the suit. On 29-6-1991 the Court ordered for issuance of proclamation of sale and on 17-8-1991 the decree holders/opposite parties 1st Set appeared and made a prayer to the Court to participate in the auction sale as the sale proclamation has been served. The Executing Court allowed the prayer of the decree-holders to participate in the bid. The bid was held on few dates and the Opposite party Upendra Singh on 27-8-1991 offered the highest amount of Rs. 15,000 which was accepted. He deposited the sale amount on the next date i.e. on 28-8-1991 and on 30-9-191 the sale was confirmed. The petitioners deposited the cost on 7-2-1992 and on 17-2-1992 filed an application for setting aside the auction sale, labelling the petitioner u/s 151 of the the CPC (hereinafter referred to as the Code) and under Order XXI, Rule 90 of the Code. Their assertion in the petition was that at the time of auction sale no notice was served on them as they were minors and entire proceeding of attachment as well as auction sale was conducted bala-bala to keep them in dark and the property which includes a house situate in the town of Patna worth Rs. 5,00000 (five lacs) was sold only for 15,000. It was further stated that several other irregularities were occurred in conducting the sale proceeding which wiil be demonstrated at the time of hearing.

5. In the aforesaid Miscellaneous case both parties adduced oral and documentary evidence and thereafter the trial Court by order dated 3rd May, 1995 allowed the said case and held that fraud has been committed upon the Court in holding the auction sale and accordingly set aside the sale. It is to be stated here that auction purchaser was not made party in the petition filed by the judgment-debtors but he as well as the decree-holders filed appeals challenging the aforesaid order which was set aside by the appellate Court on the ground that the application filed under Order XXI, Rule 90 of the Code was filed beyond period of limitation of 60 days provided under Article 127 of the Limitation Act and no fraud was committed upon the Court.

6. It is admitted fact that the property which has been sold for realisation of the cost of Rs. 930.35 is 2 Kathas, 12 dhurs and 16 dhurkies and a house standing over the same. In execution case No. 1 of 1987, the decree holder prayed for sale of the aforesaid property described in Schedule II for realisation of the cost. The application was typed one and there was no mention of house while

describing the property in Schedule II. However, it appears from the said execution petition the word ''House'' has been added in handwriting which appears to be a subsequent addition for the reason that the order of attachment issued under Order XXI, Rule 54 of the Code does not mention about the house while detailing the property and it only mentions about the land. The sale proclamation though contains the area of the land and the house mentioned therein but a bare perusal of the same will show that the word ''Makan'' has been a subsequent addition in different ink. The appellate Court during pendency of the appeal detected the aforesaid discrepancies and observed in the order dated 17-8-1996 inter alia as follows.

In course of argument it was detected that in original petition of Execution Case No. 1 of 1987 only the description of land with area, plot No. and holding number was given and a good deal of argument was advanced by the decree-holder as also the judgment-debtor about the non-mentioning of house in the original petition. What I find today has schoked me very much. When the attachment order was issued it also did not contain any word like ''house'' but in the sale proclamation a word "Makan" appears to have been added subsequently which is clear on the very first glance, who could have done it. Naturally the person having interest in purchase of that house in auction sale. Further I find that even in original petition the word house has been subsequently added. This also is clear interpolation in judicial record."

7. Learned Counsel appearing for the judgment-debtors/ petitioners submitted that the decree holders/opposite party 1st Set has played fraud upon the Court and on this ground alone the auction sale is vitiated and the same is to be set aside. In this connection he drew my attention to the fact that the decree-holder prayed for sale for realisation of the cost suppressing the fact that there is house standing over the same and valuable property of more than rupees five lacs has been sold for a meagre amount. These the sale is fit to be set aside. He also submitted that the Court has also not discharged its duties and has not observed the mandatory provisions while drawing of the proclamation of sale in terms of the Order XXI, Rule 66 of the Code.

8. Learned Counsel for the decree holders and auction purchaser/opposite parties on the other hand submitted that the application filed by the Judgment-debtors/ petitioners under Order XXI, Rule 90 of the Code to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting was beyond time as prescribed under Article 127 of the Limitation Act and as such the appellate Court rightly held the said application to be barred by limitation. He further submitted that no fraud was committed upon the Court in conducting br publishing the sale. He further submitted that the grounds given for setting aside the sale is covered under Order XXI, Rule 90 and as the application was filed beyond time no case for setting aside the sale is made out.

9. It is admitted position that the land 2 Kathas, 12 dhurs and 16 dhurkies and house standing over the same is situate within Digha Police Station of Patna

town. After rejection of the objection regarding rateable distribution raised by the judgment-debtors/petitioners, the Court ordered for issuance of proclamation of sale and after service of the same the property was sold for Rs. 15,000. The question is as to whether the Court white taking steps for sale of the property has discharged its duty in terms of the relevant provision. Order XXI, Rule 64 of the Code casts a duty upon the Court to see as to whether any property attached by it is liable to sale, or such portion thereof as may seem necessary is to be sold to satisfy the decree. Order XXI, Rule 66 which deals with proclamation of sale by public auction runs as follows; Proclamation of Sales by public auction.--(1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall State the time and place of sale, and specify as fairly and accurately as

(a) the property to be sold [or, where a part of the property would be sufficient to satisfy the decree, such part];

(b) the revenue assessed upon the estate or part of the State, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

(c) any incumbrance to which the property is liable;

(D) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court considers material for a purchaser to know in order to Judge of the nature and value of the property:

[Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under Rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs:

Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given, by either or both of the parties]

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by Sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him

to produce any document in his possession or power relating thereto.

10. It requires inter alia that the sale proclamation shall be drawn up after notice to the decree holder and the judgment debtor and shall State the time and place of sale and specify as fairly and accurately as possible, the property to be sold or the part of the property to be sold and the order details as mentioned therein including the details which are necessary for a purchaser to know in order to Judge of the nature and value of the property.

11. The Apex Court in the case of Ambati Narasayya Vs. M. Subba Rao and another, held that Order XXI Rule 64 CPC enjoins duty on the executing Court to first see whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. It further held that this is not just a discretion, but an obligation imposed on the Court. The sale held without examining this aspect and not in conformity with the mandatory requirement would be illegal and without jurisdiction.

12. In the case of Shalimar Cinema Vs. Bhasin Film Corporation and Another, , while dealing with Order XXI Rule 66 the Apex Court held that the Court has a duty to see that the requirements of Order XXI Rule 66 are properly complied with. It is desirable at least in cases of sale of valuable property that the Court make its valuation and enter it in the sale proclamation, though the same is not to be done in all the cases. The sale proclamation should not be prepared in a routine fashion. No action of the Court or its officers should be such as to give rise to the criticism that it was done in an indifferent or casual way.

13. In the case of Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh, the Apex Court held that the Court has obligation to State the valuation given by both the decree-holder as well as judgment-debtor. It further held that a proclamation of sale drawn casually without compliance with the mandatory requirement and a sale held in furtherance thereof is not a sale in the eye of law. The procedure adopted by the Court in violation of Order XXI Rules 66 and 67 is in flagrant breach of the mandatory provision. It is a nullity ab-initio.

14 Thus, the settled law is that auction sale held in execution of a decree without fulfilling the requirements of mandatory provisions contained under Order XXI. Rule 64 as well as the provisions contained under Order XXI, Rule 66 will make the sale void ab-initio.

15 From perusal of the order sheets of the Executing Court it appears that after rejecting the application filed by the judgment-debtors/ petitioner for rateable distribution the Court mechanically ordered for issuance of proclamation of sale and thereafter put the property on auction. No attempt was made by the Court either to consider the question whether whole or part of the property was to be sold for realisation of the cost as enshrined under Order XXI, Rule 64 of the Code nor anything was done by the executing Court to determine the valuation of the property or even to notice that there is any house standing over the said land. The Court has also not given its valuation of the property. From perusal of the

sale proclamation it appears that no valuation of the property has been mentioned in the sale proclamation. Only description of the property has been given. The question as to whether that description included house or not will be considered later on. Thus, there was a flagrant violation of the provisions contained under Order XXI 64 and 66 of the Code.

16. Learned Counsel appearing for decree holders and auction purchasers/ opposite parties submitted that the application filed by the judgment-debtors/ petitioners was beyond time and as such this question cannot be considered on merit and in support of the same he relied upon the judgment of the Apex Court in the case of Mohan Lal Vs. Hari Prasad Yadav and Others, and a Constitution Bench Judgment of the Apex Court in the case of Subrata Sen and Others Vs. Union of India and Others, .

17. Article 127 of the Limitation Act provides for a period of 60 days for filing an application for setting aside the sale and the Apex Court in the case of Mohan Lal (supra) held that the Executing Court has no power to extent the aforesaid period by entertaining the application u/s 5 of the Limitation Act. The period cannot be enlarged even u/s 148 of the Code and the Constitution Bench of the Apex Court in the Case of Dadi Jagannadham (supra) held that the period of 60 days is available not only for filing an application for setting aside the sale but also for making the deposit.

18. As admittedly in this case the application for setting aside the sale was filed beyond 60 days from the date of auction sale the sale cannot be set aside under Order XXI, Rule 90 on the ground of material irregularity or fraud in publishing or conducting the sale. The question is as to whether the sale can be set aside by taking recourse to any other provisions under the Code. I have already held that there is flagrant violation of the requirements of Order XXI and Rules 64 and 66 of the Code as the Court has neither decided the part of the property to be sold nor determined the valuation of the property after due notice to the judgment-debtor and the decree holder nor the Court has given its own valuation. Apart from this, a fraud was also committed with regard to description of the property to be sold. The property to be sold in execution of the decree of the cost has been described in Schedule II of the execution petition and only shows the description of plot number and its area. There is no mention of the house. However, later on the word ''house'' in handwritten has been added. In the proclamation of sale also the word "Makan" has been added subsequently. The same appears to be a subsequent addition for the simple reason that in the attachment order under order XXI, Rule 58 there is no mention of house while describing the property in question and thus the word "house" appears to have been subsequently added in the execution petition and the sale proclamation. The appellate Court has also noticed the aforesaid fact as mentioned above. The evidence adduced by the parties on record clearly shows that the house situate in the town of Patna is worth more than rupees five lacs whereas the property has been sold shockingly for a low price of Rs. 15,000.

19. The discussions made above clearly show that a fraud was committed upon the Court. It is well settled that fraud vitiates everything including solemn proceeding of the Court. The Apex Court in the case of Desh Bandhu Gupta (supra) has held that casual drawing of proclamation of sale ana sale held in furtherance thereof is not a sale in the eye of law. It is nullity. It further held that pre-sale illegalities committed in the execution are amenable to the remedy u/s 47 of the Code. Thus, even though the application would not be maintainable under Order XXI Rule 90, the Court still can set aside the same if the same is nullity in the eye of law by taking recourse either to provision contained u/s 47 of the Code. Labelling of the petition is immaterial. This apart the application was also filed u/s 151 of the Code apart from Order XXI, Rule 90 of the Code. The said application will be treated to have been filed u/s 151 of the Code and accordingly, the submission advanced on behalf of the decree holders and auction purchaser/opposite parties regarding maintainability of the application is untenable in law. In my view, the appellate Court has committed jurisdiction error in interfering with the order of the executing Court which has set aside the sale on the ground of fraud Practiced upon the Court.

20. In the result, the Civil Revision application is allowed and the impugned order passed by the appellate Court is set aside and the order of the Executing Court setting aside the sale is upheld. The amount of cots has already been deposited by the judgment-debtors/petitioners on 7-2-1992. The same is to be paid to the decree-holders. So far the amount deposited by the auction purchaser is concerned, he is entitled to refund of the same. In the facts of this case, I am of the view that he should be further paid a lump sum amount for the retention of his money of all these years. Accordingly, the judgment-debtors/petitioners should deposit Rs. 15,000 (rupees fifteen thousand) within two months from today which shall be paid to the auction purchaser.