

(1930) 11 PAT CK 0018
In the Patna High Court

Gajadhar Rai and Others

APPELLANT

Vs

Beahraj Manuari and Others

RESPONDENT

Date of Decision : 13-11-1930

Acts Referred:

Citation : AIR 1931 Patna 63

Hon'ble Judges : Courtney-Terrell, C.J;Adami, J

Bench : Full Bench

Judgement

Courtney-Terrell, C.J.—This is an application against an order of the District Judge of Bhagalpore refusing to set aside a sale of property and the application is based upon the allegation that there has been material irregularity in the proceedings. The property which was put up for sale and sold is the right, of the judgment-debtors under a certain mortgage deed dated 17th November 1910. The judgment-debtors were the mortgagees to an extent of a 12 annas interest in the mortgage money. The mortgage provided that it should be of a usufructuary character for a period of ten years and after that period the mortgagees should be at liberty, if they so wished either to realize the debt from the mortgagor or they might, if they so wished, continue in the position of usufructuary mortgagees in possession of the mortgaged property. The period of ten years has in fact expired and the contention of the judgment-debtors is that their interest being as they say of the nature of immovable property or partially of immovable property should have been attached under the procedure provided by Order 21, Rule 54, Civil P.C., instead of being attached as they were in fact under the procedure provided by Order 21, Rule 46.

2. A great deal of time has been spent in this case in discussion as to whether the rights of the mortgagees ought to be considered as moveable or Immovable property but the proper test of which of the two kinds of procedure is applicable is afforded by an examination of Order 21, Rule 46, which really makes that procedure for attachment applicable in cases where there is a realizable debt not secured by a negotiable instrument whether or not there may be additional rights

in the judgment-debtor beyond that of merely realizing his debt. It is true that there has been a series of cases, particularly in the Bombay Courts, which indicate that if the judgment-debtor's rights should be purely those of a usufructuary mortgagee and if he has no right to levy a debt then in those circumstances the proper procedure for attachment is under Order 21, Rule 54, Civil P.C. But that the procedure under Order 21 Rule 54, is at any rate limited to the case where the judgment-debtor's rights are purely those of a usufructuary mortgagee is indicated by the decision in the case of Ramasami Moopan v. Srinivasa Aiyar [1915] 39 Mad. 389, with which I venture personally to agree. In that case a distinction is made which I think seems to be soundly founded on principle between a purely usufructuary right in the judgment-debtor where he cannot realize a debt and the case where a debt is realizable. If a debt is realizable then the procedure under Order 21, Rule 46 seems to be the correct procedure to apply. In this case the debt was realizable by the mortgagees at the date when their interests were put up for sale and therefore on that ground alone it would seem that the proper procedure of Order 21, Rule 46, has been followed.

3. There are two further serious objections to the success of this application. In the first place orders I have referred to merely deal with the matter of procedure for attachment. After the attachment had been made there was an order for sale and no objection was taken by the judgment-debtors to the procedure taken on attachment. They might, had the procedure been irregular, have objected to the order for sale being made. But they did not do so. To my mind that is fatal to their case. The procedure after the order for sale which was not objected to cannot now be impugned, especially as it cannot be suggested that the procedure in the order for sale is defective.

4. In order to show that, there has been irregularity which can be remedied in revision it is necessary for the applicant to show that either the procedure for sale has been vitiated right from the very beginning and so is entirely illegal, or he must show that there has been an, irregularity in the proceedings which has caused damage of a serious kind to his interests. It is clear to my mind that the sale having been carried out there was nothing irregular in that and there is distinctly nothing illegal in it. Furthermore, even if the sale had been affected by any irregularity in attachment, and I do not think it was affected by such irregularity, it has not been shown that any damage to the applicant has been caused by the irregularity of which he complains.

5. For this reason I would dismiss this application with costs. Hearing-fee 5 gold mohurs.

Adami, J.

6. I agree.