

(1931) 07 PAT CK 0001
In the Patna High Court

Ganga Ram Gulraj Ram

APPELLANT

Vs

Muktiram Marwari and Others

RESPONDENT

Date of Decision : 06-07-1931

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 73

Citation : AIR 1931 Patna 405

Hon'ble Judges : Scroope, J; Mohammad Noor, J

Bench : Full Bench

Judgement

Mohammad Noor, J.—By this application we are invited to revise an order of the learned Subordinate Judge of Monghyr refusing to allow rateable distribution u/s 73, Civil P.C. The facts are these: The applicants obtained from the original side of the Calcutta High Court a simple money decree for a sum of about Rs. 5,300 against the opposite parties Nos. 6--14 and brought it on transfer for execution to the Court of the Subordinate Judge of Monghyr. The petition for execution was filed on 19th July 1927, attachments were issued on the 18th August and a sale proclamation fixing 14th May 1928 for sale on 14th March 1928. In the meantime the principal judgment-debtors applied for being declared insolvent and applied to the executing Court for stay of the execution which was granted and the execution case was dismissed. The applicants (decree-holder) preferred an appeal to this Court which was numbered as Miscellaneous Appeal No. 119 of 1928, and was allowed on 2nd May. The execution proceedings before the Subordinate Judge of Monghyr was thereupon revived. The property of the judgment-debtors was sold on 14th August 1929 and purchased by the applicant (the decree-holder) himself. In the meantime on 5th December 1928 another decree was obtained against the same judgment-debtors by opposite parties Nos. 1--5. They took out for execution on 23rd March 1929 and the properties of the judgment-debtors including those which were being proceeded against by the applicants were sold on 24th June 1929 about seven weeks prior to the sale held in execution of the applicant's decree and purchased by the opposite party Nos. 1--5 themselves who set off the purchase money towards the satisfaction of their

decree. It is obvious that the properties having already been sold in execution of the decree of the opposite parties Nos. 1--5 there was nothing left which could be sold in the decree of the applicants. The judgment-debtors (the opposite party Nos. 6--14) applied for the setting aside of the first sale, viz., the sale in favour of the opposite-party Nos.1--5: that application was dismissed for default on 7th September 1929. There was again an attempt to set aside that sale under some provisions of the Insolvency Act which was rejected and the sale was confirmed on 12th November 1930. In the meantime the applicants realizing that the properties which he had purchased on 14th August 1929 had already been sold on the 24th June in execution of another decree and consequently on the day of their sale the judgment-debtors had no saleable interest in them applied on the very day that the judgment-debtors application for setting aside the sale was dismissed (7th September 1929) for the rateable distribution of the assets realised by the sale in execution of the decree of opposite parties Nos. 1--5. It is to be noted that while this application was pending the learned Subordinate Judge ignoring it confirmed not only the sale in favour of the applicant but also the sale in favour of opposite parties Nos. 1--5. In my opinion he ought not to have done so till the application for rateable distribution was disposed of by him. However the application u/s 73 remained pending for about 15 months and on 15th December 1930 it was rejected on the ground that the decree of the applicant having been satisfied, he was not entitled to claim rateable distribution. Against this order the applicants have moved this Court in revision.

2. There are two questions which require consideration. One is whether there was on the day of the application for rateable distribution an unsatisfied decree in favour of the applicant; and the second is whether there were assets in the hands of the Court which could be so distributed. The learned advocate for the opposite party Nos. 1--5 asks us to hold both these points in his favour. He contends that the sale in favour of the applicants having been held (though it might have been for a valueless property) their decree stands satisfied. He argues that if the applicants found that the judgment-debtors had no saleable interest left in the property, their remedy was an application under Order 21, Rule 91, Civil P.C. for setting aside that sale; they not having done so cannot now plead that they still hold an unsatisfied decree. In other words, the learned advocate's contention is that as long as the sale is there the decree stands satisfied and there being no application under Order 21, Rule 91 we have no power to interfere. We cannot uphold this. It is obvious that the property against which the applicants were proceeding was really sold in execution of another decree and there was nothing left which could be sold again. If under some misapprehension the Court, not having been apprised of the fact that a property which was under sale had already been sold by that very Court to another person in satisfaction of another decree, sells it again in execution of another decree it cannot be said that the latter decree has been satisfied. The learned advocate on behalf of the applicant has placed before us the decision in the case of *Harnandan Marwari v. Pran Nath Roy* AIR 1921 Pat. 409: it lays down and, if I

may say so, correctly lays down, that when a property under attachment has been sold in execution of another decree the first attachment falls to the ground and proceedings taken thereunder fall along with it. In the present case there was an attachment in favour of the applicant while that attachment was subsisting the property was sold in execution of a subsequently obtained decree. Therefore after the sale in favour of the opposite party Nos. 1--5 held on 21th June 1929 all the steps which were taken in execution of the decree of the applicant were of no avail and the sale and the consequent satisfaction of the decree is illegal and must be ignored.

3. It has rightly been pointed out by Mr. S.N. Bose that if his client now wishes to execute the decree the execution cannot be resisted on the ground that the decree had already been satisfied it has in fact not been satisfied. In *Moti Lal v. Karabuluddin* [1897] 25 Cal. 179 the Judicial Committee held in effect that if a property is sold in execution of two decrees the first sale holds good and the second does not give to the purchaser any right in the property. It is not necessary to set aside the second sale as it did not affect the property at all. A decree can only be satisfied if either it is paid up or the decree-holder has received property in lieu of money. In this case the decree-holder has received no property in satisfaction of his decree. In *Radha Kishun Lal Vs. Kashi Lal and Another*, a Division Bench of this Court has held that if a decree-holder purchased property in execution of his decree and if subsequently the claim of a third person is established over it the effect is to set aside the sale and revive the decretal debt and no formal order to set aside the sale was necessary. In this case there is no question that the sale in favour of the opposite parties Nos. 1--5 will prevail and therefore the sale in favour of the applicant must be held to have been set aside ipso facto and decretal debt revived. Similar view was taken in *Bihari Lal Misr v. Jagarnath Prashad* [1908] 28 All. 651. The learned Subordinate Judge was informed on 7th September 1929 by the application for rateable distribution that the same property has been sold twice over in the execution of two decrees, one on 24th June 1929 and the other on 14th August 1929. By that day 7th September 1929 none of the sales had been confirmed. The earlier sale was confirmed on 12th November 1930 and the latter on 14th September 1929. When the situation was brought to his notice he ought not to have confirmed the second sale. If however his attention was drawn to this fact after he had confirmed the sales he ought to have cancelled the order of confirmation of the second sale when he disposed of the application for rateable distribution 15th months later. Thereby he would have avoided the abuse of the process of the Court. He had full power to do so, see *Thakur Barmha v. Jiban Ram Marwari* [1913] 41 Cal. 590.

4. The next question for consideration is whether there was an asset in the hands of the Court when an application for rateable distribution was filed. No doubt there was no cash in the hands of the Court, as the opposite party Nos. 1--5 were permitted to bid at the sale and the purchase money was set off against their decree. But nevertheless assets were under the control of the Court. That

sale was not confirmed till some months after the application for rateable distribution was filed. It was held in *Sri Krishna Doss v. Chandook Chand* [1909] 32 Mad. 334 that if the Court permitted a decree-holder to bid at the sale and consequently allowed him to set off the purchase money towards his decree, it was open to the Court afterwards on a good case being made out to withdraw that order and order him to deposit the purchase money in cash for rateable distribution and if the Subordinate Court did not do so the High Court could pass such an order in revision. In the case of *Bijoy Kumar Addya v. Ram Nath Barman* [1917] 43 I.C. 715 the Calcutta High Court held that the Court could order a refund and such an order might be enforced by process in execution. Their Lordships observed that although the money remained in the hands of the purchasing decree-holder it was open to the Court to direct him to pay that sum into Court and it was therefore in the power and at the disposal of the Court within the meaning of Section 73, Civil P.C. Similar view was taken by the Bombay High Court in the case of *Shrinivas v. Radhabai* [1882] 6 Bom. 570.

5. The two conditions necessary for the application of Section 73, Civil P.C. are present in this case and in our opinion the applicants have made out a good case for our interference. We therefore order that the sale held in favour of the applicants on 14th August 1929 do stand cancelled as the property had already been in execution of the decree in favour of opposite-parties Nos. 1--5 on 24th June 1929, and any order of satisfaction of the decree that might have been passed by the learned Subordinate Judge is set aside and the applicant's decretal debt is revived. The learned Subordinate Judge is directed to call upon the opposite parties Nos. 1--5 to exercise within such time as he may fix the option of either retaining the sale held on 24th June 1929 in their favour or of asking to have it set aside on their satisfying the Court that they have not created any right in favour of any third-party. If within the time fixed by the Court the opposite parties Nos. 1--5 exercise the option of having the sale set aside and satisfy the Court aforesaid that the sale will be set aside then the parties will be at liberty to proceed for the realization of their respective decrees in such manner as they think fit and their execution cases will be revived. If on the other hand within the time so fixed the opposite parties Nos. 1--5 do not exercise that option or fail to satisfy the Court as aforesaid the learned Subordinate Judge will take accounts of the decrees of the applicant and of the opposite parties Nos. 1--5 and rateably distribute between the two decree-holders the proceeds of the sale of the properties held on 24th June 1929 and the opposite parties Nos. 1--5 will be directed to pay to the applicant such sum in excess of their own quota which they might have set off towards the satisfaction of their own decree. In case of failure the applicants will be at liberty to execute the order of the learned Subordinate Judge in the manner provided for the execution of a decree. Any sum realized by the applicants will go towards the satisfaction of their decree which we have ordered to be revived and to that extent the decree of the opposite party Nos. 1--5 will stand unsatisfied. Parties to bear their own costs in this application.

Scroope, J.

6. I agree.