

(1911) 07 CAL CK 0037

In the Calcutta High Court

Case No : Appeals from Orders Nos. 58, 49, 57 and 59 of 1910

Kabilanund Thakur and others

APPELLANT

Vs

Pirthi Chand Lal Chowdhuri

RESPONDENT

Date of Decision : 11-07-1911

Acts Referred:

Citation : (1911) 07 CAL CK 0037

Final Decision : Allowed

Judgement

No. 58 of 1910

1. This appeal is directed against an order by which the Court below has dismissed an application for reversal of the sale of a Putni Taluk held in execution of a decree for arrears of rent. The putni was created on the 11th July 1882, by two instruments, under each of which the annual rent was fixed at Rs. 3,400 and a bonus of Rs. 6,800 was paid to the zemindar. It appears that the tenants committed default in the payment of rent, with the result that, on the 2nd July 1908, the landlord obtained a decree for rent against seven Defendants, for a sum of Rs. 7,000. Of these Defendants, the first three were interested to the extent of a five-twelfths share in the tenancy right; the next two, to the extent of a three-eighths share, and the remaining two, to the extent of a five-twenty-fourths share. The landlord, however, had not recognised this distribution of shares, and he was entitled, under his decree, to bring the entire putni to sale. On the 2nd December 1908, the decree-holder applied for execution, and for realisation of the judgment-debt, which at that time exceeded Rs. 7,735. At the instance of the landlord decree-holder, the value of the property was stated in the sale proclamation as Rs. 4,000. The Court directed the simultaneous issue of attachment and sale proclamation; returns of services of the writs were filed on the 21st December and the sale was fixed for the 3rd February 1909. On that date, an application was made on behalf of the judgment-debtors for adjournment of the execution proceedings for one month to enable them to pay the decretal amount. In this application it was stated that if they failed to pay on

the 1st March 1909, the sale might be held without the issue of a fresh proclamation to which the Petitioners would not raise any objection on the ground of irregularities etc. The Court thereupon recorded the following order :-- "Judgment-debtors petition to stay sale put in; but as it is not consented to by the decree-holder, the petition is rejected; on 4th February 1909, (that is, the day following) for orders and sale." On the next day, the judgment-debtors renewed their application. It was stated that the application made on the previous day had been rejected, because it had not been made on behalf of all the judgment-debtors. The second application was therefore made on the strength of a power-of-attorney purporting to have been signed by all the judgment-debtors, and it was prayed, as before, that the sale might be postponed till the 1st March 1909; it was stated that, if meanwhile the decree was not satisfied, the sale might be held without the issue of a fresh proclamation, to which the Petitioners would not take objection on the ground of irregularity. The decree-holder assented to this application, and the Court thereupon recorded the following order:?"Judgment-debtors" petition consented to by the decree-holder, the sale is stayed till noon of the 1st March 1909 for sale. Fresh sale notice waived by judgment-debtors." The money was not paid and, on the 1st March 1909, the Court directed the property to be sold on the day following. On the 2nd March the properties were sold for Rs. 20,000 and purchased by the decree-holder who was the sole bidder present. On the 1st April 1909, the fourth and fifth Defendants applied for reversal of the sale, and two similar applications were subsequently made by the first three judgment-debtors on the 22nd April and by the 6th and 7th judgment-debtors on the 24th April. On the 29th April a fourth application of a similar character was made by one Janak Kishori who claimed to be interested to the extent of an one-eighth share out of the three-eighth share of the fourth and fifth Defendants. The Subordinate Judge has held, upon the evidence, that there have been grave irregularities in connection with the proceedings antecedent to the sale. He has held, first, that the decree could be executed only as a money decree and, consequently, the writs of attachment and proclamation of sale could not be simultaneously published; secondly, that the writs were not published at the proper thana and Mal Katchari; thirdly, that the processes were not published at the Katchari of the zemindar according to law; and, fourthly, that there was a gross understatement of the value of the property in the sale proclamation. The Subordinate Judge has further held that there was great inadequacy in the price fetched at the sale, because the real value of the property is at least twice as much as the sum paid by the decree-holder. The Subordinate Judge, however, has negatived the contention that the conduct of the decree-holder was fraudulent. He has finally dismissed the application on the ground, that the judgment-debtors had waived all objections to irregularities in connexion with the execution proceedings, and that the applications of all the judgment-debtors except the turth and fifth were barred by limitation. As regards these two judgment-debtors the Subordinate Judge has held that their application was obviously in time. As regards Janak Kishori the Subordinate Judge has held that

there was no waiver of irregularities on her part, but that although she did not become aware of the sale or of the execution proceedings before the 7th April 1909 and her petition was made on the 29th April, it was nevertheless barred by limitation as she had not brought her case within sec. 18 of the Limitation Act. In this view the Subordinate Judge has dismissed all the applications and confirmed the sale. The judgment-debtors have preferred separate appeals against this order, and we shall first consider the appeal of the fourth and fifth judgment-debtors. In so far as they are concerned their application is not barred by limitation and the only ground on which it has been dismissed is that they waived all objections on the ground of irregularity in the execution proceedings. This view has been assailed on their behalf on the ground they waived a fresh sale notice but did not waive any objections which might legitimately be taken in respect of the first sale proclamation. In our opinion this contention is well-founded and must prevail. It was pointed out by this Court in the case of *Dhanukdhari Singh v. Nathuni Sahu* 6 C.L.J. 62 : S.C. 11 C.W.N. 848 (1907) that whether there has been a waiver or not of the rights of the judgment-debtors and if so to what extent depends upon the circumstances of each case; the existence of an intent to waive is a question of fact, and the best evidence of intention is to be found in the language and conduct of the parties; the Courts cannot lay down any stereotyped and inelastic rule by which all cases of waiver must be governed. Now, in the case before us, when the judgment-debtors applied on the 4th February 1909 for adjournment of the sale for one month, it became obligatory upon the Court, if the application was granted, to issue a fresh sale proclamation under the provisions of the Code. R. 69, sub-r. (2) of Or. XXI provides that where a sale is adjourned under sub-r. (1), that is, in the exercise of the discretion vested in the Court and for a longer period than seven days, a fresh proclamation under r. 67 shall be made, unless the judgment-debtor consents to waive it. It is clear, therefore, that, if a sale is adjourned for one month, the decree-holder must either obtain a waiver from the judgment-debtor or cause a fresh proclamation to be issued. The only reasonable interpretation which can be placed upon the application of the 4th February 1909, read with the order of the Court recorded on the same date, is that the judgment-debtors consented to waive merely a fresh proclamation of sale. Indeed the order of the Court placed the matter beyond the region of controversy. The contention of the decree-holder that the judgment-debtors waived not merely the issue of a fresh proclamation but also all irregularities that might have taken place in connection with the writs of attachment and proclamation of sale previously issued cannot be supported. Much reliance was placed upon the decision of their Lordships of the Judicial Committee in *Giridhari Singh v. Hurdeo Narain* L.R. 3 I.A. 280 ; 26 W.R. 44 (1876). That case, in our opinion, is clearly distinguishable. There the judgment-debtor had agreed that, if a postponement of one month was granted, the attachment and the notification of sale would be maintained. The sale was postponed on this condition and their Lordships of the Judicial Committee held that as the judgment-debtor had agreed that the attachment and notification of sale should be maintained he could not

subsequently take objection to the notification by stating that there was an error in it. The petition amounted to an admission on his part, that the notification was correct, or that, at any rate, there was no such mistake or irregularity as would be likely to mislead. On this ground it was ruled that the judgment-debtor could not impeach the validity of the sale proclamation on the allegation that the amount of the revenue payable for the property sold had been incorrectly stated therein. Similarly, in the case of *Raja Thakur Barham v. Anantaram Marwari* 2 C.L.J. 584 (1905), the judgment-debtor in his petition for adjournment of the sale, had agreed not to urge any irregularity in the service of the sale proclamation. It was consequently held that he had waived all irregularities in the service of the sale proclamation previously issued. The cases of *Noorul Hossain v. Oomatoool Fatima* 25 W.R. 34 (1875) and *Taran Singh v. Girija Kripa* 2 C.L.J. 589n (1902) are distinguishable on a similar ground. The decision of their Lordships of the Judicial Committee in *Arunachelam v. Arunachelam* L.R. 15 I.A. 171 : S.C. ILR 12 Mad. 19 (1888) is of no assistance to the decree-holder purchaser, because there the judgment-debtor, though aware of the mis-description of the property in the sale proclamation on which he relied in support of his application for reversal of the sale, had intentionally kept silent; under such circumstances it was ruled that it would be very difficult to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any mis-description of the property attached and about to be sold which he knew well but of which the execution creditor or decree-holder might be perfectly ignorant. In the case before us, we are clearly of opinion that the judgment-debtors waived the issue of a fresh proclamation of sale, they did not waive any objection in respect of the proclamation previously issued, nor, indeed, is there any evidence that they were aware of the contents of such proclamation. The ground, therefore, upon which the Subordinate Judge has dismissed the application for reversal of the sale cannot be upheld.

2. The question next arises, whether the sale can be supported. As already explained the Subordinate Judge has found that the value of the property exposed for sale was grossly understated in the sale proclamation. The decree-holder landlord deliberately stated the value to be Rs. 4,000. A bonus of Rs. 13,600 had been paid at the creation of the putni and deducting the rent reserved the annual profit was between Rs. 4,000 and Rs. 5,000. To value a property of this description for which a substantial premium had been paid at one year's purchase, was obviously inexcusable. There were no bidders present and the decree-holder who had valued the property at Rs. 4,000 offered a first bid of Rs. 20,000 and purchased it for that sum. The Subordinate Judge has held that the value is at least Rs. 40,000; according to the Appellants the value ought to be taken to be a lac of rupees at twenty years' purchase upon the net annual income. The case, therefore, falls within the principle recognized by their Lordships of the Judicial Committee in *Sadatmand Khan v. Phul Kuar* ILR 20 All. 412 : S.C. L.R. 25 I.A. 146 ; 2 C.W.N. 550 (1898), because unquestionably there

was a deliberate and gross misstatement of the value of the property calculated to mislead intending purchasers. Our attention, however, was invited to the decision of this Court in *Abdul Kashem v. Benode Lal* 12 C.W.N. 757 (1908) in which a contrary view appears to have been maintained. But the learned Judges there overlooked the decision of their Lordships of the Judicial Committee and the view taken is consequently not binding upon this Court. [See *Basanta Kumari v. Ram Kanai* 13 C.L.J. 192 (1910), *Nanda Kumar v. Gobinda Mohan* 13 C.L.J. 312 (1910) and *Sivadurga v. Rajmohan* 15 C.W.N. 577 (1910)]. In our opinion, it is plain that the object of the decree-holder was to seize a very valuable property for the smallest possible price; that it was with this object in view that he deliberately misstated the value, and that, in the sale which followed, he secured for Rs. 20,000 without any competition what is worth at least twice if not four or five times the sum he paid. Apart from the question, therefore, whether or not there were other irregularities in connexion with the sale the judgment-debtors are entitled to have the sale vacated on the one ground mentioned.

3. The question finally arises, whether upon the application of two of the judgment-debtors the sale should be set aside in its entirety. The sale was, as we have already stated, of the entire putni; the landlord decree-holder was not bound to recognise and did not as a matter of fact recognise any distribution of shares amongst the tenants. Under these circumstances in our opinion the sale ought to be set aside in its entirety. It was ruled by a Full Bench of this Court in the case of *Unnada v. Erskine* 21 W.R. 68 ; 12 B.L.R. 370 (1873) that in a suit brought by a sharer in a putni to set aside the sale thereof held under the Putni Regulation, the suit ought to be so framed as to seek the reversal of the sale of the entire property. This principle was also applied in the cases of *Ram Churan v. Drobomoyee* 17 W.R. 122 (1872), *Suresh v. Akkori* ILR 20 Cal. 746 (1893), *Gangadhar Sarkar v. Khaja Abdul Azij* 14 C.W.N. 128 (1909) and *Bideshar v. Sriksen* 9 C.W.N. 805 (1905). No doubt, it may be urged that the other judgment-debtors have not been joined as opposite parties to the application now before us. But there is no force in this contention. The other judgment-debtors as we have explained, preferred separate applications and as the applications were heard together and tried as if they constituted one proceeding, they may, in substance, be taken to have been consolidated. In this view, there can be no room for controversy that the sale should be set aside in its entirety.

4. The result is that this appeal must be allowed, and the order of the Subordinate Judge discharged. The application of the fourth and fifth judgment-debtors is granted and the sale is set aside. The Appellants are entitled to their costs from the decree-holder both in this Court and in the Court below. We assess the hearing fee in this Court at ten gold mohurs.

5. Nos. 49, 57 and 59 of 1910. These appeals are directed against orders of the Subordinate Judge by which he has dismissed the applications of two sets of judgment-debtors and of the representative-in-interest of another set of judgment-debtors for reversal of the sale which we have just set aside. As

regards these applications the objection was taken in the Court below that they were barred by limitation, as they were made more than thirty days after the date of the sale. The judgment-debtors sought to bring their case within sec. 18 of the Limitation Act. That section provides for an extension of time only when it is established that the applicant has been kept by means of fraud from the knowledge of his right or of the title on which it is founded. In view of the decision of this Court in the case of Kailash Chandra Haider v. Bissonath Paramanic 1 C.W.N. 67 (1896), it is difficult to hold that the applicants have brought themselves within the scope of sec. 18, and in this view their applications cannot be maintained. But as we have already explained, the proper way to consider all these applications is to treat them as consolidated, the first in point of time, that by the fourth and fifth judgment-debtors, as the principal application and the subsequent ones by the other judgment-debtors, as applications by them to be made parties to the proceeding then pending before the Court. From this point of view the applications by these judgment-debtors may be treated as in support of the application by the fourth and fifth judgment-debtors and, as that application has been successful, no other question arises for consideration. These appeals, therefore, must also be allowed, and the orders of the Court below discharged. The sale will stand reversed in its entirety. In these appeals, however, the parties will pay their own costs both here and in the Court below.