

(1945) 05 PAT CK 0012

In the Patna High Court

Kameshwar Singh Sharma and Others

APPELLANT

Vs

Jagdambi Singh and Others

RESPONDENT

Date of Decision : 01-05-1945

Acts Referred:

Bihar Tenancy Act, 1885 — Section 153(b)

Citation : AIR 1945 Patna 446

Hon'ble Judges : Fazal Ali, C.J.;Shearer, J

Bench : Full Bench

Judgement

Shearer, J.—This application in revision is directed against an order of the learned Subordinate Judge of Monghyr, setting aside a sale in execution of a rent decree. The decree in question was passed in 1936 in a suit instituted by one of a number of cosharer landlords, the other cosharer landlords being impleaded in the suit as pro forma defendants. The holding was sold on 1st May 1939, and was purchased by the decree-holder. Some considerable time later the decree-holder applied for a writ for delivery of possession, and on 3rd April 1941, a return was made to this writ purporting to show that it had been duly served. The application to have the sale set aside was made on 3rd February 1942, by one Jagdambi Singh, who in 1934, had purchased a portion of the holding from the judgment-debtors. The trial Court dismissed the application, but this decision was reversed on appeal. The value of the claim in the rent suit was considerably less than Rs. 50, and the learned Munsif who tried it, and who subsequently dealt with the application under Order 21, Rule 90, Civil P. C., was specially empowered by the Provincial Government to exercise final jurisdiction under Clause (b) of Section 153, Bihar Tenancy Act. Mr. B. N. Rai, for the petitioners, contends that no appeal against the decision of the learned Munsif was maintainable and in consequence, the order made by the learned Subordinate Judge was an order made without jurisdiction. Mr. Rai relies on the explanation to Section 153 of the Act. This explanation was inserted in the Bengal Tenancy Act in 1907 and appears to have been inserted in consequence of a decision of a Full Bench of the Calcutta High Court in 1905. In that decision *Kali Mandal v. Ram-*

sarbaswa Chakravarti 32 Cal. 957, it was held that an order setting aside or declining to set aside a sale in execution of a decree for rent, the decree-holder being the purchaser, necessarily decided a question relating to title to land or to some interest in land and that an appeal against it lay u/s 153, Ben. Ten. Act, as it then stood. In the CPC of 1877 the words "or fraud" did not occur after the words "material irregularity" in Section 811, corresponding to Order 21, Rule 90 of the Code of 1908, and the intention of the Legislature was to take away the right of appeal in every case where there had been a material irregularity, even where that irregularity had been brought about by fraud, the decree-holder and some officer of the Court having conspired to mis-lead the Court and suppress the processes. When, however, Section 311 of the Code of 1877 was replaced by Order 21, Rule 90 of the Code of 1908, and the words "or fraud" were inserted after the words "material irregularity" a distinction was sought to be drawn between cases of material irregularity and cases of fraud and it was suggested that an appeal lay in the latter but not in the former class of cases.

2. On this point there have been a number of decisions of the Calcutta High Court which are by no means consistent. These decisions have been collected and examined by Rankin C. J. in Jugal Chandra Anuni Vs. Ramesh Chandra Chakravarty and Others, . No decision of this Court was cited at the bar, and the only decision which I have myself been able to discover is a decision of Wort J., sitting singly in Jainarain Singh v. Rameshwar Singh Bahadur A. I. R. 1930 Pat. 371. In that case, as Wort J. was careful to point out, the trial Court had come to a very clear finding that a fraud had been committed. Mainly on that ground Wort J. decided that an appeal was maintainable, and in doing so relied on the observations of Chatterji J. in Nobin Chandra v. Bepin Chandra A. I. R. 1916 Cal. 719. The correctness of the decision of Chatterji J. was doubted by Rankin C. J. in Jugal Chandra Anuni Vs. Ramesh Chandra Chakravarty and Others, , and the weight of the authorities there cited appears to be against it. If I had to decide the point, I should, I think, be inclined to take the view that even where it is shown that there has been a material irregularity in publishing and conducting a sale, that irregularity having been brought about by some fraud, an appeal against an order made on an application to have the sale set aside is barred by Section 153, Bihar Tenancy Act. The point does not, however, in my opinion, arise, as it seems to me clear that neither the learned Munsif nor, for the matter of that, the learned Subordinate Judge decided any question as to a fraud having been committed on the Court executing this rent decree. The conclusion to which the learned Subordinate Judge appears to have come was that, for some reason or other, the sale proclamation and the writ for delivery of possession were not duly served. He does not find, in so many words, that these or any of the other processes in the execution case were deliberately and fraudulently suppressed. In fact, it would, I think, have been impossible for him to come to any such conclusion, inasmuch as it would seem that the decree-holder had succeeded in obtaining possession of so much of the holding as had not been sold by the judgment-debtors to the petitioner Jagdambi Singh. The judgment-debtors were

not made parties to the application and never seem to have contested the validity of the sale. If, however, the question which the learned Munsif decided was a question relating to the regularity of the proceedings in publishing and conducting the sale and was not a question of fraud, then an appeal against his order was clearly not maintainable. This ease is, in my opinion, substantially on all fours with Jugal Chandra Anuni Vs. Ramesh Chandra Chakravarty and Others, . The mere circumstance that some vague and general allegation of fraud may have been made in the application and not pressed or J proved at the trial is immaterial, see the observations of Page J. in Aswini Kumar Dutta and Others Vs. Raj Kumar and Others, . For these reasons I would hold that the order of the learned Subordinate Judge was made without jurisdiction and must, in consequence, be set aside. The petitioners are entitled to their costs. The hearing fee is assessed at two gold mohurs.

Fazal Ali, C.J.

3. I agree. The view expressed by my learned brother is fully supported by the decision of this Court in Ajodhya Singh Vs. Sir Kameshwar Singh Bahadur, which was decided after the hearing of the present case was concluded.