

(1957) 01 PAT CK 0025
In the Patna High Court
Case No : A.F.A.D. No. 157 of 1950

Kapileshwar Jha and Others

APPELLANT

Vs

Anirudh Jha and Others

RESPONDENT

Date of Decision : 04-01-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 21 Rule 92, Order 21 Rule 92(2)

Citation : AIR 1957 Patna 211 : (1957) 5 BLJR 128

Hon'ble Judges : Ramaswami, C.J.; Raj Kishore Prasad, J

Bench : Division Bench

Advocate : Raghunath Jha and Devakant Choudhary, for the Appellant;
Gokulanandan Prasad and Rameshwar Prasad Sinha, for the Respondent

Final Decision : Allowed

Judgement

1. The question of law involved in this case is whether a settlee from an auction purchaser is a necessary party in a proceeding for setting aside the sale under Order 21, Rule 92.

2. The Raj Darbhanga obtained a decree for rent against the defendant 1st party with regard to a holding bearing khata No. 18 in village Bajraha. In execution the holding was sold on the 8th of April, 1937, and purchased by the Raj Darbhanga. Delivery of possession was given to Raj Darbhanga on the 3rd of September, 1937. Thereafter Raj Darbhanga made settlement of the holding with the plaintiffs. The plaintiffs were later on dispossessed of the holding by the defendants 1st party.

In order to recover possession the plaintiffs instituted a title suit, namely, Title suit No. 178 of 1944, against the defendants 1st party. The suit was decreed on the 11th of April, 1945. The defendants 1st party preferred an appeal, but the appeal was dismissed by the Subordinate Judge on the 16th of November, 1946. Meanwhile the defendants 2nd party, who claimed to be the mortgagees of a portion of the holding, made an application under Order 21, Rule 90, CPC for

setting aside the sale held on the 8th of April, 1937. This miscellaneous case was numbered as Miscellaneous case No. 234 of 1946. The application of the defendants 2nd party was allowed ex parts on the 12th of April, 1947, and the sale in the execution case was set aside.

It appears that the defendants 1st party deposited the decretal amount on the 12th of December, 1947, and the decretal amount was also withdrawn by Raj Darbhanga. The plaintiffs have brought the present suit for a declaration that the order passed in Miscellaneous case No. 234 of 1946, was fraudulent and was not binding upon them; firstly because they were not parties in the miscellaneous case, and secondly because the defendants 2nd party were only benamidars for the defendants 1st party against whom the plaintiffs had successfully established their title in a proper suit.

The learned Munsif found that the plaintiffs had taken actual settlement from the Raj Darbhanga and they had no knowledge of the miscellaneous case and, therefore, the order passed in the miscellaneous case, setting aside the sale, was not binding upon the plaintiffs, since they were not made parties to it. The learned Munsif also held that Order 21, Rule 92, Code of Civil Procedure, was not a bar to the maintainability of the suit.

Accordingly, the learned Munsif granted a decree in favour of the plaintiffs. In appeal, the lower appellate Court, acting upon an unreported decision of a Single Judge of this Court, the decision of B.K. Ray, J., in Civil Revn. No. 880 of 1945, D/- 22-1-1947, (A), held that the plaintiffs were not necessary parties to the proceedings in the miscellaneous case under Order 21, Rule 90, Code of Civil Procedure, and allowed the appeal. It was held by the lower appellate Court that the suit of the plaintiffs should be dismissed.

3. The main argument put forward on behalf of the plaintiff-appellants in this Court is that the lower appellate Court has misconstrued the provisions of Order 21, Rule 90, and Order 21, Rule 92, Code of Civil Procedure, and that the plaintiffs were necessary parties to the proceedings taken under Order 21, Rule 90, Code of Civil Procedure; and in the absence of notice to the plaintiffs the proceedings in the miscellaneous case were not binding upon them. The question at issue in this appeal, therefore, depends upon the correct interpretation of the proviso to Order 21, Rule 92 (2), which is in the following terms:--

"92. (2) Where such application is made and allowed and where, in the case of an application under Rule 89 the deposit required by that rule is made within thirty days from the date of sale, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

It is manifest that the proviso clearly states that no order setting aside the sale shall be made unless notice of the application has been given to "all persons

affected thereby". In the present case it has been found that the plaintiffs had obtained settlement from Raj Darbhanga sometime in 1938 and that this transaction was genuine. The application for setting aside the sale was made by the defendants 2nd party under Order 21, Rule 90, Code of Civil Procedure, on the 8th of April, 1946. At the time of the application, therefore, the plaintiffs were in possession of the land after having taken settlement from Raj Darbhanga,

It is manifest that the plaintiffs were persons affected by the application made by the defendants 2nd party within the meaning of Order 21, Rule 92 (2), Code of Civil Procedure. It follows, therefore, that it was incumbent upon the defendants 2nd party to give notice of the application to the plaintiffs and in the absence of such notice the order of the Court setting aside the sale dated the 12th of April, 1947, in Miscellaneous case No. 234 of 1946 is illegal and without jurisdiction.

This view of the interpretation of Order 21, Rule 92 (2) is supported by a decision of a Bench of the Calcutta High Court, consisting of Mookharjee, J. and Carnduff, J., in *Menajuddi Biswas v. Toam Mandal* ILR 39 Cal 881 (B). It was held in that case that the transferee from an auction purchaser was a necessary party to a proceeding for reversal of the execution sale, when such a proceeding was commenced after the transfer had been effected. It was pointed out by the learned Judges in the course of the judgment that it was an elementary principle that no person was to be deprived of his property in any judicial proceeding unless he had an opportunity of being heard; see the case *In re Hammersmith Rent-charge* (1849) 4 Ex 87 (C).

In our opinion the principle laid down in that case is the correct principle and fully applies to the present case. On behalf of the respondents, however, reference was made to a decision of a Single Judge of this Court, dated the 22nd of January, 1947, in Civil Revn. No. 880 of 1945 (A). It was held by B.K. Ray, J., in that case that a settlee from an auction purchaser was not a necessary party to a proceeding for setting aside a sale under Order 21, Rule 90, Code of Civil Procedure. We do not accept the reasoning of this case as correct. In our view the observation made by B.K. Ray, J., as to the interpretation of Order 21, Rule 92, Code of Civil Procedure, is not a correct interpretation and does not lay down the correct law.

For the reasons we have already expressed we think that the settlee from the auction-purchaser, namely, the plaintiffs in the present case, were necessary parties to the proceedings taken for setting aside the sale in miscellaneous case No. 234 of 1946. As the plaintiffs were not made parties to that miscellaneous case there has been a violation of the statutory requirements of Order 21, Rule 92 (2), Code of Civil Procedure. The effect of that violation of the statutory requirements is that the order for setting aside the sale in Miscellaneous case No. 234 of 1946 is an invalid and illegal order and is not binding upon the plaintiffs. We are also of the opinion that the bar of Order 21, Rule 92, Code of Civil Procedure, does not apply to the present case.

4. For these reasons we hold that this appeal should be allowed that the judgment of the lower appellate Court should be set aside and the plaintiffs should be granted a decree in the terms expressed by the learned Munsif. We accordingly order that the judgment of the lower appellate Court should be set aside and the decree of the Munsif should be restored. This appeal is accordingly allowed with costs.