

(1923) 07 PAT CK 0052

In the Patna High Court

Case No : Civil Mis. Appeal No. 257 of 1922

Kishundeo Narrajan Mahta and another

APPELLANT

Vs

Ramrejhan Singh and others

RESPONDENT

Date of Decision : 09-07-1923

Acts Referred:

Citation : (1923) 07 PAT CK 0052

Judgement

Mullick, J.—The sale took place on the 20th January 1921. The application to set it aside was made by the judgment debtors on the 25th May 1921. It was set aside by the Court of first instance, the Munsif, on the 16th December 1921, and there was then an appeal to the Subordinate Judge who affirmed the finding of the Munsif and dismissed the appeal on the 13th September 1922.

2. The present second appeal is preferred by the decree-holders. A preliminary objection is taken that no second appeal lies. It is clear, however, that the application is based not only upon the failure to publish and conduct the sale according to law but also on the ground of the omission on the part of the decree-holders of the necessary notice under Or. 21, R 22 of the Civil Procedure Code. It is now settled that when the execution itself is attacked at the outset and a sale takes place afterwards, the judgment-debtor has the right to challenge the sale under S. 47 of the Code and if that is so, a second appeal does lie. Coming to the merits it is clear that the judgment of the Subordinate Judge cannot be supported. He finds that there has been fraud on the part of the decree-holders and that by some contrivance on their part the judgment-debtors were kept in ignorance of the fact that the sale had taken place and that this is a proper case for the application of S. 18 of the Limitation Act. The first ground given by the learned Subordinate Judge for finding fraud is that in the application for issue of notice under Or 21, R. 22, the decree-holders have described all the judgment-debtors as residents of Mauza Athri. The learned Subordinate Judge refers to the notice as Ex. D, but it should be Ex. A, and he is quite in error in thinking that the judgment-debtors have in fact been described as residents of Athri and not in the case of some as residents of Athri and in the case of the others as residents

of Madhopur. The fact appears to be that the judgment-debtors come from two different villages and one set have been properly described as residing in Madhopur and properly served in that village and the other set who reside in Athri have been served at Athri as stated by the Subordinate Judge. Then the Subordinate Judge states that the service of notice which he wrongly describes as Ex A-I records that the notices have been served in Mauza Athri. This is clearly wrong. We have referred to the report of the peon and we find that the notices have been entered as properly served as indicated above. Finally the learned Subordinate Judge refers to Ex. A-I. the receipt granted by the Chamar who attested the service report. This Chamar is a resident of Athri, but I cannot see that that fact alone is legal evidence upon which a finding of fraud can be based. There is no reason why a Chamar residing in Athri should not have attended the service of process in Madhopur which is an adjoining village and attested the service report in his own village afterwards. It is obvious therefore that the learned Judge has made an error of record in regard to the evidence upon which he finds fraud and that his finding is therefore liable to be attacked on the ground that he has arrived at an inference without any evidence to support it.

3. The learned Judge refers next to the service of notices under Or. 21, R. 66 and of the proclamations relating to the sale. It is difficult to say how far he has been influenced by his error with regard to the notices under R. 22 in arriving at his finding with regard to these last two sets of notices and I think in the circumstances the proper course is to set aside his order and to remand the case to him for hearing according to law. It is open no doubt be a Court to find merely upon circumstantial evidence that there has been fraud on the part of a particular party but that finding must be based on legal evidence. In the case of a sale alleged to have been brought about by the fraud of a decree-holder, it is open to the Court to find from the suppression of one or more notices relating to the sale or to the decree itself that the whole was part and parcel of one original scheme and that the various incidents were merely indications of the fraudulent intention of the decree-holder from the outset. It is open in this case to the learned Judge to find from the failure on the part of the decree-holders to serve the notices that they had a hand in the non-service of the necessary processes but there must be a clear and definite finding that the decree-holders were implicated in the matter and a mere finding that there was no service will not be sufficient. In most cases the decree-holder is required to furnish an identifier, and if there has been any perjury or false statement in respect of a service at which the identifier was required to be present, that will be sufficient to connect the decree-holder with the alleged fraud but these are matters which must be gone into and specifically found. It is not sufficient to make a general allegation that because there was no service of sale processes or because there was irregularity in the service that therefore the decree-holder must necessarily have been responsible. The result is that the appeal is decreed with costs and the case is remanded for hearing to the Subordinate Judge according to law. Costs will abide the result.

Foster, J.

4. I agree.