
(1925) 08 CAL CK 0033
In the Calcutta High Court

Kusum Kumari Lodh and Others

APPELLANT

Vs

Kutiswar Barai and Others

RESPONDENT

Date of Decision : 17-08-1925

Acts Referred:

Citation : AIR 1926 Cal 829

Hon'ble Judges : Mukerji, J;Cuming, J

Bench : Full Bench

Judgement

Mukerji, J.—The petitioners in this Rule are transferees from certain persons who purchased at a sale in execution of a decree against one Tarini and his two minor nephews, certain properties belonging to the said judgment-debtors. The sale took place on the 21st June 1922. In August 1922, Tarini applied under Order 21, Rule 90, Civil P.C. for setting the sale aside. That application was dismissed for default on the 11th November 1922, and thereafter the sale was confirmed on the 18th November 1912. On the 15th February 1924 the minors through their grand-uncle one Gayali Barui, made a further application for setting aside the sale under Order 21, Rule 90, Civil P.C. The Munsif dismissed the application, but on an appeal being preferred to the Subordinate Judge, the sale has been set aside.

2. The petitioners have obtained this Rule to show cause why the sale in so far as the share of Tarini is concerned should not be upheld. The first argument advanced on behalf of the petitioners is to the effect that Tarini's application under Order 21, Rule 90 having been dismissed, it was not open to the learned Judge to set aside the sale in so far as it affected his share in the properties sold, and that the order of the learned Judge should be limited to the share of the minors who were the applicants before him. This argument, though specious, is, in my opinion, not sound, and it overlooks the distinction between the scope of an application made by a fractional owner of a property under Order 21, Rule 90, Civil P.C., to set aside a sale and that of a suit by such owner to set aside a sale to the extent of his share or to have a declaration that the sale is void or invalid

to the extent of his share. In an application under Order 21, Rule 90, Civil P.C. the question of the share of the applicant or of his co-sharers does not come in at all. Tarini's application was to set aside the entire sale. It was dismissed for default. It may be doubted whether Tarini could come up a second time and apply to set aside the sale.

3. This question arose in the case of Paresh Nath Mallik v. Hari Charan Dey [1911] 38 Cal. 622, where the applicant to set aside a sale had his application dismissed for default and after his application for restoration was refused applied again to set aside the sale; but the question does not appear to have been decided in that case. There can, however, be no doubt that an application by a co-judgment-debtor to set aside a sale is maintainable where similar applications by other judgment-debtors have proved infructuous. That was the view taken by this Court in the case of Jadoo Nath Chatterjee v. Aswini Kumar Banerjee [1912] Cri.L.J. 98 which was a case in which the finding was that the new applicant, a minor, was a creature of the previous applicants who had failed. In an application under Order 21, Rule 90, the entire sale has to be dealt with, except where properties are sold in lota, in which case the sale of each lot is a separate sale, though all the properties are covered by one proclamation and one person may happen to be the purchaser of all the lots. There is, in my opinion, no reason why Tarini should not be permitted to benefit by the result of the proceedings taken by the minors in which the minors have succeeded in establishing the requisites which would vitiate a sale under Order 21, Rule 90, Civil P.C.

4. The next argument of the petitioner is to the effect that the findings of the learned Subordinate Judge only go to show that it was the minors' share which had not been properly sold as the minors were not properly represented in the execution proceedings, and, therefore, no order should have been made setting aside the entire sale. To deal with this argument it is necessary to examine the findings of the learned Judge. He has found that even if the minors were properly represented in the suit--a point which he did not decide--they were not properly represented in the execution proceedings, and that no guardian was appointed for them by the Court nor did anyone act as such in those proceedings. He further found that there was suppression of the said processes and other notices at the instance of the decree-holders and that the property was consequently sold at a very inadequate price. The argument of the petitioners would be well founded only if some of these findings did not exist. The scope of Order 21, Rule 90, is confined to material irregularity or fraud in publishing or conducting a sale and antecedent fraud or irregularity does not properly come within the purview of this rule except for collateral purposes. The findings as to suppression of process and inadequacy of price are quite enough to bring the case within the rule and the irregularity and fraud found in the case are sufficient to vitiate the sale as a whole.

5. Lastly it has been argued on behalf of the petitioners that the order passed by the learned Subordinate Judge is without jurisdiction as upon his findings the

sale was altogether void at least in so far as the minors share in the properties was concerned, and there was really nothing which could be set aside by the Court. This, however, is not the ground on which the Rule has been issued, and without saying anything that may suggest that the ground has any real substance, I should state that, in fairness to the opposite party who are expected to answer the Rule only in the limited form in which it has been issued, we should not allow ourselves to be drawn into a consideration of this much larger question. The Rule as it stands does not touch the share of the minors at all.

6. The Rule accordingly should be discharged, and with costs, hearing fees being assessed at two gold mohurs.

Cuming, J.

7. I agree.