
(1975) 07 PAT CK 0002
In the Patna High Court
Case No : Civil Revision No. 1032 of 1968

Manulal Singhania

APPELLANT

Vs

Natwar Lal Thakur and Others

RESPONDENT

Date of Decision : 23-07-1975

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 60, Order 21 Rule 90, Order 21 Rule 97, 151
Provincial Insolvency Act, 1920 — Section 28(2)

Citation : AIR 1976 Patna 321

Hon'ble Judges : H.L. Agrawal, J

Bench : Single Bench

Advocate : Sushil Kumar Mazumdar and Ambika Kant Sinha, for the Appellant; Lakshmi Narayan Misra and Sabitri Mishra, for the Respondent

Final Decision : Allowed

Judgement

H.L. Agrawal, J.—This application in revision is by the decree holder against an order of the executing court releasing the property from attachment u/s 151 of the CPC (hereinafter to be called as "the Code") long after the sale and its confirmation at a stage when delivery of possession had been issued.

2. The relevant facts are these: The petitioner brought Execution Case No. 18 of 1962 in the court below for realisation and sale of the two properties. The properties were sold on 14-5-1963 and the sale confirmed on 18-6-1963. Before, however, the decree holder would succeed in obtaining delivery of possession, opposite party Nos. 1 to 4 filed a miscellaneous case on 18-2-1965 only two days earlier when the delivery of possession was to be effected by the court's Nazir, under various provisions of the Code, namely, Sections 47, 94, 151 and Order 21 Rules 58, 90 and 99 and Order 40 Rule 1 of the Code for release of one of the properties sold in execution case, namely, lot No. 3 on the ground that the judgment debtor had already transferred his interest in the property in question by a registered document on 13-2-1950, and he thereafter was occupying the

premises in question as tenants against whom the opposite party had already obtained a decree for eviction. It was further pleaded on their behalf that the property in question was at the relevant time under the control of the joint Civil Judge of Ahmedabad in Insolvency Case No. 20 of 1953 taken by a creditor against the transferee of the judgment debtors in which case this property was described as belonging to the judgment debtors' transferee.

3. An objection was taken on behalf of the decree-holder petitioner that an application for release of this property from attachment could not be entertained at this stage when the sale had already been confirmed. On merits of the case of the opposite party, the petitioner also denied all those allegations. However, it is not necessary for me to examine the case of the parties on those questions and, accordingly, it is not necessary either to state all those facts.

4. The Court below, however, took a view that the decree holder had the knowledge of the pendency of the insolvency case and the appointment of receivers and therefore, it was necessary for him to take permission of that Court before getting the property attached and put on sale. The attachment and sale of the property was, therefore, irregular and liable to be set aside. Coming to this conclusion and on taking the view that the prayer could not be granted under Order 21 Rule 58 of the Code, but as it was equally not desirable to drive the opposite party to institute a title suit, the Court below has set aside the sale purporting to exercise the inherent powers u/s 151 of the Code.

5. In this Court learned Counsel for the decree holder petitioner has challenged this order on the ground that the sale could not be set aside and in any event the Court below had no jurisdiction to invoke the inherent powers.

6. The relevant provision for releasing a property from attachment is contained in Rule 58 of Order 21 of the Code. It specifically enjoins upon a Court receiving a claim or objection from any person, to investigate the same and then to release the property from attachment if satisfied upon the said investigation under rule 60. Rule 58 itself lays down that the Court ordering the sale may postpone it pending investigation of the claim or objection. From reading the provisions of various rules under the heading "Investigation of Claims and Objections" the stage contemplated for entertainment of an application for releasing a property from attachment is to save it from a wrongful sale. But in case the property happens to be already sold away and the sale stands confirmed in the meantime, the Court cannot possibly give any relief to the claimant in this summary proceeding. It seems that the stage contemplated for investigation is such where the sale itself can be set aside. The point has already been well settled by several decisions of this Court and suffice it may to refer to only one decision, namely, the case of Janki Mohan and Another Vs. Dr. S. Samaddar and Others, . In this case it has been clearly laid down that an executing court has no jurisdiction to entertain and decide the claim on an application for releasing the properties from attachment after sale has taken place because the sale ipso facto determines the attachment. This case is also an authority for the proposition as was contended

on behalf of the petitioner in the court below as well that a claimant's application for adjudication of his claim of title and possession over the disputed property before an allegation of resistance or obstruction on his part made by the decree holder under Order 21 Rule 97 of the Code was pre-mature and has got to be dismissed without any enquiry. The claimant cannot pray for inherent jurisdiction either. A reference may also be usefully made in this connection to a Full Bench decision of this Court in the case of Babu Upendra Nath Basu Vs. Pandaya Gulab Sarkar, where it was held that the right to set aside the Court sale does not exist apart from the provisions of the statute under which the sale is held.

7. It, therefore, must be held that the executing court had committed an apparent error of jurisdiction in releasing the property from attachment at this stage.

8. Learned counsel appearing for the opposite party, however, purported to support the order on the ground that in as much as the property in question was under custody of the Insolvency Court under the charge of receivers, the sale in question was itself void ab initio. There is no force in this contention either. A distinction has been made between a receiver in insolvency proceeding and that in an ordinary civil suit. The position of a receiver in insolvency is merely of an assignee in bankruptcy. A Bench of this Court in the case of Sant Prasad Singh Vs. Sheodut Singh, has held that it is not necessary for a party to obtain the leave of the court to proceed against a receiver appointed under the provisions of the Provincial Insolvency Act, Even with respect to a receiver appointed in a regular suit with respect to the property, the sale of such a property in execution of a decree without the leave of that court does not render the sale void. Although the person proceeding against the property may be otherwise liable, the jurisdiction of the Court holding the sale is not taken away. This view finds support directly from a Bench decision of this Court in the case of Mangtural Bagaria Vs. Daya Shanker Gobardhan Das Bhata and Others, .

9. The Supreme Court in the case of Kanhaiyalal Vs. D.R. Banaji and Others, where this question fell for decision, did not decide it and proceeded on the assumption that the sale was merely irregular. It has been made clear by the Supreme Court that the only illegality attached to such a sale is in the sense that the person proceeding against the property without the leave of the Court concerned is liable to be committed for contempt of Court. In both the cases, that is, the Patna case and the case before the Supreme Court, the party challenging such a sale on the ground that the property in question at the relevant time was under custodia legis, had instituted separate suits for declaration that the sale by the executing court in such circumstances was illegal. I, however, by this observation, do not intend to hold that the only remedy of the opposite party is by way of a separate suit, but at the same time do not entertain any doubt that the order passed by the executing Court for setting aside the sale on the ground that the sale was illegal in absence of the leave of the insolvency Court appointing a receiver, is wholly erroneous and must be set aside. The Court

below had no jurisdiction to act under the inherent powers in this case. On committing this error of law it has committed material irregularity in exercise of the jurisdiction.

10. In the result, I would allow this application and set aside the impugned order. The petitioner will be entitled to his cost of Rs. 84/- only.