
(1995) 12 PAT CK 0025

In the Patna High Court

Case No : Civil Revision No. 1146 of 1991

Mehrunisha and 3 Ors.

APPELLANT

Vs

Trilok Singh and 6 Ors.

RESPONDENT

Date of Decision : 15-12-1995

Acts Referred:

Citation : (1995) 12 PAT CK 0025

Final Decision : Dismissed

Judgement

S.N. Mishra, J.—This civil revision application is directed against the judgment and order, dated 7.6.1991, passed in Miscellaneous Appeal No. 16 of 1990, by the learned District Judge, West Champaran, Bettiah, whereby he has set aside the order, dated 14.6.90, passed in Miscellaneous Case No. 28 of 1982, by the learned Munsif, setting aside the sale under Order XXI Rule 90 of the Code of Civil Procedure.

2. The predecessor-in-interest of the Petitioners, namely. Ali Sher Khan, filed a petition under Order XXI Rule 53 read with Rule 90 of the Code of Civil Procedure, in the Court of Munsif, Bettiah, praying therein to release the property detailed in Schedule 1, namely, Plot No. 1636P. appertaining to Holding No. 420, measuring an area of 13 1/2 dhurs, situate in Mohalla Purani Gudari, within the Bettiah Municipality, on the ground that he had purchased the said land through a registered sale-deed, dated 23.9.71 for a consideration of Rs. 3.000/- from one Mahadeo Prasad Patel, who had been originally made opposite party No. 2, who died during the tendency of the case and his widow, Mostt. Sudama Devi, opposite party No. 2, and others were substituted in his place. Prior to the aforesaid sale-deed, said Mahadeo Prasad Patel on 7.6.1979, had executed a registered usufructuary mortgage deed in favour of one Chandan Prasad for a consideration of Rs. 800/- which has subsequently redeemed and, accordingly, the applicant-Petitioners came in possession of the aforesaid Schedule 1 land, and sinew then having paying rent against receipts to the Municipality. It is further alleged that the Petitioners had no knowledge of Execution Case No. 110.

of 1971 and the opposite party No. 1, namely, Trilok Singh, purchased the property, in question, by suppressing all the processes of the Court by bringing the Process-Servers in his collusion and, accordingly, he sold the land in favour of opposite party No. 1 in Execution Case No. 110 of 1971 is not binding upon them because no notice of any kind was ever served upon them until on 15.7.82 when the Petitioners for the first time, came to know about the decree passed in favour of opposite party no 1 and the execution case arising there from In pith and substance the case of the Petitioners is that the disputed property could not have been auction-sold in the, execution case, inasmuch as neither the property belonged to the judgment-debtor not the property was under attachment prior to the execution of the sale-deed.

2. In opposite. Opp. Party No. 1 appeared and contested the case on the ground, inter alia, that the Petitioner under Order XXI Rules and 90 of the Code of Civil Procedure, is hopelessly barred by limitation, inasmuch on 6.2.1962. the original opposite party No. 2. namely, said Mahadeo Prasad Patel executed a mortgage deed in his favour with respect to the land, in question measuring 1 Katha 10 dhuis for a sum of Rs. 3,500/- Opposite Party No. 1 Trilok Singh, filed a suit, namely. Mortgage Suit No. 52 of 1967, against the said Mahadeo Prasad Patel, opposite party No. 2 which was ultimately compromised on 24.7.70 wherein it was agreed that the said Mahadeo Prasad Patel shall pay a sum of Rs. 600/- by way of principal and interest accrued thereon, before 31.12.70 and it was also agreed that there was no necessity of preparing any final decree. Since the said Mahadeo Prasad Patel failed to pay the agreed amount in terms of the compromise, opposite party No. 1 filed Execution Case No. 110 of 1971 on 23.8.71 before the Court of Munsif, Bettiah. After having complied with the formalities and after processes were served at various stages, the property was ultimately auction-sold on 12.4.73. Opposite Party No. 1 further pleaded that the original Petitioner, namely, Ali Sher Khan and the original opposite party were having a good relation and the Petitioners had full knowledge about the mortgage as well as the compromise decree including the execution case, they fraudulently brought into, existence the Farzi sale deed, dated 23.9.71. It has been further alleged that he had no knowledge regarding the mortgage deed of Chandan Prasad nor he had the knowledge about the redemption of the mortgage deed. It has been further alleged that the suit was filed on the basis of the simple mortgage and the question of attachment of the property did not arise. It has been further stated that the Petitioner have falsely alleged that, for the first time they came to know about the execution case and the sale of the property only on 15.7.82. On the contrary, the Petitioners were aware of the tendency of the execution case and even then, they purchased the land in question, in collusion with the judgment-debtor in order to deprive the opposite party from the usufruct of the decree.

3. On the pleadings of the parties, the learned Munsif framed the issues-

i. Whether the auction-sale of the property involved in execution case No. 110/71

suffers from material irregularities or fraud in publishing or conducting sale,

ii. Is the present misc. case time barred?

The learned Munsif answered first point in the affirmative and. the second issue regarding limitation in the negative and, accordingly, held that the auction-sale is a nullity and. thus, set aside the auction-sale and the said miscellaneous case was consequently allowed.

4. Opposite party, thereafter, filed, an appeal before the learned District Judge who, after hearing the parties, and after taking into consideration the evidence available on the record, has held that the processes were served in due course in a bona fide manner by the process-servers of the Court and: the same cannot be said to have suffered from material irregularity and/or fraud in publishing or conducting the sale. The learned Judge has further held that an order: to defeat the claim of the mortgage, the mortgagor dishonestly executed a Farzi sale-deed in favour of the Petitioners mainly in order to deprive the decree-holder, from the usufruct of the decree and, accordingly, set aside the order of the learned Munsif and allowed the appeal filed by the opposite party No. 1.

5. Learned Counsel for the Petitioners has firstly submitted that the Petitioners are the bona fide purchasers of the land, in question, through a registered sale-deed without having and notice of the decree in favour of opp. party No. 1 as well as the tendency of the execution case. It has been further submitted that since the property was not under attachment, the Petitioners were not supposed to know the actual state-of-affairs with respect to the property in question. It has further been submitted that the sale was conducted without serving notice and/or complying with the formalities as required under the law. before confirming the sale in the execution proceeding. According to the learned Counsel, mala fides on the part of the decree-holder, opposite party is further writ large on the face of it inasmuch as the decree-holder, opposite party, No. 1 himself filed a petition for release of the property, which admittedly belongs to the judgment-debtor, from the sale-certificate, which was allowed. Accordingly, it has been submitted that there is no valid explanation as to why the admitted property of the judgment-debtor was allowed to be released at the "instance" of the decree-holder, which clearly established the mala fide intention on the part of the decree-holder opposite party No. 1. Lastly, it has been contended that after purchase, the Petitioners have constructed a house on the land in question. By investing more than Rs. 1,00,000/-(one lakh) where the Petitioners are residing with their family members.

6. Learned Counsel for the opp. party, on the other hand, has submitted that the miscellaneous case was initiated for setting aside the sale after nine years, which was hopelessly barred by limitation, inasmuch as the Petitioners neither explained the delay nor made a prayer for condonation of such a long delay beyond stating that they came to know only on 15.7.82. It has further been stated that the petition under Order XXI Rule 90 of the CPC for setting aside the

sale, is not maintainable after the sale has become absolute. It has been further submitted that the Petitioner purchased the land on 23.9.71 during the tendency of the aforesaid execution case for a sum of Rs. 3,000/- albeit the mortgage is for Rs. 3,500/-. Lastly, it has been submitted that it is false to say that the Petitioners have constructed any house and/or are residing therein, on the contrary, they are living in a separate house at a distant place. In support of his contention, the learned Counsel has relied upon the following decisions of this Court, namely 1. Sona Lal Halwai Vs. Jamuna Singh and Others, Pat 6. 2. Sobhan Khan Vs. Gangadhar Senapati and Others,

6. From the materials on record, it appears that the process-servers, who have served different processes in the execution case, have been examined and they have categorically proved service of notices in terms of Order XXI Rule 22 of the CPC One of the process-servers, namely O.P.W. 3 has said that the notice on said Mahadeo Prasad Patel was served on refusal. The other process-server was examined as O.P.W. 1, who has stated that the valuation notice was served and proved Ext. A. The other process-server O.P.W. 2 has also proved the notice regarding the valuation to the judgment-debtor. The other witnesses have proved the service of proclamation of sale In terms of Order XXI Rule 66 of the Code of Civil Procedure. The evidence of the process-servers has fully established that the processes issued at different stages by the Court in the aforesaid execution case were duly served. Similarly, opp. party No. 2 has been examined as O.P.W. 8, who has stated in his evidence in detail about the mortgage suit, the compromise arrived at the final decree passed therein and also supported the fact that all the notices in matters of valuation and proclamation of sale etc. were properly served.

7. On a consideration of the aforesaid evidence, the Court of appeal below has rightly held that the several processes were duly served by the process servers and there is no material irregularity and/or fraud committed in publishing and conducting the sale. Accordingly, I do not find any illegality in the findings arrived at by the learned appellate Court and "thus" the contentions of the learned Counsel for the Petitioners to the contrary are hereby rejected.

8. As regards the prayer made on behalf of the decree holder for release of the property, which Admittedly belongs to the judgment-debtor, it has been submitted by the learned Counsel for the opposite party, that he opted to put the property on sale by which the decree could have been satisfied and. accordingly, the decree-holder has rightly prayed for release of the other property. It has further been submitted that both the properties admittedly belong to the judgment-debtor and accordingly, on the prayer made by him, one of the properties was released from the sale certificate. It was not known to the decree-holder that the Petitioners, had purchased the said property during the tendency of the said execution case. Accordingly, it has been submitted that the opposite party had made a bona fide prayer and in good faith to release the other property since the property sought to be included in the sale certificate was

sufficient to satisfy the decree granted in favour of the decree-holder. The submission of the learned Counsel for the opposite party is correct. Having regard to the nature of the decree passed, it was not necessary for the decree-holder to put the entire properties of the judgment-debtor on sale.

9. In the instant case, compromise decree was passed on 24.7.1970. The execution was levied on 23.8.1971, on 23.9.1971. the Petitioners purchased the disputed land during the tendency of the execution case No. 110 of 1971. On 22.3.1973, the judgment-debtor filed an application praying therein for payment of the decretal amount by instalments, which was rejected. On 12.4.1973, the sale was confirmed. On 30.4.1973, sale certificate was finally issued. On 21.7.1982, after about ten years, the Petitioners filed the petition under Order XXI Rule 90 of the Code of Civil Procedure, though the limitation prescribed is 30 days for filing such an application. Admittedly neither any explanation was furnished as to why the said petition was filed after so many years nor any prayer for condonation of delay has been made before the Court at any stage of the proceeding. In Sobhan Khan's case (supra), it has been held that where a person applied to the Court to set aside the execution sale under Order XXI Rule 90 beyond the period of limitation, the onus lies on him to show that he had no knowledge until within 30 days of the application. It has been further observed as follows:

...It may be that in the circumstances of a particular case, owing to the disparity between the value stated in the sale proclamation and the real value of the property, it is possible to infer fraud in the service of the processes. But the presumption, which may arise in such a case is obviously rebuttable by credible evidence that the processes were, in fact, served. In the present instance in spite of the under valuation of the properties, there was evidence which both the Courts below have found to be true that the processes were properly served. In these circumstances, the Petitioner has been unable to get over the bar of limitation. The applications must be dismissed with costs.

In Sona Lal Halwai's case (supra), somewhat a similar question arose for consideration wherein it has been held that termination of the execution proceeding, no objection in terms of Order XXI Rule 90 of the CPC is maintainable as the proceeding in respect of execution sale comes to an end after the preparation of the sale certificate and the delivery of possession effected in favour of the purchaser.

10. After having heard learned Counsel for the parties in detail and after having gone through the materials on record and relying upon the ratio of the aforesaid decisions, I am of the view that the aforesaid miscellaneous case instituted on the basis of an application filed by the Petitioners under Order XXI Rule 90 of the CPC is hopelessly barred by limitation and the same cannot be entertained. I am further of the view of the such application is not maintainable, particularly, when the sale has become absolute and I hold that the sale in the instant case was conducted after following the Inscribed procedures and, as such, the sale, in

question, is not a nullity.

11. In the result, this civil revision application is dismissed. In the facts and circumstances of the case, there shall be no order as to costs.