

(1937) 09 PAT CK 0029

In the Patna High Court

Munshi Ramkishun Lal and Others

APPELLANT

Vs

Saiyid Muhammad Manzural Haque and Others

RESPONDENT

Date of Decision : 30-09-1937

Acts Referred:

Bihar Tenancy Act, 1885 — Section 174
Civil Procedure Code, 1908 (CPC) — Section 26M

Citation : AIR 1938 Patna 593

Hon'ble Judges : Manohar Lall, J

Bench : Division Bench

Judgement

Manohar Lall, J.—This is an application on behalf of the petitioners who, having successfully applied under the provisions of Section 174, Bihar Tenancy Act, to have the sale set aside, had an adverse order passed against them under the following circumstances.

2. The petitioners purchased in a mortgage execution sale on 20th May 1935 certain holdings belonging to their judgment-debtors and the sale was confirmed on 29th June 1935. In the meantime, on 10th June 1935, the new Bihar Tenancy Amendment Act, came into operation. By virtue of the provisions of Section 26-M the Court is directed notwithstanding the provisions of the Code of Civil Procedure, 1908, that it shall not confirm the sale unless the auction purchasers have filed a certain notice and also have deposited for payment to the landlord a certain sum as provided therein. This was not done apparently upon either a mistake of law or upon the view that this provision could not affect the sales which have already been held before the passing of the Act. The sale having been held, as I have stated above, another set of circumstances came into operation.

3. On 24th September 1936, the opposite party before me obtained a decree for rent and in execution thereof he sold the same holding on 17th March 1937, and purchased it himself. Thereafter on 12th April 1937, the petitioners before me made an application u/s 174, Bihar Tenancy Act, and offered to make a deposit

which was accepted on 23rd April 1937 by the Court with the result that the sale was set aside. The opposite party informs me that this order was passed ex parte without any notice to him which was certainly an error in procedure. The landlord opposite party, on 14th May 1937, moved the Court under the provisions of Section 151, Civil P.C., to recall that order of 23rd April 1937 setting aside the sale and he induced the learned Munsif to accede to his prayer. The present application is against that order.

4. The learned Munsif has taken the view that inasmuch as the landlord's transfer fee had not been paid the petitioners had no locus stand to apply u/s 174 and therefore he recalled the order. With great respect to the learned Munsif it was not open to him to recall that order. The order originally passed by him on 23rd April 1937 was an order with jurisdiction; he may have taken an erroneous view of the law; he may not have followed the correct procedure in not giving notice to the opposite party. But, nonetheless, it was an order which was within his jurisdiction to pass; and the opposite party, if aggrieved by that order, had his remedy either in appeal or in revision. Again I am not satisfied that the order which was originally passed was illegal. The Court was required, as their Lordships of the Judicial Committee have pointed out recently, under the statute to confirm the sale as soon as 30 days from the sale have elapsed, if there is no application pending before it either under Rule 89 or Rule 90, Civil P.C. There was no such application in the present case admittedly, and, therefore the Court was bound to confirm the sale on the expiry of the 30 days from 20th May 1935. It is said that in the meantime another Act had come into operation.

5. It is not argued before me that this matter was brought to the notice of the Court who confirmed the sale, and I very much doubt that anybody ever thought before the decision of their Lordships of the Privy Council in AIR 1936 49 (Privy Council) that this Act was retrospective in every matter. Therefore, the Court had jurisdiction to confirm the sale on 29th June 1935, when the facts which directed him not to confirm were never brought to his notice.

6. The only thing that remained was that on the date of the application, that is on 12th April 1937, the landlord's fee had not been paid, and this fact was again not brought to the notice of the Court. Now, if a Court had jurisdiction to pass an order under the provisions of Section 174, it cannot be said that that order is without jurisdiction simply because he has omitted to notice inadvertently or in ignorance that certain salami or transfer fee had not been paid. That is a question of fact which could only be considered and decided if it would have been brought to the notice of the Court.

7. In the circumstances, I do not think that in the facts of this case the mere fact that the landlord's fee had not been paid on the date of the application deprived the Court of the jurisdiction to set aside the sale, which he could do under the provisions of Section 174, Tenancy Act. Moreover, there is no merit in this objection because I am informed that the auction-purchaser petitioners have deposited the landlord's fee which would amount to a very small sum of Rs. 9.

Under the circumstances, I hold that the order of the learned Munsif recalling his original order is without jurisdiction.

8. The order is therefore set aside. It necessarily follows that the order setting aside the sale on 23rd April 1937 remains in force. The opposite party is entitled to withdraw the landlord's fee and compensation which I am told have been deposited. The opposite party is entitled to the costs of this hearing one gold mohur.