(1935) 08 PAT CK 0005

In the Patna High Court

Case No : Appeal No. 283 of 1934

Nageshwar Prasad Misra and others APPELLANT

Vs

Ambika Prasad Upadhya and others RESPONDENT

Date of Decision : 26-08-1935

Acts Referred:

Citation : (1935) 08 PAT CK 0005

Final Decision : Dismissed

Judgement

Luby, J.—Nageshwar Prasad Misra and others appeal against the order dated 14th September 1934 of Babu A.K. Sahay, Subordinate Judge at Motihari whereby that officer dismissed with costs their application under O. 21, R. 90 for setting aside the auction sale held on 29th June 1934 in the execution case brought by Ambika Prasad Upadhya and others, decree-holders (now respondents). A short history of the proceedings will be illuminating. The execution case was filed on 20th September 1932. When notices under O. 21, R. 66 were served upon them the judgment-debtors (now appellants) appeared and filed an objection on various grounds, including: (1) misdescription of the properties sought to be attached; (2) under-valuation of the same; (3) addition to the decretal dues of certain amounts which the decree-holders had to pay in order to protect the mortgaged properties.

2. The Subordinate Judge heard this objection, and after taking evidence doubled the valuation which the decree-holders had suggested, and dismissed the remaining objections. An appeal against his order was subsequently dismissed by this Court. 6th November 1933 was fixed for sale of the property; and on that date some of the judgment-debtors applied for time to pay the decretal amount and agreed to waive all objections regarding irregularities, undervaluation or non-issue of fresh sale proclamation. On 13th November the guardian-ad-litem of the minor judgment-debtors joined in this petition and then the Subordinate Judge, granted an adjournment. Similar adjournments were granted on similar petitions by the judgment-debtors for the next seven and a half months. In the meantime

the judgment-debtors filed two more miscellaneous cases which were dismissed in due course, and the appeals to this Court were also dismissed. The sale was held on 29th June 1934 and the judgment-debtors after waiting a full month filed their application under O. 21, R. 90 on 28th July 1934. The Subordinate Judge after hearing the parties dismissed the application under O. 21, R. 90 on the preliminary ground that it was not maintainable, because (1) most of the points raised had already been decided by him in the previous miscellaneous cases; (2) the judgment-debtors had waived all objections in their various petitions for adjournment. For the appellants, it is argued that the Subordinate Judge was not entitled to dismiss their application summarily, but was bound to take whatever evidence might be offered on the various points mentioned in the application. So we shall have to consider whether there were any points upon which it was still necessary for the Subordinate Judge to take evidence, after all that had gone before. The application under O. 21, R. 90 consists of 20 paragraphs; but the grounds taken may be reduced to five items as follows : (1) that some of the properties attached were not saleable; (2) that the valuation of those properties made by the Subordinate Judge was inadequate and nominal; (3) that the decree-holders were not entitled to add to the decretal dues certain payments which they had made to save the mortgaged property from sale in execution of rent decrees; (4) that the minor judgment-debtors were not properly represented throughout the execution proceedings; (5) that the sale proclamation was not properly published. Of these five grounds of objection, Nos. 1, 2 and 3 were the subject of the previous miscellaneous cases Nos. 3379 and 80 of 1933. Grounds 1 and 3 were in substance res judicata and could not be considered again. As regards ground 2 we have been referred to the observations made by this Court in Maharaj Bahadur Singh v. P.C. Lal Chaudhuri, 1928 Pat 25 = 105 IC 689 = 6 Pat 588 = 9 PLT 387, where it was held that a judgment-debtor is not estopped from raising the question of valuation in proceedings to set aside a sale, because the question had already been decided when the sale proclamation was made. But in the present case we have to remember that there was an express waiver by the judgment-debtors of all objections about under-valuation. By their various partitions for adjournment, they led the Court to believe that they would not in future make any objection regarding under-valuation, etc, and the Court was thereby induced to grant them adjournment after adjournment, without even insisting on part payments of the decretal dues. In return for the judgment-debtors'' undertaking the Court granted them exceptional favors. So they must be held to be bound by that undertaking. In my opinion it was not necessary for the Subordinate Judge to go into the question of valuation again. As to ground 4 it is urged that the minor judgment-debtors Nos. 8 and 9 were not properly represented throughout the proceedings, because on 7th February 1934 in the absence of the guardian-ad-item one of the major judgment-debtors was permitted to act as guardian and in that capacity signed one of the petitions for adjournment without fulfilling all the formalities prescribed by O. 32, R. 3.

3. It is suggested that the major judgment-debtor who signed for the minors had or might have had an interest adverse to the minors, and signed the petition to their detriment. There is no ground for this suggestion. The major judgment-debtor who signed the petition for the minors was the minors father, and may be presumed to be their friend and not their enemy. Moreover the only act which he performed on their behalf was to sign the petition for adjournment, from which act they could derive nothing but benefit; and as a matter of fact they got the benefit of adjournment as a result of that act. It must also be noticed that the earliest petition for adjournment (with waiver of all objections) was signed by the guardian-ad-litem; so it cannot be said that by signing another similar petition at a later date the minor''s father was striking out a new line. I now come to ground No. 5 about which the Subordinate Judge has not taken evidence at any stage. As regards this ground the Subordinate Judge has relied upon the petitioners for adjournment in which the judgment-debtors waived all objections about irregularities in publishing the original sale proclamation but referred only to such irregularities as might be committed in future (e.g., non-issue of fresh sale proclamation) and not to any irregularities or frauds that might have been committed in publishing the original sale proclamation. Our attention has been invited to the remarks made by Mookerjee J., in Dhanukdhari Singh and Another Vs. Nathima Sahu and others . It was held in that case that:

There can be no waiver unless the persons against whom, the waiver is claimed had full knowledge of his rights and of facts which would enable him to take an effectual action for the enforcement of such rights.

4. In She application under O. 21, R. 90, it is alleged that:

No notification, for sale or notice about the execution of the decree reached the locality or the necessary places nor was it served upon the petitioners nor was it hung at necessary places. The petitioners came to know of this after enquires in the locality after the sale. Before this they had no necessity to make enquiries in the miasmal nor did they make any enquiry.

5. These allegations are not consistent with what is found in the order-sheet of the execution case. The judgment-debtors were present and objecting throughout the proceedings. They were present when the order for issue of sale proclamation was made, and they appeared again on the first date fixed for sale, and on all subsequent dates fixed for sale. They must therefore have known from the very beginning whether the sale proclamation was duly published or not. If there had been any irregularity or fraud committed in respect of the publication, one would have expected them to bring the matter to the Court''s notice atone. But nothing of the kind was done. For the next 7? months the judgment-debtors contented themselves with filing petitions for adjournment. In those petitions they accepted the situation and only asked for time to pay up the decretal dues. I take it therefore that they had "full knowledge of their rights and of the facts." It is also argued that a Court should refuse to enforce the plea of waiver when there is any room for suspicion that there may have been fraud upon the process

of the Court itself. This proposition of law may be readily accepted. But in the present case there is nothing whatever to show that any fraud has been committed by the decree-holders. Moreover the application under O. 21, R. 90 does not contain any specific allegations of fraud, but only alleges fraud in vague and general terms. As observed by Mookerjee, J., in the case mentioned above:

The existence of an intent to waive is a question of fact, and the best evidence of intention is to be found in the language and conduct of the parties.

6. From the conduct of the judgment-debtors in the present case I would infer that they really meant what they said when they waived all objections about irregularities, etc.; and that when they filed their various petitions for adjournment they were fully aware that the sale proclamation had been duly published. In my opinion the Subordinate Judge acted rightly in enforcing the plea of waiver and in dismissing the application under O. 21, R. 90 as not maintainable. In any case'' the sale could not be set aside unless it was proved that the judgment-debtors had sustained substantial injury by reason of irregularity or fraud. And there is nothing to indicate such a state of affairs. The mortgaged property has been sold for Rs. 27,687 which is more than the value mentioned in the sale proclamation. It may not be so good a price as might have been fetched if the property had been sold to the best advantage in the open market; but that was not to be expected when the property was sold by auction. I see no reason for interference. I would dismiss this appeal with costs to the respondents.

Fazl Ali J.

7. I agree

