

(1935) 03 CAL CK 0010
In the Calcutta High Court

Probodh Chandra Basu

APPELLANT

Vs

Kunja Lal Ghosal and Others

RESPONDENT

Date of Decision : 08-03-1935

Acts Referred:

Bengal Tenancy Act, 1885 — Section 174(3), 174(3)(b)
Civil Procedure Code, 1908 (CPC) — Section 115

Citation : 163 Ind. Cas. 761

Hon'ble Judges : McNair, J;Henderson, J

Bench : Division Bench

Judgement

Henderson, J.—In order to understand the arguments which have been made at the hearing of this Rule the following facts require to be noted. The Receiver of the petitioner's estate brought a suit against the opposite party No. 4. A decree was passed on compromise. In the meantime the Receiver was discharged and the petitioner started execution proceedings. In the course of those proceedings the property was purchased by the petitioner on July 24, 1933. On August 23, 1933, an application was made by the opposite parties Nos. 1-3 under the provisions of Section 174(3) of the Bengal Tenancy Act. Their contention was that their interest was affected by the sale inasmuch as they had attached the property in execution of a money decree obtained by them against opposite party No. 4. The learned Judge demanded a deposit in terms of Section 174(3) (b). Opposite parties Nos. 1-3 then applied to this Court and the order was set aside on the ground that it was premature. The application was then heard on the merits, the sale was set aside and the petitioner appealed to the District Court without, success.

2. It is now contented that the order setting aside the sale ought to be set aside inasmuch as no deposit was made and the Judge did not record any reason for considering it unnecessary Sub-section (6) is in these terms:

No application by a judgment-debtor or any person whose interests are affected by the sale under this sub-section shall be allowed unless the applicant either

deposits the amount recoverable from him in execution of the decree or satisfies the Court, for reason to be recorded by it in writing, that no such deposit is necessary.

3. It is admitted that these terms were not complied with. But it has been argued on behalf of opposite parties Nos. 1-3 that this is a mere irregularity which does not justify an interference by this Court under the provisions of Section 115 of the Code (of Civil Procedure.

4. We are clearly of opinion that this contention is unsound. It is quite true that the execution Court had jurisdiction to set aside the sale. But such a sale cannot be set aside unless the amount recoverable is deposited except under special circumstances. It is quite clear that if this provision is not complied with, the Court is exercising its jurisdiction in an irregular manner. The deposit can only be dispensed with under two conditions, firstly that the Court is satisfied I hat no deposit is necessary and secondly that the reasons for so holding are recorded in writing. Now this is not a case in which the learned Judge recorded that he was in fact so satisfied merely omitting to give his reasons. There is nothing to show either that the Judge was satisfied or that opposite parties Nos. 1-3 even attempted to satisfy him to the point. It may be that the failure to demand a deposit was nothing more than an omission or due to forgetfulness.

5. On behalf of opposite parties Nos. 1-3 it was alleged that this Rule had become in-fructuous, because in the meantime the execution case has been dismissed by the learned Subordinate Judge. It would certainly be an extraordinary thing if our powers to set aside an illegal order were to be rendered nugatory by anything of that kind. It is quite clear that any order that we may pass would in no way be affected by the fact that the original execution case has been dismissed.

6. The result is that this Rule is made absolute. Opposite parties Nos. 1-3 must deposit the amount recoverable from opposite party No. 4 under the decree within one month of the date of the arrival of the record in the executing Court. If this deposit is not made, the order setting aside the sale will be set aside. The petitioner is entitled to his costs, hearing fee being assessed at two gold mohurs.

7. On the deposit being made, the petitioner will be allowed to withdraw the money.

8. Let the record be sent down as early as possible.

Mc Nair, J.

9. I agree.