
(1936) 12 CAL CK 0040
In the Calcutta High Court

Radha Raman Saha

APPELLANT

Vs

Makhom Lal Ganguly and Others

RESPONDENT

Date of Decision : 22-12-1936

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, 47

Citation : AIR 1937 Cal 461

Judgement

1. The facts which give rise to this appeal are as follows: The appellant purchased certain properties belonging to the respondent on 5th December 1931 for Rs. 2,795 at an execution sale held in execution of a decree obtained by him against the respondents. The judgment-debtors made an application for setting aside the sale under O. 21, Rule 90, Civil P.C., on 13th January 1932. On 4th June 1932 a petition was filed by the decree-holder and the judgment-debtor in the case arising out of this application stating that the case was compromised on the following terms: (1) That decree-holder will withdraw out of the money Rs. 2,995 deposited by him. (2) That sale will be set aside if the judgment-debtor pays the decretal amount in three kists, namely Rs. 500 on 30th Ashar 1339 corresponding to 14th July 1932, Rs. 400 on 12th Aswin 1339 corresponding to 20th September 1932 and the balance, namely Rs. 3,575, on 29th Poush 1339 corresponding to 13th January 1933. (3) In case of default in the payment of any kist the application for setting aside the sale would be dismissed without any evidence and the sale would stand and be confirmed. (4) If the whole decretal amount be paid according to the kists the application for setting aside the sale will be allowed without any evidence and the sale will be set aside. The executing Court passed the following order on this compromise:

Both parties have filed a petition of compromise. Let the compromise be recorded. Let the case be disposed of on compromise.

2. On 14th July 1932, that is on the last date of the first kist, the judgment-debtor made an application to the Court for extending the time for the payment of the first kist. The Court rejected the application by the following order:

The Court has no power to extend time unless a joint petition be made. The prayer is refused and the petition stands rejected.

3. On 29th July 1932 the Court confirmed the sale and dismissed the execution case on part satisfaction. On 13th August 1932 the judgment-debtor made an application for review of the orders rejecting his application for extension of time which was filed on 14th July 1932, and confirming the sale. While this application for review was pending the judgment-debtor with the permission of the executing Court deposited in that Court towards the satisfaction of the decree Rs. 700 on 29th September 1932, Rs. 3,073-9-3 on 14th January 1933, Rs. 500 on 24th January 1933 and Rs. 212-12-0 on 5th August 1933. On 8th July 1933, the application for review was granted and the order rejecting the judgment-debtor's application for extension of time and the order confirming the sale were set aside and the case for setting aside the sale was restored along with the petition of compromise. On 6th September 1933, the Subordinate Judge came to the conclusion that the judgment-debtor had complied substantially with the terms of compromise. He accordingly set aside the sale and dismissed the execution case as the decree was fully satisfied. An appeal was thereupon taken by the decree-holder to the lower appellate Court. The learned Additional District Judge who heard this appeal came to the following conclusions: 1. That the appeal against the order of the Subordinate Judge was competent inasmuch as the order setting aside the sale was made under Order 21, Rule 92, Civil P.C., and the order dismissing the execution case on satisfaction was an order u/s 47 of the Code. 2. that the intention of the parties at the time when the case for setting aside the sale was compromised was that the entire decretal amount should be paid within the month of Poush 1339 B.S. and that the instalments were fixed with a view to secure payments within that time and that the date for the payment of the first kist was not the essence of the contract. 3. That Rs. 700 out of the decretal amount remained unpaid at the end of Poush 1339 B. Section 4. That out of this amount Rs. 500 was not deposited in time as the judgment-debtors were misled by the mistake of the officers of the Court in calculating the balance of the decretal amount. 5. That there was deliberate default in the payment of the remaining Rs. 200 by the end of Poush and that this amount was paid seven months after. 6. That the judgment-debtor did not comply substantially with the terms of compromise.

4. He accordingly set aside the order of the learned Subordinate Judge setting aside the sale. He however did not confirm the sale but ordered the case for setting aside the sale to be heard on merits as he was of opinion that the compromise was not binding on the judgment-debtor as it was entered into by the receiver without the consent of the Court appointing him receiver. The decree-holder appeals to this Court. A preliminary objection has been taken to the competency of the appeal by the learned advocate appearing for the respondent on the ground that the order of the learned District Judge against which the appeal has been preferred does not come u/s 47 of the Code and consequently a second appeal to this Court is not maintainable.

5. The learned Subordinate Judge set aside the sale and dismissed the execution case on full satisfaction as he was of opinion that the judgment-debtor had substantially complied with the terms of compromise. The learned District Judge has vacated this order but he has not confirmed the sale and has ordered the application for setting aside the sale to be heard on merits by the Subordinate Judge after taking evidence as he was of opinion that the compromise was not binding on the judgment-debtors. The contention of the appellant is that the decision of the District Judge amounts to this that the decree has not been satisfied by the auction sale of the judgment-debtors' properties and consequently it is a decision on a question relating to the satisfaction of the decree. In every case where the sale is set aside by the trial Court, but is confirmed by the lower appellate Court on appeal under Order 21, Rule 92, after the lower appellate Court disallows the application for setting aside the sale, the decree is satisfied either in whole or in part as the sale proceeds go to the satisfaction of the decree. If the contention of the appellant be given effect to, there would be a second appeal to this Court by the aggrieved party in every such case and B. 104(2) of the Code which lays down that no appeal shall lie from any order passed in appeal, would be rendered nugatory. An application for setting aside a sale under Order 21, Rule 90, may be disallowed either because the evidence adduced by the applicant does not establish his allegation in the petition or because he fails to adduce any evidence in support of his case. By the compromise in this case the judgment-debtor's right to adduce evidence in support of his application for setting aside the sale was gone as soon as he failed to comply with the terms. In principle therefore it is difficult to distinguish this case from a case where the judgment-debtor's application for setting aside a sale is disallowed on the ground that the evidence adduced by him to prove his allegations in his petition fails to substantiate them. When the Subordinate Judge set aside the sale he did so under Rule 92, because he found that the judgment-debtor had complied with the terms of the compromise and consequently the allegations in his petition must be taken as proved, though no evidence was given by him to prove them. The District Judge on the other hand found that the judgment-debtor had not complied with the terms of the compromise and the effect of his finding in view of the terms of the compromise is that the judgment-debtor's allegations in the petition for setting aside the sale must be taken as not proved. The appellant's contention is that the District Judge in his own finding should have rejected the application for setting aside the sale and confirmed the sale if his view that the compromise is not binding on the judgment-debtor is wrong. If this contention is correct, the position is that the lower appellate Court has not made the proper order under Rule 92, or in other words he was wrong in not making an order dismissing the application for setting aside the sale and in not confirming the sale. The order of the District Judge therefore is not an order u/s 47 of the Code. The preliminary objection taken by the respondent must therefore prevail.

6. The appeal is accordingly dismissed with costs, hearing fee being assessed at

one gold mohur. We make no order on the application which was filed in the alternative for revision u/s 115 of the Code as the Bench is not empowered to deal with such applications. Let the records in this case be detained here and let the application filed in the alternative u/s 115, Civil P.C., be placed before the proper Bench for disposal.