

(1918) 05 PAT CK 0020

In the Patna High Court

Rai Dalip Narain Singh and Mahanth Jugarnath Dass and
Babu Bikramjit Singh

APPELLANT

Vs

Rai Baijnath Goenka Bahadur and Rai Baijnath Goenka
Bahadur and Rai Baijnath Goenka Bahadur

RESPONDENT

Date of Decision : 27-05-1918

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151, 73

Citation : AIR 1918 Patna 418 : 46 Ind. Cas. 275

Hon'ble Judges : Thornhill, J; Mullick, J

Bench : Division Bench

Judgement

Mullick, J.—These applications for revision arise out of a sale held in 1908 in execution of a decree obtained by the decree-holder Baijnath Goenka against the Mohunth of Shuja Asthal. At that sale one Makhu Lal, an opposite party in Civil Revision No. 240 of 1917, purchased 15 lots for Rs. 36, 431 while Bikramajit Singh, petitioner in Civil Revision No. 286, purchased 6 lots for Rs. 2,425 and Jagarnath Das, petitioner in Civil Revision No. 255, purchased 7 lots for Rs. 6,476.

2. The Subordinate Judge, however, set aside the sale. The decree-holder then appealed to the High Court of Calcutta with the result that on the 4th February 1913, the decision of the Subordinate Judge was set aside and the case remanded to him for disposal. The Subordinate Judge, therefore, on the 10th May 1913, confirmed the sale.

3. Meanwhile the auction-purchasers had, after the sale was first set aside by the Subordinate Judge, withdrawn their purchase moneys. The decree-holder, therefore, after the sale was finally confirmed, called upon them, on the 14th May 1913, to refund the moneys they had withdrawn. They appeared and made various objections and so far as Bikramajit and Jagarnath Dass are concerned, there were no complications and an order was made against them as prayed for

4. In regard to Makhu, however, the matter is not so simple. Makhu filed his

objection on the 13th June 1913. On the 21st April 1914, the decree-holder conceived the idea of joining one Dalip Narain, the petitioner in Civil Revision No. 240, on the footing that Makhu was a benamidar at the auction in his behalf. On the 8th August 1914, the Subordinate Judge rejected the decree-holder's prayer for leave to make Dalip Narain a party in the restitution proceedings. The decree-holder appealed to the High Court and succeeded, and it was directed in the absence of Dalip Narain that he should be joined but should be free to raise whatever objections he thought fit.

5. The Subordinate Judge has, in spite of Dalip Narain's protests, now held that Dalip Narain was the real auction-purchaser and has directed him to refund the amount withdrawn by Makhu.

6. Hence these revision applications by Dalip Narain, Bikramajit and Jagarnath Das.

7. It will be convenient to deal first of all with the grounds which are common to the three applications.

8. The first ground is that neither Makhu nor Bikramajit nor Jagarnath Das were joined as parties to the order of the High Court of the 4th February 1913, and that, therefore, they are not bound by the order of the 10th May 1913, confirming the sale.

9. The reply to this is that under the CPC of 1882, which seems to have been the Code applicable to the appeal when it was filed, the auction-purchaser was not a necessary party. *Surendra Mohini Debi v. Loharam Chattopadhyaya* 14 Ind. Cas. 67 : 16 C.W.N. 570 : 39 C. 687 is authority for this proposition. The auction-purchasers, therefore, are bound by the order of confirmation.

10. The next objection is that the Subordinate Judge should not in the exercise of his inherent jurisdiction u/s 151, Civil Procedure Code, have directed the refund.

11. The reply to this is that the order for refund was in accordance with the principle laid down in *Sukhdeo Dass v. Rito Singh* 39 Ind. Cas. 763 : 2 P.L.T. 361 : 1 P.L.W. 551. In my opinion the Subordinate Judge was right in correcting what amounts to an abuse of the process of the Court.

12. The third ground is that no interest should have been ordered and that in any event it should be charged, not from the 21st May 1908 which was the date of withdrawal, but from the 10th May 1913 which was the date of confirmation of the sale.

13. The reply is that the auction-purchaser is liable to pay interest if he was in possession of the property as well as the money. Whether he was in possession is a question of fact, into which we cannot enter in revision. We cannot, therefore, interfere with the learned Subordinate Judge's order in this respect.

14. The result is that the applications in Civil Revisions Nos. 255 and 286 of 1917 must be dismissed with costs. Hearing fee Rs. 16 each.

15. There remains the application in case No. 240.

16. In this case the matter is complicated by the introduction of Dalip Narain.

17. Makhu appears as one of the opposite parties and submits that having been allowed to draw out the money without objection 10 years ago, it is not equitable that he should have to return it. I see no in justice in this, but his liability is not the matter with which we are concerned in the case before us. We are concerned only with the propriety of the order made against Dalip Narain.

18. Now it does not seem to me to be in accordance with justice, equity and good conscience that in a summary miscellaneous proceeding for refund of money taken out by an auction-purchaser, the Court should enter into an adjudication between the auction-purchaser and a person who is strictly no party at all to the proceedings. Mr. Pugh on behalf of the decree-holder relies on *Puran Chand Boid v. Surendra Narain Singh* 16 Ind. Cas. 795 : 16 C.L.J. 582 : 17 C.W.N. 326, but that case turned on the construction of Section 73 of the CPC of 1908 and the learned Judges there held that a decree-holder who came in under that section for rateable distribution must be a real decree holder and that the Court could inquire whether or not he was a benamidar for the judgment-debtor. That case, therefore, does not assist us here. On the other hand *Nagendra Bala Dassi v. Debendra Nath* 44 Ind. Cas. 13 : 27 C.L.J. 388 : 22 C.W.N. 491 comes somewhere near this case and shows that an execution Court cannot adjudicate upon a question of benami between the apparent decree-holder and, a third party. I think that I should also refer to one other case, though it has not been cited by either party. In *Jointee Chunder Sein v. Anundo Lal Doss* 14 W.R. 1, where the plaintiff sued in ejectment and failed and where the defendants asked the Court to throw the costs of the suit on a third party, alleging that he was the hidden plaintiff, Phear, J., sitting on the Original Side of the High Court of Calcutta held an enquiry into the third party's privity with the apparent plaintiff and finding that he had through the apparent plaintiff committed fraud upon the Court directed the costs to be levied from this third party.

19. But here Dalip Narain is not shown to have been guilty of any fraud or of any abuse of the process of the Court. Nor is there any question here as to costs. I cannot persuade myself that equity, justice and good conscience require that he should be fixed with liability for a large sum of money on the very meagre evidence which has been accepted by the Subordinate Judge. In my opinion this is not a case for any further extension of the inherent jurisdiction of the Court. I think the fairer course would have been to order Makhu Lal to refund the money and if he failed to do so, to leave the decree-holder to take such other steps as he thought fit in the Civil Courts against Dalip Narain.

20. In my opinion the Subordinate Judge in exercising his inherent powers against Dalip Narain assumed a jurisdiction which he did not possess and his order must, therefore, be set aside. The application is allowed with costs. Hearing fee Rs. 16.

Thornhill, J.

21. I agree.