(1934) 04 PAT CK 0022

In the Patna High Court

Rajkishore Prasad Singh APPELLANT

Vs

Chhotey Narayan and Others RESPONDENT

Date of Decision : 11-04-1934

Acts Referred:

Citation : AIR 1934 Patna 329

Hon'ble Judges : Courtney-Terrell, C.J;Varma, J

Bench : Full Bench

Judgement

Varma, J.—This is an appeal from an order of the Subordinate Judge of Gaya, dated 14th July 1932 dismissing an application to set aside a sale held in execution of a decree passed in a suit based on certain mortgage deeds. The appellant before this Court is one of the judgment-debtors, who was defendant 8 in the original suit and happens to be the transferee of a 2-annas share in village Nazardih the subject matter of the present appeal. Defendant 1 of the original suit was the mortgagor who had executed five mortgage deeds in favour of the decree-holders on different dates. Village Nazardih was included in the properties comprising the second, third and fourth mortgage deeds executed respectively on 22nd April 1914, 6th January 1916, and 7th March 1916. A preliminary decree was drawn up in the suit on 1st September 1926, and the final decree was passed on 25th February 1928.

2. In execution of the decree, village Nazardih, amongst other proper, ties, was put up for sale and was purchased by the decree-holders with the permission of the Court on 8th July 1931. On 7th August 1931, the judgment-debtors filed an application before the Subordinate Judge under Order 21, Rule 90, Civil P.C., to set aside the sale, and their petition having been rejected, defendant 8, one of the judgment-debtors, has preferred the present appeal to this Court.

Mr. Manohar Lal, on behalf of the appellant, contends that village Nazardih should not have been sold and that the properties comprised in the first and the fifth deeds should have been sold first and that this village should not have been saddled with the expenses in connection with properties included in the deeds in which it was not mentioned.

3. In my opinion, the argument cannot prevail inasmuch as the preliminary decree did not mention the order in which the properties were to be sold. The preliminary decree was to the effect that the suit be decreed with costs and interest at the stipulated rates until six months and future interest at 6 per cent. per annum until paid, that an account be made of the sums found due to the plaintiff''s under each of the mortgage bonds in suit with their proportionate costs, that the defendant do pay the sums found due to the plaintiffs under each of the mortgage bonds in suit with proportionate costs, and that in default thereof the mortgaged properties be sold in satisfaction of the decree.

4. It was open to the appellant to take exception to the terms of the preliminary decree, but he did not do so, and even after the decree was made final he did not move against the decree by way of appeal or otherwise. That being so, the executing Court was perfectly justified in effecting the execution in the manner in which it did and the appellant cannot question the validity of the sale held thereunder. The lower Court has rightly held that the decree was "not incapable of execution."

Mr. Manohar Lal then points to certain incidents that took place at the time of the sale. On 8th July 1931, village Nazardih was sold to the highest bidder who happened to be the decree-holder for Rs. 2,400.

5. He argues that as the 25 per cent. deposit on the amount of the purchase was not made on the very date of the sale, the sale was a nullity under Order 21, Rule 84, Civil P.C. In this case the provisions of Rule 84 are to be read along with Rule 72 of the same order. Under Clause (2), Rule 72, where a decree-holder is allowed to bid and himself purchases the property put up for sale, the purchase-money and the amount due on the decree may be set off against one another. As I have already said, the decree-holder purchased the village Nazardih on 8th July, 1931.

6. He deposited Rs. 70 as poundage fee and at the same time applied for a set-off. It was however found that the poundage fee fell short by 12 annas. The petition for set-off therefore remained pending and the decree-holders were directed to make good the deficit in poundage fee by 13th July 1931. The deficit poundage fee was deposited on 11th July 1931; and on the date fixed, i.e. 13th July, accepting the deposit of the deficit poundage fee the Court allowed the set-off applied for.

7. It is clear therefore that the order for set-off was not passed until the deficit poundage fee was realized. Under these circumstances it cannot be said that the sale was a nullity because the 25 per cent. of the purchase money was not deposited by the decree-holders at the time of the sale. The decree-holders were not called upon to make the deposit and it was not necessary to require them to do so when there was already an application by them for a set-off which the executing Court did not reject at once and indeed it passed that order after

realizing the deficit of 12 annas in the poundage fee.

The result is that appeal fails and it must be dismissed with costs.

Courtney-Terrell, C.J.

8. I agree.