**(1919) 05 PAT CK 0027**

**In the Patna High Court**

**Case No :** Miscellaneous Civil Appeal No. 19 of 1919 in Civil Revision Nos. 211 and 212 of 1918

Ramendra Nath APPELLANT

Vs

Musammat Hikait Kuer RESPONDENT

**Date of Decision :** 09-05-1919

**Acts Referred:**

**Citation :** (1919) 05 PAT CK 0027

## Judgement

1. Three applications have been presented to us on behalf of the judgment debtor, viz., Miscellaneous Appeal No. 19 of 1919 coupled with Civil Revision No. 211 of 1918 and Civil Revision No. 212 of 1918.

2. The questions which await our determination are covered by Miscellaneous Appeal No. 19 of 1919 and Civil Revision No. 212 of 1918. The respondent in this appeal is a decree-holder who obtained a decree on foot of a mortgage-bond, dated the 20th January 1899, for a sum of Rs. 3,100. Many attempts have been made to execute this decree from time to time but unhappily they have all been rendered abortive for one reason or another.

3. The present application for leave to issue execution is dated the 17th January 1911, now eight years ago. The sale that is now impeached by these proceedings took place so far back as the 14th April 1913, and various applications were made to set aside that sale. The matter proceeded to the Calcutta High Court and eventually came before this Court and our learned brothers Chapman and Roe, JJ., held that no appeal lay to the High Court and that an appeal should be presented before the District Judge to whom only an appeal lay. The learned Judge in one proceeding dismissed the appeal that came before him on the 25th of March 1918. The learned Subordinate Judge in another proceeding refused to set aside the sale by his order dated the 28th June 1913.

4. Now Miscellaneous Appeal No. 19 comprises two matters, one a proceeding u/s 47 of the CPC for the purpose of setting aside the sale on the ground of non-observance by the decree-holder auction-purchaser of the provisions of Order

 

XXI, rules 85 and 86, and also dealing with an application under Order XLVII, rule 1, for a review of a prior order of the learned Subordinate Judge. The property was valued at Rs. 30,000 by the Subordinate Judge but was sold to the decree-holder as the only bidder for a sum of Rs. 8,000. Apart from this double-barreled application u/s 47 of the CPC and under Order XLVII, rule 1, of the Civil Procedure Code, there was also an independent proceeding under Order XXI, rule 90, seeking to set aside the sale on the ground of irregularity and fraud. Fraud was not specifically alleged but irregularity in the conduct of the sale was relied on to justify setting aside the sale. The irregularity complained of was referable to the non-service of the notice of the sale proclamation. The learned Judge in dealing with this matter held that the notice of sale proclamation had not been served and though the non-service of the sale proclamation was an irregularity that nevertheless the judgment-debtor had not suffered any substantial damage or injury by reason of such irregularity. The reasoning of the learned District Judge in this aspect of the case is far from clear, and his conclusion of fact appears to be based on surmise rather than on proof.

5. The learned District Judge appears to have failed to consider the question of impeaching the sale on the ground alleged by the judgment debtor in Miscellaneous Appeal No. 19 of 1919 relative to the non-observance of rule 85 and 86 of Order XXI. The District Judge thought that, inasmuch as an appeal was taken from his decision in the proceeding under Order XXI, rule 92, that it would be open to the High Court in that appeal to consider as an additional ground for impeaching the sale the non-observance by the auction purchaser of the provisions of rules 85 and 86 of Order XXI. That portion of the application in Miscellaneous Appeal No. 19 of 1919 which dealt with the review application of the Subordinate Judge''s order under Order XLVII, rule 1, it is not material to consider, and Mr. Mullick I think concedes this.

6. However, the learned Vakil''s two main points are that the learned Judge in Civil Revision No. 212 of 1918 acted without or failed to exercise a jurisdiction vested in him in not setting aside the sale on the ground of irregularity, and he alleges that on the face of the proceedings the property was sold at a gross undervalue to the decree-holder; that there was no proper bidding; and that obviously, having regard to the value of the property and the price offered by the decree-holder, there was substantial injury to the judgment-debtor. The learned Judge assigns certain reasons for holding that the judgment-debtor cannot be considered as a person who has sustained substantial injury inasmuch as he and the decree-bolder have deliberately set themselves to make war one against the other and to use every means in their power to defeat the execution which the decree-holder seeks to enforce The reasons are more in the nature of surmises than conclusions of fact founded upon legal proof and appear to us unsatisfactory; and in our opinion the order of the District Judge refusing to set aside the sale on the application presented to him under Order XXI, rule 90, Civil Procedure Code, should be set aside. However, apart from the application instituted under Order XXI, rule 90, we think that the sale must also be set aside

 

on a ground that was not considered by the learned District Judge, namely, the ground that the decree-holder auction-purchaser failed to comply with the provisions of Order XXI, rule 85, rend in conjunction with rule 86. Rule 85 provides that the purchaser shall bring into Court the amount of his purchase mercy within fifteen days of the date of sale. Now admittedly in this case the purchase price bid for the property sold was the sum of Rs. 8,000 and it is apparent that there would be a residue in favour of the judgment-debtor to the extent of Rs. 2,000, if the true value of the mortgage decree be Rs. 6,000 and odd as alleged. It is right to mention that in the execution petition the decree-holder specified that the amount due on the foot of the mortgage decree was the sum of Rs. 15,726. This estimation of the amount due on the mortgage-decree was obviously incorrect. If the true rate of interest be calculated upon the decree, the actual amount due to the decree-holder would be Re. 6,728. Thus if the purchase price of the property be Rs. 8,000, then there would be a balance of Rs. 1,272 in favour of the judgment-debtor. Therefore clearly the obligation which the CPC imposes upon a decree-holder purchaser is to bring into Court whatever balance may be due on foot of the purchase money, after deducting the amount of the decree. This the decree-bolder did not do. Rule 86 of Order XXI provides a penalty on failure to observe the provisions specified in rule 85. In our opinion the provisions of rules 85 and 86 of Order XXI read in conjunction are mandatory. The obligation was clearly upon the decree-holder purchaser at the auction sale to bring into Court the balance due on the foot of the purchase price of the property for which he bid and purchased, and having failed to do that the property was liable to be re-sold, and upon the application of the judgment-debtor under Order XLVII, rule 1, the Court ought to have considered the judgment-debtor''s application and set aside the sale and directed a re-sale of the property. Accordingly the relief sought in Miscellaneous Appeal No. 19 of 1919 is granted with costs and the sale impeached in the proceeding u/s 47 of the CPC is set aside on the grounds stated above. The application in Civil Revision No. 211 of 1918 is disallowed, without costs. The application in Civil Revision No. 212 of 1918 is also granted but without costs. The hearing fee in Miscellaneous Appeal No. 19 of 1919 is measured at three gold mohurs.