

(1938) 01 PAT CK 0004

In the Patna High Court

Rameshwar Lal Jhunjhunwala Auction-purchaser

APPELLANT

Vs

Mt. Subdi-Claimant

RESPONDENT

Date of Decision : 18-01-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144, 151

Citation : AIR 1938 Patna 468

Hon'ble Judges : Mohamad Noor, J

Bench : Division Bench

Judgement

Mohamad Noor, J.—The petitioner who was the auction-purchaser of a house in execution of a simple money decree has come up in revision against the order of the executing Court directing that the house be restored to the opposite party whose claim to the property has been upheld in a suit under Order 21, Rule 63.

2. The facts have been very clearly stated in the judgment of the learned Subordinate Judge and they are as follows : Ramcharan Prasad Sahu and others who had obtained a decree against Kalicharan Sahu and others attached a house as belonging to their judgment debtors. Mt. Subdi, the opposite party, preferred a claim under Order 21, Rule 58, Civil P.C., which was allowed on 14th January 1931, and thereupon the decree-holders instituted a title-suit (Suit No. 108 of 1931) in the Munsif's Court of Bhagalpur under Order 21, Rule 63, Civil P.C. The suit was decreed on compromise by which the house was declared to be the property of the judgment-debtor who was given time to pay up the decretal amount. On their failure to do so, the decree-holders executed the decree and the house was sold and purchased by the petitioner. The sale was confirmed and the decree-holders withdrew the decretal amount from the Court. In the meantime Mt. Subdi (or Sarbatia) whose claim to the property under Order 21, Rule 58 was successful instituted a title-suit, (No. 84 of 1933, of the Munsif's Court) to set aside the compromise decree as fraudulent.

3. The suit was decreed in the presence of the auction-purchaser, the petitioner. The first title suit brought by the decree-holder was restored and was ultimately

dismissed by this Court. The petitioner who by this time had obtained delivery of possession over the property, applied for refund of the purchase money. This was allowed by the executing Court; but this Court in *Rameshwar Lal v. Ram Charan*, reported in AIR 1938 Pat. 447 refused the refund on the application as it stood but directed the application to be amended and converted into an application for setting aside the sale, on the ground that the judgment-debtor had no saleable interest in the property sold. This has been done, and the application is pending before the learned Subordinate Judge.

4. In the meantime, Mt. Subdi, the opposite party, applied for the restitution of the house. This has been granted and the petitioner has, as stated above, come up in revision. The learned advocate for the petitioner has raised two points. The first is that Section 151, Civil P.C, under which the learned Subordinate Judge has acted is not applicable. He has further contended that the remedy of the opposite party was to bring a regular suit for recovery of possession. He has indirectly argued that as the sale stands, the property could not be restored to the opposite party and that the opposite party ought to have objected to the delivery of possession under Order 21, Rule 100. I am unable to accept these contentions. It may be conceded that the opposite party can sue for the recovery of the property; but in my opinion this fact is no ground for the Court to refuse restitution of a property which has been taken away from an innocent person under its orders.

5. It is a well recognized principle that one of the first and highest duties of all the Courts is to take care that the act of the Court does no injury to any of the suitors.

It was pointed out by their Lordships of the Judicial Committee in *Jai Berham v. Kedar Nath*, AIR 1922 P.C. 269

It is the duty of the Court u/s 144, Civil P.C., to "place the parties in the position which they would have occupied but for such decree or such part thereof as has been varied or reversed." Nor indeed does this duty or jurisdiction arise merely under the said Section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved.

6. It may be argued that the observation of their Lordships referred to a case in which the sale had been set aside, but in this case the sale stands. I shall presently deal about the effect of the decree in favour of the opposite party on the sale ; but apart from this it was held in this Court in *Hemendra Chandra Mullick Vs. Ballavi Devi and Another*, that:

When a Court in consequence of its own erroneous order ousts the rightful owner from the possession of property which belongs to him and places another in possession, it is the action of the Court which causes the injury to the aggrieved party and it is to the Court that the latter is entitled to look for redress. No suit lies against the Court. The proper remedy if the case is not one falling within Section 144, Civil P.C., is by exercise of the Court's inherent powers.

7. This case was exactly similar to the case now before me. There a claim under Order 21, Rule 58 was disallowed and the claimant instituted a suit under Order 21, Rule 63 and the sale was not stayed and the property was sold and purchased by the auction, purchaser who was given delivery of possession. It was held that though the case did not come u/s 144, Civil P.C., it was a proper case for exercise of the inherent powers of the Court.

8. The same view was taken in the Calcutta High Court in *Sufal Chandra Golui and Another Vs. Surendra Nath Dhara*, and by the Allahabad High Court in (Dubey) *Amba Lal Vs. Firm Ram Gopal-Madho Prasad*. In the last case the decree-holder auction-purchaser was allowed restitution of the purchase money when the property purchased by him was held in a separate proceeding not to be belonging to the judgment-debtor. The fact that a suit is maintainable is no ground for refusing redress when wrong has been done under the order of the Court. The learned advocate for the appellant has relied upon a decision of the Madras High Court in *Alagasundaram Pillai v. Pichuvier* AIR 1926 Mad. 757 and laid 8996 and laid stress on this passage :

The resort to inherent powers may be justified in a case of gross injustice where the party has no other remedy. But here the party has his remedy by way of suit.

9. But in this case the right of the opposite party to the property has already been established in a suit and the Court which sold the property is bound to take notice of the decree and act accordingly. Then the facts of the Madras case were different. There the question was whether an application under Order 21, Rule 100, which was dismissed for default could be restored under the inherent powers of the Court. It was held that it could not. There was no question of any property having been taken away under an erroneous order of the Court. But in this case the property was taken away under the order of the Court and then there was a decree which established that the property was of the opposite party and not of judgment-debtors. As I have already said before, the Privy Council has definitely laid down that the Courts must use their inherent powers to reconstitute to innocent persons their properties of which they have been deprived by erroneous orders of the Courts. The learned advocate however contended that the opposite party ought to have objected to the delivery of possession under Order 21, Rule 100. It is obvious that she could not do so. The compromise decree which was ultimately held to be fraudulent, stood in her way. That decree declared the property to be belonging to the judgment-debtor. Any objection by the opposite party to the delivery of possession would have been fruitless.

10. I have already referred to the judgment of the learned Judge of this Court in *Rameshwar Lal Jhunjunwala Vs. Ram Charan Prasad Sahu and Others*, which was decided on 25th August 1937, in which the order of the executing Court for refund of the purchase money to the petitioner was set aside and his application was ordered to be amended so as to make it one for setting aside the sale on the ground that the judgment-debtor had no saleable interest in the property. The learned advocate has therefore argued that as the sale subsists, the property

cannot be restituted to the opposite party. It is not necessary for me to discuss the correctness of the decision of my learned brother. The question of the refund of purchase money stands on a different footing. If the sale has been confirmed and it subsists, Order 21, Rule 93 may be used against the order of refund of money on the ground that the refund can only be granted when a sale is set aside under Rule 92. It may however be argued on the other hand that while Rule 92 bars suits for setting aside an order confirming or setting aside a sale, there is no express bar to an order of refund of the purchase money, though there is some force in the contention that purchase money cannot be refunded as long as the sale subsists.

11. It may however be argued that the effect of the decision of a suit under Order 21, Rule 63 is that the sale stands cancelled automatically. This was the view taken in *Radha Kishun Lal Vs. Kashi Lal and Another*, . In this case after the confirmation of the sale a third person sued the auction-purchaser and a judgment-debtor for a declaration of his title to the property and for possession and obtained a decree. It was held that the effect of the decree in favour of the third person was to set aside an execution sale and revive the decretal debt and that no formal order for setting aside the sale was necessary.

12. The learned Judge of this Court in the case referred to above was of opinion that this case was decided on the facts of its own. But I fail to find out any distinguishing feature. I am aware that the correctness of this decision was left open in the Full Bench decision of this Court in *Surendra Kumar Singh Vs. Srichand Mahata and Others*, . The learned Judges who decided this case distinguished the facts of *Radhakishun Lal's* case AIR Pat. 273 from the facts of the case before them. *Dhavle, J.* who delivered the judgment of the Full Bench, after referring to the observations of *Mullick, J.* in *Radha Kishun Lal v. Kashi Lal* AIR 1924 Pat. 273 said as follows:

This view has been criticized in Madras in view of the finality of the execution proceeding between decree-holders and judgment-debtor. But it is not now necessary to examine its soundness, for in the present case there is no adjudication in the presence of the decree-holder and the judgment-debtor which could be taken to have the effect of setting the sale aside.

13. We are not concerned in adjusting the rights of the decree-holder vis a vis the judgment-debtor and the auction-purchaser. We are concerned with the rights of a third party. Suit under Order 21, Rule 63 is a continuation of a claim preferred under Order 21, Rule 58. If the claim is disallowed and the property is sold it must be held that it was sold subject to the result of the decision in the suit which may be instituted under Order 21, Rule 63 which in essence is an appeal against the summary decision of the executing Court. For instance, if a claim is disallowed and the property is sold and afterwards the claimant successfully obtains a reversal of the summary order and gets a declaration in his favour that the property which was attached and afterwards sold belonged to him, it will be travesty of justice to hold that the sale; which was held subject to

the result of the suit, subsists after the decree in the suit in which the claim of the third party is established.

14. The same thing holds good in the converse case. Suppose the claim is allowed and decree-holder brings a suit and the suit is decreed by the trial Court and during the pendency of the appeal by the claimant the property is sold, can it be said that the sale subsists after the claim of the third party is upheld by the Court of Appeal? The same was the position in this case.

15. The claim was allowed, but under a compromise decree which was ultimately set aside the property was held to be that of the judgment-debtor and it was by virtue of this decree that the property was sold. If this decree was set aside and in the suit of the decree-holder under Order 21, Rule 63 it was held that the property did not belong to the judgment-debtor but to the third party, can it be said that the sale subsists? Be that as it may, as I have said, I am not concerned whether the opposite party is entitled to refund of the money without setting aside of the sale.

16. The effect of the decree in the suit of the decree-holder under Order 21, Rule 63 was that the property was held to be of the opposite party and the sale, whatever may be its effect between the auction, purchaser and the decree-holder or the judgment-debtor, has not effected the property so far as the opposite party is concerned; and, as I have said, under the circumstances the Court is bound to exercise its inherent powers and restore the property from whom it has been wrongly taken away.

17. The application is rejected with costs, hearing fee two gold mohurs.