
(1945) 11 PAT CK 0013
In the Patna High Court

Shyamnandan Sinha and Others

APPELLANT

Vs

Naurangi Singh and Others

RESPONDENT

Date of Decision : 28-11-1945

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, 47
Limitation Act, 1963 — Article 166

Citation : AIR 1946 Patna 270

Hon'ble Judges : Ray, J;Meredith, J

Bench : Full Bench

Judgement

Meredith, J.—This is a decree-holders" second appeal against an order of reversal setting aside the sale, in an application under Order 21, Rule 90, Civil P.C., read with Section 47 of the Code. The application was filed on the usual grounds, alleging fraudulent suppression of processes in the execution proceeding, fatal material irregularities in publishing and conducting the sale, and in consequence a sale at a grossly inadequate price to the injury of the judgment-debtors. The application was not made until more than two years after the sale, but the applicants alleged that owing to the fraudulent suppression of processes by the decree-holders they knew nothing about the sale, which took place on 19th August 1941, until they heard of it for the first time from one Ram Lakhan Mander with whom the disputed land was said to have been settled by the decree-holders, on 9th September 1943.

2. The decree was a rent decree against two brothers, Daroga Singh and Jamuna Singh. Daroga died during the execution proceedings, and thereafter applicant 1, the eldest of Daroga's three sons (who are now the applicants), appeared through his uncle Jamuna Singh as guardian and asked that he should be substituted as his deceased father's legal representative. Thereafter, on the decree-holders" application, the three sons of Daroga were substituted, but for some reason, as majors, not minors, and notice under Order 21, Rule 22, Civil P.C., was Served upon them as majors, the evidence being that the processes were presented to Jamuna Singh, the eldest member and karta of the joint

family, and on his refusal to accept them or give a receipt they were hung up on the wall of the dwelling louse.

3. The learned Munsif held upon all points against the applicants, and refused to set aside the sale. On appeal the learned Subordinate Judge did not go into the merits of the application under Order 21, Rule 90, except to the extent of holding that the price fetched was in fact inadequate. He held that the application must succeed as one u/s 47 because of two fatal defects, with which I shall presently deal. He held that as the sale was a nullity the application would be governed not by Article 166, Limitation Act, but by Article 181, and was consequently within time.

4. The fatal defects upon which the learned Subordinate Judge proceeded were, first, what I have already mentioned that Daroga Singh, the father of the applicants, having died the applicants were substituted as majors, and no guardian was appointed on heir behalf. This, he said relying upon Bachoo Prasad Singh and Others Vs. Gobardhan Das and Others, , rendered the sale without jurisdiction and a nullity.

5. The second defect was that according to the calculation of the learned Subordinate Judge, based on the record of the execution case, he found that the decree-holders' dues amounted to Rs. 1656-6-3 1/2 and not rupees 1656-6-6 1/2 as noted by the office in the account prepared on the back of the execution petition. The property was sold for Rs. 1656-6-4 1/2, and the decree-holders filed a petition for setting off their dues against the purchase money which was allowed. But as the dues were only Rs. 1656-6-3 1/2 and the purchase money was Rs. 1656-6-4 1/2 there remained an excess of one pie out of the purchase money, which could not be set off and so remained unpaid. The sale, therefore, should be set aside in accordance with the provisions of Order 21, Rule 86, Civil P.C.

6. With regard to the second point I am not at all satisfied that the learned Subordinate Judge's calculation is correct to half a pie as he assumes. It seems probable that he had not included all the expenses of the decree-holders to date. But assuming that there was a deficit of one pie, a coin which I understand is no longer available the learned Subordinate Judge's view seems to me a case of failing to temper technicality with commonsense, or, as Sir George Rankin once put it, "piling technicality upon unreason (?)." The maxim de minimis non curat lex is sufficient to dispose of this contention.

7. The first needs more serious consideration. Mr. K.N. Lall for the respondents has argued, in the first place, on the basis of the Full Bench case, Ajab Lal Dubey and Another Vs. Hari Charan Tewari @ Hari Tewari and Others, , that as there was failure to serve the notice under Order 21, Rule 22, the entire sale was without jurisdiction. This, however, was not a case of failure to serve the notice. The notice was certainly served and the service, as the learned Munsif, has observed, was a good service upon an adult male member of the family under

Order 5, Rule 15, Civil P.C. The service was merely irregular, as the notice was served upon these applicants as majors whereas they were in fact minors. But served it was and there was at most an irregularity, not an absence of service.

8. The case is similar to the case of *F.E. Chrestien Vs. Jaideo Prasad Rai*, where it was held that a mere irregularity in the method of service did not go to the root of jurisdiction. In so far as it held that, this case has not been dissented from in the Full Bench case just referred to, though no doubt it has been distinguished. There, is, therefore, nothing in this point.

9. Secondly, however, there arises the question what was the effect of failure to bring the applicants on the record in the proper manner; failure to appoint any guardian for them. So far as the applicant Naurangi is concerned, it seems to me that he was properly brought on the record, because he came in on his own application through the guardian selected by him. With regard to the other two, there was certainly a serious irregularity. But would it have the effect of vitiating the entire sale, rendering it a nullity? I think not. Mr. Sarju Prasad has argued on the basis of the Privy Council case, *Walian v. Banks Behari Pershad Singh* (03) 30 Cal. 1021 that this was a mere irregularity. In that case a person had represented the minors in the case as guardian, but had never been appointed as such by the Court. Mr. Sarju Prasad contends that the two minors were sufficiently represented by their elder brother Naurangi and by their uncle Jamuna who was the karta of their joint family, and also one of the recorded tenants, and who was himself a party to the proceedings as a judgment-debtor. It is not necessary to express any opinion at this stage as to the effect of the irregularity with regard to these two minors, and whether it would give them any right to relief. It would not, in my opinion render the sale without jurisdiction. The landlord was certainly entitled to proceed with execution against Jamuna Singh, the surviving recorded tenant, and to bring the holding to sale.

10. In this connection it may be well to recall *Malkarjun v. Narhari* (01) 25 Bom. 337 where the Court had wrongly decided that a certain person was the proper legal representative of the deceased judgment-debtor, and it was held that despite the fact that the proceedings were against a person who was not really the proper legal representative, they were not wholly without jurisdiction.

11. Mr. K.N. Lall has relied upon the case referred to by the learned Subordinate Judge, *Bachoo Prasad Singh and Others Vs. Gobardhan Das and Others*, but that was a case where the objection was taken before the sale had been confirmed. Their Lordships, after referring to *Malkarjun's* case, observed:

This case is different. Here we are not trying after long lapse of time the effect of proceedings which have long ago reached their conclusion in the Court which was seised of them. But we are dealing with a pending case and a sale which has not yet been confirmed.

12. Clearly this case is distinguishable. The other case relied on is *Mazharul Haq and Others Vs. Raghuber Singh and Others*, . But that case merely lays down

what should be done where the objection is made while the execution proceeding is pending, and does not deal with the effect upon a sale which has been held, without the defect having been remedied.

13. In my opinion, the learned Subordinate Judge was wrong in holding that the sale was a nullity. He has not considered the application upon the merits as one under Order 21, Rule 90, and the case must go back to him to be dealt with as such; to consider the allegations of fraudulent suppression of notices, lack of knowledge, and application of Section 18, Limitation Act, and whether injury has resulted from the irregularities.

14. I would, therefore, remand the case with these observations, and direct that costs should abide the eventual result of the application.

Ray, J.

I agree.