

(1941) 10 PAT CK 0013
In the Patna High Court

Sir Kameshwar Singh Bahadur

APPELLANT

Vs

Hari Chand Pandey and Others

RESPONDENT

Date of Decision : 30-10-1941

Acts Referred:

Citation : AIR 1942 Patna 112

Hon'ble Judges : Agarwala, J

Bench : Division Bench

Judgement

Agarwala, J.—This is an appeal by the decree-holder. The appellant obtained a decree for rent against the respondents on 18th March 1936, and applied for execution of the decree on 18th December 1937. This application resulted in a sale of the judgment-debtors' property on 11th April 1938. The sale was confirmed on 12th May 1938. After confirmation of the sale, the Court recorded that the execution case was dismissed on full satisfaction. Thereafter on 15th July, a person holding a mortgage on the property made an application under Order 21, Rule 90 to have the sale set aside. The first Court held that processes had been served and refused to set aside the sale. On appeal the learned District Judge observed that the evidence in support of the service of processes was not very satisfactory and went on to observe that the indications were that the judgment-debtors had deliberately allowed their property to be sold for an inadequate price in order to get rid of the mortgage on it. His final conclusion was that the processes were fraudulently suppressed in collusion with the judgment-debtors for extinguishing the right of the applicant as a mortgagee. Whether the learned District Judge intended to find that the decree-holder was a party to this* fraud is not by any means clear. However, the sale was set aside by the learned District Judge on 29th November 1939. On 12th February 1940, the decree-holder again applied for sale of the very same property whose sale he had applied for in 1937 and prayed for revival of his previous application. The Courts below have held that execution of that decree is barred by the three years' rule of limitation applicable to the execution of money decrees.

2. The question which arises for decision is whether the setting aside of the execution sale resulted in a revivor of the application for execution which had resulted in the sale. In this Court a Division Bench held in *Musammatt Kaniz Zohra and Another Vs. Rai Syam Kisen and Another*, , that where, in execution of a decree, some property of the judgment-debtor is sold, and that sale is subsequently set aside, the effect of the application of the decree-holder for re-sale of the same property is an application to revive the previous execution and is governed by Article 181, Limitation Act. In this case, however, it is contended that there is a note in the order-sheet that the execution case was dismissed on full satisfaction resulting in it being impossible to revive the previous application, because it is said this note in the order sheet resulted in the final and complete disposal of that application and rendered it incapable of being revived. I think the answer to this contention is to be found in *Musammatt Kaniz Zohra and Another Vs. Rai Syam Kisen and Another*, . The facts of that case were that a decree was passed on 28th June 1905, and an application for execution made in August 1906 was dismissed in February 1907. A second application was made in July 1909, and resulted in the sale of the judgment-debtor's property on 4th December. The sale, however, was set aside on 12th February 1910. A third application for execution was made on 10th December 1912, asking the Court to sell the identical property which had been the subject-matter of the sale of 4th December 1909. There also, as in the present case, there appears to have been recorded an order dismissing the first execution case after the sale had been set aside. Immediately after the order setting aside the sale was recorded there was a note in the order sheet "no steps taken. Dismiss the execution case." It was contended in that case, as in the present case, that the effect of this note was that the first application for execution was incapable of revivor. The learned Chief Justice observed:

It appears to me that the words in question were not intended to do more than strike the execution case off the file for the Court could not have expected the decree-holder, immediately on hearing the order of the Court setting aside the sale, to present another application for execution.

3. Apart from this aspect of the matter, however, there is another angle from which the question may be approached. In *Abdul Khayar Abdul Huq v. Rajuddin Ahmad* I.C. 341 , as in the present case, a sale was held in execution of a decree and the execution proceedings were then struck-off. Subsequently the sale was set aside and this was followed by another application for execution beyond the period of limitation. It was contended that the second application for execution was time-barred. In respect of that the learned Judges observed:

We do not think, however, that in the present case the question of limitation really arises. There is on the record the decree-holder's first application dated 28th April 1904. The sale took place in consequence of that petition. All the proceedings taken on that application have now been set aside and the decree-holder, therefore, is now entitled to ask the executing Court to dispose of his first

application which was certainly within time. And his present application is no more than a prayer to dispose of his first application.

4. Applying these observations to the facts of the present case, in my view, the order setting aside the execution sale resulted in the setting aside of the orders which were consequent on that sale, including the order dismissing the first execution case on full satisfaction, thus leaving the decree-holder's first application, to be dealt with. As that application was obviously in time it should be allowed to proceed to its normal conclusion. In this case both the Courts below held and the learned advocate for the respondents has contended that the decree-holder was guilty of fraud in the former execution proceedings and that, therefore, his former application should not be revived. This contention is said to be based on some equitable principle. If, however, the order setting aside the former execution sale resulted in the setting aside of all the orders consequent on that sale, I fail to see what equity has to do with the matter at all. As I have already said the plain result is that the first application for execution remains undisposed of. As was pointed out in the Calcutta case to which I have already referred:

If when an honest sale is set aside at the instance of the judgment-debtor, the decree-holder's subsequent proceedings are a continuation of the first, it is difficult to see how they can cease to be so if the sale was dishonest. The honesty or dishonesty of the sale seems to us to have no logical bearing on the question whether the subsequent proceedings are or are not a continuation of the former proceedings.

5. In my view the decision of the Court below is wrong and must be set aside. The execution will now proceed. The decree-holder is entitled to the costs in this Court and in the Court below.