

(1938) 11 CAL CK 0026
In the Calcutta High Court

Sm. Kiran Bala Saha

APPELLANT

Vs

Sm. Suniti Prova Saha and Others

RESPONDENT

Date of Decision : 11-11-1938

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90

Citation : AIR 1939 Cal 146

Hon'ble Judges : B.K. Mukherjea, J

Bench : Division Bench

Judgement

B.K. Mukherjea, J.—This rule is directed against an appellate order passed by the Subordinate Judge, Faridpur, dated 8th December 1937 reversing the order of the first Munsif at Goalundo passed in a proceeding under Order 21, Rule 90, Civil P.C. The facts are not in dispute and the controversy centres round a short point. The petitioner is the auction purchaser at an execution sale which was held on 24th June 1936. The opposite party 1 took a conveyance of the interest of one of the judgment-debtors by a kobala which was executed on 7th July 1936, that is to say nearly two weeks after the sale was held. She at first applied for making a deposit under Order 21, Rule 90, Civil P.C., but that application being rejected she started the present proceeding under Order 21, Rule 90, Civil P.C., for setting aside the sale on grounds of material irregularity in publishing or conducting the sale resulting in substantial loss to her. The trial Court dismissed the application on the ground that as the applicant was a purchaser after the sale was held, she had no locus standi to make the application. This decision was reversed on appeal and the Appellate Court has come to the conclusion that the words whose interest is affected by the sale" as used in Order 21, Rule 90, Civil P.C., are wide enough to include a person who has acquired an interest in the property subsequent to the sale. As the Appellate Court held on evidence that there had been irregularity in publishing or conducting the sale by reason of which the judgment-debtors suffered loss, the sale was set aside. It is against this order that the present rule has been obtained.

2. The only point argued before me is as to whether the opposite party who admittedly purchased the property after the execution sale is competent to apply for setting aside the sale under Order 21, Rule 90, Civil P.C. Under Order 21, Rule 90, Civil P.C., the decree-holder, or any person who is entitled to have a share in the rateable distribution of assets or whose interests are affected by the sale can apply to the Court to have the sale set aside. The words "whose interests are affected by the sale" are certainly very much comprehensive and are of wider import than the words "person whose immovable property has been sold" as they occurred in the old Act of 1882. It is now settled that the word "interests" as used in this rule is not limited to proprietary or possessory interest in the property itself but extends to other kinds of interests, pecuniary or otherwise which is in any way affected by the sale. But whatever the nature of the interest might be, it is clear to me from a plain reading of the Section that the interest must be in existence at the time when the sale takes place and must be prejudicially affected by it and if it is created after the sale, it is inconceivable how it can be affected by the sale and give the person a right to set it aside. This view has been taken in *Surendra Nath Das Vs. Alauddin Mistry*, *Khetro Mohan Datt Vs. Sheikh Dilwar and Others*, *K.V.A.L. Chettyar Firm v. M.P. Maricar* AIR (1929) Ran. 33 and *Nihal Chand-Gopal Das v. Pritam Singh* A.I.R.(1932) Lah. 468. In all these cases it was held that the auction-purchaser at an execution sale was not competent to make any application under Order 21, Rule 90, Civil P.C., inasmuch as his interest was created by the sale itself and had no existence prior to it.

3. I am not unmindful of the fact that a contrary opinion has been expressed by the Madras and the Allahabad High Courts on this point, vide the cases in *Ravi Nandan Prasad Vs. Jagar Nath Sahu and Others* and *Gopala Krishnayya v. Sanjeevareddi* (1920) 7 AIR Mad. 145 and they have allowed the auction-purchaser to attack the sale under Order 21, Rule 90, Civil P.C. Walsh J. who delivered the judgment in the Allahabad case was of opinion that a purchaser whose bid was accepted at an execution sale incurred certain liabilities inasmuch as he was compelled to pay the deposit and complete the purchase which involved the necessity of finding the necessary funds and also the necessity of carrying through to fruition the provisional contract into which he has entered. The Madras High Court on the other hand laid stress on the fact that the auction-purchaser was a necessary party according to law in a proceeding to set aside the sale and consequently he has an interest in the property which is affected by the sale which makes him competent to come in and apply under Order 21, Rule 90, Civil P.C. The reasons given above do not appear to me to be cogent and they have not been accepted by Mitter J. in the case reported in *Surendra Nath Das Vs. Alauddin Mistry*, referred to above. But, even assuming that the reasons given by the learned Judges are correct, they do not touch the present case. The interest, if any, of the opposite party in the present rule was not created even by the sale and he acquired no rights and incurred no obligations under it as the auction-purchaser would. She is not a necessary party in the sale set aside

proceedings and I have not the least doubt that she does not come within the purview of Order 21, Rule 90, Civil P.C. The result is that this rule is made absolute. The order of the lower Appellate Court is set aside and that of the trial Court restored. As the purchaser according to the findings of the Courts below was the wife of one of the judgment-debtors and was held to be his benamidar, I direct that each party would bear his own costs throughout.