

(1960) 01 PAT CK 0017

In the Patna High Court

Case No : A.F.A.D. No"s. 39 of 1957, 776 of 1958 and A.F.A.O. No. 445 of 1958

Sudarsan Mahto and Others

APPELLANT

Vs

Radhika Prasad Singh and Others

RESPONDENT

Date of Decision : 14-01-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 69(3), 151, 47

Citation : AIR 1960 Patna 311

Hon'ble Judges : H. Mahapatra, J

Bench : Single Bench

Advocate : Lal Narain Sinha and Shambhu Nath, No. II in No. 39 of 1957, Prem Lall and Satyendra Sahai Verma, in No. 776 of 1958 and Prem Lall and Satyendra Sahai Verma, in No. 445 of 1958, for the Appellant; Prem Lall, Satyendra Sahai Verma and Braj Kishore Narain Singh, in No. 39 of 1957, Lal Narain Sinha and Shambhu Nath, No. II and Lal Narain Sinha and Shambhu Nath, No. II in No. 445 of 1958, for the Respondent

Final Decision : Allowed

Judgement

H. Mahapatra, J.—M. A. 445 of 1958. This appeal arises out of an order passed by learned Subordinate Judge, Gaya, confirming an order of the learned Munsif, who rejected an application made by the appellants u/s 151 of the CPC for setting aside a sale held in Execution Case No. 116 of 1953 of the Court of 2nd Munsif, Gaya. The facts leading to this case are rather unfortunate. They have involved three litigations between the parties and all those are now before this Court in Second Appeal 39 of 1957, in Second Appeal 776 of 1958 and in this Miscellaneous Appeal. A rent suit (No. 131 of 1951) was brought against one Parmeshwar Singh and his 3 sons and an ex parte decree was obtained therein on 2-2-1952. In execution, of that decree, the sale of the properties was fixed for 16-4-1954 at 8 a.m. On 14th of April, the judgment-debtors filed chalan for depositing the decretal amount with costs and the chalan was passed on that day.

The period between 16th of April and 20th of April was holidays and the Courts

were closed. After the reopening of the Courts on 21st of April, the sale was adjourned to 28th of April with a note in the order sheet to await the chalan that had been issued to the judgment-debtors. On 28th of April the sale was again adjourned to 29th of April as the chalan had not till then been received. On that day (29-4-1954), the judgment-debtors made an application to re-enface the chalan in order to enable them to deposit the money that day. This was done and the money was deposited that day into the treasury. The working hours of the treasury (Imperial Bank of India) were from 10-30 a.m. whereas the working hours of the Court during that period were in morning.

According to the findings of the appellate Court the sale was held on 29-4-1954 during the morning hours and not after 11-30 a.m. and the deposit was made after 10-30 a.m. on that day into the Imperial Bank. The chalan was filed in Court on 30-4-1954. Since the sale had already taken place on the previous day, no action was taken by the Court on receipt of this chalan. It is to be noted here that one of the judgment-debtors, Parmeshwar Singh, father of the other 3 judgment-debtors, died on 30-7-1952 and this was before execution was levied on the decree. The remaining judgment-debtors with 3 sons of one of them instituted a suit, namely T. Section 98/54 in the Court of the Munsif for a declaration that the decree and the sale were nullities and that no title had passed to the auction-purchaser.

This suit was dismissed by the learned Munsif, and, on appeal, the lower appellate Court held that the sale was illegal but it only allowed the decree in favour of plaintiffs 1 to 3 in that case, who were the sons of one of the judgment-debtors, on the ground that they having not been impleaded as parties to the rent suit or in the execution proceedings, their interest did not pass under the sale. The lower appellate Court in that case observed, however, that the sale would have been set aside on an application made by the judgment-debtors to set aside the sale. Following that cue, the judgment-debtors made an application u/s 151, C. P. C. to the executing Court for setting aside the sale. That application was dismissed by the learned Munsif and the present miscellaneous appeal arises out of that. The Court of appeal below has observed :

"No Court will exercise its discretion u/s 151, C. P. C. in favour of a party who have been persistently and grossly negligent."

This view is based upon the fact that, though the chalan had been taken by the judgment-debtors on 14-4-1954, they did not make the deposit till after the sale took place on 29-4-1954 and that they did not tender the money even on the date of sale (29-4-1954) to the Nazir, who was conducting the sale, nor did they inform the Presiding Officer of the Court that they were going to make such deposit. The evidence adduced on behalf of the judgment-debtors to the effect that they had orally informed the Presiding Officer that they were going to make the deposit in treasury that morning was not accepted by the trial Court as well as by the lower appellate Court. The chalan was issued originally on 14-4-1954 but it was re-enfaced on 29-4-1954. This re-enfacement must have been made

during Court hours on 29-4-1954. There is an endorsement under the signature of the Judge-in-charge in the chalan to the following effect:

To the Cashier of the Court Gaya Officer incharge of the Treasury Receive and credit the above sum if tendered to you before 3 p.m. to day morrow.'''

This endorsement was dated 14-4-1954. When it was re-enfaced on 29-4-1954, the date 14-4-1954 has not been changed but that endorsement with the endorsement of re-enfacement dated 29-4-1954 would mean that it was remade that day (29-4-1954). Therefore, this endorsement along with the endorsement of re-enfacement will mean that the money had been received notionally by the Judge-in-charge and was directed to be deposited with the cashier of the Court or the officer in charge of the treasury, Gaya, by 8 p.m. on that date. As a matter of fact, as held by the Courts below, and as proved by the seal of payment embossed on this chalan, the money was paid that day to the Imperial Bank of India, Gaya, which was working as treasury. There is ample evidence on record and that is also borne out by the discussion made by the Courts below that this deposit was made sometime after 10-30.

It is nobody's case that this deposit was made after 3 p.m. on that day because it could not have been accepted by the treasury (the Imperial Bank of India) after that hour, according to the endorsement made by the Judge-in-charge. If the direction of the Court was that the money should be deposited in treasury by 3 p.m. that day then payment made at any hour during that time will be in accordance with such direction and it will mean payment made to the Court that day. The question, therefore, is whether the sale that took place at 8 a.m. or at any time before 11-30 a.m. that day was valid in face of such deposit. Rule 69 of O. 21 of the CPC says that every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

It is in evidence that the Nazir was conducting the sale. It is further in evidence that the Court was aware of the issue of chalan on 14-4-1954 and also of re-enfacement of the same chalan on 29-4-1954. This re-enfacement is not said to have been done after the sale. The application, by which this re-enfacement was asked for, shows that it was addressed to the Presiding Officer of the Court and the Registrar of the Court directed re-enfacement on 29-4-1954. The seal of the Munsif is also on that application and somebody has also endorsed, after the order of re-enfacement made by the Registrar, that it was complied with on that day. From the endorsement on the chalan made by the Judge incharge, to which I have already referred, it will be taken that the payment was made to the Court before the sale, and it was directed to be deposited in the treasury later on that day by 3 P.M. In that view, before the sale took place that day, the Presiding Officer will be taken to have been aware of this payment and the Nazir conducting the sale will also be attributed with that knowledge.

2. The sale was ordered for realisation of the decretal amount and the time for payment of such decretal amount, according to the statutory provisions, is extended till the time of sale. In the circumstances of the present case, the judgment-debtors, although they could and should have deposited the money at any time between 21-4-1954 and 29-4-1954, did come to the Court, as appears from their application made on 29-4-1954, with the money took the re-enfacement on the chalan that morning and made all endeavours to deposit the money that very day, according to the direction of the Court, in the Imperial Bank of India at Gaya, which was working as the Government treasury. If the treasury, or for the matter of that Imperial Bank, was not working after 10-30 then this money could have been deposited during morning hours which were the hours of working of Court also.

The arrangement that the authorities had made for these deposits will not be construed to hamper the legal right that accrues to a person in the matter of deposit. The Courts below have held that this money could have been tendered to the Nazir who was conducting the sale. That is true. But the chalan itself, which had been passed originally on 14-4-1954 and re-enfaced on 29-4-1954, gave a direction to the judgment-debtors to make the deposit only to the officer in charge of the treasury or to the cashier of the Court. It is said that the usual practice for such deposit is to pay the money to the Imperial Bank and that is compliance with the direction to tender the amount to the officer in charge of the treasury.

I do not see how it can be said in the circumstances stated above that the judgment-debtors had defaulted to make the payment on 29-4-1954 before the sale took place. The ends of justice should not be allowed to be defeated by over-strained technicalities. It will be sufficient if it would appear from the facts of the case that the judgment-debtors did take all possible steps that they could, to pay the money on the date of sale. By the arrangement that the Court would sit in morning during that period, different from the hours of working of the treasury, the judgment-debtors were put in the predicament for which the Courts below have rejected their plea that the deposit had been made before the sale.

In case, *Srinivasa Bhatta v. Malayacha Mannadi* ILR 7 Mad 211, the auction-purchasers took the balance of the purchase money to the treasury but the officer in charge of the treasury declined to receive it as the account for the day had been made up. The next day, Saturday, was a holiday. On Monday following, the money was paid into the treasury and the receipts were obtained. The sale was cancelled on the ground that the balance of the purchase money had not been paid into Court on the 15th day after the sale. Prayer was made for confirming the sale. Their Lordships held in the circumstances of that case that the balance of the purchase money was brought to the Court on the 14th day after the sale, a chalan was obtained and the money and the chalan were taken to the treasury. But, as the treasury officer refused to receive them because he had closed the account for that day and as 15th and 16th days were holidays at

the treasury, the receipt of money on the 17th day of the sale by the treasury would not show that the money was not paid within 15 days of the sale.

Therefore, the issue of the chalan with the endorsement, that the money was received by the Judge-in-charge and was directed to be paid elsewhere would determine, after the money has been actually paid, the date of payment. In the present case, after re-enfacement, it will mean 29-4-1954. In *Bijoy Singh Vs. Raja Kirtyanand Singh and Others*, , the auction-purchaser came to the Court at the opening hour of the 15th day of sale, with the money, prepared to make his deposit and took steps required by the departmental rules to deposit it. He was not held responsible for the obstruction which was caused by the delay in passing the chalan. It was held in that case that the Court holding that the sale must be set aside as the money was not paid in time acts illegally and with material irregularity in exercise of its jurisdiction.

The facts of that case were that at 10-30 a.m. on the 15th day, the petitioner came with the balance of the purchase money which he tendered with the chalans to the chief ministerial officer of the Court. The chalans were made over to the Judge in charge for signature but the petitioner did not get them back on that day and without them the money could not be paid into the treasury. When the time came for confirming the sale, the Munsif of his own motion decided that, as the whole of the purchase money had not been deposited in time, the sale must be set aside under Order 21, Rule 86, C. P. C. It is true that in the present case, there is no finding that the money was actually brought to the Court on 29-4-1954 when the chalan was re-enfaced. But the application made by the judgment-debtors on that day asking for re-enfacement makes that clear.

This coupled with the fact that the money was actually deposited that very day soon after the Bank re-opened at 10-30 a.m. would show that the judgment-debtors took all steps required to tender and deposit the money. In *Mahbub Ali v. B. Bishen Singh* AIR 1944 Lah 470, the facts were that under a compromise decree the decretal amount was to be paid by instalments. On default in payment of any instalment, the decree-holder was entitled to execute the decree. All the instalments were to be paid through Court. The first instalment was to be paid up to the end of June, 1940. On 28-6-1940 a representative of the judgment-debtor went to the treasury, obtained a voucher and got it initialled by the Presiding Officer of the Court with a view to enable him to deposit the amount in the Imperial Bank where all moneys payable in court were to be paid under the rules. On the two following days, i.e. the 29th and 30th neither" the court was open nor the Bank.

On the 1st July, 1940 the judgment-debtor appeared in the Imperial Bank at 1 p.m. There was a great rush of business on that day. He approached the head cashier, under whose orders the money could be received by the cashier or the Bank even if the tender had been delayed by a few minutes. The head cashier initialled the voucher but all the same the money could not be deposited as the time for disposing of Government business had expired, which could be dealt

with only upto 2 O'clock at the most 2.15 p.m. The result was that the deposit was made only on 2nd July, 1940. On account of this belated payment the decree-holder took out execution proceedings. It was held that "for the purposes of Court payments the Bank was the agent of the court".

The working hours of the court as also of the Bank ranged between 10 A.M. and 4.30 P.M. This period could not be arbitrarily curtailed by either the court or the Bank. If a tender, therefore, was made long before the working hours of the day terminated it was a valid tender and if the payee or his agent, i.e. the Imperial Bank refused to accept that tender on the basis of some sort of a domestic rule made by them so as not to receive any deposit after a time, i.e. 2 P. M. arbitrarily fixed by them, the payer was not to blame. The judgment-debtor, therefore, was not responsible for making any default in payment of instalment due on 30th June, 1940.

3. What follows from these cases is that, if the judgment-debtor has taken all steps that he could under the law or under rules or under practice obtaining in the Courts or in the treasury or in the Imperial Bank, to make the deposit in time, i.e. on the date when the sale was fixed, his tender of money at a time earlier than the sale should be taken to be a payment to avoid the same. In this view of the matter, the courts below do not seem to have acted judicially in refusing to exercise their discretion u/s 151 of the Code of Civil Procedure.

In the circumstances of the case, I am satisfied that the ends of justice will be met if the sale is set aside on a finding that the deposit as made by the judgment-debtors will be taken to have been tendered before the sale, as otherwise there will be serious miscarriage of justice.

4. In the result, this miscellaneous appeal is allowed, the orders passed by the courts below are set aside and the sale held on April, 29, 1954, in Execution Case No. 116 of 1953 in the court of End Munsif, Gaya, is set aside. There will, however, be no order for costs.

Second Appeal 39 of 1957.

5. As I have already indicated in the judgment passed in Miscellaneous Appeal 445 of 1958, this second appeal arises out of a suit which was instituted for a declaration that the sale held in Execution Case 116 of 1953 in the court of 2nd Munsif, Gaya, was a nullity. The miscellaneous appeal also arose out of an application made to set aside that sale and it has been allowed. Some points of law have been raised by the learned Counsel appearing for the appellants on the question of representation of the minors by the father in the Rent suit as well as *res judicata*.

But all these things are not necessary to be gone into in view of the order passed in Miscellaneous Appeal 445 of 1958 which governs the result of this appeal. This second appeal will accordingly be dismissed but there will be no order for costs. The cross objection filed in this appeal will succeed but there will be no order for

costs.

Second Appeal 776 of 1958

6. This appeal arises out of a suit brought by the judgment-debtors in the Rent decree for a declaration that the sale held in Execution Case No. 116 of 1953 in the court of 2nd Munsif of Gaya was void. By orders passed in Miscellaneous Appeal 445 of 1958 that sale has been set aside. This appeal, therefore, succeeds but there will be no order for costs.