

(1927) 11 CAL CK 0034
In the Calcutta High Court

Umesh Chandra Majumdar

APPELLANT

Vs

Mt. Safiyatannessa Khatun and Others

RESPONDENT

Date of Decision : 21-11-1927

Acts Referred:

Citation : AIR 1928 Cal 267

Hon'ble Judges : Mukerji, J

Bench : Division Bench

Judgement

Mukerji, J.—The facts which have given rise to the order against which this Rule is directed are shortly as follows : The petitioners obtained a decree against certain judgment-debtors in 1910 in Money Suit No. 750/1164 of that year. In 1920 a jote of the judgment-debtors-was sold in execution of rent decree obtained by the landlords and was purchased by some other parties and the sum of Rs. 525 was deposited by them in Court in two instalments. The petitioners had failed to realize the amount of their decree of 1910 and they, on the amount of Rs. 525 being put in by the auction-purchasers, applied for attachment of a certain portion of the said amount, Rs. 287-10-0 having gone towards the satisfaction of the decree for rent and Rs. 287-6-0 being left in Court-as surplus sale proceeds. As a result of the proceedings thus instituted by the petitioners, they were allowed to withdraw Rs. 79-2-6 from Court, out of the aforesaid amount deposited by the auction-purchasers, in part satisfaction of their decree of 1910. In 1922 the amount of Rs. 79-2-0 was thus withdrawn by the petitioners. It appears that thereafter there were certain proceedings under Order 21, Rule 90, Civil P.C., to which the petitioners were not parties and of which, it is said, no notice was given to them, as a result of which the sale in execution of the rent decree to which I have already referred was set aside by the Court. On the sale being set aside, as aforesaid, the auction purchasers applied to get back their purchase money and upon that the learned Munsif made an order in their favour against which the present Rule is directed.

2. The substance of the contention that has been urged in support of the Rule is

to the effect that the order setting the sale aside was passed in contravention of the provisions of Order 21, Rule 92, of the Code which makes it obligatory on the Court to issue notices of the application for setting aside the sale to all the parties affected by the order that has to be passed on such application. It is urged that, in the present case, the petitioners were not given such notices, that the order setting aside the sale was, therefore, one passed without jurisdiction and that inasmuch as the petitioners would suffer irreparable loss, if they are now called upon to refund the amount which they have withdrawn in part satisfaction of their own decree, the learned Munsif acted without jurisdiction and also improperly in making the order aforesaid. The whole basis of the petitioner's contention seems to me to be what is alleged by them in para. 10 of their petition and which is to the effect that the order setting the sale aside was passed without jurisdiction inasmuch as no notice was served on them and further that the proceeding held in connexion with the application for setting the sale aside was a collusive and benami affair. It may be conceded that if the order setting the sale aside may be looked upon as a nullity, the petitioners are entitled to urge that they are not bound by it and that any further or consequential orders that may have been passed on the basis of it should also be set aside.

3. It may also be conceded that in view of the proviso to Sub-rule 2, Rule 92 the Court should not have passed an order on the application for setting aside the sale without giving notice of the application to all the persons affected by such an order. But I find it very difficult to hold that merely because no notice was given of the application, the order which the Court passed was one that can be said to have been passed without jurisdiction. It was an order which the Court was wrong in passing and the parties whose interests were affected by the order may very well complain of its validity. But it is quite a different thing to say that it can be regarded as an order passed entirely without jurisdiction. The petitioners do not appear to have challenged the validity of the order itself either by an application for review or by moving against it or by taking such other measures as the law allows. So long as the order is not set aside all consequences that it may legitimately lead to will follow. The present application on which this rule has been granted is not directed against that order but against a subsequent order which has been passed directing the petitioners and the judgment - debtor to refund the amount which had been withdrawn by them. I am unable to see what relief the petitioners can expect in this Rule so long as this Court is not competent to go behind the order that was passed setting aside the sale. The provisions of Order 21, Rule 93 of the Code are imperative. The rule runs in these words:

Where a sale of immovable property is set aside under Rule 92, the purchaser shall be entitled to an order for repayment of his purchase money, with or without interest as the Court may direct, against any person to whom it has been paid.

4. In the present case the sale has been set aside under Rule 92. The order by

which the sale has been set aside is at the present moment a subsisting order and so long as it subsists it must attract the operation of Rule 93. In support of the argument that the equities are in favour of the petitioners and that they should not be made to suffer in consequence of an order passed in the proceedings to which they were not parties, reference has been made to the decision of the Judicial Committee in the case of Jai Berham v. Kedar Nath Marwari AIR 1922 P.C. 269, and also to a decision of the Madras High Court in the case of Raja Rao Vs. Ananthanarayanan Chetty and Others, . These two decisions have very little bearing upon the present case as the statutory obligations arising under Rule 93, Order 21, Civil P.C. did not come in for consideration in either of them. Whatever other remedies the petitioners may have in connexion with this matter. I am clearly of opinion that on the facts, as they are, the present Rule cannot -be made absolute. The Rule is accordingly discharged; but in view of the circumstances of the case, I make no order as to the costs.