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JANAK RAJ

v.

GURDIAL SINGH AND ANR.

November 8, 1966

B [K. N. WANCHOO AND G. K. MITTER, JJ.]

Code of Civil Procedure (Act 5 of 1908), O.XXI. rr. 89—92—Ex parte money decree—Sale of property in execution—Decree set aside before confirmation—If sale could be confirmed.

The appellant, a stranger to the suit, was the auction-purchaser of the judgment-debtor's immovable property in execution of an *ex parte* money decree. On the question whether he was entitled to a confirmation of the C sale, under O.XXI, r. 92, Civil Procedure Code, notwithstanding the fact that after the holding of the sale the *ex parte* decree was set aside.

HELD : The sale should be confirmed.

The law makes ample provision for the protection of the interests of the judgment-debtor, when his property is sold in execution. He can file an application for setting aside the sale under the provisions of O.XXI, rr. D 89 and 90. Apart from exceptional cases when a court will refuse to confirm a sale because it was held without giving notice to the judgment-debtor, or the court was misled in fixing the reserve price, or where there was no decree in existence at the time when the sale was held, ordinarily, if a sale had been validly held, an application for setting it aside can only be made under O.XXI, rr. 89 to 91. If no such application was made, or when such an application was made and disallowed, the court has no choice but to confirm the sale. [78 F-H; 79 H; 80 A-B]

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Case law reviewed.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1322(N) of 1966.

Appeal from the judgment and order dated December 24, 1965, of the Punjab High Court in L.P. Appeal No. 20 of 1965.

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The appellant appeared *in person.*

D. D. Sharma and *M. C. Bhatia*, for respondent No. 1.

The Judgment of the Court was delivered by

Mitter, J. This is an appeal from a judgment and order of G the Punjab High Court dated December 24, 1965 on a certificate granted by the said court.

The question involved in this appeal is, whether a sale of immovable property in execution of a money decree ought to be confirmed when it is found that the *ex parte* decree which was put into execution has been set aside subsequently.

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The facts are simple. One Swaran Singh obtained an *ex parte* decree on February 27, 1961 against Gurdial Singh for Rs. 519/-. On an application to execute the decree, a warrant for the attachment

of a house belonging to the judgment-debtor was issued on May 10, 1961. At the sale which took place, the appellant before us became the highest bidder for Rs. 5,100/- on December 16, 1961. On the 2nd of January 1962, the judgment-debtor made an application to have the *ex parte* decree set aside. On January 20, 1962 he filed an objection petition against the sale of the house on the ground that the house which was valued at Rs. 25,000/- had been auctioned for Rs. 5,000/- only and that the sale had not been conducted in a proper manner inasmuch as there was no due publication of it and the sale too was not held at the proper hour. By an order dated April 19, 1962, the executing court stayed the execution of the decree till the disposal of the application for setting aside the *ex parte* decree. On October 26, 1962 the *ex parte* decree against the defendant-judgment-debtor was set aside. On November 3, 1962 the auction purchaser made an application for revival of the execution proceedings and for confirmation of the sale under O.XXI, r. 92 of the Code of Civil Procedure. On November 7, 1962 the judgment-debtor filed an objection thereto contending that the application for revival of execution proceedings was not maintainable after setting aside the *ex parte* decree and that the auction purchaser was in conspiracy and collusion with the decree-holder and as such not entitled to have the sale confirmed. It is to be noted here that the case of collusion was not substantiated. On August 31, 1963 the executing court over-ruled the objection of the judgment-debtor and made an order under O.XXI, r. 92 confirming the sale. This was affirmed by the first appellate court. On second appeal to a single Judge of the Punjab High Court, the auction purchaser lost the day. An appeal under cl. 10 of the Letters Patent in the Punjab High Court met the same fate. Hence this appeal.

Before referring to the various decisions cited at the Bar and noted in the judgment appealed from, it may be useful to take into consideration the relevant provisions of the Code of Civil Procedure. So far as sales of immovable property are concerned, there are some special provisions in O.XXI beginning with r. 82 and ending with r. 103. If a sale had been validly held, an application for setting the same aside can only be made under the provisions of rr. 89 to 91 of O.XXI. As is well-known, r. 89 gives a judgment-debtor the right to have the sale set aside on his depositing in court a sum equal to five per cent of the purchase money fetched at the sale besides the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of sale, have been received by the decree-holder. Under sub-r. (2) of r. 92 the court is obliged to make an order setting aside the sale if a proper application under r. 89 is made accompanied by a deposit within 30 days from the date of sale. Apart from the provision of r. 89, the judgment-debtor has

A the right to apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it provided he can satisfy the court that he has sustained substantial injury by reason of such irregularity or fraud. Under r. 91 it is open to the purchaser to apply to the court to set aside the sale on the ground that the judgment-debtor had no saleable interest in B the property sold. Rule 92 provides that where no application is made under any of the rules just now mentioned or where such application is made and disallowed the court shall make an order confirming the sale and thereupon the sale shall become absolute. Rule 94 provides that where the sale of immovable property has become absolute, the court must grant a certificate specifying the property sold and the name of the person who at the time of sale C was declared to be the purchaser. Such certificate is to bear date of the day on which the sale becomes absolute. Section 65 of the Code of Civil Procedure lays down that where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when it is sold and not from the time when the sale be- D comes absolute. The result is that the purchaser's title relates back to the date of sale and not the confirmation of sale. There is no provision in the Code of Civil Procedure of 1908 either under O.XXI or elsewhere which provides that the sale is not to be confirmed if it be found that the decree under which the sale was ordered has been reversed before the confirmation of sale. It E does not seem ever to have been doubted that once the sale is confirmed the judgment-debtor is not entitled to get back the property even if he succeeds thereafter in having the decree against him reversed. The question is, whether the same result ought to follow when the reversal of the decree takes place before the confirmation of sale.

F There does not seem to be any valid reason for making a distinction between the two cases. It is certainly hard on the defendant-judgment-debtor to have to lose his property on the basis of a sale held in execution of a decree which is not ultimately upheld. Once however it is held that he cannot complain after confirmation of sale, there seems to be no reason why he should be G allowed to do so because the decree was reversed before such confirmation. The Code of Civil Procedure of 1908 contains elaborate provisions which have to be followed in cases of sales of property in execution of a decree. It also lays down how and in what manner such sales may be set aside. Ordinarily, if no application for setting aside a sale is made under any of the provisions of rr. 89 to 91 of H O.XXI, or when any application under any of these rules is made and disallowed, the court has no choice in the matter of confirming the sale and the sale must be made absolute. If it was the intention of the Legislature that the sale was not to be made absolute

because the decree had ceased to exist, we should have expected a provision to that effect either in O.XXI or in Part II of the Code of Civil Procedure of 1908 which contains ss. 36 of 74 (inclusive). A

It is to be noted however that there may be cases in which, apart from the provisions of rr. 89 to 91, the court may refuse to confirm a sale, as, for instance, where a sale is held without giving notice to the judgment-debtor, or where the court is misled in fixing the reserve price or when there was no decree in existence at the time when the sale was held. Leaving aside cases like these, a sale can only be set aside when an application under r. 89 or r. 90 or r. 91 of O.XXI has been successfully made. B

Provisions in the Code of Civil Procedure over the years have not been unanimous in this respect. In *Sorimuthu* v. *Muthukrishna*(1) Madhavan Nair, J. traced the course of these provisions from the Code of 1859 up to the Code of 1908. The relevant sections in the Code of 1859 were ss. 256, 259 and 260. The net effect of these provisions was that no sale of immovable property would become absolute until the sale had been confirmed by the court and after the sale had become absolute, the court was to grant a certificate to the purchaser stating that he had purchased the right, title and interest of the defendant in the property sold. Sec. 314 and s. 316 of the Act of 1877 correspond in part with s. 256 and s. 259 of the Act of 1859. Sec. 316 was amended in 1879. The proviso to this section as amended was to the effect that the purchaser was to have title to the property sold from the date of the confirmation of the sale only if the decree under which the sale took place was subsisting at that date. Sec. 316 with the proviso was re-enacted in the Code of 1882. In the Code of 1908 s. 316 was split up into s. 65 and O.XXI r. 94 but the proviso was not included either in s. 65 or in r. 94 of O.XXI. C D E

Elaborate arguments were put forward in the Madras case just now cited as to the cause and effect of the deletion of the proviso to s. 316 of the Code of 1908. Madhavan Nair, J. referred to the report of the Select Committee which considered the Bill to amend the Civil Procedure Code of 1877 as showing that the alteration was effected in order to preclude the doubt which had arisen in Bombay where a certificate had been granted to an auction purchaser in ignorance of the fact that the decree under which the sale took place had been previously reversed in appeal. Probably the decision which the Select Committee had in mind was the case of *Basappa* v. *Dundayya* (2) before the said decision in the High Court of Bombay. In that case, the court had observed that it was the duty of the purchaser to satisfy himself before he applied for confirmation of the sale that the decree was still in existence. The learned Judge Madhavan Nair, J. pointed out that neither in the Act of F G H

(1) A.I.R. 1933 Madras 598. (2) I.L.R. 2 Bombay 340.

A 1859 nor in the Act of 1877 was there any specific statement of law regarding the time when the title to the property vested in the auction purchaser as is to be found in s. 316 of the Act of 1877 after the amendment in 1879, which was repeated as s. 316 of the Act of 1882, and in the present Act of 1908. Further, according to the learned Judge :

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> "By s. 49, Amending Act of 1879, it was enacted that the title of the auction purchaser to the property would start from the date of the certificate and in order that it may be so formal recognition was given to the principle that there must be a decree in existence at the time of the certificate; and that the proviso came to be enacted as a
> C necessary condition upon which would depend the commencement of the title of the auction purchaser ; and when the law on the latter point was altered, there was no need for the existence of the proviso and so it was dropped out from the new Code."

D Nothing has been urged before us which would lead us to take a contrary view. Under the present Code of Civil Procedure, the Court is bound to confirm the sale and direct the grant of a certificate vesting the title in the purchaser as from the date of sale when no application as is referred to in r. 92 is made or when such application is made and disallowed.

E We may now proceed to take note of a few decisions before the Code of 1908 came into force. In *Subbayya* v. *Yellamma*(1) which was decided in the year 1885 the suit having been instituted in 1876, the facts were as follows. The plaintiff obtained a decree against the defendant for Rs. 5,617/12/0. On the death of the defendant, his son was made a party to the suit as a representative
F of his father and when the son died, the grandson was made a party to the suit as representative of his grandfather. In 1883 the decree-holder attached certain lands and the grandson, the petitioner before the High Court, filed an objection to the attachment claiming the property as his own. The objection and the claim were disallowed by the District Judge by order dated August 20,
G 1883. On December 5, 1883, the petitioner filed an appeal in the High Court against that order and the High Court on February 22, 1884 reversed the order of the District Judge. In the meantime the lands attached were put up for sale and were purchased on February 22, 1884—the same day as the High Court allowed the order disallowing the petitioner's claim. The District Judge was not aware of the order of the High Court nor did it appear which
H order was made first in point of time on February 22. The highest bidder was a stranger to the suit who had paid the purchase money

(1) I.L. R. 9 Madras 130.

and was a *bona fide* purchaser. On August 16, 1884, the petitioner filed a petition in the District Court praying that the attached lands might be given to and put in his possession. This was dismissed by the District Judge. The petitioner applied to the High Court in revision under s. 622 of the Code of Civil Procedure on the ground that the District Judge had refused to exercise the authority vested in him to restore the petitioner to possession under the order of the High Court and on the ground that the confirmation was made without jurisdiction. He also presented an appeal against the order as a question between the decree-holder and petitioner, parties to the suit, relating to execution. The High Court observed that the petitioner might have applied to the District Court to stay the execution pending the sale, but did not do so, and he might, by diligence, after the appeal order was made have prevented the sale certificate and the possession from being given to the purchaser, but he did not do so. In these circumstances, the Court felt that even if it had the power to order the District Judge to deliver possession to the appellant, it would be inclined to refuse to do so.

A B C D

In *Rewa Mahton* v. *Ram Kishen Singh*(1) the Judicial Committee observed that notwithstanding anything in s. 246 of the Code of Civil Procedure of 1877, the auction purchaser was not bound to inquire whether the judgment-debtor held a cross decree of higher amout against the decree-holder any more than he was to inquire, in an ordinary case, whether the decree, under which execution had issued, had been satisfied or not.

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In *Zain-ul-Abdin Khan v. Muhammad Asghar Ali Khan*(2) certain sales had been held in execution of an *ex parte* decree and some of the properties were bought by *bona fide* purchasers. The decree was modified afterwards as a result of an appeal to Her Majesty in Council and it was found that as the decree finally stood, it would have been satisfied without the sales in question having taken place. The judgment-debtor sued the purchasers of some of the sales including holders of the decree and *bona fide* purchasers. It was held by the Judicial Committee that as against the *bona fide* purchasers who were strangers, the suit must be dismissed.

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In *Doyamoyi Dasi v. Mojumdar*(3) which was decided under the Code of 1882 both the learned Judges held in favour of the judgment-debtor. Maclean, C.J. remarked that when the *ex parte* decree was discharged, no decree in the suit remained and that being the position no sale could be confirmed when the decree under which it was made had ceased to exist. Both the learned Judges referred to s. 316 of the Code which included the proviso.

G H

(1) I.L.R. 14 Calcutta 18. (2) I.L.R. 10 Allahabad, 166.
(3) I.L.R. 25 Calcutta 175.

A In *Chitambar Shrinivasbhat v. Krishnappa*(1) there was an *ex parte* decree which was found to have been fraudulently obtained by the first defendant against the plaintiff and in execution thereof certain lands belonging to the plaintiff had been sold by auction and purchased by the second defendant. The plaintiff sued to set aside the sale and to recover possession of the land. It B was found that although the decree was obtained by fraud, the property was sold at a considerable undervalue and the purchaser had no knowledge of the fraud. It was held by the Bombay High Court that a purchaser for valuable consideration without notice of the fraud was not liable to have the sale in his favour set aside. It will thus be seen that even before 1908 the different High Courts C were always disposed to uphold the auction purchase in favour of a stranger to the suit when he was no party to a fraud against the judgment-debtor and where the case did not clearly fall within the proviso to s. 316 of the Code of 1882.

Let us now examine a few decisions given under the Code of 1908. In *Shankar* v. *Jawaharlal*(2) a Full Bench of the Judicial D Commissioner's Court at Nagpur went elaborately into the question and came to the conclusion that:

> "a private satisfaction of a decree certified in court after the sale of immovable property has been held and before the confirmation of the sale is ordered, does extinguish the decree E and prevent the Court from confirming the sale in favour of the auction purchaser, if he be the decree-holder himself, but it does not extinguish the decree and prevent the court from confirming the sale where a third person has purchased the property *bona fide* at the auction sale."

In *Kabiruddin* v. *Krishna Rao*(3) an application to set aside F the decree under O.XXI r. 89 was made by the judgment-debtor after the expiry of 30 days from the date of sale. The decree had been satisfied before the date of the application. It was held by the Judicial Commissioner's Court, by a majority, that the lower court was bound to reject the application made under O.XXI r. 89 and therefore to confirm the sale.

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In *Nanhelal* v. *Umrao Singh*(4) the decree-holder and judgment debtor had agreed to adjust the decree before confirmation of an execution sale. Allowing the appeal from Nagpur, the Judicial Committee held that when once a sale had been effected and third party's interest intervened, there was nothing in O.XXI r. 2 to H suggest that the sale could be disregarded and the court could refuse to confirm the sale on that ground. The Board pointed out:

(1) I.L.R. 26 Bombay 543.
(2) A.I.R. 1928 Nagpur 265.
(3) A.I.R. 1928 Nagpur 136.
(4) A.I.R. 1931 P.C. 33

"The only means by which the judgment-debtor can get rid of a sale, which has been duly carried out, are those embodied in r. 89, *viz.*, by depositing in court the amount for the recovery of which the property was sold, together with 5 per cent on the purchase money which goes to the purchaser as statutory compensation, and this remedy can only be pursued within 30 days of the sale.....That this is so is, in their Lordships' opinion, clear under the wording of r. 92, which provides that in such a case (*i. e.*, where the sale has been duly carried out), if no application is made under r. 99:

"the Court shall make an order confirming the sale and thereupon the sale shall become absolute"."

This aspect was stressed in the judgment of Madhavan Nair, J. who also referred to certain instances where sales had been refused to be confirmed on grounds other than those contained in O.XXI rr. 89 and 90. The learned Judge pointed out that these were instances where the court held that in law there was no sale at all. In *Sorimuthu's* case(1) Madhavan Nair, J. refused to set aside the execution sale of property in favour of a stranger auction purchaser on the ground that the decree leading to the sale had been upset in appeal before the confirmation of the sale.

In *Birdichand* v. *Ganpatsao*(2) it was held that it did not matter that the sale had not been confirmed at the date of the reversal of the decree unless there was a successful application under rr. 89, 90 or 91 of O.XXI.

In *Ambujammal v. Thangavelu Chettiar* (3) it was observed:

"There is no provision in the Code for the cancellation of a sale merely because of the cancellation of the decree and though it is in accordance with justice that a person who has succeeded in appeal should get from the opposite party such restitution as is possible, there is no principle of justice whereby an innocent third party who has purchased in a valid auction held by the Court should be deprived of his property, merely because the decree under which the sale was held has been cancelled in appeal. On general principles the judgment-debtor can look to the decree-holder to give restitution when the decree has been set aside in appeal, but there is no general principle which would give him a similar right to look to a third party who has for good consideration purchased the property sold through the Court."

(1) A.I.R. 1933 Mad. 598. (2) A.I.R. 1938 Nagpur 525.
(3) A.I.R. 1941 Madras 399.

A In *S. Chokalingam* v. *N. S. Krishna*(1) there was a Letters Patent Appeal out of restitution proceedings in the Sub-Court at Madurai. The first respondent was the judgment-debtor, the second respondent was the decree-holder-purchaser and the appellant was a purchaser from the decree-holder-purchaser. A Division Bench of the Madras High Court observed:

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> "If the purchaser were to lose the benefit of his purchase on the contingency of the subsequent reversal of the decree, there will be no inducement to the intending purchasers to buy at execution sale and consequently the property would not fetch its proper price at such sales, and the net result would be that the judgment-debtor would
> C be the ultimate sufferer. This wise policy of protecting the title of the stranger purchaser, even though in any individual case it may work some hardship, is clearly conceived in the interests of the general body of judgment-debtors so that purchasers will freely bid at the auction without any fear of later objection. But in the case of a
> D decree-holder-purchaser the rule is different and in that case the purchase is subject to the final result of the litigation between the decree-holder and the judgment-debtor."

In *Lalji Sah* v. *Sat Narain*(2) the Patna High Court held that auction sale of property belonging to a minor for grossly inadequate price due to gross negligence of the guardian would not affect the
E auction purchaser for value who was not a creature of the decree-holder and a suit to set aside such sale did not lie.

In *Mani Lal* v. *Ganga Prasad*(3) it was held that the mere fact that the auction purchaser knew that the judgment-debtor had filed an appeal against the decree in which the sale was held would
F not affect the *bona fide* nature of his purchase even if the decree was ultimately reversed.

In *Abdul Rahim* v. *Abdul Haq*(4) which was a decision of a single Judge of the Lahore High Court, it was held that the sale in execution of a decree could not be set aside merely on the ground that after the date of the sale but before its confirmation, the
G judgment-debtor was declared to be a member of an agricultural tribe entitled to protection under the provisions of the Punjab Alienation of Land Act.

All the judgments so far noticed are against the contention of the respondent. Our attention was however drawn to a judgment
H of the Calcutta High Court in *Baburam Lal* v. *Debdas Lala*(5).

(1) A.I.R. 1964 Madras 404.
(2) A.I.R. 1962 Patna 182.
(3) A.I.R. 1951 Allahabad 832.
(4) A.I.R. 1936 Lahore 191.
(5) A.I.R. 1959 Calcutta 73.

There is an observation to the effect that where the lower Court's decree has been reversed in appeal, the execution proceedings cannot go on. In that case, there was no sale in execution and the question before the court was, whether the plaintiff should be allowed to proceed with the execution of a decree for Rs. 1,493-1-6 when as the result of the final decree it was found that the defendant was entitled to Rs. 1,589-0-8 as owelty money from the decree-holder.

The decision in *Ariatullah* v. *Seshi Bhusan* (1) cited by the respondent is really of no help. There a sale was held in execution of a decree for an amount in respect of which there was no decree existing at the time. It was observed that the fact that subsequently to the sale the decree-holder obtained a decree entitling him to the amount for which the sale was held would not validate the sale.

For the reasons already given and the decisions noticed, it must be held that the appellant-auction purchaser was entitled to a confirmation of the sale notwithstanding the fact that after the holding of the sale the decree had been set aside. The policy of the Legislature seems to be that unless a stranger auction-purchaser is protected against the vicissitudes of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of the interest of the borrower and the creditor alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified. The Code of Civil Procedure of 1908 makes ample provision for the protection of the interest of the judgment-debtor who feels that the decree ought not to have been passed against him. On the facts of this case, it is difficult to see why the judgment-debtor did not take resort to the provisions of O. XXI r. 89. The decree was for a small amount and he could have easily deposited the decretal amount besides 5 per cent of the purchase money and thus have the sale set aside. For reasons which are not known to us he did not do so.

Lastly, it was contended that the amendment of s. 47 of the Code of Civil Procedure altered the whole situation inasmuch as by the Amending Act of 1956 auction purchasers are to be treated as parties to the suit. We are not here concerned with the question as to whether restitution can be asked for against a stranger auction-purchaser at a sale in execution of a decree under s. 144 of the Code of Civil Procedure and express no opinion thereon. In our opinion, on the facts of this case, the sale must be confirmed.

Although we have noticed some decisions where the right of the auction-purchaser decree-holder in circumstances similar to the

(1) A.I.R. 1920 Calcutta 99.

A case before us was discussed or the right of a purchaser in regard to a sale held after the setting aside of the decree was touched upon, our judgment must not be taken as adjudication upon any of these points.

In the result, the appeal is allowed. The order of the High B Court is set aside and that of the executing court affirmed. The appellant is entitled to the costs of this appeal.

V.P.S. *Appeal allowed.*