

TASADDUG HUSSAIN KHAN
v.
SHIV NATH SAHU (DECEASED) THROUGH LRS. AND ANR.

MARCH 26, 1998

[G.N. RAY AND G.B. PATTANAİK, JJ.]

Code of Civil Procedure, 1908 : Section 144

Restitution—Decree obtained by judgment-debtors jointly—Variation to decree in the absence of some of the judgment debtors—Permissibility of—Money—Decree—Auction sale in execution of decree—Appellant auction purchaser—Respondents judgment-debtors—Decreeal amount deposited by judgment-debtors—Application for restitution of property filed by judgment-debtors—Decree for restitution passed in favour of judgment-Debtors—Executing court directed delivery of possession to judgment-Debtors as well as payment of mesne profits—High Court held that judgment-debtors respondents were entitled for the restitution of possession of the property as well as mesne profits—Appellant auction purchaser preferred appeal before Supreme Court—During pendency of this appeal, at the instance of the appellant, names of some of the heirs of one of the judgment-debtors deleted from the array of parties at the risk of the appellant—Preliminary objection taken during hearing of the appeal that the decree passed by High Court was not maintainable in the absence of some of the judgment-debtors whose names were deleted—Held any variation of the said decree was not possible in the absence of some of the judgment-debtors in whose favour impugned decree was passed by the High Court—As the decree in the instant case was indivisible such a decree cannot be interfered with unless all the parties in whose favour such decree was passed were before this Court.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3805 of 1983.

From the Judgment and Order dated 17.4.80 of the Allahabad High Court in S.A. No. 2269 of 1968.

Tapas Ray, T. Sridharan and Tufail A. Khan for the Appellant.

Rakesh Kumar Gupta for K.K. Gupta, Respondent No. 1.

R.B. Mehrotra, Dr. I.B. Gaur, Dileep Tandon for Respondent No. 3.

The following Order of the Court was delivered :

A This appeal is directed against the order passed by the Allahabad High Court on April 17, 1980 in Second Appeal No. 2269/1968 being connected with Second Appeal No. 2270/1968. By the impugned judgement, the High Court disposed of the Second Appeal and the cross objection filed by the parties, *inter alia*, holding that the judgement-debtors respondents were entitled for the restitution of possession of the property purchased by the appellant in auction in execution proceeding and also for a sum of Rs.20,309 from the auction purchaser-appellant by way of damages and mesne profits subject to payment of Rs. 8,000 by the said judgement -debtors to the auction purchaser.

C It may be stated here that the appellant purchased the property belonging to the predecessor-in-interest of the judgement-debtors in auction in execution of money decree passed against the judgement-debtors. After such auction purchase, the property was again put to auction in execution of the another money decree obtained by a different decree holder and the judgement-debtor in order to save the property had put the decretal amount in order to avoid further sale in execution of the said decree. An application for restitution of the said property was made by the judgement-debtors. Such application was opposed but ultimately the order of restitution under Section 144 of the Code of Civil Procedure was passed in favour of the judgement-debtors. An appeal was taken by the appellant auction purchaser against such order and the appeal was allowed by order dated October 31, 1952 and the case was remanded . After the remand, auction purchaser filed objection to the judgement-debtors' application for restitution, *inter alia*, contending that the auction purchaser was entitled not only to the payment of Rs.8,000 being the sale price but also Rs. 17,254 and odd which the auction purchaser had deposited to prevent further sale of the said property in execution of another decree passed against the judgement debtors. The auction purchaser also claimed Rs. 3500 as cost of repairs and Rs. 50 per annum for such repairs since 1942. The restitution application was allowed and the executing court directed for delivery of possession of the disputed property to the judgement-debtors together with a sum of Rs. 65,565 on account of mesne profits and cost to be payable by the auction purchaser-appellant.

G Being aggrieved by such order of the executing court, the auction purchaser-appellant preferred an appeal and the judgement-debtors also filed appeal against the said order. Both the appeals were disposed of by the Civil Judge by order dated 21st May, 1968. The Civil Judge allowed the appeal of the auction purchaser and directed that the judgement-debtors should pay H Rs. 8,000 along with interest which comes to Rs. 22,400 and also a sum of

Rs. 19,723 and odd but no direction was given for payment of interest on the aforesaid amount. The appeal of the judgement-debtors was dismissed. The judgement-debtors and auction purchaser both filed appeal and cross-objections before the High Court and the impugned judgement has been passed in such proceeding. A

During the pendency of this appeal, unfortunately, at the instance of the appellant, the names of the respondent Nos. 1/2, 2/1 and 2/2 being heirs of one of the judgement-debtors were deleted from the array of parties at the risk of the appellant. Subsequently, a further order was passed by this Court directing that the attention of the Court should be drawn about such deletion and consequences flowing therefrom. B C

When the appeal was taken up for hearing, Mr. Mehrotra, the learned senior counsel appearing for the respondents, took a preliminary objection that the decree passed by the High Court in the restitution application which is the subject matter of challenge in the instant appeal, cannot be maintained in the absence of some of the judgement-debtors whose names were deleted at the risk of the appellant. The said judgement-debtors jointly obtained the said decree for restitution together with order for payment of certain sums of money by the appellant auction purchaser. Therefore, in the absence of some of the decree holders, no effective order can be passed in this appeal. The decree obtained by the judgement-debtors is a joint decree and not divisible. Therefore, if any order is passed by the High Court the same will bring inconsistent position vis-a-vis the respondents on record and decree holders not on record. D E

Mr. Ray, the learned senior counsel appearing for the appellant, however, has strenuously contended that in equity, the order passed by the High Court is unreasonable and the auction purchaser has been fastened with the liability which was not payable by the auction purchaser. Mr. Ray has contended that it has not been held that there was any illegality or fraud practised by the auction purchaser in the auction sale proceedings. The judgement-debtors although had no liability to pay the amount to satisfy the other money decree passed against the judgment-debtors, but in order to prevent further auction of the said property, in the event of non payment of decretal amount by the judgement debtors, the auction purchaser had to pay the decretal amount on behalf of the judgement debtors. Mr. Ray has submitted that judgement debtors in the first execution proceeding are on record. Therefore, this appeal is maintainable even if other judgement debtors in whose favour order of F G H

A restitution was made, are not on record in this appeal.

B We are, however, unable to accept the said submission of Mr. Ray. The question of claim and counter claim of the parties need not be considered on merit because the impugned decree passed in the restitution proceeding has been made in favour of the judgement-debtors whose appeals were allowed by the High Court. Therefore, any variation of the said decree is no possible in the absence of some of the judgement debtors in whose favour impugned decree was passed by the High Court. In our view, Mr. Mehrotra has rightly contended that the decree in the instant case, is indivisible and such decree cannot be interfered with unless all the parties in whose favour such decree was passed are before this Court. This appeal is, therefore, dismissed but without any order as to costs.

T.N.A.

Appeal dismissed.