

Satish Chandra And Anr. vs Jwala Prasad And Anr. on 20 March, 1950

Equivalent citations: AIR1950ALL461, AIR 1950 ALLAHABAD 461

ORDER

Seth, J.

1. The plaintiffs-applicants are the auction-purchasers. They purchased some property belonging to opposite party Jwala Prasad (hereinafter referred to as the 'judgment-debtor') in execution of a decree in favour of opposite party Girdhari Lal (hereinafter referred to as the "decree-holder") against the judgment-debtor. The sale was confirmed on 21st April 1942. Consequent on the confirmation of the sale the decree holder withdrew from the Court, the sale price deposited by the plaintiffs applicants. The order confirming the sale was set aside on appeal by the District Judge of Pilibhit and the order of the District Judge was upheld by this Court. The District Judge, while setting aside the sale, provided by his order that the auction purchasers shall get interest at the rate of 6 per cent. per annum, but omitted to pass any order for the refund of the purchase money. The auction-purchasers then instituted the suit giving rise to this application in revision against the decree-holder and the judgment-debtor both for the recovery of the purchase money. The Court below has dismissed the suit holding that the plaintiffs should have applied for repayment of the money under Order 21, Rule 93, Civil P. C., and that a separate suit for the refund of the sale price is not maintainable. The plaintiffs auction-purchasers challenge the correctness of this decision.

2. Learned counsel for the opposite parties has attempted to support the decision of the Court below by reference to Nannu Lal v. Shagwan Das, 39 ALL. 114 : (A. I. R. (4) 1917 ALL. 363), Sahu Deputy Shankar v. Mangal Sen, 54 ALL. 948 : (A. I. R. (20) 1933 ALL. 63), Mangal Sen v. Mathura Prasad, 57 ALL. 690 : (A. I. R. (22) 1985 ALL. 470), Amar Nath v. Chhotelal, I. L. R. (1938) ALL. 922 ; (A.I.R. (25) 1938 ALL. 593), Nagendra Nath v. Shambhu Nath, 3 pat. 947 : (A. I. R. (12) 1925 Pat. 106), Paliram v. Laheria Sarai Central Co-operative Bank Ltd., A.I.R. (25) 1988 Pat. 150 : (175 I. C. 347) and Mirza Jan v. Ghulam Raza, A. I. R. (28) 1941 Pesh. 41 : (194 I. C. 565).

3. None of these cases, however, except the Peshawar ease, (A. I. R. (28) 1911 pesh. 41 : 194 I. C. 565) case, touches the point upon which the decision of the present case depends for all these cases deal with the situation where, in spite of the existence of an order under Order 21, Rule 93, Civil P. C., confirming the auction sale, the auction-purchaser seeks to recover, by a regular suit, the purchase money from the decree-holder or somebody else who has taken it, on the ground that the judgment-debtor had no saleable interest in the property auctioned. All these cases unanimously lay down that such a suit is not maintainable. In order to appreciate the ratio of these decisions, it is necessary to bear in mind the well settled rule of law that the principle of caveat emptor applies to auction sales and that there is no warranty of title in such sales; so that before 1877 an auction

purchaser, who made a bad bargain and was deprived of the property purchased by him by reason of the fact that the judgment-debtor had no saleable interest in it, found himself without any remedy.

4. It was for the first time in the year 1877, that a statutory right was given to the auction purchaser to recover back his purchase money if the judgment-debtor had no saleable interest whatsoever in the property auctioned. The provisions of the Code of Civil Procedure of 1877 in this behalf were repeated in the Code of 1882 and it was held in cases arising while those Codes were in force that the remedy of the auction purchaser was not confined only to an application to the executing Court but that he could recover the amount by a suit also. The Code of 1908 has materially altered the law on this point. The history of the legislative changes is fully set out in *Ram Sarup v. Dalpat Rai*, 43 ALL. 60 : (A. I. R. (8) 1921 ALL. 377) and *Nagendra Nath v. Shambhu Nath*, 3 Pat, 947 : (A. I. R. (12) 1925 Pat, 106) and the result of the changes has been formulated by a Full Bench of this Court in *Amar Nath v. Chhotelal*, I.L.R. (1938) ALL. 922 : (A. I. R. (25) 1938 ALL. 593) as follows:

"In conclusion it appears that the common law of England gave no implied right of warranty of title to a purchaser of immovable property. The two rulings of their Lordships of the Privy Council in *Ram Tuhul Singh v. Biseswar Lall*, 2 I. A. 131: (15 Beng. L. R. 208 P. C.) and *Dorab Ally v. Executors of Khajah Moheeoodeen*, 3 Cal. 806 : (5 I. A. 116 P. C.) lay down that there is no warranty in an auction sale and that the auction-purchaser has no right to recover the purchase price by suit from the decree-holder in case it subsequently turns out that what he has purchased does not belong to the judgment-debtors. A statutory right was granted under the Codes of Civil Procedure of 1877 and 1882 by which an auction-purchaser could sue to recover the purchase price under those Codes. With the repeal of the Code of 1882 by the Code of 1908 that statutory right came to an end as the present Code of Civil Procedure, Act V [5] of 1908, makes no such provision. There is no right at present either in law or in equity for an auction-purchaser to recover under such circumstances.

As regards a decree-holder who has purchased at auction sale, his rights are limited to those granted by the Civil Procedure Code in Order 21, Rules 91 and 92, and if the auction sale is confirmed, that becomes *res judicata* between him and the judgment-debtor and he cannot re-open the matter by the mere application for further execution or by any other means unless he can get the order confirming the sale set aside."

The cases relied on by the learned counsel for the opposite parties support the propositions of law laid down in this Full Bench decision and do not require any further consideration.

5. It would appear from a consideration of the Full Bench case and the other cases referred to above that in those cases the right to recover the purchase money by a suit has been denied to the auction-purchaser for the following reasons :

(1) That there being no warranty of title in an auction-sale, the auction-purchaser has no right to recover the purchase money if the judgment-debtor is found to have no saleable interest, apart from the statutory right conferred upon him by the Code of Civil Procedure;

(2) that the statutory right does not extend beyond what is contained in Order 21, Rule 93, Civil Procedure Code;

(3) that the mere fact that the judgment-debtor has been found to have no saleable interest in the property auctioned does not confer any equitable right upon the auction-purchaser to obtain refund of the purchase money; and (4) that such a suit, being in substance a suit to set aside the order confirming the sale, would be barred by Order 21, Rule 92 (3), Civil P. C.

6. None of the reasons stated above applies to the present case, where the sale has already been set aside in proceedings properly started under Order 21, Civil P. C. The plaintiffs did not seek refund of the purchase money, on the ground that the judgment-debtor had no saleable interest in the property that was put up to sale, but on the ground that the auction sale has been set aside. The plaintiffs did not, therefore, in substance, ask, in contravention of Order 21, Rule 92 (3), Civil P. C., that the order confirming the sale be ignored, for the order confirming the sale has already been vacated and 'now the order under Order 21, Rule 92 (3), Civil P. C., stands in favour of the plaintiffs. They did not found their claim on any equity which has been found not to exist in favour of an auction-purchaser in the cases relied on by the learned counsel for the opposite parties, but on a different equity altogether. Under these circumstances, I have no doubt that the aforesaid cases do not negative the claim of the plaintiffs.

7. Nevertheless, the plaintiffs cannot succeed without establishing an affirmative case that they have a cause of action against the defendants or one of the defendants and that there is some rule of law or equity which entitles them, to claim a refund of the purchase money.

8. There is no warranty of title in an auction sale. Therefore, the plaintiffs are not entitled to base their claim on any warranty of title for its breach. The sale being an involuntary sale, there was no privity of contract between the plaintiffs auction-purchasers on the one hand and the decree-holder or the judgment-debtor on the other hand. So that the plaintiffs are not entitled to sue for failure of consideration. There seems to be no reason, however, why they should, not be entitled to recover the amount claimed on equitable grounds.

9. It was held by a Pull Bench of this Court in Bindeshri Prasad v. Badal Singh, 45 ALL. 369 : (A. I. R. (10) 1923 ALL. 394 that where the decree, in execution of which an auction-purchaser had purchased the property, was set aside by a separate suit, the auction-purchaser had an equitable right to recover back the purchase money paid by him. The following passage which occurs in the judgment of that case recognises the equitable right of the auction-purchaser under appropriate circumstances :

"The decree-holders have, therefore, obtained from the auction-purchaser, under an invalid decree, money to which they have no right, and there is a clear equity in favour of the purchaser entitling him to recover it back."

Similarly, it was observed by Sulaiman C. J., in *Mangal Sen v. Mathura Prasad*, 57 ALL. 690 : (A. I. R. (22) 1935 ALL. 470):

"It may be conceded at once that where a decree, in execution of which the sale took place, is itself found to be invalid, or where it is found that the sale officer had no authority to sell the property, the remedy of a separate suit would not be barred. The confirmation of the sale would itself be wholly invalid and not binding, upon the auction-purchaser. . . ."

10. There seems to be no reason why the ratio of these observations should not be applied to the present case. If a clear equity arises in favour of the auction-purchaser when the decree in execution of which the sale was held, is set aside, I consider that a clear equity arises in favour of the auction-purchaser also when the sale itself is set aside, and that he becomes entitled to recover back the purchase money by reason of this equity without resorting to any statutory right conferred upon him by the Code of Civil Procedure.

11. A suit to enforce this equitable right would be maintainable under Section 9 of the Code, unless expressly or impliedly barred by some provision of law. I have already pointed out that Order 21, Rule 92 (3), Civil P. C., does not bar such a suit. No other provision of law has been pointed out to me according to which such a suit may be barred expressly or impliedly.

12. Almond J. C., who delivered the judgment of the Bench in *Mirza Jan v. Ghulam Raza*, A. I. R. (28) 1941 pesh. 41: (194 I. C. 565), after referring to the conflict of rulings on the point, observed as follows :

"The argument of the Allahabad and Patna High Courts is to the effect that the Legislature by removing the additional clause in re-enacting the Code in 1908 intended to deprive the auction-purchaser of any remedy except that given by the new rule. The argument of the Lahore and Calcutta Courts on the other hand is that the additional clause was removed by the Legislature as it was unnecessary in view of the fact that the auction-purchaser had already another remedy by way of equitable relief to be sought in a separate suit. Under Section 9, Civil P. C., the Courts have jurisdiction to try all suits of a civil nature except suits of which their cognizance is expressly or impliedly barred, and the question for decision in this case is whether this suit is impliedly barred by the provisions of Order. 21, Rule 93, Civil P. C. We are of opinion that it is so impliedly barred. When the Legislature removed the additional clause in re-enacting the Code of Civil Procedure, they must have done so deliberately. There was no other provision of statute law under which the auction-purchaser could recover the sale money when he was ousted by a paramount title and we think that the reasonable inference was that the Legislature intended that

the lights of the auction-purchaser to get a sale set aside were to be confined within the limits of Order 21, Rule 93."

It would thus appear that the learned Judges who delivered this judgment preferred the reasoning of the Allahabad and the Patna High Courts to the reasoning of the Calcutta and the Lahore High Courts. The cases of the Allahabad and the Patna High Courts relied upon by the learned Judges were *Amar Nath v. Chhotelal*, I. L. R. (1998) ALL. 922: (A. I. R. (25) 1938 ALL. 593 FB) and *Paliram v. Laheria Sarai Central Co-operative Bank Ltd.*, A. I. R. (25) 1938 Pat. 150 : (175 I. C. 347). In neither of the two cases had the auction sale been set aside by proceedings taken under Order 21, Civil P. C. nor does the auction-sale appear to have been set aside in the Peshawar case. No doubt, the observations of Almond J. C., to the effect that a suit for the refund of purchase money is impliedly barred by the provisions of Order 21, Rule 93, Civil P. C., are very wide and do not make any distinction between a suit brought after the auction sale had been set aside and a suit brought without the sale having been set aside. Nevertheless, these observations should be read in the context in which they occur and I do not understand the learned Judge to have held that even where an auction sale has been set aside in appropriate proceedings, a suit for the refund of the purchase money would not lie. I have already indicated my reasons why I consider that such a suit does not appear to be expressly or impliedly barred by any rule of law. I, therefore, hold that the suit was maintainable and the Court below has erred in dismissing it on the ground that it was not maintainable.

13. This application in revision is, therefore, allowed, the decree of the Court below is set aside and the case is remanded to that Court for decision upon merits. Costs here and hitherto shall abide the result.