

Krishna Kumar And Ors. vs Brijbasi Lal And Ors. on 26 July, 1950

Equivalent citations: AIR1952ALL361, AIR 1952 ALLAHABAD 361

JUDGMENT

Brij Mohan Lal, J.

1. This is a second appeal by the judgment-debtors against an appellate decree of the learned District Judge of Farrukhabad.
2. It appears that firm Banarsi Das Durga Prasad (hereafter described as decree-holders) obtained in 1932 a decree against the following two sets of defendants, namely--(1) Ram Ratan and his brothers and (2) Krishna Kumar, Murli Manohar and their aunt, Shrimati Javitri.
3. On 31-10-1936, Ram Ratan and his brothers made an application under Section 4, Encumbered Estates Act. Krishna Kumar and Murli Manohar were impleaded as parties to those proceedings. For reasons, which do not appear on the record, Shrimati Javitri was not impleaded as a co-debtor. On 25-8-1943 the Special Judge apportioned among the debtors the debt due to the decree holders. Sam Eatan and his brothers were found liable to pay a half share of the decretal amount and Krishna Kumar Murli Manohar were held liable to pay the remaining half. Since Shrimati Javitri was not a party to those proceedings, she was not saddled with liability to pay any portion of the decretal amount.
4. An execution application had been presented by the decree holders against Krishna Kumar, Murli Manohar and Shrimati Javitri but it had been shelved because of the pendency of the proceedings before the Special Judge. After the apportionment of the liability by the learned Special Judge the aforesaid execution application was revived. A certain house was attached and proclaimed for sale. The sale was to take place on 12-4-1945. It was, however, adjourned on 15-7-1945. Meanwhile two other creditors put in applications for rateable distribution. The claim of one-of them to seek rateable distribution was rejected by the execution Court, but the right of the other creditor, namely, firm Earn Eatan Shyam Manohar was upheld. An intimation was sent to the amin and a note was made on the back of the sale warrant to the effect that the amount of the sale proceeds should be recovered in cash because the claim of firm Ram Ratan Shyam Manohar for rateable distribution had been entertained by the Court. It may, however, be pointed out that this endorsement on the sale certificate does not indicate what was the exact amount due to firm Earn Eatan Shyam Manohar.
5. The sale fixed for 15-7-45 was further adjourned till 27-7-1945. As the adjournment was for a period of less than fourteen days, no fresh proclamation was issued. On 28-7-1945 the amin started

the auction proceedings. At that stage, the judgment debtors (appellants) tendered to him a sum of Rs. 2,898 3-6 which was the amount mentioned in the sale proclamation. The sale proclamation contained a statement that the property sought to be sold had an encumbrance of Rs. 16,000 and old. The decree-holders contended before the amin that the sale should not be stayed unless the amount of the encumbrance was also paid in cash. The amin referred the matter to the Court and the Court passed an order stating that since there was an application for rateable distribution, the sale could not be stayed on payment of the sum of Rs. 2,898-3-6 which represented the decree-holders' claim only. On receipt of this order, the amin completed the sale. Brij Basi Lal (respon-det 1) purchased the property.

6. The appellants (judgment-debtors) presented a petition of objection before the execution Court. They raised several points, but the only one which is material now and which is pressed by their learned counsel is that in view of the provisions of Order 21, Rule 69 (3), the amin was bound to stay the sale when a sum of Rs. 2898-3-6 was tendered to him. According to his contention, no sale should have taken place. On that ground, the appellants sought the setting aside of the sale. This petition Of objection was stated by them to have been filed under Order 31, Rule 90, Civil P. C.

7. Another petition of objection had been filed several months earlier, that is, on 20.3-1945 by Shrimati Javitri. Her contention was that she was not liable to pay anything under the decree in view of the finding of the Special Judges. Further she contended that the house which had been attached and, of which the sale was sought by the decree-holders, was owned by her and that it was not attachable and saleable because she was not liable to pay anything under the decree. The connected Appeal No. 1378 of 1946 relates to her objection. I shall deal with it hereafter. For the present I propose to confine myself to the objec-tion filed fay the appellants.

8. The trial Court held that the appellants were bound to pay the entire amount, namely, the amount due to the decree-holders as well as to the claimants for rateable distribution and since they have not tendered that amount the sale was rightly held. The appellants preferred an appeal. The learned District Judge was of the opinion that it was not necessary to deposit the amount due to the claimants for rateable distribution but, in his view, the amount deposited by them in the first Court was insufficient even to satisfy the decree-holders' decree. The learned Judge pointed out that the sale having been adjourned at the appellants' request for a period of 13 days, interest for those 13 days had also accrued and since this amount had not been tendered by the appellants on the date of the sale, the amount so tendered by them was insufficient to discharge the decree in full. Further he was of the opinion that the costs incurred in respect of the two applications which had been presented by the decree-holders after the issue of the sale proclamation should also have been tendered by the appellants and since that was not done, the amount tendered was insufficient on that score also. On these findings, he dismissed the appeal with costs.

9. The judgment-debtors have come up in second appeal. A preliminary objection is taken by the learned counsel for the respondents. He contends that the appellants' petition of objection was one under Order 21, Rule 90, Civil P. C. and the decision was appealable as an order only once under Order 43, Rule 1 (j). He contends that no second appeal lies.

10. The learned counsel for the appellants concedes that no second appeal lies against the decision given on a petition presented under Order 21, Rule 90, Civil P. C., but he contends that his objection was not one under Order 21, Rule 90, Civil P. C., but it was one under Section 47, Civil P. C. He takes his stand on certain remarks of their Lordships of the Privy Council in *Prosunno Kumar v. Kali Das*, 19 Cal. 683. At p. 689 their Lordships remarked as follows:

"Their Lordships are glad to find that the Courts in India have not placed any narrow construction on the language of Section 244 and that, when a question has arisen as to the execution, discharge, or satisfaction of a decree between the parties to the suit in which the decree was passed, the fact that the purchaser, who is no party to the suit, is interested in the result has never been held a bar to the application of the section."

11. Before discussing the aforesaid dictum of their Lordships of the Privy Council, it is necessary to refer to the case of *Harindra Nath v. Bhola Nath*, 1937 ALL. L. J. 288. In this case, it was remarked at p. 291 that:

"Section 47, Civil P. C. is very wide in its terms and in one sense all questions relating to the execution, discharge or satisfaction of the decree that arise between the decree-holder and the judgment-debtor are within the purview of that section. Nevertheless the section ought to be so interpreted as not to render redundant the other provisions contained in the Code. When the judgment-debtor objects to the validity of an auction purchase made by the decree-holder in execution of the decree, the question no doubt is one between the parties to the suit and also relates to the execution of the decree. But this by itself is no warrant for holding that all objections by the judgment-debtor to the validity of an auction purchase made by the decree-holder or his application for setting aside such sale are necessarily within the scope of Section 47, Civil P. C. The Legislature has by Order 21, Rr. 89, 90 and 91 made provision for setting aside sale in certain events, and those rules are applicable to applications made by the judgment-debtor or by the decree-holder for setting aside a sale irrespective of the fact whether the decree-holder or a third person is the purchaser..... It follows that as between the judgment-debtor and decree-holder only such applications to set aside an auction purchase made by the decree-holder as do not come within the purview of Rr. 89, 90 and 91 are within the scope of Section 47, Civil P. C."

12. Their Lordships summarised the law at p. 292 and laid down that where the sale was sought to be set aside on the ground of any irregularity, the application shall be treated as one under Order 21, Rules 89, 90 and 91, but where it was sought to be set aside on the ground that the sale was a nullity, it would be treated as an application under Section 47, if the decree-holder himself happens to be the auction-purchaser. But when the auction-purchaser was a stranger, the remedy lay by means of a suit and not by means of a decree (application?).

13. Applying these rules, one finds that the appellants are on the horns of a dilemma. If their application is treated as one challenging the sale on the basis of an irregularity, it is to be treated as one under Order 21, Rule 90 and is not open to second appeal. On the other hand, if it is treated as one based on the suggestion that the sale was a nullity, their remedy was by way of a sale. So in either case, this appeal must fail.

14. The Privy Council case, *Prosunno Kumar v. Kali Das*, 19 Cal. 683 was discussed in the Pull Bench case of *Kedar Nath v. Arun Chandra*, reported in 1937 ALL. L. J. 889. It was pointed out by his Lordship the Chief Justice that that decision was given before the coming into force of the present Code. As the law stood on the date of that decision, no application could be made under Section 311 (which was the corresponding provision of Order 21, Rule 90), for setting aside a sale on the ground of 'fraud in publishing and conducting (the sale)'. His Lordship went on to point out that in that state of the law, the only possible conclusion could be that an objection of the nature of the present one should be treated as an objection under Section 47, but after the passing of the present Code, which made special provisions under Order 21, Rule 90 for disposing of such an objection the objection must necessarily be treated as falling under that rule and not as one falling under Section 47. It is, therefore, obvious that after the passing of the present Code, the pronouncement of their Lordships of the Privy Council is to be interpreted in the manner indicated in the above-mentioned Full Bench case, *Kedar Nath v. Arun Chandra*, 1937 ALL. L. J. 889.

15. It has been pointed out above that whether the appellants' objection in the Court below be treated as one under Section 47 or Order 21, E. 90, the present appeal must fail. But I do not wish to leave the matter in this state of uncertainty. It is better to record my view as to whether it is an objection under Order 21, Rule 90 or one under Section 47. I am of the opinion that it is an objection under Order 21, Rule 90, Civil P. C. The mere fact that the Court was of the opinion that a higher amount was due from the judgment-debtor will not make the order of sale as one passed without jurisdiction, nor will it make the sale a nullity. Even if it be assumed, for the sake of argument that the Court was wrong in its conclusions, still it had the jurisdiction to sell the property. I am not prepared to hold that the sale was a nullity on that ground. If the appellants' contention, namely, that they were liable to pay a smaller amount than that demanded by the Court below is accepted as correct, even then nothing more than an irregularity was committed and the sale was still not without jurisdiction. It cannot be described as void. Therefore, the objection was under Order 21, Rule 90. I am fortified in this conclusion by the fact that the appellants themselves described their petition of objection as one presented under Order 21, Rule 90, Civil P. C.

16. This means that the preliminary objection prevails and the appeal should be dismissed.

17. As the learned counsel on either side has argued the case on merits also, it seems desirable to discuss briefly that aspect of the case too.

18. Order 21, Rule 69 (3), Civil P. C., 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."

Learned counsel for the appellants interprets the expression 'debt and costs' as meaning amount specified in the sale proclamation. I am not prepared to accept this contention. In my opinion, the phrase 'debt and costs' means the debt and costs recoverable in the execution proceedings. In other words, this phrase includes the amount due to a claimant for rateable distribution whose claim has been accepted by the Court. Had it been the intention of the Legislature to stay the sale on a mere tender of the amount due under the sale proclamation, the Legislature would have adopted language similar to that contained in Order 21, Rule 89. There it is stated that the sale shall be set aside on payment of the amount specified in the proclamation in addition to the amount of solatium. Since the Legislature did not use such language, it is obvious that it was not the intention of the Legislature that the tender of the amount mentioned in the sale proclamation should suffice. 19. Another reason why this could not have been the intention of the Legislature is that there would be no sense in staying the sale in such circumstances. The amount tendered would become divisible between the decree-holder and the claimant for rateable distribution. The claims of both of them will remain unsatisfied in part. The result will be that the sale will have to take place afresh. Thus it becomes meaningless to stay the sale.

20. It may also be pointed out that under Order 21, Rule 55, as substituted by the Allahabad High Court the property could not be released from attachment on mere deposit of the amount stated in the sale proclamation without the deposit of the amount due for rateable distribution.

21. I am, therefore, of opinion that the Court was perfectly right in refusing to stay the sale unless the amount for rateable distribution was also tendered.

22. One of the reasons recorded by the learned District Judge for holding that the amount tendered was inadequate is also correct. The sale proclamation contained only the amount of principal and the interest due till the date fixed for sale. Since the appellants had themselves sought the adjournment of sale, they knew or should have known that they would be liable for payment of the interest for thirteen days more. It was their duty to pay up that amount also and, if they failed to do so, the amount tendered by them was certainly insufficient. On this ground also the order of the lower appellate Court should be upheld.

23. For the above reasons, the appeal fails. It is, hereby, dismissed with costs.

24. Next comes the appeal of Sm. Javitri. I have mentioned the grounds of her objection. When her objection came up for hearing, the decree-holders stated before the Court that they did not seek execution against her. It was pointed out by her learned counsel that her name had been mentioned in Col 10 of the execution application which is supposed to contain the names of the judgment-debtors against whom execution is sought. Thereupon the decree-holders' counsel prayed for amendment of the entry in that column. He prayed that Sm. Javitri's name might be deleted from that column. This was done. Thereupon the Court dismissed Sm. Javitri's petition of objection by a very brief order which runs as follows :

"The D H. has not claimed sale of the property of this J. D., applicant (vide application No. 34C). The objection has no force and it is dismissed with costs."

It may be pointed out that Sm. Javitri had claimed the house, of which the decree-holders had sought sale, as her house. That matter had to be decided.

If the house was owned by her and if the decree-holders had not sought the execution of the decree against her, the house could not be sold. The Court did not enter into that question and dismissed her objection.

25. She preferred an appeal and the learned District Judge held that she had no right to the house in question. Further he was doubtful as to whether an appeal lay at her instance. On these findings, he dismissed her appeal. She has now preferred a second appeal against that decision.

26. Sm. Javitri was a party to the decree. Section 47 says that all objections by parties to a decree shall be decided under Section 47. If she claimed the house as her property, the decision of that question was a decision under Section 47, Civil P. C., and amounted to a decree. As such, it is open to appeal and second appeal.

27. The learned District Judge's finding, namely, that she had failed to prove her title to the house has no force because she was never given an opportunity to prove her title. The order of the trial Court quoted above apparently disposed of her objection summarily without entering into the merits. She is entitled, therefore, to an opportunity to be heard and to prove her title. In her case, I propose to remand the case so that her objection may be decided on merits.

28. Appeal No. 962 of 1946 is dismissed with costs. Leave is given to file Letters Patent appeal.

29. Appeal No. 1378 of 1946 is allowed and the decisions of the Courts below are set aside. The case shall be remanded to the trial Court so that Sm. Javitri's objection (Misc. No. 36 of 1945) be heard and decided on merits. An opportunity shall be given to both parties to adduce evidence. Sm. Javitri will get her costs of this Court.

30. Permission to file Letters Patent appeal in this case is refused.