

Allahabad High Court

Badal Singh And Ors. vs Debi Saran Dhar Dube on 21 January, 1927

Equivalent citations: AIR 1927 All 395

JUDGMENT

1. The plaintiff in this suit is a mortgagee who obtained a decree on a mortgage executed by one Debi Saran in the year 1913 and in execution of that decree put the mortgaged property to sale and obtained full satisfaction on 22nd April 1919. At this point the mortgagor's grandson came forward and obtained a decree to the effect that the whole proceedings, including the mortgage and the sale, were void against him. As a result of that decree the auction-purchaser of the property demanded the return of his money and obtained the return of his money on the 22nd February 1923. This application has been made under Rule 6, Order 34 of the Civil Procedure Code for a personal decree against the mortgagor. The application was allowed by the Court of first instance but disallowed on appeal by the Subordinate Judge on two grounds. In the first place he holds that Rule 6, Order 34 has no application to this case and secondly that even if such an application could be made it is barred by the three years rule of limitation provided by Article 181 of the Limitation Act. Rule 6, Order 34 provides for a case in which the net proceeds of sale are insufficient to pay the amount due to the plaintiff. Now in the present case the net proceeds of the sale were sufficient to pay the amount due. But when in consequence of an order of the Court the plaintiff was compelled to refund to a third party the whole amount received by the sale, it must be held that the net proceeds of the sale were nil and therefore insufficient to pay the amount due. The lower Court has followed the authority of *Pirbhu Narain Singh v. Baldeo Misra* [1907] 29 All. 260. In that case there had been no sale and it was on this account that the learned Judge of this Court distinguished an earlier ruling in *Kedar Nath v. Chandu Mal* [1903] 26 All. 25. In our opinion the ruling in *Kedar Nath v. Chandu Mal* [1903] 26 All. 25 is more in point than the ruling in *Pirbhu Narain Singh v. Baldeo Misra* [1907] 29 All. 260 and we refer in particular to the passage of the judgment of Mr. Justice Aikman on page 27 where he says:

It appears to me that on this state of facts it would be in the highest degree inequitable to refuse him a decree by which alone he can recover from the judgment-debtors the unpaid balance of money which they owed him.

2. We would also remark that the Oudh Court at least has not followed the ruling reported in *Pirbhu Narain Singh v. Baldeo Misra* [1907] 29 All. 260 even in cases which were exactly parallel: see the judgment of Mr. Sundar Lal reported in the case of *Ram Raghubir v. Imami Begam* [1911] 14 O.C. 217 and that of Mr. Evans reported in the case of *Sheo Din v. Bhawani Baksh* [1911] 14 O.C. 62. Thus in our opinion Rule 6, Order 34 does apply to this case.

3. The second point to decide is that of limitation. The period of limitation under Article 181 of the Limitation Act begins to run from the date when the right to apply accrues. The lower Court finds that the right to apply accrued from the 14th August 1919 when the decree for setting aside the auction sale was passed. But that decree did not in itself take away from the present applicant the purchase money which he still continued to hold in execution of his decree, and we consider that his right to apply only accrued from the 2nd of February 1923 when the auction purchaser recovered the

money. On this finding the present application is within time. We, therefore, allow this appeal with costs and restore the order of the Court of first instance. Costs in this Court will include fees on the higher scale.