

CIVIL RULE.*Before Sanderson C. J. and Chotzner J.*

1921

July 21

SARODA KRIPA LALA (PETITIONER)

v.

HARENDRA LAL DAS* AND ANOTHER (OPPOSITE PARTY).

Execution Sale—Application to set aside sale—Subsequent purchaser—Civil Procedure Code (Act V of 1908) O. XXI, r. 89.

A purchaser of an immovable property from a judgment-debtor, subsequent to the sale of the same in execution of a decree, cannot apply to have the execution sale set aside on deposit under O. XXI, r. 89 of the Civil Procedure Code.

Pandurang Laxman Uphade v. Gorind Dada Uphade (1) considered.

THIS Rule was obtained by one Saroda Kripa Lala, the decree-holder purchaser, at an auction sale in execution of his decree. Two days after the sale in execution of the decree the judgment-debtor sold the same property to Harendra Lal Das, the opposite party, by a private conveyance. Harendra after his purchase applied to have the execution sale set aside on deposit under O. XXI, r. 89 of the Civil Procedure Code. The learned Munsif held that the private sale was void as against the decree-holder auction purchaser. Harendra appealed from that order to the Subordinate Judge, who allowed the appeal and set aside the order of the Munsif. On that this Rule was obtained by the auction purchaser.

* Civil Rule No. 16 of 1921, against the order of Aswini Kumar Das Gupta, Officiating Subordinate Judge of Chittagong, dated Sep. 30, 1920.

Babu Chandra Sekhar Sen, in support of the Rule. The purchase by the opposite party was subsequent to the auction sale. He had no interest in the property at the date of the execution sale: *Anantha Lakshmi Ammal v. Kunnan Chankarath Sankaran Nair* (1), *Ishar Das v. Asaf Ali Khan* (2), *Mussamat Dharmvanti Koer v. Seo Sankar Lall* (3), *Pandurang Laxman Uphade v. Govind Dada Uphade* (4).

Babu Kanaidhan Dutt, for the opposite party.

SANDERSON C. J. This Rule arises out of an order of the Officiating Subordinate Judge of Chittagong by which he overruled the decision which had been arrived at by the learned Munsif. It appears that the petitioner to this Court had obtained a money decree against one Ramesh Chandra Das, and that in execution of the decree the property of Ramesh Chandra Das was put up to sale by auction. The petitioner, the decree-holder, purchased the property at the auction sale for Rs. 375. Two days after the auction sale the judgment-debtor purported to sell the property by means of a *kobala* to a third party whose name was Harendra Lal Das. Harendra Lal Das then applied under Order XXI, r. 89, Code of Civil Procedure, for the purpose of making the deposits which are therein specified. The learned Munsif came to the conclusion that Harendra Lal Das was not qualified to make the deposit under Order XXI, r. 89. The learned Munsif held that the private sale was void as against the decree-holder who was the auction purchaser, and referred to section 64 of the Civil Procedure Code and he confirmed the sale to the auction purchaser. The result was that Harendra Lal Das appealed to the Subordinate Judge, who reversed

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(1) [1913] Mad. W. N. 101.

(3) (1919) 4 Pat. L. J. 340.

(2) (1911) I. L. R. 34 All. 186.

(4) (1916) I. L. R. 40 Bom. 557.

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the learned Munsif's order and remanded the case ~~for~~ taking the deposit and making the necessary orders thereon, if not otherwise barred. This Rule was issued at the instance of the decree-holder calling upon the opposite party to show cause why the order of the learned Subordinate Judge should not be set aside.

The question which has been argued on this Rule is whether Harendra Lal Das was a person entitled, within the meaning of Order XXI, r. 89, to apply to have the sale set aside upon complying with the terms of that rule.

The learned vakil, who has argued this case in support of the Rule, has drawn our attention to the several cases the decisions in which go to show that there is a considerable difference of opinion as to the meaning of the terms of this Rule. As for instance, the case of *Anantha Laksmi Ammal v. Kunnan Chankarath Sankaran Nair* (1), where the learned Judges took the view that the subsequent purchaser, if I may so call him (Harendra Lal Das in this case), would be qualified to apply under Order XXI, r. 89; the case of *Ishar Das v. Asaf Ali Khan* (2) where the learned Judges took a contrary view to that which was taken by the Madras High Court. Again in the case of *Mussamat Dhanwanti Koer v. Sheo Shankar Lall* (3), a view contrary to that of the Madras High Court was taken by the learned Judges of the Patna High Court. The last case, to which I need refer, is the case of *Pandurang Laxman Uphade v. Govind Dada Uphade* (4) of the Bombay High Court. In some of those cases there was a discussion as to the effect of the auction sale,—as to whether by reason of the auction sale the judgment-debtor was divested of

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all his interest in the property sold. The High Court at Patna seems to have taken the view that he was: on the other hand, the learned Judges of the Bombay High Court seem to have taken the view that the judgment debtor was not divested of all his interest in the property by reason of the auction sale, at all events, until it was confirmed. That point was raised during the argument on this Rule but I do not intend to express any opinion upon it, for, I do not think it necessary for the purpose of my judgment. I base my judgment upon what I consider to be the true interpretation of Order XXI, r. 89, so far as it is applicable to the facts of this case. The rule runs as follows:—

“(I) Where immoveable property has been sold in execution of a decree, any person, either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court”—then follows the particular sums to be deposited, which are specified in the section.

The view which was taken by the Bombay High Court in *Pandurang Laxman Uphade v. Govind Dada Uphade* (1), as appears from the head note, was that a judgment-debtor whose property had been sold at a court sale in execution of a decree against him had a right to apply to have the sale set aside as a person owning the property sold in execution of the decree within the meaning of rule 89 of Order XXI of the Civil Procedure Code of 1908, in spite of the fact that he had transferred his interest in the property after the court sale. That is not a decision expressly on the point now under consideration but there are some observations in the judgments, which are applicable. Batchelor J., at page 561, said “I am not able

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“to adopt the view that it is open to the subsequent purchaser to apply under this rule, for, as it seems to me, he is excluded by the term of the rule”; and later, on the same page: “For myself I can see no serious difficulty in holding that for the purposes of the rule the judgment debtor in the position of the present applicant is still the owner of the property in the eye of the law, the auction-sale being still unconfirmed,” and Shah J., at page 563 said “it seems to me that a person owning the property or holding an interest therein by virtue of a title acquired before the sale is within the rule, provided he owns it or holds an interest therein at the date of the sale by the Court”. In this case I have only to deal with the application by Harendra Lal Das, who purported to purchase the property from the judgment-debtor two days after the execution sale by the Court, and before the sale was confirmed, and to decide whether he was entitled to make the deposit under Order XXI, r. 89, and to apply to have the sale set aside.

In my judgment, Harendra Lal Das, “the subsequent purchaser”, as he has been called, is excluded by the express terms of the rule. The interest, if any, which he held in the property was not by virtue of a title acquired by him before the execution sale: his interest, if any, was by virtue of a title acquired after such sale and consequently, in my judgment, he is precluded by the very terms of the rule from applying under Order XXI, r. 89. That is the only point which I decide upon this application and, in my judgment, it is sufficient to justify me in holding that this Rule should be made absolute.

It was agreed by the two learned vakils who argued this case that there is no decision of this Court upon the point. Reference was made to the case of

Dulhin Mathura Keer v. Bangshidhari Singh (1). In that case the point, which is now before us, did not arise and was not dealt with by the learned Judges. For the abovementioned reasons, in my judgment, this Rule should be made absolute. The result is that the order of the learned officiating Subordinate Judge is set aside and the order of the learned Munsif is restored. We make no order as to costs.

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CHOTZNER J. I agree.

Rule absolute.

N. G.

(1) (1911) 15 C. L. J. 83.

PRIVY COUNCIL.

GOPAL LAL SETT (DEFENDANT)

v.

PURNA CHANDRA BASAK (PLAINTIFF)
AND OTHERS (DEFENDANTS)
(AND THE CONSOLIDATED APPEAL).

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[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Hindu Law—Will—Construction—Provision for worship—Absence of gift to idols—Person to whom will addressed and charge of worship given—Shebaitship—Private charity—Civil Procedure Code (Act XIV of 1882), s. 539.

The will of a Hindu testatrix was addressed to her grandson, and provided that out of the income of specified property he should perform the worship of certain family idols, and that he should be the person in charge of the worship. The will contained no gift, express or to be implied, to the idols; and there was no provision for the worship after the death of the grandson.

Present: LORD BUCKMASTER, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.