

CIVIL REVISION.

Before Nasim Ali and Khundkar J.J.

RADHAKISHAN MAHESRI

v.

TANSUKH MAHESRI.*

1934

July 31;
Aug. 9.

Auction Sale—Application for setting aside sale—Limitation—Decree-holder—Rateable distribution—Notice—Jurisdiction—Code of Civil Procedure (Act V of 1908), O. XXI, rr. 90, 92 (2) prov.

An application, for setting aside a sale within the prescribed period of limitation under the proviso to rule 92(2) of Order XXI of the Civil Procedure Code, is not bad in form, if notice has not been served on any person, who may be affected by the order setting aside the sale.

The court has power to issue such notice, as the law does not impose any period of limitation for the said purpose.

Where a decree-holder, who is entitled to rateable distribution, is not mentioned as a party to the application for setting aside the sale within the period of limitation prescribed for such an application, the application is not bad and the court has jurisdiction to entertain such an application.

Raj Chandra Das v. Kali Kanta Das (1) referred to.

Ajiuddin Ahamed v. L. Khoda Bux Khondkar (2) not followed.

CIVIL RULE under section 115 of the Code obtained by the applicants.

The facts of the case appear sufficiently in the judgment.

Rajendrachandra Guha for the petitioners. The lower court has erred in law in dismissing the petitioner's application under Order XXI, rule 92 (2) proviso, of the Code of Civil Procedure on the preliminary ground that another decree-holder, who had applied for a rateable distribution of the sale proceeds and had got a part thereof, had not been made a party within the prescribed period of limitation; and the court has in consequence failed to exercise a jurisdiction vested in it by law.

*Civil Revision, No. 939 of 1934, against the order of J. Younie, District Judge of Jalpaiguri, dated May 4, 1934, affirming the order of A. Banerji, Subordinate Judge of Jalpaiguri, dated Dec. 14, 1933.

(1) (1922) 82 Ind. Cas. 776 ;

(2) (1919) 50 Ind. Cas. 5.

[1923] A. I. R. (Calc.) 394.

Atulchandra Gupta (with him *Sateeshchandra Singha*) for the opposite party. The court below had no jurisdiction to entertain such an application after the prescribed period of limitation. The auction-purchaser should be made a party. I rely on the decision in *Ajiuddin Ahamed v. I. Khoda Bux Khondkar* (1).

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Cur. adv. vult.

The judgment of the Court was as follows:—

This Rule is directed against an order of the District Judge of Jalpaiguri dated the 4th May, 1934, confirming in appeal an order of the Subordinate Judge of the same district in a proceeding under Order XXI, rule 90, Civil Procedure Code. The courts below have dismissed the petitioners' application under Order XXI, rule 90, not on the merits, but on a preliminary ground, that another decree-holder, who had applied for rateable distribution of the sale proceeds and had got part of them, had not been made a party within the period of limitation for such an application and consequently the court had no jurisdiction to entertain such an application.

The only point for determination, therefore, is whether the courts below were wrong in dismissing the petitioners' application under Order XXI, rule 90 on this preliminary ground.

Order XXI, rule 92, clause (2), Civil Procedure Code, is in these terms:—

Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, the court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

The Code does not say that the parties, who would be affected by the order setting aside the sale, should be formally described as parties in the application for setting aside the sale. The names of the parties in the present case, who will be affected by such an order, are already on the record of the execution case. It would, therefore, be sufficient if, before the sale is set aside,

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notice is given to the persons, who would be affected thereby, inasmuch as the proviso to clause (2) of rule 92 simply lays down that no order setting aside the sale should be made, unless notice of the application for setting aside the sale has been given by the court to the persons affected, thereby. The learned advocate for the opposite party, however, relied upon a decision of this Court in the case of *Ajiuddin Ahamed v. L. Khoda Bux Khondkar* (1). It is not, however, clear from the judgment in that case what the learned Judges meant, when they observed that the auction-purchaser should be made a party.

If by the expression it is understood that the parties to the application should be arrayed in the corresponding categories of plaintiffs and defendants, there is no provision to that effect within the four corners of the Code of Civil Procedure. To hold otherwise would necessitate reading into the proviso to Order XXI, rule 92, a mandatory provision which could have, had the legislature so intended, been expressly mentioned.

See *Raj Chandra Das v. Kali Kanta Das* (2).

We are, therefore, of opinion that the application is not bad in form. If notice has not been served on any person, who may be affected by the order setting aside the sale, the court has power to issue any such notice, as the law does not impose any period of limitation for the said purpose. The learned Judge was, therefore, not right in holding that, as the decree-holder, who is entitled to rateable distribution, was not mentioned as a party to the application for setting aside the sale within the period of limitation prescribed for such an application, the application was bad and the court had no jurisdiction to entertain such an application.

We, therefore, make the Rule absolute, set aside the order of the courts below dismissing the petitioners' application for setting aside the sale and direct that the said application be heard according to law by the learned Subordinate Judge.

Costs of this Rule will abide the result—hearing fee being assessed at one gold mohur.

Rule absolute.

G. S.

(1) (1919) 50 Ind. Cas. 5.

(2) (1922) 82 Ind. Cas. 776 ;
[1923] A. I. R. (Calc.) 394.