

CIVIL REVISION.

Before Mukherjea J.

KIRAN BALA SHAHA

v.

SUNITI PRABHA SHAHA.*

1938

Nov. 10, 11.

Auction sale—Subsequent transferee of the judgment-debtor, if can maintain application to set aside the sale—Code of Civil Procedure (Act V of 1908), O. XXI, r. 90.

A person who takes a conveyance of an immoveable property sold in execution of a decree from the judgment-debtor after the auction-sale is not one "whose interests are affected by the sale" within the meaning of O. XXI, r. 90, of the Code of Civil Procedure, and, is not entitled to maintain an application to set aside the sale under that Rule.

Surendra Nath Das v. Alauddin Mistry (1); *Khetro Mohon Datta v. Sheikh Dilwar* (2); *K. V. A. L. Chettyar Firm v. M. P. Maricar* (3) and *Nihal Chand-Gopal Das v. Pritam Singh* (4) referred to.

Ravinandan Prasad v. Jagarnath Sahu (5) and *Bhavisetti Gopalakrishnayya v. Pakanati Pedda Sanjeeva Reddy* (6) distinguished and dissented from.

CIVIL RULE obtained by the auction-purchaser.

The facts of the case and the points raised in the argument on behalf of the petitioner are sufficiently stated in the judgment.

Surajit Chandra Lahiri and *Smriti Kumar Roy Chowdhury* for the petitioner.

No one appeared for the opposite party.

Cur. adv. vult.

*Civil Revision, No. 345 of 1938 against the order of J. Chatterji, Subordinate Judge, Faridpur, dated Dec. 8, 1937, reversing the order of Bhabesh Chandra Sen Gupta, First Munsif of Goalundo, dated Feb. 27, 1937.

(1) (1928) 49 C. L. J. 207.

(2) (1918) 3 Pat. L. J. 516.

(3) (1928) I. L. R. 6 Ran. 621.

(4) (1932) I. L. R. 14 Lah. 1.

(5) (1925) I. L. R. 47 All. 479.

(6) [1920] A. I. R. (Mad.) 145.

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MUKHERJEA J. This Rule is directed against an appellate order passed by the Subordinate Judge, Faridpur, dated December 8, 1937, reversing the order of the First Munsif at Goalundo passed in a proceeding under O. XXI, r. 90, Code of Civil Procedure.

The facts are not in dispute and the controversy centres round a short point. The petitioner is the auction-purchaser at an execution-sale, which was held on June 24, 1936. The opposite party No. 1 took a conveyance of the interest of one of the judgment-debtors by a *kabâla* which was executed on July 7, 1936, that is to say nearly two weeks after the sale was held. She at first applied for making a deposit under O. XXI, r. 89, of the Code, but that application being rejected she started the present proceeding under O. XXI, r. 90, of the Code for setting aside the sale on grounds of material irregularity in publishing or conducting the sale resulting in substantial loss to her.

The trial Court dismissed the application on the ground that, as the applicant was a purchaser after the sale was held, she had no *locus standi* to make the application. This decision was reversed on appeal and the appellate Court has come to the conclusion that the words "whose interest is affected "by the sale" as used in O. XXI, r. 90, of the Code are wide enough to include a person who has acquired an interest in the property subsequent to the sale. As the appellate Court held on evidence that there had been irregularity in publishing or conducting the sale by reason of which the judgment-debtor suffered loss the sale was set aside. It is against this order that the present Rule has been obtained.

The only point argued before me is as to whether the opposite party, who admittedly purchased the property after the execution-sale, is competent to apply for setting aside the sale under O. XXI, r. 90, of the Code.

Under O. XXI, r. 90, the decree-holder or any person who is entitled to have a share in the rateable distribution of assets or whose interest are affected by the sale can apply to the Court to have the sale set aside. The words "whose interests are affected by the sale" are certainly very much comprehensive and are of wider import than the words "person whose immoveable property has been sold" as they occurred in the old Act of 1882. It is now settled that the word "interest" as used in this Rule is not limited to proprietary or possessory interest in the property itself, but extends to other kinds of interest pecuniary or otherwise which is in any way affected by the sale. But whatever the nature of the interest might be, it is clear to me from a plain reading of the section that the interest must be in existence at the time when the sale takes place and must be prejudicially affected by it and if it is created after the sale, it is inconceivable how it can be affected by the sale and give the person a right to set it aside. This view has been taken in the cases of *Surendra Nath Das v. Alauddin Mistry* (1); *Khetro Mohon Datta v. Sheikh Dilwar* (2); *K. V. A. L. Chettyar Firm v. M. P. Maricar* (3) and *Nihal Chand-Gopal Das v. Pritam Singh* (4). In all these cases it was held that the auction-purchaser at an execution-sale was not competent to make any application under O. XXI, r. 90, of the Code, inasmuch as his interest was created by the sale itself and had no existence prior to it. I am not unmindful of the fact that a contrary opinion has been expressed by the Madras and the Allahabad High Courts on this point [*vide* the cases of *Ravinandan Prasad v. Jagarnath Sahu* (5) and *Bhaviriseti Gopalakrishnayya v. Pakanoti Pedda Sanjeeva Reddy* (6)] and they have allowed the auction-purchaser to attack the sale under O. XXI, r. 90, of the Code. Walsh J., who delivered the judgment in the Allahabad case, was of opinion that

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a purchaser whose bid was accepted at an execution-sale incurred certain liabilities, inasmuch as he was compelled to pay the deposit and complete the purchase which involved the necessity of finding the necessary funds and also the necessity of carrying through to fruition the provisional contract into which he has entered. The Madras High Court, on the other hand, laid stress on the fact that the auction-purchaser was a necessary party according to law in a proceeding to set aside the sale and consequently he had an interest in the property which is affected by the sale which makes him competent to come in and apply under O. XXI, r. 90, of the Code. The reasons given above do not appear to me to be cogent and they have not been accepted by Mitter J. in the case reported in *Surendra Nath Das v. Alauddin Mistry* referred to above. But even assuming that the reasons given by the learned Judges are correct, they do not touch the present case. The interest, if any of the opposite party in the present Rule, was not created even by the sale and he acquired no rights and incurred no obligations under it as the auction-purchaser would. She is not a necessary party in the sale set aside proceeding and I have not the least doubt that she does not come within the purview of O. XXI, r. 90, of the Code.

The result is that this Rule is made absolute. The order of the lower appellate Court is set aside and that of the trial Court restored.

As the purchaser according to the findings of the Courts below was the wife of one of the judgment-debtors and was held to be his *benāmdār*, I direct that each party would bear his own costs throughout.

Rule absolute.

A. A.