

REVISIONAL CIVIL

Before Mr. Justice Ziaul Hasan

1936
September, 28

SARDAR KHAN (PLAINTIFF-APPLICANT) v. BADRI PRASAD
(DEFENDANT-OPPOSITE-PARTY)*

Civil Procedure Code (Act V of 1908), order XXI, rules 91 and 93—Execution of decree—Sale in execution—One of several decree-holders purchasing property—Judgment-debtor held not owner of property sold on suit of third party—Auction purchaser decree-holder deprived of property whether can recover back money paid to another decree-holder in rateable distribution.

Where a person purchases immovable property at an auction sale in execution of a decree of court and subsequently loses the same under a decree passed in a suit brought by a third party against the purchaser, the decree-holder and the judgment-debtor, such a purchaser is entitled to bring a suit for the recovery of his purchase money as against the decree-holder and it makes no real difference if he was himself one of the decree-holders who brought the property to sale. *Bahadur Singh v. Ram Phal* (1), followed.

Mr. R. D. Sinha, for the applicant.

Mr. H. H. Zaidi holding brief of Mr. Hyder Husain, for the opposite party.

ZIAUL HASAN, J.:—This is an application under section 115 of the Code of Civil Procedure for revision of a decree of the learned Civil Judge of Unao dismissing the applicant's suit for money against the opposite-party.

The applicant held a money decree against a certain Shambhu Narain and so did the opposite-party, Badri Prasad. Badri Prasad put his decree in execution by attachment and sale of a house alleged to be the property of Shambhu Narain. The applicant applied for execution of his own decree against Shambhu Narain and prayed that a rateable distribution be made of the sale proceeds of the house which was going to be sold in

*Section 115 Application No. 121 of 1935, against the order of Pandit Dwarka Prasad Shukla, dated the 15th of August, 1935, reversing the order of S. Hasan Irshad, Munsif of Safipur at Unao, dated the 12th of January, 1935.

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execution of Badri Prasad's decree. The house was sold for Rs.300 and purchased by the present applicant. Out of the sale proceeds a sum of Rs.237-0-6 was paid to Badri Prasad rateably on the amount of his decree, Rs.18-12 were deducted about the sale commission and the balance of Rs.44-3-6 was paid to the applicant himself about his decree. Subsequently Musammat Sheorani, mother of the judgment-debtor, brought a suit for possession of the house on the ground that it was her property and was wrongly sold in execution of the decrees against her son. To this suit both the present applicant and Badri Prasad were parties. The suit was decreed and possession of the house was delivered to Musammat Sheorani. Thereupon the applicant brought a suit which has given rise to this application for recovery of Rs.255-12-6 (that is Rs.237-0-6 received by Badri Prasad as his share of the sale proceeds plus Rs.18-12 sale commission) from Badri Prasad on the ground that he himself believed in a *bona fide* manner that the house belonged to Shambhu Narain and that the loss was caused to him by reason of Badri Prasad putting the house to sale in execution of his decree.

The trial court decreed the applicant's suit but the learned Civil Judge in appeal dismissed it holding that the applicant himself was as much responsible for the sale of the house as Badri Prasad. It is against this decree that the present application has been filed.

I have heard the learned counsel for both parties and am of opinion that the application must mainly succeed. In the Full Bench case of *Bahadur Singh v. Ram Phal* (1), it was held that when a person purchases immovable property at an auction sale in execution of a decree of court and subsequently loses the same under a decree passed in a suit brought by a third party against the purchaser, the decree-holder and the judgment-debtor, such a purchaser is entitled to bring a suit for the recovery of his purchase money as against the decree-

(1) (1929) I.L.R., 5 Luck., 552.

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holder. The learned Judge of the court below distinguished this ruling on the ground that while in that case the auction purchaser was a third party, in the present case the plaintiff was himself one of the decree-holders who brought the property to sale. I do not think, however, that this makes any real difference. HASAN, J. (subsequently Sir Wazir Hasan, the late Chief Judge of this Court) in his judgment made the following observations:

“According to section 3 of the Oudh Laws Act, 1876, the law to be administered by the Courts of Oudh shall be as follows:

- (a)
- (b)
- (c)
- (d)
- (e)
- (f)
- (g) in cases not provided for by the former part of this section or by any other law for the time being in force, the courts shall act according to justice, equity and good conscience.”

Then, referring to the case of *Imperial Bank of Canada v. Bank of Hamilton* (1) he quoted the following remark of their Lordships of the Privy Council:

“But means of knowledge and actual knowledge are not the same; and it was long ago decided in *Kelly v. Solari* (9 M. & W., 58) that money honestly paid by mistake of facts could be recovered back although the person paying it did not avail himself of means of knowledge which he possessed. This decision has always been acted upon since and their Lordships consider it applicable to the present case.”

Referring to this passage the learned Judge says:

“To my mind the above pronouncement is conclusive on three points—

- (1) that an action would lie to recover back money honestly paid under a mistake of facts,
- (2) that it is enough that the person paying money had no knowledge of the true state of facts at the time of the

(1) (1903) A.C., 49.

payment though he had had means of knowing the true facts, and

(3) that the action would lie even in cases where money has not been paid by virtue of a contract."

Applying these principles to the case before me, it is quite clear that the plaintiff-applicant is entitled to recover the money that the opposite-party received out of the sale proceeds of the house. There can be no doubt that both the parties were under a mistake of fact as to the ownership of the house that they brought to sale and now that the house has been held not to have belonged to the judgment-debtor and has been taken out of the possession of the applicant, justice, equity and good conscience require that the applicant should get his money back from whosoever received it in pursuance of the sale. To my mind it would be unfair to hold that because the plaintiff-applicant himself was as mistaken as Badri Prasad on the question of the ownership of the house, Badri Prasad should be allowed to keep the money acquired by him on account of the mistake of both the parties. In this view of the matter the plaintiff-applicant is entitled to recover Rs.237-0-6 that Badri Prasad received out of the sale proceeds but not the whole of the amount of Rs.18-12 deducted about the sale commission. Out of this amount he should, in my opinion, get only one-half.

The application is, therefore, allowed in part and the plaintiff's suit decreed for Rs.246-6-6 only with proportionate costs.

Application partly allowed.

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