

1923.

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v.  
NILRATAN  
ADHIKARI.  
MULLICK, J.

With regard to the objection that the decree is a nullity because it was not made in accordance with the provision of Order XXXIV, of the Civil Procedure Code, in my opinion it was open to the parties to dispense with a preliminary decree; the making of a final decree payable in instalments was not illegal, much less was it a nullity, and in any event such a decree could not be challenged in execution proceedings.

*Appeals dismissed.*

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### REVISIONAL CIVIL.

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*Before Das and Macpherson, J.J.*

JAIBAHADAR JHA

v.

MATUKDHARI JHA.\*

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*April, 17.*

*Execution Sale—when completed—procedure to be observed—Code of Civil Procedure, 1908 (Act V of 1908), Order XXI, rule 84.*

An execution sale, whether held in the immediate presence of the presiding officer of the court or not, is not complete until the presiding officer of the court has accepted the bid and declared the purchaser under Order XXI, rule 84. A mere order to close the bidding does not complete the sale even though the highest bidder is erroneously permitted to make the deposit required by rule 84.

The formal order declaring who has purchased the property put up for sale should be submitted for signature under rule 84 expeditiously, before the presiding officer rises for the day, and the presiding officer of the court, before signing the bid, should enquire from the persons present in court whether there is any advance on the highest bid given by the officer conducting the sale.

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\* Civil Revision No. 411 of 1922, from an order of Maulavi Aziz Ahmad, Munsif of Madhubani, dated the 16th November, 1922, in Execution Case No. 711 of 1922.

The facts of the case material to this report are stated in the judgment of Macpherson, J.

*Murari Prasad*, for the petitioner.

*Lakshmi Kant Jha*, for the opposite party.

MACPHERSON, J.—The circumstances in which we are asked to interfere in this case hardly admit of any dispute. A *raiyati* holding was put up to auction on the 15th November, 1922, under the orders of the Munsif of Madhubani. The sale was conducted by the *nazir* of the Court, who is the officer of the Court designated under Order XXI, rule 65, of the Code of Civil Procedure and the High Court General Rules and Circular Orders, but not in the presence of the Court. The bid-sheet, the entries in which are in the handwriting of the *nazir*, shows that the decree-holder bid Rs. 188, one Babunandan Rs. 189, the petitioner, Jaibahadar Jha Rs. 200, Babunandan Rs. 215 and the petitioner Rs. 220. The *nazir* sent the bid-sheet, in accordance with practice, to the Munsif who wrote "Close" against the last offer, and signed the order. The petitioner thereafter, purporting to act under Order XXI, rule 84, paid in by *chalan* to the officer conducting the sale a deposit of one-fourth of Rs. 220. After the Court had risen for the day, certain persons, including the opposite party, approached the Munsif and represented that they had been waiting the whole day to bid and that no public auction had taken place. The learned Munsif informed them that he had not signed the order "knocking down the sale" and would consider their representation next day. On the following day, when the Munsif took his seat in his private chamber, order No. 3 in the order-sheet, dated the 15th November, was put up before him for signature by the execution clerk, and it is as follows :

" Sale held. One Jaibhadar Jha purchased the property at Rs. 220 and deposited the earnest money today. *Vide chalan* No. 1184. The purchaser to deposit the balance of the purchase money in time. Put up on 1st December 1922."

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The Munsif initialled this order. He was then about to sign the following order on the bid-sheet which had been written and sent by the *nazir*,

" Sale knocked down in favour of Jaibhadar Jha son of Sona Lal Jha, Bhatsiwar, pargana Bachow for Rs. 200 only. Munisif, 15th November 1922,"

and which should have been put up for signature before the order on the order-sheet, when he realized that the case must be that regarding which certain persons had approached him on the previous day. He then made enquiries from them and from his office. As a result he struck out his incomplete signature on the bid-sheet and cut his initials to order No. 3 on the order-sheet. On the bid-sheet he wrote :

" Some of the intending purchasers represent that the sale took place in their ignorance, while they were ready to bid for high amount. In the interest of the judgment-debtor the property is put to sale again,"

and signed and dated this order the 15th (or 16th—the figure is not clear) November. In the order-sheet he wrote :

" Before the sale was knocked down, some of the intending purchasers represented to me that sale took place in their ignorance while they were ready with their money to bid at the sale. As the sale appears to me to have been conducted in haphazard way, in the interest of the judgment-debtor the property is put to sale again."

He affixed no date to this order, though order No. 4 in the order-sheet, which is in the handwriting of the clerk, is dated the 15th and is :

" Put up for sale tomorrow as there is no time today."

Order No. 5, dated the 16th November, is :

" One Radhakant Jha and others file a petition stating that the decreeholder wants to get the property sold secretly and praying that the sale be held in the presence of their pleader. Let the sale be held as prayed for."

The auction was accordingly resumed on the same day in the presence of the Munsif himself, Rs. 220 being the starting point. The petitioner appears to have been present but he did not interpose. The first bid of the day was Rs. 420 and it came from Mutukdhari Jha, the present opposite party. There was a spirited contest, and eventually against Mutukdhari Jha's final bid of Rs. 1,075, the Munsif

wrote and signed the order "Closed," and later affixed his full signature to the order endorsed by the *nazir* on the bid-sheet :

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and also, after the opposite party had made the deposit required under Order XXI, rule 84, on the order-sheet of the case to an order in the same terms as order No. 3 quoted above. On the 6th December both, the opposite party and the petitioner, deposited the balance of the purchase money. As regards the latter, the Munsif recorded the order :

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" One Jaibhadar Jha in whose favour the sale was not knocked down, has deposited the balance of purchase money. He is directed to take back his money."

The learned Munsif has not yet confirmed the sale, as proceedings were stayed by order of this Court prior to the date fixed for the confirmation of the sale.

In the view of the learned Munsif there had been no sale to the present petitioner. By his order "Close" he merely meant the officer conducting the sale to stop the auction and put up for the Court's signature the order knocking down the property and declaring the purchaser under Order XXI, rule 84. The sale in his view would be completed only after the Court's signature was obtained. The passing of the *chalan* for the earnest money was done erroneously by the *sarishtadar* in anticipation of the Munsif's acceptance of the highest bid which would have been forthcoming in ordinary cases and would have denoted the completion of the sale.

There are no materials before us upon which it is possible to determine whether on the 15th November the *nazir* conducted the auction in a hole-and-corner fashion. The rule laid down by the High Court, which is also in accordance with long standing practice, is that the auction should be conducted in the immediate presence of the presiding officer, and where that is not possible, in another place within the Court premises to be selected by the presiding officer. No application was made under Order XXI, rule 90. The

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only point for determination, therefore, is whether there was a sale to the petitioner on the 15th. If there was, the Munsif, as is obvious and as indeed is admitted, acted without jurisdiction in resuming the auction on the following day and purporting to sell the property to the opposite party.

Mr. *Murari Prasad*, on behalf of the petitioner, contends that in the circumstances the sale to his client was complete and he should be considered to have been declared the purchaser of the immovable property within the meaning of Order XXI, rule 84. He claims that the word "Close" written by the Munsif showed that the Court had accepted the bid and that the order "Knocked down to, etc." was in the circumstances superfluous being merely a record of the fact of sale such as was also entered in the order-sheet. Stress is laid on the allegation that an order to the prejudice of the petitioner was made without hearing him.

This contention is, in my judgment, not well-founded. The petitioner who, as appears from the affidavit of the opposite party, was present in Court on the 16th when the auction was resumed, made no protest, though the opportunity presented itself, and it is not unreasonable to infer that he also understood that the sale was not complete. The contention, moreover, takes no account of the distinction which has on several occasions been pointed out in this Court, between the function of the presiding officer in connection with a civil court sale and the function of the officer who conducts the sale. The sale is held by the Court. Thus, in *Miscellaneous Appeals No. 112 to 114 of 1922*, the sales were not set aside inasmuch as they had, it was found, been completed, the bid having been accepted by the Court (and not only by the *nazir*) and the purchaser having been declared. In fact, the function of the *nazir* or other officer appointed by the Court to conduct the auction is of a ministerial character: if he conducts it in presence of the presiding officer, the latter is still in direct charge of it, forthwith declares under Order XXI, rule 84, who the purchaser is and signs the formal order (as in fact

happened on the 16th November in this case), and the sale is not complete until the declaration has been made and the order signed. Equally when the auction is (for reasons of convenience) not held in his presence, the presiding officer is still in charge of it and the officer conducting the sale is in no more responsible position than if he were conducting it in presence of the presiding officer : that the sale may be completed, not only the order of the presiding officer to close the bidding, but also his order under Order XXI, rule 84, formally accepting the bid and declaring the purchaser is required, exactly as in sale proceedings conducted in his presence. In really efficient proceedings, the officer conducting the sale puts up the formal order under rule 84 for signature expeditiously and certainly before the presiding officer rises for the day, and the presiding officer before signing the order enquires from the persons present in Court whether there is any advance on the highest bid given to the *nazir*. In the case before us the proceedings were somewhat casual, both on the part of the officer conducting the sale, who did not put up the order terminating the sale and yet in anticipation of it erroneously accepted from the highest bidder the deposit required from a declared purchaser, and on the part of the Court which rose before the proceedings in connection with the sale had been concluded. Nevertheless, it is manifest that there was no sale to the petitioner since until a bid has been accepted, it is only an offer and there is no sale—in such a case it is open to the Court to resume the auction. That is what occurred in the present instance. As there was no sale to the petitioner the Court did not act without jurisdiction in declaring the opposite party to be the auction-purchaser, and there is no reason, so far at least as the petitioner is concerned, why the sale to the opposite party should not be confirmed.

Accordingly the application fails and is dismissed with costs.

DAS, J.—I agree.

*Application dismissed.*

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