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Court : Allahabad

Decided On : Feb-11-1925

Reported in : AIR1925All456; 87Ind.Cas.349

Appellant : Mulay

Respondent : Balgobind and anr.

Judgement :

Mukerji, J.

1. This appeal is by the defendant and arises under the following circumstances. Respondent Bal Govind held a simple money decree against one Kanak Singh who has since died, and in execution of the decree Kanak Singh's property, which is now in dispute, was attached, Sale proclamation was issued, but no sale was effected. On the 11th of September, 1920, the executing Court passed a certain order, the effect of which has to be considered in this appeal. The order was somewhat in the following language:

Since the decree-holder has failed to pay the cost of munadi (proclamation of sale by beat of drums) the execution case be struck off as infructuous the attachment will stand. The execution costs will be paid by the judgment-debtor.

2. Four days later, the decree-holder again applied for execution. the Court held that the order dismissing the execution application for default was really a wrong

order because nothing whatever was to be done by the decree-holder towards the sale being effected. It, accordingly, proceeded with the execution at the stage is stood, on the 11th of September, 1920. While the second stage of the proceeding was being held, on the 4th of November, 1920, the defendant purchased the property. The attachment effected at the instance of the decree-holder was duly followed by a sale in execution and the property was purchased by the decree-holder the defendant in pursuance of his private purchase obtained an order for mutation of names in his favour and there-fore, the decree-holder purchaser could not obtain a mutation order in the Revenue Court. He, thereupon, instituted the suit for recovery of possession and mesne profits against the purchaser from the judgment-debtor.

3. Two points have been urged in this Court. One is that in spite of the order of learned Munsif, dated the 11th of September, 1920, that the attachment should stand it did not stand and secondly, in any case, the appellant should be allowed to retain the property by paying off the decretal amount due to the auction-purchaser as the decree-holder.

4. In my opinion none of the points is tenable.

5. Taking the second point first. It is clear that the respondent Balgobind obtained a complete title to the property if the attachment subsisted. In the circumstances there is no reason why he should lose the property on receiving the decretal amount.

6. Coming to the first point. It is not even the case that the appellant is purchaser between the two dates, viz., the date of dismissal of the execution proceeding and the date of its revival. I need not express any opinion as to what would have happened if the purchase had been made between those two dates. It has been held in this Court vide Mohammad Mubarak Husain v. Sahu Bimal Prasad A.I.R. 1922 All. 62 that an order directing the attachment to subsist in the case of a default on the part of the decree-holder would be an improper order, but it would not be a nullity and would be binding on the parties to it. This is the latest case in this Court and the learned Judga who decided it distinguished an earlier case of Dildar Husain v. Sheo Narain (1919) 41 All. 157. The appellant in this case claims

under one of the parties to the order, viz., the judgment-debtor, and is bound not only by the order of the 11th of September, 1920, but also by the order passed on the application, dated the 15th of September, 1920. On the same date as this application was made, that is to say on the 15th of September, 1920, the Court ordered that a sale proclamation should issue. The Court evidently held that the attachment subsisted. In the teeth of these two orders it was not open to the judgment-debtor to transfer the property so as to give a person claiming under him a title, better than his own.

7. The result is that there is no force in this appeal and it must fail. The appeal is dismissed with costs.

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