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Court : Kolkata

Decided On : May-30-1934

Reported in : AIR1934Cal764a,152Ind.Cas.770

Appellant : Mukhram Agarwalla and ors.

Respondent : S. Ehsan Ahmad and ors.

Judgement :

1. This rule is issued on the opposite party to show cause why the judgment and order dated 5th September 1933 of the Subordinate Judge of Darjeeling in Mortgage Execution Case No. 9 of 1933 should not be set aside and the sale confirmed. The circumstances are as follows: The decree-holders Mukhram Agarwalla and others obtained a decree against Section Ehsan Ahmad and others and in execution of that decree, they on 4th August 1933 purchased in auction sale the properties of the judgment-debtors worth Rs. 7,000. On the date of sale and shortly before the sale was held Mukhram Agarwalla and another and Nagar Chand Goenka Agarwalla proprietor and partner of the firm of Pokurmull Shew Narayan applied for rateable distribution in execution of the decree held by them against the judgment-debtor. The learned Subordinate Judge directed rateable distribution of their decree which was for Rs. 6,125. It is against this order that this rule has been issued and also against the order of the Court directing the petitioners to deposit the purchase money of Rs. 7,000 as they were led to expect that the amount of this decree would be set off against the purchase money. The grounds of this application are that the Court below had no jurisdiction to recall its

order allowing set off and acted without jurisdiction in directing the petitioners to deposit the purchase money; secondly, that the Court below should have held that the claimant decree-holders were not holders of any decree for the payment of money within the meaning of Section 73, Civil P. C, and as such it acted without jurisdiction in entertaining their claim for rateable distribution and finally that the finding by the Court below that mortgaged properties of Pokhermal's decree had been sold and exhausted and found insufficient to satisfy the decree was not warranted by the evidence on record relied on by the learned Judge.

2. According to the terms of the final decree in default of defendants paying up by the due date, the shares of the first three defendants in the property will be sold for satisfaction of the decree, the balance of the decretal amount must be satisfied out of other assets of the defendants (including defendant 4's share in the Diana Tea Co.). The mortgaged property was 10 shares in the Tea Co. and the decree for sale was that the shares of three of the judgment-debtors in these Tea shares must be sold in the first instance and if the decretal amount was not realised by sale of their shares, the balance must be realised by the sale of the other shares of the defendants including defendant 4's share. The question is whether this can be regarded as a personal decree. Under the terms of Order 34, Rule 6 where the net proceeds of any sale held under Rule 5 are found insufficient to pay the decretal amount, on the application of the plaintiff the Court may, if the balance is legally recoverable from the defendant otherwise than out of the property sold pass a decree for such balance. It is therefore argued that there must be a separate application for personal decree. There is authority for holding that a composite decree such as has been passed in this case though improper is not on that account invalid. We find in this case in the preliminary decree also there is a direction that if the decretal amount is not realised by the sale of the property mortgaged the decree-holder will be entitled to realise the balance by personal decree. In the case of 1918 P. C. 159 Jeuna Bahu v. Parmeshwar Narayan, 1918 PC 159 it was held that

a decree for the sale of mortgaged property can validly provide that if the proceeds of sale are not sufficient to cover that amount of the mortgage-deed together with interest, the defendant shall pay the balance. It is not a condition precedent to the

making of a personal decree for the balance that the mortgaged property should have been sold and the proceeds found insufficient to satisfy the debt.

3. This indicates that the words of the section are satisfied in case where the Court passes a decree that on the happening of the event when the net proceeds of the sale are found to be insufficient the balance should be paid. This was followed in the case of 1932 Cal. 775 Fala Krista Pal v. Jagannath Marwari 1982 Cal 775. In the present case, the decree is clearly a composite decree and includes a personal decree. We think therefore that the Court below was not wrong in directing a rateable distribution. The order is further disputed on the ground that it includes a direction as regards that share of defendant 4, that is the decretal amount is to be satisfied out of the assets of the defendants including defendant 4's share in the Diana Tea Co. But an affidavit has been filed by the opposite party to show that the share has also been sold and purchased by the decree-holder for Rs. 50. This amount should have been included in the amount shown as realized in the decree-holders application for execution. He has only shown as realized Rs. 720 on a previous execution case but the affidavit now filed shows that Rs. 50 was realized in a subsequent execution case (Execution Case No. 41 of 1931) by the sale of the share of defendant 4. This amount must accordingly be deducted from the decretal amount which is to be rateably distributed to him.

4. As regards the alleged order for set off we find that although the petitioner was allowed to bid at the sale and ask for permission to set off, no order for set off was actually passed and he was directed to deposit one-fourth of the bid money in case the sale was knocked down in his favour and having expressed his inability to deposit the requisite amount was allowed by the Court to pay the poundage-fees on the clear understanding that he would have to deposit the bid money in proportion in case the application for rateable distribution was granted. We think the petitioner is entitled to a certain amount of sympathy because no application for rateable distribution having been made up to the date of sale he was naturally under the impression that he would be allowed a set off. But in the circumstances of the case, the action of the Court allowing rateable distribution does not seem to have been contrary to law and we find ourselves unable to interfere otherwise than by the modification noted above, with the order which has been passed by the

Court below. This rule must accordingly be discharged. There will be no order as to costs.

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