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Court : Kolkata

Decided On : Jul-15-1910

Reported in : 7Ind.Cas.91

Judge : Holmwood and ;Chatterjee, JJ.

Appellant : Ekadashi Das and anr.

Respondent : Chandra Mohan Shaha and anr.

Judgement :

1. This is an appeal from the order of the learned District Judge of Midnapore in an application under Section 244, Civil Procedure Code, for rectification of an error which took place at an execution sale. It appears that what actually happened was that one lot out of seven was put up for sale and fetched a sufficient price to cover the decretal amount and that the sale in respect of the other plots was consequently stopped. It appears that two bids which were made for the property to be sold were made in respect of the first lot and there is a note at the foot of the bid-sheet which we are unable to read after a careful consideration in any other way than as Ek number lot and not as Ek lot E as contended by the appellant. But owing to the ambiguity of this note and to the fact of some person inserting a bracket in red ink including the whole of the lots afterwards the sale certificate was drawn up for the whole seven lots. Then an application was made under Section 244 in which it was asked that the ex parte decree should be set aside and the sale declared void on the ground of fraud. The learned Judge found that the sale

could not be set aside on that ground and that the ex parte decree also could not be set aside. He, however, did not decide the point which appears to have been mentioned to him by the pleaders in argument, namely, that there had been this mistake in respect of the bid-sheet. He says in his present judgment that he purposely refrained from deciding that point inasmuch as he could not at that time bring home the interpolation to any of the parties concerned. He still finds that it is probably the work of the nazir himself for he says that there is no distinction between the faint red bracket drawn along the lots and the nazir's endorsement of the bids. Now here we are unable to agree with the learned Judge. Being a question of fact we cannot do more than point out that the colour of the ink of the bracket is totally different from that in the handwriting of the nazir. Be that as it may, the learned Judge found that there was this mistake, that as a matter of fact lot No. 1 was alone put up and alone knocked down in the sale and that the subsequent proceedings did not affect the present question at all.

2. It is urged before us in appeal that such a question cannot come under Section 47 of the Code of Civil Procedure. We can see no reason whatever why it should not fall under that section. That section includes all questions arising between the parties relating to the execution of the decree and the question of what was sold at an execution sale is a question relating to the execution of the decree and no decision as to the validity of the decree or as to the validity of the sale held under the decree on the ground of fraud can possibly operate as res judicata in a question of mistake which occurred in the execution proceedings itself. The Court has full jurisdiction, conferred upon it by Section 151 of the new Code of Civil Procedure, and it would have been our duty if the lower Court had taken a different view to have exercised that power to the relief of the judgment-debtor in this case. There appears to be a laxity of practice in the nazarat department of the District to which we would draw the learned Judge's attention. He should consider whether he should not exercise a more careful supervision over the execution department and particularly the nazarat and as far as possible render it impossible for such patent fraud as the present to be committed in the course of execution sales.

3. With these remarks the appeal is dismissed with costs. We assess the hearing fee at two gold mohurs.

