

Bindu Bashini Debi Vs. Provat Chandra Sarkel and ors.

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Court : Kolkata

Decided On : Jul-18-1934

Reported in : AIR1935Cal92

Appellant : Bindu Bashini Debi

Respondent : Provat Chandra Sarkel and ors.

Judgement :

ORDER

1. This rule is directed against an order of the District Judge of Backergunj dated 6th September 1933, reversing the order of the first Court Munsif at Barisal by which the learned Munsif set aside a sale under the provisions of Section 174, Ben. Ten. Act. The learned Munsif on a consideration of the evidence came to the conclusion that the processes were not served and that if there would have been any service, the petitioner would never have allowed the property to be sold for arrears of rent. The learned Munsif has observed that in the facts and circumstances of the case it cannot be for a moment believed that the processes of sale were served. The learned Munsif further found that it was highly probable that the processes were intentionally suppressed by the decree-holder in collusion with, the judgment-debtor with a view to frustrate the claim of the petitioner. In this view of the matter the learned Munsif set aside the sale. An appeal then was taken by the auction-purchaser to the District Judge and the District Judge on a consideration of the evidence came to the conclusion that the processes were served and that the property had not been sold at a very adequate price and in

that view he confirmed the sale. Hence the present rule was obtained by the petitioner.

2. The only ground urged in support of the rule is that the District Judge had no jurisdiction to entertain the appeal inasmuch as the Munsif who set aside the sale was vested with powers under Section 153(b), Ben. Ten. Act. From the findings of the learned Munsif it is clear that he did not believe the evidence about the service of processes. Under S 153 Ben. Ten. Act, the order passed by the Munsif who is invested with special powers under Section 153(b), Ben. Ten Act is final and cannot be challenged in appeal unless the order decided a question relating to title to land. In the explanation to the section which was added in the year 1907 in Bengal and in 1908 in East Bengal it was laid down that a question of irregularity of proceeding in publishing or conducting a sale is not a question relating to title to land. The irregularity in publishing or conducting the sale includes non-service of the process. This non-service may be due to the negligence of the process server. It may also be due to a collusion between the decree-holder as well as the process server. In the case before us the learned Munsif did not believe the evidence which was given by the auction purchaser to prove that the notices were actually served. It is true that he observed that it might have been due to fraud the part of the decree-holder. The effect of the learned Munsif's finding however is that he did not find any fraud which could be said to be independent of the irregularity in the proceedings in publishing or conducting the sale. In this view of the matter we are of opinion that the irregularity found in this case is one which is covered by the explanation to Section 153, Ben. Ten. Act

3. It was however argued by the learned advocate for the opposite party that as there is a finding by the learned Munsif to the effect that the decree itself was obtained by fraud, and that as this fraud is antecedent to the sale an appeal to the lower appellate Court was competent. It is clear from the judgment of the learned Munsif that he did not set aside the sale on any fraud antecedent to the publishing or conducting of the sale. In fact any fraud antecedent to the decree cannot be a ground for setting aside a sale instituted under Section 174, Ben. Ten. Act.

4. We are therefore of opinion that the appeal by the decree-holder auction-purchaser to the lower appellate Court was incompetent and that the District Judge had no jurisdiction to set aside the order of the learned Munsif. We accordingly make the rule absolute, set aside the order of the District Judge and restore that of the Munsif. The application for setting aside the sale is allowed. As however this objection to the competency of this appeal was not taken before the learned District Judge we make no order as to costs in this rule.

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