

MANU/BH/0046/1936

Equivalent Citation: AIR1937Pat113, 169Ind. Cas.483, 169Ind. Cas.483

IN THE HIGH COURT OF PATNA

Decided On: 10.12.1936

Appellants:**Bhagwat Narain Singh and Ors.**

Vs.

Respondent:**Srinivas**

Hon'ble Judges/Coram:

Courtney Terrell, C.J. Mohamad Noor James Sankara Balaji Dhavle and Varma, JJ.

JUDGMENT

Mohamad Noor, J.

1. This appeal is against an order of the Subordinate Judge of Patna confirming a sale held in execution of a decree on September 13, 1935, at which the decree holder had himself purchased the property sold. The facts are these: On the very day when the property was sold the decree-holder auction-purchaser and the judgment-debt's jointly filed an application to the effect that the latter had paid Rs. 500 to the farmer towards satisfaction of the decree and that the parties had agreed that if the remaining decretal amount be paid by November 10, next the sale would be set aside and the auction purchaser would forego the five per cent, compensation which he was entitled to. In case of default in the payment as provided by the date fixed the sale would stand confirmed. The Court was closed on November 10 and re-opened on the 13th. It may be conceded and in fact has not been disputed, that a deposit of the decretal amount in Court on November 13, would have been within the terms of the agreement. The money was not, however, deposited even on that date. Some explanations were offered on behalf of the judgment-debtors for this default, but they were not pressed either before the lower Court or before this Court. On the next day, that is on November 14, the judgment-debtors applied to the Court for a chalan to deposit the amount. There was, for some reason or other which is not necessary to investigate, some delay in passing the chalan by the Court and it was not made over to the judgment-debtors till November 20, 1935, on which date the money was deposited in Court. The delay in depositing the money between November 14, when the chalan was applied for and November 20, when the money was actually deposited is immaterial, as on behalf of the judgment-debtors the case has been argued on the assumption that there was a default on their behalf at least on November 13, when the Court re-opened and on which date the money could have been deposited. The deposit on November 20, was accepted at the risk of the judgment debtors and when the matter was taken up by the Court it held that the deposit was not within the terms of the agreement, and that it had no power to extend the time of payment as agreed to between the parties and accept the deposit beyond the time so fixed. It confirmed the sale. It is against this order that the present appeal has been preferred. It was contended on behalf of the decree-holder auction-purchaser that no appeal lay as the proceedings before the learned Subordinate Judge were outside the scope of the Code of Civil Procedure and there is no appeal unless it has specifically been provided. At most it might be said that the Court in allowing the parties to substitute an agreement in place of their legal rights was acting under its inherent powers. If this be the case, orders passed in such a proceeding are not open to appeal.

2. As to the merits of the appeal, Sir Sultan Almad has contended that the agreement between the parties, which was filed in Court in September 13, 1935, immediately after the sale, should be treated as a pure contract between the parties and should be dealt with as such. It was, therefore, for the Court to decide whether the time fixed for payment was of the essence of the contract. He contended that under the circumstances of the case the Court should have held that the payment though actually made on November 20, was in effect on November 14 (the delay between the 14th and the 20th being due to the acts of the officers of the Court) and the Court should have also held that time was not the essence of the contract and that the payment made on November 14, was substantial compliance with the agreement between the parties, and the decree-holder auction-purchaser could not avoid it and the sale ought to have been set aside by virtue of that agreement. The case was originally heard by a Division Bench of this Court, but considering the important issues raised, it asked that the case should be heard by a larger Bench.

3. The first question to be considered is whether the order of the learned Subordinate Judge, dated November 25, 1935, confirming the sale, is appealable. Now the proceeding before him may be looked upon from two points of view. On the one hand, it may be said that it was outside the scope of the Code. Once a sale has been held it can be set aside only on applications made either under Order XXI, Rule 89 or Rule 90 or Rule 91. There is no question of there being any application under Rule 90 or Rule 91, and strictly speaking there was no application under Rule 89 also. That rule contemplates an application for setting aside a sale within 30 days of it as prescribed in Article 166, Limitation Act. If such an application be made within the time and the decretal amount and compensation be deposited in Court within 30 days of the sale, the sale has to be set aside. In this case though there was an application within 30 days of the sale, the deposit was not made and was not to be made within the prescribed time but was to be made under the agreement of the parties on a later date fixed by them. Therefore, the proceeding was outside the scope of Order XXI, Rule 89, and the Court in allowing the parties to substitute a procedure in lieu of one prescribed by law was acting under its inherent power and the order passed in such a proceeding is not appealable. On the other hand, as was pointed out by Mitter, J. in *Banga Chandler Mozumdar v. Nand Kumar Mozumdar* MANU/WB/0432/1936 : 40 C.W.N. 1402 : I.L.R. (1937) Cal. 142, where a Court has general jurisdiction, the parties to a proceeding can by agreement adopt a different procedure quite contrary to the ordinary *curia* and the Court is bound to give effect to such an agreement His Lordship referred to two decisions of the Privy Council in which this principle was laid down. They are *Henry Peter Pisani v. Her Majesty's Attorney-General* (1874) 5 P.C. 516 : 30 L.T. 729 : 22 W.R. 900 and *Sadasiva Pillai v. Ramalinga Pillai* 15 B.L.R. 383 : 21 A. 219 : 24 W.R. 193 : 3 Sar. 519 (P.C.). In the former case it was held that:

The departure from an ordinary procedure is permissible unless there is an attempt to give the Court jurisdiction which it does not possess or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of Appeal cannot properly review the decision. Such a departure has never been held to deprive either of the parties of the right of appeal.

4. In this case though it may be said that the parties agreed to substitute an agreed procedure prescribed by law, the procedure nevertheless was in essence though not exactly in form under Order XXI. The setting aside of a sale under Order XXI, Rule 89, requires (1) an application, and (2) a deposit of the compensation and decretal

amount. In this case the application filed on the date of the sale jointly by the parties may be treated as an application for setting aside the sale under Order XXI, Rule 89 and the compensation, instead of being deposited in Court, was to be foregone by the auction-purchaser and a portion of the decretal-amount, namely, Rs. 500, was paid to the decree-holder out of Court and the balance was to be deposited not within the time prescribed by law but some time later. Now in a case in which there is an application for setting aside a sale, but its requirements are not complied with within time, it is clear that the sale cannot be set aside, but nevertheless the proceeding is under the Order and the Rule and an order passed even on a barred application or on an application in which the deposit is not made according to law, is an order under Order XXI, Rule 89. Take for instance a case in which there is an application under Rule 89 but the judgment-debtor, instead of depositing the compensation and the decretal amount in Court pays them to the auction-purchaser and the decree-holder out of Court and the sale is set aside. It is obvious that the order in essence is one under Order XXI, Rule 89. In our opinion the order of the learned Subordinate Judge is appealable.

5. In view, however, of our decision on the main issue it is not necessary to pursue this point further. Even if there be no appeal and if we would have come to the conclusion that the order of the learned Subordinate Judge was wrong, this was clearly a case of not exercising jurisdiction, namely, of setting aside the sale, or, at any rate, a case of exercising jurisdiction with material irregularity, and it would have been open to us to interfere. The main contention of the appellant in this case is that the agreement between the parties as evidenced by the joint application filed on the date of the sale, should be treated purely as a contract and the Court should decide whether or not the time for payment fixed was of the essence of the contract. Mr. Das on behalf of the respondent has, however, contended that what the parties did was, to substitute for 30 days (the time fixed by the statute) another period and as the time of payment fixed by the statute cannot be extended, so the date fixed by the parties, which takes the place of the period fixed by the statute, cannot be extended. We have come to the conclusion that it is not necessary for us to decide this wider question of the general power of the Court under such circumstances, as assuming for the sake of argument that the Court had power to examine whether or not the time fixed by the parties was of the essence of the contract, the question remains whether in this particular case the time was or was not of the essence of the contract. Section 55, Contract Act, enacts:

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before a specified time, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract. If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

6. In order to decide whether in this particular case time was of the essence of the contract we must look to the contract itself. The words are that in case the judgment-debtor fails to pay up the decretal amount within the time specified, the sale would stand confirmed. No particular order was necessary. The wording of the contract, in our opinion, clearly shows that the parties meant that the benefit which was to accrue

to the judgement-debtors would be lost to them if the payment was not made within the specified time; or in other words, the time was of the essence of the contract. The effect of the contract was that on the expiry of November 10, the last date fixed for the payment of the decretal amount, the sale automatically became confirmed. Even if it be conceded that on account of the Court being closed on that and on two subsequent days the payment could have been made by November 13, even then the sale stood confirmed on the expiry of that date, no order of the Court being necessary. There was nothing left which could be set aside after that date. It is true that the Court, when the joint application was filed on September 13, 1936, ordered the case to be put up for confirmation on November 15, but this is immaterial as the Court fixed this date for its own convenience in order to finally dispose of the case on a consideration of what happened on the date fixed by the parties. In that view of the matter the appeal fails and is dismissed with costs.

Courtney Terrell, C.J.

7. I entirely agree.

James, J.

8. I agree.

Sankara Balaji Dhavle, J.

9. I agree.

Varma, J.

10. I agree.

© Manupatra Information Solutions Pvt. Ltd.