

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.354 of 2016

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Rajesh Upadhyay, Son of late Bhukhal Upadhyay, Resident of Mohalla-
Gopeshwar Nagar, Town- Chapra, P.S. Bhagwan Bazar, P.O. Chapra, District-
Saran.

... .. Appellant/s

Versus

1. The State Of Bihar Through The District Magistrate Saran At Chapra
2. The Chief Engineer(B.C.), P.W.D. North Bihar, Patna.
3. The Executive Engineer(B.C.), P.W.D., Chapra Division, Chapra.
4. The Superintending Engineer, Arbitrator (B.C.), P.W.D. , Chapra Circle,
Chapra.
5. Nilkamal Devi, W/o Randheer Kumar Pandey, R/v- Gopeshwar Nagar, P.S.
Bhagwan Bazar, Distt. Saran at Chapra.

... .. Respondent/s

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Appearance :

For the Appellant/s	:	Mr.Nagendra Rai, Advocate
For the State	:	Mr.Shailendra Kumar Dwivedi, AAG-12
		Ms. Nutan Sahay, AC to AAG-12
For the Respondent no.5 :		Mr. Anjani Kumar Jha, Advocate
		Ms. Puja Kumari, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
ORAL JUDGMENT

Date : 07-02-2023

Heard learned counsel for the parties.

This Miscellaneous Appeal has been filed for setting aside the order dated 14.01.2016 passed by learned Sub-Judge-VI, Chapra in Misc. Case No.04 of 2006 whereby and whereunder the learned Sub-Judge-VI has allowed the Misc. Case filed under Order XXXI Rule 90 and Section 47 of the Code of Civil Procedure. By the impugned order the learned court below has been pleased to set aside the auction sale held in Execution Case No.2 of 2001 on 17.12.2002.



A perusal of the impugned order would show that this case has a chequered history. One Bhukhal Upadhyay was a contractor of Building Construction Department. For certain works done by him for the Department he claimed a sum of Rs.3,15,714/- as outstanding amount. In terms of the arbitration clause present in the agreement an arbitration proceeding was conducted and the award of the arbitrator was filed in the court in accordance with Section 14 of the Arbitration Act, 1940. The arbitration award was made rule of the court. In the first round of battle, the State of Bihar challenged the judgment of the learned court below making the award a rule of the court and succeeded in getting the matter remanded to the court for considering the objection of the State. On remand, the objection of the State was considered but once again the learned court below made the award a rule of court. In this manner, the court granted a decree in favour of the contractor Bhukhal Upadhyay for a sum of Rs.3,15,714/-. He filed an Execution Case No.2/2001 and in the said execution case, in order to satisfy the decree all the buildings of the Department i.e. office of the Executive Engineer, residence of Superintending Engineer, Technical Adviser, Executive Engineer and Driver have been auction sold for Rs.17,04,161/-.



The auction sale was given effect to by way of delivery of possession which was confirmed twice on 16.05.2003 and 16.07.2004. Under these circumstances, the present application for setting aside the auction sale was filed under Order XXXI Rule 90 read with Section 47 and 151 of the Code of Civil Procedure.

After consideration of the materials available on the record, the learned court below framed the following issues:-

- I. Whether this misc. case is maintainable?
- II. Have the petitioners got valid cause of action for this case?
- III. Whether the case is barred by law of limitation and estoppel and res judicata?
- IV. Whether the auction sale is fraudulent, irregular, arbitrary, void and without jurisdiction and wroth to set aside?"

Evidences were laid on behalf of the parties and thereafter the learned court below examined those evidences and answered the issues particularly the issue no.IV in which after holding that the opposite party had obtained the decree by throwing dust into the eyes of the court, the court having noticed that the decree was still in existence proceeded to consider as to whether the procedure adopted in satisfaction of the decree has been followed as per law or not and whether material irregularity and fraud has been committed in conducting the auction sale or not? While deciding Issue No.4, the learned



court has inter-alia recorded the following findings:-

“Now on this point the learned counsel on behalf of the petitioner has submitted that the material irregularity and fraud has been committed in conducting the auction sale. No attachment at the spot had been done, No proclamation of sale was done at the spot, no beating of drum had been taken place. The peon was taken in collusion and he did all the processes in collusion of the applicant. That the summons of the attachment and the auction sale was not properly served and were done Bala-Bala. The value of auction sale property was not properly ascertained and the value given in proclamation of sale was wrong. The process of auction sale was kept in dark and as such the people could not show about the auction and the bidder could not reach at the spot. No bidder was present at the time of beat due to lack of knowledge. The tamila report was collusive as it was not served upon the applicant. Due to aforesaid fraud and irregularity the property of the government worth not less than 2,40,00,000/- and odd were auction sold by the nominal price of Rupees 17,00,000/- and odd. On the other hand, the opposite parties have contended that the petitioner was present at every stage of the proceeding and all the processes were legally served upon them.

Now ground to set aside the sale Under order 21 rule 90 of CPC is that it must be shown that(1) There has been material irregularity or fraud in publishing and conducting the auction sale (2) substantial injury has been caused to the applicant. Now, this Court has to examine whether there is material irregularity or fraud in conducting the auction sale, due to which petitioner suffered substantial injury.

Now the contention of the learned counsel on behalf of the petitioner that the order 21 rule 54 has not been



complied and no beating of drum had been taken place at the spot. In this regard both parties have adduced their evidence.

Now perused the attachment order which has been marked as ext.-U in this case. It appears that notice has been issued to the office of BCD and SBI and it is stated in the notice that Bara Babu of the office has received the notice and one notice was affixed with the office of BCD. Now from perusal of the ext.U it transpires that mandatory procedure of order 21 rule 54(2) of CPC has not been done and the attachment was not made as per form 24 of appendix-E of the CPC. From perusal of ext.U it transpires that the property has not fully described. It was only described as the office of the executive engineer and residence of so and so. No plot number, circle number, Ward number, area have been mentioned. No beating of drum appears to be taken place from ext.U. It also does not come from ext.U that the attachment was affixed on the notice board of circle officer, Sadar Chapra to whom the revenue government has paid as the property was revenue paying land. The O.P has adduced three witnesses. O.P.W.2 to 4 to prove that the beating of drum had taken place at the spot but from perusal of evidence of all these three witnesses, it transpires that all three witnesses have deposed that the beating of drum had taken place at the time of delivery of possession. They never stated that any beating of drum had taken place at the time of attachment. O.P.W5 namely Rajesh Upadhya has stated in his affidavit that the beating of drum was effected by Jatan Chamar at the time of proclamation but he is no more now. From perusal of materials available on the record, it appears that no evidence regarding the death of Jatan Chamar has been filed by O.Ps and they have failed to show that beating of drum had been taken place at the time of



attachment. All the evidence adduced by O.Ps regarding this, contradicts his statement that beating of drum have been taken place at the time of attachment. Although, it is admitted position that order 21 rule 54 has not been complied but the object of attachment under rule 54 is to make the Judgment debtor aware that the attachment has been affected and that he should not make any transfer or encumber the property thereafter. It is in the interest of decree holder to have the notice of attachment served personally on the Judgment debtor. Nonetheless the sale is not void since encumbrance thereafter was not created on the attached property. Hence non-compliance of the processes of 54 of CPC is mere and irregularity and solely on the basis of that the sale cannot be set aside.

Now come to the other facts of the auction sale. The learned counsel on behalf of the petitioner has submitted that in proclamation of sale order 21 rule 66 has not been complied which is mandatory in nature and on this count only, the sale is void. On the other hand, the learned counsel of the O.Ps has submitted that all the processes for proclamation of sale by public muction has been followed and thereafter it has been confirmed by the court. Now perused the proclamation of sale which is marked as ext.B/3 in this case. Ext B/4 is the report of the nazir on the same which shows that no one appeared except the decree holder for bid and the decree holder has taken the property. From perusal of sale proclamation it transpires that the same procedure has been adopted in proclamation as adopted under order 21 rule 54. It is not mentioned any where in the proclamation of sale that any beating of drum has been taken place. The ward number, circle number, plot number and as of the disputed property has also not been mentioned. The opposite party has failed to prove that the beating of drum had been taken place at the time of proclamation of sale. As



discussed earlier that all the witnesses of O.Ps no.2 to 4 on the point of beating of drum have stated that beating of drum had been taken place at the time of delivery of possession and no one has even whispered that the same has been taken place at the time of proclamation of sale. It is also clear from perusal of sale proclamation that the time and place have not been mentioned in it for auction sale. The O.P.W.8 namely Chhathi Lal Prasad who was the then Naiab Nazir at the time of auction sale had stated in his affidavit that auction sale was done as per the proclamation and no one appeared except the decree holder. Not bit has been written by him on the sale proclamation which has been marked as ext.B/4, B/5, B/6 respectively. OPW.8 in para 10 of his cross examination has admitted that the time and place of auction sale is not mentioned in sale proclamation. He has further stated that it was his clerical mistake. Now it is clear from perusal of sale proclamation and the evidence of OPW8 that the time and place of auction sale has not been mentioned in proclamation of sale. This is not mere irregularity but it is material irregularity which goes at the root of the matter. The object of the proclamation of sale was frustrated and the proclamation of sale without mentioning the time and place deemed to be no proclamation at all. The result of which no bidder came forward except the decree holder for the bid at the spot and price of the valuable property of the Government had not been fetched.

From perusal of sale proclamation it also appears that only valuation of decree holder has been given which is rupees eight lac. Now perused the evidence of Rajesh Upadhyaya OPW5. He has stated in para 64 of his evidence that he had not seen the valuation report of the property auction sold. He has further stated that he did not know the area of the total land and he cannot even guess the total area of the property in dispute. He admitted in same



para that there were six big buildings and 4 to 5 small building situated at the time of auction sale. In the same para he denied the suggestion of the petitioner that the total area of the property auction sold is about 2 and half bigha. Here, I am constrained to observe that O.P. no.2 namely Rajesh Upadhya has given his statement on dated 6.2.2015 and the property was auction sold in 2002 and he is in possession from the year 2003. Still he is unaware about the area of the disputed land. Here the question arose that if the O.P had no about the area of the disputed land then how the valuation of rupees eight lac had been given in the proclamation of sale. The opposite party is not aware about the area of the property in dispute after the lapse of almost 12 years shows his mala fide intention.

Now perused the valuation report provided by the petitioner regarding the property auction sold which is marked as Ext.4 in this case. It is the official valuation report of the BCD as per the circle rate of the area. The total valuation of the property auction sold is rupees two crore forty lac sixthy seven thousand five hundred forty only on dated 30.1.2006. It is well known fact to every one, that the market rate are usually much higher than the circle rate of Government. Here the circle rate is about two crore forty lac and odd. No objection regarding the valuation has come forward on behalf of the O.Ps. Hence, it is clear that the valuable property of the government in Lansdowne area of Chapra had been sold on shockingly low value price. The learned counsel on behalf of the petitioner has also argued that the court has not made estimate of the valuation of the property and believed in the valuation given only by the decree holder. It is further submitted that the petitioner had objected the same through the petition which has been marked as ext.F/1 in this case. From perusal of ext.F/1 it transpires



that the petitioner had given a petition that the decree holder have given wrong and nominal value of the property and its valuation is wrong. The petition of the petitioner was rejected and the court had auction sold the valuable properties of the Government relying on the valuation of the O.Ps who even do not know the area of the disputed land even at present now.

The learned counsel O.Ps has submitted that the second proviso of rule 66 says that the court is not bound to give his own estimate. Now on this point learned counsel of the petitioner has submitted the case law **AIR 1973 S.C page 2593**, in which the Hon'ble Apex court has held that it is true that it is not necessary to the court to state its own estimate of the valuation of the property but the Hon'ble Apex court has made it clear that all the material facts have to be mentioned by court when stating its estimate of the value of the property to be sold and the court must not accept the ipse-dixit of one side. The court should have invite the objection to the valuation from the Judgment debtor and should have considered the same after applying its mind. Here the Judgment debtor had given objection still the valuable property of the Government was auctioned sold at nominal price.

Proclamation of sale also shows that order 21 rule 66(2) (e) has not been complied. Now on this point learned counsel of the petitioner has submitted the case law **Deshbandhu Gupta Vs N.L.Anand and Rajendra Singh 1994 S.C.C 131**, in this case, The Hon'ble Apex court has held that the object of order 21 rule 66(2)(e) of CPC is to fetch the value of the property. The court has only to decide whether all the material particular regarding the property has been mentioned in the proclamation. It is an obligation imposed by rule 66(2) of CPC, In discharge of it, court should state the valuation given by both the decree holder as well as judgment



debtor, where they both have valued the property. It may usefully state the other material facts such as the area of land. Nature of right in its municipal assessment actual revenue realized. From the perusal of the sale proclamation it appears that all these procedure had not been done in proclamation of sale which the obligation imposed by the legislature.

The learned counsel of the petitioner in this case has submitted that order 21 rule 64 have also not been complied in conducting the auction sale which enjoins the duty on the executing court to see whether it is necessary to bring the entire attached property to sell or such portion thereof as may seem the necessary to satisfy the decree. Now on this point learned counsel of the petitioner has submitted the case law **AmbatinarSaiya Vs. M.Subba Rao and ors 1989 SCC page 693** in which The Hon'ble apex court has stated that applying the procedure of rule 64 is not just the discretion but an obligation imposed on the court. The sale held without examining this aspect and not, in conformity with the mandatory requirement would be illegal and without jurisdiction. From the material available on the record it transpires that the mandatory requirement of rule 64 has not been complied as it was not estimated that what was the value of the property at the time of auction sale and auction sale of how much part will satisfy the decree.

The learned counsel on behalf of the petitioner has also submitted that the provision of rule 67 has also not been followed as no notice for auction sale was published either in the Newspaper for wide circulation or published in official gazette. The O.P has stated that the newspaper had flashed the News of auction of sale. It is worth to mention here that it was the news of Newspaper after the auction sale as material provides on the documents and it is quite different from the publication in Newspaper or



official gazette regarding the proclamation of sale. As per rule the cost of publication is to be adjusted in the decretal money but no such step was taken nor the decree holder had paid the cost of publication.

IN Deshbandhu Gupta vs N.L.Anand, the Hon'ble apex court held that procedure adopted by court in violation of order 21 rule 66 and 64 is in flagrant breach of the mandatory provision and it is nullity ab initio. Thus the settled law is that the auction sale held in execution of decree, without fulfilling the requirement of mandatory provision contained under order 21 rule 64 as well as the provision contained under order 21 rule 66 will make the sale void ab initio.

Hence, from the aforesaid discussion it is crystal that the mandatory provision regarding the auction sale has not been followed and in consequence of that no bidder came at the time of auction sale and the decree holder had purchased the valuable property of Government on a throw away price due to which the petitioner suffered the substantial injury. The price of auction sale is substantially inadequate and it is settled law that if the price is substantially inadequate, there is both material irregularity and substantial injury. Hence by committing fraud on the court and throwing the dust into the eyes of the court, the O.Ps had got the valuable property the Government in Lansdowne area of Chapra on throw away the price. Hence in my considered opinion the aforesaid auction sale is void ab initio.”

Mr. Nagendra Rai, learned counsel for the appellant has assailed the impugned order mainly on the ground that the learned court below could not appreciate that this application was highly belated and in this case Section 5 of the Limitation



Act would not apply. Learned counsel has placed before this Court Section 5 of the Limitation Act to submit that it would not apply in an application filed under Order XXXI of the Code of Civil Procedure. It is submitted that no doubt the application was filed on behalf of the judgment-debtors -respondents within a period of three years from the date of delivery of possession but the court had allowed Section 5 application to condone the delay which was not permissible.

Learned counsel for the State has, however, opposed this appeal. It is submitted that in fact there was no need to file application under Section 5 of the Limitation Act. In this regard, the discussions made in the impugned order for purpose of deciding the issue no. 1, 2 and 3 have been relied upon. This Court would reproduce the same hereunder for a ready reference:-

“Issue No.1,2,3- Now the other technical point which has been raised by O.Ps is that this miscellaneous case is barred by law of limitation and also barred by principle of res-judicata. The petitioner has also got no valid cause of action to this case. It is further submitted by O.Ps that this court has no jurisdiction to entertain this matter because order 21 rule 90(3) provides that petitioner can not raise the matter under this provision, which could have been raised by him before the proclamation of sale. Hence this case is not maintainable.

Now as far as the matter of limitation is concerned. The limitation of filing of the petition under order 21 rule-90 of CPC is 60 days from the date of sale.



Admittedly the miscellaneous case has been filed after the limitation of period prescribed in article 127 of the limitation Act. In this regard the learned counsel on behalf of the O.P has filed case laws **AIR 2005 Allahabad page 75, AIR 1986 Patna** by which it is shown that limitation of period for filing the petition under order 21 rule 90 is 60 days. The learned counsel on the behalf of the petitioner has filed the case law **Rammana v/s Mallappa Raju, AIR 1956 S.C** at page 87, in this case three Judges bench of Hon'ble Apex Court has held in placitum (c) that article 166 applies only when the sale is one which has under law to be set aside as per example under order 21 rule 88, 90 and 91 of the CPC but it has no application when the sale is inoperative and void. In placitum D the Hon'ble Apex Court has held that an application by a party to the suit to recover the possession of the property which had been taken by delivery of possession of under void execution sale would be in time under article 181 if it was filed within three years of his dis-possession. The article 166 is substituted by article 127 and article 181 is substituted by Article 137 of the Limitation Act.

Now from the aforesaid case law the view of the Hon'ble Apex Court is very clear that in void execution sale the limitation of period starts from the date of dis-possession and the applicant may file the petition to set aside the sale within three years and date of his dis-possession. In this case the auction sale is void as discussed in earlier paras. In this case the auction sale held on dated 17.12.2002. The sale was published on dt 29.04.2003, D/P was confirmed twice on dated 25.6.2003 and 16.7.2004, delivery of possession was given on dt 16.05.2003 and miscellaneous case was filed on dt 01.03.2006 which is well within the period of three years from the date of dispossession. The learned counsel on the behalf of the petitioner has also filed another case law on this point i.e; **AIR 2003 Kolkata 2018** in which Hon'ble Court has held that the plea of limitation cannot protect the interests of wrong-doers and save the sale from being set aside and the Hon'ble Court has set



aside the sale after the lapse of long 22 years. In aforesaid case also the valuable property in posh area of the city of Kolkata was sold in nominal price which the Hon'ble Court has observed to be serious enough amounting to practicing the fraud on the court, resulted in substantial injury to the judgment debtor.

As discussed in earlier paras that the Hon'ble Apex Court in **AIR 1976 SC 87 in palcitun C and D at page 87** clearly held that when the sale is void, right to apply to set aside is 3 years and it starts from the date of dis-possession. As discussed earlier that the sale in this case is also void, hence it is not hit by law of limitation.

Now as far as the point of res-judicata is concerned, the learned counsel of the O.P has submitted that the petitioner has raised all these grounds which has been taken by him in this miscellaneous case at different stage of Misc. Case No. 21/92 and execution case no. 1.02. Hence case is barred by res-judicata. On the other hand, the learned counsel of the petitioner had submitted that the matter raised by the petitioner had not been decided on merit. Hence not barred by principle of resjudicata.

From perusal of the materials available on the record in my opinion the contention of the learned counsel of the petitioner finds weight as from perusal of the order of the court at different stage it transpires that the metter raised by the petitioner at different stages were not decided on merit. Hence in my considered opinion as the matter raised by the petitioner has not been decided on merit. Hence it is not barred by principle of resjudicata”.

Having heard learned counsel for the parties and upon perusal of the records, this Court finds substance in the submission of learned counsel for the State. There are overwhelming materials on the record to show that the auction sale held on 17.12.2002 was not in accordance with the



established procedure of law. This Court has noticed that 1 bigha and 18 kathas of government land approximately with building have been auction sold even as on record there is no material to show that there was any proper valuation of the properties. Several discrepancies have been noticed by the learned court below in the matter of conduct of auction sale.

This Court has further found that in this case admittedly the delivery of possession was confirmed twice on 25.06.2003 and 16.07.2004, delivery of possession was given on 16.05.2003 and the Miscellaneous Case was filed on 01.03.2006 which was well within a period of three years from the date of delivery of possession.

This Court having noticed the aforementioned materials on the record finds no reason to interfere with the impugned order. This appeal is dismissed.

The intervener-respondent no.5 has come on record. It is stated in the application that in Miscellaneous Case No.4 of 2006 the respondent no.5 was opposite party no.3, but her name was expunged fraudulently vide order dated 02.01.2015 showing that she died which would be evident from para '1' of page no. '3' of the impugned order. The intervener-respondent claims that she is the daughter of late Bhukhal Upadhayay.



This Court finds that so far as order dated 02.01.2015 by which the name of the opposite party no.3 was expunged is concerned, the same is not under challenge in the present appeal and for purpose of adjudication of the present lis, such issues are not required to be gone into. All contentions of intervenor-respondent no.5 are left open without prejudice to the contentions of any other party.

(Rajeev Ranjan Prasad, J)

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CAV DATE	
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