

Privy Council Appeal No. 7 of 1921.
Patna Appeal No. 20 of 1917.

Jai Berham and others - - - - - *Appellants*
v.
Kedar Nath Marwari and others - - - - - *Respondents*

Kedar Nath Marwari and others - - - - - *Appellants*
v.
Jai Berham and others - - - - - *Respondents*
(*Consolidated Appeals*)

FROM

THE HIGH COURT OF JUDICATURE AT PATNA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 19TH JUNE, 1922.

Present at the Hearing :

LORD PHILLIMORE.

LORD CARSON.

SIR JOHN EDGE.

[*Delivered by* LORD CARSON.]

The question to be decided in this appeal arises out of an order on appeal made by His Majesty in Council dated the 19th December, 1913, which set aside an auction sale of certain landed property held on the 27th July, 1904, in execution proceedings in the Court of the Subordinate Judge of Godda.

The case before this Board is reported in L.R. 41, I.A. 38.

Rajah Thakoor Barma, since deceased, the predecessor in title of the appellants 1-5 (hereinafter referred to as the judgment debtors) was the owner of a full 16 annas share of a village called Patsanda. Ten of the said shares were encumbered and six were unencumbered, save that two bonds had been executed by the

Rajah in favour of one Gobardhan Das and others, which purported to create a charge on a 3 annas share in the said mahal as security for the said Gobardhan Das for Rs. 23,965 and Rs. 532.

Six annas share of the encumbered property was attached for a judgment debt in execution of a decree obtained by the respondents third party, and sold on the 27th July, 1904. The respondents first and second parties are the representatives of the original auction purchasers and are hereinafter referred to as the auction purchasers.

The purchase money was a sum of Rs. 1,12,000, and this sum was paid into Court and eventually distributed to various mortgagee decree holders and others holding money decrees against the judgment debtor whose debts were thereby discharged to the extent of such payments.

The auction purchasers claimed to have purchased for the sum aforesaid the six unencumbered annas share, and on the 21st December, 1904, a sale certificate was granted to the auction purchasers, which declared the respective interest of the auction purchasers in the six annas share, and also declared that such share was subject to the charge created by the aforementioned bonds, but was outside the 10 annas share hereinbefore described as the encumbered property.

On the 26th December, 1904, the auction purchasers were duly put into possession of the said six annas share and paid off on the 7th February, 1905, the amounts covered by the two bonds. An appeal was subsequently made by the Rajah to the High Court of Calcutta against the order of the Subordinate Judge of the 21st December, 1904, granting the said sale certificate, and when this appeal was dismissed he appealed further to His Majesty in Council, and this Board on the 25th November, 1913, advised that the appeal should be allowed and that the order of the Subordinate Judge confirming the sale, together with the said certificate of sale of the 21st December, 1904, should be set aside, and added "this will, of course, have the effect of setting aside all subsequent proceedings on the part of the auction purchasers based thereon." In consequence of this order setting aside the sale the judgment debtors applied to the Subordinate Judge claiming restoration to them of the said 6 annas share of the property, together with mesne profits.

The auction purchasers resisted the said claim, and contended (1) that the auction purchasers could not be asked to restore the property until (a) the amount which they had deposited in Court to complete the sale; and (b) the sum paid by them to satisfy the bonds given by the Rajah to Gobardhan Das had been refunded and they also claimed that Chaturi Ram Marwari, one of the auction purchasers, who was a respondent in the appeal before the Privy Council, had died before the hearing, and that therefore the order of His Majesty in Council could not affect his share, viz., $\frac{1}{2}$ an anna of the 16 annas.

The Subordinate Judge overruled all the contentions of the auction purchasers, and by an order dated the 20th August,

1916, ordered restitution to the judgment debtors of the said 6 annas share, together with the mesne profits from the date of delivery of possession of the said property, after the auction sale on the 27th July, 1904.

From that order the auction purchasers appealed to the High Court of Judicature at Patna, who, by order dated the 14th December, 1916, set aside the order of the Subordinate Judge, and in lieu thereof, ordered that the Subordinate Judge should ascertain :

(1) " Whether Chaturi Ram died before the hearing of appeal by the Judicial Committee ; (2) that he do ascertain the amount of mesne profits due on the share in respect of which restoration is to be made ; and (3) that he set off the sum due to the judgment debtors as mesne profits against the sum due to the auction purchasers in recovery of their deposit and in the event of the sum due to the judgment debtors being in excess of the sum due to the auction purchasers he do restore possession of the property forthwith to the judgment debtors and in the event of the sum due to the auction purchasers being in excess of the sum due to the judgment debtor he do refuse to restore possession of the property until the deficit due to the auction purchasers has been made up either of the decree holders or by the judgment debtors themselves."

It is to be observed that the Court made no order as to the claim of the auction purchasers to be paid as a preliminary to restoring possession the sum paid to Gobardhan Das in respect of the two bonds, creating a charge on 3 annas share of the unencumbered property sold to the auction purchasers.

The appellants (the judgment debtors) have appealed to His Majesty in Council against the said judgment and decree of the High Court, dated the 14th December, 1916, and the auction purchasers (respondents first and second parties) have entered a cross appeal relating to the payments to Gobardhan Das as aforesaid. On the main question, *viz.*, whether the auction purchasers are entitled to repayment of the deposit paid into Court as a condition precedent to their handing over possession to the judgment debtors, their Lordships are in agreement with the judgment of the High Court, and think the order already referred to should on this point be affirmed. It is the duty of the Court under Section 114 of the Civil Procedure Code to " place the parties in the position which they would have occupied, but for such decree or such part thereof as has been varied or reversed." Nor indeed does this duty or jurisdiction arise merely under the said section. It is inherent in the general jurisdiction of the Court to act rightly and fairly according to the circumstances towards all parties involved. As was said by Cairns L. C. in *Rodger v. the Comptoir d'Escompte de Paris* (L.R. 3 P.C. 465 at page 475). " One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors and when the expression ' the act of the Court,' is used, it does not mean merely the act of the primary Court, or of any intermediate Court of Appeal, but the act of the Court as a whole from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case." The auction purchasers have parted with their purchase money which they

paid into Court on the faith of the order of confirmation and certificate of sale already referred to. This money has been distributed amongst creditors of the judgment debtor who had attached the unencumbered property in question and could have realised their judgment debts by a sale of this property in execution and it would be inequitable and contrary to justice that the judgment debtor should be restored to this property without making good to the auction purchaser the moneys which have been applied for his benefit.

It was argued that the remedy of the auction purchasers was either to apply for a certificate of sale of the unencumbered property or to obtain from the judgment creditors repayment of the sums paid out to them under the orders of the Court. Their Lordships cannot agree with either of these suggestions, and for the reasons stated by the Judges of the High Court.

As regards the sums paid by the auction purchasers to Gobardhan Das to clear off the bonds charged on the property they had intended to purchase, their Lordships are in agreement with the decision of the High Court that this payment stands on a different footing from the deposit of the purchase money. It was an optional payment, made without any order of the Court, and as it entitled them to stand in the shoes of Gobardhan Das as holders of the bonds, it entails no hardship; but however that may be, these payments cannot be made a condition of restoration to the judgment debtors.

A question was raised before this Board as to whether the "mesne profits" on the one hand, and "the deposit" on the other, should under the order of the High Court carry interest. The order is silent upon this point, but in their Lordships' opinion, the equities of the case will be met by not allowing interest in either case.

There only remains the question as to the rights of Chaturi Ram who was one of the auction purchasers at the said sale of the $\frac{1}{2}$ anna share of the mahal. It is alleged that he had died pending the hearing of the appeal before the Privy Council and that as his heir or personal representative was not brought upon the record, the order on the advice of their Lordships in the Privy Council cannot affect the $\frac{1}{2}$ anna share in his possession or that of his heir.

Their Lordships have no evidence before them of the facts alleged and no claim was presented on behalf of the said Chaturi Ram or his representative and they are of opinion that under the circumstances, the order in this case should be made without prejudice to the rights, if any, of Chaturi Ram, or if he is deceased, of his heir or legal personal representative.

Their Lordships are of opinion that the order of the High Court, subject to the modification last hereinbefore mentioned, should be affirmed, and that the appeal and cross appeal should be dismissed with costs, including in the case of the appeal the costs of the petition to add certain documents to those set out in the record as originally printed, and they will humbly advise His Majesty accordingly.



In the Privy Council.

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DELIVERED BY LORD CARSON.

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