

ESA No.10 of 2013 (O&M)

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**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**ESA No.10 of 2013 (O&M)
Date of decision:10.02.2015**

Mahasha Dev Raj (dead) through his LR's ...Appellant
Versus
Nirmal Kumari and others ...Respondents

CORAM: Hon'ble Mr. Justice Rakesh Kumar Jain

Present: Mr. Santosh Kumar, Advocate,
for the appellant.

Mr. Arjun Partap Atma Ram, Advocate,
for the respondents.

Rakesh Kumar Jain, J.

This appeal is directed against the order dated 25.02.2010 passed by the Civil Judge (Senior Division), Sri Muktsar Sahib and order dated 22.11.2012 passed by the Additional District Judge, Sri Muktsar Sahib, disposing of an application filed by the judgment-debtor to the effect that the decree under order has been fully satisfied.

In brief, Raj Kumari Verma filed the Civil Suit No.RT-231 dated 04.10.2007 against Professor Krishan Kumar (deceased) for recovery of an amount of ₹3,30,000/- with costs and interest @ 12% per annum before filing of suit and 6% per annum after filing the suit. The suit was decreed on 19.12.2007. The decree-holder filed an application for

execution on 19.04.2008 for recovery of ₹4,12,691/- including principal sum, interest and costs.

The judgment-debtor filed objection petition in the execution which was dismissed on 04.12.2008 and warrants for attachment of shop of the judgment-debtor was ordered. The said shop was subsequently put to auction vide order dated 30.06.2009. The shop was auctioned on 11.08.2009 in favour of the appellant for a sum of ₹24,05,000/-. The appellant paid 1/4th amount of auction money, i.e. ₹6,01,250/-, at the post office which was deposited by the Court Cashier in the Government Treasury on 12.08.2009. The remaining amount of ₹18,03,750/- was also deposited by the appellant on 21.08.2009.

On 12.09.2009, the judgment-debtor moved an application under Order 21 Rule 89 of the Code of Civil Procedure, 1908 (here-in-after referred to as the "CPC") to pay the decretal amount and 5% of the purchase money to be paid to the auction purchaser and prayed that the sale in favour of the appellant may be set aside. He deposited a sum of ₹3,80,000/- in the Court which was accepted by Shri I.M.L.Verma, Advocate, on behalf of the decree-holder, in complete satisfaction of his claim in the decree under execution. The auction purchaser-appellant was not present on that day to whom notice was issued for 19.09.2009. The notice was not received back duly served and fresh notice was ordered to be issued to him for 10.10.2009 and then for 07.11.2009. In the meantime, on 13.10.2009, the judgment-debtor moved another application depositing 5% amount of the purchase money to be paid to the auction purchaser and also moved an application for

condonation of delay. He was allowed to deposit the purchase money subject to the decision of the application for setting aside the sale in favour of the auction purchaser. The auction purchaser joined the proceedings on 07.11.2009 and filed reply on 08.12.2009 and 07.01.2010. The judgment-debtor in his application dated 12.09.2009 has alleged that he was not served properly before drawing proclamation of sale and had also filed an appeal against the decree under execution. He had already paid decretal amount to the decree-holder in complete satisfaction of the decree and was also ready to pay 5% of the purchase money and any other amount, as directed by the Court to the auction purchaser.

Counsel for the appellant has argued that the objection of the auction purchaser is that the application filed by the judgment-debtor was not maintainable as it was filed after the expiry of the period of limitation prescribed under Order 21 Rule 92 of the CPC which cannot be extended. It is submitted that the period of 60 days is provided under Order 21 Rule 92 of the CPC, whereas admittedly the application was filed on 63rd day and was clearly beyond the period of limitation and the said limitation cannot be extended in any manner. It is further submitted that in the application dated 12.09.2009, the decree-holder had only recorded his readiness and willingness to pay 5% of the purchase money to be paid to the auction purchaser but no such amount was deposited except for the decretal amount and since an application was filed for condonation of delay to deposit the amount equivalent to 5% of the purchase money, the judgment-debtor had lost his right to invoke the provisions of Order 21 Rule 89 of the

CPC. He has also submitted that the judgment relied upon by the Courts below in favour of the respondents in the case of **Baljit Singh v. Gulab Singh and others**, 2012(1) PLR 823 is also not applicable.

On the other hand, counsel for the respondents has argued that the application for setting aside the sale in favour of the auction purchaser was filed immediately on 12.09.2009 much-less within the period of 60 days as prescribed under Order 21 Rule 92 of the CPC and an offer was also made to pay 5% amount of the purchase money to be paid to the auction purchaser, if so ordered by the Court. However, the application could not be decided as notice was issued to the auction purchaser for 19.09.2009. He did not appear and then it was ordered to be issued for 10.10.2009 and then for 07.11.2009 but on that day also, the case could not be taken up because the Presiding Officer was on leave as he had to attend a legal seminar at Chandigarh. In the meantime, the judgment-debtor had filed an application on 13.10.2009 to deposit 5% of the purchase money to be paid to the auction purchaser. It is submitted that his intentions were very much clear and the circumstances were beyond his control as he could not have deposited 5% of the purchase money without an order of the Court. He has thus submitted that the judgment in **Baljit Singh's case (supra)** fully covers his case.

I have heard learned counsel for the parties and examined the available record with their able assistance.

Before I proceed to record my findings, it would be relevant to refer to Order 21 Rules 89 & 92 of the CPC, which are reproduced as

under:-

“89. Application to set aside sale on deposit— (1)

Where immovable property has been sold in execution of a decree, any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person, may apply to have the sale set aside on his deposition in Court,—

- (a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and
- (b) for payment, to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered less any amount which may, since the date of such proclamation of sale, have been received by the decree- holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.”

“92 . Sale when to become absolute or be set aside—

(1) When no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute:

Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within thirty days from the date of sale, or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

Provided further that the deposit under this sub-rule may be made within sixty days in all such cases

where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

(5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court directs, be revived at the stage at which the sale was ordered.”

It is not disputed that the judgment-debtor has a right for setting aside the sale deed in favour of the auction purchaser by offering 5% of the purchase money to the auction purchaser in terms of Order 21 Rule 89 of the CPC and at the same time it is not disputed that the said application has to be filed within a period of 60 days of the deposit of the entire sale consideration by the auction purchaser which was deposited in the present case on 21.08.2009 and the application under Order 21 Rule 89 of the CPC

was filed by the judgment-debtor on 12.09.2009. However, to his misfortune, the Court issued notice to the auction purchaser for 19.09.2009, 10.10.2009 and on 07.11.2009 the Court was not available but looking at the intention of the judgment-debtor as he had even filed an application on 13.10.2009 by engaging a new advocate to allow him to deposit 5% of the purchase money, the application for setting aside the sale in favour of the auction purchaser-appellant has been allowed.

Thus, there is no fault on the part of the judgment-debtor and his case is fully covered by the decision of this Court in **Baljit Singh's case (supra)**. The relevant portion of the order passed by this court in **Baljit Singh's case (supra)** is reproduced thus:-

“In application Annexure P-2, JDs pleaded in paragraph 3 that they were prepared to deposit the requisite amount under Order 21 Rule 89 CPC. In paragraph 6 of the same application, it was pleaded that JDs were ready with the money and they prayed to the Executing Court for granting requisite permission to deposit the same. Thus, the JDs were ready with requisite amount to deposit the same in the Executing Court. However, the Executing Court, instead of immediately allowing the JDs to deposit the requisite amount under Order 21 Rule 89 CPC, ordered issuance of notice of the application, Annexure P-2 to counsel for DH, for 01.10.2004. However, ultimately, order on the said

application was passed on 20.12.2004 only to deposit the requisite amount on or before 10.01.2005 and the amount was accordingly deposited by JDs on 10.01.2005. Request of JDs for deposit of the said amount was not opposed by counsel for the auction-purchaser. The delay occurred because in the meanwhile, auction-purchaser had to file reply to the said application. Thus, there was no delay on the part of JDs in depositing the requisite amount. The delay was either on the part of the Executing Court or on the part of the auction-purchaser – petitioner himself, for which JDs cannot be penalised. The auction was held on 17.09.2004 and JDs sought permission to deposit the requisite amount under Order 21 Rule 89 CPC on 28.09.2004 i.e. within 11 days of the auction sale i.e. long before the expiry of requisite period of 60 days mandated by Order 21 Rule 92 (2) CPC. In this view of the matter, judgment in the case of Dadi Jagannadham (supra) would have no applicability to the facts of the instant case. On the other hand, requisite amount was deposited long before confirmation of the sale and consequently, in view of judgment of this Court in the case of Girdhari Lal (supra) also, the sale cannot be confirmed. At the risk of repetition, it may be highlighted that JDs sought permission to deposit the

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requisite amount within prescribed period and they were also ready with the requisite amount, but there was delay by the Court in granting permission to JDs for depositing the said amount and for this delay, the JDs obviously cannot be penalised. It would not be out of place to notice here that the JDs, without permission of the Court, could not have deposited the requisite amount because neither the Treasury Office nor the Bank would have accepted the said amount without permission of the Court. Thus, examined from any angle, there was no delay by JDs in depositing the requisite amount under Order 21 Rule 89 CPC. Consequently, the Executing Court had no discretion, but to set aside the sale in view of mandatory provision of Order 21 Rule 89 CPC. Resultantly, first contention raised by counsel for the petitioner has to be negated.”

In view of the aforesaid discussion, I do not find any error in the orders of the Courts below and merit in the present appeal. Hence, the same is hereby dismissed.

February 10, 2015
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(Rakesh Kumar Jain)
Judge