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

**Civil Revision No.3682 of 2016 (O&M)
Date of Decision: 02.12.2016**

Rakesh Sethi

......Petitioner

Vs

Subhash Sethi

.....Respondent

CORAM: ***HON'BLE MR. JUSTICE RAJ MOHAN SINGH***

Present: Mr. Arun Takhi, Advocate
for the petitioner.

Mr. Sudershan Goel, Advocate and
Ms. Rashmi Dhillon, Advocate and
Ms. Rupinder Kaur, Advocate
for the respondent.

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RAJ MOHAN SINGH, J.

[1]. Petitioner has assailed order dated 24.02.2016 passed by Civil Judge (Jr. Divn.) Chandigarh vide which suit property was put to auction and the order dated 26.04.2016 being illegal and contrary to the provisions of Partition Act, 1893.

[2]. Brief facts as gathered from the record are that one Kishori Lal Sethi was the original owner of House No.281, Sector 21-A, Chandigarh, who died on 15.01.1965. Deceased Kishori Lal Sethi left behind his widow Smt. Lata Sethi (since deceased) and two sons namely Subhash Sethi (respondent),

Rakesh Sethi (petitioner) and two daughters namely Chander Prabha Sethi and Rattan Prabha Sethi. Widow of Kishori Lal Sethi and his two daughters relinquished their shares in favour of Subhash Sethi and Rakesh Sethi respectively. Accordingly the house was transferred in the name of the petitioner and respondent to the extent of 50% share each by the Estate Officer, UT, Chandigarh on 24.02.1971.

[3]. Respondent solemnized marriage with a lady, who was divorcee having one son from the previous wedlock. The said marriage was against the wishes of the family members. Respondent was not taking care of his mother and left along with his wife. He started living in some Government accommodation allotted to his wife. Respondent filed a suit for partition and possession of the house in question on 15.02.2006 against the petitioner. Mother of the parties died on 27.01.2008. The suit was decreed vide judgment and decree dated 17.08.2011.

[4]. Petitioner remained unsuccessful in first appeal before the lower Appellate Court which was dismissed on 22.04.2014 and in Regular Second Appeal No.3575 of 2014 which was dismissed by this Court on 15.07.2014.

[5]. However, the respondent without waiting for the

abovementioned outcome of the appeal, on 29.08.2011 filed an application for passing final decree and for *mesne* profits under Order 22 Rules 18 and 12 CPC read with Section 151 CPC. Petitioner being in possession of the property in question filed an application before the executing Court seeking leave to buy the share of the respondent in the house in question on 12.12.2012. The application was contested by the respondent.

[6]. Vide order dated 19.12.2012, the executing Court before proceeding further on the application thought it appropriate to call for the report of Local Commissioner regarding possible mode of partition between the parties. Sh. Yogesh Mittal, Advocate was appointed as Local Commissioner with a direction to submit his report regarding possible mode of settlement between the parties. Sh. Yogesh Mittal, Advocate sent an intimation to both the parties in compliance of the order dated 19.12.2012 to invite responses in respect of bids in writing with regard to the price at which the petitioner intended to purchase 50% share of the respondent and vice versa. It was also circulated that in case bids were not received, the Local Commissioner would have no option, but to advertise the house in the newspaper for open auction for the General Public. In that eventuality, the amount received would be apportioned between the contesting parties.

[7]. The aforesaid gesture was shown by the Local Commissioner pursuant to the direction for exploring possible mode of settlement between the parties. The appointment of Local Commissioner was challenged by the judgment-debtor on the aspect of possible mode of settlement between the parties as well on the ground of calling upon them to give their bids in writing.

[8]. The executing Court vide order dated 20.04.2013 directed the Local Commissioner to first assess the market value of the property and thereafter submit his report. The objections regarding recalling of appointment of Local Commissioner raised by the judgment-debtor was rejected. Thereafter Local Commissioner got the valuation report of the house in question assessed from the approved Valuer which was found to be Rs.336.12 lacs. The valuation report was obtained from Er. Vikash Kaushal, Government approved Valuer. The valuation report was submitted before the executing Court on 05.07.2013.

[9]. The petitioner filed objections to the valuation report submitted by the Local Commissioner. The objections filed by the judgment-debtor were contested by the respondent and the same were rejected by the executing Court vide order dated

17.08.2013. The Local Commissioner was directed to put the property to auction firstly between the parties i.e. petitioner and the respondent and further to submit the report on or before 07.09.2013. Local Commissioner intimated the petitioner in compliance of the aforesaid order. Since the reserve price was on the higher side, therefore, the petitioner as well as the respondent could not make any offer for the purchase of the property.

[10]. The executing Court put the property in question for public auction and fixed 27.10.2014 and 10.11.2014 to be the dates for auction and submission of auction report of the Court Auctioneer. None came forward. On 02.02.2015 again public auction was ordered to be held. Due to non-publication, none participated on that occasion as well.

[11]. On 14.09.2015, decree-holder/respondent moved an application before the executing Court for refixation of auction price to be Rs.2.25 crores in the backdrop of decline in the prices of properties in Chandigarh. Executing Court fixed Rs.20,80,000/- as base price and again put the property to auction for 06.02.2016 and 15.02.2016 for the report of auction. Publication was made. Since copy of the orders of the publication allegedly was not forwarded to the Court Auctioneer,

therefore, he did not turn up to conduct the auction and resultantly the same was postponed. Since the base price was wrongly fixed as Rs.20,80,000/-, the same was ordered to be corrected vide order dated 24.02.2016 and the base price was fixed to be Rs.2,08,00,000/-. Thereafter executing Court once again put the property for public auction and fixed the date for sale by way of auction on 26.04.2016 and 27.05.2016 was the date fixed for report of the Court Auctioneer. Publication was made as per norms. Petitioner is aggrieved of the order dated 24.02.2016 vide which the property was put to public auction on the premise that in view of changed base price *inter se* auction was not ordered by the executing Court.

[12]. I have heard learned counsel for the parties and have gone through the record.

[13]. As per Sections 2 and 3 of the Partition Act, the sale by auction is the last resort before putting the property to auction. Parties are required to make attempt for purchase of the property by mutual bidding. In view of orders dated 07.08.2016, 03.11.2015, 11.12.2015 and 24.02.2016 on record, it is evident that the petitioner had consented for the auction and he had even participated in the process. The application for passing the final decree under Order 22 Rule 18 CPC was pending since

the year 2011. Both the parties had exhausted their options for purchasing the property under pre-emptory mechanism and ultimately consented for putting the property for a public auction so that the proceeds can be distributed amongst them as per their entitlement under the preliminary decree. Despite the appointment of Court Auctioneer, the property could not be auctioned for various reasons. While passing order dated 11.12.2015, the executing Court noticed that the parties had agreed to fix the collector's rate of the suit property as the base price. Evidently, no application was filed by the judgment-debtor to purchase the property on collector's rate.

[14]. In view of aforesaid, it cannot be appreciated that the parties were not put to *inter se* auction on pre-emptory mechanism. The fixation of base price was on erroneous basis and that was rectified, but the intention of the judgment-debtor was not too good for *inter se* auction in view of non-filing of any application to purchase the property on collector's rate.

[15]. Partition of the suit property by metes and bounds was not possible in view of Rule 14 of the Chandigarh (Sale of Sites and Buildings) Rules, 1960 framed under the Capital of Punjab (Development & Regulation) Act, 1952. Only mode for execution of decree was to sell the property and apportion the sale

proceeds equally between the parties in the ratio of 50:50. Judgment-debtor is in possession of the entire property and has raised objections at every stage for obvious reasons to delay the ultimate conclusion of the *lis*.

[16]. The auction was held as per schedule. On 26.04.2016, both the parties were present at the site. Bidders as per list came forward to participate in the auction. Highest bid of Rs.2,25,00,000/- was offered jointly by Sh. Sandeep Mahajan, Mrs. Manu Garg, Amaninder Singh and Des Raj and the same was accepted and they were held to be joint purchasers in equal share of the property being the highest bidders in the open auction held on 26.04.2016. The highest bidders paid the requisite 25% of the amount of total auction amount of Rs.2,25,00,000/- on 26.04.2016 and the balance amount of Rs.1,68,75,000/- was to be paid within 15 days from the date of auction i.e. 26.04.2016. The Court Auctioneer prepared the report regarding auction on 27.05.2016.

[17]. During the course of arguments, it was argued by the learned counsel for the petitioner that there was no proper publication in the newspaper for the auction to be conducted on 26.04.2016. Both the parties were required to filed their affidavits. Learned counsel for the respondent with reference to

Annexures R-1 and R-2 brought on record submitted that the auction notice was appearing in the Chandigarh Tribune and The Tribune on 16.01.2016 and 25.03.2016 respectively. The aforesaid fact could not be denied by the petitioner with reference to any material on record despite giving opportunity.

[18]. Since the suit property was agreed to be sold on collector's rate and the petitioner/judgment-debtor did not move any application for purchasing the same even on collector's rate, the objections with regard to *inter se* auction cannot be appreciated in the light of aforesaid facts. An attempt has been made by the petitioner that there was an agreement/ compromise entered into between the parties on 26.04.2016 and the petitioner was prevented from taking part in auction for the reasons that his signatures were obtained on the compromise and by that time auction was completed.

[19]. I am afraid that no such material has come on record to presume such an event. Even otherwise, auction dated 26.04.2016 showed the participation of the petitioner. Petitioner has concealed the factum of fixing the collector's rate as per order dated 11.12.2015. Even otherwise, after the auction the remedy available to the petitioner was in terms of Order 21 Rule 89/90 CPC. Petitioner did not apply for getting the sale set aside

by depositing any amount in Court for payment to the purchaser a sum equal to the 5% of the purchase money and other amounts as required under Rule 89 Order 21 CPC.

[20]. In terms of Order 21 Rule 90 CPC, no sale can be set aside on the ground of irregularity or fraud in publishing or conducting the auction unless upon the evidence to show that the judgment-debtor has sustained injury by reasons of such irregularity or fraud. Due to decline in rise in price index, petitioner even did not offer the collector's rate for *inter se* auction between the parties.

[21]. During pendency of the revision petition, at one point of time petitioner intended to seek instructions to show his intention to purchase half share of the respondent at the rate on the property was auctioned in favour of the auction-purchasers. The fact was duly noticed in the order dated 22.10.2016, but thereafter the petitioner did not show his readiness and willingness towards the proposal. The alleged defect in the attachment and sale of the property are not the grounds defined under Order 21 Rule 90 CPC. Even no such objections were filed by the petitioner under Order 21 Rules 89 and 90 CPC.

[22]. In terms of Order 21 Rule 92 CPC, in the absence of any application made under Rules 89 or 90 of Order 21 CPC.

The Court shall make an order of confirmation of sale and thereafter sale shall become absolute. Since there was no objection made by the petitioner under Rule 89 of Order 21 CPC and no such amount was deposited as required under the said Rule, therefore, the petitioner cannot be allowed to question the proceedings.

[23]. In ***Annapurna Vs. Mallikarjun, (2014) 6 SCC 397***, the Hon'ble Apex Court after considering Article 127 of the Limitation Act held that although Order 21 Rule 89 CPC does not prescribe any period of limitation for making an application, but Article 127 of the Limitation Act prescribes period of 60 days within which the application was required to be made. The deposit of requisite money is a condition precedent and is a *sine qua non* to an application for setting aside the execution of sale and such amount has to be deposited within prescribed time. In the instant case, neither any objection or application in terms of Order 21 Rules 89 and 90 CPC was moved, nor any amount was deposited within the time prescribed.

[24]. In terms of Rule 90 of Order 21 CPC, the sale has to be made absolute in the auction of sale property. The Court has power to set aside the auction on deposit of required amount by the judgment-debtor. Such powers are discretionary and are

based on sound principles of law. Mere establishing some irregularity or fraud are not the grounds unless and until objector establishes that material irregularity and fraud has resulted in substantial injury to the objector.

[25]. In view of facts enumerated in the preceding paras, I am of the considered view that no indulgence can be granted to the petitioner. This revision petition is accordingly dismissed.

December 02, 2016 **(RAJ MOHAN SINGH)**
Atik **JUDGE**

Whether speaking/reasoned Yes / No

Whether reportable Yes / No