

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

CR No.4739 of 2016(O&M)

Date of decision:9.9.2016

Darshan Kumar

....Petitioner

VERSUS

Dharamvir Kochar and others

.....Respondents

CORAM: HON'BLE MRS. JUSTICE REKHA MITTAL

Present: Mr. A.P. Kaushal, Advocate for the petitioner.

REKHA MITTAL, J.

CM No.18035-CII of 2016

Allowed as prayed for.

Annexure P-17 is taken on record subject to just exceptions.

CR No.4739 of 2016

The present petition has been directed against order dated 31.05.2016 passed by the Civil Judge (Junior Division), Ludhiana whereby application filed under Order 21 Rule 90 of the Code of Civil Procedure, 1908 (in short 'CPC') has been dismissed.

The brief backdrop of the case is that Dharamvir Kochar-respondent No.1 filed a suit for separate possession of half share by way of partition of a shop detailed in headnote of the plaint (Annexure P-1) and recovery of Rs.1,80,000/- as compensation on account of use of the property by the defendants with mesne profits at the rate of Rs.5000/- per month from the date of suit till property is partitioned. Further prayer was made for permanent injunction restraining the defendants from making additions, alterations, selling any specific portion of the suit property. The

suit was contested by the defendants and culminated in the judgment and decree dated 10.12.2008 (Annexure P-2) passed by the trial Court. The defendants except Pawan Kumar (defendant No.1) filed an appeal against the judgment and decree dated 10.12.2008 and the appeal was dismissed by the Additional District Judge, Ludhiana vide judgment dated 21.04.2011.

Dharamvir Kochar/decreed holder filed an application for execution of the decree only qua recovery of an amount of Rs.2,67,000/- awarded as compensation/mesne profits. In the execution proceedings, property of the judgment debtor(s) was attached and put to sale. The auction was conducted on 30.10.2014 by Sh. Ramesh Lakhanpal (Advocate/Court Auctioneer) Ludhiana. Surinder Singh son of Joginder Singh purchased the auctioned property bearing No.1500/1, Gokul Road near Chowk Kesar Ganj, Ludhiana measuring 75 square yards. The sale was confirmed and sale certificate was issued in favour of the auction purchaser on 30.01.2015.

The auction purchaser filed an application under Section 94 read with Section 95 CPC for delivery of possession (Annexure P-11). It appears that in response to the said application, one objection petition was filed by Sharat Kumar and Darshan Kumar (Annexure P-10) and the other was preferred by Pawan Kumar and Sunita Mehta. The objection petitions as well as application filed by Surinder Singh were disposed of by the Civil Judge (Junior Division), Ludhiana vide order dated 09.09.2015 wherein the Court rejected contention of the petitioner/JDs that auction was conducted at their back is without any merit but they have not produced any documents to prove the fact that auction has been set aside and as such sale certificate already issued in favour of the applicant stands.

Later, the petitioner and Sharat Kumar filed the instant application under Order 21 Rule 90 CPC read with Section 151 CPC (Annexure P-12) for setting aside the auction dated 30.10.2014. It is alleged that the Civil Judge, Ludhiana appointed a local commissioner to conduct auction of the property mentioned in execution proceedings in recourse of law but the local commissioner did not follow the due procedure and auctioned the property. He did not give any notice to the JDs, so auction conducted without following mandate of law at the back of JDs is not sustainable. It is further averred that JDs are not withdrawing any amount deposited by the auction purchaser and the same is still lying in the treasury of Ludhiana.

After reply filed by the auction purchaser and having heard counsel for the parties, the application was dismissed by the trial Court vide order impugned.

Counsel for the petitioner, in line with the averments raised in the application has submitted that as the local commissioner appointed by the Court to conduct auction did not give any notice to the JDs, he is guilty of violating the due procedure of law, therefore, auction of the attached property is liable to be set aside. Another submission made by counsel is that the JDs have not withdrawn any amount (auction money) deposited by the auction purchaser in pursuance of the auction conducted by the local commissioner. A vain attempt has been made to contend that the Court has allowed auction being conducted despite the fact that a report was submitted by the local commissioner dated 28.04.2014 that the property is not divisible as is apparent from the site plan of the first floor and ground floor.

I have heard counsel for the petitioner perused the paper-book particularly the order impugned.

Counsel for the petitioner has not disputed that sale of attached property conducted by the Court auctioneer was confirmed and a sale certificate was issued in favour of the auction purchaser on 30.01.2015. The present petition was filed by the petitioner in February, 2016, more than a year after the sale certificate was issued in favour of the auction purchaser and prior thereto sale was confirmed.

Order 21 Rule 92 CPC deals with sale when to become absolute or be set aside. A relevant extract therefrom, germane to the controversy, is extracted hereinbelow for ready reference:-

“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.”

As per sub-Rule (1) of Rule 92, the Court shall make an order confirming the sale and thereupon the sale shall become absolute if no application is made under rule 89, rule 90 or rule 91 or where such application is disallowed, meaning thereby that an application under rule

89 or 90 or 91 can be made by an aggrieved party only before the sale is confirmed and made absolute. As in the case at hand, no such application was filed by the petitioner/JD prior to confirmation of the sale and issuance of sale certificate, such an application filed at such a highly belated stage could not be maintained more particularly in the circumstances that this is none of the plea of the petitioner that he was not aware of issuance of a proclamation for sale by the Court and appointment of a local commissioner/auctioneer for conducting auction of the attached property.

This brings the Court to another important aspect of the case as to whether the application filed by the petitioner satisfies the requirements of Rule 90 or otherwise. Rule 90 deals with application to set aside sale on ground of irregularity or fraud. Sub-Rule (1) of Rule 90 provides for persons entitled to file an application to the Court to set aside the sale but the twin grounds available to the applicant are material irregularity or fraud in publishing or conducting sale. The petitioner has not made any allegation with regard to fraud in publishing or conducting sale. What has been alleged by the petitioner is that the sale is liable to be set aside as the local commissioner/auctioneer has not given any notice to the JDs.

On a pointed query raised by the Court, counsel for the petitioner has failed to invite attention of the Court to any such provision under Order 21 CPC or otherwise which requires a notice to be given to the JD(s) by the auctioneer before conducting sale of the attached property. In absence of any such provision much less creating any mandatory requirement to give a notice to the JD by the auctioneer, I find myself unable to accept the submissions made by counsel for the petitioner that

the grievance expressed by the petitioner can fall within the purview and ambit of Rule 90 of Order 21 CPC.

Counsel for the petitioner pointed out a report dated 28.04.2014 submitted by a local commissioner. Though, it is not very clear as to in which proceedings Sh. Shiv Kumar, Advocate, Ludhiana was appointed as a local commissioner but it appears that he was appointed as a local commissioner to suggest mode of partition in view of the preliminary decree of partition passed in favour of Dharamvir Kochar that has been affirmed in appeal by the Court of Additional District Judge, Ludhiana Counsel for the petitioner has failed to say as to how the said report is relevant in the context of controversy raised in the present petition or in the application under Rule 90 CPC.

No other point has been raised.

For the foregoing reasons, finding no merit, the petition fails and is accordingly dismissed in limine.

SEPTEMBER 9, 2016
'D. Gulati'

(REKHA MITTAL)
JUDGE

Whether speaking/reasoned : yes/no

Whether reportable : yes/no