IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

ESA No.57 of 2015 (O&M)
Date of Decision-08.01.2016

Kunj Chowdhary and another ... Appellants

Versus

Krishan Kumar and another ... Respondents

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

Present: Mr. Rajan Bansal, Advocate for the appellants..

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__RAJ MOHAN SINGH, J.__

[1]. Appellants have filed Execution Second Appeal against the impugned order dated 15.09.2015 passed by Additional District Judge, Sangrur whereby order dated 25.08.2014 passed by Additional Civil Judge, Senior Divison, Dhuri has been upheld vide which objections filed by the appellants in execution have been dismissed.

[2]. A civil suit for recovery was filed by respondent No.1 Kirshan Kumar against Rajiv Chowdhary who is missing since 05.08.2009. Trial Court decreed the suit ex parte vide judgment and decree dated 16.08.2012 in a sum of Rs.6,00,000/- along with interest @ 9% per annum since 04.05.2009 till the date of filing of the suit i.e. 19.01.2012 and future interest @ 6% per annum till physical realization of the amount. On the basis of said decree, an execution was filed for recovery of Rs.8,20,980/- (Rs.6,00,000/- as decreetal amount, interest from 04.05.2009 to 19.01.2012 Rs.1,44,000/-, interest from 19.01.2012 to 23.11.2012 Rs.2,70,000/-, costs Rs.27,980/- along with expenses of present execution Rs.22,000/-). In execution, decree holder sold 8 biswas 5 biswasis of the property of judgment debtor Rajiv Choudhary in

favour of respondent No.2. The appellants being son and wife of JD filed objections against the auction before the Executing Court on the ground that as against recovery of Rs.8,20,980/-, auction has been conducted for Rs.26,36,800/- and no auction took place on the spot on 09.01.2014. The objectors have alleged that the auction has been conducted in utter disregard of Order 21 Rule 64 CPC. The whole of the property was not required to be sold for the recovery of Rs.8,20,980/-.

[3]. The objections have been contested by the decree holder claiming that property of the judgment debtor is a self acquired property and objectors have no interest therein and they do not acquire any such right through inheritance. Judgment debtor has not been declared as civilly dead by any competent authority and inheritance has not opened so far. Therefore, objectors have no right in filing objections. The report of revenue officials reflect that the property was constructed property and the same could not be sold in parts. Auctioneer being the best Judge to sell the property and to fetch maximum price and in order to prevent any loss to the Judgment debtor sold the entire property at the maximum value in open auction. No finger can be raised against the proceedings at the instance of the objectors. The objectors were fully aware about the proceedings and the decree against the judgment debtor. The brother of judgment debtor is an Advocate having common office with the judgment debtor. Once Rajiv Chowdhary has not been declared civilly dead by any competent authority so far, the objectors being son and wife of judgment debtor has no interest in the auctioned property. The third party interest has already been created by the auction and at this stage auction cannot be nullified which has been done after following proper procedure and wide publicity in order to fetch maximum price of the auctioned property.

The objections have been filed after the conclusion of auction. The objections could have been filed at the commencement of the proceedings i.e. before auction. The objections under Order 21 Rule 90 (3) CPC could have been filed on or before the auction and no objection can be taken into consideration at the confirmation of the sale. The confirmation has already been done on 15.10.2015.

[4]. Auction purchaser purchased the property auctioned by the Court in an open auction after making sufficient publication. The auction purchaser being stranger to the auction purchased the property in a bona fide manner. The sale of such nature is duly protected and the auction purchaser cannot be compelled to return the property to the judgment debtor in the light of observations made in ***Woods Beach Hotel Ltd. Vs. Mapusa Urban/Cooperative bank of Goa Ltd. and others reported in CCC 2009(3) SC 187***. Such objections are not legally maintainable under Order 21 Rule 90 (3) CPC as the same ought to have been filed before starting of auction proceedings. Notice under Order 21 Rule 66 CPC was served upon the judgment debtor. No objections were filed. In the event of filing no objection to the auction sale at the relevant time, dis-entitle the appellants to raise the same at a subsequent stage particularly when third party interest has come to fore. No objection or application can be entertained to set aside concluded sale in terms of Order 21 Rule 90 CPC after the conduct of the sale. Such a step should have been taken by the objectors before conclusion of the auction proceeding as has been held in ***M/s R.J. Agro Industries Vs. M/s Parkash Rice and General Mills, RCR (Civil) 2007 4) 244***. No such application is maintainable on any of the ground which the objectors could have taken on or before the

date of sale. The reference can be made to ***Davinder Singh Vs. Hardev Singh, RCR © 2004 (3) 157.***

[5]. Objectors were in knowledge of the proceedings from the very beginning. They being members of joint family have the common office. The notice under Order 21 Rule 66 CPC has been duly served on the joint office and objections came to be filed through an Advocate who is none else the brother of the judgment debtor. The objectors kept the brief, watching the brief and kept mum till culmination of auction proceedings and now they have turned around to get the entire process nullified in view of filing of these objections. The property which has been made subject matter of auction is importable in nature. The judgment debtor is missing since 05.08.2009 and has not been declared as civilly dead by any competent Court so far. Requisite period of 7 years have not been completed so far, therefore, it cannot be presumed that judgment debtor is civilly dead. Notice in terms of Order 21 Rule 66 CPC was issued to the judgment debtor on the known address and judgment debtor was found missing. Notice in the main suit was also issued on that very address.

[6]. Learned counsel for the appellants has vehemently contended that the decree holder has played fraud upon the Court as well as with the objectors. Notice in terms of Order 21 Rule 66 CPC has been issued by mentioning the khasra numbers and constructed houses have not been shown. Munadi has been received back duly served through son. Munadi is one of the recognized mode of service and it is necessary to be signed by any of the party once proclamation is made in the locality. The objectors have already moved an application under

Order 9 Rule 13 CPC to set aside the ex parte judgment and decree passed against the judgment debtor. Since the Executing Court cannot go beyond the decree whatever relief is available to the judgment debtor is available in the proceedings under order 9 Rule 13 CPC. No objections were ever taken in the original suit as JD is missing. Due notice was served upon common address. The alleged knowledge derived on 30.01.2014 appears to be farce. The contention that objectors would file application under Order 9 Rule 13 CPC to set aside the ex parte judgment and decree against the judgment debtor has to be appreciated in the light of actual filing of such application. Nothing has come on record whether such an application has been filed or not. It further adds to the conduct of the objectors in stalling the proceedings only. It is also proved on record that along with the objections, decree holder has also attached the sale deed of the property sold and this fact has already been mentioned in the execution, therefore, there is no concealment of any fact by the decree holder as the sale deed itself reflect that there is a construction on the site. Since sale deed has been filed along with the execution, therefore, the alleged argument that only khasra number has been mentioned and not the house does not stand to reason. The Court has also issued warrant of attachment of the house and it was the house which was made subject matter of the auction. Since the property sold was not partable/divisible, therefore, whole of the property was put on sale. The passage in the property was not common, rather, a part and parcel of the sold property and therefore, it cannot divisible. The issuance of notice to the judgment debtor by a recognized mode of service ie. munadi cannot be faulted with on both occasions. Even the sale warrants were executed after the munadi and no objection came to light at the instance of the objectors. The judicial proceedings have the presumption in terms of Section 144 (e) of the Evidence Act, unless and until the same are rebutted by way of cogent evidence, the factum of knowledge seems to be based on falsehood as nothing has been adduced on record as to how the objectors acquired knowledge about the pendency of present execution. The stand of the objectors is conspicuous by the absence of source of knowledge. The auction was done on 09.01.2014 and filing of these objections within limitation is suggestive of the fact that the judgment debtor as well as the objectors kept close vessel over the proceedings and when the case was at the final stage, the objections have been filed just to stall the proceedings. The objectors claimed that they are resident of Bathinda but they have intentionally not disclosed their addresses. The auction amount was already stood deposited in the Court. The service upon the judgment debtor was done after resorting to substitute mode of service by means of munadi and after the munadi, judgment debtor was lawfully proceeded against ex parte and the property was sold after attachment. No objections were filed to the notice under Order 21 Rule 66 CPC and thereafter, warrants of sale was issued. The sale warrant was duly executed and when the case was at the fag end for confirmation of sale the present objections came to be filed. No objections have been moved by the father of the judgment debtor during the pendency of the suit as well as during the pendency of execution. Sons and wife of judgment debtor have come forward at this belated stage of the execution. The stand of the objectors that they are going to file application under Order 9 Rule 13 CPC against the ex parte judgment and decree has not been culminated by filing the same as on date despite the fact that present objections were filed on

30.01.2014.This conduct itself shows that the intention of the objectors is to only delay proceedings and not to contest the proceedings in reality as per lawful procedure. The objections at the stage of confirmation of sale are not maintainable.

[7]. Learned counsel for the petitioner relies ***upon Kulwinder Kaur Vs. Raghbir Singh, 1998(4) RCR (Civil) 381*** to contend that when whereabouts of defendant executants of agreement are not known since more than7 years, though he cannot be presumed to be dead, but in his absence his wife and children are necessary parties and they were required to be impleaded under Order 1 Rule 10 CPC. Apparently this relief pertains to the main proceedings and not in execution where the Executing Court cannot go beyond the decree. The objectors have the common address even the brother of the judgment debtor having common address who is a practicing Advocate, therefore, it was for the applicant/objectors to come forward to move an application under Order 1 Rule 10 CPC for their impleadment in the proceedings and not otherwise. The decree holder has taken all the lawful steps to serve the judgment debtor even by munadi which is a notice to all has been resorted to and thereafter, the objectors action was that they were required to be impleaded under Order 1 Rule 10 CPC by the decree holder. Similar is the proposition in terms of ***Amarjit Singh Vs Charan Singh and others, 2007(1) RCR (Civil) 389***. Since the decree has already been passed and in execution property has been sold, such a proposition at this belated stage, in considered opinion of this Court does not arise, particularly when the objectors have not resorted to the proceedings under Order 9 Rule 13 CPC so far. ***Smt. Bimla Devi and others Vs. Dharam Chand and another, 1993(2) RCR (Rent) 676 and***

Gurdeep Kaur Vs. Vinod Kumar Lamba, 1994(2) (Rent) 1 are also the propositions relating to the main controversy and have no domain, where, in execution the attached land has been sold to answer the claim in the decree. Learned counsel for the appellants has also attacked the proceedings in terms of Order 21 Rule 64 CPC having not been conducted as per mandatory requirement, vitiates the proceedings in toto.

[8]. Having given thoughtful consideration to the submissions made by the learned counsel for the appellants, this Court is of the considered view that munadi is one of the recognized mode of service and after having conducted the same, it is only for the objectors to come forward by way of resorting to lawful procedure either to move an application under Order 9 Rule 13 CPC or to raise objections at the earliest in the objections. Since the objections have been made at a belated stage, therefore, I am of the view that no such objections can be entertained at this stage. Consequently, I find no merit in this Execution Second Appeal and the same is accordingly dismissed.

(RAJ MOHAN SINGH)
JUDGE

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