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IN THE HIGH COURT OF DELHI AT NEW DELHI

RESERVED ON: 08.07.2016

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PRONOUNCED ON: 27.07.2016

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EFA (OS) 14/2004, CM APPL.12591/2010

CAPTAIN CHARMAINE KAULA & ORS. Appellants

versus

RATAN KAULA & ORS. Respondents

**EFA (OS) 1/2011, CM APPL.300-301/2011, 15069/2011,
14477/2012 & 12710/2013**

PRIME COMMERCIAL PVT LTD Appellant

versus

RATAN KAULA & ORS Respondents

Appearance: Mr. Sudhir Nandrajog, Sr. Advocate with Mr. Sumit Gahlawat, Advocate for Prime Commercial Pvt. Ltd.

Mr. Sandeep Sethi, Sr. Advocate with Mr. P.S. Bindra, Advocate for respondents.

Mr. Saurabh Kirpal with Ms. Simran Brar, Mr. Varun Kumar and Ms. Deveshi Mishra, Advocates for Resp-15.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MS. JUSTICE DEEPA SHARMA

S.RAVINDRA BHAT, J.

1. These are third party execution appeals questioning the approval of sale, given by the learned single judge, in the order dated 11.05.2004. The appellant in EFA 1/2011, Prime Commercial (Pvt) Ltd (hereafter called "Prime") also seeks modification of an earlier order disposing of EFA 14/2004 in C.M. No.12951/2010. It has

preferred application, C.M. Nos.300-301/2011 and 14477/2012 for various related reliefs, in EFA 1/2011. The merits of the appeal and all related applications are considered in this judgment.

2. The brief facts are that late Ms. C.B. Kaula, wife of Sir Ganga Ram Kaula filed a Civil Suit (CS (OS) No.406/1972) for partition of property No.7, Sikandra Road, New Delhi (“the suit property”). On 5th September 1986, the Court decreed the suit, based on compromise/settlement dated 19th August 1986. In terms of the decree, drawn on 5th September 1986, the suit property had to be developed collectively or was to be sold collectively. Later, in an execution proceeding, Execution Petition No.204/1998, it was agreed by all co-owners that it was not possible for them to develop the suit property, which ought to be sold by public auction, and that the proceeds thereof received through auction be distributed amongst the co-owners in terms of their respective shareholding. In the course of an appeal, EFA (OS) 14/2004 the Division bench directed public auction of the suit property. By order dated 21st August, 2006, the Division Bench settled the terms and conditions of the auction, directing that 25% of the bid amount was to be deposited by the successful bidder within a week from the date of the order approving the bid and the balance amount of 75% was to be deposited within three weeks thereafter. The subsequent deposit of the balance amount of 75% of the bid amount was conditional on receipt of the order of conversion of the suit property from leasehold to freehold. The Court also stated:

“It is also made clear that if the successful bidder is unable to deposit the bid amount in accordance with the stipulation and time schedule fixed by this court, in that event the security deposit of Rs.50 lacs, which will be deposited in this court, shall stand forfeited.”

3. The auction was held on 26th September, 2006, in which a total of five bids were received. Triveni Infrastructure Development Company Ltd was the highest bidder with an offer of ₹117 crores; the appellant, Prime had bid ₹115 crores. While confirming Triveni’s bid, the Court observed as follows:

“The highest bid offer of M/s. Prime Commercial was Rs.115 crores whereas M/s. Triveni Infrastructure bid for the highest price of Rs. 117 crores. Since M/s Triveni Infrastructure has offered the highest price of Rs.117 crores their bid is accepted. M/s. Triveni Infrastructure shall deposit 25% of bid amount within a week from today in terms of the bid conditions. Further orders in respect of the sale shall be passed on the next date. Security deposits in the form of demand draft for the sum of Rs.5.0 lacs deposited by M/s Maruti Nandan Housing and Land Development (P) Limited, M/s Zoom Developers (P) Limited and M/s Om Shivam Apartments Private Limited shall be returned to the said parties by the Court Master of this Court after retaining and placing on record photocopies of the same. So far as security deposit of M/s Prime Commercial is concerned the same shall be retained till further orders. In case, there is default on the part of M/s Triveni Infrastructure Company declared as the successful bidder today to pay the purchase money in terms of the orders of this Court, the bid of M/s. Prime Commercial could be accepted.

The matter shall now be listed on 4th October, 2006.”

4. On 5th October, 2006, the Division Bench in its order, recorded firstly that Triveni had deposited 25% of the consideration within the time; it was given 3 weeks to deposit the balance 75% after receipt of intimation regarding conversion of the suit property into freehold. It was also observed that *“In view of the aforesaid position, the security deposit of M/s. Prime Commercial (P) Limited is released in favour of the representative of the said firm, through their counsel, against receipt which shall be retained in the file.”* Apparently cheques for ₹11.5 crores tendered by Triveni were dishonoured; this led the court - on 01.11.2006 to initiate contempt proceedings. However, that order (dated 01.11.2006) was recalled, on 06.11.2006 because Triveni’s application (CM No. 14875/2006) for that relief, and to permit deposit of the amount, was allowed.

5. In November, 2008, the Land and Development Officer granted sanction for conversion of the property from leasehold to freehold. On 19th January, 2009 Conveyance Deed of the property in the name of owners was registered in the Office of Sub-Registrar. Triveni was informed about this development; it did not pay the balance amount in time and, instead, sought extension (of time) for purpose of fulfilling its commitment. The request was granted and time to pay the amount was extended till end of December, 2009, with condition that in case the amount was not paid before 31st October, 2009, Triveni had to pay extra ₹87.75 crores. Again, on 12.06.2009, Triveni’s application (EA 320/2009) for modification of the previous order (with respect to payment of balance ₹87.75 crores) by substituting M/s Angle

Infrabuild (P) Ltd, its subsidiary, was allowed. The heirs of the owner preferred an appeal, EFA (OS) 29/2009 in respect of this order, complaining that substitution of a third party who had not participated in the bidding was not correct and it could prejudice their interests. In this background, before expiry of the date for payment - 31.12.2009, another application (EA 732/2009) was moved for directions. The Court, on 23.12.2009, issued directions which modified the terms of payment to a certain extent. Firstly, the auction purchaser (Triveni) was permitted to tender the amount payable, on the date of execution of sale deed; secondly the owners were required to hand over vacant possession of the suit property.

6. Since the order of 23.12.2009 was made *ex-parte*, the co-owners filed an appeal (EFA (OS) 8/2010). During the pendency of the appeal, a joint application (EA 191/2010) - on behalf of Triveni, Angle Infrabuild, and three individuals- M/s Chetan Sabharwal, Nitin Sabharwal and Kabul Chawla (joint applicant Nos.3) proposed that the third applicants would acquire the shareholding of Angle Infrabuild - which had been endorsed by its shareholders; that Triveni, the holding company (of Angle Infrabuild) was agreeable to the proposal, and its shareholder authorization was forthcoming. This application was allowed on 20th April, 2010 and the amounts payable to the co-owners were accepted in court. This order was made in the presence and with consent of the co-owners of the suit property, whose counsel undertook to withdraw the pending appeals, EFA 29/2009 and EFA 8/2010. The court accepted the statements on behalf of Triveni, Angle

and the third applicants, as well as owners about the disbursement of the amounts and consequent execution of the sale deed. In the light of this development, the court disposed of and closed the pending execution proceeding, i.e., EP 204/1998.

7. The appeal (EFA 1/2011) preferred by Prime is premised on its being the second highest bidder and entitled, by reason of the order of the Division Bench dated 26th September, 2006, to be the purchaser of the suit property in the event of default by the highest bidder, Triveni, in payment of the balance amounts. It is pointed out that the record of the execution proceeding itself shows that Triveni had chronically defaulted in making payments. Though the intimation regarding conversion was given in end 2008, Triveni deliberately did not make payment. Its bid therefore was cancelled. The repeated indulgence given by this court in making balance payment - extended to 31st October, 2009, on condition of payment of extra amount. The directions and concessions were not honoured; the payments were never made on time. Further extensions were sought and an entirely different set of terms - other than what were the conditions of auction were substituted. These included, *inter alia*, substitution of the purchaser on two occasions and secondly, the imposition of new terms such as condition of handing over vacant possession of the property. It was submitted that the advertised auction was on “as is where is” basis. Tenants inhabited the suit property. The bids of those willing to purchase were on the basis of that condition, rather than handing over vacant possession of property - a later unilateral condition. If such

terms were originally known, the appellant would have offered a higher amount as bid. Likewise, the extension of payment term - , i.e., release of amount on execution of sale deed - were unilateral.

8. Mr. Sudhir Nandrajog, learned counsel for the appellant, argued that the impugned orders are unsustainable in law. It is submitted that by order dated 15th May, 2007, the Division Bench directed that the orders passed by it from time to time including the order dated 21st August, 2006 and 26th September, 2006 shall continue to operate and the parties were entitled to approach, Learned Single Judge for clarifications, if any. The Learned Single Judge lacked jurisdiction to substitute the said orders or change the terms and conditions of the auction including the substitution of the auction purchaser Triveni. It was argued that in terms of the order dated 26th September, 2006, the appellant was the default purchaser, i.e., if Triveni failed to pay the balance amount in time, the sale deed had to be registered in its favour. As Triveni did not deposit the amounts within time, the default condition applied.

9. It was highlighted that in terms of Order XXI Rule 86, a default in payment of balance of an auction sale, by the purchaser, results in forfeiture of the amount paid by the purchaser and re-auction of the property. The court erred in not adopting the mode indicated in the order dated 26th September 2006, nor go by the mode indicated in Order XXI Rule 86. It is also argued that the co-owners, out of desperation consented in accepting the balance sale consideration from third parties. It is submitted that the consent of the co-owners was in

any case wholly irrelevant for substituting third parties to the auction sale conducted by this Court.

10. It is argued that the judgments of the Supreme Court are consistent that upon default by the successful auction purchaser in compliance with the terms of auction, the sale would be rendered ineffective and the amounts deposited would be forfeited. Learned counsel relied upon the judgment of the Supreme Court reported as *Mani Lal Mohan Lal Shah v. Sardar Sayed Ahmed Sayed Mahmud and Anr* 1955 SCR 108, *Rao Mahmood Ahmad Khan through their LR v. Ranbir Singh & Ors* 1995 Supp (4) SCC 275 and *Shilpa Shares and Securities and Ors. v National Cooperative Bank* 2007 (12) SCC 165. It was argued that the appellant has *locus standi* to challenge the impugned orders because it was default purchaser and was the “other person” whose “interests are affected by the sale” in terms of Order XXI Rule 90 CPC.

11. Shri Sandeep Sethi, learned senior counsel for the respondents, i.e. the auction purchaser and the subsequent purchasers (Sabharwals and Kabul Chawla) urge that the appeal is highly belated. It was submitted that the appellant had in fact withdrawn from the race and taken away its earnest money deposit as far back as in October 2006. It was highlighted that the appellant was aware about the further proceedings in execution and the orders made from time to time. Learned counsel pointed out that the records in the execution proceedings were inspected on 14.01.2008 on behalf of the appellant. It was, therefore, always aware about the pendency of the execution

proceedings and the orders made by the Court from time to time, and yet chose to appeal only in 2011.

12. Learned counsel urged that the impugned orders, especially the orders dated 12.06.2009 and 20.04.2010 are consent orders, which are not appealable by reason of Section 96(3) of the CPC. It is stated that the appellant claims to be even a vendee in terms of Section 54 of the Transfer of Property Act because there was no contingent interest in the property. Shri Sandeep Sethi, emphasized that the first order whereby the terms of auction were set on 26.08.2006, at no stage defined the consequence of its breach, if the auction purchaser were to default in its commitment to pay the balance. That addition was made later, on 26.09.2006 at the stage of confirmation of sale. It was submitted that the terms of auction are not in accord with Order XXI CPC but rather are independent of it. If this aspect were to be kept in mind, the question of the delayed deposit, if any, cannot result in the effacing of the entire transaction itself.

13. Learned counsel highlighted that unlike in the case of auction of public properties where everyone is likely to have an interest and the Court has to zealously safeguard the rights of the citizens and general public, the present controversy is in respect of sale of private property as a sequel to a compromise decree in a partition suit. In such proceedings, it is open to the parties at any stage to agree to sell their private properties either by auction or by private treaty. The grievance of the owners - articulated on the ground that they were not heard when the orders of 12.06.2009 and 23.12.2009 were made, were

redressed and they eventually withdrew their appeals, EFA 29/2009 and 8/2010 consequent to the impugned order dated 20.04.2010. They also accepted the full balance amount payable to them as consideration for conveyance of the property.

14. It was stated that there is no bar in law to the procedure proposed and accepted by the learned Single Judge of substituting firstly M/s. Angle Infrabuild and later the three joint applicants (Sabharwals and Mr. Kabul Chawla) as beneficial purchasers. The Court and the owners were satisfied with this course of action as were the shareholders of both Triveni and M/s. Angle Infrabuild. In the circumstances, the argument and objections of the appellant is that of a rank outsider and interloper. The appeal, therefore, should be rejected. Learned counsel highlighted that the appellant cannot be termed as a party or person interested or affected by the sale. It was stated that the grounds on which reliefs can be granted under Section XXI Rule 90 are narrow, i.e. fraud or material irregularity as to undermine the entire sale. At no stage did the appellant move such an application alleging fraud. Even the grounds of appeal do not allege fraud or material irregularity that affects the rights of a party interested. In any case, with the appellant having withdrawn the earnest money as far back as in 2006 itself, it cannot be said that it is in any manner affected by the transfer of the suit property to the purchasers or their nominees.

15. It was submitted that even in the case of the highest bidder in the sale of public property, there can be no grievance till the sale itself

is confirmed. Learned counsel relied upon *Harish Chandra Agarwal v. U.P. AvasEvamVikasParishad&Ors* 2013 (5) SCC 182.

Analysis and findings

16. The above factual discussion would reveal that the original co-owners of the suit property had settled their partition suit, which led to a compromise decree. The parties' efforts at implementing the settlement were unsuccessful; they were also unable to develop the property. Eventually, they agreed to have the property sold. Initially, the response for the sale was poor; with intervention of the court, a public auction was held- pursuant to the order dated 26-08-2006. That order, significantly, set the terms in such manner that the successful bidder had to deposit 25% of the amount within a particular period, and the balance within 3 weeks after confirmation of the bid and after conversion of the suit property into freehold. In the bidding, the two highest bidders were Triveni and Prime; *inter se* bidding was resorted to, in which the former bid ₹117 crores; the appellant, Prime had bid ₹115 crores. Triveni was declared the successful bidder. At the stage of bid confirmation, the Court, for the first time, stated that default in paying the balance would lead to the second highest bidder becoming the default successful bidder. There was some default in regard to payment of the initial amount, because Triveni's cheques were dishonored. The court initiated contempt proceedings; however they were later dropped on 06.11.2006 when Triveni deposited the amount. The court accepted this.

17. The suit property was converted into freehold- intimation of this was given in the beginning of January, 2009. Triveni concededly did not deposit the amount within the stipulated time; on the other hand, the court, by a series of orders, granted concessions and extension of time to facilitate deposit of the balance ₹87 crores. On 05.05.2009 time for depositing the amount was extended to end December, 2009 with further condition that in case the amount was not deposited by end October, Triveni had to pay extra ₹5 crores. On 12.06.2009, the Court permitted Angle Infrabuild to be substituted as the purchaser; it was the subsidiary of Triveni. The owners appealed against this order. Later, the court again extended the time for deposit of balance, stating that it could be paid at the time of execution of sale deed and that vacant possession of the suit property had to be handed over. The owners appealed against this order too. It was at this stage, that an application was moved for substitution of the three joint applicants as purchasers; the court was informed that they were to take over the shareholding of Angle Infrabuild, with approval of Triveni and its shareholders. The court permitted this and also recorded that the entire balance was paid to the owners, who then proceeded to withdraw their appeals, on 20th April 2010.

18. The relevant provisions of the Code of Civil Procedure (CPC), i.e., Order XXI Rules 86, 89 and 90 read as follows:

Order 21 Rules 86, 89 and 90 CPC

“86. Procedure in default of payment.- In default of payment within the period mentioned in the last preceding rule, the

deposit may, if the court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re sold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.”

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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 depositing 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.”

90. Application to set aside sale on ground of irregularity or fraud. - *(1) Where any immovable property has been sold in execution of a decree, the decree holder, or the purchaser, or any other person entitled to share in a rateable distribution of*

assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation: The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule."

19. A plain reading of Rule 86 would show that it is not compulsive; the court has discretion to forfeit the amount. Now this discretion is to be exercised keeping in mind, the circumstances. *Mani Lal Mohan Lal Shah (supra)* is no doubt an authority for the point that if the auction purchaser does not deposit the balance consideration within the stipulated time, the court has to forfeit the deposit and re-auction the property. At the same time, however, what is to be seen, in any given case where the issue arises, is whether the omission to deposit was in the context of a dispute involving the owner. In *Rao Mahmood Ahmad Khan through LR (supra)* the auction was of private property, but to recover public revenue dues; in *Mani Lal Mohan Lal Shah (supra)* the dispute pertained to auction of a mortgagor's property for recovery of the debt. Likewise, in the last case cited, *Shilpa Shares and Securities and Ors (supra)* the owner owed dues to

the bank; his property was put to sale. In all cases, the parties aggrieved were owners of the property, whose interests were directly affected. There could not and cannot be any doubt that irregularity in auction would have materially prejudiced them. In the present case, the appellant cannot even be said to have a contingent interest. It is not the appellant's case that it was induced to part with money, and the invitation to bid contained a condition that in the event of default, it would become the bidder. This condition was inserted post auction, more by way of precaution to protect the owner's interest. It was clearly not meant *for the benefit of the appellant, whose offer was not accepted and in whose favour no rights crystallized*. It cannot even be said that the appellant had some expectation in respect of the property; in the absence of a binding promise, the appellant had no manner of interest, direct or indirect.

20. As to which kind of individual had interest in the property was subject to debate for a long time; there is divergence of opinion of various High Courts as to whether even an auction purchaser could be said to have interest before the conveyance of property. Rule 90 was amended to include that class. It was in the context of the nature of interest of someone claiming to be affected that the Kerala High Court held that only those whose rights would be affected after confirmation, who would have *locus standi* to move under Order 21 Rule 90, in its judgment reported as *K. Kattayil v. Sathiavan Nair* AIR 1970 Ker 94. In that case, it was held that even an auction purchaser gets the right to approach under Order 21, Rule 90 *after confirmation of sale*, because

before that point in time, there is no interest in the property, of the said auction purchaser. In the said judgment it was held that:

“9. We find it difficult to agree with the reasoning in the above two decisions and to hold that the auction purchaser has got sufficient pecuniary interest prior to the sale to see that the sale is conducted in conformity the provisions of the Civil Procedure Code. A logical extension of the reasoning in AIR 1939 Nag 179 and ILR 47 All 479 = (AIR 1925 All 459) will be to hold that even unsuccessful bidders taking part in the auction are entitled to the benefit of Order 21, Rule 90 CPC. Suppose a non-existing encumbrance is disclosed in the proclamation of sale by the decree-holder. It may be that unsuccessful bidders would have been prepared to purchase the property at higher price if the wrong disclosure was not in the mere proclamation. But if immediately after the sale they came to know that the statement regarding the encumbrance is wrong it may be possible in a wider sense to say that they are persons whose interests will be affected by the sale and therefore competent to file applications under Order 21 Rule 90, CPC. We are sure that such could not be the intendment of Order 21, Rule 90 CPC. We cannot therefore, accept the very wide interpretation of the term “interests” in the several decisions including those in AIR 1939 Nag 179 and ILR 47 All 479 = (AIR 1925 All 459).

10. It is also not possible to follow the reasoning in these decisions because of the decision of the Supreme Court in AIR 1954 SC 349. According to their Lordships of the Supreme Court, if there is no compliance of Order 21, Rules 84 and 85 there would be no sale at all. Even if an auction-purchaser were to file an application before the payment of the purchase money under Order 21, Rule 85 it is obligatory for him to deposit the 3/4th of the sale amount. Otherwise the sale proceedings will be wiped out and the application be filed

under Order 21, Rule 90 CPC will be infructuous. In the light of the Supreme Court's decision, it is even possible to hold that there will be no completed sale before the payment of the amount under Order 21, Rule 85 CPC. The view which will be consistent with the decision of the Supreme Court is to hold that an auction purchaser cannot maintain an application under Order 21, Rule 90, CPC. We also think it necessary to point out that our view gains strength because of Order 21 Rule 91 CPC which enables the purchaser at an execution to have the sale set aside only on the ground that the judgment-debtor had no saleable interest in the property sold.

11. If Order 21, Rule 90 comprehends the filing of an application by an auction purchaser that rule will be sufficient to cover cases where the judgment-debtor had no saleable interest in the property. Order 21, Rule 91 CPC will then be unnecessary. It is well known that a Court sale carries with it no guarantee that the property sold in auction is that of the judgment debtor or that it is free from any defect of title and the principle of caveat emptor applies to such sales. Sale in execution of the decree is not void for the reason that the property sold in court auction does not belong to the judgment debtor. Probably that is the reason why the legislature wanted to specifically give a remedy to the auction-purchaser only in cases where there is total absence of title and not in cases of defect of title. We, therefore, hold that the appellant cannot maintain a petition under Order 21 Rule 90 CPC."

21. There is also force in the submission of the respondent that the property being private, and auction being conducted with the consent of all the family owners- who were decree holders, it was open to the owners to agree to alter the condition if it appeared to them that the purchaser would eventually pay the auction amount. Unlike in the

cases cited, where the interest of the owners (who were materially affected because of the nature of the auction process involved) here the appellant is truly a third party with no interest in the auction; the auction concluded and it was not successful in it. Even the earnest money deposited was refunded to the appellant. Given these circumstances and the further fact that the owners voluntarily agreed to modification of the terms in respect of payment schedule and also ultimately received the total consideration, entertaining the present appeal and granting relief is unwarranted; it would be contrary to law and wreak injustice. That the modification of terms of auction at a later date might seem distasteful or improper should not blind the court into inquiring whether in fact it was so and whether it caused any real or tangible injustice or prejudice to anyone. Clearly in this case, there was none.

22. In the light of the above discussion, it is held that there is no infirmity with the impugned orders; the appellant clearly has no right or interest, in terms of Order XXI Rule 90 or in any other manner, to question them. The appeal (EFA 1/2011) is consequently dismissed. C.M.12591/2010 is an application by Prime Construction for declaring that it is the successful bidder. The Court has dealt with the merits of the appeal. C.M.12591/2010 is, therefore, rejected.

S. RAVINDRA BHAT, J

JULY 27, 2016

DEEPA SHARMA, J