

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

C.R. No.1363 of 2017

Date of Decision: 14.03.2017

Narender Singh

....Petitioner

Versus

Krishan and others

....Respondents

BEFORE :- HON'BLE MRS. JUSTICE DAYA CHAUDHARY

Present:- Mr. Bhupinder Malik, Advocate
for the petitioner.

Mr. Sanjiv Kumar Aggarwal, Advocate
for the respondents.

DAYA CHAUDHARY, J.

The present revision petition has been filed under Article 227 of the Constitution of India for setting aside order dated 08.02.2017 (Annexure P-6) passed by learned Civil Judge (Junior Division), Safidon.

Briefly, the facts of the case are that respondent No.1/decree holder filed a Civil Suit for recovery of an amount of ₹ 2,05,600/- i.e ₹ 1,20,000/- as principal amount and ₹ 85,000/- as interest at the rate of 24% per annum against the petitioner/judgment debtor and his brother-Nirmal Singh. The suit was decreed on 29.03.2012 and it was ordered that respondent No.1/decree holder is entitled to recover ₹ 2,05,600/- from the petitioner/judgment debtor with interest at the rate of 6% per annum from the date of filing of the suit till the date of actual realization. Petitioner/judgment debtor and his brother filed an appeal against the said

order but the counsel for the petitioner/judgment debtor did not appear before the Appellate Court. The Appellate Court upheld the order of the trial Court and dismissed the appeal on 26.07.2013. However, the petitioner did not file Regular Second Appeal. Thereafter, respondent No.1/decree holder filed an Execution Petition. The petitioner gave statement before the Executing Court that he would pay ₹ 2,05,600/- on 22.12.2014 to the respondent No.1/decree holder but the money could not be paid by them due to its shortage. However, their counsel gave an assurance that he will move an application for extension of time. Thereafter, on 03.12.2015, Civil Judge (Junior Division), Safidon passed an *ex-parte* order under Order 21 Rule 66 CPC for proclamation of sales by public auction of one main residential house without issuing any notice to them. Auction of their house was held on 03.01.2016 and it was sold for ₹ 5,10,000/-. The house was purchased by respondent No.2-Kuldeep Singh, who is brother of respondent No.1/decree holder. As per auction report, the *bid* of the property, in dispute, was started from ₹ 1,50,000/- by one Om Parkash and the highest *bid* was of ₹ 5,10,000/- by said Kuldeep Singh. An application was moved by the petitioner/judgment debtor and his brother under Order 21 Rule 90 CPC for setting aside the auction held on 03.01.2016 contending therein that auction was conducted without any proper proclamation as required under Order 21 Rules 54 and 67 of CPC; no publication was effected in local newspaper and official gazette; the property was sold below the collector rate and market rate. The petitioner/judgment debtor also moved an application on 08.01.2016 for setting aside the *ex-parte* order dated 03.12.2015 with an application for condonation of delay in filing the application. The application of the petitioner/judgment debtor under Order

21 Rule 90 CPC was dismissed on 09.01.2017. On the same day, the application of the petitioner for setting aside the *ex-parte* order dated 03.12.2015 and application for condonation of delay were dismissed. Thereafter, respondent No.2/Auction purchaser moved an application under Order 21 Rule 92 CPC for confirmation of sale and notice was issued to the petitioner for 30.01.2017. A request was made by counsel for the petitioner to file reply of the application, which was accepted. Thereafter, the case was adjourned for 08.02.2017 for filing reply of the application under Order 21 Rule 92 CPC. However, reply of the application was not filed on 08.02.2017 and again a request for an adjournment was made by counsel for the petitioner as he wanted to file appeal against order dated 09.01.2017. The request made by learned counsel for the petitioner was rejected and the application was decided without filing reply. Vide order dated 08.02.2017, the sale was also confirmed. The impugned order dated 08.02.2017 passed by the Civil Judge (Junior Division), Safidon is subject matter of challenge in the present revision petition.

Learned counsel for the petitioner submits that the impugned order has been passed hurriedly without giving any opportunity for filing reply of the application. Learned counsel also submits that notice in the application was received by the petitioner on 30.01.2017 and on the next date of hearing i.e 08.02.2017, the impugned order was passed within a period of one week of the notice. Learned counsel also submits that a request was made by counsel for the petitioner as he wanted to file an appeal against the order dated 09.01.2017. The appeal was filed on 08.02.2017 and the same was kept for consideration on 09.02.2017. Notice in the appeal was issued for 16.02.2017. Learned counsel also submits that

the petitioner was having right to file appeal within a period of 30 days and he filed the same within the prescribed period but still the impugned order was passed before expiry of prescribed period of 30 days. Learned counsel further submits that the petitioner is having only one house, where, he is residing with his wife and three minor daughters.

Learned counsel for the petitioner submits that as per Section 60(1)(ccc) of CPC, the residential house is exempted from attachment and as such, the attachment of house is illegal as per aforesaid section. Learned counsel for the petitioner also submits that the petitioner also took this ground in filing application under Order 21 Rule 90 of CPC while challenging the *ex-parte* order dated 03.12.2015 but the plea of the petitioner was not considered and the impugned order was passed. It is also the argument of learned counsel for the petitioner that the house, which was sold in execution of the decree and auction of which was confirmed by the impugned order, is subject matter of final outcome of Regular Second Appeal filed by the petitioner/judgment debtor and the same is pending before this Court. Learned counsel also submits that the suit for specific performance against the petitioner/judgment debtor regarding the same house is also pending and it was in the knowledge of the Court. At the end, learned counsel for the petitioner submits that the impugned order has been passed in violation of Order 21 Rule 92 of CPC and the petitioner is ready to pay the decretal amount to the tune of ₹ 2,05,600/-.

Learned counsel for the petitioner has also relied upon the judgments of this Court in cases ***Bilas Chand Jain vs The State Bank of India and others 1988(1) PLR 587, Parminder Singh vs Balbir Singh and another 2015(9) RCR(Civil) 111, Bakhsho vs Pakhar Singh and another***

1985(2) PLR 259 as well as judgment of Kerala High Court in case **Tessy vs Suvarna Investments 2007(59) AIC 732**.

Learned counsel for the respondents has opposed the submissions made by learned counsel for the petitioner by submitting that the petitioner is lingering on the proceedings of the Executing Court. The application moved by the petitioner/judgment debtor under Order 21 Rule 90 CPC for setting aside the sale had already been dismissed vide order dated 09.01.2017. The sale of the house has been confirmed and only the sale certificate is to be issued to said Kuldeep Singh.

Learned counsel for the respondents has relied upon the judgment of Hon'ble the Apex Court in case **Hirabai vs Hanumanth Krishnaji Bhide 1997(1) RCR (Civil) 38**, **Kadiyala Rama Rao vs Gutala Kahna Rao (Dead) by LRs and others 2000(3) SCC 87**, judgments of this Court in cases **Lakhwinder Singh vs Chetan Dass and another 2014(1) Civil LJ 301** and **Devinder Singh vs Hardev Singh and another 2004(3) RCR (Civil) 157**.

Heard the arguments of learned counsel for the parties and have also perused the impugned order dated 08.02.2017 passed by the Civil Judge (Junior Division), Safidon as well as other documents on the file.

In the present case, the petitioner made a statement before the Executing Court that he would pay a sum of ₹ 2,05,600/- on 22.12.2014 to the respondent/decree holder but at that time, he was not having sufficient amount to pay. The counsel for the petitioner gave an assurance to the petitioner and his brother him that he will move an application for extension of time and will inform them but he did not inform on the date of passing of *ex-parte* order under Order 21 Rule 66 CPC for Proclamation of sales by

public auction of their only residential house. Even no notice was issued to the petitioner and his brother for that purpose, whereas, the same is mandatory. The auction of the house of the petitioner was held on 03.01.2016 and the auction report was submitted in the Court on 08.01.2016. The petitioner and his brother moved an application under Order 21 Rule 90 of CPC for setting aside the auction held on 03.01.2016. All grounds were taken in the appeal like the auction was conducted without any proper proclamation as per Order 21 Rules 54 and 67 of the CPC. Even no publication was published in any local newspaper. On the same day, the petitioner/judgment debtor also moved an application for setting aside the *ex-parte* order dated 03.12.2015 with an application for condonation of delay in filing the application. The application under Order 21 Rule 90 CPC was dismissed on 09.01.2017 by Civil Judge (Junior Division), Safidon. On the same day, the application of the petitioner for setting aside order dated 03.12.2015 and application for condonation of delay were also dismissed. Learned counsel for the petitioner requested to file reply of the application moved by respondent No.2 under Order 21 Rule 92 CPC for confirmation of sale as notice was issued to the petitioner. Although the request of counsel was accepted and the case was adjourned to 08.02.2017 for filing reply but counsel for the petitioner did not file reply of the application on 08.02.2017 and again requested for date as he wanted to file an appeal against order dated 09.01.2017. The request of the counsel was declined and the application was dismissed without filing any reply. It clearly shows that before passing of impugned order, no opportunity was afforded to the petitioner as the impugned order was passed within a period of one week and notice of the application was received by the petitioner on

30.01.2017. The request of the petitioner for filing appeal was not accepted.

However, the appeal was filed by the petitioner on 08.02.2017 and the same was kept for consideration on 09.02.2017. Notice in the appeal was issued for 16.02.2017 which shows that the appeal was pending and still the impugned order was passed. It is also relevant to mention here that the period of filing appeal was 30 days and the appeal was filed within period of limitation. The petitioner has only one residential house and as per provisions of Section 60(1)(ccc) of the CPC, residential house is exempted from attachment. Section 60(1)(ccc) of the CPC is reproduced as under :-

“ Provided that the following properties will not be liable to such attachment or sale namely:- (ccc) – one main residential house and other buildings attached to it (with the material and the site thereof and the land immediately appurtenant thereto and necessary for their enjoyment) belonging to a judgment debtor other than an agriculturist and occupied by him;

Provided that the protection afforded by this clause shall not extend to any property specially charged with the debt sought to be recovered.”

The petitioner also mentioned this ground in the application moved under Order 21 Rule 90 CPC while challenging the *ex-parte* order dated 03.12.2015 but it was not considered. The residential house, which was sold in execution of the decree and auction of which was confirmed by the impugned order, is also subject matter of RSA filed by the petitioner and the same is still awaited for its final outcome. Order 21 Rule 92 of the CPC is also relevant for deciding the controversy in the present case and the same is reproduced as under :-

“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 [sixty 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.] ”

A perusal of aforesaid provision shows that the impugned order has been passed contrary to the provisions of Order 21 Rule 92 CPC. The petitioner has also made a request to State that he is ready to pay the decretal amount of ₹ 2,05,600/- but the same was not accepted.

In **Tessy's** case (supra), it was held that without disposing of the claim, the Court could not confirm the sale and the impugned order of confirmation of sale was set aside. A direction was issued to dispose of the claim petition filed by the petitioner expeditiously and to pass order about confirmation of sale.

In the present case, the application was moved by respondent No.2/Auction purchaser under Order 21 Rule 92 CPC for confirmation of sale. Notice was issued to the petitioner but without waiting for the reply, the application was decided and the impugned order was passed.

As per provisions of Section 60(1)(ccc) CPC, the only residential house is not liable to be attached and nowhere, it has been mentioned that the petitioner was having some other house.

Resultantly, by considering the submissions made by learned counsel for the petitioner, the revision petition deserves to be allowed. There is merit in the contentions raised by learned counsel for the petitioner. Hence, the present revision petition is allowed and the impugned order dated 08.02.2017 (Annexure P-6) passed by Civil Judge (Junior Division), Safidon is hereby set aside.

The Executing Court is directed to re-consider the case of the

petitioner afresh after taking into consideration the observations and the provisions as discussed above and pass necessary order without being influenced by the observations made in the order passed earlier. The necessary exercise be done within a period of two months from the date of receipt of certified copy of the order.

14.03.2017
gupreet

(DAYA CHAUDHARY)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes