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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ CM(M) 1275/2016 & CM No.45874/2016 (for stay).

SHYAM SUNDER NARWANI THR ATTORNEY Petitioner

Through: Mr. M.L. Mahajan and Mr. Gaurav Mahajan, Advs.

versus

PUNEET KHARBANDA & ANR Respondents

Through: Mr. Rohit Nagpal, Adv.

AND

+ EX.F.A. 6/2017, CM No.11144/2017 (for stay) and CM No.34609/2017 (under Section 151 CPC).

PUNEET KHARBANDA Appellant

Through: Mr. Rohit Nagpal, Adv.

versus

SHYAM SUNDER NARWANI & ANR Respondents

Through: Mr. M.L. Mahajan and Mr. Gaurav Mahajan, Advs.

Mr. Mukul Sharma and Mr. Prashant Kumar, Adv. for the applicant.

CORAM:

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

ORDER

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20.09.2017

1. This order is in continuation of earlier order dated 29th August, 2017.
2. The counsel for the petitioner in CM(M) No.1275/2016 informs that the balance decretal amount has been deposited and has in this regard handed over in the Court a copy of the order dated 11th September, 2017 in Ex. No.31/12/13 of the Court of the Additional District Judge, (Central)-10, Tis Hazari Court, Delhi and which is taken on record of file of CM(M) No.1275/2016.
3. The factum of deposit is not disputed by the counsel for the respondent no.1 / decree holder / auction purchaser Puneet Kharbanda.

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4. The counsel for Shyam Sunder Narwani, the counsel for Puneet Kharbanda, the counsel for the Court Auctioneer and J.K. Sharma, Court Auctioneer himself have been heard.

5. I have at the outset enquired from the counsel for the decree holder / auction purchaser Puneet Kharbanda that now that the decretal amount has been deposited in the Court, what is his right, as an auction purchaser, left. It has further been enquired from him, whether the legal proposition recorded in para 7 of the order dated 29th August, 2017 is correct and if it is so then whether not on the deposit of the decretal amount, the said decree holder / auction purchaser Puneet Kharbanda would be left with no interest.

6. The counsel for the decree holder / auction purchaser Puneet Kharbanda though does not dispute that with the deposit of the decretal amount in the Court, prior to the sale in execution being confirmed, Puneet Kharbanda, as decree holder or as auction purchaser has been left with no right in the property but draws attention to Order XXI Rule 89 of the Code of Civil Procedure, 1908 (CPC) which *inter alia* provides "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, may apply to have the sale set aside on depositing in the Court, for payment to the purchaser, a sum equal to 5% of the purchase money". It is argued that Puneet Kharbanda, as auction purchaser, is entitled to 5% of the purchase consideration of Rs.1,35,00,000/- i.e. to a sum of Rs.6,75,000/- from Shyam Sunder Narwani. It is also argued that Puneet Kharbanda, besides the aforesaid amount, would also be entitled to other incidental charges.

7. I have enquired from the counsel for the decree holder / auction purchaser Puneet Kharbanda, whether the provisions of Order XXI Rule 89 of the CPC, since use the words "where the immovable property has been sold in execution of a decree.....", apply even before the sale is confirmed; in the present case it is the admitted position that the sale was not confirmed. It has further been enquired that even if Order XXI Rule 89 of the CPC were to apply, the same having provided for only payment of 5% of the purchase consideration, whether the decree holder / auction purchaser Puneet Kharbanda be entitled to other incidental expenses over and above the said 5%.

8. The counsel for the decree holder / auction purchaser Puneet Kharbanda, instead of showing any law in this respect, has argued that the conduct of the objector Shyam Sunder Narwani in the present case is *mala fide* and obstructive and the said objector Shyam Sunder Narwani had thereby caused losses to the said decree holder / auction purchaser Puneet Kharbanda. It is stated that the sum of Rs.1,35,00,000/- deposited by the decree holder / auction purchaser Puneet Kharbanda in the Court as purchase money was by taking loan from the bank and on which loan, decree holder / auction purchaser Puneet Kharbanda has paid interest of about Rs.60,00,000/-.

9. Though I have repeatedly asked the counsel for the decree holder / auction purchaser Puneet Kharbanda as to how, without showing the law to the effect that non-confirmation of the sale also leads to the consequence of the purchaser being entitled to 5% of the purchase consideration, what purpose the argument on facts sought to be urged would serve but the

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counsel for the decree holder / auction purchaser Puneet Kharbanda has only drawn attention to (i) the order dated 25th March, 2014 in the course of the execution when option was given to objector Shyam Sunder Narwani to deposit the decretal amount; (ii) order dated 17th April, 2014 in the execution proceedings when the objector Shyam Sunder Narwani had refused to deposit the decretal amount and has contended that had the objector Shyam Sunder Narwani deposited the decretal amount then, as he has done now, the decree holder / auction purchaser Puneet Kharbanda would not have been made to suffer interest on the loan taken for depositing the purchase money; and, (iii) the letter dated 17th January, 2014 of the Court of the Additional District Judge-1 (Central) District, Tis Hazari Courts, Delhi to the Executing Court informing of another money decree against the judgment debtor and asking the Executing Court to deposit the surplus in satisfaction of that decree-however on asking as to what is the relevance of the same to the present controversy, the only answer forthcoming is that the property in any case will have to be auctioned again in execution of the other decree.

10. This Court cannot, in this proceeding decide on the basis of some other decree against the judgment debtor.

11. The counsel for the decree holder / auction purchaser Puneet Kharbanda has then drawn attention to the objections filed and has with reference to certain paragraph thereof contended that the entire story cooked up by the objector Shyam Sunder Narwani of having come to know of the auction just before filing the objections is false as it is unbelievable that if he was in possession of the property or had posted any caretaker in the property, he would not have known of the auction sale. Faults are also found with the

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Vakalatnama executed by the objector Shyam Sunder Narwani in favour of his Advocate.

12. I am afraid none of those arguments have any relevance at the present stage without the counsel for the decree holder / auction purchaser Puneet Kharbanda satisfying this Court of the entitlement of the decree holder / auction purchaser Puneet Kharbanda to the said sum of Rs.6,75,000/- and other incidental expenses. All that can be observed is that the said claim was not even made before the Executing Court and there is no order of the Executing Court in that respect and this Court exercising appellate jurisdiction and / or supervisory jurisdiction cannot adjudicate upon the said claim. If the decree holder / auction purchaser Puneet Kharbanda has any entitlement to the said amount, it is open to him to take appropriate proceedings either in the Executing Court or otherwise for recovery thereof and nothing contained herein will come in the way thereof.

13. This Court in this proceeding is only concerned with the propriety of the order of the Executing Court refusing to confirm the sale and which on deposit of the decretal amount as aforesaid has become infructuous.

14. Execution First Appeal is thus disposed of with the aforesaid observations.

15. As far as CM(M) No.1275/2016 is concerned, the grievance of the petitioner Shyam Sunder Narwani is now confined to the conditions imposed upon him on the application of the Court Auctioneer to pay commission charges and auction expenses as per High Court Rules.

16. The counsel for the Court Auctioneer has in this regard drawn attention to Chapter 12 Part L (Sale of property and delivery to the

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purchaser) of Part C (Instructions to Civil Courts in Delhi) of the compendium of Delhi High Court Rules Practice and Procedure. Rule 22 (i)(b) thereof provides that commission at the rate of 5% on Rs.5,000/- and two-and-a-half per cent on the remainder is payable and if the sale is conducted by Court Auctioneer and 80% of the said commission will be paid to the Court Auctioneer and 20% will be paid into the Treasury to the credit of Government. The counsel for the Court Auctioneer states that as per the said Rule, a sum of Rs.2,70,000/- is due as Government Commission and auction expenses.

17. Per contra, the counsel for the objector Shyam Sunder Narwani has drawn attention to Rule 23(i) which provides that no commission shall be paid on the proceeds of sales set aside for a material irregularity in publishing or conducting the sale. He has in this regard drawn attention to para 42 of the order dated 27th October, 2016 refusing to confirm the sale where the reason given is of the procedure under Order XXI Rule 66 of the CPC having not been followed in conducting the sale.

18. The Court Auctioneer has contended that the Rule 23(i) further provides that the commission on the proceeds of a sale set aside for any other cause shall be paid by the person at whose instance and for whose benefit the sale is set aside and the Court Auctioneer shall be entitled to his share of such commission. He also contends that the defect found by the Executing Court in the order dated 27th October, 2016 is not attributable to the Court Auctioneer and is a defect in the attachment issued and sale ordered. It is contended that it was for the objector Shyam Sunder Narwani to object to the attachment of the entire house of which he claimed one half share.

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19. I may in this regard notice that the order dated 27th October, 2016 records that the Sale Deed of the property was in the joint name of the judgment debtor Manohar Narwani and objector Shyam Sunder Narwani.

20. I have enquired from the counsel for the Court Auctioneer, whether it was not incumbent upon the Court Auctioneer to, before proceeding with the sale, examine the title of the property and ensure that only the interest of the judgment debtor in the property and not the entire property is sold.

21. The Court Auctioneer states that is not his role and his counsel draws attention to para 39 of the order dated 27th October, 2016 to contend that it has been observed therein that there is no material irregularity or fraud in the procedure followed in conducting of the auction sale.

22. I am still intrigued at the purpose of designating a Court Auctioneer, if the Court Auctioneer with his expertise is to proceed with the auction without examining the title which is being auctioned. However it is not deemed expedient to delve further into this question as it is deemed expedient to for the aforesaid reason modify the order dated 27th October, 2016 by holding the Court Auctioneer to be entitled to only 50% of the amount claimed i.e. to a sum of Rs.1,35,000/-, to be deposited by the objector Shyam Sunder Narwani with the Executing Court on or before 20th October, 2017, failing which such recovery shall be enforced including from the interest of the objector / judgment debtor in property no.707, Double Storey, New Rajendra Nagar, New Delhi – 110 060. With the aforesaid, CM(M) No.1275/2016 is also disposed of.

Dasti.

RAJIV SAHAI ENDLAW, J

SEPTEMBER 20, 2017 'pp'
(Corrected & released on 4th October, 2017)
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