

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

CR No.5378 of 2009

Date of Decision: 04.04.2018

Dedar Singh

.....Petitioner

Vs.

Gurbaj Singh @ Baja Singh and others

.....Respondents

CORAM: HON'BLE MS. JUSTICE RITU BAHRI

Present:- Mr.B.S.Bedi, Advocate, for the petitioner.

Mr.Kanwal Jeet Singh, Sr.Advocate, with
Mr.Adarsh Jain, Advocate, for respondent No.1.

RITU BAHRI, J. (ORAL)

CM No.17747 of 2016

Application is allowed, subject to all just exceptions.

Documents Annexures A-1 to A-4 are taken on record.

Main Case

Petitioner has come up in revision under Article 227 of the Constitution of India for quashing/setting the order dated 07.09.2009 whereby warrant of possession has been issued and vide order dated 12.09.2009, execution of warrant of possession by providing police help has been ordered.

In the present revision, Gurbaj Singh @ Baja singh filed a suit for possession by way of redemption of mortgage and the said suit was dismissed by the learned trial Court vide judgment and decree dated 23.10.1981 and the appeal filed by the respondent was also dismissed vide order 24.09.1986 passed by the learned Additional District Judge, Kurukshetra. Aggrieved against the same, he filed RSA No.419 of 1987, which has been allowed vide judgment and decreed dated 26.08.2009. Vide

order dated 26.08.2009, warrant of possession had been ordered to be issued without notice to the judgment debtors/petitioners and further police help had been provided vide order dated 12.09.2009 for execution of warrant of possession under the provisions of Code of Civil Procedure. Vide order dated 07.09.2009, the decree holder was granted permission to deposit Rs.27,200/- as per direction given by the High Court while allowing the RSA and notice was issued to the judgment debtors. On 12.09.2009, while warrants of possession could not be delivered, an application was made for police help through SHO concerned.

Learned counsel for the appellant i.e. B.S.Bedi, Advocate, has challenge the abovesaid order only on the two grounds i.e. while passing the judgment Annexure P-1 it was only a preliminary decree under Order 34 Rule 7 CPC and final decree under Order 34 Rule 8 was required to be passed. Whereas, in the instant case, the provision of law has been ignored and without following the procedure as envisaged under the provisions of law under Order 34 CPC.

In the present case, notice has been issued to judgment debtors before accepting the mortgage amount under Order 21 Rule CPC. After hearing counsel for the parties, this revision deserves to be dismissed.

On the first point, respondents have placed on record the judgment passed by the Co-ordinate Bench of this Court i.e. Annexure R-1 as well as the order passed by the Hon'ble Supreme Court wherein, the SLP was dismissed (Annexure R-3). A perusal of the judgment passed by this Court on 27.08.2009 shows that the amount of mortgage was assessed at Rs.27,200/-. Keeping in view the statement made by DW-5 Bahal Singh-defendant No.1 had deposed regarding the terms of the mortgage. From his

statement, the amount of mortgage comes to Rs.2200/- and another sum of Rs.25000/-. Therefore, DW5 Bahal Singh sufficiently proved the amount of mortgage can be 27,200/- and on payment of such mortgage amount, the plaintiff was entitled to redemption. Thereafter, no further clarification for passing a final decree was required as the finding that land was proved to have been mortgaged at Rs.27,200/- as it was upheld by the Hon'ble Supreme Court by affirming the order passed by this court by dismissed the SLP vide Annexure R-3.

After hearing counsel for the parties at length, this revision is deserves to be dismissed. This Court in the case of **Ajinder Pal Singh Virk Vs. Sudarshan Kumar 2005(1) RCR (Civil) 830**, examined in a suit for possession by redemption, the preliminary decree has been passed. The trial Court decreed the suit and passed final decree for possession on payment of money due and the judgment was affirmed by the learned appellate Court in appeal. There was no occasion to pass a preliminary decree since the defendants had taken the plea that there was no mortgage. The defendant has not questioned the title of plaintiff and thus plaintiff was entitled to a decree for possession after payment of Rs.5,000/-. After this judgment, the judgment of of Supreme Court passed in the case of **Sanjiv Kumar and another Vs. Darshan Singh and others RCR(Civil) 116** wherein, it was held that in a suit for redemption of mortgage, the Court is not bound to pass a preliminary decree in terms of Order 34 Rule 7. In paragraph 8 of this judgment, it has been observed as under:

“ *The appellant has not questioned the title of the plaintiff nor set up his own title. By a previous inter-parties order Ex.P-3, parties have been declared to be mortgagor and mortgagee. No mortgage deed has*

*been executed but the plaintiff has received a sum of Rs.5,000/- from the defendant and given possession of the suit property to the defendant. Thus, even if the plea of the defendant that in absence of registered mortgage deed, no mortgage came into existence is to be accepted, the plaintiff will be entitled to a decree for possession on payment of Rs.5,000/-. Contentions raised on behalf of the appellant have no merit. The trial Court has referred to the decision of the **Apex Court in Kolathoor Variath's case (supra)**, wherein it was held that even where there is no mortgage deed, plaintiff will be entitled to decree for possession on the basis of title unless there was any legal objection to such a decree being passed. In the present case, no such legal objection has been raised on behalf of the appellant. Objection of a preliminary decree being passed can also not be sustained in view of the plea taken by the defendant that there was no mortgage. The defendant has also not shown any claim for any other amount which may be due to him of which account may be required to be taken. On the other hand, the defendant being in possession, was liable to render accounts for the produce of the land and in this view of the matter, there is no prejudice caused to the defendant by not passing of preliminary decree.”*

The next argument of the counsel for the appellant is that no notice was given to the judgment debtor before issuing warrants of possession. This aspect has been considered in the judgment passed by the Co-ordinate Bench in the case of **Pritam Singh Vs. Sardara Singh 2002(3) RCR (Civil) 784**, it has been held that it is mandatory on Court to issue notice to judgment debtor if application for execution is made after more than two years of decree in terms of Order 21 Rule 22. The application for execution had been filed after more than 2 years of decree in the facts of the present case. In

paragraph 5 it has been observed as under:

“ a perusal of sub-rule (1) of Rule 22 Order 21 of the code would show that if an application for execution is made more than two years after the date of the decree, the Court executing the decree is under a legal obligation to issue notice to the person against who execution is applied for requiring him to show why decree be not executed against him. In the present case, the decree was passed on 18.11.1978 and the application was filed on 29.08.1981 i.e. after more than two years. Therefore, it was mandatory for the Court to issue notice to the petitioner -judgment debtor before passing the impugned order on 12.09.1981. the affect of omission to issue a show cause notice under sub-rule(1) of Rule 22 order 21 of the Code is that the sale in execution is absolutely void and without jurisdiction. This view is supported by the judgment of the Supreme Court rendered in the case of Satyanarain Bajoria Vs. Ramnarain Tibrewal, (1993)4 1993(3) RRR 584 (SC): S.C.C. 414. Their Lordship of the Supreme court while referring to the provision of Order 21 Rule 22 of the Code observed as under:

“.....Without proof of service of notice in these proceedings, the lower appellant court could not have gone merely by order sheets of the execution file. No process-server was examined to prove service of notice under Order 21 rule 22 of the code. It will be noticed that the decree was passed as far back as 1964. The present application was filed in 1968 more than 2 years after dismissal of earlier execution application, and, therefore, for father proceedings in pursuance of a fresh execution application, the Court was duty bound to issue notice and served notice of the execution application on the judgment debtor as provided for a Order 21 Rule 22 of the code which contemplates inter alia that if an application for execution is made more than two years after the date of the decree, the Court executing the decree shall issue a notice to the person against whom execution is applied for reacquiring him to show cause, on a date to be fixed, why the decree should not be executed against him. The last order made in the earlier execution application was on November 29, 1965 and the second execution application was filed more than two years thereafter i.e. in 1968. Therefore, issuing of notice under Order 21 Rule 22 was mandatory. The idea of issuing such a notice is to ascertain whether the averments as to the amount being

claimed in the execution application are true or incorrect. Besides, even if the amount was due, the judgment-debtor could have paid it and he was deprived of this opportunities to clear off dues, if any under the decree. It is only the service of notice under Order 21 Rule 22 of the code and failure of the judgment-debtor to pay the decretal amount, as claimed, that the decree holder takes recourse to proceedings under Order 21 Rule 54 of the Code.”

In the present case, the Regular Second Appeal was allowed vide Annexure P/1 dated 26.08.2009 and suit for redemption was decreed after depositing Rs.27,200/- within three months and this amount was deposited on 07.09.2009. Vide impugned order dated 07.09.2009, the judgment debtor was allowed to deposit Rs.27,200/- and thereafter notice was issued to the judgment debtor and a direction was given to issue notice to the judgment debtor for warrants of possession and on 12.01.2010, application filed by decree holder for police help was taken up and in view of the report of Naib Tehsildar, application for police help was allowed and warrant of possession was redirected to get the same executed by providing police help. The provisions of sub-rule (1) of Order 22 Rule 21 reads as under:

22. Notice to show cause against execution in certain cases.-(1)

Where an application for execution is made—

(a) more than two years after the date of the decree, or

(b) against the legal representative of a party to the decree or where an application is made for execution of a decree filed under the provisions of section 44A, or

(C) against the assignee or receiver in insolvency, where the party to the decree has been adjudged to be an insolvent).

the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him:

Provided that no such notice shall be necessary in consequence of more than two years having elapsed between

the date of the decree and the application for execution if the application is made within two years from the date of the last Order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the court has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the end of justice.

As per aforesaid provisions makes abundantly clear that no notice is required to be issued and in view aforesaid judgment **Pritam Singh supra**, it is quite clear that an application for execution is made within 2 years from the date of last order, the order passed by the trial Court did not reflect any material irregularity or perversity which warranting interference. Hence, the present revision stands dismissed.

04.04.2018

(RITU BAHRI)
JUDGE

anil

Whether speaking/reasoned Yes

Whether reportable Yes