IN THE HIGH COURT FOR THE STATES OF PUNJAB AND HARYANA AT CHANDIGARH

C.R. No.2480 of 2004 (O&M)
Date of Decision.30.05.2019

Bahadur Singh (deceased) through LRs ...Petitioner

Vs

Ram Kumar and others ..Respondents

CORAM:HON'BLE MR. JUSTICE AMIT RAWAL

Present: Mr. P.K. Ganga, Advocate
for the petitioner.

Mr. Sanjiv Gupta, Advocate
for respondent No.1.

Mr. Satinder Pal Singh, Advocate for
Mr. C.S. Pasricha, Advocate
for respondent No.2.

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AMIT RAWAL J.

The present revision petition is directed at the instance of the legal representatives of judgment-debtor for setting aside the impugned order dated 23.02.2004 (Annexure P-1) and order dated 5.5.2004 (Annexure P-2) passed by trial Court and lower Appellate Court respectively dismissed objection qua sale and auction of their property.

The Punjab National Bank, decree holder, respondent No.2 instituted suit bearing No.1367 of 1989 for recovery of outstanding amount on account of loan facility availed by Jot Ram. Aforementioned suit was decreed vide judgment and decree dated 23.11.1994 (Annexure P-3) for a sum of ₹1,83,233.85 with future interest @12 ½% per annum from date of filing of suit till its final realization against defendants Jot Ram, Bahadur and Jes Raj son of Puran through his LRs. Bank was also held entitled to recover the decretal amount first from defendants No.1 and 2 being loanees and remaining amount from the legal representatives of guarantor, defendant No.3. The aforementioned judgment debtors-defendants did not contest suit as were proceeded ex parte.

Punjab National Bank preferred appeal bearing No.1 of 1995 against aforementioned judgment debtors claiming agreed and contractual rate of interest instead of 12 ½% per annum as granted by trial Court but it was dismissed by lower Appellate Court, vide, judgment and decree dated 30.09.1997.

In execution application dated 25.03.1998, the Executing Court after warrant of attachment, ordered for auction of the land attached by drawing the shareholding to be held on 24.09.2003. On 17.01.2004, vide Annexure P-5, petitioner filed objections on ground that neither copies of summon nor registered cover with the plaint were offered to them for service and filed application for setting aside the ex parte judgment and decree, separately, but alleged that the auction was ill-procured on account of fraud and misrepresentation. The sale of 12 killas have been shown to ₹5,25,000/- whereas the market price was more than that. 1/4th of the bid money was to be deposited at the time of auction and remaining within 15 days whereas it was deposited on 16.10.2003 i.e. beyond 15 days which expired on 09.10.2003. The auction and sale proceedings were kept secret and therefore, no occasion arose for filing the petition.

The auction purchaser-respondent No.1 opposed objections to be time barred in view of provisions of Article 127 of the Limitation Act, which were to be filed within 60 days. On merit, it was stated that auction was carried out on 24.09.2003. Ram Kumar being the highest bidder was required to deposit 25% of the auction money and a sum of ₹1,32,000/- with the official conducting the auction was deposited. The Court granted permission and the auction was confirmed on 6.10.2003. Auction Purchaser was bound to deposit the amount but when his offer was not accepted, sought clarification of the Court and therefore, 15 days would run from the date when offer of the highest bidder was accepted.

Mr. P.K. Ganga, learned counsel appearing on behalf of the petitioners, legal representatives of defendant No.2 Bahadur, submitted that objections were will within the period of limitation. Land measuring 95 kanals 14 marlas has been sold for a paltry sum of ₹5,25,000/-. Defendants in fact were never served in suit. Vide order dated 10.08.2006, this Court called upon the petitioner to deposit the entire amount with interest and accordingly, an amount of ₹11.52 lakhs was handed over to the counsel for the Bank, though it was without prejudice to the petitioner's right to question the Bank's calculations. Executing Court was directed to release land forthwith in favour of petitioner but without prejudice to rights of the auction purchaser. Respondent-auction purchaser preferred Special Leave to Appeal (Civil) bearing No.14753 of 2006 before Hon'ble Supreme Court whereby operation of the order dated 10.08.2006 was stayed.

Aforementioned SLP, vide order dated 14.09.2010, (Annexure P-8) was dismissed against the legal representatives of deceased respondent No.1 i.e. Bahadur for failure to comply with the order of effecting service and vide order dated 05.01.2011, dismissed SLP for non-prosecution and interim order dated 11.09.2006 stood vacated.

In support of aforementioned contentions, he referred to provisions of Order 21 Rule 85 CPC and also following case law:- ***Manilal Mohanlal Shah and others Vs. Sardar Sayed Ahmed Sayed Mahmad and another AIR 1954 SC 349*** to contend that in case auction purchaser fails to deposit the amount of 25% and the balance amount within 15 days, the auction is completely wiped out. On similar lines, ***Sardara Singh (dead) by LRs and another Vs. Sardara Singh (dead) and others 1991 PLJ 120 (SC)*** and ***Gangabai Gopaldas Mohata Vs. Fulchand and others AIR 1997 SC 1812*** wherein it has been held that mandatory requirement in law cannot be done away with.

He further contended that limitation for filing appeal would start from the date of the knowledge and therefore, there was no need of seeking condonation of delay for filing application as the petitioner-defendants were ex parte in the trial Court. In support of aforementioned, relied upon judgment rendered by this Court while interpreting the provisions of Section 81 of the Punjab Tenancy Act in ***Raghbir Saran Vs. State of Haryana etc. 1980 CLJ 50*** and judgment of Hon'ble Supreme Court in ***Seethammal Vs. Senthil Finance and another AIR 1996 SC 1551*** wherein auction was set aside for selling the valuable land for a paltry amount.

Per contra, Mr. Sanjiv Gupta, learned counsel appearing on behalf of auction-purchaser, respondent No.1 supported the impugned orders and stated that as per Article 127 of the Limitation Act read with Order 21 Rule 92 CPC, the period to file objections was 60 days, which expired on 06.12.2003 by taking 60 days from the date of auction i.e. 06.10.2003 but the objections (Annexure P-5) were filed on 17.01.2004. Though Order 21 Rule 89 CPC enables the judgment debtor to challenge the sale by depositing 5% of the amount and under Rule 90 the auction can be challenged on account of irregularity or fraud. No evidence with regard to any compliance has been placed on record. The amount was deposited with the officer conducting the auction, which fact is evident from copy of challan. Auction was conducted on 24.09.2003 and 1/4th amount was deposited. The Court auctioneer signed the auction proceedings. Bid of auction purchaser was not accepted at the spot as he was told that auction will be confirmed by the Court. The trial Court confirmed the auction on 06.10.2003 and directed the auction purchaser to deposit remaining 3/4th amount within 15 days. The aforementioned order has not been assailed so far. Accordingly, a sum of ₹3,93,000/- was deposited on 15.10.2003. The doctrine of *actus curiae neminem gravabit* i.e. the act of the Court shall prejudice no one, would apply in this case.

In support of aforementioned contentions, relied upon judgment passed by the Hon'ble Supreme Court in ***Janak Raj Vs. Gurdial Singh and another AIR 1967 SC 608*** to contend that once third party rights have been created, even if the decree is reversed on merits, there rights would be protected. It was next contended that recently the Hon'ble Supreme Court in ***Annapurna Vs. Mallikarjun***

and another 2014 (6) SCC 397; 2014(2) PLJ 31 by noticing the period of limitation under Article 127, without any application for condonation of delay, rejected the objections. In the aforementioned judgment, factum of deposit in the Court was also noticed, thus, urges this Court for dismissal of the revision petition.

I have heard learned counsel for the parties, appraised paper book and of view that there is no force and merit. It would be apt to reproduce provisions of Rules 89, 90 and 92 of Order 21 CPC, which are as under:-

> *"**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 gold 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*
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> *(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.*
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> *(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.*
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> *(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 was drawn up.*
>
> ***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 ratable 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 h 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 lucre absence of, or defect in, attachment of the property sold shall not, by it be a ground for setting aside a sale under this rule.

92. Sale when to become absolute or be set aside. *(1) Where no application is made 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 thirty days from the date of sale, or in cases where the amount of the 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 way 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 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-doubter's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shaft 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 sale the had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered."

As per second proviso to sub-rule 2 of Rule 92 of Order 21 CPC added w.e.f. 1.7.2002, deposit under the sub-rule is mandatorily to be made within a period of 60 days. Concededly, the auction was held on 24.09.2003. Objections (Annexure P-5) are bereft of any averment alleging the date of knowledge of the auction or to be suffering from irregularity or fraud. Rule 89 CPC provides an opportunity to the judgment debtor to save the property from auction or creation of third party rights on deposit of 5% of money and having failed to do so before confirmation of the auction, Rule 92 provides to make the shortfall or make complete payment. However, both the opportunities under law were not availed off. Objections were accompanied by an application under Section 5 of the Limitation Act. In this regard, para 8 and 24 of the judgment rendered by Hon'ble Supreme Court in ***Janak Raj's case*** (supra) would be necessary to be extracted:-

"8. Elaborate arguments were put forward in the Madras case just now cited as to the cause and effect of the deletion of the proviso to S. 316 of the Code of 1908. Madhavan Nair, J. referred to the report of the Select Committee which considered the Bill to amend the Civil Procedure Code of 1877 as showing that the alteration was effected in order to preclude the doubt which had arisen in Bombay where a certificate had been granted to an auction purchaser in ignorance of the fact that the decree under which the sale took place had been previously reversed in appeal. Probably the decision which the Select Committee had in mind was the case of Basappa v. Dundayya I.L,R. 2 Bombay 540, before the said decision in the High Court of Bombay. In that case, the court had observed that it was the duty of the purchaser to satisfy himself before he applied for confirmation of the sale that the decree was still in existence. The learned Judge Madhavan Nair, J. pointed out that neither in the Act of 1859 nor in the Act of 1877 was there any specific statement of' law regarding the time when the title to the property vested in the auction purchaser as is to be found in s. 316 of the Act of 1877 after the amendment in 1879, which was repeated as s. 316 of the Act of 1882, and in the present Act of 1908. Further, according to the learned Judge :

> *"By Section 49, Amending Act of 1879, it was enacted that the title of the auction purchaser to the property would start from the date of the certificate and in order that it may be so formal recognition was given to the principle that there must be a decree in existence at the*

> *time of the certificate; and that the proviso came to be enacted as a necessary condition upon which would depend the commencement of the title of the auction purchaser ; and when the law on the latter point was altered, there was no need for the existence of the proviso and so it was dropped out from the new Code."*

Nothing has been urged before us which would lead us to take a contrary view. Under the present Code of Civil Procedure, the Court is bound to confirm the sale and direct the grant of a certificate vesting the title in the purchaser as from the date of sale when no application as is referred to in r. 92 is made or when such application is made and disallowed.

24. For the reasons already given and the decisions noticed, it must be held that the appellant-auction purchaser was entitled to a confirmation of the sale notwithstanding the fact that after the holding of the sale the decree had been set aside. The policy of the Legislature seems to be that unless a stranger auction-purchaser is protected against the vicissitudes of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of the interest of the borrower and the creditor alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified. The Code of Civil Procedure of 1908 makes ample provision for the protection of the interest of the judgment-debtor who feels that the decree ought not to have been passed against him. On the facts of this case, it is difficult to see why the judgment- debtor did not take resort to the provisions of O.XXI r. 89. The decree was for a small amount and he could have easily deposited the decretal amount besides 5 per cent of the purchase money and thus have the sale set aside. For reasons which are not known to us he did not do so".

From cumulative reading of the aforementioned provisions and paragraphs of judgment supra, it is evident that even if ex parte judgment and decree on merit is set aside and in the meantime, third party rights are created, it cannot be taken away at the asking of the judgment debtor on whose default the stage of auction and creation of third party rights occurred. In case such seriousness of the issue is not taken into consideration then the procedure aforementioned would be rendered *otiose,* as all the judgment debtors in money suits at the last stage when third party rights are created would come with the excuse of deposit. In other words, it would tantamount to expressing disrespect to the orders of the Court and taking them for granted.

Mr. Ganga during the course of hearing also cited one judgment rendered by Hon'ble Supreme Court in ***Chinnamal and others Vs. P. Arumugham and another (1990) 1 SCC 513; AIR 1990 SC 1828*** whereby the Hon'ble Supreme Court while considering the provisions of Section 144 read with Order 21 Rule 29 CPC did not hold the third party as bona fide purchaser, as the property was purchased during the pendency of the appeal against the decree. The aforementioned ratio would not apply in this case at all.

In para 5 of the judgment rendered by Hon'ble Supreme Court in ***Annupurna's case*** (supra), the Hon'ble Supreme Court noticed that the High Court in misc. appeal permitted the judgment debtor to deposit the amount over and above for which the property was sold and further proceeding were stayed but noticing that the objections, *prima facie*, were time barred, as limitation of 60 days provided for objections was *sine qua non*, dismissed the objections and upheld the auction. Paras 5, 7 and 8 of the aforementioned judgment read as under:-

"5. In the Writ Petition preferred by him, the High Court agreed that Miscellaneous Appeal was not maintainable but primarily because the judgment-debtor, on an opportunity given by the Writ Court, had deposited Rs.25,000/- over and above the amount for which the property was sold, impugned order was passed to remit the matter back to the Executing Court for fresh disposal of the application under Order XXI Rule 89 of the CPC with liberty to the writ petitioner to place available materials before the Executing Court to show that the value of the property is more than the price obtained in the Court auction.

7. On the other hand, learned counsel for Respondent no.1, judgment- debtor, submitted that the High Court has adopted a just and proper course to C.A. @ S.L.P.(C)No.16312/10 …. (contd.) give another chance to the judgment-debtor to prove his objection that the property sold in the court auction was not valued properly. He submitted that such a course of action was warranted by the peculiar facts and circumstances of the case.

A careful perusal of the provisions in Rules 89 and 92 of Order XXI, CPC and Article 127 of the Limitation Act leaves no manner of doubt that although Order XXI Rule 89, CPC does not prescribe any period either for making the application or the required deposit, Article 127 of the Limitation Actnow prescribes 60 days as the period within which such an application should be made. In absence of any separate period prescribed for making the deposit, as per judgment of the Constitution Bench in the case of Jammlu Ramulu (supra) the time to make the deposit and that for making the application would be the same.

8. In the case of Ram Karan Gupta (supra), it has been held, after considering the Constitution Bench judgment and other relevant case laws, that deposit of the requisite amount in the court is a condition precedent or a sine qua non to application for setting aside the execution of sale and such an amount must be deposited within the prescribed time for making the application otherwise the application must be dismissed.

Now coming to the applicability of Rule 85 of Order 21 CPC, though in the first blush argument of Mr. Ganga look attractive but on going through the record of the case, it is prima facie established that auction purchaser was advised by court auctioneer for clarification and on seeking confirmation of the Court, amount of ₹3,93,000/- was deposited. This cannot be non-compliance of the aforementioned provisions. It was not a case of extension. Doctrine that the act of the Court prejudice none. The petitioners cannot be permitted to blow out of proportion for setting aside the order as their intention was throughout not honest.

In view of aforementioned circumstances, I do not find any illegality and infirmity in orders under challenge and same are upheld. The revision petition is dismissed. The petitioner is at liberty to seek refund of the money handed over to the Bank by virtue of order dated 10.08.2006 of this Court along with interest, if any, as the same may have been kept in the FDR.

(AMIT RAWAL)
JUDGE

May 30, 2019
Pankaj*

Whether speaking/reasoned	Yes
Whether reportable	No