

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

Civil Revision No.7857 of 2018(O&M)

Date of Decision: January 6, 2022

Pawan Kumar and others

..... PETITIONER(s)

Versus

Pankaj Sharma and others

..... RESPONDENT(s)

CORAM:- HON'BLE MRS.JUSTICE LISA GILL

Present: Mr. D.S.Malwai, Advocate
for the petitioners.

Mr. V.K. Jindal, Senior Advocate, with
Mr. Gopal Soni, Advocate
for respondents no.1 and 4.

LISA GILL, J.

This revision petition has been filed for setting aside order dated 16.10.2018, passed by the learned Civil Judge (Junior Division), Ludhiana, vide which application filed under Order 21 Rule 89 CPC by judgment debtor no.4 namely Pankaj Sharma, arrayed as respondent no.1 in this revision petition, has been allowed for setting aside the sale conducted on 14.05.2018.

Brief facts necessary for adjudication of the case are that, the petitioner No.1-Pawan Kumar and petitioner No.2-Surinder Kumar as well as respondent No.5-Darshana Devi, children of Ram Dev son of Shri Ami Chand, filed a suit for partition of the property in question, as detailed in the plaint including four shops and a house situated at its back by metes and bounds for 1/4th share of the plaintiffs and also sought the accounts of 1/4th share of the plaintiffs and arrears of rent for three shops from 04.04.2006. Suit was decreed

and preliminary decree was passed on 05.05.2011 by the learned Civil Judge (Junior Division), Ludhiana. An application for passing of the final decree was filed, which was allowed by the learned Civil Judge (Junior Division), Ludhiana, vide judgment and decree dated 05.08.2015, wherein it was directed that the property be put to auction and the sale proceeds be divided between the parties as per their respective shares. Decree holders thereafter filed an application for execution of the final decree. Respondent no.1 i.e. judgment debtor no.4 appeared before the learned Executing Court and on applications moved by the decree holders and judgment debtor, they were permitted to participate in the auction proceedings vide order dated 20.12.2017 (Annexure P3). Judgment debtors No.1, 2 and 3 were proceeded ex-parte. Respondents No.1 and 4 (i.e., judgment debtors No.4 and 5) were duly represented by one counsel.

The property was thereafter put to auction. The Court auctioneer moved an application on 15.05.2018 for depositing the bid amount in the shape of demand drafts, which was allowed and the matter adjourned to 31.05.2018. As per report dated 31.05.2018 of the Court auctioneer, highest bid for the property was for Rs.78,50,000/- and 1/4th of the amount i.e. Rs.19,62,500/- was handed over to her by way of three cheques at the spot on 14.05.2018 by Pawan Kumar s/o Ram Devi s/o Ami Chand, Ashok Kumar s/o Sham Lal s/o Ami Chand and Surinder Kumar s/o Ram Devi s/o Ami Chand (highest bidders) i.e. the present petitioners. At request of the Court auctioneer, demand drafts of Rs.6,55,000/-, Rs.6,54,167/- and Rs. 6,53, 333/- were handed over by Pawan Kumar, Ashok Kumar and Surinder Kumar, respectively and the cheques handed over on 14.05.2018 were returned to them.

Respondent no.1 filed an application for deposit of 5% of the total

sale proclamation to the auction purchasers alongwith another application for permission to deposit the remaining amount of the sale proclamation after deduction of his share. Respondent no.1 moved an application under Order 21 Rule 89 CPC, taking a plea that auction was conducted behind his back without any intimation, depriving him of an opportunity to participate therein. Collusion of the petitioners with some of the judgment debtors was alleged. Petitioners filed an application dated 21.05.2018 for not permitting the applicants to deposit the bid amount. Learned Executing Court on 31.05.2018 permitted respondent no.1 to deposit the amount in question and notice was issued to the decree holders for the date fixed.

Application under Order 21 Rule 89 C.P.C. was allowed by the learned Executing Court subject to the condition that respondent no.1 shall deposit the share of Neeraj Sharma within 30 days. Objection raised by the petitioners that the amount deposited by respondent no.1 was deficient inasmuch as only Rs.62,80,000/- was deposited, was not found material in view of the statement of Neeraj Sharma – judgment debtor no.8 to the effect that respondent no.1-Pankaj Sharma had filed the application under Order 21 Rule 89 CPC with his consent i.e., judgment debtor no.8 – Neeraj Sharma and he did not raise any objection regarding non-deposit of his share and that respondent no.1 did not deposit the amount with his consent. Objection raised by the petitioners that as there is no specific prayer for setting aside the sale conducted vide auction dated 14.05.2018 in the application under Order 21 Rule 89 CPC, therefore, same should be dismissed, was also negated. Aggrieved therefrom present petition has been filed.

Learned counsel for the petitioners vehemently argued that once the

entire bid amount alongwith 5% of the total sale proclamation is not deposited within the period of 30 days, learned Executing Court has no option but to dismiss the application, therefore, learned Executing Court has clearly erred in going ahead and even granting time to respondent no.1 to deposit the share of Neeraj Sharma - one of the share holders. It is contended that the learned Executing Court can permit a party to make good the deficiency in the amount deposited only on account of a clerical or an arithmetical mistake. In the present case, it is asserted that there is no clerical or arithmetical mistake with respondent no.1 having taken a categoric stand in his application that he be permitted to deposit the amount less his own share. Learned counsel for the petitioners has relied upon the judgment of the Hon'ble Supreme Court in **Ram Karan Gupta Vs. J.S. Exim Ltd. and others, 2013(1) RCR (Civil) 837**. It was also argued that there is no specific prayer in the application under Order 21 Rule 89 C.P.C. filed by respondent no.1 for setting aside the sale of the property in question conducted vide the auction held on 14.05.2018. It is asserted that respondent no.1 was very well aware of the date on which auction was to be held and deliberately did not come forward to participate in the proceedings, therefore, he cannot turn around and take the plea of not being aware of the auction to be held on 14.05.2018. It is thus prayed that this revision petition be allowed and order dated 16.10.2018, passed by learned Civil Judge (Junior Division), Ludhiana, be set aside.

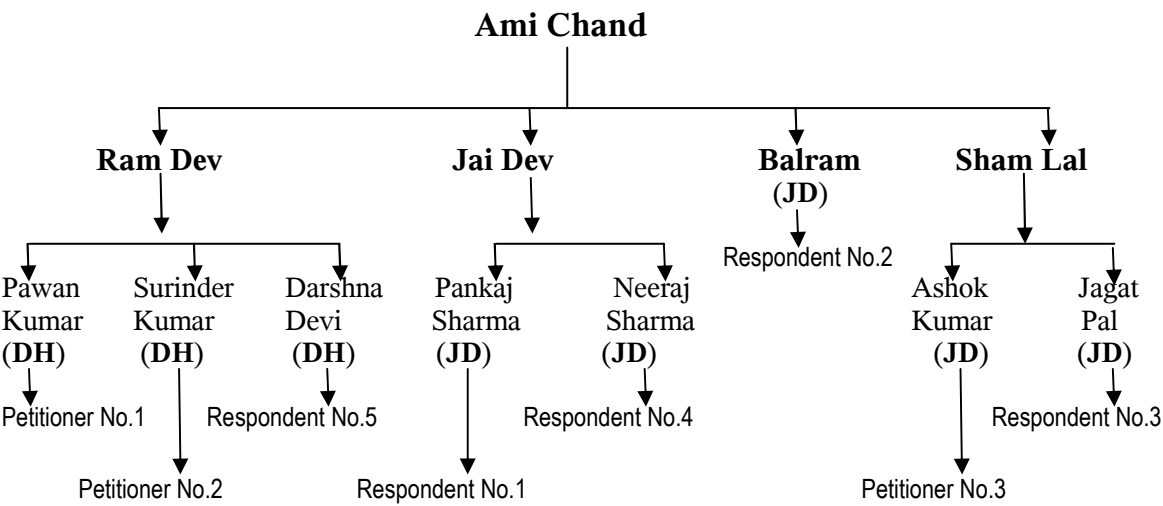
Learned counsel for respondents argued that all the decree holders and the judgment debtors are admittedly co-sharers in the property in dispute. While referring to order dated 20.12.2017, passed by the learned Executing Court, wherein permission was granted to the judgment debtors as well as

decree holders to participate in the auction proceedings, learned counsel submits that while judgments debtors no.1 to 3 were proceeded ex-parte, respondents no.1 and 4 i.e. Pankaj Sharma and Neeraj Sharma, sons of Jai Dev son of Ami Chand were duly represented by one counsel. Application under Order 21 Rule 89 CPC, it is submitted, was filed with the express consent of respondent no.4, who is none other but the real brother of respondent no.1. As the total bid amount was Rs.78,50,000/-, 5% additional amount came to Rs.3,92,500/- with the total amount to be deposited to be Rs.82,42,500/-. Accordingly the sum of Rs.62,80,000/- was deposited on 31.05.2018 as the amount of Rs.19,62,500/- was not deposited being the share of the two brothers i.e. Pankaj Sharma and Neeraj Sharma sons of Jai Dev. In the given circumstances, where all the parties are share holders and statement of Neeraj Sharma regarding his categorical consent was specifically recorded before the learned Executing Court, there is no ground whatsoever for setting aside the impugned order. It is submitted that share of the two brothers i.e., the petitioners and Neeraj Sharma is Rs.19,62,500/- half of which is Rs.9,80,250/-. Thus once Neeraj Sharma specifically expressed that application had been moved with his consent and his share was not accordingly deposited, there is no illegality in non-deposit of this amount and application under Order 21, Rule 89 CPC cannot be dismissed on ground of deficiency in deposit. It is contended that in fact even though deposit of Rs.9,80,250/- i.e., share of Neeraj Sharma need not have been deposited, respondent No.1 has deposited the same on 05.11.2018 within the stipulated period, as afforded by the learned Executing Court vide order dated 16.10.2018. The petitioners, it was submitted, had acted in connivance with respondents no.2, 3 and 5, who are even arrayed as proforma respondents in this revision

petition and the auction was got conducted without respondent no.1 being notified of the date fixed. It was contended that in this view of the matter impugned order dated 16.10.2018 should be upheld and the present revision petition be dismissed.

I have heard learned counsel for the parties and have gone through the file with their able assistance.

In so far as relationship between the parties is concerned, the same is not in dispute. Petitioners as well as the respondents are descendants of Shri Ami Chand. Petitioners no.1 & 2 and respondent no. 5 are sons and daughter of Ramdev son of Ami Chand. Petitioner no.3 and respondent no.3 are sons of Sham Lal son of Ami Chand. Respondents no.1 and 4 are sons of Jai Dev son of Ami Chand.



There is further no dispute regarding the decree for partition of the property by metes and bounds being passed on 05.05.2011 at the instance of petitioners No.1, 2 and respondent No.5, children of Ram Dev s/o Ami Chand and thereafter the final decree being passed on 05.08.2015 wherein it was directed that the property be put to sale and sale proceeds be divided between the parties as per their share. Admittedly, applications of the decree holders and

the judgment debtor in question were allowed and they were permitted to participate in the auction proceedings. Whether or not the judgment debtors were notified of the date of auction is not relevant for adjudication of the matter at this stage, as a judgment debtor in any case has the right to move an application under Order 21, Rule 89 CPC. Suffice it to say that an application under Order 21 Rule 89 CPC was moved by respondent no.1 - one of the judgment debtors, seeking permission to deposit 5% of the total sale proclamation alongwith the remaining amount of the same after deduction of his own share. The bid was admittedly for a sum of Rs.78,50,000/-. Sum of Rs.62,80,000/- was deposited by the applicant/respondent on 31.05.2018. The amount deposited by the applicant was claimed to be deficient by Rs.19,62,500/- as it is stated that it was incumbent upon him to deposit a sum of Rs.82,49,500/. Case set up by respondent no.1 is that application under Order 21 Rule 89 CPC was moved with the express consent of his brother Neeraj Sharma – respondent no.4 in this petition and judgment debtor no.5. As per the final decree, respondent No.1 and his brother are together entitled to 1/4th share of the property.

At this stage, it is useful to refer to under Order 21 Rule 89 CPC, which reads as under:-

- (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 deposition 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.

The Hon'ble Supreme Court in **Ram Karan's case** (supra) has observed as under:-

“..... Order 21 Rule 89 CPC, it may be noted, gives a final opportunity to the judgment debtor to save his property by setting the sale aside before the confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction purchaser. Rules 89 to 92 of Order 21 deal with setting aside of sale. When a property is sold in execution of a decree and an application for setting aside the sale can be made under those provisions by the persons affected on the grounds mentioned therein. Such an application has to be made within the prescribed period of limitation, the provisions mentioned therein are in the nature of concession and those provisions must be strictly complied with before a sale is set aside before confirmation. On setting aside the sale under Order 21 Rule 89 CPC the property continues to be the property of the judgment debtor.”

Reference was also made to Order 21 Rule 92 CPC and it was held that in case a deposit is made within 30 days from the date of sale and an application is filed, the Court would have no discretion but to set aside the same and if the deposit is beyond the period of 30 days but within a period of 60 days, it shall be within the discretion of the Court whether or not to grant the application. In **Ram Karan's case** (supra) the judgment debtor did not deposit the amount within the stipulated time and had merely filed an application without the requisite deposit and it is in this situation it was held that an application could not be entertained and the sale had to be confirmed.

Learned counsel for the petitioner had laid much stress on the fact that the entire amount as stipulated in Order 21(1) of Rule 89 CPC has not been

deposited, therefore, the application could not have been entertained in view of the judgment of the Hon'ble Supreme Court in ***Ram Karan's*** case (supra). It is to be noticed at this stage that the amount deposited is equal to the bid amount less the share of respondent no.1 and judgment debtor no.5, who is none other but his real brother. It cannot be disputed that even at the time when permission was afforded by the learned Executing Court to the decree holders and the judgment debtors to participate in the auction proceedings, Pankaj Sharma-respondent no.1 and his brother Neeraj Sharma-respondent no.4 were duly represented by one counsel while the other judgment debtors stood proceeded ex-parte. Respondent no.4 has duly recorded his statement before the learned Executing Court on 04.10.2018 specifically stating that the application under Order 21 Rule 89 CPC has been filed by respondent no.1 with his consent and that the entire amount as required under Order 21 Rule 89 CPC has been deposited and the 1/4th share amounting to Rs.19,62,500/- i.e. their share has not been deposited with his express consent and the amount deposited is the one as required to be paid to the decree holder and other judgment debtors as per their share. Learned Executing Court while referring to Order 21 Rule 92(2) CPC has permitted deposit of the share of Neeraj Sharma i.e. Rs.9,81,250/- within 30 days. Said amount has been deposited on 05.11.2018. The argument raised by learned counsel for the petitioners that the amount in terms of Order 21 Rule 89 CPC was not deposited, is not justified. The amount was in fact deposited within the period of 30 days of the sale, therefore, the sale has to be set aside.

Argument that there is no specific prayer for setting aside the sale in the application under Order 21 Rule 89 CPC is clearly untenable, hence, rejected. It is a settled position of law that the true intention and substance of the

petition/application has to be gathered, before proceeding to non-suit an applicant on such a hyper-technicality. Moreover, in the present case it has been rightly held by the learned Executing Court that the application itself being filed under Order 21 Rule 89 CPC is indicative of the relief sought by the applicant.

Learned counsel for the petitioner is unable to point out any illegality, infirmity or perversity in the impugned order dated 16.10.2018, passed by learned Civil Judge (Jr. Division), Ludhiana, which calls for interference by this Court in exercise of revisional jurisdiction.

No other argument has been raised.

Revision petition is accordingly dismissed with no order as to cost.

(LISA GILL)
JUDGE

January 6 , 2022.
Sunil/‘om’

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No