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IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

RSA No.1897 of 1994 (O&M)
Date of decision : 09.09.2024

Nishan Singh
Versus
Gopal Singh and another

....Appellant
....Respondents

CORAM: HON'BLE MR. JUSTICE PANKAJ JAIN

Present : Mr. R.K. Girdhar, Advocate and
Mr. Chirag Girdhar, Advocate
for the appellant.

Mr. Rajeshwar Singh Thakur, Advocate
for respondent No.1.

Respondent No.2 is proforma respondent.

PANKAJ JAIN, J. (ORAL)

Defendant is in second appeal.

2. For convenience, the parties hereinafter are referred to by their original position in the suit i.e. the appellant as defendant No.1 and respondent No.1 as the plaintiff.
3. Plaintiff filed suit seeking declaration to the effect that he is owner in possession of the suit land measuring 12 Kanals 10 Marlas being 1/4th share of the land measuring 50 Kanals fully detailed in the head-note of the plaint. He further sought decree of joint possession.
4. Pleaded case of the plaintiff is that he was co-sharer in the land

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admeasuring 50 Kanals to the extent of 1/2 share. The total land of 50 Kanal was under mortgage with one Mulla Singh. On 9th of March, 1965, Mulla Singh instituted suit seeking possession of the mortgaged land or in the alternate for recovery of mortgaged money of Rs.3,000/- by sale of the mortgaged property. The plaintiff was also arraigned as one of the defendant in the said suit. Suit was decreed by Sub Judge 1st Class, Muktsar on 26th of November, 1965. Preliminary decree was passed for recovery of Rs.3,000/- by sale of the land. Plaintiff and Tehal Singh were granted three months' time to deposit the amount. Failing which, the plaintiff was held entitled to apply for the final decree. The plaintiff as well as other Judgment Debtor i.e. defendant No.2 in the present suit namely Tehal Singh, failed to deposit the amount in terms of the decree. Mulla Singh applied for final decree. On 26th of August, 1968 final decree was passed by Sub Judge 1st Class, Muktsar ordering recovery of Rs.3,000/- by sale of 92 Kanals and 12 Marlas of the land. In execution of the said decree, defendant No.1 purchased the land measuring 25 Kanals i.e. 1/2 share of total land measuring 50 Kanals in open auction for a sum of Rs.3,550/-. The plaintiff claimed that during the pendency of the said civil suit, defendant No.2 sold the land to defendant No.1 though registered sale deed dated 1st of June, 1968 for a sum of Rs.15,000/- which was the total share of defendant No.2. Sale certificate was issued by Sub Judge, Muktsar in execution w.r.t. 25 Kanals of land describing the same as the land of the plaintiff as well as defendant No.1

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despite the fact that it was only 1/2 share out of the 1/2 share of the plaintiff which was sold in auction and as per the sale certificate.

5. Defendant No.2 Tehal Singh, who was judgment debtor to the earlier suit along with the plaintiff admitted the claim of the plaintiff in *toto*. Suit was contested by defendant No.1. Defendant denied the claim of the plaintiff. It was denied that the decree was passed *ex parte*. It was pleaded that the plaintiff contested the final decree. After the evidence of Decree-Holder, plaintiff deliberately withdrew from the proceedings and the final decree was passed on 26th of August, 1968. Objection was raised w.r.t. maintainability of the suit.

6. On the basis of the pleadings of the parties, Trial Court framed the following issues:

- “1. Whether the suit is not maintainable ? OPD.
2. Relief.”

7. While answering issue No.1, Trial Court held that in terms of provisions of Order 21 Rule 92 (3) CPC, the plaintiff being one of the JDs cannot be allowed to contest the sale effected during the execution of the decree and dismissed the suit.

8. In appeal preferred by the plaintiff, lower Appellate Court reversed the findings of the Trial Court holding that the sale certificate was issued assuming the land to be the ownership of both the brothers namely

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Gopal Singh and Tehal Singh. Whereas, on the day of auction, Tehal Singh had no share left in the land. 25 Kanals was ownership of Gopal Singh alone. Lower Appellate Court held that in the land measuring 25 Kanals left after Tehal Singh sold his share, only one half should have been chunked out of the ownership of Gopal Singh and thus Gopal Singh should have been effected only to the extent of 1/4th share in the land measuring 50 Kanals. Appellate Court held that in proclamation of sale, it was set out that the land measuring 50 Kanals i.e. 1/2 share of Gopal Singh and Tehal Singh was put to auction sale. Unfortunately, for Nishan Singh and Tehal Singh had no share in land which was put to sale at public auction, for which Nishan Singh should suffer. Lower Appellate Court thus decreed the suit filed by the plaintiff holding that the sale certificate issued in favour of defendant No.1 has no effect on 1/4th share of the plaintiff i.e. 12 Kanal 10 Marlas and the plaintiff was entitled to joint possession of 1/4th share of land out of total land admeasuring 50 Kanals of the suit land.

9. Counsel for the appellant while assailing the impugned judgment and decree submits that the lower Appellate Court has totally misdirected itself in decreeing the suit filed by the plaintiff. The suit was filed to defeat the rights of the appellant/defendant No.1 who is auction purchaser in the sale, effected for execution of a lawful decree. The sale stood confirmed. The sale certificate was issued. Thus, the same ought not have been annulled by the Court. Counsel for the appellant further submits

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that the plaintiff is none-else but a Judgment Debtor and he cannot be allowed to defeat the decree. Suit was not maintainable in terms of Order 21 Rule 92 (3) CPC. Trial Court dismissed the same on the issue of maintainability. In case, lower Appellate Court differed with the view taken by the Trial Court and reversed the finding on the issue of maintainability, the proper course ought to have been to remand the *lis* back to the Trial Court to adjudicate the same on merits.

10. Per contra, Counsel for the respondent/plaintiff refers to the revenue record and submits that it is evident that from *Jamabandi* for the year 1984-1985 that Gopal Singh was recorded as owner of 1/2 share of land measuring 50 Kanals. Nishal Singh was shown as owner of land measuring 50 Kanals. In *Jamabandi* Exhibit P-2, there is a note in the red ink that vide Mutation No.2911, land measuring 25 Kanals i.e. 1/2 share of land measuring 50 Kanals, was mutated in the name of Nishan Singh on account of sale at public auction on behalf of Gopal Singh son of Lehna Singh. Appellate Court rightly held that land measuring 25 Kanals should have been chunked out of the ownership of Gopal Singh and half share should have been chunked out of the ownership of Tehal Singh, which means that it is only 1/4th share of the total land i.e. 1/2 share of Gopal Singh, should have been mutated leaving Gopal Singh with the rest of 1/4th share. He, thus, submits that the lower Appellate Court rightly interfered and reversed the judgment and decree passed by the Trial Court.

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11. I have heard counsel for the parties and have gone through records of the case.

12. The facts are not much in dispute. Defendant No.1 is an auction purchaser of the land measuring 25 Kanals in execution of the decree. The same has been proved on record as Exhibit D-3. The same reads as under:

“This suit coming on this day for final disposal before this Court in the presence of Shri Inder Mohan Lal Verma Advocate counsel for the plaintiff and the defendants were proceeded against ex parte.

Previous on 26th day of November, 1966, preliminary decree was passed for recovery of Rs.3000/- by sale of land in Khasra No.113, 112 min, 28 min, 29, 31 and 32. The suit with respect to possession and with respect to recovery of money from Khasra No: 114 min, 30 and 711/33-34 was dismissed. The costs of the suit were to be paid by defendants No: 1 and 2 to the plaintiff. The mortgagor to deposit the mortgage money within a period of 3 months from the date of decree failing with the plaintiff shall be entitle to apply for final decree.

On 21.3.67 the plaintiff applied for final decree: it is ordered that final decree is passed in favour of the applicant-plaintiff Moola Singh for recovery of Rs.3000/- with costs by sale of land measuring 92 Kanals 17 marlas bearing Khasra No: 3/6/1, 4/10/1, 20, 21, 13/1, 4/5, 60/23/2, 24, 67/1, 2, 3, 4/1 and 457 as given in Jamabandi copy Ex.P.1. The sale proceeds in excess of Rs.3000/- plus costs shall be paid to Gopal Singh and Tehal Singh.”

13. In execution of the aforesaid decree, land admeasuring 25 Kanals i.e. 1/2 of 50 Kanals i.e. the suit land was sold. Certificate of sale of

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land was issued. The sale certificate reads as under:

“Certificate of sale of land.

(Order XXI, rule 94 of the Code of Civil Procedure, Schedule I, Appendix E, form 38).”

In the court of Shri Dina Nath, P.C.S., Subordinate Judge 1st Class,
Muktsar.

Moola Singh s/o Uttam Singh s/o Hakam Singh resident of village
Verowala, tehsil Patti-----Plaintiff-D.H.

vs:

Gopal Singh, Tehal Singh sons of Lehna Singh, Banta Singh son of
Ujjagar Singh, Ajit Singh son of Banta Singh, Smt. Data w/o
Gurdeep Singh son of Banta Singh r/o village Kutianwali, tehsil
Muktsar, District Ferozepure-----Defendants-Judgment debtors

This is to certify that Shri Nishan Singh son of Banta Singh,
resident of village Khema Khera, tehsil Muktsar, District
Ferozepore, has been declared the purchaser at a sale by public
auction of land measuring 25 kanals which is 1/2 of 50 kanals,
bearing Khasra No.3/6/1 (1-9), 4/10/1 (8-11), 11(8-0), 20(8-0),
21(8-0), 13/1 (8-0), 14/5 (8-0), situate in the revenue limits of
village Kuttianwali, tehsil Muktsar, District Ferozepure, in the sum
of Rs.3550/-, which was the ownership of above mentioned
judgment debtors Gopal Singh and Tehal Singh and that in
execution of the decree in this suit and that the said sale has been
duly confirmed by this court on 30th day of January, 1970.

Given under my hand and the seal of the court this 13th day
of March, 1970.

13.3.70.

Sd/-
Subordinate Judge Ist Class,
Muktsar”

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14. Sale certificate was issued on 30th of January, 1970. Mutation bearing No.2911 was sanctioned. Though sale certificate records that auction is of 25 Kanals of the suit land which is ownership of the Judgment Debtors namely Gopal Singh and Tehal Singh but on the given date Tehal Singh was left with no share in the land under auction as he had already sold his 1/2 share prior to the date of auction. Plaintiff by filing present suit wants to take benefit of the name of Tehal Singh mentioned in the sale certificate to claim that the auction of 25 Kanals in fact implied 1/2 ownership of Gopal Singh and 1/2 ownership of Tehal Singh. The plea is misconceived. It is not in dispute that both plaintiff and his brother i.e. defendant No.2 were the Judgment Debtors. Both were held liable. 25 Kanals of the land under mortgaged was ordered to be auctioned. Tehal Singh in order to defeat the decree *qua* his ownership, sold the land during the pendency of the suit. Executing Court in execution of the decree ordered auction of 25 Kanals of land out of the total land of 50 Kanals.

15. Counsel for the respondent/plaintiff has emphatically argued that the Trial Court erred in dismissing the suit as not maintainable as there is no challenge to the sale certificate but the suit is w.r.t. misreading of the sale certificate. Order 21 Rule 92 CPC reads as under :

“92. Sale when to become absolute or be set aside.—(1) Where 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

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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 2 [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 auctionpurchaser, 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 otherwise directs, be revived at the stage at which the sale was ordered].”

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16. Though at the first blush the plea raised by counsel for the respondent/plaintiff seems to be attractive however, on close scrutiny it is evident that an attempt is only to set aside the sale effected pursuant to execution of a decree. Attempt made by judgment debtor to defeat the auction conducted in execution of a decree is evident. Having failed to deposit the decretal amount, the land was auctioned in terms of decree suffered by judgment debtors. The plaintiff is also a Judgment Debtor. The Judgment Debtors were liable to satisfy the decree. As per the fiat of decree land was to be sold. The land put to auction is the one which is mentioned in the decree. Nowhere in the decree it was mentioned that the same shall be to the effect of 1/2 share of Tehal Singh and 1/2 share of Gopal Singh. Decree was for sale of land belonging to both Tehal Singh and Gopal Singh. Thus, holding the suit to be maintainable would mean walking in the trap laid down by the Judgment Debtors who want to frustrate the decree. The same is evident from the fact that Tehal Singh sold his land prior to satisfaction of the decree. Judgment Debtor by way of present suit has made another attempt to wriggle out of the decree and has also tried to make Court party to his attempt.

17. The policy of the Code as evident from bare reading of Order 21 Rule 92 CPC is to protect a strange auction purchaser from a protracted litigation. Reference can be made to the following observations made by Supreme Court in the case of **Janak Raj vs. Gurdial Singh and another**

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AIR 1967 Supreme Court 608 held as under :

“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 credition alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified. The Civil Procedure Code of 1908 make 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 provision of Order 21, Rule 89. The decree was for 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.”

(emphasis supplied)

18. In view of above, this Court finds that the present appeal merits acceptance. Consequently, instant second appeal is allowed. Impugned judgment and decree passed by the lower Appellate Court is ordered to be set aside. Suit filed by the plaintiff is ordered to be dismissed.

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19. Pending application(s), if any, shall also stand disposed off.

September 09, 2024
Dpr

(Pankaj Jain)
Judge

Whether speaking/reasoned : Yes
Whether reportable : Yes