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IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR-3343-2019 (O&M)
Date of Decision : 31.07.2024

Liyakat ... Petitioner(s)

Versus

Oriental Bank of Commerce & Ors. ... Respondent(s)

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. Sanjiv Gupta, Advocate for the petitioner.

Mr. Akhil Ahuja, Advocate for respondent No.1.

Mr. Arun Kumar Singal, Advocate for respondent No.2.

ALKA SARIN, J. (Oral)

1. The present revision petition has been filed challenging the order dated 25.04.2019 dismissing the applications filed by the JD-petitioner herein for setting aside the sale dated 15.10.2005 (Annexure P-1) and for dismissal of the execution petition (Annexure P-2).

2. The brief facts relevant to the present *lis* are that the predecessor-in-interest of the JD-petitioner took a loan of Rs.78,000/- on 15.11.1988 for purchase of a tractor from respondent No.1-Bank and he extended collateral security in the shape of his landholding measuring 66 kanals 18 marlas situated in Village Rana Majra, Tehsil and District Panipat. The tractor was purchased by the predecessor-in-interest of the JD-petitioner herein. In the

year 1993 the predecessor-in-interest of the JD-petitioner herein died. The predecessor-in-interest of the JD-petitioner was the person who had taken the loan of Rs.78,000/- for the purchase of the tractor. On 10.10.1995 a suit for recovery was filed by respondent No.1-Bank to the tune of Rs.1,47,141.80 paise. In the said suit, on 30.10.1996, the JD-petitioner was proceeded against *ex parte* and a preliminary decree was passed in favour of the respondent No.1-Bank. On 16.05.1998 the final decree was passed in favour of the respondent No.1-Bank. Execution petition was filed by respondent No.1-Bank and on 15.10.2005 the entire secured property measuring 66 kanals 18 marlas was put to auction. Virender Singh - respondent No.2 herein - was the highest bidder with a bid of Rs.12,47,000/-. The JD-petitioner came to know of the auction on 16.10.2005 and on 19.10.2005 filed an application for setting aside the sale (Annexure P-1). Between 11.11.2005 and 01.12.2005 the entire decretal amount was paid to the respondent No.1-Bank by the JD-petitioner. The payment of the decretal amount satisfying the decree in favour of the respondent No.1-Bank is an admitted position. On 03.01.2006 the JD-petitioner herein filed an application for dismissal of the execution (Annexure P-2) on the ground that the payment had been made to respondent No.1-Bank and that the JD-petitioner also offered to pay 5% of the auction money. In para 3 of the application (Annexure P-2) it was stated that *"The applicant/JD want to deposit and is ready to deposit a sum equal to 5% of purchase money to set aside the sale and to deposit it before the ld. Court"*. On 23.01.2006 the respondent No.1-Bank withdrew the execution petition. On 17.03.2006 the objections filed by the JD-petitioner were dismissed and the sale was confirmed. The JD-petitioner filed an appeal against the order dated 17.03.2006. Before the Appellate Court the JD-petitioner also filed an application (Annexure P-6) for condoning the delay in deposit of 5% of the auction money and seeking permission to deposit this amount. However, on 07.08.2006 the appeal filed by the JD-petitioner was also dismissed by the Appellate Court. Aggrieved by the same, CR-4546-2006 was filed by the JD-petitioner. The said CR-4546-2006 was allowed vide order dated 18.12.2018 (Annexure P-7) setting aside the orders dated 17.03.2006 and 07.08.2006 holding inter-alia as under :

> *"In the considered view of this Court, both the courts have overlooked the fact that the suit was under Order 34 of the Code of Civil Procedure and not a simpliciter suit for recovery of the amount. Once the suit was for recovery, in alternative sale of the property mortgaged, such suit would be governed under Order 34 of the Code of Civil Procedure and it cannot be treated as a simpliciter suit for recovery.*
>
> *Hon'ble the Supreme Court, while interpreting the provisions of Order 34 Rule 5 of the Code of Civil Procedure, has gone to the extent of laying down that if the appeal against the confirmation of sale is pending and judgment debtor tenders the amount, the payment is valid. Reference in this regard can be made to a judgment passed by Hon'ble the Supreme Court in U.Nilan Vs. Kannayyan (Dead) through LRs, 1999(8) SCC 511.*
>
> *Keeping in view the aforesaid position of law, the orders passed by the courts below are liable to be and hence, set aside. The case is remitted back to the learned executing*

> *court to re-examine the issue with reference to the provisions of Order 34 of the Code of Civil Procedure and thereafter pass a fresh order within a period of three months positively.*
>
> *Disposed of, accordingly.*
>
> *Parties through their counsel are directed to appear before the Successor Court on 14.1.2019."*

Subsequent to the passing of the order dated 18.12.2018 (Annexure P-7) by this Court in CR-4546-2006, the Executing Court vide the impugned order dated 25.04.2019 (Annexure P-9) dismissed the objections of the JD-petitioner. The Executing Court primarily held that no application had ever been filed by the JD-petitioner under Order 34 Rule 5 CPC nor the amount of 5% as contemplated under Order 34 Rule 5 CPC was deposited, though it was noticed that an offer to pay the said amount of 5% was made by the JD-petitioner as far back as 15.10.2005. Hence, the present revision petition.

3. Learned counsel for the JD-petitioner would contend that the JD-petitioner had paid the entire decretal amount to the respondent No.1-Bank and had also offered to deposit 5% of the auction money. However, the Executing Court did not deal with the said request. Even today the draft is ready with him, and he is willing to tender the amount to the auction purchaser (respondent No.2 herein). The learned counsel would further contend that this Court vide order dated 18.12.2018 (Annexure P-7) passed in CR-4546-2006 had set aside the orders dated 17.03.2006 and 07.08.2006, meaning thereby even the sale confirmation was set aside. It is further the contention of the learned counsel for the JD-petitioner that this Court vide order dated

18.12.2018 had specifically remanded the case to the Executing Court to re-examine the issue. The said order attained finality inasmuch as the same was never challenged either by the respondent No.1-Bank or by the auction purchaser (respondent No.2 herein). However, the Executing Court dismissed the objections only on the ground that no application under Order 34 Rule 5 CPC had ever been filed by the JD-petitioner. The learned counsel has further contended that the said order is in the teeth of the order passed by this Court on 18.12.2018.

4. Learned counsel for respondent No.1-Bank has stated that the entire decretal amount stands paid to the respondent No.1-Bank and the respondent No.1-Bank has no interest left in the litigation and that the decree stands satisfied.

5. Learned counsel for the auction purchaser (respondent No.2 herein) has vehemently contended that the JD-petitioner had failed to comply with the provisions of Order 34 Rule 5 CPC inasmuch as 5% of the auction money which the JD-petitioner was required to deposit in the Court was never deposited and the sale had already been confirmed and hence there is no occasion for the sale to be set aside. It is further the contention that over Rs.12,00,000/- has been paid by the auction purchaser (respondent No.2 herein) towards the purchase of the said property in the auction.

6. I have heard the learned counsel for the parties.

7. The present case is a glaring example of what an agriculturist has to endure through for having borrowed a meagre amount of Rs.78,000/- for the purchase of a tractor. For the purchase of a tractor worth Rs.78,000/-,

collateral security was taken by the respondent No.1-Bank encompassing the entire landholding of 66 kanals 18 marlas belonging to the predecessor-in-interest of the JD-petitioner. Due to the default in payment, a suit for recovery was filed for Rs.147,141.80 paise. In the said suit, the JD-petitioner was proceeded against *ex parte* and the suit was finally decreed *ex parte* on 16.05.1998. Execution was filed and strangely for the recovery of Rs.1,47,141.80 paise, the entire landholding of the JD-petitioner to the extent of 66 kanals 18 marlas was put to auction. No explanation is forthcoming as to why the respondent No.1-Bank put 66 kanals 18 marlas of land worth lakhs to auction for a recovery of an amount of Rs.1,47,141.80 paise only. It is well settled that an endeavour should be made to sell only a sufficient part of the mortgaged property to satisfy the decree. In **Balakrishnan vs. Malaiyandi Konar [(2006) 3 SCC 49]** the Hon'ble Supreme Court held that :

> *"9. The provision contains some significant words. They are "necessary to satisfy the decree". Use of the said expression clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. (See Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma [(1977) 3 SCC 337 : AIR 1977 SC 1789]). In all execution proceedings, the court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small the court must bring only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial*

> *whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This is not just a discretion but an obligation imposed on the court. The sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. (See Ambati Narasayya v. M. Subba Rao [1989 Supp (2) SCC 693]). The duty cast upon the court to sell only such property or portion thereof as is necessary to satisfy the decree is a mandate of the legislature which cannot be ignored. Similar view has been expressed in S. Mariyappa v. Siddappa [(2005) 10 SCC 235]."*

In **Ambati Narasayya vs. M. Subba Rao [1989 Supp (2) SCC 693]** it was held that :

> *"7. It is of importance to note from this provision that in all execution proceedings, the court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one, or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the court. Care must be taken to*

> *put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction."*

8. The JD-petitioner on coming to know of the said auction proceedings immediately paid the entire decretal amount to the respondent No.1-Bank. The payment of the decretal amount by the JD-petitioner to the respondent No.1-Bank was before the confirmation of the sale in favour of the auction purchaser (respondent No.2 herein), which order was subsequently set aside by this Court. The respondent No.1-Bank has received the entire decretal amount and now has stated that they have no interest left in the litigation. As far back as on 03.01.2006 the JD-petitioner had vide application (Annexure P-2) sought permission to deposit 5% of the purchase money in Court. This was after the entire decretal amount had already been deposited with the respondent No.1-Bank. Instead of considering the said application the Executing Court dismissed the objections (Annexure P-1) vide order dated 17.03.2006. In the interregnum the respondent No.1-Bank had withdrawn its execution petition on 23.01.2006. Thus, it was a situation where the decretal amount stood paid to the decree-holder (respondent No.1-Bank), the sale had taken place but not yet confirmed, and the JD-petitioner was seeking permission to deposit 5% of the auction money in Court while informing the Court that the decretal amount stood deposited. The respondent No.1-Bank is satisfied and has withdrawn it's execution petition.

9. Instead of viewing the situation in totality, the Executing Court has non-suited the JD-petitioner for not having actually deposited the 5%

auction money. The request of the JD-petitioner seeking permission to deposit the 5% auction money was neither accepted nor rejected by the Executing Court while passing the impugned order. Even today the learned counsel for the JD-petitioner has stated that a bank draft is ready with him and he is willing to tender the said amount. This offer has been rejected by the auction purchaser (respondent No.2 herein). Moreover, once the execution petition stands withdrawn by the decree-holder (respondent No.1-Bank) on 23.01.2006 meaning that the decree stands satisfied, the sale in favour of the auction purchaser (respondent No.2 herein) cannot be confirmed. The JD-petitioner cannot pay the entire decretal amount and also loose the mortgaged property.

10. The Executing Court in the impugned order held that *"In the case in hand, the JD has never moved application under Order 34 Rule 5 CPC, invoking right to deposit the mortgaged amount, and never deposited 5% of the purchase money into Court till date. Though he had made offer to make payment of the 5% of the purchase money way back in 15.10.2005 but has failed to deposit the same till date. Before invoking provisions of order 34 rule 5 CPC, it was incumbent upon the JD to move application under Order 34 Rule 5 CPC, deposit the entire loan amount/mortgaged amount, and in addition to it deposit 5% of the purchase money to be paid to auction purchaser. However, JD has miserably failed to do the aforesaid needful. Apart from paying the entire amount of loan to DH, JD has not deposited 5% of the purchase money till date and has even not moved any application under Order 34 Rule 5 CPC. Even offer made by the JD way back in year 2005 could*

not be termed bonafide in view of the subsequent conduct of the JD as he has not deposited the aforesaid amount till date. Mere making the offer does not dispensed with the essential requirement of Order 34 Rule 5 CPC and Order 21 Rule 89 CPC". Thus, the JD-petitioner has been non-suited as he paid the amount due directly to the respondent No.1-Bank instead of depositing it in Court. The Executing Court has adopted a hypertechnical and pedantic approach while considering the application filed by the JD-petitioner. Rules of procedure are a handmaid of justice. The decree in favour of the decree holder (respondent No.1-Bank) had been satisfied and the sale in favour of the auction purchaser (respondent No.2 herein) was yet to be confirmed and the JD-petitioner had sought permission to deposit 5% of the purchase money in Court while informing the Court that the decretal amount stood deposited with the decree holder (respondent No.1-Bank). Equitable considerations had come into play. The Executing Court had to see all the attendant circumstances instead of hairsplitting which defeats justice.

11. There was no occasion for the JD-petitioner to file a formal and specific application under Order 34 Rule 5 CPC since he had paid the decretal amount directly to the decree holder (respondent No.1-Bank). It would be far-fetched to expect a judgement debtor to deposit the decretal amount again in Court after having paid it to the decree holder. Since there was no deposit in Court of the decretal amount by the JD-petitioner the requirement of depositing 5% of the auction money, again in Court, did not arise. The JD-petitioner, in the circumstances, sought permission to deposit 5% of the auction money in Court while informing the Court that the decretal amount stood deposited with the decree holder (respondent No.1-Bank). The

respondent No.1-Bank has made a categoric statement that it is satisfied with the decretal amount. Order 21 Rule 2 CPC deals with payment out of Court to the decree holder.

12. It would be a travesty of justice that for not having deposited 5% of the auction amount in Court, though having offered to pay the said amount on numerous occasions, the JD-petitioner should be deprived of 66 kanals 18 marlas of land. Moreover, the Executing Court did not examine whether it was necessary to bring the entire property to sale or such portion thereof as may seem necessary to satisfy the decree. The mortgaged property is a large area and the decree to be satisfied is relatively small and therefore the Executing Court should have ensured that only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder, is put to auction. If a smaller portion could be sold without violating any provision of law only such smaller portion of the property should have been put to auction. This is not just a discretion, but an obligation imposed on the Executing Court. A sale held without examining this aspect and not in conformity with this mandatory requirement would be illegal and without jurisdiction. The Executing Court also had to examine whether the plea taken by the JD-petitioner taken on its face value amounts to adjustment or satisfaction of the decree, wholly or in part, and whether such adjustment or satisfaction had the effect of extinguishing the decree to that extent. The right of a mortgagor to have the mortgage redeemed takes predominance over the right of an auction purchaser whose sale is yet to be confirmed.

13. The impugned order passed by the Executing Court is not sustainable in law for the reasons as stated above.

14. In view of the above, the present revision petition is allowed. The sale in favour of the auction purchaser (respondent No.2 herein), which is not yet confirmed, is set aside. The JD-petitioner shall deposit 5% of the auction money in the Executing Court within a period of 15 days from the date of receipt of a copy of this order. The Executing Court shall also take appropriate steps to return the auction proceeds to the auction purchaser (respondent No.2 herein) and if the same have been released in favour of the decree holder (respondent No.1-Bank) then it shall return the said amount as the JD-petitioner has already satisfied the decree. The decree holder (respondent No.1-Bank) is also directed to hand over the title deed(s) to the JD-petitioner.

15. Disposed off accordingly. Pending applications, if any, also stand disposed off.

31.07.2024 **(ALKA SARIN)**
Yogesh Sharma **JUDGE**

NOTE: Whether speaking/non-speaking: Speaking
Whether reportable: YES/NO