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LAL CHAND

v.

VIIIITH ADDL. DISTRICT JUDGE AND ORS.

FEBRUARY 21, 1997

B

[K. RAMASWAMY AND S. SAGHIR AHMAD, JJ.]

Code of Civil Procedure, 1908 :

C

Or. XXI, Rules, 72 & 90—Execution of decree—Auction sale—Decree-holder taking part in auction without permission of Court—Held, decree-holder has no right to bid in the auction without obtaining prior permission of the Court.

D

Or. XXI, Rules 66, 67 and 90—Execution of decree—Auction sale—Conducted without proper notice and publicity—Held, procedure adopted caused great prejudice to the interest of judgment-debtor.

Desh Bandhu Gupta v. N.L. Anand & Rajinder Singh, [1994] 1 SCC 131, relied on.

E

Or, XXI Rules 64 and 90—Execution of decree arising out of an agreement of sale of 43 decimal of land and decretal amount being Rs. 10,000—Land admeasuring 1 acre 52 decimals put to auction—Land purchased by decree holder, without permission of court, for Rs. 12,000 Held, the decree-holder had over-reached his original agreement which he failed in the suit itself by participating and getting sale in his favour. There is no attempt made for sale of a reasonable portion of the property for realisation of the decree debt—Sale of property conducted by executing court is clearly illegal—However the appellant would pay the decretal amount, interest on principal earnest amount @ 12% per annum as well as impounding fee @

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5% on sale amount of Rs. 12,000.

Desh Bandhu Gupta v. N.L. Anand & Rajinder Singh, [1994] 1 SCC 131; Ambati Narasayya v. M. Subba Rao, (1989) Supp. 2 693 and Takaseela Pedda Subba Reddy, v. Pujari Padmavathamma, [1977] 3 SCC 337, relied

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on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1727 of 1997. A

From the Judgment and Order dated 9.11.95 of the Allahabad High Court in W.P. No. 2680 of 1989.

Pramod Swarup, T.N. Singh and B.M. Sharma for the Appellant. B

M.S. Ganesh, Sunil Kr. Singh and Anil Shrivastav for the Respondents.

The following Order of the Court was delivered :

Leave granted. We have heard learned counsel on both sides. C

This appeal by special leave arises from the judgment of the High Court of Allahabad, made on November 9, 1995 in Civil Miscellaneous Writ Petition No. 2680/89. D

The admitted position is that the plaintiff-respondent had entered into an agreement with the appellant to purchase 43 decimals of land in plot No. 389/2 situated in Umraha, District Varanasi for a sum of Rs. 6625. A sum of Rs. 2,000 was paid as earnest amount while the balance amount had already been paid in the form of loan. The respondent filed the suit seeking specific performance of the agreement, which relief ultimately was refused; but a decree for refund of the earnest money was granted. Since the amount was not paid, the respondent had brought the properties of the appellant, to the extent of one acre, 52-1/2 decimals to sale. The same came to be questioned by filing of an objection under Order XXI, Rule 90, CPC which was dismissed by the court below and upheld by the High Court. Thus, this appeal by special leave. E F

Two questions have arisen in this case, namely, whether the auction was properly conducted by the executing court and whether the respondent-decree holder was entitled to participate in the auction to bid and had sale confirmed in that behalf. It is not in dispute that the land, viz., plot Nos. 24 and 25 of admeasuring 1 acre 19-1/2 decimals and plot No. 50-A admeasuring 33 decimals totalling 1 acre 52-1/2 decimals was brought to sale to realise the decretal amount of Rs. 10,921-50. The court fixed the valuation at Rs. 11,000. On a sale conducted by Amin of the court, the bid was knocked down on April 30, 1983 in favour of the respondent-decree H

A holder for a sum of Rs. 12,000. As stated earlier, the question has arisen whether the sale conducted in execution of the decree is valid in law? Order XXI, Rule 72, CPC envisage as under :

"72. Decree-holder not to bid for or buy property without permission
 B – (1) No. holder of a decree in execution of which Property is sold shall, without the express permission of the court, bid for or purchase the property.

Where decree-holder purchases, amount of decree may be taken as payment -- (2) Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree
 C may, subject to the provisions of Section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

(3) Whether a decree-holder purchases, by himself or through
 D another person, without such permission, the Court may, if it thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-holder."

E A reading thereof clearly indicates that no holder of a decree execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property. In the event of such a purchase, on an application by the judgment-debtor or any other person whose interests are affected by such a sale, set aside such a sale. In paragraph 13
 F of the petition, the appellants has stated, among others, thus :

"After the said auction sale the judgment-debtor filed an objection under Order XXI, Rule 90, CPC mainly on the following grounds in the Court of Munsif Havali, Varanasi :

G (i) The decree-holder purchased the said land through auction without the permission of the Court;"

In the counter-affidavit filed by the respondent, he has not specifically denied in that behalf except stating that it is a matter of record. The proceedings of the auction do indicate that if he was really the person
 H permitted to participate in the bid, one would necessarily expect an active

participation in the auction. But the proceedings do show that after one Bali Ram Prasad, had bid, earlier, for Rs. 10,000 but later offered Rs. 11,500 and one Srinath had offered a sum of Rs. 11,000, as a last bid, the respondent offered Rs. 12,000 so as to be within the outer limit of valuation fixed by the Court to ward off further onslaught on court sale. Since there was no further offer made by anybody thereafter out of the five participants in the bid, the bid was knocked down in favour of the decree-holder-respondent. Under the teeth of the mandatory language of Order XXI, Rule 72, CPC, he has no right to bid in the auction without obtaining prior permission of the Court. As a consequence, the sale conducted was clearly in flagrant violation of Order XXI, Rule 72, CPC.

It is also to be seen that the sale was conducted without there being any proper notice and publicity as is evident from the report submitted by the Court Amin. After the bid was started, sale was notified in the village by beat of drum and thereafter people started coming and five persons including the respondent participated in the bid. This part of the procedure adopted is clearly illegal and caused great prejudice to the interest of the appellant. In *Desh Bandhu Gupta v. N.L. Anand & Rajinder Singh*, [1994] 1 SCC 131, this Court had pointed out the mandatory requirements of the procedure, as indicated therein, thus :

"The contentions of S/Shri Madhava Reddy and Gujral that the appellant had not given his valuation and that, therefore, is not open to him to raise the objections after the sale is unacceptable. Since the court had not given any notice to the appellant which is mandatory, the need to submit his valuation did not arise. Order 21 Rule 54, sub-rule (I-A) brought in by 1976 Amendment Act mandates that the Court should require the judgment-debtor to attend the court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale. Form 24 of Appendix 'E' second para and the court Rules also envisage the mandate. It is a reminder to the court that it has a statutory duty to issue notice to the judgment-debtor before settlement of the terms of proclamation of sale. Then only the proviso to Rule 66(2) comes into play dispensing with multiplicity of notice and not dispensation of mandatory compliance of notice to the judgment-debtor. Had it been a case where notice was served and the appellant lay by, without objecting to the valuation given by the

A decree-holder, certainly that would be put against the appellant to impugn the irregularities after the sale or the under-valuation settled by the court in the proclamation of sale. The further contentions of both the counsel that merely because there is no order under Order 21 Rule 66(2), it cannot be construed that the Execution Court had not applied its mind in settling the terms of the proclamation of sale, is on of desperation. Except giving a schedule of dates for conducting the sale the Execution Court totally abdicated its duty to scrupulously comply with the mandatory procedure and did not apply its mind to the mandatory duty cast on it by Order 21 Rule 66 to settle the terms of proclamation of sale, and proper publication under Rule 67. After April 20, 1979, the court had merely ensured its publication on the court notice board and on the site at the respective dates and no further. This Court in *Shalimar Cinema v. Bhasin Film Corpn.*, [1987] 4 SCC 717 held that the court has a duty to see that the requirements of Order 21 Rule 66 are properly complied with. It is incumbent on the court to be scrupulous in the extreme. No action of the court or its officer should be such as to give rise to the criticism that it was done in a causal way. Therefore, a proclamation of sale drawn casually without compliance of the mandatory requirement and a sale held in furtherance thereof is not a sale in the eye of law. We are of the considered view that the procedure adopted by the court in non-compliance of Order 21 Rules 66 and 67 is in flagrant breach of the mandatory provision. it is a nullity *ab initio*."

There is yet another infirmity which goes to the root of the matter. It is seen that the respondent, in fact, had a contract to purchase 43 decimals of land and in the execution, managed to give the list of all other lands totalling 1 acre 52-1/2 decimals and the decree for Rs. 10,000 and odd was sought to be put to execution, and purchased the land for 12,000. In other words, he had over-reached his original agreement which he failed in the suit itself by participating and getting sale in his favour. There is no attempt made for sale of a reasonable portion of the property for realisation of the decree debt. Order XXI Rule 64 expressly mandates as under:

"64. Power to order property attached to be sold and proceeds to be paid to person entitled. Any court executing a decree may order that any property attached by it and liable to sale, or such portion

thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same."

This part of the case was also considered in *Desh Bandhu Gupta's* case (supra) thus :

"Yet another contention of Mr. Gupta is that the sale of the plot of 550 sq. yards is in excess of the execution and the order to sell it is the result of non-application of mind touching the jurisdiction of the court rendering the sale void or manifestly illegal. Therefore, the need to invoke Order 21 Rule 90 does not arise and it can be set aside under Section 47, CPC.

Proviso to sub-rule (4) of Rule 17 of Order 21 provides the procedure to receive the application for execution of the decree. In the case of a decree for payment of money, the value of the property attached shall, as nearly as may be, correspond with the amount due under the decree. Rule 64 of Order 21 charges the Executing Court that it may order attaching of any property to the extent that "such portion thereof as may seem necessary to satisfy the decree would be sold". It is also enjoined under sub-rule (2)(a) of Rule 66 of Order 21 that where a part of the property would be sufficient to satisfy the decree, the same be sold by public auction. Form 27 of Appendix E of the schedule also directs the court auctioneer to sell so much of the said property as shall realise the sum in the said decree and costs. The Code, therefore, has taken special care charging the duty on the Executing Court and it has a salutary duty and a legislative mandate to apply its mind before settling the terms of proclamation and satisfy that if part of such property as seems necessary to satisfy the decree should be sold if the sale proceeds or portion thereon is sufficient for payment to the decree-holder or the person entitled under the decree to receive the amount and so much of that property alone should be ordered to be sold in execution. In *Ambati Narasayya v. M. Subba Rao*, [1989] Supp. 2 SCC 693 this Court held that it is the duty cast upon the court under Order 21 Rule 64 to sell only such property or a portion thereof as may be necessary to satisfy the

A decree. It is a mandate of the legislature which cannot be ignored. Therein for execution of a decree of a sum of Rs. 2000 and costs, the appellant's 10 acres land was brought to sale which was purchased for a sum of Rs. 17,000, subject to discharge of a Court mortgage of Rs. 2,000. This Court held that without the court's examining whether a portion of the property could be sold, the sale held was not in conformity with the requirement of Order 21 Rule 64 and it was held to be illegal and without jurisdiction. The sale was set aside and the court was directed to put the judgment-debtor in possession of the land and to refund the sale amount to the auction-purchaser. Further direction was given to execute the decree in accordance with law. In *Mangal Prasad v. Krishna Kumar Maheshwar*, [1992] Supp. (3) SCC 31 a shop was sold to realise a decree debt of about Rs. 29,000 and the sale price at the auction was Rs. one lakh and odd. This Court finding that it is excessive execution, set aside the sale and directed return of the sale amount to the auction-purchaser with interest @ 12%. In *Takaseela Pedda Subba Reddy v. Pujari Padmavathamma*, [1977] 3 SCC 337 to recover the decree debt in two decrees the properties situated in two different villages were brought to sale. In the first instance the property in 'D' village fetched a sum of Rs. 16,880, which was sufficient to satisfy the decretal amount. The property in 'G' village was also sold which fetched a sum of Rs. 12,000. This Court set aside the sale of 'G' village. Admittedly, the site in sale is to the extent of 550 sq. yards, situated in a commercial area around which the petroleum installations are established. Though, as contended by Shri Madhava Reddy, that there may be building regulation for division of the property into portions, but the court made no attempt to sell a portion of the property, made be 100 yards or 150 yards out of it, or whether undivided portion thereof would have satisfied the decree debt. It could be legitimately concluded that the court did apply its mind at all to this aspect as well."

G In *Ambati Narasayya v. M. Subba Rao*, [1989] Supp. 2 693 at 695, this court had pointed out as under :

H "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

a 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."

Similar view was taken in *Takaseela Pedda Subba Reddy v. Pujari Padmavathamma*, [1977] 3 SCC 337 at 340.

Thus, we hold that the sale of the property of the appellant conducted by the executing court is clearly illegal. However, the appellant's directed to pay the decreetal amount, interest on the principal earnest amount of Rs. 3,000 @ 12% per annum from the date of deposit and the costs of execution as well as impounding fee @ 5% on the sale amount of Rs. 12,000.

The appeal is accordingly allowed. No. costs.

R.P.

Appeal allowed.