

Himmatbhai

Vs

Rikhilal and Others

Civil Appeal No. 2337 of 1968

(R. S. Sarkaria, P. N. Kailasam JJ)

28.02.1978

JUDGMENT

KAILASAM, J. -

1. This appeal is by the auction-purchaser on a certificate of fitness granted by the High Court of Madhya Pradesh against its order setting aside the decisions of Single Judge and the District Judge and directing the District Judge to deal with the application under Order 21, Rule 89, Civil Procedure Code, filed by the judgment-debtors Bhagwandas and Rameshwar Prasad on February 7, 1966.
2. The decree-holder, Smt. Bittibai, the 17th respondent herein, in execution of a money-decree in her favour against respondents 1 to 16 and 18 herein sold a house belonging to the judgment-debtors on January 8, 1966. It was purchased in the court-auction by the appellant herein. On January 17, 1966, respondent 18 Babulal, one of the judgment-debtors made an application in the Court of District Judge, Sagar, under Order 21, Rule 90, Civil Procedure Code, for setting aside the sale. On February 7, 1966 an application was filed under Order 21, Rule 89 by Babulal, the 18th respondent, on behalf of himself and respondents 1, 4 and 7 and the decretal amount of Rs. 27,267.90 and Rs. 2300 as compensation, totaling in all Rs. 29,567.90 was deposited. The appellant, auction-purchaser, resisted the application filed by the judgment-debtors, under Order 21, rule 89, on the ground that as an application under Order 21, Rule 90, was already pending the application under Rule 89 is not maintainable.
3. The trial Court by an order dated August 9, 1966 held that since the application of the judgment-debtors under Order 21, Rule 90, was pending the application under Order 21, Rule 89, was liable to be dismissed as not competent. It further held that the application filed by judgment-debtor, Babulal, dated February 7, 1966 was not a proper application under Order 21, Rule 89. The judgment-debtors filed an appeal to the High Court of Madhya Pradesh and the learned Single Judge who heard the appeal held that the application dated January 17, 1966 under Order 21, Rule 90, was a bar to the maintenance of the application dated February 7, 1966 under Order 21, Rule 89, and dismissed the appeal of the judgment-debtors on February 24, 1967. The judgment-debtors filed a Letters Patent Appeal to a Division Bench of the Madhya Pradesh High Court. The Division Bench allowed the appeal of the judgment-debtors and set aside the judgment of the courts below on May 2, 1968. The decree-holder filed an application for granting a certificate of fitness which the High Court granted by its order dated September 18, 1968. In pursuance of the certificate this appeal has been preferred by the appellant.
4. The main contention put forward by Mr. Sanghi, the learned Counsel for the appellant, is that the

application dated January 17, 1966 filed by Babulal was not behalf of the firm and therefore the application alleged to be under Order 21, Rule 89, on behalf of the firm is not maintainable as the earlier application under Order 21, Rule 90, was pending. The learned Counsel further contended that the application dated February 7, 1966, was for a mere deposit of money and not an application under Order 21, Rule 89, for setting aside the sale. In any event, it was submitted that the courts below ought to have found that the application under Order 21, Rule 89, was barred by time.

5. In order to appreciate the contentions of the learned Counsel, it is necessary to set out the relevant applications. The application filed by Babulal on January 17, 1966, is marked as item No. 3 on p. 25 of the printed paper book. The cause-title mentions the applicant as Firm Durga Prasad Ganesh Dass, through Partner Babulal. Bittibai, the Decree-holder, and Himmatbhai, the Auction-purchaser, are impleaded as respondents. The applicant Babulal has filed the application as partner. The learned Single Judge construed this application as having been made by Babulal for himself alone as one of the judgment-debtors. The plea that the application under order 21, Rule 90, was on behalf of all the judgment-debtors was not taken before the Single judge. The learned Single Judge in fact held that Babulal's application dated January 17, 1966 under Rule 90 though made on his behalf was a bar to the making of an application dated February 7, 1966, under Rule 89 by other judgment-debtors when Babulal insisted on the sale being set aside under Order 21, Rule 90. The Division Bench understood the judgment of the learned Single Judge as construing the application by Babulal as having been made on his behalf only and not on behalf of the judgment-debtors and that two of the judgment-debtors Bhagwandas and Rameshwar Prasad had at no time applied under order 21, Rule 90. We have no hesitation in agreeing with the view taken by the Single Judge as well as the Division Bench of the High Court that the application that was made by Babulal on January 17, 1966 was only on his behalf and not on behalf of other judgment-debtors. Even in special leave petition in the statement of the case of the appellant it is stated in paragraph 3 that on January 17, 1966, Babulal one of the judgment-debtors made an application under order 21, Rule 90. From the order of the District Judge we find that the execution was taken by the decree-holder separately against the various judgment-debtors. In spite of the fact that all through the proceedings it was understood that the application made under order 21, Rule 90, was by Babulal on his behalf alone, the learned Counsel for the appellant Mr. Sanghi, invited us to construe the application dated January 17, 1966 which he submitted would establish his case. We have gone through the document very carefully and we find that though the cause-title states the applicant as Firm Durga Prasad Ganesh Dass, through Partner Babulal, it was made only by Babulal as a partner and not on behalf of the firm. On this finding the submission of the learned Counsel that the application was made on January 17, 1966 under Order 21, Rule 90, by Babulal on behalf of all the judgment-debtors cannot be accepted. The learned Single Judge found that the application under Order 21, Rule 89, was made on behalf of four judgment-debtors, viz. Babulal, Rikhilal, Bhagwandas and Rameshwar Prasad. This view was accepted by the Division Bench which held that there was a valid deposit by Bhagwandas and Rameshwar Prasad for setting aside the sale.

6. It was sought to be contended that the application made by Babulal on February 7, 1966, was not an application under Order 21, Rule 89, but was only an application for depositing the amount of Rs. 29,567.99. The application is item 5 and is found at p. 29 of the printed paper book. The application is stated to be under order 21, Rule 89, Civil Procedure Code. The first paragraph mentions that the property of the judgment-debtor was auctioned for Rs. 46,000 on January 8, 1966 and was purchased by the auction purchaser. Second paragraph recites that the applicant wants to deposit a sum of Rs. 27,267.99 as shown in the proclamation of sale and Rs. 2300 as commission of the purchaser on Rs. 46,000, in all a sum of Rs. 29,567.99. There is no specific prayer for setting aside the sale but we have no hesitation in reading the application as one under Order 21, Rule 89.

The purpose of the application is clear and in fact the learned Judge has specifically stated "It has not been contended before me that the application dated February 7, 1966 was not an application within the meaning of order 21, Rule 89 Civil procedure Code". The Division bench also proceeded on the basis that the application dated February 7, 1966 was under Rule 89 and was on behalf of Babulal himself and on behalf of some other judgment-debtors.

7. The learned Counsel in support of his contention that unless there is a specific plea for setting aside the sale under order 21, Rule 89, the application cannot be treated as one under Order 21, Rule 89, cited three decisions, Kurunakara v. Krishna (AIR 1916 Mad 717 : 39 Mad 429), Mst. Rukminibai v. Gajadhar Budmal Agarwal (AIR 1955 Nag 185 : 1955 Nag 586) and Muppanappa v. Fakiragouda (AIR 1949 Bom 213). We do not feel it necessary to refer to those decisions for they are clearly distinguishable and do not apply to the facts of this case.

8. It was next contended that in any event no relief should be granted on the application dated February 7, 1966 as Babulal being one of the judgment-debtors having filed an application under order 21, Rule 90, is not entitled to relief under Order 21, Rule 89 and to that extent the other judgment-debtors cannot take advantage of the deposit made by Babulal, at least to the extent of Babulal's share. We do not see any merit in this contention. Apart from the fact that this point was not raised in any of the courts below, we feel that when a deposit is made by any of the judgment-debtors as required under Order 21, Rule 89, a proper deposit is made and the benefit for setting aside the sale would accrue to the other judgment-debtors. It is not disputed that the entire amount as contemplated under Order 21, Rule 89, had been deposited. It is also not in dispute that the deposit was made on behalf of the judgment debtors. Even though Babulal's petition under order 21, Rule 90, was pending, so far as the application under Order 21, Rule 89, by other judgment-debtors is concerned, it cannot be said to be ineffective when an application has been made by them and the entire money as required under the rule deposited.

9. In this view the Division Bench of the High Court was right in setting aside the order of the Single Judge holding that the application of Babulal under Order 21, rule 90, did not in any manner stand in the way of two other creditors, Bhagwandas and Rameshwar Prasad, making the application under Order 21, Rule 89.

10. The learned Counsel for the respondent relied on a local amendment made in order 21, Rule 89, of the Code of Civil Procedure and submitted that the terms of the rule are much wider and any person claiming any interest in the property or acting for such person is entitled to relief. The amended rule runs :

Where immovable property has been sold in execution of a decree, any person claiming any interest in the property sold at the time of the sale or at the time of Petition, or acting for, or in the interest of, such person, may apply to have the sale set aside on his depositing in Court, -

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As we have found that even without this amendment the application filed by Babulal on behalf of other judgment-debtors will be a valid application under order 21, Rule 89, it is unnecessary to refer to this amendment.

11. We find that there is no merit in any of the contentions raised by the learned Counsel for the

appellant. The amount deposited by the auction-purchaser has been lying in court. We find that under Order 21, Rule 93, the Court is entitled to direct repayment of the purchase-money and interest. Pending appeal before this Court we are told that this amount was deposited in a fixed deposit account. During the time in which the amount was not earning any interest, we direct the judgment-debtor to pay interest at 6 per cent per annum on that amount. From the date on which the amount was invested in fixed deposit no interest need be paid but the auction-purchaser will be entitled to withdraw the amount covered by the fixed deposit along with the interest thereon. As we are disposing of the entire matter the direction by the Division Bench to the District Judge to dispose of the application under Order 21, Rule 89, is set aside. The result is that the application by judgment-debtors under Order 21, Rule 89, will stand allowed and the sale set aside. The appeal is dismissed with costs.

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