

Basavantappa

Vs

Gangadhar Narayan Dharwadkar and Another

Special Leave Petition No. 8862 of 1986

(A. P. Sen, B. C. Ray JJ)

10.09.1986

ORDER

SEN, J. -

1. In this special leave petition the short point involved is whether by reason of sub-rule (2) of Rule 92 of Order XXI of the Code of Civil Procedure, 1908, the deposit required by Rule 89 not having been made within thirty days from the date of sale, the application made by the Judgment-debtor was not maintainable. Sub-rule (2) of Rule 92 has been amended by Section 72 of the Code of Civil Procedure (Amendment) Act, 1976 by adding the words "the deposit required by that rule is made within thirty days from the date of sale", the following "or in cases where the amount deposited under Rule 89... within such time as may be fixed by the court" to prevent any controversy as to the power of the court to extend the time to make good the deficit. Unfortunately, the words added speak of the deficiency owing to 'any clerical or arithmetical mistake' on the part of the depositor. The amended Rule 92(2) now reads :

92(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 thirty 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.

2. The failure to deposit the amount entails confirmation of sale under Order XXI, Rule 91(1) and thereupon the sale becomes absolute. The limitation prescribed for an application under Order XXI, Rule 89 was thirty days from the date of sale under Schedule I, Article 166 of the Limitation Act, 1908, now replaced by Article 127 of the Limitation Act, 1963. The words "may apply to have the sale set aside on his depositing in court" etc. show that not only the application, but also the deposit, should be made within thirty days from the date of sale. It is not enough to make the application within thirty days, Nor is it enough to make the deposit within thirty days. Both the application and the deposit must be made within thirty days from the date of sale. Article 127 of the Limitation Act, 1963 has now been amended by Act 104 of 1976 and the words 'sixty days' have now been substituted for the words 'thirty days'. As a result of the amendment, the limitation for an application to set aside a sale in execution of a decree, including any such application by a judgment debtor under Order XXI, Rule 89 or Rule 90 is therefore sixty days now, Such being the law, there is need

for an appropriate amendment of sub-rule (2) of Rule 92 of the Code. Under Order XXI, Rule 89 as it now exists, both the application and the deposit must be made within thirty days of the sale. The failure to make such deposit within the time allowed at once attracts the consequences set forth in sub-rule (2) of Rule 92. This is an unfortunate state of things and Parliament must enact the necessary change in law.

3. In the present case, the auction was held on July 26, 1985. The decree-holder brought to sale in execution of a money decree for Rs. 21,948.45, the property of judgment-debtor 1 comprised of a house and open site appurtenant thereto. The highest bid of Rs. 22,500 offered by the auction-purchaser was accepted and the bid was knocked down in his favour. The executing court fixed the case for confirmation of sale on September 30, 1985. In the meanwhile, judgment debtor 1 deposited Rs. 22,000 on August 29, 1985 towards payment of the decretal amount together with an application under Order XXI, Rule 90 read with Section 151 of the Code for setting aside the sale. Again, on September 6, 1985 he made another application purporting to be under Order XXI, Rule 89 read with Section 151 of the Code and made a deposit of the balance amount. The auction-purchaser objected to the entertainment of the application contending inter alia that the deposit required by Rule 89 not having been made within thirty days of the date of sale as required by Rule 92(2) of the Code, the sale was liable to be confirmed under sub-rule (1) thereof. It is undisputed that the judgment-debtor has deposited the entire decretal amount together with 5 per cent of the purchase money by way of commission to the petitioner-auction-purchaser. The Principal Munsif, Dharwar by his order dated October 4, 1985 overruled the objection raised by the petitioner. A learned single Judge (Kulkarni, J.) by his judgment dated March 26, 1986 declined to interfere with the order of the learned Munsif setting aside the sale. The learned Judge relying upon the decision of the Madras High Court in *Thangammal v. K. Dhanalaksmi* [AIR 1981 Mad 254] held that the provisions of Order XXI, Rules 89 and 92(2) of the Code and that of Article 127 of the Limitation Act should receive a harmonious construction. In that view, the learned Judge held that the Judgment-debtor 1 having deposited the decretal amount together with 5 per cent of the purchase money and having made the application under Order XXI, Rule 89 of the Code within sixty days of the sale i.e. within the period as provided by Article 127 of the Limitation Act, the sale was liable to be set aside. The learned single Judge has brought about the inconsistency between subrule (2) of Rule 92 of Order XXI of the Code and Article 127 of the Limitation Act and suggested that steps should be taken to remove this inconsistency. We fully endorse the view expressed by the learned single Judge.

4. In the result, the special leave petition must fail and is dismissed.

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