

SUPREME COURT OF INDIA

Challamane Huchha Gowda

Vs.

M.R. Tirumala

(S. R. Babu and Ruma Pal JJ.)

08.12.2003

JUDGMENT

S. Rajendra Babu, J.

1. Leave Granted.

2. In execution of a decree the executing Court brought the properties owned by the Petitioner-Judgment Debtor for sale. Proclamation was published on 19/07/1992. on 26/08/1992 the scheduled properties were put up for auction. The final bid was offered by respondent No. 1 in Court on 28/08/1992. On 25/09/1992 the Petitioner-Judgment Debtor paid the entire decretal amount together with the cost to the Respondent No 2 -Decree Holder accompanied by memorandum of objections for confirmation of sale. A memo was also filed praying to close the execution proceedings. On 30/10/1992 another Memo was filed in the Executing Court reporting the payment of the decree amount. Then the executing Court directed the Petitioner - Judgment Debtor to pay solatium to the Respondent No. 1 - Auction Purchaser. Executing Court also noted that the Respondent No. 1 - Auction Purchaser was not ready to accept the solatium amount. In the meanwhile, on 13/11/1992 Respondent No 1 -Auction Purchaser filed an Interlocutory Application under Order 21, Rule 92 of CPC for confirmation of sale. On 24/07/1993 the Petitioner - Judgment Debtor filed an application to treat the earlier objection dated 25/09/1992 as an application under Order 21, Rule 89 of CPC. However a separate application was also filed under Order 21, Rule 89 or CPC with a prayer for condoning the delay. The execution Court held that the objection filed by the Petitioner -Judgment Debtor on 25/09/1992 could be treated as application under Order 21, Rule 89 of CPC. Predominantly noting the fact that the Petitioner -judgment Debtor has paid the entire decree amount and that the sale was yet to be confirmed the executing Court set aside the sale. Accordingly the execution proceeding was closed.

3. On Appeal preferred by the Respondent No. 1 - Auction Purchaser, the first Appellate Court reversed the Order passed by the Executing Court. Aggrieved by the findings of the first Appellate Court, the Petitioner - Judgment Debtor moved a Civil Revision Petition before the High Court. High Court found that an objection can never be treated as an application within the meaning of Order 21, Rule 89 or 90; that the later application was filed is barred by limitation; that the Section 5 of Limitation Act is not applicable in the instant

case; that the deposit was not made within the prescribed date; that there is no evidence to the effect that the value of property is more than the bid / purchase price; that the question of adequacy of the sale price is irrelevant as it is outside the scope of Rule 89 of Order 21. For these reasons the revision petition was dismissed. This judgment is impugned before us.

4. The only question that requires our consideration in this case is whether the setting aside of sale by the executing Court is correct or not. Under Order 21 Rule 89(1) of CPC an application to set aside sale under Rule 89(1) can be filed. The said provision reads as under:

“Rule 89, Order 21: Application to set aside sale on deposit: - (1) Where immovable property has been sold in execution of a decree, any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest if such person, may apply to have the sale set aside on his depositing in Court, -

(a) for payment to the purchaser, a sum equal to five per cent of the purchase money, and

(b) for payment to the decree holder, the amount specified in the proclamation of sale as that for the recovery which the sale ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree holder.”

5. The follow up action to Rule 89(1) is provided under Rule 92(2) of Order 21, which reads as follows:

"(1)...

(2) Where such an 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 date of sale, or in case where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the deposit 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."

6. In *Raoji Baburao v. Bansilal*¹, *Venkatasubba Rao v. Narayana Rao*², and *Ram Autar v. Sheo Plarey Lal*³ and *Pachlayae v. Vallimuthu*, where judgment debtor deposited entire decretal amount, cost and compensation in court but could not file an application to set aside sale and his contention that the deposit of money itself could be treated as an application to set aside sale was rejected. Diametrically, opposite view has been expressed in several decisions which we may briefly notice.

7. In *Jyothish Chandra Skidar and Ors. v. Surendra Nath Das and Anr.*, , the Court treated Challan deposited by the Judgment Debtor under Rule 89 as an application. In *Mahaboob Khan v. Majid Husain*, , the tender for deposit or money in Court itself was held to be an application for the reason that the presentation of the tender form itself clearly shows the intention of the Judgment Debtor to set aside the sale. Here the Court also found that Rule 89 only insist for two things - a). Deposit for Decree Holder and b). Deposit for the purchaser by way of compensation, court clearly said that there is no third requirement of an application under the Rule. Money deposit itself was treated as an application in *Asan Kutti v. Koyaman Kutti*⁴. In *Kishun Lal v. Hardevi Kaur*⁵, the Court was of the opinion that -"the prayer that an auction sale to be set aside is implicit in the making of deposit...We do not think that the deposit in order to be valid must necessarily be made along with application." In the view we propose to take, we need not examine which of these two views is correct.

8. There is a third view taken in situations arising as in the present case. In *Dr. Parmanand Verma v. Satnarain Prasad* the Judgment Debtor deposits the decretal amount and compensation along with a petition, but with no express prayer to set aside the sale. Here the Court ruled that in such circumstances the petition as a whole has to be considered otherwise there would be no reasonable meaning to such an application. So is the decision in *Hirania v. Ram Plan* , wherein an application to deposit money in Court itself was treated as an application to set aside the sale. The Bombay High Court insisted upon an application made under Order 21 Rule 89(2) in *Raoji Baburao v. Bansilal* case (supra) but in *Maruti Shidalapa v. Shivappa Mallappa*, , treated purshis along with money deposited in the Court as an application to set aside sale. Court noted that though Order 21 Rule 89 CPC requires an application to be made for setting aside the sale, nothing is stated in the rule regarding the mode of application and then held that purshis contains an implicit prayer for setting aside the sale and the absence of a formal application does not amount to non-compliance of the provision. In *Behari Lall v. G.K. Pathak* , the High Court ruled that "...application by Judgment Debtor whereby a prayer was made for passing the challan for, deposit of requisite money, by necessary implication there was a prayer to do justice by setting aside the sale." Similar view was taken in *Pratap Kishore v. Rama Chandra* and in *Durga Prasad Singh v. Ram Lakhan* .

9. Execution is the enforcement, by the process of the Court of its orders and decrees. This is in furtherance of the inherent power of the Court to carry out its orders or decrees. Order 21 of CPC deals with the elaborate procedure pertaining to the execution of orders and decrees. Sale is one of the methods employed for execution. Rule 89 of Order 21 is the only means by which a Judgment Debtor can escape from a sale, that has been validly carried out. Object of the rule is to provide a last opportunity to put an end to the dispute at the instance of Judgment Debtor before the sale is confirmed by the Court and also to save his property from dispossession. Rule 89 postulates two conditions: they are depositing - 1). of sum equal to five percent of the purchase money to be paid to the purchaser, 2). of the amount specified in the proclamation of sales less any amount received by the decree holder since the date of such proclamation, in the Court. If these two conditions are satisfied, the Court shall make an order for setting aside the sale under Rule 92(2). of Order 21 of CPC on an application made to it. In other words then there will be compliance of Court's order or decree that is sought to

be executed. Because the purpose of the Rule 21 is to ensure the carrying out of the orders and decrees of the Court. Once the Judgment Debtor carried out the order or decree of the Court, the execution proceedings will correspondingly come to an end. It is to be noted that the Rule does not provide that the application in a particular form shall be filed to set aside the sale. Even a memo with prayer for setting aside sale is sufficient compliance with the said Rule. Therefore, upon the satisfaction of the compliance of conditions as provided under Rule 89, it is mandatory upon Court to set aside the sale under Rule 92. And the Court shall set aside the sale after giving notice under Rule 92(2) to all affected persons.

10. In the case on hand, it is not disputed that within the stipulated period of one month from the date of final bid in Court, the Petitioner -Judgment Debtor paid the decree amount to the Decree Holder and also filed a memo for setting aside the sale in the form of objections. Executing Court noted this aspect. By this payment the requirement under Rule 89(1)(b) of Order 21 was fulfilled. It is also noted that the Respondent No. 1 - Auction Purchaser refused to accept the solatium and he subsequently filed Application for confirmation of sale. Meanwhile" the executing Court ordered for the deposit of solatium with the Court. This "deposit complied with the second requirement under Rule 89(1)(a) of Order 21. Admittedly, on 25/09/1992 the Petitioner - Judgment Debtor filed his objections to the sale and also paid the entire decree amount together with the cost to the Respondent No 2 - Decree Holder. The factum of the payment of entire decree amount to the Decree Holder with cost was not looked into by the First Appellate Court or by the High Court nor did it attach any value to the memo of objections for setting aside sale. It is also a settled position of law that a mere non-mentioning or wrong mentioning of a provision in an application is not a ground to reject an application. Since, there is no bar in treating the objection (filed in the present case) as an application to setting aside the sale. Hence- the setting aside of sale by the execution Court is perfectly in tune with the Code. In this view of the matter it is not necessary to look into other aspects agitated by the contesting parties nor to look into the authorities cited before us. Accordingly the order of the High Court affirming that of the First Appellate Court is set aside and order of the Executing Court is restored.

11. Appeal allowed accordingly.

¹*AIR 1919 Bombay 130*

²*AIR 1922 Madras 83*

³*AIR 1925 Oudh 411*

⁴*AIR 1937 Madras 342*

⁵*AIR (33) 1946 Oudh 45*