ALLAHABAD HIGH COURT

Kundan Lal

Vs.

Jagan Nath Sharma

Civil Revn. No. 1158 of 1960. , against order of Civil J. Dehradun
(B. Mukerji and D.P. Uniyal, JJ.)

08.11.1960. 09.03.1962

JUDGMENT

Uniyal J.

1. This is a judgment debtor's application in revision against an order dismissing his objections under Rule 90 of Order 21, C.P.C. The matter came up before a learned single Judge of this Court who was of the opinion that the order of dismissal, based as it was on the proviso to Rule 90 of Order 21, C.P.C. added by this Court, had been wrongly interpreted by the Civil Judge. The attention of the learned Single Judge was invited to a decision of this Court in *Bhawan Ram v. Kunj Behari Lal,* [1] in which it was held that the proviso introduced by this Court to Rule 90 of Order 21 bars entertaining an objection altogether if the requirements of the proviso are not complied with by the time up to which the objection can be legally entertained and that the objection cannot thereafter be validly made nor can the security deposit be accepted. The learned Single Judge was of the opinion that the view taken by this Court in Bhawan Ram's case 1960 All LJ 578: AIR 1962 Allahabad 42 was not sound. On his reference the matter was referred to the Division Bench.

2. The facts giving rise to this application in revision are as follows. There was a money decree passed against the defendant judgment-debtor. In execution of that decree certain property of the judgment-debtor was put to auction sale on the 17th October 1958. On the 30th October 1958 he made an application under Rule 90 of Order 21, C.P.C. to set aside the sale on ground of certain irregularities committed in the conduct of the sale. Objections to this application were made both by the Official Receiver as well as by the auction purchaser. One of the grounds raised in the objections made by the auction purchaser was that along with the application filed by

the judgment-debtor he had not deposited 121/2% of the sum realized by the sale nor furbished security as required by clause (b) of the proviso to Rule 90 of Order 21, and that the application was, therefore, liable to be rejected. There upon the judgment-debtor made an application on the 12th June 1959 praying that he might be allowed time to give the necessary security. The learned Civil Judge allowed this application on the 26th February 1960 and the judgment-debtor then filed the necessary security within the time allowed, that is, on the 7th March, 1960. When the application came on for disposal the learned Civil Judge upheld the objection of the auction purchaser and held that the application of the judgment-debtor was not maintainable in view of the fact that he had not made any necessary deposit of 121/2% of the sale price nor filed the security along with the application.

3. The learned counsel for the applicant, Mr. Rajaram Agarwal, has contended that the true meaning and scope of the proviso to Rule 90 of Order 21, C.P.C. is that 124% of the sale price in cash or security for the same should be deposited, by the judgment-debtor within the time allowed by the court. He contended that the proviso did not require that the applicant should make the deposit or give security along with the application. In Order to appreciate the contention of the learned counsel it would be useful to quote the proviso to Rule 90 of Order 21, C.P.C. in full:

> "Provided that no application to set aside the sale shall be entertained:
> (a) upon any ground which should have been taken by the applicant on or before the date on which the sale proclamation was drawn up;
> (b) unless the applicant deposits such amount not exceeding 121/2% of the sum realized by the sale or furnishes such security as the court may in its discretion fix, except when for reasons to be recorded it dispenses with the requirements of this clause;....."

4. It would thus appear that the proviso to Rule 90 of Order 21 provides for the following: (1) that the application to set aside the sale shall not be "entertained" on any of the grounds which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up; (2) that the application to set aside the sale shall not be entertained unless the applicant deposits such amount not exceeding 121/2% of the sum realized by the sale; (3) or unless the applicant furnishes such security as the court may in its discretion, fix; and (4) that the application for sale shall not be entertained unless the court for reasons to be recorded dispenses with the

requirements of this clause. The clear meaning of the proviso, it appears to us, is that at the time when the court is considering the application to set aside the sale it shall not allow the judgment-debtor to raise any ground which he could have raised as the time when the sale proclamation was drawn up and, further, that the court will not consider the grounds of the objection to the sale unless it finds that the applicant has deposited either such amount not exceeding 121/2% of the sum realized by the sale or furnished such security as required by the Court. This in our opinion clearly goes to indicate that the stage at which the question as to whether the applicant has complied with the terns of the proviso to Rule 90 of Order 21 arises is when the court is actually seized of the application filed by the judgment-debtor for setting aside the sale.

5. The expression 'entertain' in our opinion does not mean the same thing as the filing of the application or the admission of the application by the court. The dictionary meaning of the word 'entertain' is to deal with or to take a matter into consideration. A court hearing an application under Rule 90 of Order 21 C.P.C. can only be said to entertain the application when it is actually disposing of the application on the merits. It, therefore, follows that the mere filing of the application by the judgment-debtor would not be its entertainment by the court and therefore what is contemplated by the proviso to Rule 90 of Order 21 is that the conditions which are prescribed by the proviso have to be complied with by the judgment-debtor before the court comes to dispose of the application on the merits. If this be the correct interpretation, of the proviso to Rule 90 of Order 21 then it follows that the present application of the judgment-debtor was validly presented and that the judgment-debtor had fully complied with the proviso to Rule 90 of Order 21.

6. A similar question came up for consideration before another Division Bench in *Dhoom Chand v. Chaman Lal,* [2] One of the arguments raised before that Bench was that there was a breath of clause (b) of the proviso to Rule 90 of Order 21, C.P.C., inasmuch as the judgment-debter had not mads the necessary deposit nor given proper security before making the application to set aside the sale. It was held in that case that the word 'entertain' bears the meaning of admitting to consideration and that the contention that the court should not admit an application which was not backed by deposit of security is not sound.

7. The use of the word 'entertain' in the proviso to Rule 90 of Order 21 demotes a point of time at which an application to set aside the sale is heard by the court.

This appears to be clear from the fact that in the proviso it is stated that no application to set aside a sale shall be entertained upon 'any ground which could have been taken by the applicant on or before the date on which the sale proclamation was drawn up'. Surely, the question as to the consideration of the grounds upon which the application is based can only arise when it is being considered by the Court on the merits, that is, when the court is called upon to apply its mind to the grounds urged in the application. In our view the stage at which the applicant is required to make the deposit or give the security within the meaning of Clause (b) of the proviso would come when the hearing of the application is due to commence.

8. If it had. been intended that the deposit to be made or the security to be furnished had to be done at the time of presenting the application to set aside the sale, the language employed would have been in terms similar to that used in Section 17 of the Provincial Small Cause Courts Act, which reads thus:
S.17 "(1) The procedure prescribed in the C.P.C., 1908, shall, save in so far as is otherwise provided by that Code or by this Act, be the procedure followed in a Court of Small Causes in all suits cognizable by it, and in all proceedings arising out of such suits:

> "Provided that an applicant for an order to set aside a decree parsed ex parte or for a review of judgment shall, at the time of presenting his application, either deposit in the court the amount due from him under the decree or in pursuance of the judgment, or give such security for the performance of the decree or compliance with the judgment as the court may, on a previous application made by him in this behalf, have directed."

9. The proviso to Section 17 (1) of the Provincial Small Cause Courts Act makes it clear that the applicant seeking for an order to set aside a decree passed ex parte must, at the time of presenting his application, either deposit in the court the amount due from him under the decree or give such security for the performance of the decree an the court may on a previous application made by him in this behalf had directed. This proviso clearly postulates that the applicant should have already applied giving security for the performance of the decree and it is only when he has done so that an application to set aside the ex-parte decree would be entertained by court. Thus the legislature clearly intended that the applicant shall have a right to make an application to set aside a decree if he had already obtained permission of the Court to furnish the

necessary security for the performance of the decree or compliance with the judgment of the court. Had this been the intention of the proviso to Rule 90 of Order 21, C.P.C., the language of that proviso would have been similarly worded as is to be found in the proviso to Section 17 of the Provincial Small Cause Court., Act. This lends support to the view that the legislature intended that a judgment-debtor applying to have the sale set aside could, after making an application, obtain leave of the court to make the necessary deposit or give security, or even ask the court to dispense with the compliance of that rule. We have, therefore, no hesitation in holding that the true intention of the proviso is that compliance of clause (b) of the proviso may be made at any time before the application under Rule 90 of Order 21, C.P.C. comes up for decision by the court on the merits.

10. It was contended by the learned counsel for the auction purchaser that the Proviso to Rule 90 of Order 21 should be construed in a narrow sense and that the expression 'entertained' must be given the same meaning as the word 'filed'. We find no warrant for this argument. In fact, as we have pointed out above, the true intention of the proviso appears to us to be to allow the judgment-debtor to prosecute his application to set aside the sale if he complies with the conditions contained in the proviso to Rule 90 before the application is finally heard and disposed of by the court. We are respectfully of the view that case 1960 All LJ 578: AIR 1962 Allahabad 42 has not been correctly decided.

11. The learned counsel for the applicant states that the second question referred to us does not arise for decision.

12. The learned counsel appearing for the Official Receiver has conceded that the view that we have taken of the case is the correct one.

13. We, therefore, allow this revision with costs and set aside the order of the learned Civil Judge dated the 8th November, 1960 and remand the application for decision according to law.

Revision allowed.

Cases Referred.

1. 1960 All LJ 578: AIR 1962 All 42
2. Second Appeal No.527 of 1960: AIR 1962 All 543, decided on 27-7-1962