
(2009) 06 AHC CK 0144
In the Allahabad High Court

Abdul Hafeez Khan alias Chakkan (D.) by L.Rs.	APPELLANT
Vs	
Civil Judge and Others	RESPONDENT

Date of Decision : 29-06-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 64, Order 21 Rule 90

Citation : AIR 2009 All 162 : (2009) 4 AWC 3532 : (2009) 4 CivCC 80 : (2010) 7 RCR(Civil) 1364

Hon'ble Judges : S.U. Khan, J

Bench : Single Bench

Final Decision : Allowed

Judgement

S.U. Khan, J.—At the time of argument no one appeared on behalf of contesting respondents even though the case was taken up in the revised list. Accordingly only the arguments of learned Counsel for the petitioner were heard.

2. This writ petition arises out of execution proceedings. Original respondent No. 3, Durga Charan since deceased and survived by legal representative obtained a money decree against the petitioner which was put in execution for the first time in the year 1973 in the form of Execution Case No. 207 of 1973. Uptil that time decretal amount was Rs. 1347. The property of the petitioner was sold in execution, however, on the objections of the petitioner the sale was set aside, again same thing followed. For the third time the following property of the petitioner was auctioned on 14.8.1981 in realisation of the dues.

3. Plot. No. 1356 Area 1.45 acres.

4. Plot No. 1180 Area 1.86 acres.

5. In the auction property was purchased by original respondent No. 4, Ayodhya Prasad since deceased and survived by the legal representative who is stated to be a brother-in-law of a decree holder respondent No. 3.

6. Petitioner filed application/objection under Order XXI, Rule 90, C.P.C. against

the auction dated 14.8.1981. In the aforesaid sold plots petitioner had half share. In para 7 of the objections (Annexure-1) it was stated that only one of the two plots would have been sufficient to satisfy the decree. The share of the petitioner in the plots in question was auctioned for Rs. 7,160. It was also stated that the property was sold for grossly inadequate consideration. Objections were rejected by Munsif, Pilibhit through order dated 6.3.1982, Annexure-4. Regarding the specific objection that auction of only part of one of the two plots could satisfy the decree, learned Munsif held that such objection should have been taken before or at the time of preparation of proclamation of sale. Against order dated 6.3.1982 petitioner filed Misc. Civil Appeal No. 19 of 1982. Civil Judge, Pilibhit dismissed the appeal on 21.3.1982, hence this writ petition. Appeal was dismissed on the ground that petitioner had full knowledge of the proceedings. The specific objection pertaining to sale of excess property was not decided by the appellate court also.

7. Order XXI, Rule 64, C.P.C. mandates that only so much property must be sold which is necessary to satisfy the decree. The Rule is quoted below:

Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may be 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.

(Italics supplied)

8. Learned Counsel for petitioner has cited the following authority of the Supreme Court holding that provisions of Order XXI, Rule 64 are mandatory.

9. Lal Chand v. A.D.J. 1997 ACJ 926.

10. In this regard reference may also be made to Balakrishnan Vs. Malaiyandi Konar,

11. In the latter authority several earlier authorities have also been considered. Paras 10 and 11 of the said authority are quoted below:

10. The provision contains some significant words. They are "necessary to satisfy the decree". Use of the said expression clearly indicates the legislative intent that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. (See Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma and Others, In all execution proceedings, Court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as 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 is not just a discretion but an obligation imposed on the Court. The sale held without examining this aspect and

not in conformity with this mandatory requirement would be illegal and without jurisdiction. (See Ambati Narasayya Vs. M. Subba Rao and another, . The duty cast upon the Court to sale only such portion or portion thereof as is necessary to satisfy the decree is a mandate of the Legislature which cannot be ignored. Similar view has been expressed in S. Mariyappa (Dead) by Lrs. and Others Vs. Siddappa and Another,

11. In S.S. Dayananda Vs. K.S. Nagesh Rao and Others, it was held that the procedural compliance of Order XXI, Rule 64 of the Code is a mandatory requirement. This was also the view expressed in Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh,

12. Accordingly the view of the courts below that if such objection is not taken at the time of preparation of proclamation of sale then the same stands waived is not correct in law. Moreover petitioner in para 4 of his objections (Annexure-I to the writ petition) clearly stated that notice under Order XXI, Rule 66 (relating to preparation of proclamation of sale) was not sent on his address. There is no finding that at the time of preparation of proclamation of sale petitioner was present.

13. It has also been stated that both the plots were put to auction and then half share in both the plots was actually sold in auction to respondent No. 4.

14. Accordingly, the auction sale is held to be void for non-compliance of provisions of Order XXI, Rule 64, C.P.C. Writ petition is therefore allowed. Both the impugned orders are set aside and auction dated 14.8.1981 is also set aside.

15. Petitioner is directed to deposit the entire decretal amount along with interest due till the date of deposit within four months from today failing which 2% per month interest shall be payable thereupon since after 4 months till actual payment. For four months no fresh proceedings for auction in realisation of the decree shall take place. However, if within four months the amount is not deposited, fresh auction proceeding may be initiated.