

(1978) 09 DEL CK 0002

In the Delhi High Court

Case No : Regular Appeal No. 49 of 1978

Amolak Singh Jain

APPELLANT

Vs

Krishna Misra

RESPONDENT

Date of Decision : 20-09-1978

Acts Referred:

Citation : (1978) 14 DLT 258

Hon'ble Judges : M.S. Joshi, J

Bench : Single Bench

Advocate : M.S. Chadha, R.N. Suri and R.S. Oberoi, for the Appellant;

Judgement

M.S. Joshi, J.

(1) Property bearing No. N-8, Kailash Colony, New Delhi was sold by public auction for Rs. 1,02,000.00 on 28-11-1974. The auction took place in execution of a decree favoring Amolak Singh. The judgment-debtors preferred an application dated 22-12-1977 for setting aside of that sale under order 21 Rule 90 read with Sections 41 and 151 of the CPC on the ground of material irregularities and fraud. The said application (E.A. 405/77) was listed before the court on 2-1-1978 but because neither of the parties to the matter were present it was ordered to be re-listed on 3-1-1978. On that day again there was no appearance and the application was, Therefore, dismissed in default. The instant application, E.A. 49/78, has been preferred for restoration of E.A. 405/77.

(2) Stated briefly, the judgment-debtors' case is that the application sought to be restored (E.A. 405/77) was filed on 23-12-1977 and copies thereof "were served on the decree-holder and the auction-purchaser through registered post. Under the orders of the court dated 8-12-1977 the execution application was directed to be listed before the Deputy Registrar on 4-1-1978 for further directions and when the counsel for the parties appeared before the Deputy Registrar on that date he recorded an order reading. "Case file not received from the Registry. Re-notify for 18-1-78." On the last mentioned date the counsel for

the judgment-debtors appeared before the Deputy Registrar and came to know that application No. 405/77 had been dismissed for default on 3-1-1978. He was all along under the impression that his application would be coming up before the Deputy Registrar on 4-1-1978 and that is why there was no appearance before the court on 2-1-1978 and 3-1-1978. It has been submitted that there was no deliberate default on the part of the judgment-debtors and there was sufficient cause in the circumstances for the dismissal being set aside. This application was opposed by the decree-holder as well as the auction purchaser. It was urged by them that the application did not lie and there was no ground otherwise for its being granted. In view of the pleas of the parties the following issues were framed in the case :-

1. Whether the application is maintainable ? 2. Whether there is sufficient ground for setting aside the order of dismissal of the objection-petition ? 3. Relief.

(3) The parties have confined their evidence to affidavits. From the side of the applicants there are affidavits of Hari Mohinder Misra and Shri S.L. Sahney and that of the parties opposing the application of Smt. Bhagwati Devi auction-purchaser and Amolak Singh decree-holder. Issue No. 1.

(4) The application for restoration purports to have been filed under Order 9 Rule 3 read with Sections 47 and 151 of the Code of Civil Procedure. It has been conceded by Shri N.R. Suri, appearing for the judgment debtors) that the provisions of Order 9 and Rule 3 and Section 47 CPC are not applicable and that his plea may be considered in the light of Section 151. It has not been disputed by the counsel for the decree-holder and the auction purchaser that the application does lie u/s 151 CPC In these preemies the 1st issue "is decided in favor of the applicants. Issue No. 2.

(5) A perusal of the file shows that execution case No. 2 of 1977 was put up before the Court on 8-12-1977. On that date the bid of the auction-purchaser for Rs. 1,02,000.00 was approved and the matter was ordered to be listed before the Deputy Registrar on 4-1-1978 for further directions. It was pointed out by the judgment-debtors" counsel at the same hearing that he would be making an application raising objections to the sale under Order 21, Rule 90 of C;P.C. and it was remarked with reference to that statement that the application would be put up before the Court then filed. The judgment-debtors preferred their objections, as noted ,en 23-12-1977 ard because the application was meant by them to be treated as urgent the office listed it before the court on 2-1-1978. Since the applicants did not appear on the date and even on the date following, an order dismissing the objections was passed. The learned counsel for the judgment-debtors submits that because the court had fixed 4-1-1978 as the date on which the case was to be put up before the Deputy Registrar be was under the impression that his objection-petition would come up before the said officer on that date. The office did not commit any mistake in putting up E.A. 405/77 on 2-1-1978 because the order passed by me on 8-12-1978 said that the objections of the judgment-debtors under Order 21 Rule 90 CPC would be put up before the

Court when filed. The impression of the judgment-debtors' counsel that his objections were meant to be listed before the Deputy Registrar on 4-1-1978, the date mentioned in the Court's order dated 8-12-1977 was thus not correct. But it appears the judgment-debtors did suffer from a mis-apprehension. It was urged by them in their objection-petition that the property in question was worth Rs. 3,00,000.00 and it had been sold on account of the fraud practiced by interested parties for an amount of Rs. 1,02,000.00 only. It was pointed out further that Sham Sunder Sharma had agreed to purchase back half portion of the house in dispute for a sum of Rs. 85,000.00 and the same person had got his fictitious bid of Rs. 1,02,000.00 in the name of his wife, Bhagwati Devi Sharma recorded as the last one. According to them the front portion being obviously, much more precious than the back one, the whole property was not worth less, than Rs. 3,00,000.00. In this situation the objections filed by the judgment-debtors could not have been filed just for the fun of it. They must have been very serious about their prosecution and it was due to wrong assumption as to the date of hearing that they did not turn up personally or through their counsel on 2-1-1978 and again on 3-1-1978. The counsel for the decree-holder and the auction-purchaser have urged that a blunder of the lawyer would not justify the court exercising its discretion in favor of his client and Hind Estate Ltd. Vs. Ansar Ahmed, has been cited in this behalf. But, decision of each case rests on its own peculiar facts and the discretion of the court has to be used in accordance with the circumstances of the particular case. The non-appearance of the judgment-debtors' counsel before me on 2nd and 3rd January, 1978 seems to be due to the reason that the learned Advocate did not comprehend the true meaning of the order passed by the court on 8-12-1977. He went to appear before the Deputy Registrar on 4-1-1978 and did not come to the court on 2nd and the 3rd January in the belief that the matter had been ordered to be put up before the Deputy Registrar on the first mentioned date. The courts are prone to be lenient to the defaulting party in such like circumstances and pertinent instances of exercise of jurisdiction in this manner are to be found in cases reported as Charanji Lal Vs. Sushil Chander Bharal, and Banwari Lal v. Mfs. Banwarilal Sons 1976 RLR 119. The second issue is as such answered in favor of the applicants.

(6) The application is, for the foregoing reasons, accepted, the order of dismissal dated 3-1-1978 is set aside and the objection petition E.A. 405/77 is ordered to be restored and put up before the court for further directions on 25-9-1978. The restoration is, however, subject to payment of Rs. 200.00 as costs by the applicants.

(7) As a necessary consequence of the restoration of the objection- petition the order of confirmation of the sale passed on 9-1-1978 shall stand vacated and execution case No. 2 of 1977 shall be put up Along with E.A. 405/77 on the aforesaid date.