

(1982) 02 MP CK 0012

In the Madhya Pradesh High Court

Case No : Miscellaneous Petition No. 90 of 1981

Anshiram

APPELLANT

Vs

Tax Recovery Commissioner and Others

RESPONDENT

Date of Decision : 18-02-1982

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 66, Order 21 Rule 90, Order 21 Rule 92
Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Rule 61
Income Tax Rules, 1962 — Rule 56, 60, 62, 63

Citation : (1982) ILR (MP) 1047 : (1983) 142 ITR 6 : (1982) 27 MPLJ 711

Hon'ble Judges : G.P. Singh, C.J.;K.K. Dube, J

Bench : Division Bench

Advocate : K.M. Agarwal, for the Appellant; B.K. Rawat, for respondent Nos. 1, 2 and 4 and B.L. Nema and A.S. Jha, for the Respondent

Judgement

G.P. Singh, C.J.

By this petition under Article 226 of the Constitution, the petitioner seeks quashing of the auction sale of his house held on 14th February, 1972, for recovery of arrears of Income Tax.

The facts briefly stated are that recovery proceedings under Schedule II of the I.T. Act, 1961, were started against the petitioner on a recovery certificate issued by the ITO (Collection) to the TRO. This certificate related to the Income Tax dues of the assessment years 1964-65, 1965-66, 1967-68 and 1968-69. The amount to be recovered under this certificate was Rs. 15,654, The dues for the year 1964-65 were Rs. 13,206 and the remaining amount was for the other years. The petitioner's house was attached some time in November, 1971. Proclamation was issued on 16th December, 1971, for sale to be held on 19th January, 1972. On this date the TRO adjourned the sale to 14th February, 1972, on the ground that the highest bid offered was inadequate to cover the amount of arrears. A proclamation for sale was again issued on 11th February, 1972,

Respondent No. 3 was the highest bidder on that date and his bid was accepted. The petitioner had in the meantime filed an appeal to the Tribunal in the assessment proceedings for the year 1964-65. On 1st March, 1972, the Tribunal passed an interim stay order in the following terms:

On a perusal of the application and accompanying affidavit, we are satisfied that interim stay should be granted in respect of the disputed amount of tax. We direct accordingly."

The interim stay was confirmed on 5th April, 1972. The TRO, however, confirmed the sale on 15th March, 1972. The Tribunal substantially allowed the appeal of the petitioner 30th June, 1972. We have earlier stated that the amount of dues for the year 1964-65 was Rs. 13,206. As a result of the Tribunal allowing the petitioner's appeal, this amount was considerably reduced. The petitioner then filed a petition under Article 226 for challenging the sale. The petition (Misc. Petition No. 750 of 1972) was dismissed by the High Court on 11th July, 1979, on the ground that the petition stood abated in view of Section 58 of the Constitution (42nd Amendment) Act. The petitioner then filed an appeal against the order of confirmation of sale, which was dismissed by the TRC by his order dated 13th November, 1979, on the ground that it was barred by limitation. The petitioner then filed the present petition under Article 226.

Learned counsel for the petitioner has raised before us only two contentions. The first contention is that the TRO could not have confirmed the sale on 15th March, 1972, because of the stay order passed by the Tribunal and so the order of confirmation should be ignored and it should be held that as the petitioner's appeal was substantially allowed by the Tribunal before any valid confirmation of the sale, the sale became void. The second contention of the learned counsel is that no notice was given to the petitioner before the second proclamation for sale was issued on 11th February, 1972, for the notice in respect of this proclamation was served on the petitioner on 12th February, 1972, and that the absence of prior notice constitutes a breach of the mandatory provision of Rule 53 of Schedule II and so the sale is a nullity.

Before examining the validity of these contentions, reference has to be made to the rules contained in Schedule II, When the TRO receives a certificate from the ITO for recovery of arrears, he issues a notice under Rule 2 to the defaulter to pay the amount specified in the certificate within fifteen days from the date of service. The mode of recovery is provided in Rule 4. Attachment and sale of immovable property are dealt with in Rules 48 to 68A, Rule 53 deals with the contents of proclamation and corresponds to Order 21, Rule 66 of the CPC. Rule 56 provides that the sale shall be by public auction to the highest bidder and shall be subject to confirmation by the TRO. Then follow Rules 60, 61, 62 and 63 which correspond to Rules 89, 90, 91 and 92 of Order 21 of the CPC. Rules 61 and 63, which are material for our purposes, read as follows :

"61. Application to set aside sale of immovable property on ground of non-

service of notice or irregularity.--Where immovable property has been sold in execution of a certificate, the Income Tax Officer, the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale of the immovable property on the ground that notice was not served on the defaulter to pay the arrears as required by this Schedule or on the ground of a material irregularity in publishing or conducting the sale :

Provided that-

(a) no sale shall be set aside on any such ground unless the Tax Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the non-service or irregularity ; and

(b) an application made by a defaulter under this rule shall be disallowed unless the applicant deposits the amount recoverable from him in execution of the certificate."

"63. Confirmation of sale.-(1) Where no application is made for setting aside the sale under the foregoing rules or where such an application is made and disallowed by the Tax Recovery Officer, the Tax Recovery Officer shall (if the full amount of the purchase-money has been paid) make an order confirming the sale, and, thereupon, the sale shall become absolute.

(2) Where such application is made and allowed, and where in the case of an application made to set aside the sale on deposit of the amount and penalty and charges, the deposit is made within thirty days from the date of the sale the Tax Recovery Officer shall make an order setting aside the sale :

Provided that no order shall be made unless notice of the application has been given to the persons affected thereby."

It is true that the TRO confirmed the sale on 15th March, 1972, after there was an interim stay granted by the Tribunal in the assessment appeal for the assessment year 1964-65. But the stay was only a qualified stay in respect of the disputed amount of the tax. We have earlier pointed out that the recovery proceedings were started against the petitioner on a certificate which covered dues for four assessment years 1964-65, 1965-66, 1967-68 and 1968-69. The auction sale had taken place before the interim stay was granted by the Tribunal. The proceedings for recovery of the arrears in respect of the amount that was not disputed for the year 1964-65 and for the entire amount due for the other three assessment years had not been stayed. In such a situation, it is difficult to hold that in view of the interim stay the TRO was left with no jurisdiction to confirm the sale. Even assuming that the TRO had no jurisdiction to confirm the sale on 15th March, 1972, in view of the stay order, the result would only be that when the appeal of the petitioner was allowed by the Tribunal on 30th June, 1972, granting him substantial relief for the assessment year 1964-65, it could be said that the auction sale had remained unconfirmed. But even on this

assumption the petitioner does not get any benefit. We have already stated that the scheme of Rules 60 to 63 of Schedule II is the same as Rules 89 to 92 of Order 21. It has been held by the Supreme Court in Janak Raj Vs. Gurdial Singh and Another, , that if the decree in execution of which a sale is held is set aside in appeal before confirmation of the sale, it has no effect on the validity of the sale because under Order 21, Rule 92, which makes it incumbent on the executing court to confirm the sale, it is not open to the executing court to refuse to confirm the sale on the ground that the decree has been set aside. The same principle must apply here. Even though the petitioner substantially succeeded in the assessment appeal for the year 1964-65, that had no effect on the validity of the auction sale which had already taken place and which on the assumption referred to above remained only to be confirmed under the provisions of Rule 63. Learned counsel drew our attention to the language of Rule 56 which says that the sale shall be subject to the confirmation by the TRO. Learned counsel's argument is that this makes a distinction and the ruling of the Supreme Court will not apply. The aforesaid words used in Rule 56 only make it clear that in situations in which the TRO is precluded from confirming the sale under the scheme of the Rules, the sale would be avoided. These situations are covered by Rules 60, 61 and 62 and as the setting aside or variation of the assessment order in appeal is not covered by these Rules, the sale has to be confirmed even though the assessment order creating the liability which is executed by issuance of recovery certificate is set aside or modified in appeal. The principle of the Supreme Court ruling fully applies here. In our opinion, therefore, neither the interim stay order nor the final order passed by the Tribunal on 30th June, 1972, had any effect upon the validity of the sale.

As regards the second contention, a perusal of Rule 61 which we have earlier quoted goes to show that this provision is much wider than Rule 90 of Order 21. Even a ground which makes the sale wholly invalid has to be raised for avoiding the sale by making an application under Rule 61. The rule specifically says that if the defaulter wants to challenge the sale on the ground that notice was not served on him to pay the arrears, that ground has also to be taken in the application to be made under Rule 61. Under the scheme of Order 21, the ground that no notice was given under Rule 22 or Rule 66 not being merely material irregularity in publishing or conducting the sale will not fall under Rule 90. Having regard to the wider scope of Rule 61 of Schedule II, we are of opinion that even a ground that no notice was issued to the defaulter before drawing up the proclamation of sale under Rule 53 ought to be taken only by an application under Rule 61 and that such an objection cannot be otherwise taken. If no application is made under Rule 61 on this ground, the confirmation of sale will automatically follow under Rule 63. Apart from this, we do not think that the learned counsel for the petitioner is right in contending that a notice to him was necessary before the second proclamation was issued. Under the CPC, the view appears to be settled that when an auction sale is adjourned and a fresh proclamation is issued, no further notice need be ordered to the judgment-debtor

under Rule 66 of Order 21. It is also settled law that if a notice has already been issued under Rule 22 of Order 21, no notice need be given under Rule 66 (AIR 1948 177 (Nagpur)). The learned counsel for the petitioner submitted that there is no provision for the adjournment of sale in Schedule II like the one in Order 21 Rule 69 and, therefore, if a sale is adjourned and a fresh proclamation is issued, the defaulter must be noticed again. We are not impressed by this argument. Rule 56 of Schedule II, which deals with sale by auction, does not provide that the TRO cannot adjourn the sale if the bid offered is not satisfactory. Power to adjourn the sale for good reasons is implicit in Rule 56. Therefore, the analogy of the CPC can be applied here also and it must be held that no fresh notice is necessary to the defaulter when the sale is adjourned and a fresh proclamation is issued. Further, the petitioner was present when the sale was held on 14th February, 1972. It is so stated in the return which is supported by the relevant record, which was produced before us at the time of hearing by the learned standing counsel. A perusal of the order-sheet of that date goes to show that the petitioner filed an objection at about 3 p.m. The petitioner did not complain about any defect in the proclamation of sale. All that he wanted was that he should be allowed instalments for payment of the arrears and that the sale should not be held. It would thus be seen that the petitioner did not raise any objection that the proclamation was defective or that it was invalid because no notice was issued to him before its preparation even though he was present at the time when the sale was held. In the circumstances, this objection can be taken to be waived. Learned counsel for the petitioner has referred to us the ruling of the Supreme Court in *Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others*, , which related to non-compliance with Section 35 of the Bengal Money Lenders Act. It was held in that case that non-compliance with the requirement of that provision was a material irregularity in publishing the sale and such a ground could only be taken under Order 21, Rule 90. That case does not help the petitioner here.

The petition fails and is dismissed. There shall, however, be no order as to costs. Security amount be refunded to the petitioner.