(2011) 08 AHC CK 0009

In the Allahabad High Court

Case No : C.M.W.P. No. 40863 of 1993

Bhagwat Dayal — APPELLANT

Vs

District Judge, Shahjahanpur and others — RESPONDENT

Date of Decision : 24-08-2011

Acts Referred:

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

Citation : (2012) 5 AWC 4523

Hon'ble Judges : Sibghat Ullah Khan, J

Bench : Single Bench

Advocate : Manoj Misra, P.K. Dubey and Pawan Kumar Pandey, for the Appellant; S.K. Mehrotra and C.S.C., for the Respondent

Final Decision : Dismissed

Judgement

Sibghat Ullah Khan, J.—Heard learned counsel for the parties and perused the written arguments filed subsequently. Respondent No. 3, Smt. Ram Beti is widow of Gur Din. Gur Din was real brother of petitioner and respondent No. 4. Smt. Gyan Devi. Respondent No. 3 after the death of her husband filed suit (O.S. No. 146 of 1982) for maintenance against her father-in-law, i.e., Gopi Nath, father of petitioner and respondent No. 4 as well as of Gur Din, husband of respondent No. 3. The suit was decreed for payment of Rs. 200 per month as maintenance. For execution of the decree Execution Case No. 5 of 1984 was instituted by respondent No. 3 Gopi Nath died during pendency of execution proceedings hence petitioner and respondent No. 4, being his son and daughter were impleaded therein.

2. Agricultural land in the form of grove comprised in plot No. 157, area 0.344 hectare was sold through auction in execution on 22.1.1991 for Rs. 20,000 and was purchased by respondent No. 3, decree-holder herself.

3. Petitioner filed application under Order XXI, Rule 90, C.P.C. against the said auction sale on 4.3.1991. Copy of the application is Annexure-II to the writ

petition. Along-with the said application, an application was filed on the same date praying that as applicant was not in a position to deposit the poundage fees, i.e., 12.5% of the auction amount in lump sum, hence he must be exempted from depositing the said amount. That application was supported by affidavit in para 6 of which it was stated that applicant was ready to deposit the security. Copies of the exemption application and affidavit are Annexures-III and IV to the writ petition. Objections were filed against the same by respondent No. 3. Executing Court/IInd Additional Munsif, Sahjahanpur rejected the petitioner''s application under Order XXI, Rule 90, C.P.C. through order dated 20.11.1992 copy of which is Annexure-VII to the writ petition. Against the said order, petitioner filed Misc. Civil Appeal No. 1 of 1993. In the said appeal, an interim order was passed directing the petitioner to deposit 12.5% of auction amount, which was deposited on 15.1.1993. Copy of the tender receipt is Annexure-VIII to the writ petition. Misc. Civil Appeal No. 1 of 1993 was dismissed on 31.8.1993, hence this writ petition.

4. The executing court in its order dated 20.11.1992 held that proceedings for execution were pending since long; earlier also twice Judgment-debtor had got the auction proceedings set aside and that it was apparent from the record that due to his influence in the village the Judgment debtor did not permit the auction to be held in the village and he threatened the prospective purchasers and for this reason order had been passed for holding the auction within the Court premises. Execution court also observed that the suit was for maintenance which had been decreed but till the date on which the said order was passed no compensation had been paid to the plaintiff decree holder, which must be causing great difficulty to her. Accordingly, the application for exemption from depositing poundage fees (4-ga) was rejected and thereafter the main application under Order XXI, Rule 90, C.P.C. (3-ga) (Annexure-II to the writ petition) was also rejected. The appellate court observed that the contention of appellant that in case application for exemption from deposit of poundage fees was not accepted, then he should have been provided opportunity to make the deposit was not tenable. It was also observed by the appellate court that appellant had not sought permission to file security in respect of the deposit, hence the only course left upon for the executing court was to reject the application (4-ga).

5. The main argument of learned counsel for the petitioner is that in the affidavit (Annexure-IV to the writ petition) petitioner had expressed his willingness to furnish security in the alternative, therefore, the exemption application should not have outrightly been rejected. It has also been argued that in any case 12.5% of auction amount, i.e., Rs. 2,500 had been deposited under interim order passed by the appellate court, hence that should have been taken to be valid deposit.

6. In my opinion, the trial court rightly held that under the facts and circumstances of the case, it was not at all appropriate to exempt the petitioner from depositing 12.5% poundage fees in cash. A negligible amount of Rs. 200

per month had been directed to be paid to the decree holder by her father-in-law but a single penny was not paid. Execution was pending since long. Twice auction had been set aside on the objections of the petitioner. In view of this, there was absolutely no occasion to grant exemption from deposit to the petitioner. As petitioner could not be exempted from depositing cash, hence there was no question of considering the application for furnishing the security. Even though the observation of the lower appellate court that appellant had not sought permission to file security is not very correct still it will not make much difference as appellant was found not to be entitled to furnish security in lieu of cash deposit.

7. On the date on which the arguments were heard in this writ petition and judgment was reserved, i.e., 26.5.2011, learned counsel for the petitioner had stated that a conditional stay order was granted to the petitioner in this writ petition but he could not comply with the condition, hence probably he was dispossessed (interim order was passed in this writ petition on 9.11.1993 staying the operation of the impugned orders subject to the condition that petitioner deposited Rs. 10,000.

8. Learned counsel for the respondent also argued that the auction sale was later on confirmed which order was never challenged by the petitioner. I fully agree with the courts below particularly the trial court that absolutely no ground for exemption from depositing the poundage fees had been made out by the petitioner, hence application under Order XXI, Rule 90, C.P.C. was rightly rejected on the ground that 12.5% poundage fees as required under Proviso (b) of Order XXI, Rule 90, C.P.C. as added by Allahabad High Court was not deposited. The proviso is quoted below:

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; and

(b) Unless the applicant deposits such amount not exceeding twelve and half per cent 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.

Accordingly, there is no merit in the writ petition, hence it is dismissed.

