
(1998) 02 AHC CK 0096
In the Allahabad High Court
Case No : C.M.W.P. No. 6899 of 1979

Bhola Nath Sita Ram

APPELLANT

Vs

IVth Additional District and Sessions Judge, Kanpur and
others

RESPONDENT

Date of Decision : 24-02-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 67, Order 21 Rule 90, Order 21 Rule 90(1), Order 21 Rule 90(2)

Citation : (1998) 2 AWC 1192

Hon'ble Judges : D.K. Seth, J

Bench : Single Bench

Advocate : Vishnu Sahai, for the Appellant;

Final Decision : Disposed Off

Judgement

D.K. Seth, J.—The Judgment debtor, opposite party No. 3 filed an application under Order XXI, Rule 90 of the CPC for setting aside the sale dated 10.11.64 of a house for a sum of Rs. 15,000 in execution of a decree obtained by the decree holder on 7.10.60 through Execution Case No. 216/63 for recovery of Rs. 3.874.45 paise on the ground that the valuation of the house was about Rs. 1 lac which was sold for Rs. 15,000 which is shockingly a low price. This application was allowed and the order dated 10.11.64 was set aside and a fresh proclamation as provided under Order XXI, Rule 67, C.P.C. was directed to be issued by order dated 27.11.75. The decree-holder preferred and appeal which is being numbered as Civil Appeal No. 24/76 which was converted into a revision by the learned IVth Addl. District Judge Court at Kanpur. By order dated 4.5.79 the learned IVth Addl. District Judge has dismissed the revision. It is these orders which have since been challenged by means of this writ petition by the judgment-debtor.

2. Notices were sought to be served on opposite party No. 3 but it could not be ultimately served thereunder. By an order dated 13.2.81 the petitioner was

directed to file an affidavit of service with regard to the service. The affidavit of service was filed on 16.5.97. It appears that the affidavit of service was affirmed on 4.9.79. From the acknowledgment card and envelop it appears that the same was sent under registered post with acknowledgment due.

3. By an order dated 16.5.97 the service was accepted as valid service. Thus this matter has been placed for hearing today. No one appears to oppose the petitioner.

4. Mr. B. Dayal, learned counsel for the petitioner contends that in view of the decision in the case of Chunni Lal v. Santoo Lal, AIR 1983 All 167, no application under Order XXI, Rule 90, should be entertained unless security as provided in clause (b) of Order XXI, Rule 90 sub-rule (2) of Allahabad amended C.P.C. is complied with. The said Rule requires furnishing of security as mentioned therein for the purpose of making an application under Order XXI, Rule 90. Relying on the said decision learned counsel submits that the order impugned had overlooked to the legal aspect and therefore cannot be sustained and is liable to be set aside.

5. Order XXI, Rule 90 stands amended so far as its application to U. P. is concerned. Proviso to sub-rule (1), provides that "no application to set-aside a sale under this Rule shall be entertained :

(a) upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up ; and

(b) unless the applicant deposits such amount not exceeding twelve and half per cent of the sum realised by the sale or furnishes such security as the Court may in its discretion fix except when the Court for reasons to be recorded dispenses with the requirements of this clause :

Provided further that no sale shall be set aside on the grounds of irregularity or fraud unless upon the facts proved the Court is satisfied, that the applicant has sustained substantial injury by reason of such irregularity or fraud."

6. Relying on clause (b) of Proviso to Rule 90, or Rule 1, and the decision in the case of Chunni Lal (supra). Sri B. Dayal contended that in the present case the judgment-debtor having not furnished security in terms of clause (b), the application was not maintainable. Therefore, both the learned Courts below wholly without jurisdiction entertained the application and allowed the same and thereby acted illegally and for this reason the impugned orders are liable to be set aside.

7. The learned Munsif in his order dated 27.11.75. has recorded that after several rounds ultimately the petitioner was directed to furnish security by an order dated 22.1.72. It appears that originally the petitioner was asked to deposit 50% in cash and the balance by security which order was subsequently modified by requiring him to deposit 12 1/2%, of the sale price. It further appears that on application of the judgment-debtor, the said order for deposit of

cash security was recalled. But admittedly the Judgment-debtor had furnished the security in terms of the order dated 22.1.72. On 3.2.72. the deposit of such security was accepted by an order dated 1.4.72. On an application moved by the decree-holder, the said order dated 1.2.72. was recalled. It may be mentioned that on an earlier occasion, there was a revision with regard to the same question which was disposed of by an order dated 16.3.71 remanding the case back with the direction to deposit cash or furnish security in lieu thereof. The learned Judge had further directed that the executing court may in its discretion dispense with the requirement of the Rule.

8. In such situation, the executing court by its order dated 22.1.72 had permitted the judgment-debtor to furnish the security which was complied with on 3.2.72 and accordingly accepted on 1.4.72. Thus it was a discretion of the learned executing court in terms of the order of learned Civil Judge passed in the revision. This order was recalled at the instance of the decree-holder. But ultimately the learned executing court proceeded and allowed the application even without deposit of any cash amount despite recalling the order dated 22.1.72 when admittedly the security already furnished and accepted was very much on the record. In such circumstances, it is implied that the executing court had either accepted the security or it dispensed with the requirement of the rule and had ultimately set aside same.

9. This order when was challenged by means of the appeal since been converted into a revision, by the order dated 4.5.79 the learned Additional District Judge had also recorded that it was contended by the decree-holder that even inadequacy of the sale price cannot be assailed in a petition under Order XXI. Rule 90, C.P.C. But in this case no cash security was demanded and the judgment-debtor filed security bonds which was accepted by the Court. This order was subsequently recalled at the instance of the decree-holder. Having noted such a situation, the learned Additional District Judge also affirmed the order of the learned Munsif and observed that the interest of justice demands that the sale should be set aside. This also impliedly affirms the fact that either furnishing of security by cash deposit was found complied with or the requirement has been dispensed with. Since both the Courts having found concurrently, it will not be proper to interfere with the said order.

10. So far as the decision in the case of Chunni Lal (*supra*), is concerned, it is necessary to examine that how far such a situation can be permitted, namely, whether without cash deposit an application under Order XXI. Rule 90 could be maintained or not.

11. In the case of Chunni Lal (*supra*), it has been held in paras 7, 8, 9 and 10 which is as follows :

"7. The question that remains to be seen is whether compliance of the proviso is a precondition for entertaining the objections raised by the judgment-debtor at all. Earlier there had been substantial divergence of opinion in this Court. In

Bawan Ram v. Kunj Behari Lal AIR 1962 All 42 a learned single Judge of this Court held that:

"the requirement of clause (b) of the proviso to Rule 90 must be complied with either at the time when the objection was filed or in any case before the period of expiry of limitation for making such application. If this is not done objection under Rule 90 must be rejected."

Same view was taken by a Division Bench of this Court in Dully v. Devi Charon. 1962 All 759 wherein it was held that:

"Although it was not imperative that making of deposit and furnishing of security should be done either before or simultaneously with the making of the application under Rule 90 yet this must be done before the period of limitation prescribed for making such an application expires."

It appears that the attention of the Bench was not invited to the two earlier Division Bench decisions of this very Court which are Dhoom Chand Jain Vs. Chaman Lal Gupta and Another, and Kundan Lal Vs. Jagan Nath Sharma, . In both these cases it was held that:

"the only bar created by clause (b) of the proviso was against the judicial consideration of the application if the same was not backed up by necessary deposit or security."

8. Subsequently in Haji Rahim Bux and Sons and Others Vs. Firm Samiullah and Sons, , another Division Bench of this Court took the same view and held that:

"After the application is made within time compliance by making deposit or furnishing security must be done only before the Judicial consideration of the application.

Same position was reiterated in the case of Mahavir Singh v. Court Shanker AIR 1964 All 389 and Smt. Joggiv. Rom Autar 1965 A LJ 1135. The controversy was finally set at rest by a Full Bench Decision of this Court in M/s. Lotto Mol Hordeo Doss v. M/s. Sukh Dayal Ram Bilas ILR (1967) AU 724 where all the aforesaid cases were considered and the Court observed as under :

"Upon the aforesaid consideration it is clear that when the proviso declares that the application shall not be entertained unless the applicant complies with clause (b), it refers to the point for Judicial consideration in order to act upon it and, in a proper case, to require the respondent to show cause against the application being allowed on the grounds contained in it. Before that stage is reached the applicant must comply with the order made by the Court under clause (b).

In my Judgment, upon an application being filed under Order XXI, Rule 90 the Court must call upon, the applicant to establish whether the requirements of clause (b) should be dispensed with and if not, what according to him should be the amount of deposit to be made of the security to be furnished. It should appoint a date upon which the applicant can produce evidence on the basis of

which he claims either that the requirements of the clause should be dispensed with or, according to him, what should be the amount to be deposited or the security to be furnished. That date need not fall within the period of limitation prescribed for an application under Order XXI, Rule 90. Before making the order under clause (b) the Court should afford an opportunity to the parties in the execution proceedings, who may be affected by such order to be heard in the matter. Where the Court decides not to dispense with the requirement of clause (b) it will make an order fixing the amount to be deposited by the applicant or the security to be furnished by him, and will specify a period within which deposit must be made by the applicant. Upon the making of that order the applicant is under a duty to comply with it, and if he does not, his application for setting aside the sale is liable to be dismissed."

9. In the case of Lakshmi Rattan Engineering Works Ltd. Vs. Asstt. Commr. Sales Tax, Kanpur and Another, . a question arose as to what is meant by the word "entertain". In that connection some of the aforesaid cases were considered and approved by that Court.

10. Finally this question directly arose in Hindusthan Commercial Bank Ltd. Vs. Punnu Sahu (Dead) through Legal representatives, . That Court fully approved its earlier decision and held that:

"Word "entertain" in sub-clause (b) of the proviso to Rule 90 means to "adjudicate upon" or "proceed to consider on merit" and does not mean the initiation of proceedings."

12. Thus I find that the said decision in the case of Chunni Lal (supra), has also referred to the decision of the Full Bench and to almost all the decisions reported on the question involved. There cannot be any dispute with regard to the proposition laid down in the decision. In view of the Allahabad amendment of Rule 90 (1) proviso (b), it is clear that 12-1/2% of the sum realised is to be deposited at the time of making such application. The alternative was is to furnish such security as the Court in its discretion may direct or may dispense with the requirement of this clause. Therefore, clause (b) is not an absolute proposition disentitling the Court from entertaining an application without cash deposit. The Court In its discretion may permit furnishing of security or even may dispense with the requirement of deposit of cash or security.

13. In the present case, the Court had originally directed to furnish cash deposit and thereafter to furnish security. After such security was furnished, the Court had accepted the same in its discretion. Thereafter the same was recalled at the Instance of the decree-holder. It is a discretion vested In the Court. The decree-holder cannot complain and get an order passed on exercise of such discretion to be recalled. Then again the said order of recall has been Ignored by both the Courts below. After ignoring the said same the Court had proceeded to decide the case when the security furnished was already on the record. Such a step can be deemed to be an exercise of discretion to dispense with the requirements of

the clause. Since in my view the recalling of the order after accepting the security furnished does not seem to be proper and both the learned Courts below had proceeded within its Jurisdiction without requiring furnishing of cash deposit either impliedly accepting the furnishing of security or impliedly dispensing with the requirements as the case may be, therefore it cannot be said that the Court had no jurisdiction to entertain the application in the facts and circumstances which is wholly distinguishable from the facts and circumstances of the case referred to in Chunni Lal's case.

14. After having perused both the orders of learned Court below, I do not find any reason to hold that the same are perverse or suffers from any immaterial irregularity. I am not inclined to interfere with the aforesaid order. The writ petition fails. The executing court may proceed in terms of the order of learned Munstf dated 27.11.1975. It is expected that the executing court will proceed with the execution expeditiously after giving proper and adequate notice to all the parties and opportunity in the proceedings In accordance with law preferably within a period of six months from the date of receipt of a certified copy of this order before it.