
(1968) 06 CAL CK 0006
In the Calcutta High Court
Case No : Civil Revision Case No. 2 of 1955

Birendra Nath Bose and Another	Vs	APPELLANT
Corpn. of Calcutta and Others		RESPONDENT

Date of Decision : 18-06-1968

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 92, 115, 151, 47

Citation : 73 CWN 6

Hon'ble Judges : Bijayesh Mukherji, J

Bench : Single Bench

Advocate : Pankaj Kumar Ghose, for the Appellant; Jitendra Kumar Nag for opposite party No. 1 and T.K. Ghosh and Bankim Chandra Roy (No. 2), for opposite party No. 2, for the Respondent

Judgement

Bijayesh Mukherji, J.—This is a rule u/s 115 of the Procedure Code obtained by Birendra Nath Bose and Badhisatta Bose, father and son, whose application dated November 27, 1963, under Order 21, rules 89 and 92, padded by other sections as well: sections 47 and 151, for setting aside a court-sale held on November 14, 1962, fails before the munsiff, and, on appeal, before the subordinate judge too. So it fails, on a single preliminary point: that the deposit required to be made, and made in fact, under Order 21, rule 89, has not been an unconditional one, and cannot, therefore, have the sale set aside.

2. The sale proclamation was served on October 3, 1962, in execution of what is called a charge decree by the Corporation of Calcutta against Ashraf Hussain, Md. Ashem for arrears of rates as respects the premises at 24 Karaya Road, Calcutta, with an area of 3 cottahs and 14 chhataks of land. In the sale, so proclaimed, and held on November 14, 1962, a property as that in the heart of the town of Calcutta, valued by the decree-holder Corporation at Rs. 10,000 in the execution petition and the sale proclamation, was knocked down to the only bidders, Arif Ismail Mulla and Mirja Hamid Hossain Beg, for Rs. 3,000.

3. The amount the sale proclamation specifies is Rs. 957.45 paise.

4. So, in order to have the sale set aside under Or. 21, r. 89, the petitioners were to deposit, in terms thereof,

(a) 5 per cent of Rs. 3,000, the purchase-money, that is to say, Rs. 150, as solatium to the two auction-purchasers, plus

(b) Rs. 957.45, the amount specified in the proclamation, minus

(c) any amount which, since October 3, 1962, the date of the proclamation, was received by the decree-holder Corporation.

5. For nothing, therefore, the petitioners made noise about a payment of Rs. 250 to the decree-holder in the manner following:

1. Rs. 200 by challan, dated November 20, 1958,

2. Rs. 25 by challan, dated November 30, 1959, and

3. Rs. 25 by challan, dated January 5, 1960.

All such payments were before October 3, 1962, the date of the proclamation, and, are, therefore, irrelevant for the purposes of Or. 21, r. 89.

6. Still, it is plain to be seen that the petitioners did deposit on November 27, 1963,

Rs. 150, 5 per cent of the purchase-money by one challan,

Rs. 250, by another challan, and Rs. 707.45 by still another challan.

So, what they were to deposit in terms of Order 21, rule 89, they did deposit, though not by a single challan. But that is neither here nor there. The statutory amount has been deposited, no matter by three challans, instead of one. So, the contention on behalf of an auction-purchaser opposite party: that the deposit in dribblets is a bad deposit, appears to be destitute of merit.

7. That is not the point. The point is: has such deposit been unconditional or conditional?

8. Reiterating the deposit of Rs. 250, prior to the date of the sale, and, therefore, useless for the purpose of Order 21, rule 89, the petitioners aver in paragraph 7 of their petition to the executing court that such credit to the decree leaves a balance of Rs. 707.45 paise, and continue:

But, for the purpose of this case, and for expediency, and to avoid all controversies, the petitioners beg leave of the court to deposit, and are depositing, Rs. 707.45 paise by one challan and Rs. 250 by another challan, both in favour of the decree-holder, thus making a total deposit of Rs. 957.45 paise, the total decretal amount as stated in the proclamation of sale.

Nothing like any condition is seen here. What is seen instead is absence of any condition. The total decretal money, as specified in the sale proclamation, is put

in, though by two challans, to the credit of the decree-holder, who has only to file an application for payment order, under the rules of the court, to get it. No withholding of such deposit or part of it (Rs. 250 by a separate challan) the petitioners pray the court for. On the contrary, they place the entire money at the disposal of the decree-holder, who gets it for the mere asking, in accordance with the rules, And the deposit of 5 per cent of the purchase-money in favour of the auction-purchasers is already there. It is also theirs, likewise, for the mere asking. Up till now, then, an unconditional deposit is clearly discernible. That is the clear intention too of the petitioners, who deposit so, for the purpose of Order 21, rule 89, for expediency, and to avoid all controversies, as they say.

9. Then comes paragraph 8 of their petition. It bears:

That if your honour be satisfied and be pleased to hold that the said Rs. 250/- is not again due to the decree-holder under the circumstances as staed above, then this Rs. 250/- may be ordered to be refunded, to the petitioners, for which a separate petition will be filed hereafter according to circumstances.

10. Does it make any difference ? Does it make the deposit a conditional one? Does it ask the court to withhold the amount deposited from the decree-holder ? Read fairly, as a whole, and in the context, all it means is this: If the court holds that Rs. 250 is not again due to the decree-holder, then this sum may be ordered to be refunded to the petitioners, and that too on a separate petition to be filed hereafter. In other words, let the decree-holder take what has been deposited. But if the petitioners succeed in their future petition, the decree-holder will have to refund this sum of Rs. 250. So, no condition attaches to the deposit and withdrawal thereof by the decree-holder. But only a claim is asserted, and. the claim succeeding in future, it is submitted that the decree-holder will have to refund the amount. It was wholly unnecessary to say so. But only because it has been so said, such plain, unconditional deposit does not lend itself to the interpretation that the deposit carries with it a condition which stands in the way of the decree-holder getting the money deposited, so soon as the deposit is made.

11. Thus, the terms in which the deposit is made in the case on hand - and the terms are the deciding factor -do not prevent the decree-holder from getting forthwith the money deposited, as the terms in (1) Sm. Nurjahan Khatun v. Sm. Asia Khatun, (1931) 35 CWN 1056, did. There, the terms were that the deposit by the judgment-debtor would remain in court until further orders. Naturally, the decree-holder, could not get the money forthwith. And the judgment-debtor, by the very terms attached to the deposit, prevent the decree-holder from doing so. That was a conditional deposit. Nothing like this can be predicated of the deposit here. The case of (2) Mt. Shakoti v. Maharaja Bahadur Sir Jatindra Mohan Tagore, (1896) 1 CWN 132, merits like treatment. A deposit u/s 174 of the Bengal Tenancy Act having been made by the judgment-debtor to have the sale set aside, it was prayed that the decree-holder might not be allowed to withdraw the amount deposited, until the disposal of an appeal preferred by her against an

order of the executing court rejecting her objection to the execution having been barred by limitation. In the circumstances, the decree-holder was disabled to draw out at once the money so deposited. Hence, a deposit as this went down as a conditional one. The deposit I see here cannot go down so. I have statad why.

12. The petitioners' attempt to get out of the difficulty - their own creation - in another way. It is said that, at and during the hearing of the petition before the munsiff, they withdrew all they had averred in paragraph 8: vide paragraph 11(b) and (c) of the revisional petition in this court. Such attempt seeks to bring this matter within the ratio of (3) *Dulhin Mothura Koer v. Bansidhar Singh*, (1911) 16 CWN 904: 15 CLJ 83: 10 IC 880 and (4) *Sham Sundar Singh v. Munshi Mushaheb Lal*, (1923) ILR 2 Pat 534, where the withdrawal of the condition at the time of the hearing, soon after it was objected to by the decree-holder, led Sir Asutosh Mookerjee in one case and P.R. Das, J. in another to hold that the deposit was too good, causing no prejudice to the decree-holder, who was at liberty to withdraw the money, and would, therefore, reverse the sale. The salutary nature of the principle so laid down is there to be seen. What remains obscure, and unworthy of credence too, is such allegation made for the first time in this court. The judgments of both the courts below, as also the memorandum of appeal in the lower appellate court, do not contain a word to the effect that the averment in paragraph 8 was withdrawn ever. By such allegation, the petitioners are only adding, so it seems to me, an untruth to needless prolixity they are addicted to. They cannot, therefore, escape that way. Their escape from their own verbiage lies in the plain meaning of the averment in paragraph 8 which, I am afriad, both the judges below have misinterpreted due to their total failure (as distinguished from a wrong decision) to appreciate and determine the true scope thereof, in the context of all facts, and, in so doing, have acted, in the exercise of their jurisdiction, with illegality.

13. The averments in paragraphs 13, 14 & 17 in this unnecessrily wordy petition remain. Fraud, nullity, etc., of the sale are adverted to. But all this is mere assertion of rights, without prejudice to which Order 21, rule 89, is being called in aid, with a view to having the sale set aside. Such is the clear averment in paragraph 17. That - deposit without prejudice to rights so asserted - cannot convert an unconditional deposit into a conditional one: (5) *T.L. Jagannatha Iyer Vs. B.H. Krishna Iyer and Another*, .

14. In vain have I been addressed on the questions of locus standi of the petitioners, or of the auction-purchasers, and limitation. The courts below have gone into only one question: that of maintainability rested on a conditional deposit. Since I see jurisdictional err or on their part and upset the judgments they have entered, as remit has to be there for re-hearing on all other aspects. It is not right, therefore, that I enter into such matters at this stage. I can only deplore that all masters in controversy were not heard and decided; were that done, the remand I am compelled to direct could have been avoided, eliminating troubles and expenses for all concerned.

15. In the result, the rule succeeds and be made absolute. The orders complained of be set aside. The case do go back to the executing court for re-hearing on all points, save the point of the deposit being conditional or unconditional - which is closed by this judgment.

16. This appears to be a fit case where neither party should get costs. I order so. The records be sent down not later than July 3, 1968, reporting to the Additional Registrar, A.S., that that has been done.