(1993) 12 CAL CK 0009

In the Calcutta High Court

Case No : Appeal of 1993, Company Application of 1993 and Company Petition No. 2 of 1965

D.C. Dhiman and Bros. (P) Ltd. (In Liqn.) APPELLANT

Vs

The Official Liquidator and Others RESPONDENT

Date of Decision : 20-12-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 88, Order 21 Rule 89, Order 21 Rule 90

Transfer of Property Act, 1882 — Section 44

Citation : (1994) 1 CALLT 378

Hon'ble Judges : Samaresh Banerjea, J;Prabir Kumar Majumdar, J

Bench : Division Bench

Advocate : Anindya Kumar Mitra, A.C. Kar and Subhrangshu Ganguly, for the Appellant;Pratap Chatterjee and Subrata Mukherjee and S. Sen Barat, for the Respondent

Final Decision : Allowed

Judgement

Samaresh Banerjea, J.—This application was taken out by Chiranjilal Dhiman and others in the appeal against the order of a learned Judge of this Court taking company matters passed on 18th March, 1993 regarding a sale held by the Court which has been confirmed in favour of the respondent No. 2 at a price of Rs. 7 lakhs in regard to the share of Gurudeb Dhiman and others the heirs of the judgment debtors Meher Chand and Keher Chand Dhiman.

2. The petitioners asked for an order before the trial Court inter alia, for setting aside the sale dated 26th February, 1993 in favour of the respondent No. 2 under order 21 Rule 89 of CPC and a direction upon the Official Liquidator to convey the half share of the premises Nos. 113 and 115 Benaras Road, Howrah in favour of the applicants and also for an order staying further proceedings in execution of the misfeasance decree until further order of the Court.

3. By an order dated 27th March, 1992 passed by a learned single Judge of this

Court, the share of Meher Chand Dhiman and Keher Chand Dhiman in the properties being premises Nos. 113 and 115 Benaras Road, Howrah was put up for sale, being undivided share of the said property being premises Nos. 113 and 115, Benaras Road, Howrah. It is stated by the applicants that they made an offer of Rs. 10 lakhs in respect of said undivided share in the said premises. The said offer was not, however, accepted by the Court and the matter was again directed to appeal for sale on 24th April. 1992. On 24th April, 1992 the matter again appeared and the applicants being represented by their Advocate were ready to make the offer, but the sale was not concluded on that date. As stated in the petition, in the meantime an application was taken out by Gurdeb Dhiman son of said Meher Chand Dhiman since deceased for stay of the sale of the shares of Meher Chand Dhiman and Keher Chand Dhiman being undivided share in the said premises Nos. 113 and 115 Benaras Road, Howrah hereinafter referred to as the said premises. On the said application the sale was stayed until hearing of the application. The matter was ultimately heard by another learned single Judge of this Court on 2nd June, 1992 and by a judgment and order dated 23rd November, 1992 the applications of Gurdev Dhiman as also of the applicant had been disposed of.

4. Thereafter, a fresh sale notice was issued by the Official Liquidator by which the Official Liquidator invited offers in sealed cover for sale of the right, title and interest of said Meher Chand Dhiman and Keher Chand Dhiman in respect of undivided share in the said premises. It is stated in the said sale notice that offers were to be accompanied by a bank draft or pay order of 10% of the amount offered in favour of the Official Liquidator. The said sale notice further stated that the said sale would take place on 26th February, 1993 at 2-00 p.m. before the Hon''ble Judge taking company matters. It is the further case of the applicants that they attended the court of the learned Judge taking company matters on 26th February, 1993 at about 2-40 p.m. with 10% of the bid money but on attending the court the applicants came to know that the sale of the property had already been concluded when the matter was called on at 2-00 p.m. It is also the case of the applicants that it transpired that in the daily cause list it was mentioned as "sale of assets at 2/3 p.m.".

5. It appears that the respondent No. 2 had been declared the highest bidder of the said undivided share at a price of Rs. 7 lakhs. It is now claimed by the petitioners that the said property being premises Nos. 113 and 115 Benaras Road, Howrah never belong to the company in liquidation namely, D.C. Dhiman & Bros. (P) Ltd. and the property in question was the personal property of D.C. Dhiman, since deceased, Meher Chand Dhiman, since deceased, Keher Chand Dhiman since deceased and Kissen Chand Dhiman each having 1/4 th share in the said property and it was not a sale of assets of the company in liquidation, but it was a sale in execution of misfeasance decree passed by the Court and restricted to the shares of said Meher Chand Dhiman and Keher Chand Dhiman who had an undivided 1/2 share jointly in the said properties.

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6. The petitioners made an application under Order 21 Rule 89 of the CPC for setting aside the sale contending inter alia that they being co-sharers of the property in question have interest in the property. Such application was opposed by the respondent No. 2 before the Court of first instance inter alia on the ground that the present writ petitioners had no locus standi to make such application as they were third parties so far as the shares of said Meher Chand Dhiman and Keher Chand Dhiman are concerned whose share in the property have been sold by auction. It as further contended by the respondent No. 2 that the present writ petitioners not being heirs and legal representatives of said Meher Chand and Keher Chand had no interest in the property and therefore are not entitled to apply under Order 21 Rule 89 and even assuming that the applicants are co-sharers of the property, and their right of pre-emption is to be exercised only at the time of partition.

7. The learned Judge of the Court of first instance have rejected such application of the petitioners made under Order 21 Rule 89 on the view that the petitioners even though may be co-sharers of the property cannot have interest in the undivided half share belonging to Meher Chand and Keher Chand which was sold in auction and therefore not entitled to apply under the said rule and the stage for deciding whether as co-sharers, the writ petitioners can exercise the right of pre-emption or not has not yet reached.

8. The only question therefore, which we are called upon to decide in this application and the appeal is whether under the provisions of Order 21 Rule 89 of the CPC a co-sharer is entitled to apply for setting aside the sale of undivided share of another co-sharer in the property, which was sold in execution of a decree.

9. Since the decision on such question will also govern the appeal, by consent of parties the appeal was treated as on days list and was taken up for hearing after dispension of all formalities including that of filing paperbook and releasing the appellant from the undertaking.

10. Before us Mr. A.C. Kar appearing for the appellants submitted that appellants are admittedly co-sharers in the said premises being premises Nos. 113 and 115 Benaras Road, Howrah as the legal representatives of the other co-sharers of the property and as such the appellants are entitled to claim a right of pre-emption and on that basis can make an application under Order 21 Rule 89 of the Code of Civil Procedure. It is contended on behalf of the appellants that by this sale in favour of the respondent No. 2, the interest of the appellants as co-sharers has been affected. In support of his contention, Mr. Kar has referred to a decision of this court reported in AIR 1950 Cal. 321 (Anand Prasad v. Harihar). It is the submission of Mr. Kar that the appellants'' interest being affected by such sale the appellants have locus standi to make this application under Order 21 Rule 89 of the Code of Civil Procedure.

11. Mr. Kar has also referred to Section 44 of the Transfer of Property Act, 1882

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to contend that if one of the co-owners of immovable property transferred his share or interest in the property, a transferee (here the respondent No. 2) cannot be put into joint possession. Mr. Kar submits that the said premises being 113 and 115 Benaras Road, Howrah is the dwelling house and the respondent No. 2 being a stranger transferee cannot claim any possession along with the co-owners, and any co-owner or co-sharer has the option of buying out such share at a valuation, to be made by the court. Therefore, it is the submission on behalf of the applicants that as co-sharer they have right to be in joint possession and to prevent a stranger to come in the dwelling house and the appellants therefore are entitled to make an application under Order 21 Rule 89 of the CPC having interest in the property and are entitled to reliefs under the said Rule 89 and Order 21 of the Code of Civil Procedure.

12. Mr. Kar has also submitted that this right of pre-emption is well recognised in Section 4 of the Partition Act.

13. Mr. Kar has also relied on a decision of Supreme Court in Sri Ram Pasricha Vs. Jagannath and Others, to contend that a co-sharer has a right in every part of the property along with other co-sharers. This position will change only when partition takes place. Therefore, according to Mr. Kar the appellants have every right to make such application under Order 21 Rule 89 the CPC and claim reliefs thereunder.

14. Mr. Pratap Chatterjee, the learned Counsel appearing for the respondent No. 2 has submitted that right of a pre-emption as claimed by the appellants can only arise in case of partition of the property. Mr. Chatterjee submits that u/s 44 of the Transfer of Property Act if the property in question is a dwelling house and if the transferee of a share in such a property is a stranger, then such stranger transferee cannot claim any joint possession until partition. If such transferee claims partition of the property then only other co-sharers can exercise their right of pre-emption as recognised by Section 4 of the Partition Act. Mr. Chatterjee submits that until the premises in question is the subject-matter of the partition suit, no one can claim a right of pre-emption. Therefore, according to Mr. Chatterjee, this is not the stage to claim any right of pre-emption where no partition suit has yet been instituted either by any of the co-sharers including the appellants of the respondent No. 2 being the stranger purchaser.

15. Mr. Chatterjee has next submitted that the appellants have no interest in the said undivided share being 1/2 share of the said premises as the appellants are not the heirs or legal representatives of said Meher Chand Dhiman and the said Keher Chand Dhiman whose undivided share in the said property was the subject-matter of the sale. It is only their heirs and legal representatives can claim an interest in the share of said Meher Chand Dhirnan and Keher Chand Dhiman or any mortgagee of the said undivided share belonging to said Meher Chand Dhiman and Keher Chand Dhiman. Mr. Chatterjee submits that under Order 21 Rule 89 of the CPC any person claiming an interest in the property sold at the time of the sale or at the time of making the application or acting for or in the

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interest of such person may apply to have the sale to set aside on his depositing in court for payment to the purchaser, a sum: equal to 5 % of the purchase money, and for payment to the decree holder an amount specified in the proclamation of the sale for the recovery of which the sale was ordered. Mr. Chatterjee contends that the appellants are not and cannot be persons claiming an interest in the said undivided share belonging to said Meher Chand Dhiman and Keher Chand Dhiman not being their heirs and legal representative nor having any interest otherwise in the undivided share of said Meher Chand Dhiman and Keher Chand Dhiman. It is the submission of Mr. Chatterjee that the appellants do not possess any right under the law to transfer the said undivided share of said Meher Chand Dhiman and Keher Chand Dhiman. Therefore, according to Mr. Chatterjee, the appellants can no way have any locus standi to make such application under Order 21 Rule 89 of the Code of Civil Procedure. Mr. Chatterjee has also submitted that the said undivided share in the said premises was sold under order of court in execution of misfeasance decree against the judgment debtor being said Meher Chand Dhiman and Keher Chand Dhiman. Admittedly, as submitted by Mr. Chatterjee, Mr. Kar''s clients are not the judgment debtors in the said misfeasance proceedings and the interest of said judgment debtors being said Meher Chand Dhiman and Keher Chand Dhiman could not in any manner devolve upon the other co-sharers or their heirs, some of whom are Mr. Kar''s clients. It is also the submission of Mr. Chatterjee that it is the judgment debtor who has the right to make an application under Rule 89 of Order 21 of the Code of Civil Procedure. Mr. Chatterjee submits that the appellants claiming to be co-sharers of the said premises can make an application under Order 21 Rule 88 of the Code of Civil Procedure, wherein it is provided that the property sold is a share of undivided immovable property and two or more persons of whom: one is a co-sharer respectively bid the same sum for such property or for any lot, the bid shall be deemed to be the bid of the co-sharers. It is submitted by Mr. Chatterjee that this Rule 88 does not, however, indicate any right of pre-emption when the sale is involuntary but this rule makes a statutory exception to it.

16. Mr. Chatterjee submits that the appellants as such co-sharer could have made a bid when the sale was being held by the Court on 26th February, 1993 or any other date but such stage was over as the appellants did not or could not make any bid in the sale held by the Court. Mr. Chatterjee submits that the rights as available under Order 21 Rule 88 of the CPC is available to the co-sharer and the right under Rule 89 of Order 21 of the CPC is the right available to the judgment debtor or any person deriving interest from the judgment debtor and one is not the alternative to the other.

17. Mr. Chatterjee has relied upon a Division Bench decision of our Court in the case of Kunjolal Pal and Another Vs. Idurali Sardar and Others, and has submitted that in view of the aforesaid Division Bench judgment, the judgment of Ruxburah, J. reported in AIR 1950 Cal 84 which is against the decision of the aforesaid Division Bench is not a good law. Mr. Chatterjee has also placed

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reliance in the case reported in ILR All 42and Sheo Ratan v. Dev Ward and Ors. reported in 1980 ALJ 365 as also on the Full Bench decision of this Court in the case of Asmutumissa Begum v. Ashruff Ali and Ors. reported in ILR Cal 488.

18. After careful consideration of the respective submissions of the parties we are of the view that a co-sharer of the property is entitled to apply under Order 21 Rule 89 for setting aside the sale of an undivided share of another co-sharer.

19. Under Order 21 Rule 89 of the CPC Any person claiming an interest in the property sold at the time of sale or at the time of making the application is entitled to apply for setting aside the sale. Interest can either be proprietory, monetary, possessory or otherwise.

20. It is well settled that each co-sharer has a right to be in joint possession of the undivided property with other co-sharers and each co-sharer is in possession of each part of the undivided property through another cosharer therefore has an interest in the whole corpus of the undivided property and such interest of the co-sharer in the entire corpus of the property is served only after partition of the undivided property when there is no more unity of possession.

21. Under the aforesaid circumstances if one of the co-sharers prefers to pay the debt of another co-sharer for continuing in joint possession of the dwelling house and applies for setting aside the sale under Order 21 Rule 89 of the Code of Civil Procedure, in our view he should be allowed to do so. In our view, there is no reason why a restricted meaning should be given to the expression "claiming any interest" in the property sold used under Order 21 Rule 89 of the CPC so as to exclude a cosharer from obtaining benefit under the said section and to ask him to wait to apply for pre-emption when the stranger purchaser would ultimately ask for partition of the property, when the intention of the legislature appears to be from the provisions of Order 21 Rule 89 of the CPC after the 1976 Amendment is to give a meaning to the said provision of the widest amplitude.

22. Prior to the 1976 Amendment of the Code of Civil Procedure, under Order 21 Rule 89 of the CPC "any person, either owning such property or holding any interest therein by virtue of a title acquired before such sale" was entitled to have the sale set aside. After 1976 Amendment under Order 21 Rule 89 "any person claiming an interest in the property sold at the time of sale or at the time of making the application or acting for interest such person" is entitled to set aside the sale. It appears the intention of the legislature is to permit any person claiming an interest in the property to apply under the said Rule. The same would be further evident from the fact that unlike Order 21 Rule 90, it is now not necessary for the applicant under Order 21 Rule 89 to show that his interest is likely to be affected by sale, although such requirement is a must under Order 21 Rule 90. The legislature consciously appears to have made such distinction between Order 21 Rule 89 and Order 21 Rule 90.

23. Under such circumstances, we do not find any reason to restrict the scope of Order 21 Rule 89 and to exclude a co-sharer who is interested to pay the debt of

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another co-sharer and wants to apply under said rule.

24. The fact that the legislature has given opportunity to the co-shares to participate in the auction itself under Order 21 Rule 88, in our view, does not impliedly or expressly exclude a co-sharer from applying under Order 21 Rule 89 when the undivided share of another co-sharer is sold in auction.

25. In our view, the Division Bench decision reported in Kunjolal Pal and Another Vs. Idurali Sardar and Others, is not the authority for the proposition that a co-sharer is not entitled to apply under Order 21 Rule 89 for setting aside the sale of undivided share of another co-sharer. The ratio of the said Division Bench decision is that it is not open to the third parties under Order 21 Rule 90 of the CPC to raise question of irregularity in the sale in execution of a decree and the only person who can raise such question is either the decree holder or a person whose interest is affected by the sale. In the said decision the Division Bench had no occasion to consider the scope of Order 21 Rule 89 and the question whether a co-sharer can apply under the said Rule. The observation of Page, J at page 83 of the aforesaid report to the effect that at the time of sale the defendants were not among the class of persons who were entitled to apply for setting aside the sale under Order 21 Rule 90 as at that time they had no interest in the property and therefore, they had no interest which could be affected by the sale, which has been very much emphasised by the learned Counsel appearing for the respondents, in our view as an obiter. There was no issue before the Division Bench at all as to whether a co-sharer is entitled to apply under Order 21 Rule 89. It is also worth noting, at the relevant point of time when such judgment was delivered, under Order 21 Rule 89 "any person either owning such property or holding an interest therein by virtue of a title acquired before such sale" was entitled to apply under the rule, which has now undergone a change after the 1976 Amendment enlarging the scope of the rule as pointed out hereinbefore.

26. In the decision reported in Annada Prosad Vs. Harihar Manna and Others, Roxburgh, J. had to consider the very question whether under Order 21 Rule 89 a cosharer can apply for setting aside the sale and held that it is permissible. The same is also the view by the Madras High Court in the case of Ram Chandra v. Srinivas reported in Ramachandra Upadya and Another Vs. Srinivasa Tantri and Another, . The decisions of the Allahabad High Court referred to by Mr. Chatterjee, the learned Counsel for the respondent, is: of no assistance in the instant case because in both the aforesaid cases, Allahabad High Court was interpreting the scope of Order 21 Rule 90 and not of Order 21 Rule 89. For the same reason the full Bench decision of this Court reported in ILR Cal 15 is of no assistance.

27. In the result, the application is allowed. The appeal is also treated as on days list and is allowed. The impugned order passed by the Trial Court dated 18th March, 1993 is set aside and the matter is sent back on remand to the Trial Court for consideration of the application made by the petitioners under Order 21 Rule 89 of the CPC on merits as it appears from the impugned order that the Trial

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Court rejected the application not on the merits but on the sole ground that the same cannot be maintained by co-sharers. It is however made clear the only point that we have decided in the instant appeal and application is that a co-sharer is entitled to apply under Order 21 Rule 89 of the CPC for setting aside the sale of undivided share of another co-sharer and all other questions including the question whether the petitioners are at all co-sharers, are kept open for consideration by the Trial Court. There will be no order as to costs. Filing of the paper book is dispensed with and the appellant is released from the undertaking.

The counsel for the Respondent prays for stay of operation of this judgment and order. Such prayer is refused.

Official Liquidator will not take steps for execution of the conveyance until further orders from the trial Court.

Official Liquidator and all parties are to act on a signed copy of the minutes of the operative part of this judgment and order on the usual undertaking.

P.K. Majumdar, J.

I agree.

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