
(2004) 07 AHC CK 0173
In the Allahabad High Court
Case No : C.M.W.P. No. 20915 of 1986

Ganga Saran (D) through L.Rs.

APPELLANT

Vs

IVth A.D.J. and Others

RESPONDENT

Date of Decision : 26-07-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 89(2), Order 21 Rule 90
General (Civil) Rules — Rule 364, 371

Citation : (2004) 4 AWC 3680

Hon'ble Judges : S.U. Khan, J

Bench : Single Bench

Advocate : A.K. Gupta, M.K. Gupta, Pankaj Agarwal and V.K. Gupta, for the Appellant; S.K. Saxena and Rama Goyal and Rama Kurel, S.C., for the Respondent

Final Decision : Allowed

Judgement

S.U. Khan, J.—Ganga Saran original petitioner (since deceased and survived by legal representatives) was tenant of a property on behalf of respondent No. 3 Smt. Anna Puma. Respondent No. 3 filed suit against the petitioner for ejectment from the tenanted premises and for recovery of arrears of rent etc. The suit was decreed. Decree for recovery of money was put in execution through Execution Case No. 88 of 1979. In the said execution proceedings property in dispute belonging to the petitioner was sold through Court auction on 27.1.1984. The property was purchased in Court auction by Naveen Kumar respondent No. 4, who was already the tenant of the said property on behalf of the petitioner.

2. Petitioner filed an application on 25.2.1984 i.e., within 30 days from the date of sale for setting aside the sale. Along with the application necessary amount as required under Order XXI Rule 89, C.P.C. including 5% of the sale price and decretal amount was deposited. The said application was registered as Misc. Case No. 25 of 1984. In the application it was mentioned that the decretal

amount mentioned in the proclamation of sale under Order XXI Rule 66, C.P.C. was not correct, as it did not adjust the total amount deposited during the pendency of the suit. It was also stated that the proclamation of sale was issued by the Court on 7.1.1984 and it was not properly advertised. From the order sheet it is clear that the application was registered as application under Order XXI Rule 89, C.P.C.

3. The amount deposited by the petitioner along with his application did not include poundage fee as required by Rules 364 and 371 of General Rule Civil a compendium of Rules framed by this High Court for the subordinate courts u/s 122, C.P.C. The poundage fee was deposited on 21.4.1984. Thereafter on 4.5.1984, petitioner filed an application for withdrawing/deleting paragraphs Nos. 1, 2 and 3 of his application. In the said paragraphs correctness of the contents of proclamation of sale was challenged and manner of publication of sale was also questioned.

4. Munsif, Anoop Shahar refused to set aside the sale and rejected the application of the petitioner which was numbered as Misc. Case No. 25 of 1984 through judgment and order dated 4.4.1985. Against the said order petitioner filed appeal being Misc. Civil Appeal No. 64 of 1985. The IVth Additional District Judge, Bulandshahr, through judgment and order dated 13.8.1986, dismissed the appeal, hence this writ petition.

5. Both the courts below have rejected the petitioner's application under Order XXI Rule 89, C.P.C. on following two grounds :

(1) Poundage fee was necessary to be deposited within 30 days from the sale under Order XXI Rule 89, C.P.C. and the same having not been done, requirement of the said Rule was not complied with.

(2) Allegations in the application regarding irregularity in publishing the sale fell under Order XXI Rule 90, C.P.C. and the said allegations having been withdrawn after 30 days from the sale, the application under Order XXI Rule 89, C.P.C. was time barred as it could be treated to have been filed on the- date on which the said allegations were withdrawn, by virtue of Order XXI Rule 89 (2), C.P.C.

First Point. -This question was once raised before the Supreme Court but Supreme Court refused to decide the same as it was not raised before the courts below (see Shiv Prasad Vs. Durga Prasad and Another,

6. Order XXI Rule 89, C.P.C. is quoted below :

"Application to set aside sale on deposit.-(1) Where immovable property has been sold in execution of a decree, [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 interest of such person,] may apply to have the sale set aside on his depositing in Court :

(a) For payment to the purchaser, a sum equal to five percent of the purchase-

money, and

(b) For payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under Rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale."

7. A combined reading of Rule 89 (1) (b) and (3) makes it quite clear that judgment debtor is required to deposit only the amount specified in the proclamation of sale and 5% of purchase money as provided for under Rule 89 (1) (a), C.P.C. and any amount which becomes due after the date of proclamation of sale either as cost or interest is not required to be deposited by the judgment debtor. In order to avail the benefit of Rule 89, even though he would continue to be liable to pay the same. Under the aforesaid rule judgment debtor is required to deposit the decretal amount including the costs due till the date of proclamation of sale and not due till the date on which the application for setting aside sale is made, even though he remains liable to pay the amount due after the date of proclamation of sale. Liability to pay the poundage fee accrues from the date of sale, as it is the amount, in the nature of commission for the purpose of conducting the sale.

8. Learned counsel for the respondent No. 4 has cited an authority of Andhra Pradesh High Court in Guttala Chandra Rao Vs. Dubburi Veera Venkata Satyavathi and Another, , in support of his contention that poundage fee is necessary to be paid by the judgment debtor. In the said authority it was not held that sale cannot be set aside if poundage fee was not deposited within 30 days. In the said authority while passing the order of setting aside the sale under Order XXI Rule 89, C.P.C. judgment debtor was directed to deposit the amount of poundage fee within a week. In another authority of the same Court in Sannidhanam Lakshmi Kantayya Vs. Ghatam Suryanarayana and Another, , it was specifically held that sale could not be refused to be set aside under Order XXI Rule 89, C.P.C. for non-depositing the poundage fee. Our High Court in a Division Bench authority in Abdul Wahid Vs. Tribhawan Das and Others, , has held that failure to deposit poundage fee in the form of stamps under old General Rules Civil is a mere irregularity which could not oust the jurisdiction of the Court to entertain an application under Order XXI Rule 89, C.P.C. The same view has been taken by the Division Bench of Calcutta High Court in Gopal Chandra Chanda Vs. Gobardhan Chandra Chanda and Others, . Similar view has been taken In AIR 1981 Mad 125 and Bharat Chandra Bera Vs. Rajendra Nath Ghose

and Another, . It is therefore, held that even though judgment debtor is liable to pay poundage fee, however deposit of the same within thirty days from date of sale is not necessary for setting aside the sale under Order XXI Rule 89, C.P.C.

9. The matter may be looked from another angle also. By way of amendment in C.P.C. through Act No. 104 of 1976, it has been provided under Order XXI Rule 92 (2), C.P.C. that in case amount deposited under Rule 89 is found to be deficient owing to the arithmetical mistake on the part of the judgment debtor then the said deficiency may be made good within such time as may be fixed by the Court.

10. Even if it is assumed that it was necessary for the judgment debtor to deposit poundage fee under Order XXI Rule 89, C.P.C. then the failure to deposit the same may be taken to have been caused due to misconception of judgment debtor and his counsel regarding necessity to deposit the same.

11. Accordingly the finding of the Courts below that sale could not be set aside as poundage fee was deposited after 30 days from the sale is erroneous in law and is hereby set aside.

Second Point.-By virtue of Order XXI Rule 89 (2), C.P.C. if an application for setting aside the sale on the ground of irregularity under Order XXI Rule 90, C.P.C. is made first and thereafter application under Order XXI Rule 89, C.P.C. is made then the latter will be treated to have been filed on the date on which earlier objection under Order XXI Rule 90 is withdrawn. If withdrawal application is filed after 30 days from the date of sale then application under Order XXI Rule 89, C.P.C. would be treated to be barred by time. On the other hand, if application under Order XXI Rule 89, C.P.C. along with deposit is filed first and within 30 days from the date of sale and thereafter application under Order XXI Rule 90, C.P.C. is filed then applicant will not be entitled to prosecute the application under Order XXI Rule 89, C.P.C. unless he withdraws his subsequent application under Order XXI Rule 90, C.P.C. However, in this contingency no question of limitation will arise as application under Order XXI Rule 89, C.P.C. has been filed within time. Even if hearing of application under Order XXI Rule 89, C.P.C. in such case remains suspended for years due to non-withdrawal of subsequent application under Order XXI Rule 90, C.P.C. question of limitation will not arise. In the instant case, the situation is quite peculiar. Application under Order XXI Rule 90, C.P.C. is neither prior nor subsequent to the application under Order XXI Rule 89, C.P.C. In the same application, allegations under Rule 90 have been made as well as prayer for setting aside sale on full deposit under Rule 89 has been made. (The argument of the learned counsel for the petitioner that the allegations regarding the irregularity in publishing the sale were quite vague hence those allegations could not amount to objection under Order XXI Rule 90, C.P.C, is not tenable. In ray opinion, the said allegations clearly fell under Order XXI Rule 90, C.P.C. Vagueness or truth of the allegation is not at all relevant to determine as to whether any application under a particular provision has or has not been filed).

12. In my opinion, in such situation, Order XXI Rule 89 (2) is not attracted. There must be separate applications, one under Rule 89 and other under Rule 90. An application under Rule 89 cannot be said to have been properly made if on the date of making application, an application under Rule 90 on behalf of the same judgment debtor is pending and no application for its withdrawal has been filed. This principle will not apply to simultaneous applications under both the Rules or one application containing allegations and relief pertaining to both the rules. In such situation application under Order XXI Rule 89 is neither prior nor subsequent to application under Order XXI Rule 90, C.P.C. The provisions of sale and setting aside the sale under Order XXI, C.P.C. are already too technical to leave any scope for adding any other technicality by way of interpretation. On the other hand in case of excessive technicality the Court must endeavour to soften its rigour, whenever possible by way of interpretation unless the provision does not admit of any scope for such exercise. In this, regard reference may again be made to the authority of Supreme Court in Shiv Prasad Vs. Durga Prasad and Another, . The words used under Order XXI Rule 89 (2), C.P.C. are "unless he withdraws his application". The Supreme Court interpreted the said words to mean that application for withdrawal is filed, even though order of Court permitting withdrawal may be passed much later.

13. In view of the above, with great respect, I am unable to subscribe to the contrary view taken by a Division Bench of Bombay High Court in Shankar Laxman Katkar Vs. Sharad Mahadeo Vable and Another, and relied upon by courts below. In my opinion, the Bombay High Court was not right in placing reliance upon the aforesaid authority of the Supreme Court of 1975 for holding that if allegations under both the rules, i.e., Rule 89 and Rule 90 of Order XXI, C.P.C. are contained in the same application then the date on which application for withdrawal of allegation under Rule 90 is made would be treated to be the date on which application under Rule 89 is filed for the purpose of limitation.

14. The matter may be looked from another angle also. If an amendment application seeking amendment in pleading is allowed then amendment relates back to the date of filing of the pleading unless ordered otherwise by Court while allowing the amendment. (Vide Siddalingamma and Another Vs. Mamtha Shenoy, and Sampath Kumar Vs. Ayyakannu and Another, .

15. In view of this the application of the petitioner for amending his original application and deleting paragraphs alleging irregularities in publishing the sale having been allowed by the trial court, the amendment will relate back to the date of institution of application,

16. Accordingly, I hold that both the above legal points have wrongly been decided by both the courts below. The impugned judgment and orders are therefore, liable to be set aside.

17. Accordingly, writ petition is allowed. Both the impugned judgments and orders as well as sale are set aside.

18. However, it is provided that for the period since the date of sale till the date of this judgment auction purchaser respondent No. 4 shall not be liable to pay any rent to the petitioner. With effect from today his tenancy in property in dispute revives on the same rate of rent, which he was paying to the petitioner on the date of sale. This has been done in view of the assertion made by learned counsel for the auction purchaser, during the argument of this writ petition that auction purchaser has made substantial construction in the property in dispute after purchase of the same. It is further directed that any addition or modification done by the auction purchaser in the property in dispute shall not be demolished or removed by him. The entire property as it exists today, shall be deemed to be owned by the petitioner and in tenancy occupation of the respondent No. 4 auction purchaser. It is further clarified that auction purchaser, now tenant, shall not be liable to be ejected on the ground of any addition alteration or damages to the building which he may have done since the date of sale till today u/s 20 (2) and (c) of U. P. Act No. 13 of 1972.