

(1948) 07 BOM CK 0011
In the Bombay High Court
Case No : First Appeal No. 29 of 1947

Goverdhandas Kanhayalal Bhate

APPELLANT

Vs

Ranchhoddas Bhikharilal Shet Bhate

RESPONDENT

Date of Decision : 07-07-1948

Acts Referred:

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

Citation : AIR 1949 Bom 271 : (1949) 51 BOMLR 230

Hon'ble Judges : Jahagirdar, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Jahagirdar, J.—This is an appeal filed by the judgment-debtor against the order dismissing Ins application to set aside the sale under Order XXI, Rule 89. The facts of the case are briefly these. The plaintiff obtained a mortgage decree and filed Darkhast No. 110 of 1944 to execute the decree. That decree was transferred to the Collector for execution. On May 11, 1946, the decree-holder purchased the property for Rs. 18,250. On June 3, 1946, the defendant-judgment-debtor applied to the Collector to set aside the sale under Order XXI, Rule 90, and on June 8, 1946, the judgment-debtor entered into an agreement with one Dhondiram for the sale of the property which had been sold in execution. One of the conditions was that Dhondiram was to deposit Its. 19,500 in Court. This amount was deposited by Dhondiram on June 8, 1946, on behalf of the judgment-debtor. Then the judgment-debtor made the present application for setting aside the sale under Order XXI, Rule 89.

2. The decree-holder contended that it is not competent to the judgment-debtor to file an application under Order XXI, Rule 89, as the amount is not deposited by him, and secondly, he contended that when an application under Order XXI, Rule 90, is pending, it was not competent to the judgment-debtor to make another application under Order XXI, Rule 89. Both these contentions found favour with the trial Court, with the result that the application to set aside the

sale stands dismissed. Against this order the defendant-judgment-debtor has come in appeal.

3. If the case had been *res integra* there would not have been any difficulty in arriving at the conclusion. Paragraph 2 of Order XXI, Rule 89, reads thus :

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.

4. In this case it is admitted that on June 8, 1946, an application for setting aside the sale under Order XXI, Rule 90, had been made and under the Civil Circulars that application to the Collector is treated as an application made to the Court within the meaning of Order XXI, Rule 90. go, an application under Order XXI; Rule 90, was pending when the present application for setting aside the sale under Rule 89 was made. Now, Sub-rule (2) of Rule 89 in terms directs that where an application under Rule 90 is made, no application under Rule 89 can be made or prosecuted unless the application under iv 90 is withdrawn. So, looking at the wording of Order XXI, Rule 89(2), I am inclined to hold that the learned Judge was right in dismissing the application. This construction of Sub-rule (2) is supported by the case of AIR 1937 161 (Nagpur) There the facts were very similar to the facts in the present case. There the judgment-debtor whose property was attached and sold in execution of a decree on April 8, 1933, applied for setting aside the sale under Order XXI, Rule 90, on April 21, 1933, and subsequently he sold the property privately to a third person, who applied on April 22, 1933, to set aside the sale under Order XXI, Rule 89. I might incidentally mention here that the person who deposited the money could file an application in his own name for setting aside the sale under Order XXI, Rule 89, under the local amendment to Rule 89. It was held that the application made by the purchaser from the judgment-debtor under Order XXI, Rule 89, was not competent as the application made by the judgment-debtor under Order XXI, Rule 90, was still pending. The material observations are at p. 162:

It was then argued that the lower Court should not have dismissed the application but should have put the applicant to election as was done in *Sarvi Begam v. Ramctiandra Sarup*. ILR (1925) All. 850 It was urged that the stricter rule applied in AIR 1928 136 (Nagpur) may be permissible in some cases but the application is wrong. An election under Rule 89 in that event would have to date from the date on which the application under Rule 90 is actually accepted. The prohibition is express.

He shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

Therefore, no application can be entertained until the other under Rule 90 has been withdrawn and it is for the applicant to do this and not for the Court. He cannot shift his responsibility to another.

5. There is another decision of the Sind Court in *Rughunath Jethabhai v. Hariram Dipchand* AIR [1940] Sind 181 which supports this view. It is a decision of a division bench consisting of Davis J.C. and Weston J. Here a composite application was made for setting aside the sale both under Order XXI, Rule 90, and under Order XXI, Rule 89. But the prayer for setting aside the sale under Order XXI, Rule 90, was mentioned first. The prayer to set aside the sale under Rule 90 was supported by detailed allegations of irregularity, and the application further contained a prayer that it is only after the Court has refused to set aside the sale under Rule 90, it should consider the application under Rule 89. The application under Rule 90 was therefore considered to be made first and that was not withdrawn till February 23 when the learned advocate for the judgment-debtor abandoned his first prayer for relief under Rule 90. Then it was argued that the application for setting aside the sale under Rule 89 was already there and the Court should proceed with it. This contention was negatived and the Court held that "Rule 89 prohibits the making or prosecution of an application under Rule 89 unless a previous application under Rule 90 has been withdrawn, and as it prohibits the making, so it excludes an application already made." Therefore the application under Order XXI, Rule 89, was not at all taken into consideration. This decision shows that the application made under Rule 89 when the application under Rule 90 was pending was not regarded as a valid application which could be taken into consideration. These two cases therefore support the construction which I am putting on Rule 89(2).

6. Mr. Desai has invited my attention to certain observations of the Calcutta High Court and the Madras High Court which support the contentions of the appellant. The facts in *Gour Chand Mallik v. Pradyumna Kumar Mallik* [1943] 2 Cal. 485 were that on March 8, 1943, the petitioner made an application for setting aside the sale under Order XXI, Rule 90, in the first paragraph of that application. Then in the 3rd and 4th paragraphs he prayed that the sale should be set aside as he has deposited the amount as required by Order XXI, Rule 89. It was contended by the decree-holder that such an application was not competent. The learned Judge had framed three questions which will be found at p. 495 :

(1) Was prayer (a) of the summons wholly based on Rule 90 or was it based partly on Rule 90 and partly on Section 47 of the CPC ? In so far as it was not based on Rule 90 did it attract the operation of Rule 89(2)

(2) Even if Order XXI, Rule 89, applied to prayers (c) and (d) (i.e. paragraphs 3 and 4) must those prayers be withdrawn or dismissed in limine because the petitioner insists on going on with his application under Rule 90 ? and

(3) Can prayers (c) and (d) be treated, if necessary as application under Order XXXIV, Rule 5, if there is any difficulty in applying Order XXI, Rule 89?

7. The reply to these questions was given by the Court at p. 501 :

To summarise, I hold :

(1) that the application in so far as it seeks to set aside the sale on grounds not covered by Order XXI, Rule 90, may be combined with the application, in so far as it seeks to set aside the sale on payment of the requisite amounts;

(2) that if prayers (c) and (d) be treated as one under Order XXI, Rule 89, it need not be dismissed in limine, if the applicant does not withdraw his application under Order XXI, Rule 90, and that it will be sufficient to stay that part of the application until after the disposal of the other part of the application;

(3) that this application, in so far as it seeks to set aside the sale on payment of the requisite amounts, may be treated as one substantially under Order XXXIV, Rule 5, also if Order XXI, Rule 89, fails and need not be dismissed in limine.

8. After pronouncing this opinion, the learned Judge proceeded with the disposal of the case on merits and he set aside the sale under Order XXI, Rule 90, on account of the irregularities which were held to have been proved in the conduct of the sale. From this it would be clear that the question of proceeding with the application under Order XXI, Rule 89, was not present before the Court at all.

9. Mr. Desai relies upon these observations at p. 498 :

I am inclined to the view, for reasons stated above, that the requirements of Sub-rule (2) of Rule 89 are sufficiently complied with and satisfied if the application under Rule 89 is not allowed to be "made" or "prosecuted," i.e., actually moved or proceeded with and be stayed until the disposal of the application under Rule 90 and it is not obligatory on the Court to dismiss it in limine.

10. With great respect to the learned Judge, I do not agree with this view. The second question framed was this : Should the application under Order XXI, Rule 89, be withdrawn or dismissed in limine because the petitioner insisted on going on with his application under Rule 90? That is not, however, Rule 89(2). Rule 89(2) only directs that when an application under Rule 90 is pending, an application under Rule 89 cannot be made or proceeded with, and therefore the observations that have been made in the course of the judgment may be regarded as obiter, and there is another reason for holding that these observations are obiter because the Court came to the conclusion that the prayers for setting aside the sale in paragraphs (c) and (d) need not be necessarily treated as an application under Order XXI, Rule 89, but they may be treated as an application under Order XXXIV, Rule 5, of the Civil Procedure Code. It is therefore clear that this question did not fall to be considered by that Court. The only question that was decided was that it is not necessary to dismiss the application under Rule 89 before the hearing of the application under Rule 90 is proceeded with. This case therefore is not a direct authority on this point.

11. I might even add that the learned Judge does not seem to have considered an earlier ruling of a division bench of the same Court reported in *Rajendra Nath Halder v. Nilaratan Mitra*. ILR (1896) Cal. 958. Though it is not a direct authority, there are some helpful observations. In that case, an application u/s

310, Civil Procedure Code, was made to set aside the sale. The very next day another application u/s 311 was made for the same purpose. Before the application u/s 311 was disposed of, the judgment-debtor requested the Court to proceed with the application u/s 310A corresponding to Order XXI, Rule 89. His contention was that under the proviso to Section 310A, he was prevented from making an application and not from proceeding with the application which he had already made. This contention was not accepted. It was held that a person makes an application not only when he presents it, but also when he carries it on or "continues to make it." As a result of this case the words "or prosecute" were added in Order XXI, Rule 89(2), in the new Civil Procedure Code, 1908. It may be noticed that not only the word "make" is retained, but the word "prosecuted" is added. The intention of the Legislature appears, therefore, to be very clear. It prevented not only the making of the application but also prosecuting the same, when an application under Order XXI, Rule 90, is pending. This case, therefore, may be regarded as an authority for holding that no application under Rule 89 can be presented when a similar application under Rule 90 is pending.

12. Then the next case which is relied upon by Mr. Desai is Krishna Ayyar v. Arunachalam Chettiar. ILR (1935) 58 Mad. 972 It is a judgment of the full bench. But the facts appear to be entirely different and the point under Order XXI, Rule 89(2), was not considered. There the judgment-debtor applied to have the sale set aside under Order XXI, Rule 90. A few days later, the assignee of the judgment-debtor applied for setting aside the sale under Order XXI, Rule 89, by depositing the amount as provided by that rule. Later both the applications were allowed on the same day. The assignee of the judgment-debtor thereupon filed a suit to recover the amount deposited by him under Rule 89. It was held that the amount must be taken to have been deposited for payment to the decree-holder voluntarily and unconditionally and, therefore, no suit would lie for its recovery.

13. Here their Lordships assumed that an application under Rule 89 can be made and proceeded with even though an application under Rule 90 was pending, and then proceeded to consider the effect of setting aside the sale under Rule 89 on the rights of the decree-holder and the person depositing the amount. I do not find any discussion as to whether the application under Rule 89, which was admittedly filed by the assignee of the judgment-debtor a few days after the judgment-debtor had applied to set aside the sale under Rule 90, was validly made and whether that application was rightly allowed. This case therefore cannot help the appellant.

14. I, therefore, hold that the trial Court was justified in dismissing this application as not competent under Order XXI, Rule 89(2). In this view, it is not necessary for me to consider the other ground for dismissing the application. The other ground was that the application has not been made by the person depositing the money in Court. But in the view I have taken of Rule 89(2), it is not necessary for me to decide that point.

15. The result is that the appeal fails and is dismissed.

16. There will be no order as to costs of this appeal.