

(1986) 03 BOM CK 0037

In the Bombay High Court

Case No : Civil Revision Application No. 383 of 1982

Gulb Singh

APPELLANT

Vs

Chandrapal Singh and Others

RESPONDENT

Date of Decision : 10-03-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 65, Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 91, Order 21 Rule 93
Partition Act, 1893 — Section 2, 3

Citation : (1986) 03 BOM CK 0037

Hon'ble Judges : H.W. Dhabe, J

Bench : Single Bench

Advocate : A.S. Bobde and V.C. Daga, for the Appellant; S.C. Mehadia, V.R. Manohar and M.H. Rizwi, for the Respondent

Judgement

1. The applicant, who is one of the co-owners in the suit house, has challenged the order of the learned trial Court dated 30-4-1982 by which the learned trial Court rejected the objection raised by the application for confirmation of the sale of the suit house in favour of the non-applicant No.7 and has confirmed the said sale in his favour.

Briefly, the facts are that the non-applicants 1 and 2 in this revision filed a suit for partition against the applicant and the non-applicants 3 to 6. The said suit was numbered as Civil Suit No. 945 of 1968. The parties to the said suit filed an application on 4-7-1969 for passing a consent decree in terms of the compromise arrived at between them. As per the compromise terms, it was agreed that each of the co-owners had 1/6th share in the suit house. However, since it was found that the said suit house was not capable of being partitioned into specific shares, it was agreed that it should be sold and the sale proceeds should be divided between the parties according to their respective shares. The sale was to be effected and the sale deed was to be executed in favour of the buyer within a period of six months, failing which the trial Court was to appoint a receiver to sell the property and to divide the sale proceeds between the parties. A decree in

terms of the aforesaid compromise was passed by the trial Court on 4-7-1969 itself.

2. It appears that the sale of the suit house was not made by the parties within six months. Hence an application was filed by the non-applicant No.5 in the instant revision for appointment of a receiver for sale of the property in suit which is Exh-1, The said application was filed on 13-6-1974 in Miscellaneous Judicial Case No. 173 of 1974. On 25-201982, the learned trial Court passed an order upon the aforesaid application appointing Shri M. I. Shareef of Advocate as a Commissioner to sell the suit property by public auction and to divide the sale proceeds amongst the parties as per their shares. According to the said order he was directed to submit his report by 31-3-1982. By the said order he was directed to take help of the Architect Shri Nimgade for assessing the market price of the suit property. A writ of commission was issued to the Commissioner on 6-3-1982 and the same was received by him on 11-3-1982. The Architect submitted his report to the Commissioner on 20-3-1982 whereafter on 25-3-1982 an advertisement was given by the Commissioner in the issue of the said date of the daily "Nagpur Times" inviting written offers from the intending purchasers by 31-3-1982. The description of the suit house given in the said advertisement was as follows:--

"A double storeyed house bearing Corporation No. 123/0+1 in Sadar Extension Area, Nagpur, adjacent to Advocate Deopujari's house."

3. The Commissioner submitted to the trial Court his report on 31-3-1982 containing the offers received by him and the trial Court on the same date accepted the offer of Rs. 1,27,000/- made by the non-applicant No.7 in the instant revision, which was the highest offer from amongst the offers received by the Commissioner. It may be stated at this stage that the Architect Shir Nimgade had estimated the market price of the suit house at Rs. 1, 16,000/- and the offer made by the non-applicant No. 7 was more than the said amount. By the same order dated 31-3-82 the learned trial Court directed the auction purchaser i.e. the non-applicant No.7 to deposit 25 per cent of the price within 10 days and the balance within 15 days from the date of his order. The case was posted for confirmation of the sale on 30-4-1982. It is not in dispute that the auction purchaser deposited 25% of the amount on 3-4-1982 and amount on 13-4-1982.

4.praying for rejection of the same and for proper execution of the writ of commission issued to him. The non-application No. 5 had also filed his objection to the report of the Commissioner but he withdrew the same. The applicant and the non-applicant No.4 also filed an application u/s 3 of the Partition Act, that they had the right to purchase the suit house at the highest offer of Rs.1,27,000/ as per the report of the Commissioner and they be allowed to deposit the amount to the extent of the shares of the remaining co-owners. This application dated 28-4-1982 filed by the applicant and the non-applicant No.4 for purchase of the suit house and the objections filed by the applicant were decided by the learned trial Court by his order dated 30-4-1982.

5. The learned trial Court by his order dated 30-4-1982 held that the application of the applicant and the non-applicant No.4 dated 28-4-1982 was not bona fide because they had not deposited any amount at all and further that their offer could not be accepted at the stage of confirmation of the sale because they had not given any offer to the Commissioner. As regards the objections filed by the applicant, the learned trial Court held that the sale effected by inviting the offers by the advertisement in spirit and in fact conformed to the sale by public auction. He further found that the suit house had fetched a good price of Rs. 1,27,000/- when its market price at that time estimated by the Architect was Rs. 1,16,000/- only. In this view of the matter, the learned trial Court by his order dated 30-4-1982 confirmed the sale of the suit house. Being aggrieved, the applicant has preferred the instant revision in this Court.

6. The learned counsel for the applicant has urged before me that the sale in question effected by inviting offers through the advertisement in press was not a sale by public auction as ordered by the learned trial Court and as also contemplated by the provisions of Order 21 Rule 65 of the CPC (for short the "Code"). He had further urged that the advertisement issued by the Commissioner lacked material particulars which had adversely affected the number of bidders and also the price which would have been fetched by the suit house was not given in the local language, no ward number was given, neither any building area nor the constructed area was given. He also urged that neither the rights in which the suit land was held nor the condition of the house was given in the advertisement. It is, therefore, the submission that the sale of the suit house was materially affected because of the lack of the material particulars in the advertisement.

7. Another contention raised by the learned counsel for the appellant is that the partition has to be effected in accordance with the provisions of the Partition Act. To understand his contention it would be useful to notice briefly the scheme of the said Act. Section 2 of the said Act enables the Court to sell the Immovable property and distribute its proceeds against the co-owners if it is incapable of division, but the said power can be exercised by the Court only at the instance of any of the co-owners. When such a power can be exercised by the Court u/s 2 of the Partition Act, it is open to the other co-owners to apply for leave to buy the property in suit at a valuation determined by the Court in which case they can pay the amount to the extent of the shares of the remaining co-owners. Section 6(1) of the Act provides that every sale u/s 2 shall be subject to a reserved bidding, and the amount of such bidding shall be fixed by the Court in such a manner as it may think fit. It is provided in sub-section (2) of Section 6 of the Act that on any such sale any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase money or any part thereof instead of paying the same as the Court may seem reasonable. Section 7 of the Act provides that as far as practicable, the property to be sold under a decree or order of any other court, shall be governed by the procedure prescribed in the Code in respect of

the sales in execution of decrees under the Code.

8. IT is in view of the above provisions of the Partition Act that is urged on behalf of the applicant by his learned counsel that in any case in which the sale is ordered u/s 2, the said sale being subject to reserved bidding as per section 6(1), it is mandatory to determine the reserved price for such bidding. According to him, failure to determine the reserved price has vitiated the sale in the instant case. It is further pointed out by reference to Section 6(2) of the Partition Act that the co-owners were deprived of their right to bid at the sale because no public auction as ordered by the Court was held by the Commissioner in this case. In support of the application u/s 3 of the Partition Act, it is urged that the learned trial Court committed a grave error of law in rejecting the application of the applicant and the non-applicant no.4 for allowing them to purchase the suit house at the valuation given by the non-applicant No.7. It is the submission that there is no time limit fixed for making an offer of sale was directed u/s 2 and before it was confirmed by the Court.

9. The learned counsel appearing for the non-applicant No. 7 has contested the aforesaid contentions urged on behalf of the applicant. It is urged by him that the sale directed by the order of the Court dated 25-2-1982 was not a sale u/s 2 of the Partition Act and therefore, the provisions of the said Act, and at any rate the provisions of Section 3 of the said Act, were not applicable to the instant sale. It is further urged by him that the advertisement dated 25-3-1982 is in substantial compliance with the requirements of Rule 66 or Order 21 of the Code, or at any rate it is in substantial compliance with the requirements of the public action, as contemplated therein. IT is further urged by him that since the instant sale was governed by the provisions of Order 21 Rule 90 of the Code, it was necessary for the applicant to show not only that there was material irregularity or fraud, committed in publishing or in conducting the sale, but it was also necessary for him to show that by reason of the said sale, a substantial injury was caused to him. It is also urged by him that the applicant failed to prove that there was any substantial injury caused to him even assuming that there was material irregularity in the procedure followed in the sale of the suit house. A plea of estoppel and waiver is also raised by him on behalf of the non applicant No.7.

10. In considering the rival contentions the first question which arises for consideration is wheather the instant sale is a "sale" within the meaning of Section 2 of the Partition Act. The submission of behalf of the non-applicant No.7 is that since as per the compromise decree the parties themselves agreed to sell the suit house on the ground that it was incapable of being divided, the learned trial Court has not independently applied his mind as required by Section 2 of the Partition Act to the question whether the suit house was incapable of being divided before directing its sale by its order dated 25-2-82. In my view, there is no merit in the above contention. While examining the compromise terms arrived at between the parties, the learned Trail Court has applied his mind to the

compromise terms including the question whether the suit house was incapable of division before passing the consent decree. It cannot, therefore, be said that there is non-application of mind by him as contemplated by Section 2 of the Partition Act. The said sale therefore is a sale as contemplated by Section 2 of the said Act. It is clear from the terms of compromise decree that in case the parties did not dispose of the house within six months the trial Court was empowered to appoint a receiver for disposing of the same. The learned trial Court, therefore, at that stage when an application (Ex. 1) was made to him for the sale of the house, applied his mind to the requirement of Section 2 of the Partition Act and by the order dated 25-2-1982 passed on Ex. 1 directed its sale by public auction.

11. There is, however, merit in the contention on behalf of the non-applicant No.7 that at any rate the provisions of section 3 of the Partition Act would not be applicable in the facts of instant case and it was not therefore, open to the applicant and the non applicant No.4 to make an application for purchase of the suit property at the price offered by the non-applicant No.7. It is clear from the terms of the consent decree that all the parties agreed that the house should be sold because it was incapable of being divided and no liberty was reserved in the said compromise terms for any party to buy the suit house. Even assuming that the terms of the compromise decree could be varied, there is no application by all the parties to the compromise decree that the applicant and the non-applicant No.4 should be allowed to purchase the suit house. In my view, the learned trial Court was bound by the consent decree and could not go behind it. As such it was not open to the applicant and the non applicant No.4 to give an offer that they were ready to purchase the suit house at the price offered by the non-applicant No.7. The above application of the applicant and the non-applicant No.4 dated 28-4-1982 was therefore, rightly rejected by the learned trial Court.

12. The next and more important question to be considered is whether the sale in question in the instant case is a "sale" within the meaning of Order 21 Rule 90 of the Code. Numerous cases have been cited before me upon the question what the material irregularity in publishing or conducting the sale within the meaning of Order 21 Rule 90 of the Code is as well as upon the question that there should be a nexus between the material irregularity and fraud in publishing or in conducting of the sale and the substantial injury caused due to it. The learned counsel of the non applicant No. 7 has relied upon a decision of the Supreme Court in the case of Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, in support of his contention that the advertisement dated 25-3-1982 was merely at the most a material irregularity even assuming that Rule 66 or Order 21 of the Code was mandatory and since there was no evidence to show that there was any substantial injury caused to the applicant particularly when the price offered was much more than the estimated market price the sale was not vitiated in the instant case. In urging that the sale by advertisement in the instant case was not a nullity, the principle laid down in the aforesaid decision is invoked on behalf of the non-applicant No.7.

13. It is laid down in the said decision of the Supreme Court cited supra that the safest rule to determine what an irregularity or a nullity is to see whether the party can waive the objection; if he cannot it is nullity. It is also pointed out in the above decision that a directory provision can always be waived but a mandatory provision can only be waived if it is not conceived in the public interest but in the interest of the party that waives it. It is held in the facts of the above case that the provision of Section 35 of the Bengal Money Lenders Act, 1940 even assuming that it was mandatory was a provision indented only for the benefit of the judgment debtor and therefore could be waived. It may be seen that Section 35 of the aforesaid Act is a provision relating to the contents of the proclamation and is analogous to Rule 66(2) of Order 21 of the Code. It was held by the Supreme Court that the aforesaid provision was for the benefit of the judgment debtor and could be waived by him. It was, therefore held that sale in that case was not vitiated.

14. The question raised in the instant case is however a more basic question and the said question is whether the sale by advertisement is at all a "sale" by public auction. Section 35 of the Bengal Money Lenders Act 1940 related merely to the procedure in holding the public auction. The submission, on behalf of a applicant therefore, is that if the provisions relating to the holding of sale by public auction are mandatory provisions and if the sale by advertisement is not a sale by a public auction, the sale in the instant case would be a nullity. In support of the above contention the learned counsel for the applicant has relied upon two decisions of the Madras High Court in Venkateswara Ettu Naicker Vs. Ayyammal and Others, and Srikakula Chinna Venkatanarayana and Others Vs. Pannapati Elias, and also a decision of the Mysore High Court in Doddamane Gurupadappa v. Hugulavalli Ranganna, AIR 1959 Mys 38. They are the cases of total absence of issuance of proclamation under Rule 66(2) of Order 21 of the Code. It was held in the said cases that the sales in those cases held even by public auction were a nullity. In my view, there is substance in the submission made on behalf of the applicant.

15. I have already referred to the provisions of the Partition Act in which by Section 5, the provisions of the Code are made applicable to a sale to be held under the said Act. The provisions relating to the sale of immovable property.....the decrees are contained from Rule 64 of Order 21 of the Code onwards. Order 21 Rule 64 of the Code empowers the Court to sell the property of the Judgment debtor and to pay out of the sale proceeds the money decree of the decree holder. Rule 65 of Order 21 of the Code which is more relevant to this case provides that "save as otherwise prescribed every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the Court may appoint in this behalf and shall be made by public auction in manner prescribed." It is thus clear from rule 65 of Order 21 of the Code that every sale in execution of a decree has to be made by a public auction. Even the trial Court itself therefore, has directed the sale in the instant case to be made by a public action.

16. It may further be seen that Rules 66,67,68,69 and 84 of Order 21 of the Code are relevant for the purpose of the mode or the procedure of public auction as provided therein. In particular Rule 66 provides that "where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court." Sub-rule (2) of rule 66 then provides for drawing up of a proclamation by the trial Court itself after issuing notice to the decree holder and the judgment debtor. IT would thus be seen that an obligation is cast upon the Court to issue a proclamation after drawing it itself. It is in the absence of such a proclamation in the Madras decisions cited supra, that the sales have been held to be a nullity.

17. However, the principal question to be considered in the instant case is as to whether the mode of sale by calling offers by advertisement can be said to be a form of a public auction. In support of the contention that the mode of calling for offers by advertisement is not a sale by public auction the provisions of Section 64 of the Sale of Goods Act 1930 are brought to my notice by the learned counsel for the applicant to show what an auction sale means or how it is understood. The main feature distinguishing the auction sale from other sales which ison the spot and is by public competition. Every body present at the time of the said sale is entitled to raise his own bid on the spot and that is how the highest bidder is determined. It is pointed out that in a case of sale by tenders or by calling for offers there is no opportunity to the intending buyer to raise his own bid. It is therefore urged that sale by inviting offers cannot be a sale by public auction. IT is also pointed out relying upon the provisions of section 6 of the Partition Act that in an open spot sale everybody would know the reserved bid or the upset price fixed therein and the bid would be above that.

18. I may usefully refer in this regard to the Halsbury's Laws of England Volume 2 Fourth Edition for what an "auction" means. Para 701 on page 360 is relevant. According to Halsbury's Laws of England, "the auction is a manner of selling or letting property by bids usually to the highest which those who bid can be tempted to offer by the skill and tact of the auctioneer under the excitement of open competition." It is thus clear that an auction is held by public competition wherein every bidder has right to raise his own bid. It is also clear that in public auction the atmosphere therein created by open bidding can tempt the bidder to raise his bid and thus enhanced price can be fetched by the said mode.

19. In a sale by tender, however, no such opportunity is available to the tenderer. Once he gives his offer that is final and cannot be raised, whereas in public auction each bidder knows the bid of the other person. In the mode of sale by calling for offers or tenders none of the persons of tenders know the price offered by the other. In regard to the tenders, it is observed in Halsbury's Laws of England, Volume 9, Fourth Edition para 230 on page 101 that "an advertisement that goods or services are to be bought or sold by tender is not, prima facie, an offer to sell to the person making the highest tender". It is therefore, clear that

by sale by tender or by calling for offers, the highest bid need not be accepted.

20. There is thus a substantial distinction..... between the sale by calling for offers through advertisement and the sale by public auction. By no stretch of imagination a sale by calling for offers through advertisement can be said to be a sale by public auction. By relying upon the decision of this Court in *Digambut Tatya v. Hari Damodar* AIR 1927 Bom 143, it is submitted on behalf of the non-applicant No.7 that there can be a limited court auction in which the class of bidders can be restricted. In my view the said analogy is not apt. Even in the case of limited auction the principal characteristic of an auction sale about raising a bid at the spot would remain present which is totally absent when there is sale by tender or by calling for offers.

The above decision is, therefore, of no assistance to the non applicant No.7.

21. Considered in this light, it has to be seen whether the sale in the instant case by calling for offers by advertisement is a sale within the meaning of Order 21 Rule 90 of the Code. It is well settled that the provision of Rule 65 of Order 21 of the Code has to be by public auction it would not be a sale to which the provisions of Order 21 Rule 90 of the Code would be null and void being in breach of Order 21 Rule 65 of the code as well as the order of the Court dated 25-2-1982 See *Ram Chandra Arya Vs. Man Singh and Another*, The power of the Court to consider legality or otherwise of such a sale is then u/s 47 and not under Order 21 Rule 90 of the Code.

22. If the requirement of Rule 65 of Order 21 of the Code is that every sale shall be by a public auction then the sale held in any other manner would be a nullity. In the instant case, even the Court by his order has directed to hold the sale by public auction by his order dated 25-2-1982. The Commissioner therefore had no power to hold the sale by calling for offers by a advertisement in the instant case. In fact the procedure provided under the relevant rules under Order 21 of the Code for public auction should have been followed by the Court and the Commissioner in the instant case. The sale held in the instant case is, therefore, a nullity. In this view of the matter the requirement of Rule 90 of Order 21 of the Code that there must be a substantial injury need not be looked into.

23. The next question which arises for consideration is whether the non-applicant No.7, who is a stranger and has given the highest offer and deposited the money as per the directions of the trial Court for the purchase of the suit houses on consideration of the principles of equity because his money was locked up in the deposit without there being any fault on his part. In urging the said ground on behalf of the non-applicant No.7 has relied upon the principles of restitution incorporated in Section 144 of the Code. According to him, the auction purchaser would have been entitled to possession of the house after the sale was confirmed if there was no stay of this Court. It is his submission that for no fault of the auction purchaser (non-applicant No. 7) who is altogether a stranger to the dispute between the parties in the instant suit, he suffered for all these long

years since he could not utilise the money deposited by him on 13-4-1982.

24. It is, however contended on behalf of the applicant that the principle relating to the repayment of the purchase money with or without interest is contained in Order 21 Rule 93 of the Code. The submission is that the said provision is exhaustive and except in cases covered by the said provision, no interest upon the deposit can be directed by the Court. The further submission is that unless the amount of purchase money is actually paid to the applicant and other co-owners, the interest cannot be awarded to the auction purchase because the Court can direct the payment of interest only against any person to whom the amount deposited has been paid. It is also the contention that even on equitable consideration, the auction purchaser is not entitled to any interest from the applicant. It is urged that the auction-purchaser himself should have taken care to seek order from the trial Court to invest his purchase money in some good securities so as to earn fair interest upon the same and by his failure to do so, he cannot penalise the successful parties by requiring them to pay the interest.

25. As regards the contention of behalf of the non-applicant No. 7 about the application of the principles of restitution u/s 144 of the Code, in my view, the said principle is not attracted in the facts of this case because no benefit is received by the applicant and the other co-owners since the purchase money was not paid to them. As regards the question whether Order 21 Rule 93 of the code is exhaustive is correct because it is applicable only in case where sale of immovable property is set aside under Order 21 of the Code which in other words would mean the said auction sale is set aside under the provisions of Rules 89,90 and 91 of Order 21 of the Code. It cannot, therefore, cover a case of a sale which does not fall under the said rules but still is a nullity and the executing Court exercises its power for setting it aside u/s 47 of the Code. In my view, in such a case, the Court would be able to exercise its inherent powers u/s 151 of the Code upon the consideration of equity.

26. Considering now the merits of the claim made on behalf on the non-applicant NO.7 it has to be seen whether in the first place there is equity in this favour and secondly whether it can be enforced against the applicant or any of the co-owners. The submission on behalf of the non-applicant No.7 to carve out the equity in his favour is that he was a stranger and had deposited the purchase money as per the directions of the Court. It is further the submission that the applicant was aware of the appointment of the Commissioner on 25-2-1982. It is also the submission that when the notice was issued in press on 25-3-1982, the applicant and the other co-owners were aware that the suit house was being sold by calling or offers. It is, therefore, urged that if, according to the applicant, any illegality was committed in disposing of the suit house in the above mode, he should have objected to the same before 31-3-1982, which was the last date for giving offers and on which date the offere of the non-applicant No. 7 was accepted. In not doing so, and in allowing the amount to be deposited by the non-applicant No.7 it is contended that the applicant and the other co-owners

are responsible for the obligation to pay interest upon the deposit by the non-applicant No.7.

27. In my view, there is no merit in the above submission. It may be made clear that under law it is open to the parties to make an application for setting aside the auction sale within the period of limitation provided there for under the Limitation Act. Therefore, only because an application to set aside the procedure adopted by the Commissioner is not made after 25-3-1982 and before 31-3-1982, it cannot be said that it would constitute an equitable obligation upon the applicant to satisfy the claim of interest of the non-applicant No.7. It may also be further seen that although the parties were aware of the appointment of the Commissioner, after the writ was issued by the Court to the Commissioner, the Commissioner never informed the parties about the procedure which he wanted to adopt and about the dates of sale by him. From the mere fact that the advertisement was published by him on 25-3-1982, it cannot be inferred so as to fasten a liability upon the co-owners that they ;were aware about the particular procedure of sale adopted by the Commissioner. Even while accepting the highest bid although there was no need to hasten the matter, the bid of the non-applicant No.7 was accepted on 31-3-1982 itself by the Court in the absence of or without notice to the parties because that was not the date on which the matter was fixed in the trial Court. It is clear from the record that after 15-3-1982, when ;an application was made for adjournment for compromise, the case was adjourned to 7-4-1982. In these circumstances, it cannot be said that there was any equitable obligation cast upon the co-owners regarding the payment of interest to the non-applicant No.7.

28. It may also be seen that the applicant and other co-owners also took the risk of not getting the directions from the Court to deposit the amount of purchase money in securities because, had they lost in this case, they would have received the same amount of purchase money without any interest. If the parties have chosen to take risk and suffer the consequences of not getting the purchase money invested in securities, in my view, no liability about interest can be fastened upon the applicant and the other co-owner, particularly when they are successful in the litigation. No case, therefore, is made out by the non-applicant No.7 for claiming interest against the successful party as the co-owners did not earn any benefit of utilisation of the amount deposited by the non-applicant No.7 in the trial Court. It is unfortunate that the non-applicant No.7 would not be able to get any interest upon the substantial amount deposited by him, but then it is he who is responsible for the same.

29. In the circumstances, the instant revision is allowed. The impugned order of the learned trial Court confirming the sale of the suit house in favour of the non-applicant No.7 is set aside and he is directed to conduct the sale by public auction afresh as per him order dated 25-2-1982 by appointing a new Commissioner and by following the procedure for sale by public auction laid down in the Code. No order as to costs in this revision.

30. Petition allowed.