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**(2007) 03 AHC CK 0139**

**In the Allahabad High Court**

**Case No :** Civil Miscellaneous Writ Petition No. 19438 of 1989

Kabool Singh @ Kabul Chand

APPELLANT

Vs

VIIth Addl.District Judge, Saharanpur and others

RESPONDENT

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**Date of Decision :** 23-03-2007

**Acts Referred:**

**Citation :** (2007) 03 AHC CK 0139

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

**Final Decision :** Allowed

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## **Judgement**

S.U. Khan, J.—Heard learned Counsel for the parties. Original Suit No. 376 of 1977 was decreed. In the said suit petitioner was defendant. The suit had been filed by respondent No. 5 Jagmandar Dass. Thereafter execution was filed which was registered as execution case No. 156 of 1978. The execution case was dismissed in default on 12.1.1987. Decree holder filed restoration application which was allowed on 30.10.1987. Against the said order judgment debtor petitioner filed civil revision No. 438 of 1987. VIth Additional District Judge, Saharanpur through judgment and order dated 8.1.1988 allowed the revision, set aside the impugned order of the trial Court and directed the Trial Court to decide the restoration case (Misc. Case No. 3 of 1987) after giving notice to the judgment debtor petitioner. Both the parties were directed to appear before the Trial Court on 20.1.1988. Unfortunately on 20.1.1988 property in dispute was auctioned and respondents 3 and 4 Devendra Kumar Jain and Kanishka Kund Jain purchased the property. Thereafter, petitioner filed an application before the Trial Court on 29.1.1988 against which objections were filed. The said application which was filed in execution Case No. 156 of 1978 was allowed by Executing Court/City Munsif, Saharanpur on 19.2.1988 and auction dated 20.1.1988 was canceled. (Meanwhile in pursuance of remand order restoration application had again been allowed on 15.2.1988). The Trial Court mentioned in its order that on 18.1.1988, copy of revisional Court's order dated 8.1.1988 was filed on which purchaser made his initials. However, that order was placed in the file of Misc. Case No. 3 of 1987 hence execution proceeded. Against order of the Trial Court

dated 19.2.1988 revision was filed by the decree holder being civil revision No. 75 of 1988. Vth Additional District Judge, Saharanpur allowed the revision on 13.9.1989, set aside the order of the Trial Court and directed for confirmation of sale. The order dated 13.9.1989 is challenged through this writ petition. Revisional Court held that, the judgment debtor should have impleaded the auction purchaser as party in the earlier revision (Civil Revision No. 438 of 1987). This observation is quite strange. The revision of judgment debtor had already been allowed on 8.1.1988. Property was auctioned on 20.1.1988 hence until 8.1.1988 there was no auction purchaser.

2. Revisional Court mentioned that when execution was restored on 15.2.1988, all previous proceedings stood validated. This view is also erroneous in law. On 20.1.1988 there was no exception case pending as it had already been dismissed in default. Only restoration matter was pending. Hence on 20.1.1988 no auction could take place. The fact that restoration application was allowed on 15.2.1988 can not validate the auction dated 20.1.1988 retrospectively. Only after restoration of the execution, auction could be held.

3. Auction dated 20.1.1988 was utterly illegal and liable to be set aside under section 47, C.P.C. The Trial Court set aside the auction under section 151, C.P.C. Accordingly writ petition is allowed. Order of the Revisional Court dated 13.9.1989 is set aside. Order passed by the Trial Court dated 19.2.1988 is restored.

4. As restoration application has been allowed on 15.2.1988 hence fresh execution proceedings shall at once be taken. Both the parties are directed to appear before the Executing Court on 23.4.2007 alongwith certified copy of this judgment. On the said date notice shall be issued to the decree holder as no one has appeared on his behalf. On the date fixed before the Trial Court on 30.4.2007 petitioner may deposit in Court the entire decretal amount due till 30.4.2007. The amount of Rs. 80,000/- deposited by the auction purchaser shall be returned to them at once alongwith any interest which may have accrued thereupon. Learned Counsel for auction purchaser states that decree holder has died. However, this fact not been brought on record through any affidavit. In case decree holder has died then notices must be issued to the legal representatives of decree holder by the executing Court.