(2003) 01 P&H CK 0302

In the Punjab And Haryana At Chandigarh

Case No : Execution Second Appeal No. 148 of 2003

Karan Singh and Others — APPELLANT

Vs

Punjab and Sind Bank and Others — RESPONDENT

Date of Decision : 23-01-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 90(1), Order 21 Rule 90(2), Order 21 Rule 91

Citation : (2003) 2 BC 657 : (2003) 114 CompCas 311

Hon'ble Judges : Adarsh Kumar Goel, J

Bench : Single Bench

Advocate : M.L. Sarin and Gurpreet Singh, for the Appellant; Ishwar Lal, for the Respondent

Final Decision : Dismissed

Judgement

Adarsh Kumar Goel, J.—Respondent No. 1, Punjab and Sind Bank, filed a suit for recovery alleging that the defendants failed to repay the loan taken against mortgage of property. On January 18, 1989, the suit was decreed and in the judgment, it was made clear that the bank will be at liberty to realise the decretal amount by sale of the mortgaged property. The said clause was also incorporated in the decree drawn up. The decree became final.

2. In execution proceedings, the property was ordered to be auctioned on September 5, 1994. The objections were filed by the present appellants stating that they were bona fide purchasers without notice of the mortgage and this fact came to the notice of the appellants only on the date of the auction and they filed objections before the Tehsildar on the same day. The further objection was that the property was worth more than Rs. 25 lakhs and was sold only for Rs. 7.50 lakhs and the sale was the result of a fraud.

3. The decree-holder bank filed reply to the effect that the property was the property of the judgment debtor and was duly mortgaged with the bank and the objectors were not the bona fide purchasers. The auction purchaser Gur-bachan

Kaur, respondent No. 8, appeared through her attorney and husband Kartar Singh, respondent No. 7 and submitted that Charanjit Singh, husband of objector Satwinder Kaur, was the attorney of judgment debtor Sat Dev Singh and had moved an application on May 16, 1989, under Order 9, Rule 13 read with Section 151 of the CPC for setting aside of the decree, which was dismissed on November 12, 1991. The said Charanjit Singh had also filed an application for Stay of execution and an application for review of order dated June 1, 1995, rejecting the objections and the said review application was dismissed on November 8, 1995. On June 14, 1995, Satwinder Kaur also filed a suit for declaration in respect of the subject matter of the property in question, which was dismissed and the appeal was dismissed on January 8, 1995. The original title deed was mortgaged with the bank for taking loan. The objectors were, thus, fully aware of the liability of the judgment debtor in respect of the said property. Notice was published in the daily Ajit on September 23, 1993, to the effect that the property was mortgaged with the bank since February 20, 1981. Warrant of attachment was also issued and attachment was effected. Mutation was sanctioned in the revenue records in the names of Joginder Singh and Sat Dev Singh in the year 1993. The objectors filed a rejoinder stating that the property had been purchased by Charanjit Singh on May 8, 1986, prior to the filing of the suit and in the year 1991, a factory was constructed and there could be no equitable mortgage by Sat Dev Singh as the property was in the name of Piara Singh in the revenue records. It appears that the objection petition was dismissed against which the objectors moved this court and after remand objections were considered again. The following issues were framed :

1. Whether the objector is the bona fide purchaser if so its effect ? OPD

2. Whether the sale is liable to be set aside ? OPD

3. Whether the auction purchaser Gurbachan Kaur is entitled to the issuance of sale certificate in her favour ? OPA

4. Whether the objections filed by the objector Satwinder Kaur are not maintainable ? OPA

5. Whether the objector has no locus standi to file the present objections ? OPA

6. Relief.

4. After considering the case of the parties, the trial court recorded the following findings :

1. Thus, it cannot be said that the objectors are the bona fide purchasers of the property which was already mortgaged with the bank. As discussed earlier, since the title deed was already deposited with the bank, the objectors/subsequent purchasers cannot avoid the mortgage by leading evidence to show that this fact was not mentioned in the revenue records as a mortgage and there is a transfer of interest in the property mortgaged to the mortgagee.

2. The sale was valid and a sum of Rs. 1,90,000 towards 25 per cent, of the price offered was tendered in cash by the auction purchasers, but since it was 5 p.m. and the bank had closed, a cheque for the said amount was taken by the officer conducting the sale, which was duly realised and therefore, it cannot be held that the sale was void in the absence of cash payment.

5. On appeal, the above findings were affirmed. Hence this second appeal.

6. Learned counsel for the appellants submitted that in view of the provisions of Order 21, Rule 84 of the Civil Procedure Code, the purchaser was required to deposit 25 per cent, of the purchase money with the officer conducting sale and in default thereof, the property was liable to be resold and since no such deposit was made in cash, deposit of cheque, even if it was encashed, was not valid and rendered the sale a nullity. Reliance is placed on the judgments of the apex court in Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, ; Rao Mahmood Ahmed Khan Vs. Sh. Ranbir Singh and others, ; Gangabai Gopaldas Mohata Vs. Fulchand and others, ; Balram Vs. Ilam Singh and others, and Mrs. Margaret A. Skinner v. Empire Store Connaught Place [1976] PLR 64. In the alternative, it was submitted that the appellants were now willing to pay the purchase price under Order 21, Rule 89 of the Civil Procedure Code.

7. Counsel for the auction purchaser submitted that, the auction purchaser had tendered the cash and on being asked to give the cheque gave a cheque, which was duly encashed and all payments were duly deposited. He submitted that the objectors never moved under Order 21, Rule 89 of the Civil Procedure Code, and that option was closed once he moved an application under Order 21, Rule 90 of the Civil Procedure Code, in view of the provisions of Order 21, Rule 89(2) of the Civil Procedure Code. He also submitted that under Order 21, Rule 90(2) of the Civil Procedure Code, no injury was caused to the objectors by reason of the alleged irregularity. Reliance was placed on a judgment by a three-judge Bench of the apex court in K. Saraswathy alias K. Kalpana (Dead) by Lrs. Vs. P.S.S. Somasundaram Chettiar, to the effect that the payment of cheque will be a valid payment.

8. I have considered the rival submissions and perused the record of the case.

9. In my view, there is no ground for interference in the second appeal for the reasons that follow.

10. Under Order 21, Rule 92 of the Civil Procedure Code, auction sale becomes absolute where no application under Order 21, Rule 89, 90 or 91 of the Civil Procedure Code, is filed or where such application is disallowed and the court is bound to make an order confirming sale. Since no application has been made under Order 21, Rule 89 or Rule 91 of the Civil Procedure Code, the only question is whether application under Order 21, Rule 90 filed by the appellants is to be allowed or disallowed. In view of statutory bar under Order 21, Rule 90(2) of the Civil Procedure Code, sale cannot be set aside unless the applicant shows

any substantial injury by reason of any irregularity or fraud, which is the statutory ground under Order 21, Rule 90(1) of the Civil Procedure Code.

11. Learned counsel for the appellants submitted that the bar contained under Order 21, Rule 90(2) of the CPC will not operate when the sale is vitiated by illegality. This contention cannot be accepted, as the expression "material irregularity or fraud" mentioned under Order 21, Rule 90(1) of the CPC is exhaustive of all possible grounds under Order 21, Rule 91(1) of the CPC and also includes "illegality" and unless substantial injury is shown to the applicant, the applicant will be liable to be non-suited. In AIR 2000 3402 (SC) the apex court in para. 2 of the judgment observed "even if we assume here for the sake of argument that there was material irregularity in conducting the sale of the property, we do not find any pleading by the objectors in their objections that on account of such material irregularity, they were put to substantial injury. In the absence of such pleading, it was not open to the executing court to set aside the auction." In view of the fact that tender was made and the cheque was encashed, it cannot be held that the sale was void or suffers from any irregularity.

12. The judgment of the apex court in Rao Mahmood Ahmed Khan Vs. Sh. Ranbir Singh and others, was under the provisions of U.P. Zamindari Abolition and Land Reforms Act, though in para. 7, it was observed that the provisions were simi- lar to Order 21, Rule 84 of the Civil Procedure Code, the court was however not concerned with the provisions like Order 21, Rule 90(2) of the Civil Procedure Code. The said judgment is, therefore, distinguishable. In Gangabai Gopaldas Mohata Vs. Fulchand and others, there was default in the deposit of the amount after initial deposit. In Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, there was default in deposit. In Balram Vs. Ilam Singh and others, payment by cheque was held to be valid, following an earlier judgment in COMMISSIONER OF Income Tax, BOMBAY SOUTH, BOMBAY Vs. OGALE GLASS WORKS LTD., .

13. In the facts of the present case, the amounts were duly paid and there is no infirmity in the auction sale. Both the courts below have upheld the sale. I find no reason to take a different view in the second appeal.

14. For the above reasons, this appeal is dismissed.

