
(2008) 04 MP CK 0086
In the Madhya Pradesh High Court
Case No : M.A. No. 4069 of 2006

Mohd. Aleem

APPELLANT

Vs

Bank of India and Others

RESPONDENT

Date of Decision : 29-04-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 66, Order 34 Rule 5, 151

Citation : (2008) 3 MPJR 388

Hon'ble Judges : U.C. Maheshwari, J

Bench : Single Bench

Advocate : Pushpendra Yadav, for the Appellant; Anil Sharma, for the Respondent

Final Decision : Dismissed

Judgement

U.C. Maheshwari, J.

The Appellant/judgment debtor No. 3 has directed this appeal under Order 43 rule i (J) of Code of CPC being aggrieved by the order dated 07.11.06 passed by the I Ind Addl. District Judge, Bhopal in Execution Case No. 424/05, dismissing his application filed under Order 21 Rule 90 read with Section 151 of the Code of CPC for setting aside the auction proceedings in respect of the mortgaged and the charged property of the impugned decree.

The facts giving rise to this appeal in short are that Respondent No. 1/Plaintiff instituted the suit against the Appellant and Respondent 2 to 4 for recovery of Rs. 5,85,677/- and interest with a prayer to sale the mortgaged property under Order 34 Rule 5 of the Code of CPC to recover such sum. The same was decreed on dated 15.02.99. Under execution of such decree the mortgaged property of Appellant was placed on auction and the same was knocked down in favour of Respondent No. 5, on which the Appellant filed the aforesaid application under Order 21 Rule 90 read with Section 151 of the Code of CPC contending that the proclamation notice of such sale issued under Order 21 Rule 66 of the Code of

CPC was never served personally on the Appellant and Respondents 2 to 4. The same was published in the Newspaper "Sandhya Prakash" on dated 21.06.02 whereby the date 13.11.02 for auction of such property was fixed. Having knowledge of the aforesaid proclamation, Appellant filed an application u/s 151 of the Code of CPC seeking permission to file objections in that regard but the same was dismissed by the executing court vide order dated 13.07.04. Subsequent to it, the auction sale was not conducted on the date fixed by the aforesaid proclamation and thereafter without issuing any new proclamation under Order 21 Rule 69 read with Rule 67 of the CPC, the auction proceeding was carried out and the sale was knock-down in favour of Respondent No. 5 on dated 18.10.06 in consideration of Rs. 7,00,000/-, whereas as per the present market rate, the property was having the worth of Rs. 20 lacs. The copy of the price-index obtained from the district registrar, Bhopal is also annexed with it. As per further averments, the impugned decree could have been satisfied by selling some part of the aforesaid property and executing court was bound to follow the mandatory provisions of Order 21 Rule 64 of the Code of CPC in that regard. In such premises the prayer for setting aside the aforesaid auction sale is prayed. The same was not replied on behalf of the Respondent No. 1 the decree holder. On consideration, the executing court has dismissed the aforesaid application by the impugned order. Being dissatisfied with it the Appellant/judgment debtor No. 3 has come forward to this Court with this appeal.

Shri Pushpendra Yadav, learned Counsel for the Appellant assailed the impugned order saying that the aforesaid auction proceeding was carried-out without following the mandatory provision of order 21 Rule 66 to Rule 69 of the CPC. By elaborating his arguments he said that after publication of the proclamation of sale if the auction proceeding was not carried on the date fixed then the court was duty bound to issue new proclamation in that regard under Order 21 Rule 69 read with Rule 67 of the CPC. The same was not complied with and contrary to it, the auction proceeding was carried-out. He further said that the alleged property was having the worth of Rs. 20 lacs, while the impugned decree was passed for the sum of Rs. 5,85,677/- and its interest and cost. The same could have been satisfied only by disposing some part of such property and placing the entire property on auction was not necessary in view of. Order 21 Rule 64 of the Code of CPC but such mandatory provision has not been complied with by the executing court and property of the Appellant having worth of Rs. 20,00,000/- was knocked-down only for consideration of Rs. 7,00,000/- thereby the right of the Appellant has been prejudiced at large and on upholding the aforesaid auction proceedings, the Appellant has to suffer irreparable injury which could not be compensated subsequently in any manner. He also placed his reliance on some reported cases and prayed for setting aside the impugned order and the auction proceedings by allowing this appeal.

Responding the aforesaid arguments, Shri Rajesh Maineretta counsel for the Respondent No. 1/decree holder, by justifying the impugned order said that the provision of Order 21 relating to the execution of the decree are not applicable to

the present case as the impugned decree has been passed by the trial court in favour of Respondent No. 1 under the provision of Order 34 and its rules of Code of CPC for recovery of the sum with a direction to recover the same by auctioning the charged and mortgaged property. By referring the provision of Order 34 of the Code of CPC he said that the execution of the impugned decree is governed by such provision and provision of Order 21 does not have over-riding effect over such provision. By elaborating his arguments, he said that under Order 34, there is no such provision as enumerated under Order 21 Rule 64 of the CPC, hence the executing court was not bound to direct to put the part of the property on auction on the contrary the trial court was bound to put the property for auction in accordance with the decree and the same was ordered. It was also argued that in accordance with the provision of Order 21 Rule 83 of the Code of CPC at any stage of the proceedings before knocking down the auction proceedings, the Appellant did not show his desire to deposit the entire decretal sum to satisfy the decree. Thus, the impugned order does not require any interference and prayed for dismissal of this appeal.

Shri A.P. Singh, learned appearing counsel for Respondent No. 5 the auction purchaser, by adopting the arguments advanced by Shri Mainderetta has further said that in compliance of the provision of Order 34 Rule 4 and

5 of the Code of CPC on completion of the sale proceedings, the sale certificate has also been issued in his favour. He further said that the provision of order 21 of the Code of CPC is not applicable to the present case, hence, the Executing court has rightly dismissed the objection of the Appellant and prayed for dismissal of this appeal.

Having heard the counsel after perusing the papers and the impugned order, I am of the view that the executing court has not committed any error in dismissing the aforesaid objections of the Appellant. It is apparent on record that the impugned decree has been passed in a suit filed by Respondent No. 1 under Order 34 and its rules of the Code of CPC for recovery of the outstanding sum of the loan for which the Appellant was one of the surety who placed the disputed property under the equitable mortgage with Respondent No. 1, for repayment of the aforesaid loan. It is undisputed fact that under execution of such decree by holding the auction proceeding of the alleged property the sale was knocked-down in favour of Respondent No. 5, in whose favour, the sale-certificate has also been issued.

It is not a case of normal money-decree in which the property is attached during execution of the decree and then put for auction. In the decree impugned, the mortgaged property of the Appellant was directed to be sold for recovery of the decretal sum. Since, the impugned property was the charged and mortgaged property in respect of the loan transaction.

The suit relating to the mortgaged property are governed by the provisions of Order 34 of the Code of CPC and the decree of such is also governed by the

same. In such premises the proceeding of final decree is carried-out under the same provision and not under the provision of Order 21 of the CPC. In other words the provision of Order 21 relating to the execution of the other decree are not applicable for the execution of the decree passed under Order 34 of the CPC. Such question was also answered by the Apex Court in the matter of S. Sivaprakasam Vs. B.V. Muniraj and Others, in which it was held as under:

..... The procedure under Order 34 is entirely distinct and different from the procedure prescribed under Order 21. Order 21 deals with execution of decrees and orders and objections therein other than those relating to the property covered in mortgage decree. Order 34 is a special procedure prescribed relating to mortgages. Therefore, the procedure prescribed under Order 21, Rule 92 has no application as regards the passing of final decree under Order 34, Rule 5 CPC. Thus considered, we hold that the action taken by the executing court is not vitiated by any error of law, warranting interference.

The same principle is followed by this Court in the matter of Suraj Singh v. Union Bank of India and others passed in Civil Revision No. 786/2004 vide order dated 27.02.02.

In view of the aforesaid dictum the Order 21 and its rules of Code of CPC was not applicable for execution of the impugned decree then the objection filed by the Appellant under Order 21 Rule 90 of the Code of CPC was also not entertainable and in that background the approach of the executing court appears to be in accordance with law, although such approach is based on appreciation of the facts in some different manner keeping in view the provision of Order 21 of the CPC.

So far Order 21 Rule 64 of the Code of CPC is concerned, this Court does not have any dispute that such provision is mandatory and on carrying-out any auction proceedings in violation of such provision, is liable to be vitiated. The same is laid down by the Apex Court in the matter of Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh, . But the same is not applicable to the present case in view of the findings of the foregoing paras of this order by which it was held that provision of Order 21 Code of CPC is not applicable to the case at hand.

Although, on behalf of the Appellant in support of his submissions the Nani Gopal Paul Vs. T. Prasad Singh and others, (Regi George Vs. K.K. Bhaskaran Nair and Others, (Regi George V.K.K. Bhaskaran Nair), 2002 (P&H) 264 (Randhir Singh v. New Bank of India), 1999 SC 3750 (U. Nilan v. Kannayyan), are cited but all such decisions are based on the provision of Order 21 of the Code of CPC although, this Court did not have any dispute for the principle laid down in such cases but in the case at hand, in view of the aforesaid findings, the same are not helping to the Appellant.

In view of the aforesaid, it is held that the impugned order is governed by Order 34 and its rules of the Code of CPC and that itself is a code to deal with the decree passed in the mortgage suit. On perusing the entire scheme of Order 34

of the CPC, I have not found any provision like Order 21 Rule 64 of the Code of CPC in it. Even the provision like Order 21 rules 66,67 and 69 of Code of CPC are also not there. Therefore, firstly, the objection filed by the Appellant before the executing court under Order 21 Rule 92 was not entertainable and secondly it is held that the executing court has not committed any error in dismissing the same. In such premises, the order of the executing court does not appear to be perverse or illegal in any manner. Apart the above, I would like to mention here that while holding the auction proceedings by the executing court some application for submitting the objection was filed by the Appellant u/s 151 of the CPC. The same was dismissed on dated 13.07.2004, on which, no Appeal or Revision was preferred by the Appellant. Subsequent to it, after completion of the auction proceeding, the impugned objection was filed by the Appellant but it is apparent that at any point of time, he did not wish to satisfy the impugned decree by depositing the sum. Therefore, on this count also he does not deserve for any relief as prayed in this appeal.

Under the aforesaid premises, I have not found any merit in this appeal, hence by affirming the impugned order, this appeal is hereby dismissed. However, in the facts and circumstances of the case, there shall be no order as to the cost.