
(2025) 01 RAJ CK 1648

In the Rajasthan High Court, Jodhpur Bench

Case No : Civil Writ Petition No.3479 Of 2015

Ajay Pal Singh

APPELLANT

Vs

Canara Bank Andors

RESPONDENT

Date of Decision : 28-01-2025

Acts Referred:

Citation : (2025) 01 RAJ CK 1648

Hon'ble Judges : Arun Monga, J

Bench : Single Bench

Advocate : Khet Singh Rajpurohit

Final Decision : Dismissed

Judgement

Avneesh Jhingan, J

1. These two writ petitions are decided by this order as the facts and issues involved are similar. The facts are being taken from S.B. Civil Writ Petition No.3479/2015.

2. This petition is filed seeking quashing of orders dated 15.10.2003, 28.11.2003 and 08.08.2014, rejection of the objections by the Recovery Officer (hereinafter referred to as 'RO'), dismissal of appeals by the Debts Recovery Tribunal, Jaipur (DRT) and Debts Recovery Appellate Tribunal, New Delhi (DRAT) respectively. Further prayer is for seeking directions to hand over the vacant possession of Plot Nos.502, 503 & 512 situated in Nemi Sagar Colony, Beed Khatipura, Jaipur (hereinafter referred to as 'plots').

FACTS

3. The relevant facts are that on 25.08.1993 agreement to sell was executed between the petitioner and Smt. Shanti Bhargava, Madhu Bhargava & Yogendra Bhargava (collectively referred hereinafter to as 'borrowers'). For securing the loan facility availed the borrowers had mortgaged the plots with respondent No.1 —Canara Bank (hereinafter 'the bank'). On failure of the borrowers to maintain

financial discipline, the application filed by bank before the DRT for recovery of dues was allowed on 11.06.2002. The arbitration proceedings initiated at the instance of petitioner for resolving dispute between petitioner and borrowers culminated in award dated 14.09.2002. The execution proceedings were initiated by bank under the Recovery of Debts and Bankruptcy Act, 1993 (hereafter 'the Act of 1993'). On request of the bank for proclamation of the plots, the RO passed order fixing the auction for 05th August, 2003. A day before the auction the petitioner filed objection before the RO, claiming ownership on the basis of agreement to sell and relying upon the arbitration award passed in favour of the petitioner. The objections were rejected vide order dated 05.08.2003 but liberty was granted to raise the objections after the sale. The plots were auctioned on 05th and 06th August, 2003. The objections filed by the petitioner on 03.09.2003 were dismissed on 15.10.2003. The borrowers executed a registered sale deed for plots in favour of the petitioner on 17.01.2004. The appeals of petitioner were dismissed by the DRT and DRAT on 28.11.2003 and 08.08.2014 respectively.

CONTENTIONS

4. Learned senior counsel for the petitioner made the following submissions:-

- (i) The petitioner was owner of the plots and the auction held for recovery of the debts of borrowers is bad.
- (ii) The RO had not held enquiry under Rule 11 of the Second Schedule to the Income Tax Act, 1961 (hereinafter referred to as 'Second Schedule').
- (iii) The RO erred in not exercising the power under Rules 60 and 61 of Second Schedule to set aside the sale.
- (iv) The RO had not considered application as per the provisions of Order 21 Rule 89 and 90 of CPC.
- (v) There was discrepancy in the area of plots mortgaged and auctioned.
- (vi) Lastly that after the arbitration award directing the borrower to get the sale deed executed in favour of the petitioner having been made rule of court, the bank could not have auctioned the plots.

PROVISIONS

5. It would be relevant to quote Order 21 Rules 89 and 90 of CPC, Section 29 of the Act of 1993 and Rule 11, 60 & 61 of the Second Schedule to the Income Tax Act, 1961 as under:-

Order XXI:- Execution of Decrees and Orders

Rule 89. Application to set aside sale on deposit.

- (1) Where immovable property has been sold in execution of a decree, any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person,

may apply to have the sale set aside on his depositing in Court

(a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) 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.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

Rule 90. Application to set aside sale on ground of irregularity or fraud:-

(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation- The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule.

Section 29 of the Act of 1993:-

29. Application of certain provisions of Income-tax Act.—

The provisions of the Second and Third Schedules to the Income-tax Act, 1961 (43 of 1961) and the Income-tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income-tax:

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act.

THE INCOME TAX ACT, 1961

The Second Schedule:-

Procedure for Recovery of Tax:-

11. Investigation by Tax Recovery Officer

(1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection:

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that—

(a) (in the case of immovable property) at the date of the service of the notice issued under this Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment, he had some interest in, or was possessed of, the property in question.

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive.

Rule 60. Application to set aside sale of immovable property on deposit.

(1) Where immovable property has been sold in execution of a certificate, the

defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale, on his depositing

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(a) the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, with interest thereon at the rate of [one and one-fourth percent for every month or part of a month], calculated from the date of the proclamation of sale to the date when the deposit is made; and

(b) for payment to the purchaser, as penalty, a sum equal to five per cent of the purchase money, but not less than one rupee.

(2) Where a person makes an application under rule 61 for setting aside the sale of his immovable property, he shall not, unless he withdraws that application, be entitled to make or prosecute an application under this rule.

Rule 61. Application to set aside sale of immovable property on ground of non-service of notice or irregularity. -

Where immovable property has been sold in execution of a certificate, [such Income-tax Officer as may be authorised by the [Principal Chief Commissioner or] Chief Commissioner or [Principal Commissioner or Commissioner in this behalf]

the defaulter, or any person whose interests are affected by the sale, may, at any time within thirty days from the date of the sale, apply to the Tax Recovery Officer to set aside the sale of the immovable property on the ground that notice was not served on the defaulter to pay the arrears as required by this Schedule or on the ground of a material irregularity in publishing or conducting the sale:

Provided that -

(a) no sale shall be set aside on any such ground unless the Tax Recovery Officer is satisfied that the applicant has sustained substantial injury by reason of the non-service or irregularity; and

(b) an application made by a defaulter under this rule shall be disallowed unless the applicant deposits the amount recoverable from him in the execution of the certificate."

ANALYSIS

6. Order 21 CPC deals with execution of decrees and orders. Under Rule 89 any person claiming an interest in property sold at the time of sale or making of the application or acting in interest of such person, can apply for setting aside of sale made in the execution of the decree. The application is subject to depositing in court, 5% of purchase money to be paid to purchaser and for payment to the decree holder the amount specified in proclamation of sale, after deducting the amount paid to the decree holder since the date of proclamation.

Rule 89 (2) stipulates that in case the person had applied under Rule 90 for setting aside of the sale, application under Rule 89 cannot be prosecuted unless the application under Rule 90 is withdrawn.

As per Rule 89 (3) the judgment debtor is liable to pay costs and interest not covered by proclamation of the sale.

7. The decree holder or purchaser or a person entitled to the share in rateable distribution of the assets or whose interests are affected may apply under Rule 90 for setting aside of the sale in pursuance to execution, on the ground of material irregularity or fraud in publication or conducting the sale.

As per Rule 90 (2) the sale shall not be set aside until the court is satisfied that irregularity or fraud has caused substantial injury to the applicant.

According to Rule 90(3) the grounds which the applicant could have taken on or before the date of proclamation of sale, cannot be made basis for setting aside the sale under Rule 90. The explanation to the rule is that sale shall not be set aside merely on absence of or defect in attachment of the property sold.

8. By virtue of Section 29 of the Act of 1993 the relevant provisions of schedule second and third of the Income Tax Act 1961 and Rules of 1962 with necessary modification and to the extent possible, are applicable to the 1993 Act.

9. Rule 11 (1) of the Second Schedule obligates upon the RO to investigate the claims or objection made to attachment or sale of the property in execution.

As per proviso, RO shall not investigate the objection or claim, considered to have been filed for purpose of causing unnecessarily delay.

Rule 11 (2) empowers the RO to postpone sale during pendency of the investigation subject to condition mentioned therein.

Rule 11 (3) casts an onus on objector to prove the interest in the property in question, on specified dates.

The RO under Rule 11 (4) after investigation shall release whole or part of the property from attachment, on being satisfied that the property was not in possession of the defaulter or in occupancy of a tenant or other person paying rent to him or was being possessed by the defaulter not on his own account or as his property but interest of some other person.

Rule 11 (5) lays down the situation where the objection shall not be allowed.

Rule 11 (6) makes the order of the RO to be conclusive subject to result of civil suit instituted to establish right in the property by a person against whom the order was passed.

10. A defaulter or person whose interests are affected by the sale can under Rule 60 of the Second Schedule, within thirty days of the sale apply to RO for setting aside the sale. The application shall be subject to deposit of the amount to be

recovered as per the sale proclamation along-with interest and payment of 5% of the purchase money to the purchaser.

Rule 60 (2) provides that a person pursuing application under Rule 61 cannot prosecute an application under Rule 60 unless the application under Rule 61 is withdrawn.

11. Under Rule 61 the defaulter or person whose interest is affected by sale of property in execution, can seek setting aside of the sale within thirty days of the date of sale, on the ground that notice for payment of arrears was not served on the defaulter or for material irregularity in publishing or conducting the sale.

Clause (a) of the proviso to Rule carves out an exception for not setting aside the sale even in case of non-service or irregularity, until the RO is satisfied that the applicant had sustained substantial injury.

Clause (b) of the proviso mandates that the application shall be disallowed unless the deposit of the amount due as per the execution certificate is made by the defaulter.

CONCLUSIONS

12. The first contention of learned senior counsel that the petitioner was owner of the plots is ill-founded. The admitted facts are that the agreement to sell was an unregistered document; possession of the plots was not handed over to the petitioner and the entire consideration was not paid. Petitioner cannot claim ownership of the plots on the basis of unregistered agreement to sell.

13. It would be relevant to quote the following decisions of the Supreme Court. In the case of Suraj Lamp Industries (P) Ltd. through Director Versus State of Haryana & Anr reported in [(2012)1 SCC 656]:-

"16. Section 54 of Transfer of Property Act makes it clear that a contract of sale, that is, an agreement of sale does not, of itself, create any interest in or charge on such property. This Court in Narandas Karsondas v. S.A. Kamtam observed:

"32. A contract of sale does not of itself create any interest in, or charge on, the property. This is expressly declared in Section 54 of the Transfer of Property Act. (See Rambaran Prosad v. Ram Mohit Hazra.)

The fiduciary character of the personal obligation created by a contract for sale is recognized in Section 3 of the Specific Relief Act, 1963, and in Section 91 of the Trusts Act. The personal obligation created by a contract of sale is described in Section 40 of the Transfer of Property Act as an obligation arising out of contract and annexed to the ownership of property, but not amounting to an interest or easement therein.

33. In India, the word 'transfer' is defined with reference to the word 'convey'. ... The word 'conveys' in Section 5 of Transfer of Property Act is used in the wider sense of conveying ownership.

37. ... that only on execution of conveyance, ownership passes from one party to another..."

17. In *Rambhau Namdeo Gajre v. Narayan Bapuji Dhotra* this Court held:

(SCC p.619, para10) "10. Protection provided under Section 53-A of the Act to the proposed transferee is a shield only against the transferor. It disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance to such an agreement. It has nothing to do with the ownership of the proposed transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favor of the transferee. Such a right to protect possession against the proposed vendor cannot be pressed in service against a third party.

18. It is thus clear that a transfer of immoveable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immoveable property can be transferred.

19. Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections

54 and 55 of Transfer of Property Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53A of Transfer of Property Act). According to Transfer of Property Act, an agreement of sale, whether with possession or without possession, is not a conveyance. Section 54 of Transfer of Property Act enacts that sale of immoveable property can be made only by a registered instrument and an agreement of sale does not create any interest or charge on its subject matter."

In *Indian Overseas Bank Vs. M.A.S. Subramanian & Ors.* in Civil Appeal Nos.282-283/2025 decided on 07.01.2025 held as under:-

"6. It is well settled that an agreement for sale in respect of an immovable property does not transfer title in favour of the purchaser under the agreement. In view of Section 54 of the Transfer of Property Act, 1882, an agreement for sale does not create any interest in the property. The only mode by which an immovable property worth more than Rs. 100/- (Rupees one hundred) can be sold is by a sale deed duly registered in accordance with the Indian Registration Act, 1908."

In the case of *Sanjay Sharma vs. Kotak Mahindra Bank Ltd. & Ors.* in Civil Appeal No.14282/2024 decided on 10.12.2024 held as under:-

"27. Section 54 of the Transfer of Property Act, 1882, defines a "sale" as the transfer of ownership in exchange for a price that is either paid, promised, or part-paid and part-promised. This provision further describes the manner in which a sale is effected. It stipulates that, in the case of tangible immovable property valued at one hundred rupees or more, the transfer can be made only

through a registered instrument. The use of the term "only" signifies that, for tangible immovable property valued at one hundred rupees or more, a sale becomes lawful only when it is executed through a registered instrument. Where the sale deed requires registration, ownership does not pass until the deed is registered, even if possession is transferred, and consideration is paid without such registration. The registration of the sale deed for an immovable property is essential to complete and validate the transfer. Until registration is effected, ownership is not transferred."

(emphasis)

14. The second argument that RO had not conducted enquiry as per Rule 11 of the Second Schedule is liable to be rejected. Under Rule 11 investigation was required on objection that the property in question was not liable to be attached or sold. The plots were mortgaged for securing the credit facility availed by the borrower. The mortgage was not challenged by the borrower and the petitioner on the basis of an unregistered agreement to sell could not have challenged the mortgage. The recovery certificate was issued on 11.06.2002 by the DRT in favour of the Bank. There was no occasion for invoking of Rule 11 when there was no challenge to either the recovery certificate or to the mortgaging of plots.

15. Reliance on Rules 60 and 61 of the Second Schedule does not enhance the case of the petitioner. Under Rule 60 setting aside of the sale certificate was subject to the two conditions stipulated in Clause (a) and (b) of Sub-rule (1) i.e. depositing the amount of sale proclamation and payment of 5% penalty to the purchaser and these conditions were not complied with by petitioner.

16. The setting aside of sale under Rule 61 can be on the grounds (i) notice not served on the defaulters to pay the arrears or (ii) material irregularity in publishing or conducting the sale. The issue of service of notice on defaulter has not been raised. Vis-a-vis the second argument that three authorities have rightly recorded concurrent findings that only bald statements were made alleging that the auction was not conducted properly but no material was adduced to even prima facie substantiate the irregularity in sale.

17. Another angle is that as per clause (b) of the proviso to the Rule 61 the application shall be disallowed unless the recoverable amount as per execution certificate is deposited, whereas no such deposit was made by the petitioner.

18. The provision of Order 21 Rule 89 and 90 of CPC are analogous to Rules 60 and 61 of Second Schedule. Reliance on Order 21 Rules 89 and 90 of CPC deserves rejection in view of the reasons mentioned hereinabove while dealing with Rule 60 and 61 of the Second Schedule.

19. The factual issue raised that there was discrepancy in the area of the plots mortgaged and the area of plots sold has been dealt in detailed by the appellate authorities. The finding recorded is that the area of the mortgaged plots and area sold was same. In absence of any factual error much less perversity, no

interference is called for in the factual finding recorded.

20. Reliance on the arbitration award to argue that after award was made rule of court the sale could not have been conducted lacks merit. The bank was not party to the arbitration proceedings. The plots were mortgaged with the Bank. The right of bank over mortgaged plot is neither derived from agreement to sell nor the position of bank is similar to that of petitioner. Reference is made to decision of Supreme Court in the case of Cheran Properties Limited Vs. Kasturi and Sons Limited and Ors. reported in (2018) 16 SCC 413:-

20. xxx xxx xxx

"Section 35 of the Arbitration and Conciliation Act 1996 postulates that an arbitral award "shall be final and binding on the parties and persons claiming under them respectively". The expression 'claiming under', in its ordinary meaning, directs attention to the source of the right. The expression includes cases of devolution and assignment of interest (Advanced Law Lexicon by P. Ramanatha Aiyar 15). The expression "persons claiming under them" in Section 35 widens the net of those whom the arbitral award binds. It does so by reaching out not only to the parties but to those who claim under them, as well. The expression "persons claiming under them" is a legislative recognition of the doctrine that besides the parties, an arbitral award binds every person whose capacity or position is derived from and is the same as a party to the proceedings. Having derived its capacity from a party and being in the same position as a party to the proceedings binds a person who claims under it. The issue in every such a case is whether the person against whom the arbitral award is sought to be enforced is one who claims under a party to the agreement."

21. It is appropriate to note that prior to the appointment of the arbitrator the bank filed an Original Application before the DRT. In the arbitration proceedings it was not disclosed the plots were already mortgaged with the bank and in pursuance to proceeding initiated by bank the recovery certificate had been issued. The relevant facts were withheld in the arbitration proceedings. The proceedings for the specific performance of the agreement to sell were initiated after eight years. After the plots were auctioned in August, 2003 and sale certificate in favour of the auction purchaser was issued, the borrower executed registered sale deed in favour of the petitioner on 17.01.2004.

22. In view of the above discussions, the writ petitions are dismissed.