
(2001) 04 AHC CK 0103
In the Allahabad High Court
Case No : C.M.W.P. No. 3749 of 1986

Mst. Mangno and others

APPELLANT

Vs

1st Addl. District Judge, Muzaffarnagar and another

RESPONDENT

Date of Decision : 10-04-2001

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 89(1), Order 21 Rule 90, 151

Limitation Act, 1963 — Article 127, 5

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 89(1), Order 21 Rule 90, 151

Limitation Act, 1963 — Article 127, 5

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 89(1), Order 21 Rule 90, 151

Limitation Act, 1963 — Article 127, 5

Citation : AIR 2002 All 80 : (2001) 3 AWC 2040

Hon'ble Judges : Sudhir Narain, J

Bench : Single Bench

Advocate : S.N. Singh, R. N. Singh and S.P.S. Rathi, for the Appellant; S.C., R.P. Goyal, R.K. Jain and Manish Goel, for the Respondent

Final Decision : Dismissed

Judgement

Sudhir Narain, J.—This writ petition is directed against the order dated 13.2.1986 passed by respondent No. 1 allowing the revision and rejecting the application of respondent No. 2 to set aside the auction sale.

2. The factual matrix of the case is that respondent No. 2 filed Suit No. 80 of 1975 for recovery of money against the petitioners. The suit was finally decreed in 1979. The decree-holder filed application for execution of the decree in the year 1979. The property of the judgment-debtors was attached and sold in auction on 4.9.1981. The petitioners filed objection under Order XXI, Rule 90 of the Code of Civil Procedure. The objection was dismissed in default and the auction sale was confirmed on 18.2.1983 and the Court directed the petitioners to hand over possession of the property which was sold in auction. The

petitioners thereupon filed application to set aside the auction sale held on 4.9.1981 with the allegation that they had deposited the amount after the auction sale, which covered the amount of the purchase money. The trial court, taking the view that the amount was deposited after the auction in pursuance of the order of the Court, set aside the auction sale on 25.1.1985. Respondent No. 2 filed revision against this order. Respondent No. 1 on the finding that as the petitioners had not deposited the amount in accordance with Order XXI, Rule 89 of Code of Civil Procedure, set aside the order of the trial court vide impugned order dated 13.2.1986.

3. The core question is whether the petitioners are entitled to the benefit of any deposit under Order XXI. "Rule 89 of CPC which reads as under :

"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 percent 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 applied 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."

4. The first condition is that the required amount should have been deposited within 30 days from the date of sale as provided under Article 127 of the Limitation Act, 1963. In *Raghubir v. Gulab Shanker Upadhyaya* 1981 ALJ 1124, the Court held that the applicant claiming benefit of Order XXI, Rule 89 can avoid the sale if he deposits the amount within the time required to be deposited under Order XXI, Rule 89 of Code of Civil Procedure. In *Amritlal Narsilal v. Sadashiv* AIR 1944 Bom 233. the Court did not accept the contention that the delay in deposit can be condoned and even the plea of waiver cannot be upheld. Section 5 of the Limitation Act, 1963. specifically provides that this provision is not applicable to any application entertain able under Order XXI of Code of Civil Procedure. On facts, the Court has found that the petitioners had deposited Rs. 2,000 on 22.9.1981. Rs. 350 on 31.10.1981 and Rs. 5,811 on 8.12.1988. As the entire amount was not deposited within 30 days from the date the property was sold in

auction, the petitioner was not entitled to the benefit of this provision.

5. The second condition is that the deposit under Order XXI, Rule 89 of CPC should be unconditional. The petitioner had filed objection under Order XXI, Rule 90 of CPC and while depositing the amount with the applications 38C, 39C and 49C, the Judgment-debtor, respondent, was emphatic that she was prosecuting her objection under Order XXI, Rule 90. The objector-decree-holder could not withdraw the amount unless the objection was withdrawn. Sub-rule (2) of Rule 89 of Order XXI provides that where a person applies under Rule 90 to set aside the sale of Immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under Rule 89. As the objection was pending under Order XXI, Rule 90 of Code of Civil Procedure, the decree-holder was not entitled to withdraw the amount. The deposit of the amount shall be taken as conditional.

6. Thirdly, the petitioner had not filed any application to set aside the sale under Order XXI, Rule 89 of Code of Civil Procedure. Rule 89 (1) of Order XXI is an enabling provision permitting the interested person to apply for setting aside the sale on depositing the amount. The Judgment-debtor is to file an application to set aside the sale under Order XXI, Rule 89 of CPC and to deposit the amount as a condition to get the relief prayed for in the application. In *Dhari Jena Vs. Gauranga Charan Sahu*, it was held that an application to set aside the sale cannot be implied from the mere fact that the decretal amount and compensation was deposited. In absence of an application to set aside the sale, the sale cannot be set aside even after decretal amount had been deposited in the Court.

7. For the reasons given above the petitioners were not entitled to get the sale set aside under Order XXI, Rule 89, C.P.C,

8. Lastly, it may be noted that the auction sale was held on 4.9.1981 and it was confirmed on 18.2.1983. The petitioners filed an application under Order XXI, Rule 90 of CPC to set aside the auction sale. The application was rejected and therefore, the application to set aside the sale u/s 151 of CPC was not maintainable. The Apex Court In *Nain Singh Vs. Koonwarjee and Others*, , emphasised that the Court is not to exercise Inherent power if the order can be challenged under the provisions of the Code of Civil Procedure. The application of the petitioners in the facts and circumstances of the case u/s 151 of the CPC was not maintainable.

9. In view of the above the writ petition is dismissed with costs.