

(1962) 09 P&H CK 0013

In the Punjab And Haryana At Chandigarh

Case No : Liquidation Miscellaneous No's. 42 and 85 of 1962 in Execution No. 34/L of 1960

Punjab Mercantile Bank Ltd.

APPELLANT

Vs

Sardar Kishan Singh

RESPONDENT

Date of Decision : 17-09-1962

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, 151, 47
Limitation Act, 1963 — Article 166

Citation : AIR 1963 P&H 230 : (1963) 1 ILR (P&H) 201

Hon'ble Judges : Tek Chand, J

Bench : Single Bench

Advocate : Kishan Singh, through Daljit Singh, Dharam Singh, through A.C. Hoshiarpuri, Shiv Singh, through Ram Rang and Punjab Mercantile Bank through H.R. Mahajan, for the Appellant;

Judgement

Tek Chand, J.—These are two cases involving common questions and may be disposed of by one order (L. M. 42 and L. M. 85 of 1962).

On 12th September, 1958, I allowed the claim of Punjab Mercantile Bank Ltd., (in liquidation) against Kishan Singh for Rs. 1,52,423-2-0 and passed a preliminary mortgage decree in favour of the bank. This decree was made final on 6th November 1958. Execution was taken out by the official liquidator of the bank on 11th December, 1959. In the meanwhile the respondent Kishan Singh preferred appeals from the preliminary and final decrees to the Letters Patent Bench which were unsuccessful.

On 22nd September, 1961, the official liquidator preferred a petition to this Court under Order 21, Rule 66, praying that a house situated in village Gujjarpur, district Hoshiarpur, besides land measuring about 10 acres in that village, be sold in execution of the decree. On 2nd February, 1962, I passed the following order :

"Let the sale be held of the house in Hoshiarpur on 9th March, 1962, and sale-proclamation be affixed on the premises on 12th February, 1962. Case to come

up on 16th March, 1962. Let the house in Jullundur be attached."

The official liquidator made an application on 28th February, 1962, under Order 21, Rule 72, praying for permission to bid at the auction which was allowed. The Court-auctioneer, Hoshiarpur, sold the house on 9th March, 1962. According to his report, dated 9th March, 1962, the sale was advertised by posters and drum beating. There was also drum beating when the auction was going on. The last bid of Rs. 5,000/- of Shiv Singh contractor, respondent, of Gujjarpur, was accepted and one-fourth of the amount was paid by the auction-purchaser at that very time. There were only two bids recorded. The first bid was of Rs. 2,000/- on behalf of the official liquidator and the second bid was of Rs. 5,000/- of Shiv Singh auction-purchaser.

2. The judgment-debtor through his counsel Mr. Daljit Singh submitted objections u/s 47 151 of the Civil Procedure Code, stating that the house was auctioned on 9th March, 1962, though the date of auction as announced by beat of drum was 16th March, 1962, and that as the prospective bidders were under an erroneous impression, they did not turn up on the date of auction. The house had fetched very low price and that if it was reaucted it would fetch much more. It was, therefore, prayed that the house be reaucted. This petition is L. M. 42 of 1962.

On behalf of the auction-purchaser, the judgment-debtor's objections were opposed and the allegations made therein were dented. The following issues were framed:

(1) Is the house liable to be re-aucted for the reasons stated in the petition of the judgment-debtor ?

(2) Is the present petition maintainable u/s 47?

The auction-purchaser produced five witnesses, including himself. No witnesses were produced by the judgment-debtor.

3. The other connected matter arises out of L. M. 85 of 1962 in Execution 34 of 1960, On behalf of one Dharam Singh an application was made u/s 151 of the CPC on 24th July, 1962, wherein it was stated that the sale of a large building was proclaimed for 16th May, 1962, and that the building was sold on 9th May, 1962. These dates are of course wrong. It was also said that the applicant had learnt that the auctioneer had fixed the value at Rs. 20,000/-, but the sale was concluded in favour of Shiv Singh for Rs. 5,000/-.

The statutory provisions, it was alleged, for the sale of immovable property, had been ignored. The applicant offered to purchase the property for Rs. 15,000/-. An application was made by Dharam Singh on 10th September, 1962, stating that he had offered to pay Rs. 20,000/- for the house in dispute and that he had been bringing this sum in Court since the date when issues were framed in order to show his bona fides and that he had also brought Rs. 20,000/- on that date, in three bank drafts of the value of Rs. 5,000/-, Rs. 5,000/- and Rs. 2,100/- totalling Rs. 12,100/-. He had also brought a sum of Rs. 7,900/- in cash He

prayed that the amount of Rs. 20,000/- be got deposited in this Court. I passed an order permitting the amount to be deposited in this Court till orders are passed in the case and objections disposed of finally.

The application of Dharam Singh was opposed by the auction-purchaser and the preliminary objection raised by him was that the applicant Dharam Singh had no locus standi and that it was a collusive application to support the objections of the judgment-debtor who was his near relation. The allegation that the date of auction announced by beat of drum was 16th March, 1962, and the sale was conducted on 9th March, 1962, was denied, and it was stated that the sale had in fact been conducted on 9th March, 1962. It was alleged that a number of persons were present at the spot but besides the representative of the official liquidator and the auction-purchaser himself no other person bid. It was also alleged that Dharam Singh was personally present at the auction and did not make any bid. I framed the following issue in L. M. 85 of 1962 :

"Has the applicant a locus standi to bring the application?"

On 31st August, 1962, this case was ordered to come up along with L. M. 42 of 1962, on 7th September, 1962.

4. in this case the main contention of the learned counsel for the auction-purchaser is that Dharam Singh has no locus standi to present the application and such an application is barred by limitation allowed for making applications under Order 2r, Rule 90, by Article 166 of the Limitation Act. Before dealing with this aspect of the case, I may now turn to the evidence recorded in the connected case, L. M. 42 of 1962.

5. The first witness examined on behalf of the auction-purchaser in L. M. 42/1962 was Shri Ram Rattan, Court-auctioneer of Hoshiarpur. He stated that bills were distributed at his instance and he proved his report on the auction to which reference has already been made by me. He was allowed to be cross-examined by Mr. Amar Chand though Mr. Ram Rang had raised an objection to the locus standi of Dharam Singh. The witness deposed that the boundaries of the property had been given in the proclamation but not the dimensions or the value of the house. He stated that the house auctioned is two storeyed and 100 persons watched the auction. He did not find from Dyal Chand Bedi A. P. W. 2 whether the bills had been distributed in the neighbouring villages. A. P. W. 2 is Bawa Dayal Chand who conducted the proclamation of the auction. He said that Sadhu Ram clerk of the Court-auctioneer was with him and he made the proclamation of sale and pasted the bills and submitted his report. There were 100 or 150 people present at the auction.

In cross-examination he said that he distributed bills in 7 or 8 villages, but could not recall to his mind the names of those villages. He valued the house at Rs. 25,000/- or Rs. 30,000/-. In his view it was in a dilapidated condition. A. P. W. 3 is Chanan Singh Sarpanch of the village who stated that he was present at the time of the sale and Dharam Singh was also there, in cross-examination he

admitted that Shiv Singh was his collateral and the village is of proprietors of Jats of Man Got. Regarding the dimensions of the house he stated it is 35 cubits long and in width it is 25 feet. It is a double storeyed house-built sixty years ago. A. P. W. 4 is Gopal Dass Behal, general attorney of the official liquidator. He was present at the auction sale which had been duly proclaimed. He bid on behalf of the official liquidator and signed the Court-auctioneer's report Exhibit R. W. 1/1.

He admitted that in the bills which were circulated neither the area nor the approximate value of the house had been stated. The built-up area, according to him, is of approximately three kanals and there are 16 to 18 rooms. The house is two-and-a-half storeyed. According to him the length and breadth of the house may be 150 feet and 100 feet respectively. He said that he reported to the official liquidator that the price fetched was low. According to his estimate the value of the house cannot be less than Rs. 50,000/-. He noticed that there was a clique in the village to keep the price low and no other person bid for it. A. P. W. 5 is Shiv Singh, auction-purchaser himself, He stated that the drum was beaten and the bills had been affixed several days earlier and about 100 people were present at the spot including Dharam Singh. He then said that he asked Pharam Singh to bid especially when he was closely related to the judgment-debtor and the latter told him that he would rather purchase land with the money as that would yield income in preference to the house. There were no other bidders who were interested in the house property. In cross-examination he said that he had purchased the house by mortgaging his agricultural land.

To the question, whether he got a written agreement in favour of Kishan Singh wherein he agreed to resell the same house to Kishan Singh's son on payment of an additional sum of Rs. 1,100/-, the answer was a flat denial. He soon after admitted that on the persuasion of the Panchayats of two or three villages he agreed to resell this house to Kishan Singh's son and an agreement was in fact got scribed by Ram "Rakha a petition writer. He also admitted that he had agreed to accept Rs. 1,100/- in excess of the actual price of the property bid by him. This agreement was arrived at after Dharam Singh had moved this Court. The reason stated by him is that Dharam Singh had said to him that the family would lose face if he kept the house. Kishan Singh judgment-debtor had agreed not to press his objections. He stated that this house had 16 or 17 rooms. After the statement of his client had been recorded on 7th September, 1962, Shri Ram Rang closed his evidence and the case was then adjourned to 10th September, 1962.

6. On 10th September, 1962, Shri Daljit Singh stated that he did not want to lead any evidence as his client did not wish to press his objections. The official liquidator did not lead any evidence either.

7. Arguments were addressed by the counsel covering L. M. 42 of 1962 as also L. M. 85 of 1962. The position taken up on behalf of the official liquidator, the decree-holder, is that the price was deliberately kept low in consequence of a conspiracy and by an arrangement no one present, other than Shiv Singh, was

willing to bid at the auction. There is no "convincing proof on the record that sufficient publicity was given. My attention has also been drawn to certain irregularities which have been committed. One of them is that the sale was ordered by this Court to be held in Hoshiarpur, but it was actually held in the village. I cannot say if this is a serious irregularity, as Hoshiarpur appears to have been written under a misapprehension and the sale was intended to take place in the village which is in Hoshiarpur district but at a distance of about 15 miles away from Hoshiarpur town.

It was stated that no encumbrance was mentioned and the decree-holder had not satisfied himself that no encumbrance existed. It was stated at the bar that there was an encumbrancer to whom the house had been mortgaged and he was agitating his claim in a subordinate Court at Hoshiarpur, but apart from this allegation no proof has been led.

The next irregularity which has been alleged was that there was no indication whatever of the approximate value of the property given either in the application under Order 21, Rule 66, or in the bills which were distributed. Even the area of the property was not given. My attention was drawn to the case of Dhani Ram v. Ganpat Rai AIR 1935 Lah 390, where a sale was set aside because the proclamation of the sale did not give the proper boundaries and was silent on the question of estimated value of the property, and a fresh sale was ordered after publication of a proper sale-proclamation. At the auction in that case, there were no intending auction-purchasers except the decree-bolder himself and it was considered that this might very possibly have been due to these omissions. It is stated here that there is no proof of wide publicity in this case. It has not been indicated in how many villages, and on which dates, the posters and bills were affixed. The house, no doubt, is an exceptionally large one and the estimated value, according to the witnesses of Shiv Singh himself, has varied from Rs. 25,000/- to Es. 50,000/-. There is sufficient indication on the record that the auction-sale was not genuine and the parties were interested in keeping the price too low. It is strange that for a two-and-a-half storeyed house, which is built on an area of three kanals, according to one witness, and the dimensions of which are 150" x 100" according to another witness, no bidder was forthcoming in the village other than Shiv Singh and he too did not offer more than Rs. 5,000/-. He is, according to his own showing a collateral of the judgment-debtor and the other proprietors of the village are of the same Got.

It is also intriguing that the judgment-debtor, beyond filing an objection petition to the sale, has neither come into the witness-box nor has led any evidence, and it was only during the course of arguments that a statement was made by the judgment-debtor's counsel that he did not desire to press his objections. This conduct does support the theory that the auction was not genuine and the judgment-debtor was willing to let his valuable property be sold for Rs. 5,000/-. This riddle would have remained unsolved for want of explanation had Shiv Singh, during the course of his cross-examination, not admitted the agreement

as between him and the judgment-debtor. He first flatly denied having executed such an agreement but later on admitted that a written agreement had been executed as between him and the judgment-debtor, whereby he had, on receipt of additional Rs. 1,100/- besides the sale price, undertaken to resell the property to the judgment-debtor's son. There is no doubt whatsoever that the house is very valuable as otherwise Dharan Singh would not have offered to deposit Rs. 20,000/- in this Court in proof of his bona fides. There is a decree of Rs. 1,52,423-2-0 against Kishan Singh and the only way he could salvage this was by arranging that at the auction-sale there should be only one bidder offering nominal price. By this arrangement the judgment-debtor stood to gain and Shiv Singh had consented to render his services by accepting a sum of Rs. 1100/- for his pains. Shiv Singh admitted that in order to find money for this house he had to mortgage his land. The official liquidator was not a serious bidder. The fact that nobody else in the village was willing to bid for such a valuable house leads me to the conclusion that out of the consideration for the judgment-debtor and in view of his influence it was arranged that there should only be an external appearance of auction leaving valuable property of the judgment-debtor intact for him. By this arrangement, the decree-holder could not get more than Rs. 5,000/- though the value of the house was six to ten times the price offered at the auction. This is a case in which I feel that a sharp practice, as a result of a well-planned fraud, has been practised on the Court by the persons concerned.

8. It was argued on behalf of the auction-purchaser that the limitation as provided by Article 166 of the Limitation Act had expired and, therefore, even if fraud had been successfully perpetrated, the auction-purchaser was entitled to the property purchased by him. It is a well settled proposition that in case the fraud is proved, the length of time ought not upon principles of eternal justice, be admitted to refuse relief, (*vide* Bulli Coal Mining Co. v. Osborae 1899 A. C. 331 (363). *Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari*,

It was said in *Vane v. Vane* (1873) 8 Ch. A. 383, that those who fraudulently appropriate the property of others should be assured that no time will secure them the fruits of their dishonesty. A party who wrongfully conceals facts cannot be allowed to take advantage of his own wrong by setting up the law of limitation. In this case, there has been a fraud on the Court and on the decree-holder. It would, therefore, be monstrous to hold that a Court, upon which such fraud has been committed, is nevertheless bound to confirm the sale (*vide* *Ramayyar v. Ramayyar* ILR Mad 356 at p. 353.)

9. The next question is whether this Court possesses inherent powers in the exercise of which it can set aside the sale on grounds of fraud or sharp practices perpetrated upon it.

10. The power of vacating judgments entered by mistake or relieving against judgments procured by fraud, are among the several inherent powers of a Court. These inherent powers are not conferred on the Court by the statute but they are necessary to ordinary and efficient exercise of jurisdiction. It is a protective

power necessary to the existence and due functioning by the Courts and to the due administration of justice. These powers are necessary attributes and concomitants of judicial tribunals. According to Bauvier, inherent power is "an authority possessed without its being derived from any other. A right, ability, or faculty of doing a thing without receiving that right, ability, or faculty from another". It is not possible for the Legislature to anticipate all the complex situations which may arise in consequence of the law enacted. The Legislature cannot anticipate and provide against the infinite inconvenience which may arise in future. Sir Barnes Peacock, C. J., in *Hurro Chunder Roy v. Shoorodhonee-Debia* 9 SWR 402, cited with approval the following remarks from Domat's Civil Law -

"Since laws are general rules they cannot regulate the time to come so as to make express provision against all inconveniences, which are infinite in number, and so that their dispositions shall express all the cases that may possibly happen. It is the duty of a law-giver to foresee only the most natural and ordinary events, and to form his dispositions in such a manner as that, without entering into the detail of singular cases, he may establish rules common to them all; and next, it is the duty of the Judges to apply the laws, not only to what appears to be regulated by their express dispositions, but to all cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law, or within the consequences that may be gathered from it." (p. 406).

In the words of Mahmood, J., in *Narsingh Dass v. Mangal Dubey* ILR All 163 (FB) at p. 172 -

"I may, therefore, at the outset state that, according to my view of the rules of construction applicable to statutes like the Civil Procedure Code, the Courts are not. to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by the law."

In *Manohar Lal v. Jai Narain* AIR 1920 Lah 436, a Division Bench consisting of Shadi Lal and Martineau, JJ., made observations to the effect that even when the old Civil Code which did not contain Section 151 was in force, the Code was not exhaustive and that the Court possessed inherent power to act *ex debito justitiae* in order to do that real and substantial justice for the administration of which alone Courts exist. This principle now finds support in Section 151 of the Code of Civil Procedure.

Reliance was placed on *Hukam Chand Kamlaaand Singh* ILR Cal 927. There Wood-roofe, J., said -

"..... firstly, that the Code is not exhaustive and, secondly, that in matters with which it does not deal the Court will exercise an inherent jurisdiction to do that justice between the parties which is warranted under the circumstances and which the necessities of the case require", (p. 932)

In *Durga Dihal Dass v. Anoraji* ILR All 29, Blair, J., thought that the Code was not exhaustive and there are cases which are not provided for in the Code and the learned Judge declined to believe that those are cases where a High Court must hold its hands and allow obvious injustice to be done. The above observations have been adopted in later decisions, vide *Bhagat Singh Bugga Vs. Dewan Jagbir Sawhney*, .

11. In *Kendall v. Hamilton* (1879) AC 504 at p. 525. Lord Penzance, in a celebrated passage, observed -

"Procedure is but the machinery of law after all -- the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating it is committed to obstruct and even extinguish legal rights and is thus made to govern where it ought to subserve."

These observations have been cited with approval in a number of decisions in this country (See, *inter alia*, *Hori Lal v. Mimman Kunwar* ILR All 549 and *Kishan Lal v. Ram Chandra* ILR (1944) All 338 .

12. As to the duties of the Court, Cairns, L. C., in *Rodger v. Comptoir d'Escompte de Paris* (1871) 3 PC 465 , said, --

"One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors, and when the expression "act of the Court" is used, it does not mean merely the act of the primary Court or of any intermediate Court of appeal, but the act of the Court as a whole, from the lowest Court which entertains jurisdiction over the matter up to the highest Court which finally disposes of the case."

These observations were reiterated by the Privy Council in a later case, *Jai Eerham v. Kedar Nath* AIR 1922 PC 269 . It is based upon the principle *actus curie neminem gravabit*, (an act of the Court will hurt no person). A process of the Court may be abused either by an error of the Court itself or its officers, or even as a result of misrepresentation by, or fraud on, the party.

13. It was held by a Division Bench in *P.V. Raghavachariar*, by his authorised Agent, *P.R. Srinivasan Vs. Murugesu Mudali and Others*,), that a Court has inherent power to refuse to confirm an auction-sale held under its order if it is satisfied that it has been misled either in giving leave to bid to the decree holder or in fixing the reserve price. Where a sale has taken place under an order of the Court and there has been a false representation or undue concealment in the conditions or particulars of the property, the sale will be set aside (vide *Kerr on Fraud*, 7th Ed. p. 538).

In an earlier Madras case, *Subbaji Rau v. Srinivasa Rau* ILR Mad 264, the purchaser at a sale by public auction did, by the exercise of fraud and collusion with the agent of the execution-creditor, succeed in becoming the purchaser on a depreciated value. There was no material irregularity in publishing or conducting the sale. It was held that the Court, which ordered the sale, had jurisdiction to

refuse to confirm the sale on the ground of the fraud practised by the agent of the execution-creditor and the purchaser.

14. As a result of collusion between the judgment-debtor and the auction-purchaser, in the instant case, a fraud has been practised in order to gain an unfair advantage. It would have been appropriate if the official liquidator had taken early steps to expose the fraud and to get the sale, which had been tainted, set aside. This fraud was unearthed as a result of the application made by Dharam Singh (L. M. 85 of 1962).

15. Shri Ram Rang, counsel for the auction-purchaser, has vehemently urged that Dharam Singh has no locus standi to move this Court and, therefore, any disclosure now discovered on account of the statement of Shiv Singh during the course of his cross-examination by the counsel of Dharam Singh should not be taken into consideration even though it may reveal a fraud on the Court. It was argued that the Court should rule out that part of the admission of Shiv Singh which was brought out during the course of his cross-examination by Shri Amar Chand, counsel for Dharam Singh.

The effect of this submission comes to this: that the Court would not have discovered this fraud had Shiv Singh not admitted in the course of his cross-examination that there was an arrangement to purchase this property with a view to resell it to the judgment-debtor's son by making a profit of Rs. 1,100/-. If this portion from the statement of Shiv Singh is excluded having been recorded during the cross-examination by Dharam Singh's counsel who had no locus standi, then the collusion would remain undisclosed and it should be treated as such and, therefore, the auction-sale in favour of Shiv Singh be confirmed, especially when the judgment-debtor's counsel while the arguments were proceeding had expressed his desire to withdraw his objection petition. Emphasis was said on the fact that when the judgment-debtor and the auction-purchaser were agreeable to the confirmation of the auction-sale and the decree-holder, the official liquidator, in this case, had not moved this Court to cancel the sale, even if this Court feels satisfied that this has led to an abuse of the process of the Court, it must stay its hands and not move in the matter suo motu.

I cannot induce myself to be a party to proceedings whereby the real purpose of the law --to secure the ends of justice -- may be defeated by an underhand arrangement between two parties, on account of the inaction of the third. The official liquidator occupies the position of trust and represents the creditors whose interests in this case would stand to suffer grievously if the Court stays its hands and declines to render substantial justice for which alone it exists. It is true that occasions arise when a positive provision of law, which has to be given effect to, stands in the way of achieving that object, I am not aware of any such provision relevant to those proceedings, which I must follow, even if it may defeat the ends of justice.

It is rightly argued that Section 47 is not applicable to the facts of this case as

Dharam Singh is not a party to the decree and cannot be said to be the representative of the judgment-debtor. As to the applicability of the provisions of Order 21, Rule 90, it is said that Dharam Singh is not a person who had any interest which can be said to be affected by the sale, in terms of that provision. He certainly had no interest in the property sought to be sold. Such a person must be one who has an existing or present interest which is affected by the sale of the property, (vide *Basanta Kumar Roy Vs. Charu Chandra Pal and Others*, which Dharam Singh admittedly does not possess. It was also argued that the petition was barred by limitation as provided by Article 166 of the Limitation Act. It was further contended that if Dharam Singh has no rights either under Order 21, Rule 90, or u/s 47, Code of Civil Procedure, he cannot interfere with the auction-sale by moving this Court u/s 151,

There is no doubt, force in this argument, and the logical result of this argument is that Dharam Singh cannot assail the validity of the auction-sale. But Dharam Singh comes into the picture only to the extent that he is instrumental in revealing a fraud on the Court. Even if Dharam Singh has no locus standi, the Court has an ample reserve of inherent powers to satisfy itself suo motu that its process has been abused. Because the source of information happens to be a person who has no locus standi, the Court cannot close its eyes and decline to exercise its inherent powers to set aside the sale on being satisfied that as a result of conspiracy a fraud has been perpetrated and its process has been abused.

16. For reasons stated above, even on being satisfied that Dharam Singh has no locus standi to move this Court and that his application, L. M. 85 of 1962, cannot succeed, I am of the view that there is sufficient material on the record to justify the setting aside of the auction sale suo motu. I would, therefore set aside the auction-sale despite the fact that, on judgment-debtor's not pressing his objections, his application L. M. 42 of 1962, must also fail. The result is, that, though both the applications L. M. 42 of 1962 and L. M. 85 of 1962, are dismissed, the auction-sale cannot be confirmed. I, therefore, order that the house of the judgment-debtor, Kishan Singh, situated at Gujjarpur village in Hoshiarpur district be re-auctioned after complying with the requirements of Order 21, Rule 66. The official liquidator shall make a fresh application giving all the necessary details with respect to location, area, dimension and value of the property and the auction-sale is to be duly advertised and proclaimed. Dharam Singh has deposited Rs. 20,000/- in this Court in token of his bona fides as a bidder. This sum shall remain in the Court and will be treated as his first bid at the re-auction. In case the house is auctioned in favour of a person whose bid is higher than that of Dharam Singh, the latter will be entitled to the refund of the amount deposited by him. The official Liquidator shall make an application under Order 21, Rule 66, within three weeks.

17. Case to come up on 19th October, 1962. There will be no order as to costs.