(1975) 01 DEL CK 0010

In the Delhi High Court

Case No : Execution Petition No''s. 63 of 1971, 53 and 54 of 1972 and 34 of 1973

Ramesh Chander Jain APPELLANT

Vs

Manohar Lal Jain RESPONDENT

Date of Decision : 24-01-1975

Acts Referred:

Citation : (1975) ILR Delhi 713

Hon'ble Judges : S.S. Chadha, J

Bench : Single Bench

Advocate : I.C. Jain, N.R. Suri, Yogesh Sharma and S.R. Sharma, for the Appellant;

Judgement

S.S. Chadha, J.

(1) These four excution petitions, namely. Ex. No. 53 of 1972 (Ramesh Chander Jain v. Manohar Lal Jain) Ex. No. 54 of 1972 {Smt. Manju Jain v. Manohar Lal Jain) Ext. No. 63 of 1971 (Sita Ram Sharma v. Manohar Lal lain) and Ext. No. 34 of 1973 (Yogesh Sharma and others v. Devi Dayal Jain and. others) arc of four rival decree-holders claiming execution of their decrees against the assets of Manohar Lal Jain (since deceased) by payment of the surplus of the amount realised in execution of the mortgage decree in suit No. 157 of 1968.

(2) In the suit, being suit No. 157 of 1968 (Kishan Mohan Kapoor and others v. Manohar Lal Jam) a decree was granted by this Court on 22-1-1969, for Realizing the loan amount by the sale of the mortgaged property bearing No. 89 to 94/4, Dariba Kalan, Delhi (hereinafter referred to as the mortgaged property). The final mortgage decree by sale of the mortgaged property for recovery of Rs. 53.791.67 and interest on Rs. 50.000.00 at the rate of 7 per cent per annum for the date of the suit till realisation with costs of the suit was passed in favor of Shri Kishan Mohan Kapoor and others against Judgment-debtor, Shri Manohar Lal Jain. It was ordered in that decree that if the judgment- debtor deposits in the High Court by February 16, 1970, the decretal amount, the decree shall be

deemed to be satisfied. The judgment- debtor Shri Manohar Lal Jain committed default in the payment of the decretal amount by February 16, 1970 and as such, the decree- holders moved an application dated March 25, 1970 being Execution No. 17 of 1970 in this Court, for sale of mortgaged property. In pursuance of the orders dated May 26, 1970 passed in execution Case No. 17 of 1970, the mortgaged property being property No. 89 to 94/4, Dariba Kalan, Delhi was put to auction on Augast 23, 1971. The highest bid was for Rs. 95,000.00 . On August 26, 1971, a sum of Rs. 23,750.00 was deposited by the auction-purchaser Gulzari Lal Jain with the Court-Auctioneer, who in turn deposited it with the Administrative Sub Judge, Delhi. The balance of the auction money of Rs. 71.250.00 was deposited with the Administrative sub Judge, Delhi on 31-8-1971. Out of the amount of Rs. 95,000.00 , the decree in suit No. 157 of 1968 (Execution case No. 17 of 1970) has been satisfied by payment of a sum of Rs. 78,662.92. Rs. 2.500.00 is payable for court auction out of which 80 per cent has been paid to the Court-auctioneer and balance of 20 per cent deposited to the account of the Government. The balance of Rs. 13,837.08 is lying with the Aministrative Sub Judge, Delhi. All the four rival decree-holders are claiming this amount lying with the Administrative Sub Judge, Delhi. It would be necessary to give facts relating to the decrees and the execution petition of the rival decree-holders.

(3) So far as execution Cases Nos. 53 of 1972 and 54 of 1972 are concerned, the relevant dates are the same. In the case of Ramesh Chander Jain, however, the decree is for Rs. 5,206.25 paise, plus costs and in the case of Smt. Manju Jain the decree is for Rs. 5,225.25 plus costs. Both these decrees were passed by the Subordinate Judge, Delhi on 31-8-1970. On September 7, 1970, applications for execution were filed praying for attachment of property No. 89 to 95/4 situate at Dariba Kalan, Delhi. On September 8, 1970 the Subordinate Judge passed orders for attachment of the said property. On September 18, 1970 the attachment was effected by court-bailiff at the spot by pasting the courts notice attaching the said property and by beat of drum. Thereafter, applications were made under Order 21 Rule 66 of the CPC for drawing proclamation of sale. Shri Kishan Mohan Kapoor and others filed objections that the said property which was sought to be sold by these decree-holders was already under mortgage with them and a decree had been granted by the High Court of Delhi. On December 4, 1970, however, the objectors were not present to support the objections. On the request of the decree holders the Subordinate Judge directed that the proclamation of the sale of the said property be issued subject to the decretal amount in suit No. 157 of 1968 (Kishan Mohan Kapoor and others v. Manohar Lal Jain) and directed the sale of the property. The auction could not take place as Manohar Lal Jain died on 24-1-1971 and proceedings were initiated for bringing on. record his legal representatives. It is not necessary to mention other facts relating to these two executions, but after the property was auctioned on 23-8-1971, in executions, of the decree in Execution Case No. 17 of 1970, on the request of decree-holders, the Subordinate Judge directed attachment of the

excess amount, if any, after satisfying the decree in the case of (Kishan Mohan Kapoor v. Manohar Lal Jain) to the extent of Rs. 6,225,50 in case of Ramesh Chander Jain and to the extent of Rs. 6,247.25 in case of Smt. Manju Jain. This attachment was served on the Administrative Sub-Judge on September 23, 1971. On July 11, 1972 the decree-holders moved, two applications dated July 6, 1972 in this Court for transfer of the executions pending in the Subordinate Court and for payment of the amount to the two decree-holders and in case the left-over amount is not sufficient to fully satisfy the decrees of Shri Ramesh Chander Jain and Smt. Manju Jain, then the two decree-holders be paid reteably. These applications seeking transfer of the execution applications pending in the court of Subordinae Judge to enable the decree-holders to have rateable distribution of the amount recovered in Execution Case No. 17 of 1970, came up for orders before this Court on September 25, 1973, when Chawla, J directed that the file of the execution, pending Before Shri P. K. Jain, Subordinate Judge, be summoned and the case be listed for making further orders as may then be necessary. These two applications have been registered in this court as Execution No. 53 of 1972 and Ex. No. 54 of 1972. A decree in suit No. 499 of 1970 (Sita Ram Sharma v. Manohar Lal Jain) was granted on 19th October, 1970 by the Subordinate Judge, Delhi for the recovery of Rs. 9,675.00 with interest at the rate of 6 per cent per annum on Rs. 7,500.00 from September 8. 1970 till realisation plus costs. On September 10, 1971, Shri Sita Ram Sharma filed an execution applications before the Subordinate Judge praying for execution of the decree by attachment and sale and by joining in the rateable distribution of the amount to be recovered in the execution of the decree in the High Court in Execution Case No. 17 of 1970. Under the orders of the District Judge dated 25-9-1971 this execution application was transferred to the High Court for rateable distribution and was registered as execution case No. 63 of 1971. Chawla, J. on May 22, 1972, directed that the amount lying in deposit in Execution No. 17 of 1970, which may be available after the decree in that case is satisfied will be attached in execution of the decree in Execution Case No. 63 of 1971.

(4) A decree in Suit No. 910 of 1971 was granted in favor of Yogesh Sharma and others against Devi Dayal and others (the legal representatives of late Manohar Lal Jain as representing the Estate) by the Subordinate Judge on 9-1-1973 for Rs. 9,975.00 plus costs. On February 15, 1973 an execution application was filed by Shri Yogesh Sharma and others for execution of the decree by attachment and sale of property bearing house No. 4738, 23 Ansari Road, Delhi and by transfer of the decree for execution to this court, as permitted by section 39(d) of the CPC in view of the fact that Execution Case No. 17 of 1970 was pending in this Court. This execution application was transferred under the orders of the Subordinate Judge dated 23-3-1973 to the High Court for rateable distribution in execution case No. 17 of 1970 and was registered as Execution Case No. 34 of 1973. Chawla, J. on October 1, 1973 directed that if there be any amount: lying with this Court in excess of the decretal amount in Execution No. 17 of 1970, the

excess amount will remain attached in execution of the decree in Execution Case No. 34 of 1973.

(5) The decree-holders in. execution case Nos. 53 of 1972 and 54 of 1972 are represented by Mr. 1. C. Jain, Advocate. The arguments of Mr. Jain are that the assets are held by this Court, that the decrees obtained by Shri Kishan Mohan Kapoor and others and by his clients are decrees for the payment of money, and that such decrees have been obtained against the same judgment-debtor, that the decree-holders for rateable distribution have applied for execution to the court by which the assets are held and that such applications have been made before the receipt of assets by the court. ft is not disputed that the assets were received partly on August 26, 1971 amounting to Rs. 23.750.00 and the remaining Rs. 71,250.00 on August 31, 1971. Mr. Jain submits that since he had moved the applications for execution on September 7, 1970, though before the court which passed the decrees and had obtained the attachment of the mortgaged property, this application is an application within the meaning of 1st part of section 73(1) of the Code of Civil Procedure. He submits that where the same property of the judgment-debtor has been attached by both the superior and inferior courts and the property or its proceeds are received or realised by the superior court, he is entitled to rateable distribution of such property or proceeds, although he had not applied for execution to such superior court. He has subsequently got his execution petitions transferred to the superior court and the relevant date is the date of the execution applications, namely, September 7, 1970, which is before the receipt of such assets. In support of his contention he has relied on Sardarni Gurdial Kaur v. S. Satindar Singh and Another, AIR 1956 P&H 412 (1) and submits that the words "application to the court for execution" indicate that execution application is to be made to the appropriate court which passed the decree. Section 73 merely sets out the pre-requisite conditions before rateable distribution can be allowed. It does not in terms say that application for execution has to be made to the court where the assets are lying. He has also relied on Laxmi Narain and Others Vs. Firm Ram Kumar Suraj Bux and Others, , in which it is stated:

"THEconsensus of judicial opinion is that where section 63 is applicable it is not necessary for the decree-holder claiming rateable distribution to apply for execution to the court holding the assets. It is sufficient if he has made an application for execution to the appropriate court, that is, to the court which passed the decree or if he gets. his decree transferred for execution to another court, to. the transferee court........."

REFERENCEis also made for the same proposition to Bhola Sahu Vs. Chameli Devi and Another, , Thanmull Sowcar and Another Vs. K. Krishnaswami Reddiar, ; Dhirendra Rao Krishnarao Gunzikar v, Virbhadrappa G. Hosmani, AIR 1935 Bom 176 and Balmokund v. Rain Saran Das and Others, AIR 1936 Lah 519.

(6) There is no doubt that Shri Ramesh Chander Jain and Smt. Manju Jain had made applications for execution on September 7, 1970 prior to the dates of the

receipt of the assets, namely, August 26, 1971 and August 31, 1971 and that they arc entitled to rateable distribution only if the case was governed by the 1st part of section 73(1) of the Code of Civil Procedure. But in this case the mortgage decree was passed by the Delhi High Court against Shri Manohar Lal Jain and the property was put to auction in execution of the mortgage decree and as such proviso (c) to section 73 (of the CPC is attracted :

"73.(1) Where assets are held by a Court and more persons. than one have, before the receipt of such assets, made application to the Court for execution of decrees for the payment of money passed against the same judgmentdebtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be.- rateably distributed among all such persons :

Provided as follows :- (a) ... ... (b) ... ...

(C)where any immovable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied-

first, in defraying the expenses of the sale; secondly, in discharging the amount due under the decree; thirdly, in discharging the interest: and principal monies due on subsequent incumbrances (if any) ; and

Fourthly, among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof."

(7) Mr. N. R. Shri, who is appearing for the two other decree-holders submits that section 73(1) is subject to proviso (c), which lays down that where any immovable property is sold in execution of a decree ordering its sale for the discharge of any incuanbrance thereon, the proceeds of sale shall be applied, fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have; prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof. According to him, in the case of a sale in enforcement of a mortgage decree the point of time for consideration is the date of the sale of the property, namely August 23, 1971. There is no doubt regarding relevant date, but the dispute is to the further contention of Mr. Suri that the decree-holders must have applied to the court which passed the decree ordering such sale for execution of such decrees, and as in this case the mortgage decree was being executed by this court and no application having been filed, by Shri Ramesh Chander Jain and Smt. Manju Jain before August 23, 1971 in this court, they are not entitled to the rateable distribution. In support of his contention Mr. Suri has relied on Jamnadas Parbhudas and others v. Bai Soonabm and others, A. 1. R. 1932 Bom 622. The main question for consideration in that case was whether in respect of the surplus sale proceeds remaining after satisfaction of the mortgage decree, the

money decree-holders could claim rateable distribution even though their applications for executions were not filed prior to those sales, but filed prior to the realisation of the sale proceeds. It was contended by the applicants in that case that on a proper consideration of section 73, the time before which applications for rateable distribution or execution could have been made to the court, in order that the applicants might share in the surplus sale proceeds, is the time when the court held the sale of respective lots. The respondents, in that case, other than- respondent No. 9 contended that the material time is the time when the sale proceeds are actually received by the Commissioner and not the time when the sale is first held. Kania J. held that the relevant time in case of assets being received in execution of a money decree is the time of actual receipt of the meney, but when the sale is in execution of a mortgage decree, the point of time for consideration is the date of sale of the property. In that case, however, the decree-holder had moved an application for execution before the sale and also in the court which passed the mortgage decree for sale, and on that ground Mr. Suri contends that if such an application had not been made, that decree-holder would not have been entitled to rateable distribution.

(8) Mr. Suri has also relied on Dattatraya Durgappa Ganeshbhat Lingbhat Anant Krishnappa Bilgi v. Pundlik Narayan Pandit, 108 I. C. 992(8) for the same proposition and referred to :

"BUTclause l(c) of section 73 only refers to cases of Immovable property being sold in execution of a decree ordering the sale for the discharge of an incumbrance thereon. It is only if there is a balance, after discharging the expenses and the incumbrances, that the balance can be rateably distributed amongst those creditors who have prior to the sale of the property, applied to the Court. But where property has been realised in execution of a decree other than a decree referred to in section 73(1)

(C)then the important date is the date of the receipt of the assets by the Court, and the only question is whether, when a decree has been sent to the Collector under the rules for execution and when the Collector has sold the property and received the sale-proceeds, it can be said that the assets arc held by the Court and have been received by it."

NONEof these two authorities throw any light on the interpretation of proviso (c) to section 73(1), except the crucial dated in 73(1) and proviso (c). The words requiring interpretation arc "applied to the court which passed the decree ordering such sale for execution of such decrees".

(9) A reading of proviso (c) shows that the decree-holders who are claiming rateable distribution in the balance of sale proceeds remaining after the discharge of the mortgage debt, or any other encumbrance, should have applied to the court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof. The proviso (c) does not say that the money decree-holder should have applied to the court which passed the

mortgage decree for sale, and Therefore, it is not open to add words to proviso (c). The money decree-holder, who is claiming rateable distribution may have made an application to the court which passed his decree and, thereafter obtained orders for transfer of the execution application to the court which passed the mortgage decree, prior to the sale of that property. The mortgage property could have been sold in execution of these decrees. In the alternative, the money decree-holder may have applied to the court which passed his decree, and obtained attachment of the mortgaged property. After the attachment had been effected, the money decree- holder could apply to the court which passed his decree for orders for sale of the mortgaged property for execution of his decree, subject to the mortgage charge. If all these steps had been taken prior to the sale of the mortgaged property by the court which passed the mortgage decree, then, in my opinion, the money decree-holder is entitled to reteable distribution under clause fourthly of proviso (c). The word ''decrees'' used in proviso (c) further indicates that there may be several money decree-holders, who, in turn, have applied to the respective courts which passed their money decrees ordering sale for execution of their decrees and have not obtained satisfaction thereof. Each of these money decree-holders would be entitled to rateable distribution, if they had obtained those orders prior to the sale of the mortgage property. In the present case both the decree- holders Shri Ramesh Chander Jain and Smt. Manju Jain made applications for execution on September 7, 1970, and obtained orders for attachement of the mortgaged property. On September 18, 1970 the attachment was effected by the court bailiff. Thereafter, an application u/s 21 Rule 66 of the Code Civil Procedure for drawing proclamation of sale was made. On December 4, 1970 the Subordinate Judge directed that proclamation of sale regarding the mortgaged property be issued subject to the decretal amount in suit No. 157 of 1968 (Kishun Mohan Kapoor and others v. Manohar Lal Jain) and ordered that the property be sold in execution of the money decree subject to the said mortgage decree. There is, Therefore, no force in the contention of Mr. Suri that as the mortgage decree was being executed by this court and no application having been filed by Shri Ramesh Chander Jain and Smt. Manju Jain before August 23, 1970, in this court, they are not entitled to rateable distribution.

(10) The mortgage decree has already been satisfied by payment of a sum of Rs. 78,662.92 and Rs. 2.500.00 is payable for court auction. The balance of Rs. 13,837.08 is lying with the Administrative Subordinate Judge, Delhi. The two decree-holders, namely, Shri Sita Ram Sharma and Shri Yogesh Sharma had not made any application prior to the sale of the property and as such are not entitled to the reteable disribution under the said proviso (c) clause fourthly. Shri Ramesh Chander Jain and Smt. Manju Jain are only entitled to the reteable distribution, out of the surplus of Rs. 13,837.08. The decree of Shri Ramesh Chander Jain is for the sum of Rs. 5,206.25 plus costs, i.e. Rs. 1,025.25 totalling Rs. 6,231.50 only. The decree of Smt. Manju Jain is for Rs. 5,225.00 plus costs, i.e. Rs. 1,022.25, totalling Rs. 6,247.25. The amount of Rs. 6,231.50 and Rs.

6,247.25 may be paid to Shri Ramesh Chander Jain and Smt. Manju Jain respectively.

(11) After satisfying the decrees of Shri Ramesh Chander Jain and Smt. Manju Jain, there is a balance of Rs. 1,358.33 paisa. Both Shri Sita Ram Sharma and Shri Yogesh Sharma and others have obtained attachment of the amount. Mr. Suri had relied upon Thakurdas Moti Lal v. Joseph Iskender and Others, 12 I.C. 516(9). In that case the order that was passed was that the attaching creditors ought to share rateably with regard to the amounts which are due to them respectively. I direct that out of the balance of Rs. 1,358.33, these two decree-holders, namely, Sita Ram Sharma and Yogesh Sharma and others, should share rateably with regard to the amounts which are due to them under the two decrees. The decree-holders in execution Case Nos. 34 of 1973 and 63- of 1971 have claimed other reliefs. These two Execution Petitions may proceed in accordance with law.

INview of the facts and circumstances of the case, I leave the parties to bear their own costs of the Executions Petitions so far.

