

(2005) 03 DEL CK 0200
In the Delhi High Court
Case No : E.F.A. (OS) No. 29 of 2004

Shri Pradip Vaid

APPELLANT

Vs

Universal Constructors (Proprietor Badhwar Universal
Contractors (P) Ltd.), Veer Puru Co-op. Group Housing
Society Ltd. and Ajay Kumar Gupta

RESPONDENT

Date of Decision : 07-03-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 58(1), Order 21 Rule 58(5), Order 21 Rule 89, 151

Citation : AIR 2006 Delhi 4 : (2005) 123 DLT 688 : (2005) 82 DRJ 95

Hon'ble Judges : B.A. Khan, J; Anil Kumar, J

Bench : Division Bench

Advocate : Rajat Aneja, for the Appellant; Hima Kohli and Birja Mahapatra, for the Respondent

Final Decision : Dismissed

Judgement

1. This appeal arises from the order dated 29th October, 2004 in E.A. No. 397 of 2004 of Execution Petition No. 116 of 2001 rejecting appellant's objections against the auction and confirmation of sale of the flat No. B-53 (MIG), Puru Apartments, Plot No. 22, Sector 13, Rohini, Delhi.

2. The relevant facts in brief are that the appellant claims to be a member of Veer Puru Co-operative Group Housing Society Ltd, (respondent No. 2) which constructed Puru Apartments on plot No. 22, Sector 13, Rohini, Delhi. Respondent No. 1 was the contractor who constructed the apartments.

3. Disputes arose between respondent No. 1 and respondent No. 2 which were referred to the arbitration by order dated 28th August, 1995 in Suit No. 1679/94. The arbitrator passed award dated 11th December, 2000 for a sum of Rs.11,51,771/- with interest at 18% per annum with effect from 1st November, 1990 up to the date of payment along with cost of Rs.50,000/-. This award became final as no objections were preferred by respondent No. 2. Respondent

No. 1 thereafter filed an Execution Petition in April, 2001 for a sum of Rs.34,68,659/- which had become due and payable to him from respondent No. 2 till the filing of execution petition. Respondent No. 1 sought recovery of amount due to him by sale of the properties of respondent No. 2 which included flat No. B-53 also and in which rights are claimed by the appellant.

4. This flat was attached by an order dated 23rd May, 2001 of the learned Single Judge. After attachment, keys of the flat were deposited in the Registry. On an application for sale of this flat, a Local Commissioner was appointed to sell the flat after drawing proclamation in accordance with law by order dated 23rd March 2004. The auction sale was notified for 25th September, 2004. The order dated 23.3.2004 reads:

This is an application filed by the decree holder praying for an Order for auction sale of the property No. flat No. B-53 (MIG) situated at Plot No. 22, Sector XIII, Rohini, Delhi. This application is not opposed and, Therefore, I deem it appropriate to allow the prayer made in the application. Accordingly, it is ordered that the aforesaid flat shall be sold through auction for satisfaction of the decree. In Order to issue the sale proclamation in respect of the same and to conduct the sale. I appoint Shri Upam anaya Hazarika, Advocate (Tel. 9811039904) as the Court Commissioner, who shall get the sale proclamation issued.

March 23, 2004

Sd/-

(Dr. Mukundakam Sharma)

Judge

5. About two days before the auction sale, the appellant filed objections under order 21 rule 58 read with section 151 of CPC on 23rd September 2004 claiming that he is a member of respondent No. 2, Society and had paid some amounts from 1985 till about 1990 and had also borrowed a loan of Rs.60,000/-. It was alleged by him that though in a draw of lots, this flat was drawn in his name but the Society did not intimate and apprise him about the details of loan, allotment of flat and the manner of payments to be made. The appellant contended that thereafter an Administrator was appointed for the Society who intimated the appellant that his total liability with loan amount and penal interest was Rs.7,06,455/-. On this, he deposited a sum of Rs.4,19,559/- but possession was not given to him and has been delayed on one pretext or other according to him. He served a legal notice dated 12th February, 2004 on respondent No. 2 in this regard and he came to know later that the flat No. B-53 which was allegedly drawn in his favor in 1988 in a draw of lots, was to be sold in an auction for satisfaction of a decree obtained by respondent No. 1.

6. The objections filed by the appellant being E.A. No. 397/2004 came for consideration on 24th September, 2004 when the learned Single Judge issued notice returnable on 26th October, 2004 and also observed that the sale will be

permitted to go on but will be subject to the result of the appellant's application.

7. The auction sale was held on 25th September, 2004 and R-3 offered the highest bid of Rs.9,42,000/- which was deposited by him.

8. Appellant's objections were thereafter rejected by the executing court vide impugned order dated 29.10.2004 on account of non-explanation of delay by the appellant in enforcing his claim from 1999 till 2004 and on appellant/objector's failure to deposit the amount equivalent to highest bid amount for not confirming the auction sale in terms of Order 2 Rule 89. The auction sale was confirmed on 8th November 2004.

9. Appellant filed the present appeal on 3rd November, 2004 and on 9th November 2004, an order of status quo was passed in this subject to deposit of Rs.6 lakhs by the appellant which amount was deposited by him.

10. The appellant has impugned the order dismissing his objections mainly on the ground that as he had filed objections to the attachment under Order 21 Rule 58, his right, title or interest in the flat was required to be adjudicated upon but instead his objection was rejected under Order 21 Rule 89 for his failure to deposit the amount equivalent to the sale amount. It is submitted that the executing court had rejected his plea on mere surmises and conjectures by ignoring the material on record which comprised of documents showing his vested interest and title in the flat. The executing court had also failed to consider that he had paid a substantial amount of Rs.4,19,559/- and was swayed by extraneous and irrelevant considerations. Learned counsel for appellant supplemented this and contended that Appellant was rendered remedy less as Order 21 Rule 58 did not envisage a separate suit for adjudication of his rights and interest in the flat and once he had produced documents which included his pass-book showing amount paid by him to the respondent No. 2, his share certificate and his correspondence with society up till 1990 and thereafter in 1998-1999 which unequivocally showed that he is a member of the Society and had been allotted said flat bearing No. B-53, the executing Court ought to have adjudicated his claim and ruled on his title to the flat. Ld. counsel also argued that the provisions of Order 21 Rule 89 were inapplicable as the sale was subject to the result of his objections and as such when the sale was not confirmed appellant could not be directed to comply with the requirement of Order 21 Rule 89. He further contended that like all other members who have paid towards cost of land as well as towards construction of their flats to the respondent No. 2, judgment debtor Society, Appellant was ready and willing to pay his share which the Society legally owes to the respondent No. 1 and he cannot be asked to clear the liability of other members, as the liability of the Society is of all the members.

11. The respondent nos. 2 & 3 have contested the appeal contending that the appellant has been set up by the respondent No. 2. It is contended by them that objections against attachment of other two flats of the society were filed earlier through the same counsel who had filed objections on behalf of the appellant.

Appellant is claiming rights in the flat on the basis of 15 year old draw of lots conducted in 1988-89. Objections by the appellant just two days before the auction sale and no proceedings against the society since 1999 reflected apparent collusion between the judgment debtor society and the appellant. An earlier President of respondent No. 2, Shri Yash Pal Vaid is cousin of appellant. It was submitted by the counsel for respondent nos. 2 & 3 that the objections were designedly and unnecessarily delayed as neither any documents between 1999 to 2004 have been filed nor any rational and believable Explanation given for not taking any steps for taking possession from the society after allegedly paying all the demands of the society in 1999. Respondent nos. 2 & 3 also contended that executing court had already passed an order confirming the sale by order dated 8th November, 2004 which order has not been impugned or challenged by the appellant.

12. The primary question that falls for determination is whether Appellant's objection to attachment of the flat which ought to have been considered under Order 21 Rule 58 was wrongly considered under Order 21 Rule 89. The relevant provisions of Order 21 Rule 58 read:-

R. 58 Adjudication of claims to, or objections to attachment of property,-(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained-

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

13. This provision on its plain reading lays down that where any objection is made to the attachment of the property on the ground that such property was not liable to attachment, the court shall proceed to adjudicate upon the claim or objection in accordance with the provisions contained therein. Such adjudication entails determination of all questions relating to title, right or interest in the property to be determined by the executing court and not by a separate suit. The exception to all this is that no claim or objection would be entertained if the property had been already sold or if the objection taken was designedly or unnecessarily delayed.

14. The executing court has rejected the Appellant's objection on the ground that it was designedly and unnecessarily delayed. The court has held:-

The objections are based on a legal notice issued on behalf of the objector/Shri Pradip Vaid on 12th February, 2004 to the Society. The said notice itself states that the last amount paid by the appellant was debited on 31st March, 1999 and

yet the flat was not delivered to him. There is no Explanation in the notice as to why the said notice was sent after a period of 5 years. The application was filed on 23rd September, 2004, a couple of days before the sale was to be conducted. Mr. Aneja, the Learned Counsel for the objector has sought to reply upon the other documents filed on 30th September, 2004.

The claimant/objector according to his counsel paid the entire sum in 1999 and yet kept quiet about the allotment of his flat for a period of 5 years particularly when other allottees acquired their flats.

15. There is no scope for disagreement with this position because Appellant was basing his claim on the draw of lots that had taken place in 1988. Admittedly, he had not taken any worthwhile steps to obtain any allotment order or take over the possession of the flat of the society ever since. Appellant also claims that he had paid the consideration amount in 1998/99. If he was to be trusted on his word, there is no Explanation why he had failed to seek possession of the flat thereafter. In this scenario, it can't be said that the executing court had fallen in any error by holding that his objection was designedly and unnecessarily delayed on which ground it was not entertainable and was rightly held to be so.

16. Once the objection of Appellant was held to be non-entertainable on this ground, there was no obligation cast on the executing court to adjudicate upon the merit of his claim. Such adjudication would have been warranted and required only if the Appellant's objection had survived the conditions of proviso to Rule 58 i.e. Objection being not entertainable if it was designedly or unnecessarily delayed.

17. Looking at it from the other angle, even if Appellant's claim was to be adjudicated upon, it would lead to the same result. Because Appellant's claim on the face of it was so feeble and fragile that even threadbare adjudication would not render the decree obtained by respondent No. 1 incapable of execution. It is not that every type of a claim set up by an objector attracts a full dress adjudication under Rule 58(1). The claim must be such as would render the decree incapable of execution. If the objection is an ipse dixit and does not pose any imminent danger to the execution of the decree, the executing court would not be obliged to undertake a ball by ball adjudication to examine an objector's right which he ought to have otherwise established by an appropriate remedy.

18. The scenario projected by Appellant does not meet this test. He is neither holding any allotment nor any possession. Merely because he had paid some money to Respondent society would not be sufficient to defeat the decree of Respondent No. 1. That may raise a dispute between him and the society for which he may seek redressal by a separate remedy. But it would surely not constitute any bar to the execution of the decree.

19. The appellant has relied on *Anthony Uthup Vs. Kunjavarankutty Hajee and Another*, 2003 (8) SLT 385, *Ashan Devi and Anr. v. Phulwasi Devi and Ors.* *Canara Bank Vs. Gurmukh Singh and Others*, ; *Southern Steelmet and Alloys*

Ltd. Vs. B.M. Steel, Madras, ; AIR 1989 Mad 311, Alamelu Ammal v. Chinnaswamy Reddiar , to contend that his rights in the flat which was auctioned in satisfaction of decree, ought to have been determined by the Executing Court in objections filed by the appellant. The ratio of Anthony's case (supra) is distinguishable as in that case objections were not rejected under Order 21 rule 58 (1) (b). In Ashan Devi's case (supra) even as the Supreme Court had held that the Executing Court was justified in recording evidence and adjudicating claims of third party, it can't be stretched to mean that it was to be done in every case and even those cases which were liable to be rejected under the proviso to Rule 58. Therefore, none of these judgments are of any help to Appellant.

20. We are also not impressed by the submission that Appellant was rendered remedy less in the matter. Because where the objections or claims are not entertained under proviso (a) and (b) to Rule 58 (1), Order 21 Rule 58 (5) provides for a remedy of separate suit.

21. It lastly requires to be noted that the executing court had passed the order of sale on 23.4.2004 and had confirmed it on 8th November 2004. It was only after the sale order that Appellant had filed objections on 23.9.2004 two days before the auction sale was held. He had not challenged any of these orders and if he had, he was to satisfy the requirements of Rule 89 by depositing a sum equal to 5% of the purchase money which option was given to him by the Executing Court and which he had failed to take. It was perhaps in this context that the executing court had asked him to deposit the sale amount. His resistance to deposit had left the executing court with no option but to reject his objection. He was given this option again by this court, which he again failed to take. His plea that he was not obliged to deposit the sale amount under Rule 89 as the sale was made subject to the outcome of the objections is neither here nor there. Because once the sale order was passed and the sale had taken place, his only way out was to take recourse to Rule 89 and he could not do that without satisfying the requirements of this which provided for deposit of the sale amount.

22. In the circumstances, we find no merit in this Appeal which is dismissed. The amount of Rs.6 lakhs deposited pursuant to order dated 9th November, 2004 of this Court shall be returned to Appellant forthwith. Nothing said herein shall in any way influence any consideration and adjudication of remedy that may be sought by him under law.