(2007) 08 P&H CK 0070

In the Punjab And Haryana At Chandigarh

S.L. Chotani APPELLANT

Vs

Bank of India and Others RESPONDENT

Date of Decision : 22-08-2007

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2008) 1 CivCC 711 : (2007) 4 PLR 662 : (2007) 4 RCR(Civil) 728

Hon'ble Judges : Vinod K. Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Vinod K. Sharma, J.—This is an appeal against the order dated 17.8.2002 passed by the learned Civil Judge (Sr. Division), Ambala, and confirmed by the learned Additional District Judge, Ambala, vide which objections filed under Order 21 Rule 90 read with Section 151 of the CPC by the appellant-judgment-debtor against the sale of mortgaged property have been ordered to be dismissed.

2. The Bank of India filed a suit for recovery of Rs. 13,03,163.32 Ps. by enforcing its mortgagee right. The appellant-objector was a guarantor and as security of amount had mortgaged his property as collateral security for repayment of loan amount. On 4.12.1991, the defendant-judgment debtor was given six months'' time to deposit the decretal amount failing which it was ordered that the plaintiff-bank would be at liberty to seek auction for sale of the mortgaged property. As the amount was not paid within the stipulated period, the property was ordered to be auctioned.

3. The appellant herein filed objections under Order 21 Rule 90 of the CPC for setting aside the sale of the property on number of grounds i.e. auction notice was not properly issued; location of the property was wrongly shown in execution proceedings, the property was sold at a throw -away price and further that a fraud was played to grab the valuable property of the objector.

4. The notice was given. However, the learned trial court rejected the objections

filed by the appellant by holding that once the remedy under Order 21 Rule 66 of the CPC was not availed of by filing the objections, it was not open to the objector -appellant to raise objections after the property was auctioned. It was held that inadequacy of the price of the property could not be a ground for setting aside the sale. The other grounds, as raised by the objector-appellant, were also rejectedin appeal, the learned lower Appellate Court while affirming the findings of the learned trial Court, noticed that the appellant, in spite of offer having been made to pay the decretal amount, did not do so and, therefore, it was held that no ground was made out to accept the objections. Accordingly, the appeal was dismissed.

5. Mr. M.L. Sarin, learned senior counsel appearing on behalf of the appellant, has challenged the impugned orders primarily on the ground that the decree-holder Bank had in fact compromised the matter with the judgment-debtors and in pursuance thereto some money was paid to the bank.

6. At the time of motion hearing, the appellant made an offer to deposit the decretal amount with the decree-holder Bank and it was only on the said statement that notice of motion was issued in the present appeal. On 28th September 2004, this Court was pleased to pass the following order:

After hearing arguments for some time, it is considered appropriate that the bank should file an affidavit disclosing the calculation of the decretal amount in terms of the decree dated 4-12-1991 and that whether there is any settlement in terms of the guidelines issued by the Reserve Bank of India.

A copy of the affidavit be given three days in advance to learned Counsel for the appellant to enable the appellant to bring the decretal amount in the court. Adjourned to 14-10-2004.

7. In pursuance of the order passed on 28th September, 2004, an affidavit was filed by the Chief Manager, Bank of India, Ambala Cantt, disclosing therein that after adjusting the amount received in terms of the compromise, a sum of Rs. 8,94,777.25 Ps. was still outstanding against the borrower. The case thereafter was taken up on 3.12.2004, when the following order was passed-

Learned Counsel for the appellant states that the appellant is ready and willing to pay the entire balance decretal amount less advocate fee as per affidavit dated 11-10-2004 within two weeks from today. Mr. Goel, learned Counsel for the auction purchaser states that the appeal is not maintainable.

Admitted.

Interim order to continue subject to the condition of the appellant depositing the balance amount less advocate fee as per affidavit dated 11.10.2004 within 2 weeks with the bank.

The auction purchaser shall be entitled to withdraw the amount deposited in pursuance of auction conducted on 1.3.2000. Such withdrawal of the amount and deposit by the appellant shall be without prejudice to the rights of the parties.

8. It is the case of the appellant that in pursuance of the order passed by this Court the total outstanding amount was paid to the Bank.

Mr. M.L. Sarin, learned senior counsel appearing on behalf of the appellant by placing reliance on the judgments of the Hon''ble Supreme Court in the cases of U. Nilan Vs. Kannayyan (Dead) Through Lrs., , and Kharaiti Lal Vs. Raminder Kaur and Others, , contends that the decretal amount having been paid in appeal, the auction is liable to be set aside and the impugned order cannot be sustained.

Mr. C.B. Goel, learned Counsel appearing on behalf of auction-purchaser-respondent No. 2, has supported the orders passed by the learned Courts below and has con-, tended that this appeal cannot be accepted merely on the grounds that the order passed by this Court for payment of decretal amount has been complied with as the said order was without prejudice to the rights of the respondents to contest the matter on merit.

9. Learned Counsel for respondent No. 2 has vehemently contended that the orders passed by the learned courts below are in consonance with the settled law and that if the right to file objections under Order 21 Rule 66 C.P.C. has not been availed of by the judgment-debtor, there is no right left with him thereafter to raise objections to the sale by auction of the property. The contention of the learned Counsel for respondent No. 2 further was that alternative remedy of filing of objections under Order 21 Rule 89, C.P.C. by deposit of sale amount along with interest and 5% costs, was also not availed of and, therefore the impugned orders cannot be faulted with as the same are based on the settled principles of law.

10. Learned Counsel for respondent No. 2 further contended that the judgments relied upon by the learned Counsel for the appellant would also not be helpful to him as in the present case the appellant has failed to deposit the decretal amount in spite of offer having been made before the learned lower Appellate Court.

11. After hearing the learned Counsel for the parties, I find force in the contentions raised by the learned Counsel for the appellant. The Hon''ble Supreme Court in Kharaiti Lal''s case (supra) has been pleased to lay down as under:

The above question is identical to the question framed by the Division Bench of the High Court in this case. This Court, on a consideration of number of decisions, including the decision of this Court in Hukam Chand''s case (supra) laid down that if an appeal was pending against an order refusing to set aside the sale, the confirmation of sale as also the issuance of Sale Certificate would be a nebulous state and, consequently it would be open to the judgment-debtor to invoke the provisions of Order 34 Rule 5 CPC and make the necessary deposits to save his property from being transferred to a third person or, may be, to the decree holder in execution of the decree passed in the mortgage suit. It may be mentioned that in U. Nilan''s case (supra) reliance was also placed upon the decision of this Court in Maganlal Vs. Jaiswal Industries, Neemach and Others, , in which it was held that the sale does not become absolute or irrevocable merely on passing an order confirming the sale under Order 21 Rule 92, but it would attain finality on the disposal of the appeal, if any, filed against an order refusing to set aside the sale.

12. To the similar effect was the judgment of the Hon''ble Supreme Court in U. Man''s case (supra) holding therein as under:

Civil Procedure Code, 1908 Order 34 Rule 45 and Order 21 Rules 92(1) & 90 Application under Order 34 Rule 5 for deposit of balance mortgage money would be maintainable even after confirmation of sale but during pendency of appeal filed by judgment-debtor against an order passed by executing Court rejecting application for setting aside the sale effected in execution of decree passed in mortgage suit or against an order - rejecting the application for restoration of application for setting aside the sale Sale is deemed to be absolute not on confirmation of sale but on and form the date of disposal of such appeal, if any - Moreover the application for deposit of mortgage money does not become infructuous on rejection of application to set aside the sale on merits. - Limitation period of 3 years under Limitation Act for making an application for delivery of possession under Order 21 Rule 95 C.P.C. should be reckoned from the date the sale is deemed to be absolute - Limitation Act, 1963 Article 92.

13. In the present case, it was during the pendency of the appeal that as per direction issued by this Court, the appellant has deposited the decretal amount.

The contention of the learned Counsel for the respondent No. 2 cannot be accepted, firstly for the reason that the terms of compromise on record shows that the Bank has not been co-operating in the matter and failed to disclose the compromise having been entered into between the principal judgment-debtor. Secondly, it was only after the directions were issued by this Court, the compromise was disclosed to the appellant. This being a case of sale of mortgaged property, the right to get the property redeemed has not yet extinguished, as the property was auctioned and sale is yet to be confirmed. In view of the law laid by the Hon''ble Supreme Court in the case of Kharaiti Lal (supra) and U. Nilan''s case (supra), the right of the appellant to get property redeemed was not lost merely on account of auction or even confirmation of sale, as appeal was still pending. Having regard to the facts and circumstances of the case, the contentions raised by the learned Counsel for respondent No. 2 that judgments relied upon by the learned Counsel for the appellant are not applicable, cannot be accepted.

14. Accordingly, this appeal is allowed and the impugned orders are set aside. If any amount in pursuance to the auction of the property has been deposited by

respondent No. 2, she is permitted to withdraw the same.

