

(2012) 03 AHC CK 0145
In the Allahabad High Court
Case No : Writ C No. 11879 of 1991

Sri Ram Murti Sharma

APPELLANT

Vs

1st Additional Civil Judge Aligarh and others

RESPONDENT

Date of Decision : 16-03-2012

Acts Referred:

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

Citation : (2012) 03 AHC CK 0145

Hon'ble Judges : Sunil Hali, J

Final Decision : Allowed

Judgement

Sunil Hali, J.

Heard learned counsel for the petitioner. Neither respondents nor their counsel is present before the Court.

The facts of the case are that the respondent no. 5 (deceased) filed a suit for recovery of arrears of salary against Sri B. C. Jhuria Higher Secondary School, Hathras through Secretary and Manager, District Aligarh, respondent no. 2. The suit was dismissed by learned Trial Court and appeal was preferred against the order of dismissal. Appellate Court allowed the appeal and decreed the suit of the respondent no. 5. An execution application no. 130 of 1969 was filed before the learned Trial Court. Decree passed by the appellate Court was questioned by the judgement debtor which was partly allowed by reducing the amount to the tune of Rs. 3050/ with interest @ 6 % per annum. Decree holder respondent no. 5 assigned the decree to respondent no. 6. An application for impleadment was filed by respondent no. 6 which was allowed and purchaser respondent no. 6 was impleaded along with decree holder Girdhari Lal Sharma. An objection was taken to the assignment of decree in favour of respondent no. 6 by the judgement debtor in the execution proceedings. Executing Court dismissed the objection. Executing Court attached the property of the judgement debtor and put it to sale. Petitioner purchased the property through auction sale held on 15.5.1972 by depositing one forth on the same date and rest of the amount was deposited

within 15 days of the sale. An appeal was preferred against this order by the judgement debtor which was allowed. Aggrieved by this order second appeal was preferred by the petitioner which was allowed and the order of the first appellate court was set aside. A Special Leave Petition was preferred against the order by the judgement debtor which was dismissed as withdrawn.

After having failed to get the order of auction set aside an application under Order XXI Rule 89 CPC was moved by the judgement debtor accompanied by tender indicating his intention to deposit the amount. This application was dismissed by the executing Court vide order dated 18/3/1980 on the ground that the amount was not deposited within 30 days as contemplated under Order XXI Rule 89 CPC. Consequently, the auction sale held on 18.3.1980 was confirmed and sale certificate was issued in favour of the auction purchaser on 21.3.1980. Possession of the property was delivered to the petitioner.

An appeal against this order was preferred in the Court of Addl. Civil Judge, Aligarh who vide order dated 11.4. 1991 allowed the appeal and set aside the judgement and the order dated 30.3.1982. It is pertinent to mention here the earlier order passed by the Munsiff, Hathras was set aside by the appellate Court and remanded back for passing afresh order.

Appellate Court while allowing the appeal against the order dated 20.3.1982 set aside the order of Munsiff, Hathras and directed that the application filed by the judgement debtor be allowed as a consequence thereof he be permitted to deposit the amount in the Court. It is this order which is subject matter of challenge before this Court.

As the fact would reveal the sale was completed on 15.5.1972 and the application under Order XXI Rule 89 was filed on 3.7.1972.

In order to understand the controversy involved in this writ petition, it is necessary to quote the Order XXI Rule 89 CPC which is as under:

Order XXI Rule 89: Application to set aside sale on deposit: (I) Where where the 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 per cent 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 applies 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.

The import of the rule indicates that where the 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 the Court for setting aside the sale on his depositing the amount in the Court. Order XXI Rule 89, C. P. C. gives a right not only to the judgmentdebtor but also to other persons interested in the property or persons deriving title through the judgmentdebtor to make an application to have the sale set aside. Such an application can only be made by the applicant concerned on his depositing in court, (a), for payment to the purchaser, a sum equal to 5% of the purchase money and (b) for payment to the decreeholder, the amounts 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 decreeholder.

It is evident, therefore, that a person applying for setting aside the sale under Order XXI, Rule 89 C. P. C. has not only to deposit the entire sum included in the sale proclamation, but also to make the requisite deposit for payment to the purchaser.

Thus, the pre condition for filing an application under Order XXI Rule 89 clearly mandates that the application has to be accompanied by the deposit of the sale amount specified therein. Period for depositing of the amount is specified under Order XXI Rule 92(2) CPC, which reads as under:

"92. (2) Where such application is made and allowed and where, in the case of an application under Rule 89 the deposit required by that rule is made within sixty days from the date of sale, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

It is manifest that the proviso clearly mandates that no order for setting aside the sale shall be made unless notice of the application has been given to "all persons affected thereby".

Dispute in the present case revolved around the fact as to whether the application accompanied by the tender would be sufficient compliance with Rule 89 of Order XXI CPC or not.

Tender is a form which is required to be filled up by a person seeking cancellation of the sale in which intention is shown by the judgment debtor to have the amount deposited as provided by the Rule 89 of Order XXI. A tender which

accompanies the application in essence can be a step towards the deposit of the amount but it cannot be said that the amount stands deposited. Any application accompanied by tender must be filed before the expiry of limitation provided for depositing the sale amount. The amount must be deposited within a period prescribed by the period of limitation. Mere filing of tender accompanying the application can in no case be construed to be deposit as contemplated under Order XXI Rule 89. Deposit of amount is pre condition for entertaining the application under Order XXI Rule 89 CPC. This has consistently been held by Hon"ble Apex Court in the case of P.K. Unni Vs Nirmala Industries and others reported in AIR 1990 SC 933, wherein the Hon"ble Apex Court has held as under:

"Rule 89 postulates an application on deposit. It says "may apply to have the sale set aside on his depositing in Court". These words show that deposit is a condition precedent to the making of an application to set aside a sale. That condition must be satisfied within the period prescribed by subrule (2) of Rule 92, which undoubtedly is 30 days. Parliament refused to alter that provision even when a part of the subrule was substituted. Though subrule (2) of Rule 92 had received the special attention of Parliament in 1976. Parliament addressed itself particularly to the subrule, and yet did not, apart from the special contingency provided for by the amendment, think it necessary to extend the period generally prescribed under Rule 92(2) to make the deposit which is a condition precedent to an application to set aside a sale."

While examining the import of the judgement, it clearly envisages that any application for setting aside the sale has to be preceded by depositing the amount as contemplated under Order XXI Rule 89 CPC. The deposit has to be made within a period of thirty days (pre amended). An application for setting aside the sale can be filed within a period of 60 days by invoking Article 127 of the Limitation Act but the deposit of necessity has to be made within a period of 30 days. This in itself clearly signifies that the deposit is required to be made before an application for setting aside the sale is filed.

The reasoning given by the appellate court that the application under Order XXI Rule 89 was accompanied by a tender would be construed to be sufficient compliance under Order XXI Rule 89, cannot be accepted. Legislature has used the word deposit and not the mere intention to deposit. Purpose of depositing the amount for setting aside the auction sale proceedings by the judgement debtor is to show his intention to satisfy the decree. A person seeking setting aside of the sale has to show the intention that he is ready to satisfy the decree by depositing the amount in the Court. Mere intention to deposit will not satisfy the requirement of Rule.

Appellate Court has misdirected itself in assuming that the deposit of tender in itself was sufficient compliance of Order XXI Rule 89 CPC. As already stated herein supra, tender can only be a step towards depositing of money but it cannot be said that it tantamounts to deposit as contemplated under Order XXI Rule 89. There is one other aspect of the matter which the appellate court has

not taken note of. It is said that the tender which was accompanying the application was misplaced and could not be traced. It is ultimately in the year 1980 the judgement debtor deposited the amount. One fails to understand as to what precluded the judgement debtor to deposit the amount from 3.7.1972 till 1980. This in itself is sufficient to indicate that there was no intention shown by the judgement debtor to have the sale set aside but only to frustrate the decree and its execution.

In the circumstances, I hold that the learned appellate Court has fallen in error in accepting the application filed by the judgement debtor under Order XXI Rule 89 CPC as no deposit which is prerequisite has been made within the time prescribed. It may be noted that at the time when the application was filed the limitation was for a period of thirty days now it has been amended and has been extended to 60 days. Limitation extended to 60 days is only for filing an application for setting aside the sale proceedings for the purpose of depositing the amount limitation of 30 days continues to remain in operation.

In the result the writ petition is allowed. The order impugned dated 11.4.1991 is hereby quashed.