(1986) 11 P&H CK 0004

In the Punjab And Haryana At Chandigarh

Case No : F.A.O. No. 105 of 1986

State Bank of India APPELLANT

Vs

Rocky tyres and Another RESPONDENT

Date of Decision : 06-11-1986

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90

Citation : (1986) 11 P&H CK 0004

Hon'ble Judges : J.V. Gupta, J

Bench : Single Bench

Advocate : A.C. Jain, for the Appellant; D. Khanna and Mr. R.K. Battas for the Respondent No. 1, Mr. N.C. Jain and Mr. G.C. Garg, for the Respondent

Judgement

J.V. Gupta, J.—This appeal is directed against the order of the executing Court dated October 31, 1985, where by the objections filed under Order XXI Rule 90, Code of Civil Pro cedure, (hereinafter called the Code) by the D. H. for setting aside the sale have been dismissed.

2. The relevant facts are that the State Bank of India obtained the decree dated April 7, 1976, against M/s Rocky Tyres through S. P. Gandhi, the sole proprietor, for a sum of Rs. 5,43,239.28 out of which a sum of Rs. 17,840/- was paid by the judgment-debtor. The decree-holder moved an application for attachment and sale of movable and immovable property of the judgment-debtor. After long proceedings, the property was attached vide order dated August 13, 1976, and the actual attachment was made on August 24, 1976, which included the plot No. 360-61, Industrial Area, Chandigarh, the building constructed thereon and the machinery installed therein. After the attachment, the machinery being the movable property, was handed over on supardari to one Miss Raj Rani.

3. After the said attachment, the judgment-debtor leased out the said premises to M/s Jaysons Industries on March 14, 1977 through Jaswant Rai Jain on a monthly rent of Rs. 3,500/-. June 15, 1979, was the date fired for the auction of the property attached. At that time, it was revealed that the machinery attached

in execution of the decree was also attached earlier in execution of some other decree and was sold and was, therefore, no more available for auction sale. However, since the decree-holder agreed that only the building and the land be put to auction, the auction did take place on June 15, 1979, as published. The said property was purchased by Mrs. Manju Rani, Rohit, Mandeep Jain, Neeraj and Ajit Jain jointly The objection petition under Order XXI Rule 90 of the Code, was filed on behalf of the decree-holder Bank on July 16, 1979. The said petition was dismissed by the executing Court on September 6, 1979, summarily without framing any issues and allowing the parties to lead evidence. Dissatisfied with the same, the decree-holder Bank filed F. A. O. No. 597 of 1979 in this Court which was ultimately allowed vide this Court order dated February 6, 1981, wherein the order of the executing Court dated September 6, 1979, dis missing the objection petition summarily was set aside and the, case was sent back to the executing Court for deciding the matter afresh in accordance with law after framing necessary issuses and allowing the parties to lead evidence. During the pendency of the said appeal, the counsel for the auction-purchasers except Ajit Jain, (son of Jaswant Rai Jain, the lessee) made a statement at the bar that the appeal be accepted and the order sanctioning the auction-sale be set aside. Para graph 3 of the said judgment reads as under:

It may be mentioned at the very outset, that though in the executing Court all the auction-purchasers contested the objection petition, but in this Court, only Ajit Jain, Respondent No. 7 is con testing the appeal. The counsel for the other auction-purchasers has made a statement at the bar that the appeal be accepted and the order sanctioning the auction-sale be set aside. Thus, the auction purchasers, who have four-fifth share in the property auctioned, are not in favour of the order sanctioning the sale in their favour.

4. After the case was remanded to the executing Court, the said four auction-purchasers on whose behalf the statement was made in this Court in F. A. O. No 597 of 1979, that the appeal be accepted and the order sanctioning the auction-sale be set aside, also moved an appli cation dated August 29, 1985, purporting to be under Order XXI Rule 91 of the Code in the executing Court, for setting aside the auction-sale and refunding the purchase money. Not only that, they also moved another application which is still pending adjudication for refund of the auction-money deposited by them.

5. After the parties were allowed to lead evidence, the executing Court vide order dated August 31, 1985, dismissed the objection petition filed by the decree holder and held the auction to be valid.

6. The learned Counsel for the decree-holder contended inter alia that once it is found that the machinery which was attached in execution of the decree was not available for auction sale, the auction could not take place and the only course open to the auctioneer was to re port the matter to the executing Court and to get fresh orders for auction and proclamation. According to the, learned Counsel even if the decree-holder agreed to sell the property without the machinery, the

same could not be auctioned. It was next contended that the proclamation did not contain the necessary particulars of the nature and value of the property as to attract the necessary buyers More over, the lessee, Jaswant Rai Jain, who is the present occupant of the premises, did not comply with the undertaking as to make the property available to the auction-purchaser without any hinderance as given by him on September 29, 1978 in the executing Court.

7. An argument was also raised that Ajit Jain had no authority to purchase the property on behalf of the other auction purchasers also and, therefore, the sale on that account was (sic) It was lastly contended that in any case out of the five auction purchasers, four had already conceded in this Court earlier (sic) F. A. Order 597 of 1979, that the order sanctioning auction sale be set aside and that being so, the auction being one, was liable to be aside on that ground alone.

8.after hearing the learned consel for the parties, I am of the consideres opinion that this appeal can be disposed of on the last contention without going into the other contentions raised on behalf of the decree-holder Appellant.

9. The objection was also raised before the executing Court and there is a detailed discussion in this behalf by the executing Court in paragraph 40 of the judgment under appeal. According to the execut ing Court, these persons (the auction-purchasers) were chameleons and, therefore, the sale cannot be set aside because they have not been able to make out a case for the same under Order XXI Rule 91 of the Code. The said observations of the executing Court are unwarranted and without any basis. As a matter of fact, the whole judgment speaks for itself and the executing Court has taken unnecessary pains to justify the auction sale which had taken place on June 15, 1979. The present sale is not sought to be set aside under Order XXI Rule 91 of the Code, though an application purporting to be thereunder has been made by the said auction-purchasers after conceding in this Court that the order sanctioning the auction sale be set aside. As a matter of fact, that was the additional ground taken by them while moving that application. It is not the said application on the basis of which the auction is sought to be set aside ; it is rather on the ground that they conceded in this Court that the appeal be accepted and the order sanc tioning the auction sale be set aside. Thus, the provisons of Order XXI Rule 91 of the Code were neither relevant nor attracted while making the statement by their counsel in this Court. Thus, the only question to be determined in this appeal is ; if out of the five auction-purchasers, four have already conceded that the auction be set aside in view of the objections filed by the decree holder, whether the said auction could be maintained at the instance of Ajit Jain, son of Jaswant Rai Jain ? It may also be relevant to mention here that the other four auction-purchasers are also very closely related to each other and to Jaswant Rai Jain, the lesee, who is the pivot of the show. Ajit Jain had one-fifth share though he claimed to have one-half share, but that is the dispute inter se between the auction-purchasers which can not be decided in this appeal. At this stage, it will also be relevant to note that in the application dated August 29, 1985, filed on behalf of

the four auction-purchasers under Order XXI Rule 91 of the Code one of the grounds stated is "that the sale in the present case is void being in violation of mandatory provisions of law ; hence the present application is maintainable." Thus, the present sale is liable to be set aside under Order XXI Rule 90 of the Code on the application of the decree-holder alleging certain irregularities in the auction proceedings. It was on this application that the four auction-purchasers conceded that the order sanctioning the auction be set aside. The fact that they admitted certain irregularities or violations of mandatory provisions of law is also evident from their application dated August 29, 1985, as re-produced above. It is not disputed that the sale could be set aside under Order XXI Rule 89 at the instance of the judgment-debtor or any person claiming any interest in the property sold, or under Order XXI Rule 90 on the ground of irregularity or fraud at the instance of the decree-holder or the purchaser or any other person entitled to a share in the rateable distribution of assets or whose interests are affected by the same and lastly, under Order XXI Rule 91 of the Code, at the instance of the, auction-purchaser on the ground that the judg ment-debtor had no saleable interest in the property sold. In the present case, the decree-holder alleged certain irregularities in the auction and violation of certain mandatory provisions of law and on that basis, the four auction-purchasers agreed that the sale be set aside which amounted to an admission of the irregularities on their part alleged in the application. It is in these circumstances that the sale is liable to be set aside under Order XXI Rule 90 of the Code at the instance of the decree-holder whose claim is being accepted by four out of the five auction-purchasers. Thus, the only thing that remains to be decided now is whether the sale as a whole is to be set aside or it can be set aside partly also.

10. Somewhat similar question came up for consideration before the Patna High Court in Mt. Raisunnissa and Others Vs. Mojibur Rahman and Others, . Therein, an auction-sale was held of an entire property, comprising undivided, though distinct interests of the three judgment-debtors, but without discriminating and defining their separate interests with their particulars, as a composite sale, as one and indivisible. The sale was proclaimed as if it belonged to a single owner, without specifying the undefined but distinct interests of each of the three judgment-debtors. The application made by one of the judgment-debtor was also for set ting aside the entire sale and not for setting aside the sale in res pect of only his undivided share in it. In such circumstances, it was held therein that the result of the order passed by the Court setting aside the sale with regard only to the interest therein of the applicant, with the consent of, and, on compromises with, the auction-purchaser (and not because it was vitiated due to any material irregularity or fraud) was that it should be read as an order setting aside the sale in its entirety and as such it enured to the benefit of the other judgment-debtors also. Although either of them had not applied separately for setting aside the sale, the sale being a composite sale, one and indi visible must be set aside in its entirety and not partially. In the above-said case, the Patna High Court in this behalf, had relied upon the Full Bench judgment of the Travancore-Cochin High

Court in Pvli v. Varghese A. I. R. 1956 TC 147, wherein it was held,-

A Court auction sale may be set aside in part if it is held in lots with separate particulars and proceeds. When a Court sale is composite, i e., of an entire property, comprising undivided though distinct interests belonging to various persons and what is proclaimed for sale is the entire property, as though it belonged to a single owner without discriminating the separate interests with their particulars, a piecemeal setting aside is not possible and the party entitled to relief, though his interest may be fractional can not be denied his rights on account of the accident of the existence of a simultaneous sale of another fractional part or parts regard ing which the sale may be good. In such case in truth the sale is not a separate sale of the fraction at all but it is a sale of an entire property which is not capable of being split up into parcels.

It is, therefore, evident that the sale is to be set aside as a whole on the admission of the four auction purchasers and could not be sustained simply because one of the five auction-purchasers did not agree to the same. The only argument raised on behalf of the auction-purchaser Ajit Jain is that even if the four auction-purchasers agreed to the set ting aside of the sale, this, in itself, was no ground to set aside the sale and that the sale was liable to be confirmed at the instance of the said auction-purchaser. Reliance in support of this contention, was placed on AIR 1937 186 (Nagpur) . However, the decision in the said case has no relevancy to the facts of the present case. That was the case for specific performance of the agreement to sell where one of the co-contracting vendees had refused to join the sale to be ex ecuted in their favour jointly, and the other contracting vendees brought a suit for specific performance of the contract, the suit being one to enforce the original contract as a whole there was no vari ation in the contract piecemeal. The other willing co-contracting vendees had a right to sue for specific performance of the contract even though one of the co-contractors refused to join them in the sale.

11. Thus, taking into consideration the facts and circumstances of the present case, the sale is liable to be set aside under Order XXI Rule 90 of the Code at the instance of the decree-holder and is conse quently set aside and the appeal is allowed with no order as to costs. The executing Court is directed to fix fresh date for proclamation in accordance with law and it will be provided therein as contemplated under Order XXI Rule 95 of the Code, that vacant delivery will be made to the persons purchasing the property since the lease was created after the attachment and in view of the undertaking given, in writing, by the lessee Jaswant Rai Jain, in his applications dated September 24, 1977 and September 27, 1978 alongwith the affidavit dated 27 9.1978, as well as the order of the Court dated September 29, 1978, that he will hand over the possession of the property attached to the auction-purchasers. It is further directed that the execution proceedings be expedited and the execution application be disposed of within six months as it is pending since the year 1976. The records of the case be sent back forthwith to the executing Court. It is also directed than the District

Judge will entrust the execution application for disposal to some other Court than the one against whose order this appeal has arisen. The parties are directed to appear before the District Judge, Chandigarh on 1.12.1986.

