

**(2006) 02 MP CK 0019**

**In the Madhya Pradesh High Court**

**Case No :** Civil Revision No's. 786, 787 and 788 of 2004

Suraj Singh

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

**Date of Decision :** 27-02-2006

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 64, Order 21 Rule 65, Order 21 Rule 66, Order 21 Rule 67, Order 21 Rule 68  
Transfer of Property Act, 1882 — Section 100, 56

**Citation :** AIR 2006 MP 241 : (2006) ILR (MP) 767

**Hon'ble Judges :** Abhay M. Naik, J

**Bench :** Single Bench

**Advocate :** Pranay Verma, for the Appellant; Rajesh Maindiratta and Umesh Trivedi, for the Respondent

**Final Decision :** Dismissed

## Judgement

Abhay M. Naik, J.—The above mentioned three petitions involved a common question, hence the same are heard together and being decided by this common order.

2. The relevant facts of the three revision applications are in a very narrow compass. The Union Bank of India, Branch Kareli, Tahsil Kareli, Distt. Narshinghpur instituted three separate Civil Suits against the applicant for recovery of different amounts. All the three Civil Suits were decreed in favour of the Bank. Decrees were put into execution by the decree holder for recovery of the decretal amount. They were registered as Execution Case Nos. 4-B/98, 5-B/98 and 11-B/99 in the Court of 1st A. D.J., Narshinghpur. The three execution cases were consolidated by the executing Court vide its order dated 6-2-2004. The applicant is a common judgment debtor in all the three execution cases. The land comprised in Survey No. 30/2, 31/2 and 32 in all in area 8.497 hectares situated at Gram Baskheda, Tahsil Kareli, Distt. Narsinghpur was mortgaged by the applicant with the decree holder Bank which was attached prior to auction.

The land was put to public auction by the executing Court on 20th April, 2004. The executing Court declined to accept a final bid at Rs. 18,01,000/- on account of being low and the land was put to re-auction. On 25-10-2004 the mortgaged land was finally re-auctioned and the final bid of Rs. 23,51,000/- was accepted by the executing Court. The auction purchaser deposited Rs. 7,00,000/- in pursuance of his bid and finally deposited the balance amount of Rs. 16,51,000/- on 5-11-2004.

3. The applicant/judgment debtor on 3-11-2004 submitted an objection under Order 21, Rule 64 of CPC that a proportionate land ought to have been put to auction as the total decretal amount was merely to the tune of Rs. 11,00,000/- and the property worth Rs. 23,51,000/- could not have been sold in auction in contravention of Order 21, Rule 64, C.P.C. The applicant prayed for cancellation of the auction held on 25-10-2004 with a further prayer for sale by auction of a proportionate land. The application was opposed by the decree holder and has been rejected by the executing Court vide the impugned orders passed in an identical manner in all the three execution cases.

4. Shri Pranay Verma, learned Counsel for the applicant relied upon the provision contained in Rule 64 of Order 21 of C.P.C. which reads as under:

64. Power to order property attached to be sold and proceeds to be paid to person entitled. - Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Hon"ble Supreme Court of India has held in the case of Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh, that the said provision is mandatory and the auction conducted in violation of the same is vitiated. It is contended that the total recoverable amount under the said three decrees was Rs. 10,94,471/-. Mr. Pranay Verma, learned Advocate, submitted that the bid of Rs. 18,01,000/- was found by the executing Court to be highly on lower side and the same was declined to be accepted. According to the learned Counsel for the applicant, the land with a worth of more than double of the total recoverable amount could not have been put to auction by the learned executing Court. He submitted that the proportionate land ought to have been put to auction and the executing Court has clearly acted contrary to the mandatory provisions of Order 21 Rule 64 of C.P.C. He further submitted that the said auction in favour of the auction purchaser is vitiated for the aforesaid reason and his application under Order 21 Rule 64 C.P.C. deserves to be allowed after quashing the public auction in favour of the auction purchaser.

5. Shri Rajesh Mehndiretta and Shri Umesh Trivedi, learned Counsel for the non-applicants urged that the land in question was mortgaged with the Bank and the right to recover the decretal amount by way of putting the mortgaged land to

auction cannot be interfered with by taking resort to the provisions of Order 21 Rule 64 C.P.C. Learned Counsel therefore submitted that Order 21 Rule 64 C.P.C. has no application to the execution of decrees arising out of the mortgage suits, *moreso*, because Order 34 of C.P.C. provides a specific procedure for the suits relating to mortgage of immovable property. They drew attention of this Court to various provisions of Order 34 of C.P.C. and derived support from the authorities reported as *N.M. Veerappa Vs. Canara Bank and Others*, , *S. Sivaprakasam Vs. B.V. Muniraj and Others*, , *Vysya Bank Ltd., Ernakulam Vs. Kalapurakal Industries and Others*, , *Vysya Bank Ltd. Ernakulam v. Kalapurakal Industries and Ors.*

6. While countering, *Shri Pranay Verma*, learned Counsel for the applicant urged that the provision contained in Order 21 Rule 64 C.P.C. are very much applicable even in the present execution cases and the sale in violation of the said provision is not sustainable in law. To buttress his submission he relied upon authorities reported as *Hukamchand Vs. Bansilal and Others*, , *Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel*, , *Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma and Others*, , *Iyluri Laxmi Subramanyam Vs. Batchu Viswanadham*, , *Iyluri Laxmi Subramanyam v. Batchu Viswanadham AIR 1954 T&C 226*, *Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh*, , *AIR 1944 25 (Nagpur)* , *Nilkanthrao Laxmanrao Naik and Ors. v. Mt. Satyabhama Bai w/o Krishna Rao Totade and Ors.*

7. The most crucial question in all the three revision applications is that whether Order 21, Rule 64 of C.P.C. gets attracted in the present cases or the mortgagee Bank has a right to recover its amount by putting the entire mortgaged property into auction in the execution proceedings. For determining this question the scheme of execution contained in Order 21 of C.P.C. is to be examined in the light of various provisions contained in Order 34 of C.P.C.

8. Learned Counsel for the non-applicants submitted that the objection in the light of Order 21 Rule 64 C.P.C. was not raised in the Court below and the same cannot be now permitted to be raised before this Court. As regards this, it be seen that provision of Order 21 Rule 64 C.P.C. is already held by the Apex Court as mandatory. So, non-compliance of this provision would definitely vitiate the auction in case the provision is applicable. Moreover, the objection raised by the applicant can be entertained on the basis of the material on record and no evidence is required to be recorded for deciding the objection. Taking this into consideration, I am of the view that the objection on the basis of Order 21 Rule 64 C.P.C. can very well be agitated before this Court in spite of the fact that the same was not pressed earlier before the executing Court.

9. The provision contained in Rule 64 of Order 21 C.P.C. and further provisions up to Rule 73 are under a common heading of "Sale generally". This heading itself goes to show that the provisions contained in Rule 64 to Rule 73 are not exhaustive and the executing Court may direct sale in other manner if the same is not prohibited under the relevant provisions. Rule 64 empowers an executing Court to order that any property attached by it and liable to sale, or such portion

thereof as may seem necessary to satisfy the decree, shall be sold. Rule 65 provides for that how a sale is to be made and by whom it is to be conducted. Rule 66 provides for Proclamation of sale by public auction. The next Rule prescribes the mode of making proclamation. Rule 69 empowers the Court to adjourn or stop the sale before the lot is knocked down. If the Court ordering the sale is satisfied, then the debt and costs are tendered to the officer conducting the sale or the same has been paid into the Court.

10. Rule 82 onwards up to Rule 96 of C.P.C. deal with the sale of immovable property. Rule 89 enables any person claiming an interest in the property to apply for setting aside the sale on the basis of payment as mentioned therein. Rule 90 enables a decree holder or the purchaser to get the sale set aside on the ground of material irregularity or a fraud in publishing or conducting it. Rule 91 enables a purchaser to move an application for setting aside the sale on the ground that the judgment-debtor has no saleable interest in the property sold. Rule 92 empowers a Court to confirm the sale where no application is made under Rule 89, Rule 90 or Rule 91. This Rule also provides grounds to challenge the sale. Rule 93 makes a purchaser entitled to refund of his purchase money where the sale is set aside Rule 92 of C.P.C.

11. Now, the provisions of Order 34 of C.P.C. are being examined to ascertain the applicability/inapplicability of Order 21 Rule 64 C.P.C. Rule 3 of Order 34 C.P.C. enables a defendant to seek redemption of the mortgaged property on making payment of all amounts due from him if the final decree debarring the defendant from all rights to redeem the mortgaged property has not been passed.

Sub-rule (1) of Rule 4 of Order 34 is relevant and is reproduced below:

(1) In a suit for sale, if the plaintiff succeeds, the Court shall pass a preliminary decree to the effect mentioned in Clauses (a), (b) and (c)(i) of Sub-rule (1) of Rule 2, and further directing that, in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceeds of the sale (after deduction therefrom of the expenses of the sale) be paid into Court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amount as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same.

In this sub-rule, the plaintiff has been given liberty to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold. Thus, an option has been given to the decree holder to apply for the sale of mortgaged property or sufficient part thereof and there is clear deviation from the provision contained in Order 21 Rule 64 C.P.C. which puts an obligation on the Court to put to auction merely a proportionate property. No such restriction is contained in Order 34 Rule 4 C.P.C. Obviously, the applicant has not sought time to raise the

entire amount as required by Rule 83 of Order 21 C.P.C. Moreover, the provisions contained in Order 21 Rule 89 C.P.C. having not been availed of, it is not open for the applicant to impugn the sale on the basis of the alleged contravention of Order 21 Rule 64 C.P.C.

12. Shri Pranay Verma, learned Counsel appearing for the petitioner relied upon certain rulings which are discussed hereunder:

In *Hukamchand Vs. Bansilal and Others*, , it has been held that "On a harmonious interpretation of Order 34, Rule 5 and Order 21 Rule 92 it was clear that though the mortgagor had the right to deposit the amount due at any time before confirmation of sale, there was no question of his being granted time under Order 34 Rule 5 and if the provisions of Order 21, Rule 92 applied the sale must be confirmed unless before the confirmation the mortgagor judgment-debtor had deposited the amount as permitted by Order 34, Rule 5 C.P.C". Thus, the provisions of Order 21 Rule 92 has not been given an effect overriding Order 34 Rule 5 C.P.C.

In the cases of *Tribhuvandas Purshottamdas Thakur Vs. Ratilal Motilal Patel*, , *Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma and Others*, and *Desh Bandhu Gupta v. N.L. Anand and Rajinder Singh* AIR 1993 SCW 3458 (supra) the Apex Court was not dealing with the provisions of Order 34 C.P.C, at all. So, these cases are of no assistance to the revisionist.

In the case of *Iyluri Laxmi Subramanyam Vs. Batchu Viswanadham*, High Court of Andhra Pradesh has held that "it is not in dispute that the decree in execution is one made for sale of immovable property under Order 34, Rule 4 of the Code. Operation of Order 21 Rule 83(1) comes into play when the property of the judgment debtor is attached in execution for sale. But Sub-rule (3) of Rule 83 of Order 21 expressly provides that for the sale of mortgaged property in execution, the provisions of Order 21, Rule 83(1)(2) do not apply to such sale."

In view of the matter, this authority is of no assistance to either party.

In the case of AIR 1944 25 (Nagpur) , the learned Division Bench while dealing with Section 56 and Section 100 of the Transfer of Property Act has held that "in the case of executable charge decrees against several properties the Court has the power to sell the charged property or a sufficient part thereof or to direct that a sufficient part thereof be sold". It has been further held that "it would be most inequitable that though the decree-holder under such a charge decree may have to recover a very small amount he is entitled to sell valuable property for satisfaction of that small amount. It is therefore the inherent power of the Court in execution proceedings to decide in a suitable case what property should be proceeded with without prejudicially affecting the rights of the decree-holder." Although, it has been held by the learned Division Bench in the case of *Nilkanthrao* (supra) that the executing Court has an inherent power to decide in a suitable case what property should be proceeded with, but at the same time it has not been held that an auction pursuant to the execution of a mortgage

decree may be set aside for non compliance of Order 21 Rule 64 C.P.C

In the case of K. Sankaranarayana Pillai v. S.P. Sankara Iyer AIR 1954 T C 226 (supra), though it has been held that in terms to "attached property", the provisions therein contained would apply to all sales of immovable property in public auction by Court, however, it be seen that learned Division Bench in the case of K. Sankaranarayana Pillai (supra) was dealing with the case of money decree and not with a mortgage decree. So, this ruling cannot be treated as an authority for the purpose of applying the provisions of Order 21 Rule 64 C.P.C. to the execution matter of mortgage decrees.

12A. Now I will take up rulings relied upon by the learned Counsel for the respondents. In N.M. Veerappa Vs. Canara Bank and Others, the provisions contained in Order 34 Rule 11 CPC are treated as special provisions so far as mortgage suits are concerned and they alone were found to be applicable. It has been held by the Apex Court that the provision contained in Section 34, CPC has no application to such mortgage suits. Hon"ble Supreme Court of India in the case of S. Sivaprakasam Vs. B.V. Muniraj and Others, clearly held:

The procedure under Order 34 is entirely distinct and different from the procedure prescribed under Order 21. Order 21 deals with the execution of decrees and orders and objections therein other than those relating to the property covered in mortgage decree. Order 34 is a special procedure prescribed relating to mortgages. Therefore, the procedure prescribed under Order 21, Rule 92 has no application as regards the passing of the final decree under Order 34, Rule 5 CPC. Therefore, the action taken by the executing Court is not vitiated by any error of law, warranting interference.

13. Thus considering the scheme of Order 34 of CPC and the special procedure provided therein, it is held that the impugned orders passed by the executing Court are not vitiated by any error of law and in the result, the revision applications are hereby dismissed, however, without order as to costs.