

(1992) 10 SHI CK 0002
In the High Court Of Himachal Pradesh
Case No : Civil Revision No. 143 of 1992

Vinod Kant Gautam and Another

APPELLANT

Vs

State Bank of India and Another

RESPONDENT

Date of Decision : 28-10-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 64, Order 21 Rule 66, 51

Citation : (1993) 1 ShimLC 288

Hon'ble Judges : Devinder Gupta, J

Bench : Single Bench

Advocate : Kuldip Singh, for the Appellant; K.D. Sood, for the Respondent

Judgement

Devinder Gupta, J.—Two orders of Senior Sub Judge, Sirmur at Nahan passed in an execution petition on 26th May, 1992 and 17th June, 1992 are under challenge in this civil revision.

2. The Respondent-bank was granted decree on 15th January, 1987 for recovery of Rs. 34,202.56 paise on account of principal and interest alongwith costs and future interest at the agreed rate. The decretal amount was allowed to be paid by instalments of Rs. 850 per month. On failure to pay any instalment on due date, the judgment-debtor was held entitled to execute the decree.

3. On 30th January, 1992, the decree holder took out execution proceedings stating that Rs. 40,784 had become due inclusive of interest and costs, which the judgment-debtors had failed to pay. Notice of execution was directed to be issued to judgment-debtors, who put in appearance and the execution was thereafter kept for conciliation. On 26th May, 1992, when conciliation could not be effected, the Court directed warrant of attachment to be issued against the moveable and Immoveable property of the judgment debtors. The order reads as under:

Conciliation not effected. Warrant of attachment of Immoveable and moveable property be issued on filing of process fee and list of property returnable by 17-6-1992.

4. On the date fixed, namely, 17th June, 1992 for which date the warrants were made returnable, the Court passed the following order:

Warrant of attachment received duly executed. Now warrant of sale of property attached be issued in the name of Collector, Nahan for actual sale on spot by 26-7-1992; Sale be proclaimed on 26-6-1992 and report be called by 29-7-1992.

5. Both the aforementioned orders are under challenge. At the time of hearing, learned Counsel for the decree-holder/Respondents stated that as per instructions received by him from the bank, Rs. 30,000 has since been received from the judgment-debtors. The challenge by the judgment-debtors is against the order of attachment of their entire property as also for sale of Immovable property, which according to them is contrary to law.

6. Counsel for the parties stated that the revision petition may be finally disposed of. I have heard them and gone through the various orders passed in the case, copies of which have been produced on record.

7. The Court while making the order as regards the attachment of moveable and Immovable property of the judgment-debtors and sale of Immovable property on the face of it did not take into consideration the salutary provisions of law and various pronouncements in this regard of the Apex Court and of this Court.

8. From the order dated 17th June, 1992, it cannot be ascertain as to whether the sale warrant has been directed to be issued against both the moveable and Immovable property or against the Immovable property alone. However, since the sale warrant has been directed to be issued through the Collector, it is presumed that it must be pertaining to the Immovable property of the judgment-debtors.

9. The CPC (hereinafter referred to as "the Code") prescribes various modes available to the executing Court while executing a decree. One of the modes is attachment and sale or by sale without attachment of any property every mode is subject to such conditions and limitations as may be prescribed one of the other mode is by executing the decree against the person by arrest and detention in civil prison. Order 21, Rule 21 of the Code empowers the Court in its discretion to refuse execution at the same time against the person and property of judgment-debtor. In a money decree, decree can be executed by virtue of Order 21, Rule 30 by the detention in civil prison of the judgment-debtor or by attachment and sale of the property or by both modes There is nothing in the Code or any other law, which lays down positively that several applications for execution of a decree cannot be filed simultaneously or several modes cannot be adopted simultaneously for executing the decree, but in its discretion by virtue of Order 21, Rule 21, the Court can refuse at the same time issuing of process against the person and property of the judgment-debtor.

10. In the instant case, when re-conciliation could not be had, the Court directed the attachment of both the moveable and Immovable property of the judgment-

debtors. Section 51 of the Code enumerates in general terms the various modes in which the Court may in its discretion order the execution of the decree according to the nature of the relief granted, the Legislature has taken care to use the words "subject to such conditions and limitations as may be prescribed" It is obvious that there is no wide and un-restricted jurisdiction to order execution in every case in all the ways indicated therein. The jurisdiction has to be exercised judiciously keeping in view the facts and circumstances of each case. In case, it is a money decree for recovery, say Rs. 20,000, it will not be appropriate for a Court to order the attachment of both the moveable and Immovable property of judgment-debtors worth over lakhs of rupees, when only a part of either property may be more than the amount sought to be recovered.

11. On attachment of property, the decree-holder is entitled to pray for sale thereof which has to be done subject to the limitations contained in the Code. Order 21, Rule 61 of the Code empowers the court to order the sale of the attached property and the same is in the following words:

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.

12. The sale is to be proclaimed, as provided in Order 21, Rule 66, which reads as under:

66. Proclamation of sale by public auction--(I) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-bolder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible-

(a) the property to be sold; or where a part of the property would be sufficient to satisfy the decree, such part;

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate-paying revenue to the Government;

(c) any incumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property:

Provided that where notice of the date for settling the terms of the proclamation

has been given to the judgment-debtor by means of an order under Rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs:

Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verifications, the matters required by Sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

13. Whenever a Court has to make an order for sale of any attached property, the instructions contained in Chapter 12-L of Vol. I of the High Court Rules and Orders have to be followed. Clause 2 of the said instructions reads as under:

Whenever a Court makes an order for the sale of any attached property under Order XXI, Rule 64, it shall, if the property be land assessed to land revenue, revenue-paying or revenue-free land, or any interest in such land, act as directed in the rules hereinafter prescribed. If the property be of any other description, the Court shall fix a convenient day, not being distant more than fifteen days, for ascertaining the particulars specified in Order XXI, Rule 66(2), and settling the proclamation of sale. Notice of the day so fixed shall be given to the parties or their pleaders.

(emphasis supplied).

14. Proclamation of sale is required to be settled as per the instructions contained in Clause 4 of the Rules, after notice and, if necessary on examining the decree holder and judgment-debtor. The relevant portion of the clause reads as under:

On the day so fixed, the Court shall, after perusing the documents, if any, filed under Order XXI, Rules 13 and 14 of the Code, and the report referred to in the preceding paragraph; after examining the decree-holder and judgment-debtor, if present, and after making such further inquiry as it may be consider necessary, settle the proclamation of sale specifying as clearly and accurately as possible the matters required by Order XXI, Rule 66(2) of the Code, in the following form:

Description of Name of Extent of Details of incum- Any other property in judgment interest of branches, if any, known par- cluding name debtor. judgment

to which the particulars of village and debtor in property is liable bearing on boundaries, if the property, so far as they can be ascertained by and value has been as- the Court. of the pro- certain by perty. the Court.

This proclamation for sale is an important part of the proceedings, and the details should be ascertained and noted with care This will remove the basis for many a belated objection to the sale at a later stage.

(emphasis supplied).

It is not necessary for the Court itself to give in this proclamation its own estimate of the value of the property. It is sufficient to include in it the estimate, if any, given by either or both of the parties....

15. What can be noticed in the instant case is that on receipt of warrant of attachment, the Court, without applying its mind and without caring to the provisions of Order 21 Rule 64 and Order 21 Rule 66 and without caring to follow the instructions contained in the High Court Rules and Orders, which the Court is bound to follow, proceeded to make an order for sale of the property. Adequate care was also not taken by the Court to find out as to whether it was necessary to order the sale of the entire property or whether the sale of a portion would have been sufficient to satisfy the decree.

16. There is a duty cast upon the Court under Order 28 Rule 64 of the Code to sell only such property or a portion thereof as may be necessary to satisfy the decree, which is a mandate of the Legislature which cannot be ignored as held in Assam Rifles Multipurpose Co-operative Society Ltd. and another Vs. Union of India and another, The Supreme Court after approving the ratio of the judgment in Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma and Others, held to the following effect:

Under this provision the executing Court derives jurisdiction to sell properties attached only to the point at which the decree is fully satisfied. The words "necessary to satisfy the decree" clearly indicate that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. In other words, where the sale fetches a price equal to or higher than the amount mentioned in the sale proclamation and is sufficient to satisfy the decree, no further sale should be held and the Court should stop at that stage. The Supreme Court further held:

It is of importance to note from this provision that in all execution proceedings, the Court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree-holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could

be sold without violating any provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the Court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction.

(emphasis supplied).

17. A Division Bench of this Court in *Virender Kumar v. State Bank of India and Anr.* 1991 (1) Sim LC 163, by following the ratio in *Ambati's* case (*supra*) held that it is mandatory upon the Court to sell only such property or portion thereof, as may be necessary to satisfy the decree.

18. In every case, where the property has been attached and is sought to be sold, in order to find out as to which portion of the property would be sufficient to satisfy the decree, it would be necessary for the Court to draw proclamation and include therein such particulars as are required to be stated in accordance with the instructions contained in the High Court Rules and Orders for which purpose, it is necessary to hear the judgment debtor as also the decree-holder. In the instant case, the Court also failed not only to apply its mind to the facts of the case, but also failed to afford an opportunity to the Judgment-debtors of being heard Proclamation was also not drawn. As held in *Ambati's* case, sale held without examining the mandatory aspects and not in conformity with the requirement would be illegal and without jurisdiction. The Supreme Court also deprecated the tendency of the Courts to order the sale of the entire attached property without caring to look at the mandatory provisions of Order 21 Rule 64 of the Code.

19. Since the property has already been attached in pursuance to the order dated 26th May, 1992, the order need not be quashed since no prejudice is shown to have been caused by such attachment, but the order passed on 17th June, 1992 cannot be sustained and the same is set aside being in contravention to the provisions of Order 21 Rule 64 of the Code. The revision petition is accordingly allowed.

20. The executing Court is directed to proceed in accordance with law after ascertaining the exact amount due and payable by the judgment-debtors to the decree holder and find out if it is necessary to order the sale of the property. If so, to what extent and then to act in accordance with law. The revision petition with these observations is disposed of.

C.M.P. No. 190 of 1992:

21. In view of the disposal of the revision petition, no orders are needed in this application.