

**Bhanu Shankar Raikwar Vs. Vijay Shankar Raikwar**

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**SooperKanoon Citation :** [sooperkanoon.com/1049861](http://sooperkanoon.com/1049861)

**Court :** Madhya Pradesh

**Decided On :** Nov-22-2012

**Appellant :** Bhanu Shankar Raikwar

**Respondent :** Vijay Shankar Raikwar

**Advocate for Pet/Ap. :** Shri. A.K. Jain

**Judgement :**

1 M.A. 4455/2011 HIGH COURT OF MADHYA PRADESH JABALPUR SINGLE BENCH: HON'BLE SHRI JUSTICE A.K. SHRIVASTAVA M.A. No.4455/2011 .....Appellants:

1. Bhanu Shankar Raikwar, S/o Late Damrilal, Occupation- Service 2. Vinot Shankar Raikwar, S/o Damrilal, Both residents of House No.274, Karamchand Chowk, Ram-Manohar Lohiya Ward, Jabalpur Versus .....Respondents:

1. Vijay Shankar Raikwar, S/o Late Damrilal, Ram-Manohar Lohiya Ward, Jabalpur 2. Ravishankar, S/o Late Damrilal Raikwar, Occupation Service, R/o 1806-B, Type I, Sector 2, Vehicle Estate, Jabalpur. 3 Smt. Madhubala, wife of Jeevanlal Agarwal, Resident of Gautamjiki Madhiya, Garha, Jabalpur. 4.. Anju Yadav, W/o Shri Sanjay Yadav, R/o 290, Karamchand Chowk, Jabalpur,

----- Appellants by -  
Shri A.K. Jain, Advocate Respondent no.1 by - Shri R.P. Khare, Advocate  
Respondent no.4 by - Shri Abhishek Arjariya, Advocate

----- Date of hearing:

04. 10/2012 Date of Judgment: /11/2012 2 M.A. 4455/2011

## ORDER

( /11/2012) This appeal under Order 43 Rule 1(j) has been filed assailing the order dated 18.7.2011 passed in Execution Case No.20-A/2008 by learned Third Additional District Judge, Jabalpur by the appellants.

2. No exhaustive statements of fact are required to be narrated for the purpose of disposal of this appeal. Suffice it to say that plaintiff Vijay Shankar Raikwar who has been arrayed as respondent no.1 herein this appeal and who shall be referred to as the first respondent filed a suit for partition claiming 1/5 t h share in the suit property and for obtaining separate possession of his share arraying Ravi Shankar (respondent no.1), Bhanu Shankar and Vinot Shankar (respondents no.2 and 3/appellants), Smt. Manorma (defendant no.4) and Smt. Madhubala (defendants no.5/respondent no.3) as parties to the suit. The said suit of plaintiff was decreed by learned Trial Court on 4.2.2002. A copy of the judgment is placed on record. After passing of the preliminary decree when the partition decree was put to execution, a Commissioner was appointed but the property in question could not be partitioned and as stated by learned counsel for the parties, the Court Commissioner submitted a report to the Court that it is not possible to partition 1/5 t h share and to deliver separate possession of the suit property to the plaintiff. Eventually, the disputed property was firstly attached and thereafter put for sale.

3. After the property in question was auctioned, the present appellants filed objections under Order XXI Rules 89 & 90 to set aside the auction sale. This application has been opposed by the respondent no.1. The learned Executing Court by the impugned order has rejected the application. Hence, this appeal has been preferred by the appellants. 3 M.A. 4455/2011 4. The contention of Shri A.K. Jain, learned counsel for the appellants is that the property in question was auctioned on 30.3.2011 at 11.00 AM in which a right was given to the parties to take part in the auction sale. However, in the auction sale proceedings, only House No.274 was shown and after auction it was shown that Smt. Anju Yadav had been the highest bidder and the auction was knocked down up on her bid `

28, 01,100/-. The contention of learned counsel is that the auction proceedings were not commenced on 30.3.2011 in between 11 to 3 PM. They were never contacted on that date and thereafter the proceedings have been submitted to the Court which are forged and concocted and has been submitted in collusion with the auction purchaser Smt. Anju Yadav.

5. Further, it has been put forth by learned counsel that although appellants were directed to take part in the auction proceedings by learned Executing Court but they were never noticed prior to 30.3.2011. According to him, a date earlier to the date of auction i.e. 6.12.2010 auction sale was directed, but on this date no definite date was fixed on which the property in dispute was to be auctioned and, therefore, for this reason the appellants could not take part in the auction sale of House No.274 and not only this, the other persons who could take part in the auction sale, they could not remain present at the time of auction. It is also put forth by him that it is the mandatory requirement of law under Order XXI Rule 66 CPC to affix the auction notice upon the disputed property which was to be auctioned but this was never done. The procedure prescribed in Civil Procedure Code and the Civil Court rules were totally ignored and were not followed and in this regard my attention has been drawn to Rule 208 of M.P. Civil Court Act, 1958. Learned counsel has also placed reliance on several decisions to set aside the auction sale, they are 4 M.A. 4455/2011 Mahakal Automobiles and another Vs. Kishan Swaroop Sharma (2008) 13 SCC 113.Gajadhar Prasad and another Vs. Babu Bhakta Ratan and others (1973) 2 SCC 629.Chironjilal Vs. Vidisha Mechanical & Molding Society 1978 J.L.J. SN 6.and Narayan Purushottam Bansod Vs. Ramchandra Mudalji Choudharkar and others AIR 194.Nagpur 177. Learned counsel has also invited my attention to various provisions of Partition Act, 1893 and prayed that the auction sale may be set aside.

6. Learned counsel submits that since decree is for partition, therefore, the present appellants cannot be said to be judgment-debtors because in a partition suit every party although he may be defendant is a plaintiff. Learned counsel for the appellants has pointed out several illegalities which were committed during the auction proceedings and has also submitted that in the notice of auction sale there is a reference of auction of two immovable properties but in fact only House

No.274 was put to auction. Learned counsel has also submitted that both the properties ought to have been auctioned but they were never auctioned together, hence it has been submitted that the objections which were filed by the appellants under Order XXI Rules 89 & 90 CPC be allowed and the auction sale of House no.274 be set aside and the impugned order of the Executing Court be reversed and set aside.

7. Shri R.P. Khare, learned counsel appearing for respondent no.1 as well as Shri Abhishek Arjariya, learned counsel appearing for respondent no.4/auction purchaser argued in support of the impugned judgment and submitted that auction proceedings have been done strictly in accordance with law. Shri Khare, learned counsel appearing for respondent no.1 further submits that although on merit, learned Executing Court has rejected the objections of the 5 M.A. 4455/2011 appellants in regard to setting aside the auction sale but the objections are required to be rejected on this ground also that 5% of the purchase money was not deposited by the appellants and, therefore, the application under Order XXI Rules 89 & 90 CPC deserves to be dismissed on this sole ground. In support of his contention, learned counsel has placed reliance upon the decision of Punjab High Court Sita Ram Bishambar Dass Vs. Joginder Kumar and others AIR 196.Punjab 531. It is also put forth that learned Trial Court has assigned cogent reasons in dismissing the application under Order XXI Rules 89 & 90 CPC filed on behalf of appellants and those reasons are in consonance to the law and, therefore, this Court should not interfere in the impugned order.

8. Having heard learned counsel for the parties, I am of the view that this appeal deserves to be dismissed.

9. I do not find any merit in the contention of learned counsel for the appellants that present appellants are not the judgment-debtors and they are decree-holders because in a partition suit every party is a plaintiff. It is true that in a partition suit every party to the proceeding is having interest in the property which is to be partitioned but this would not mean against whom a partition decree has been passed cannot be said to be a judgment-debtor. The term decree- holder. has been defined in Section 2(3) of CPC which means any person in whose favour

decree has been passed or an order capable of execution has been made. If this provision is applied in stricto sensu it is revealed that it is in two parts. In the first part a decree-holder means a person in whose favour a decree has been passed and in the second part any order capable of execution has been made in his favour. Thus, the decree of partition which has been passed in favour of respondent no.1 is capable of execution. 6 M.A. 4455/2011 Indeed, the decree-holder is a person in whose favour decree or executable order has been passed.

10. Similarly, the term judgment-debtor. has been defined in Section 2(10) of CPC which means any person against whom a decree has been passed or an order capable of execution has been made. Thus, in the same manner this provision is also in two parts and includes a person against whom a decree has been passed or an order has been passed capable of execution. The decree in question is passed against the appellants and it is also capable of execution. The judgment and decree passed in Civil Suit No.56-A/99 dated 4.2.2002 has been seen and on its bare perusal it is gathered that respondent no.1 who was plaintiff has claimed 1/5 t h share in the suit property. However, the present appellants resisted the suit by pleading that the plaintiff abandoned his claim in the suit property after having obtained a sum of ` 1,50,000/- from them since he does not want to reside in the property in dispute. The learned Trial Court framed specific issue no.1 in this regard. While deciding this issue, learned Trial Court did not find the stand of the appellants to be proved. On the contrary, it was found to be not proved and it was held that respondent no.1 is entitled to 1/5 t h share in the suit property and is also entitled for separate possession after getting it partitioned. Thus, an executable decree has been passed in favour of respondent no.1 and against the present appellants who are claiming that they are not the judgment-debtors and indeed they are the decree-holders.

11. The objections under Order XXI Rules 89 & 90 CPC to set aside the auction sale was submitted by the appellants on 11.5.2010 on various grounds mentioned in the application. But, before filing those objections 5% of the purchase money for payment to the purchaser has not been 7 M.A. 4455/2011 deposited by the appellants and, therefore, according to me, on this sole ground the objections of the appellants under Order XXI Rules 89 & 90 CPC cannot be considered and

deserve to be dismissed. Rule 89 speaks about the setting aside of sale of immovable property. For better understanding, it would be appropriate to quote Rule 89 of Order XXI which reads thus:-

89. Application to set aside sale on deposit.- (1) Where immovable property has been sold in execution of a decree {any person claiming an interest in the property sold at the time of 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 percent, 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. (emphasis supplied by me) Thus making deposit is a condition precedent before filing an application for setting aside the sale. Since admittedly, this has not been done. Learned counsel for the appellants did not dispute that appellants did not deposit the said 8 M.A. 4455/2011 amount. According to him because appellants are not judgment-debtors, therefore, they were not required to deposit any amount before filing the objections to set aside the auction sale. But, according to me, when the 5% equivalent to the purchase money has not been deposited which was to be paid to the purchaser, the objections cannot be entertained and the auction sale cannot be set aside. In this regard, I may profitably place reliance upon the decisions of Supreme Court P.K. Unni Vs. Nirmala Industries and others AIR 199.SC 93.and Tribhovandas Purshottamdas Thakkar Vs. Ratilal Motilal and others AIR 196.SC 372.

12. On bare perusal of Rule 89 of Order XXI CPC, it is gathered that where any immovable property has been sold in execution of a decree, any person claiming an interest in the property sold at the time of 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. Thus, according to me, not only the decree-holder or judgment-debtor but any person claiming an interest in the property sold, may file such type of application and, therefore, it is not necessary that he should be judgment-debtor or decree- holder. Even for the sake of arguments it is held that appellants are not the judgment-debtors, since they are having interest in the property which has been auctioned, therefore, in order to trigger and set in motion the provisions of Rule 89 CPC of Order XXI, they are bound to deposit 5% amount as envisaged in Rule 89 of Order XXI. Admittedly, the appellants have not deposited the said amount and, therefore, the auction sale cannot be set aside on this short ground and for this reason various provisions of Order XXI Rule 66 CPC and the aforesaid case laws which are cited by learned counsel for the appellants are not taken into account. 9 M.A. 4455/2011 13. For the reasons stated hereinabove, this appeal fails and is hereby dismissed with no order as to costs. (A.K. Shrivastava) Judge  
rao

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