

ilam Singh Vs. Vith Addl. District Judge, Muzaffarnagar and Others

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Court : Allahabad

Decided On : Apr-19-1990

Reported in : AIR1991All34

Judge : M.L. Bhat, J.

Acts : [Constitution of India](#) - Article 226; [Code of Civil Procedure \(CPC\), 1908](#) - Sections 47, 73 and 151 - Order 21, Rule 72, 84, 84(1) and (2), 85, 86, 90 and 94

Appeal No. : Civil Misc. Writ Petn. No. 21230 of 1986

Appellant : ilam Singh

Respondent : Vith Addl. District Judge, Muzaffarnagar and Others

Advocate for Def. : Standing Counsel and ;Satish Chandra Srivastava, Adv.

Advocate for Pet/Ap. : R.H. Zaidi, Adv.

Judgement :

ORDER

1. Before the executing Court of Civil Judge, Muzaffarnagar an application under Section 47 read with Section 151, C.P.C. filed by the judgment-debtor was dismissed on 18-9-1985. The judgment-debtor filed a revision petition before the respondent No. 1 which was also dismissed on 3-12-1986. The petitioner has filed this petition to quash the said orders of the respondents Nos. 1 and 2 and wants a

command to protect his possession over the land in question.

2. The facts may be put in brief compass. The respondent No. 3 is said to have filed a Civil Original Suit No. 140 of 1980 for performance of a contract for sale on 9-1-1986 and in the alternative had prayed for refund of the consideration amount, which was Rs. 5000/-. The suit was decreed on 25-12-1982 for an amount of Rs. 8000/- with *peri-dente lite* interest and future interest at the rate of 24% and 12% respectively. A sum of Rs. 6,574.75 was allowed as costs. The respondent No. 3 put the decree in execution on 2-1-1983 and claimed an amount of Rupees 17,892/- in his execution application. The respondent No. 3 wanted the decree to be executed through sale of land mentioned in the execution application. The said land was put to auction in the execution and the respondent No. 3 was permitted by the Court to participate in the auction, which was to be held for sale of the land. This is said to have been done by the executing Court at the back of the petitioner. A big chunk of land measuring 29 Bighas and over 2 Biswas was proposed to be sold by auction to satisfy the decretal amount. The respondent No. 3 had shown the cost of the said land in the execution proceedings as Rs. 73000/- in 1976.

3. On 15-3-1984 the decretal amount was shown by the office of the executing Court as exceeding Rs. 20,000/- for which sale proclamation was issued. On 10-12-1984 the auction is said to have taken place and the decree holder offered an amount of Rupee 23,500/- which was accepted as the highest bid. The executing Court did not dispense with the requirement of deposit of one-fourth amount under law nor was one-fourth amount deposited by the decree holder as required by law. The bid was accepted without any payment having been made by the decree holder.

4. The petitioner alleged that there has been a violation of Rules 84, 85 and 86 of Order 21, C.P.C., therefore, the auction sale in favour of the decree holder is void and a nullity in the eye of law and the proper procedure for the executing Court was that the land in question should have been resold after taking fresh auction proceedings.

5. It is contended that the requirement of Rule 84 of Order 21, C.P.C. was not complied with though it was necessarily to be complied with. Therefore, for non-

compliance with the said rule, the auction sale would be void. The requirement of depositing one-fourth amount of the auction money was not dispensed with and the decree holder not having deposited the same, the sale in his favour had become void. After claiming the set off of the decretal amount the balance amount of the sale consideration was not paid or deposited in Court as required under Rule 85 of Order 21, C.P.C. therefore the entire proceedings had become void. Rule 85 of Order 21, C.P.C. is mandatory. Therefore, the deposit of the balance amount under that rule cannot be made after the time specified in that rule. Section 5 of the Limitation Act cannot apply to execution proceedings. The order of the executing Court condoning the delay for making payment of excess amount by the respondent No. 3 was bad and the order of the revisional Court is also bad and is against the provisions of law. Therefore, both the orders are liable to be set aside.

6. It appears that the judgment-debtor had made an application under Section 47, C.P.C. challenging the validity of sale and auction on the ground of non-compliance with Order 21, Rules 84, 85 and 86, C.P.C., which was rejected and the application of the decree holder, respondent No. 3, for depositing the amount after about nine months of the auction was granted on the ground that the decree holder had acted in a bona fide manner and he was misled by the office of the executing Court, inasmuch as the decretal amount was not specified by the office correctly. After it was done by the office the decree holder made the payment. The executing Court was of the opinion that the deposit was belated but it allowed deposit to be made after nine months on the ground of bona fides of the decree holder. The revisional Court in revision held that the office had committed mistake in mentioning the excess amount in the proclamation; hence the decree holder was made to believe that the decretal amount was more than the amount of auction sale. He had filed the receipt of set off of the amount of decree on 21-12-1984 i.e. within 15 days. The balance price remained with the decree holder on account of the mistake on the part of the office of the executing Court. This has not caused any prejudice to the judgment-debtor. Therefore, late deposit of the balance amount by the decree-holder was justified and the order of the executing Court was confirmed.

7. During the pendency of this writ petition this Court directed on 19-12-1986 that confirmation of sale shall remain stayed provided the judgment-debtor deposits the entire decretal amount within a period of two months from today. In case of default the stay order was to stand automatically vacated. From a perusal of the execution file it transpires that the judgment-debtor had deposited the entire decretal amount within the time granted by the Court. An amount of Rs. 19,773/- was deposited on 9-1-1987 i.e. within less than a month from the date of the interim order dated 19-12-1986. Despite this deposit, it is stated that the sale was confirmed by the executing Court and possession of the land was delivered to the respondent No. 3.

8. The confirmation of sale and delivery of possession was made by the executing Court during the pendency of the writ petition and despite the order of this Court dated 19-12-1986 whereby it had stayed the confirmation of sale and despite the fact that the decretal amount was deposited by the judgment-debtor within time, the sale had taken place. Therefore, the judgment-debtor had made an application for amendment of the writ petition and a counter-affidavit to that amended plea has been filed by the respondent No- 3. The confirmation of sale is a subsequent event and has taken place despite the order of the Court, therefore, the amended plea set up by the judgment-debtor to challenge the confirmation of sale is allowed as no prejudice is caused to the other side because it has been given time to meet the amended plea. Accordingly this Court will also be considering the validity or otherwise of the confirmation of sale, which has taken place during the pendency of this writ petition and by which the petitioner judgment-debtor has been dispossessed from the land in question.

9. The learned counsel for the decree-holder raised a preliminary objection that the writ petition in respect of two orders is not maintainable. He submitted that it was, therefore, liable to be dismissed. In support of this contention reliance is placed on (1978) 4 All LR 142 : (1978 All LJ 1386), I have perused the said authority. In the peculiar circumstances of that case it was held that unless sufficient court-fee is paid two orders cannot be challenged in one writ petition, which would, in other words, mean that if court-fee is paid in accordance with the rules, two orders can be challenged in one writ petition. However, this authority is inapplicable to the present case. The executing court has rejected the application

of the judgment debtor under S. 47, C.P.C. and against that a revision is taken to the revisional court by the judgment debtor. The order of the executing court is confirmed, Therefore, under law it will be deemed that the order of the executing court has merged into the order of the revisional Court. The judgment-debtor need not challenge the order of the executing Court. He could have challenged the order of the revisional court and in making the challenge to that order, it was open to him to criticise the order of the executing court also. The two orders emanated from one proceeding between the same parties on the same subject-matter and relate to the same controversy. Therefore, there is nothing wrong if two orders are challenged in one writ petition. In this case the question of payment of additional court-fee would not arise. The subsequent plea of the petitioner in regard to his challenge made to the confirmation of sale also can be challenged in the writ petition because that was done after 19-12-1986 despite the orders of this Court injunctioning the executing Court not to confirm the sale on the condition that the decretal amount be deposited within two months, which was deposited within time. Therefore, the subsequent plea could also be challenged and there is no defect in the frame of the writ petition, as contended by the decree-holder. The preliminary objection is, therefore, overruled and the writ petition is held to be maintainable.

10. Now coming to the merits of the controversy. It is to be seen as to whether the provisions of Rules 84 and 85 of Order 21, C.P.C. are mandatory or directory. If these rules are mandatory, then the violation of any of these rules would render the sale and auction void and non est. Rule 84 of O.21, C.P.C. reads as under:

'84. Deposit by purchaser and resale on default-- (1) On every sale of immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit of twenty five per cent on the amount of his purchase money to the officer or other person conducting the sale, and in default of such deposit, the property shall forthwith be resold.

(2) Where the decree-holder is the purchaser and is entitled to set-off the purchase money under Rule 72, the Court may dispense with the requirement of this rule.'

For Allahabad High Court there is an addition to sub-rule (2), which was made by the amendment dated 17-1-1953, which amendment reads as under:

'The Court shall not dispense with the requirements of this rule in a case in which there is an application for rateable distribution of assets'.

11. Rule 84 requires that if any person is declared purchaser, after the sale he shall pay, immediately after such declaration, a deposit of twenty five per cent of the amount of the purchase money to the officer or the person conducting the sale. In default of such deposit, the property is to be resold.

12. However, where the decree-holder is a purchaser and is entitled to set-off of the purchase money, the Court is given power to dispense with the requirement of this rule. In other words, if the requirements of this rule are not dispensed with by the Court, the provisions of R. 84(1) have to operate even in case of a decree-holder, who may have been permitted to take part in the auction sale. The court may dispense with the requirements of this rule in favour of the decree-holder but it is not obliged to do it unless the decree-holder seeks an order from the court for dispensing with the requirements of sub-rule (1) of R. 84 of Order 21, C.P.C. Sub-rule (1) of R. 84 is couched in a language, which is mandatory and does not admit any relaxation in favour of the person who is declared purchaser at the time of the auction of the property in respect of the deposit of twenty-five per cent of the purchase money unless, of course under sub-rule (2) the Court has dispensed with the requirements of the said rule, if the decree-holder is a purchaser. This discretion of the court is taken away, by virtue of the amendment relating to Allahabad, where there is an application for rateable distribution of assets.

13. Rule 85 of O. 21, C.P.C. enjoins upon the purchaser to deposit full amount of the purchase money into Court before the court closes on the 15th day from the sale of the property. The purchaser is given the benefit of set-off from the purchase money to which he is entitled under R. 72 of O. 21, C.P.C. For the sake of facility R. 85 is reproduced as under:

'85. Time for payment in full of purchase money-- The full amount of purchase money payable shall be paid by the purchaser into court before the court closes

on the fifteenth day from the 'sale of the property:

Provided, that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under Rule 72.'

From a reading of this rule it becomes manifestly clear that full amount is to be paid within 15 days from the date of sale into the Court. Of course, advantage of set-off is to be given, which would mean that after claiming the set-off the balance amount of the purchase money is to be deposited necessarily within 15 days from the date of sale into the Court.

14. Rule 72 of O.21, C.P.C. lays down that the decree-holder shall not bid for purchase of the property without the express permission of the Court and where the decree-holder purchases with such permission, the purchase money and the amount due on the decree may, subject to any rateable distribution, which may be required to be made under S. 73, be set-off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

15. The effect of non-compliance with the provisions of R. 85 of O.21, C.P.C. is given in R. 86 of O.21. That rule reads as under:'

'86. Procedure in default of payment-- In default of payment within the period mentioned in the last preceding rule, the deposit may, if the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be resold, and the defaulting purchaser shall forfeit all claim to the property or to any part of the sum for which it may subsequently be sold.'

It appears that the Legislature has made the provisions of R. 85 mandatory and the rigour of the said rule cannot be diluted or relaxed by the Court.

16. The Supreme Court in *Manilal Mohanlal Shah v. Sardar Saved Ahmed Sayed Mahmad*, reported in : [1955]1SCR108 , considered the provisions of O.21, Rr.8,4, 86 and 86. It was held, that the provision regarding deposit of twenty-five per cent by the purchaser other, than the decree-holder is mandatory as the language of the rule would suggest. However, in respect of the provisions of R. 85

it was held that if the payment is not made within 15 days the Court has the power to forfeit the deposit. The obligation of the Court to resell the property is imperative. The inherent powers of the Court cannot be invoked to circumvent the mandatory provisions of the Code and relieve the purchasers of their obligation to make the deposit of the purchase money. The Supreme Court concluded (at pp. 351-52 of AIR):

'Having examined the language of the relevant rules and the judicial decisions bearing upon the subject we are of the opinion that the provisions of the rules requiring the deposit of 25 per cent of the purchase money immediately on the person being declared as a purchaser and the payment of the balance within 15 days of the sale are mandatory and upon noncompliance with these provisions there is no sale at all. The rules do not contemplate that there can be any sale in favour of a purchaser without depositing 25 per cent of the purchase money in the first instance and the balance within 15 days. When there is no sale within the contemplation of these rules, there can be no question of material irregularity in the conduct of the sale. Non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity. The very fact that the Court is bound to resell the property in the event of a default shows that the previous proceedings for sale were completely wiped out as if they do not exist in the eye of law. We hold, therefore, that in the circumstances of the present case there was no sale and the purchasers acquired no rights at all.'

17. The provisions of R.84 of O.21, C.P.C would become mandatory in respect of such decree-holder, who has not sought permission of the Court for dispensing with the requirement of making deposit of twenty-five per cent when the decree-holder is declared to be a purchaser of the property. In case he obtains an order for dispensing with such deposit he may not be required to make deposit of twenty-five per cent. But if a decree-holder chooses not to obtain any order from the Court for dispensing with the requirement of depositing twenty-five per cent of the sale amount, he is bound to deposit twenty-five per cent and the rigour of rule in respect of such decree-holder for making deposit of twenty five per cent cannot be diluted.

18. In the present case there is nothing on the execution file that the decree-holder had obtained any order for dispensing with the requirement of sub-rule (1) of R.84 of O.21, C.P.C. In the absence of any order from the executing Court, the decree-holder was, therefore, bound to make a deposit of twenty-five per cent of the amount of purchase money the moment he was declared to be a purchaser of the property. In the absence of such deposit when there is no order of the Court dispensing with the requirements of making any deposit, the decree-holder cannot be said to be the purchaser of the property.

19. After the sale was concluded the decree-holder could be given the benefit of set-off i.e. the amount to which he was entitled under the decree to receive could be retained by him and if the property had been sold for any excess amount of the decretal amount the excess amount was to be deposited by the decree-holder within 15 days from the date of the sale in Court. This is the requirement of R.85 of O.21, C.P.C. the provisions of this rule are mandatory and do not admit of any relaxation in favour of the decree-holder. The Supreme Court also has interpreted this rule and held that the rigor of this rule is not to be diluted. It is, therefore, to be held that the decree-holder was obliged to make the deposit of the balance of the purchase money after claiming set-off in the executing Court within 15 days from the date of sale of the property. If that is not done, the sale is to be treated as non est and a nullity in the eye of law and in case R. 85 of Order 21, C.P.C. is not complied with the Court has to follow the provisions of Rule 86. It has discretion to forfeit the deposit after defraying the expenses of the sale but it is obliged to resell the property and the defaulting purchaser's claim to the property is forfeited.

20. Learned counsel for respondent No. 3 has submitted that provisions of O.21, Rr. 84 and. 85, C.P.C. are only directory and not mandatory. It was urged that even there is some irregularity in the conduct of sale of the land in question, the sale cannot be set aside because of that irregularity. He has relied on some case law which needs to be discussed briefly.

21. In AIR 1946 Madras 337 Kandukuri Chellamma v, Sri Ranganilayam Ramakrishnarao, provisions of O. 21, R.85, C.P.C. were held to be directory. The authority deals with the provisions of O.21, R. 90, C.P.C.

22. Rule 90 of O.21, C.P.C. permits an executing court to set aside a sale on the ground of fraud or on the ground of material irregularity. There are some guidelines in the said Rule as to how and on what ground the sale can be set aside. This authority is not applicable to the facts of this case in view of (he authoritative pronouncement of the Supreme Court in : [1955]1SCR108 (supra).

23. : AIR1972 All353 Amar Singh v. Bishwanath Singh has held that deposit of 25 per cent by purchaser is not mandatory with regard to decree-holder. He need not take prior permission of the executing Court to make a bid at the auction sale. Af r going through this authority, it transpires that in case of decree-holders deposit of 25 per cent as security deposit for attaining the status of purchaser at the auction is not necessary but it is not said whether the decree-holder is required to obtain an order of dispensing with the requirement of making deposit. It appears that if the decree-holder is permitted to take part in auction sale under O.21, R. 72 he may be exempted from making deposit of 25 per pent as security amount in the said order if he has not obtained exemption under that Rule, the requirements of R. 84(1) of O.21, C.P.C. may be dispensed with by the Court. Permis-sion of the Court in either case is necessary.

24. If for the sake of argument (though it is not decided in this judgment) that decree-holder can be permitted to be declared purchaser without deposit'of 25 per cent of purchase money at the conclusion of the sale but he cannot be permitted to do away with the balance purchase amount after claiming set off. Therefore, this authority also will not be of much help to the respondent No. 3.

25. AIR 1946 Patna 270, Shyamnandan Sinha v. Naurangi Singh deals with a case in which a decree-holder had not deposited excess amount of purchase money which was just one pie within 15 days of the sale. The High Court held that sale could not be set aside for non-deposit of one pie. This authority also does not help the petitioner because it does not discuss the law on the subject, but has only dealt with the meagreness of an amount which was only one pie and its effect of non-deposit.

26. : AIR 1971 AP392 , Gadde Buchaiah v. Dasari Kotaiah lays down that once permission to bid and set off is granted to a decree-holder under O.21, R. 72

express permission under O. 21, R. 84, C.P.C. is not necessary. This authority deals only with non-compliance of O. 21, R. 84, C.P.C. and does not say anything with regard to the non-compliance of provisions under O. 21, R. 85, C.P.C.

27. : AIR1972 Bom1 Raja Bahadur Motilal Mills Ltd. v. Life Insurance Corporation of India also does not throw much light on the controversy in issue. It deals with Bombay High Court Rules which are to be read with the rules of C.P.C.

28. On the basis of the submissions of the learned counsel for the respondent No. 3 it cannot be held that non-compliance with the provisions of O.21, R. 85, C.P.C. has no effect. Nor can provisions of O. 21, R. 90 be pressed into service for holding that auction sale is valid. I would not, therefore, agree with the submission made by learned counsel for the respondent No. 3 that despite the violation of provisions of O.21, Rr. 85 and 86 the sale is still valid. That is contrary to what has been held by the Supreme Court. There is no authority for the proposition that court can extend time for deposit of purchase money after allowing set off. Deposit of purchase money must conform to O.21, R.85, C.P.C.;

29. In view of the aforesaid discussion and in the light of the authority of the Supreme Court reported in : [1955]1SCR108 (supra) it is to be held that for non-compliance with the provisions of R. 84 and R. 85 of O.21, C.P.C. the sale of the property in question was a nullity and non est in the eye of law and needs to be declared so.

30. The executing Court and the revisional court have slipped into a great error by holding that the decree-holder was acting bona fide or he was misled by the office of the executing Court. The decree-holder had claimed specified amount in the execution application. He was aware about his own entitlement. This sale price was also known to him because he was the purchaser. Therefore, after claiming the set-off of the decretal amount he was obliged to deposit the balance amount of the sale price within 15 days in the executing court. The Courts below have dealt with the cases as if the provisions of Rr. 84 and 85 of O.21, C.P.C. were directory and could be observed in breach at the whim of the decree-holder. The reasoning and finding of the courts below is not only erroneous but is in disregard of the mandatory provisions of the C.P.C. which have been discussed in this judgment in

detail. The application of the judgment-debtor for declaring the sale of the property as a nullity was not liable to be rejected. Such an application should have been allowed and the sale should have been declared a nullity. The courts below have allowed the deposit of the balance amount of the purchase money after allowing the set-off in favour of the decree-holder to be made after more than nine months and have applied the provisions of the Limitation Act to such deposit, the approach adopted by the courts below in this regard is bad and the orders of the courts below impugned in this writ petition are, therefore, liable to be quashed.

31. Now a development during the pendency of this writ petition has taken place. The decretal amount was deposited within the time specified by the Court. Therefore, that amount is due to the decree-holder, who had only a decree for payment of amount in his favour and not for a decree of specific performance. Therefore, after deposit of the decretal amount the question of resale of the property under R.86 of O.21, C.P.C. does not arise. By the interim order of this Court dated 19-12-1986 the money decree is satisfied. The amount, if not withdrawn by the decree-holder, can be withdrawn by him and he is permitted to do so. In that event it will be against the justice and fair play to allow the property of the judgment-debtor to be resold in execution proceedings under R. 86 of O.21, C.P.C. There is no necessity of reselling the property by auction. The decree stands satisfied and the Court while passing the interim order dated 19-12-1986 has taken equities into consideration and thereafter made the conditional order. The conditional order is complied with. The executing court should not, therefore, proceed further with the execution proceedings but should permit the decree-holder to withdraw the decretal amount deposited by the judgment-debtor in obedience to the order of this Court dated 19-12-1986.

32. It was urged, though feebly, by the learned counsel for the respondent No. 3 that the petitioner could challenge the auction sale of his property by a regular suit and not by filing objection under S. 47 of the C.P.C. Objection or any application filed by the petitioner before the executing Court was not maintainable as he could not raise any objection to the validity of the auction sale in the execution proceedings.

33. This submission of the learned counsel for the decree-holder (respondent No. 3) is self defeating. Executing Court has the competence to consider and determine all questions which relate to the execution, satisfaction and discharge of the decree. Questions relating to execution, satisfaction and discharge of the decree must arise between the parties to the suit in which the decree was passed.

34. The petitioner was defendant in the suit in which the decree under execution was passed. He could raise the objection to the validity of the auction sale which had taken place in consequence of execution of, the decree. Therefore, the validity or otherwise of the auction sale related to the execution of the decree. By virtue of the process issued in the execution proceedings auction sale of 'the petitioner's land had taken place. The petitioner was, therefore, within his right to challenge the auction sale of his land, 'as directed by the executing Court, in the execution proceedings itself. He could not bring a separate suit for this purpose. This is the import and object of S. 47 of the C.P.C,

35. For the foregoing reasons the writ petition is allowed and the impugned order dated 3-12-1986 passed by the VI Additional District Judge, Muzaffarnagar in Civil Revision No. 142 of 1985 and that of the executing court dated 18-9-1985 passed by the Civil Judge, Muzaffarnagar are hereby quashed. The confirmation of sale during the pendency of the writ petition is also a nullity because it was done in violation of the orders of this Court dated 19-12-1986, which was complied with by the judgment-debtor petitioner within the time fixed in that order. It is commanded that the decree-holder shall be permitted to withdraw the decretal amount deposited by the judgment-debtor on 9-1-1987 in the executing Court and the decree obtained by the decree-holder shall be deemed to have been satisfied. The execution proceedings pending in the Court of the Civil Judge, Mazaffarnagar are directed to be discharged without any further proceedings and if the petitioner is dispossessed from the land, he shall be restored the possession of the said land and the executing Court shall see that the property in question is restituted and restored to the judgment-debtor petitioner. In the peculiar circumstances of the case, there will be no order as to costs.

36. Petition allowed.

