

Ramesh Kumar Vs. Budh Ram Sharma and ors.

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Court : Allahabad

Decided On : Jul-21-1972

Reported in : AIR1973All150

Judge : K.B. Asthana, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 2(2), 58, 58(2), 63, 89, 90, 91 and 92

Appeal No. : Ex. Second Appeal No. 1231 of 1971

Appellant : Ramesh Kumar

Respondent : Budh Ram Sharma and ors.

Advocate for Def. : Ashoke Gupta, Adv.

Advocate for Pet/Ap. : R.R. Agrawala, Adv.

Disposition : Appeal dismissed

Judgement :

K.B. Asthana, J.

1. This second appeal purporting to be under Section 47 of the Civil Procedure Code is by Ramesh. Kumar who had filed an objection under Rule 58 of Order XXI. Civil Procedure Code questioning the attachment of a house in execution of a

simple money decree in favour of Narendra Deo against Jai Jai Ram.

2. The objection under Rule 58 of Order XXI was that the objector and not the judgment-debtor was the owner of the house attached. This objection was preferred on 21-9-1968. The executing court, however, did not stay the execution sale which had been already advertised to be held on 23-9-1968. The sale was held on the day fixed, that is on 23-9-1968 and the highest bid was that of Budhram Sharma which was accepted by the court on 25-9-1968, The objection of Ramesh Kumar under Rule 58 of Order XXI was disallowed by the executing court on 14-4-1970. Before the sale could be confirmed by the court Ramesh Kumar filed a suit under Order XXI, Rule 63 for declaration of his title in the house sold. To this suit only the judgment-debtor and the decree-holder were impleaded as defendants. The auction purchaser Budhram Sharma was not made a party. On opposition of Ramesh Kumar the attempt by Budhram Sharma, the auction purchaser, to be impleaded as defendant failed. There was a compromise between the parties and the suit was decided in terms of the compromise on 20-10-1970 by which the title of Ramesh Kumar to the house sold in execution of the decree was recognised.

It appears while the said suit was pending the judgment debtor paid the decretal amount to the decree-holder and that payment was duly certified by the executing court by an order dated 8-8-1970 but as the sale had not been confirmed by the court by that time, it was further ordered that the certification would not prejudice the rights of the auction purchaser, if any, acquired under law. Thereafter by an order dated 21-12-1970 the executing court struck off the execution in full satisfaction and set aside the sale dated 23-9-1968. Budhram Sharma, the auction purchaser, filed an appeal against the said order which was allowed and the sale in his favour was confirmed by the lower appellate court by its order dated 27-4-1971. It is against this order that Ramesh Kumar the objector claimant has come up in appeal.

3. The main question which falls for determination in this appeal is whether the decree passed in favour of the appellant Ramesh Kumar in the suit filed under Rule 63 of Order XXI will result in an automatic cancellation of the sale in

execution of the decree and for that reason the sale in favour of Budhram Sharma, the auction purchaser was liable to be set aside. The two courts below have differed on this question. The executing court held that the objector Ramesh Kumar having established his title to the house attached in execution in the suit under Rule 63 of Order XXI the sale held in execution automatically failed and was liable to be set aside. The lower appellate Court held that there being no objection under Rules 89-91 of Order XXI to set aside the execution sale, no choice was left with the court but to confirm the sale inasmuch as Budhram Sharma the auction purchaser, not being a party to the suit under Order XXI, Rule 63 the order of the executing court disallowing the objection under Rule 58 of Order XXI remained conclusive in his favour and the sale was liable to be confirmed.

4. Sri Rajaram Agarwal, learned counsel appearing for the appellant, relying upon the provisions of the relevant rules of Order XXI as amended by our High Court submitted that the objection of the appellant under Rule 58 of Order XXI would stand allowed, the appellant having succeeded in the suit under Rule 63 of Order XXI, and the very basis, that is the attachment of the house which led to the sale in execution, having disappeared no further question arose of the confirmation of the sale. Reliance was placed by the learned counsel on the decision of a learned Single Judge of the Madhya Bharat High Court in the case of Keshav Narain v. Ghasi Ram, AIR 1956 Madh Bha 226. Learned counsel assailed the view taken by the learned Judge of the court below that the auction purchaser is a necessary party in a suit under Rule 63 of Order XXI and if he was not impleaded in such a suit the decree passed in the suit would not be binding on him and he was entitled to have the sale confirmed in his favour there being no objection under Rules 89-91 of Order XXI as legally erroneous. Relying upon a decision of the Patna High Court in Kali Dayal v. Umesh Prasad, AIR 1922 Pat 63 the learned counsel urged that the auction purchaser is the representative of judgment-debtor and will be bound by previous litigation between judgment-debtor and a third person, hence the auction purchaser would be bound by the decree in the suit filed by Ramesh Kumar under Rule 63 of Order XXI wherein it was declared that Ramesh Kumar was the owner of the attached house and not the judgment debtor Jal Jai Ram.

It was further urged that the consequence of the decree in that suit was that the objection of Ramesh Kumar under Order XXI. Rule 58 stood allowed and the house stood released from attachment, the subsequent sale held in execution, therefore fell through. In support of the proposition that an auction purchaser at a sale held in execution of a simple money decree is a representative of the judgment-debtor the learned counsel cited *Gulzari Lal v. Madhoram*. (1904) ILR 26 All 477 (FB); *M. Chimpiramma v. Rabbiseti Subramanyam.*, AIR 1957 Andh Pra 61 (FB) and *Mst Suraj Dei v. Gulab Dei* : AIR1955 All49 . On the strength of a decision of Division Bench, of this Court In the case of *Ghasi Ram v. Mangal Chand*. (1905) ILR 28 All 41 the learned counsel submitted that to a suit by a claimant to establish that the property attached belonged to him only the decree-holder would be a necessary party.

5. Sri Ashok Gupta learned counsel appearing for the respondent Budhram Sharma, auction purchaser, submitted that a sale once held in execution of a decree must be confirmed unless on an inquiry by the executing court any objection grounded on Rule 89 or 90 or 91 of Order XXI. Civil Procedure Code is allowed. Reliance was placed on a decision of the Supreme Court in the case of *Janakraj v. Gurdial Singh*. : [1967]2SCR77 . He further urged that the objection of Ramesh Kumar under Order XXI, Rule 58, Civil P. C. having been disallowed and the attached house having been found in possession of the Judgment-debtor there could be no impediment in the sale being held on the date advertised and thereafter confirmed as required by the law. It was submitted that the order of the executing court disallowing the objection of Ramesh Kumar under Order XXI, Rule 58 of the Civil Procedure Code was conclusive in favour of the auction purchaser and he not having been impleaded as defendant in the suit under Rule 63 of Order XXI as a necessary party, would not be bound by the decree in that suit. Sri Gupta refuted the contention of the appellant that the auction purchaser being a representative of the Judgment-debtor will be bound by the decree in the said suit.

Sri Gupta did not controvert the law laid down by the Full Benches of the different High Courts cited by the learned counsel for the appellant and conceded that for certain purposes depending on the facts and circumstances of each case an auction purchaser would be a representative of the judgment-debtor as the right

and interest of the judgment-debtor in the property purchased by him at an auction sale will vest in him but submitted that this rule of law cannot be said to be of universal application to all circumstances and would not be attracted to the facts of the instant case where the rejection of the claim of Ramesh Kumar under Rule 58 of Order XXI was on account of a finding that Jai Jai Ram judgment-debtor, who is father of Ramesh Kumar, the objector-claimant colluded with his son and the decree in the suit subsequently filed by Ramesh Kumar under Rule 63 of Order XXI not being on merits but passed on a compromise between the father and son, the decree-holder having consented to the compromise as he had no interest left having been paid the amount of the decree. It was pointed out that Ramesh Kumar opposed the application of the auction purchaser to be impleaded as a defendant in the suit and the main ground on which the court rejected the application of the auction purchaser was that the parties to the suit had compromised which compromise only remained to be verified and at that stage impleading of any third party would unreasonably and unnecessarily delay the decision of the suit.

In this connection it was further urged that the rights of a third party that is the auction purchaser, having become involved any compromise or adjustment between the decree-holder the judgment debtor and the objector-claimant ought not to have been sanctioned by the court, and the sale could not be set aside on the basis of a compromise decree as it would affect the auction purchaser's interest. Reliance was placed on a decision of the Privy Council in the case of *Nanhey Lal v. Umrao Singh*. Sri Gupta also contended that the objector-claimant Ramesh Kumar and the judgment debtor Jai Jai Ram, being son and father there was every likelihood of collusion between them to save the property and it appears that they satisfied the decree by payment outside the court and then obtained a compromise decree in the suit under Rule 63 of Order XXI and in such circumstances the rule that an auction purchaser is representative of a Judgment-debtor will not apply. The observations made by Allsop. J. in the case of *Monammad Ummar v. Abdul Ghani* : AIR1939 All728 to the effect that there are many cases where the judgment-debtors have very little property against which the decree-holders can proceed and are interested merely to save the properties attached, because, if those are saved, there is no other method by which the decree-holders can proceed against them and in such cases there may be

collusion between them and the claimants.

6. Before I examine the niceties of the questions arising from the able arguments of the learned counsel for the respective parties, I think it necessary to notice some of the salient features in the case which may be helpful in re-solving the controversy in this appeal.

7. From the record it appears that an order for attachment of the bouse in dispute was passed by the executing court on 17-10-1967 and the attachment actually was effected within a (few days of the said order. Then on 7-8-1968, ten months later, the terms of the proclamation for sale were settled and the sale was advertised for 23-9-1968. It was on 21-9-1968 almost about 11 months after the attachment and more than a month after the sale proclamation that the objection under Order XXI Rule 58, Civil Procedure Code was filed by Ramesh Kumar the son of the judgment debtor Jai Jai Ram. There is no satisfactory explanation on record why the objection was so much delayed. Under Rule 58 of Order XXI a court may refuse to make investigation, where it considers the claim or objection as designedly or unnecessarily delayed. However, the executing court decided to investigate claim raised in the objection but did not think it fit to stay the sale though a prayer to that effect was made by the claimant-objector. The sale was allowed to be held on 23-8-1968 the date advertised. The order of the executing court dated 14-4-1970 disallowing the objection under Rule 58 shows that on the evidence the court was (not ?) even prima facie satisfied about the genuineness of the claim and observed that the delayed claim appeared to be collusive.

It is not clear from the record whether a notice was sent to the auction purchaser Budhram Sharma, who by that time had come upon the scene. On 8-5- 1970 the suit under Rule 63 of Order XXI was filed by Ramesh Kumar without Impleading Budhram Sharma, the auction purchaser. Then on 8-8-1970 an application was filed before the executing court for certifying the payment of the decretal amount to the decree-holder outside the court and the executing court passed an order certifying the payment but without prejudice to the rights of the auction purchaser, if any acquired under law. Then an application was made in the suit by all the parties, that is the objector-claimant, who was the plaintiff, the judgment-debtor

and the decree holder, who were the two defendants, for recording a compromise in the suit. It was at that stage that Buddhram auction purchaser applied to be impleaded as a defendant to the suit. On the opposition of Ramesh Kumar the plaintiff, the application of auction purchaser was rejected mainly on the ground that the suit was about to be compromised and a third party's intervention at that stage was not proper. On 20-10-1970 the suit was decreed in terms of the compromise. One of the terms was that Ramesh Kumar the plaintiff, would continue to be the owner of the house attached in execution of the decree. On 28-4-1971 the sale was confirmed.

8. Considering the relationship 'between the objector-claimant and the judgment-debtor, the great delay in preferring the objection under Rule 58 of Order XXI and the manner in which the suit under Rule 63 was compromised go a long way in support of the submission of Sri Gupta that there was always an apprehension of collusion and may be actually there was collusion as appeared to the executing court while disallowing the objection under Rule 58, though there may not be any positive evidence to that effect, therefore, the rule that the interest of the auction purchaser was represented by the judgment-debtor in the suit filed under Rule 63 of Order XXI ought not to be extended to the facts and circumstances of the instant case. As far as the decree-holder was concerned he had been paid off outside the court. He thus had no interest in realisation of his decretal amount from the sale proceeds deposited in court, he having got his money that was due to him. It would remain no longer his worry to see that the execution sale is confirmed. In such circumstances he could agree to any arrangement arrived at between the father and son about the attached house.

The judgment-debtor having paid the decretal amount outside the court would naturally become interested in getting the auctioned house back to the family and the only best and most convenient way was to concede to the claim of his son. In a way the judgment-debtor's own interest impelled him to be adverse to the interest of the auction purchaser. Here the judgment-debtor was interested always not to oppose the claim of the objector. The whole claim was, therefore, one which was ripe for collusion. In the particular circumstances of the case. I think, it was the duty of Ramesh Kumar to implead Buddhram Sharma, the auction purchaser,

as a defendant to the suit filed under Rule 63. When Buddhram Sharma on his own initiative came before the court, the plaintiff Ramesh Kumar instead of welcoming the move opposed, it. He cannot now be heard to say that as an auction purchaser Buddhram Sharma would be bound by the compromise decree in the suit when the title in his favour is not founded on any finding arrived at after a genuine and bona fide contest.

9. In my judgment the compromise in the suit filed under Rule 63, on which the title of Ramesh Kumar is founded, would not stand on a better footing than such a compromise arrived at without notice to the auction purchaser before the executing Court during the investigation of the objection under Rule 58. Rule 63 itself provides that subject to the result of the suit the order made under Rule 58 shall be conclusive. It is well settled that a decree in a suit would bind only the parties to that suit. Having held above that in so far as the suit of Ramesh Kumar under Rule 63 was concerned, in the facts and circumstances of this case, the judgment-debtor could not represent the interest of the auction purchaser, anything decided in the suit would not affect the rights of the auction purchaser. Therefore, so far as the auction purchaser's interest goes the original order under Rule 58 disallowing the claim of Ramesh Kumar will remain conclusive. Any adjustment or arrangement by compromise after the execution sale had taken place without the auction purchaser being made a party to the suit and arrived at behind his back ought not to bind him. An executing Court as held in (Supra) ought not to grant recognition to any adjustment come to out of Court when a sale had been effected and third party's interest intervenes. In that view of the law it appears to me that the certification of the payment outside the Court on 8-8-1970 ought not to have been made by the executing Court as the sale had already been held two years earlier and the interest of Buddhram Sharma the auction purchaser, had intervened. However that is not a question which should detain me longer in this appeal.

10. Reverting to the main argument of the learned counsel, appearing for the appellant, that the substratum, of the foundation on which the sale in execution proceedings stands, having been destroyed by the decree in the suit under Rule 63 of Order 21, the sale ipso facto fell through. I find great difficulty in accepting it.

No doubt, the decision in the case of AIR 1956 Madh Bha 226 (supra) fully supports the contention of the appellant but the decision therein to my mind would no longer be valid in view of the decision of the Supreme Court in the case of : [1967]2SCR77 (supra). As I read the judgment of the Supreme Court in the said case and as I appreciate the declaration of law made therein. I find that a sale held in execution of a decree cannot be set aside unless the executing Court allows any objection grounded on the provisions of either Rule 89 or 90 or 91. The Supreme Court in paragraph 6 of the reported judgment pointed out certain exceptions as for instance where sale is held with-out giving notice to the judgment-debtor or where the Court is misled in fixing the price or when there was no decree in existence at the time when the sale was held: leaving aside such cases or their like an execution sale can only be set aside when an application under Rule 89 or 90 or 91 of Order 21 has been successfully made.

It was strenuously urged by Sri Agarwal for the appellant that the rule of law laid down by the Supreme Court in the case of Janakraj : [1967]2SCR77 will have no application where the properties auctioned have been found not to belong to the judgment-debtor and in any case that rule will not apply in Uttar Pradesh in view of the Amendment made by the High Court in the relevant rules of Order 21. As to the first point of distinction urged by the learned counsel I think the rule laid down by the Supreme Court will be attracted even to & case where the property sold in auction does not belong to the judgment-debtor. Rule 91 of Order 21 furnishes sufficient answer to this argument. It lays down that a purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. There is thus a specific rule for setting aside of a sale at the instance of a purchaser who finds that the judgment-debtor had no saleable interest in the property sold. In the present case it was open to Buddhram Sharma to apply under Rule 91 if he found that the decree obtained by Ramesh Kumar in the suit under Rule 63 prejudicially affected his rights but Budhram Sharma did not do so. Then how could the sale be set aside. There is no inherent power vested with the Court to set aside a sale on the ground that the judgment-debtor had no saleable interest in the property sold there being a specific provision for it in the Code under Rule 91 and a sale could be set aside on such a ground only at the instance of the auction purchaser. I think

the Court below rightly applied the ratio of the decision of the Supreme Court in the case of : [1967]2SCR77 (supra).

11. I do not think the Amendments made locally to Rules 92 and 58 (21 of Order 21 have changed the law radically. Those amendments make explicit what was hitherto implicit. By the addition in Sub-rule (2) of Rule 58 there had been a further elaboration of the power of the executing Court. Those amendments do not in any way make the law declared by the Supreme Court in Janek Raj's case : [1967]2SCR77 inapplicable in Uttar Pradesh.

12. Much emphasis was laid by Sri Agarwala on the addition made to Sub-rule (2) of Rule 58 which is to the effect that 'in no case shall a sale become absolute until the claim or objection has been decided'. The learned counsel contended that an objection stands decided only when finally the suit under Rule 63 is decided as the decision of the executing Court under Rule 58 is always subject to the result of such suit. The submission was that by law as it stands in Uttar Pradesh a sale will never stand confirmed if the decision in a suit under Rule 63 results in allowing the objection under Rule 58 as the conclusiveness of the decision of the executing Court under Rule 58 will stand destroyed. Sri Ashok Gupta for the auction purchaser-respondent contended that the amendment of Sub-rule (2) of Rule 58 prohibits the confirmation of a sale and prevents it becoming absolute until the claim or objection has been decided under Rule 58, that is to say that when a claim or objection has been filed under Rule 58 pending the investigation of which the sale is held, then as soon as the executing Court decides that claim or objection after investigation there remains no embargo on the power of the Court to confirm the sale and make it absolute. The Court is not to wait till the decision in the suit brought under Rule 63 by the claimant objector.

I am inclined to agree with this construction and interpretation. Where a claim or objection is disallowed and the aggrieved party files a suit under Rule 63 which is ultimately dismissed, there will be no difficulty in confirming a sale held during the pendency of the investigation of the claim or objection under Rule 58. Where the suit of the aggrieved party under Rule 63 is decreed then the conclusiveness attached to the decision under Rule 58 will be destroyed and if the auction

purchaser was bound by the decree in the suit he cannot resist the successful claimant to take possession of the property sold: then the auction purchaser would be entitled to receive back the money deposited in Court by him or if withdrawn realise it from the judgment-debtor or decree-holder or from both as the case may be. But here in the instant case the auction purchaser was a necessary party to the suit filed by the objector claimant under Rule 63 and he having not been made a party for which the objector-claimant himself is to be blamed the decision of the executing Court under Rule 58 remains conclusive and the sale in his favour has rightly been confirmed and made absolute.

13. As a result of the discussion above, this appeal fails and is dismissed with costs.

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