

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8652 OF 2012

[Arising out of SLP (Civil) No. 34402 of 2011]

Ram Karan Gupta

.. Appellant

Versus

J. S. Exim Ltd. and Ors.

.. Respondents

J U D G M E N T**K. S. Radhakrishnan, J.**

1. Leave granted.

2. This matter arises in execution and this appeal has been preferred by one of the judgment debtors challenging the common final judgment and order dated 11.11.2011 passed by the High Court of Delhi in C. M. (M) No. 1093 of 2011 and E.F.A. No. 15 of 2011.

3. Decree holders and judgment debtors are co-sharers of a property bearing No. 1-87, Ashok Vihar, Delhi (hereinafter referred to as the 'suit property'). Late Rameshwar Dass Gupta filed a suit for partition of the suit property and after passing a preliminary decree, a final decree was passed and the suit property was ordered to be sold in public auction and sale proceeds were directed to be distributed among the shareholders.

4. Decree holders filed execution petition and vide order dated 20.11.2009, the auction sale was scheduled to be held on 9.1.2010. However, objector/J.D.2 Shri Ram Karan Gupta (appellant herein) moved an application seeking stay of auction sale scheduled to be held on 9.1.2010 and a joint application was moved by the decree holders and judgment debtors, wherein it was disclosed that J.D.2 had agreed to purchase the suit property, as such, the auction sale be adjourned. Later on, J.D.2 failed to comply with the terms and conditions of the Compromise and, therefore, a fresh process for auction sale was issued and the auction sale was scheduled to be held on 4.7.2010. Due to various reasons, it did not materialize. Later, auction sale was scheduled to be held on 8.10.2010 and the

auction was completed and the auction purchaser M/s J.S. Exim Ltd. (1st respondent herein) was found to be the highest bidder for a bid amount of Rs.9.60 crores. The auction purchaser deposited Rs.2.40 crores by way of 27 demand drafts of even date towards 25% of the bid amount. The Court Auctioneer placed on record the record of the auction proceedings held on 8.10.2010.

5. Later, the auction purchaser moved an application for depositing the remaining 75% of the sale price/bid amount of the suit property and the application was allowed and 75% of the sale amount was deposited by the auction purchaser on 23.10.2010 in the State Bank of India, Tees Hazari Court, Delhi.

6. The auction purchaser, later, moved an application under Order 21 Rules 94 and 95 of the Code of Civil Procedure (for short 'CPC') for confirmation of sale. J.D.2, the appellant herein, then sought for cancellation of the auction held on 8.10.2010 stating that the auction purchaser had failed to deposit 25% of the bid amount on completion of the auction sale proceedings. Further, it was also pointed out that the auction purchaser had enclosed the drafts dated 7.10.2010 issued by the Indian Overseas Bank,

Chennai, but the said bank drafts had not been enclosed by the Court Auctioneer with her report. It was also contended that the auction was vitiated due to the violation of the mandatory provisions of Order 21 Rule 84 and 85 CPC.

7. The auction purchaser refuted all those contentions and submitted that 25% of the bid amount was deposited on the date of auction after conclusion of the auction sale proceeding and the remaining 75% of the bid amount was deposited on 23.10.2010. Further, it was pointed out that the auction purchaser had got prepared the demand drafts of Rs.2.50 crores in the name of the Court Auctioneer. But, later on, it was disclosed by the Court Auctioneer that the demand drafts should be issued in the name of the competent authority, consequently, the auction purchaser got prepared the said demand drafts on 8.10.2010 and handed over the same to the Court Auctioneer. Further, it was also pointed out that the words occurring “shall pay” and “immediately” do not mean that the 25% of the bid amount should be paid at the fall of the hammer. Further, it was also pointed out that the auction sale

could be set aside only on the ground of material irregularity or fraud that had resulted in substantial injury to the applicant.

8. The Executing Court elaborately considered the various contentions raised by the parties and perused the documents and took the view that the auction purchaser had deposited 25% of the bid amount as mandated by Order 21 Rule 84 CPC. Further, it was also held that the remaining 75% of the bid amount was also deposited by the auction purchaser on 23.10.2010 in terms of Order 21 Rule 85 CPC. The Court, therefore, rejected the objection raised by the appellant/judgment debtor and confirmed the auction, vide its order dated 24.3.2011.

9. The appellant/judgment debtor, aggrieved by the said order, preferred an appeal being E.F.A. No. 15 of 2011 and C.M. (M) No. 1093 of 2011 before the High Court of Delhi. Before the High Court, contention was raised that the auction purchaser had not complied with the mandatory requirements of Order 21 Rules 84 and 85 CPC and that 25% of the bid amount was not deposited on the fall of the hammer and, consequently, the entire sale transaction was void and liable to be set aside. Further, it was also

stated that since the appellant was one of the family members, he should have been permitted to get the sale executed in his favour, since he had a pre-emptive right and he was ready and willing to deposit the amount of Rs.9.60 crores, so as to avoid the sale.

10. The High Court considered the various contentions raised by the parties and concurred with the views expressed by the Executing Court that the auction purchaser had complied with Order 21 Rules 84 and 85 CPC. The High Court noticed that the auction purchaser had deposited 25% of the bid amount as mandated by Order 21 Rule 84 CPC and that he had also paid the remaining 75% of the bid amount within the statutory period, in terms of Order 21 Rule 85 CPC. The High Court, therefore, upheld the order of the trial Court confirming the sale and directed the parties to execute documents of title in favour of the auction purchaser. Aggrieved by the same, this appeal has been preferred.

11. Shri Ranjit Kumar, learned senior counsel appearing for the appellant, submitted that the auction purchaser had not complied with the mandatory provisions of Order 21 Rules 84 and 85 CPC, inasmuch as he did not deposit 25% of the bid amount immediately

on the fall of the hammer. It was pointed out that 25% of the bid amount was deposited only on 11.10.2010 and non-compliance of the above mentioned statutory provisions has vitiated the auction sale. In support of his contentions, reliance was placed on the judgments of this Court in **Manilal Mohanlal Shah and Others v. Sardar Sayed Ahmed Sayed Mahmad and another** AIR 1954 SC 349 and **Balram son of Bhasa Ram v. Ilam Singh and others** AIR 1996 SC 2781. Learned senior counsel submitted that the appellant had preferred an application on 1.12.2010 before the Executing Court to allow the appellant to deposit the entire amount of the sale, after deduction of his one-fourth share in the property, and handover the possession to him. Learned senior counsel submitted that the application was filed before the confirmation of sale, but was not considered by the Executing Court. Learned senior counsel submitted that only if the application is allowed under Order 21 Rule 92(2) CPC, the appellant could deposit the amount within the time stipulated in the said provision. Learned senior counsel submitted that the Executing Court has committed an error in confirming the sale before entertaining the application and allowing the same, so that the appellant could have deposited

the entire amount. Learned senior counsel submitted that even now the appellant is willing to pay the entire amount deposited by the auction purchaser including interest. Further, it was also submitted that the appellant is willing even to pay Rs.1 crore more so that he can save the property where he is residing. Learned senior counsel also placed reliance on a Constitution Bench judgment of this Court in ***Dadi Jagannadham v. Jammlu Ramulu and Others*** (2001) 7 SCC 71 and pointed out that there is no strict time limit in depositing the amount and the question of deposit arises only after the application is allowed. Learned senior counsel pointed out that rationale in ***P. K. Unni v. Nirmala Industries and others*** (1990) 2 SCC 378 and the views expressed in that judgment that Order 21 Rule 92(2) CPC prescribed a period of limitation, was found to be incorrect in ***Jammlu Ramulu*** (supra). Learned senior counsel also placed reliance on ***M. Noohukan v. Bank of Travancore and another*** (2008) 11 SCC 161 and submitted that this Court, in the similar circumstances, had extended the time for depositing the amount. Learned senior counsel submitted that, under such circumstances, the prayer for depositing the amount, as stated above, be allowed.

12. Shri C. A. Sundram, learned senior counsel appearing for the respondent, submitted that this Court shall not interfere with the concurrent findings rendered by the Courts below. Learned senior counsel submitted that the auction purchaser deposited 25% of the bid amount on 8.10.2010 and further deposited the remaining amount i.e. 75% of the bid amount on 23.10.2010. Learned senior counsel pointed out that the mandate of Order 21 Rules 84 and 85 CPC was complied with in letter and spirit and the Court Auctioneer was satisfied that the entire amount had been paid. Learned senior counsel submitted that the word “immediately” occurring in Order 21 Rule 84 CPC was expanded by this Court in ***Rosali V. v. Talco Bank and others*** AIR 2007 SC 998. It was pointed out that, in the present case, 27 drafts of Rs.2.40 crores had been paid to the Court Auctioneer on 8.10.2010, which is reflected in the report of the Court Auctioneer dated 8.10.2010. The balance amount was also deposited in accordance with Order 21 Rule 85 CPC. Learned senior counsel submitted that there is no *bona fide* in the offer made by the appellant and, if, had any genuine interest for avoiding the sale, the amount offered should have been

deposited before the confirmation of sale and within the time stipulated in Order 21 Rule 92(2) CPC.

13. We are in full agreement with the order passed by the Executing Court as well as the High Court that the auction purchaser had deposited 25% of the amount on 8.10.2010. When the auction is for such a large amount, running in crores of rupees, nobody can expect the auction purchaser to pay the amount in cash on the fall of the hammer. So far as the instant case is concerned, facts would reveal that the auction purchaser had paid Rs.2.40 crores, may not be in cash, but by way of drafts on 8.10.2010 and the balance amount i.e. 75 % of the bid amount was also paid on 23.10.2010, consequently, in our view, the auction purchaser had complied with the provisions of Order 21 Rules 84 and 85 CPC.

14. We may, in this connection, refer to the judgment of this Court in **Talco Bank** (supra), wherein this Court has extended the meaning of the term “immediately” which occurs in Order 21 Rule 84 CPC, as follows:

“30. The term “immediately”, therefore, must be construed having regard to the aforementioned principles. The term has two meanings. One, indicating the relation of cause and effect and the other, the absence of time between two events. In the former sense, it means proximately, without intervention of anything, as opposed to “immediately.” In the latter sense, it means instantaneously.

31. The term “immediately”, is thus, required to be construed as meaning with all reasonable speed, considering the circumstances of the case. (See Halsbury’s Laws of England, 4th Edition, Vol. 23, para 1618, p. 1178).”

Learned senior counsel appearing for the appellant, as we have already indicated, submitted that the Executing Court should have allowed his application dated 1.12.2010 since he preferred that application within 60 days of the date of sale, but could not deposit the amount since the application filed in terms of Order 21 Rule 92(2) CPC was neither dealt with nor allowed. Order 21 Rule 89 CPC, it may be noted, gives a final opportunity to the judgment debtor to save his property by setting the sale aside before the confirmation upon the terms of satisfying the decretal debt and of paying compensation to the auction purchaser. Rules 89 to 92 of Order 21 deal with setting aside of sale. When a property is sold in execution of a decree and an application for setting aside the sale

can be made under those provisions by the persons affected on the grounds mentioned therein. Such an application has to be made within the prescribed period of limitation, the provisions mentioned therein are in the nature of concession and those provisions must be strictly complied with before a sale is set aside before confirmation. On setting aside the sale under Order 21 Rule 89 CPC the property continues to be the property of the judgment debtor.

15. This Court in ***Tribhovandas Purshottamdas Thakkar v. Ratilal Motilal Patel and others*** AIR 1968 SC 372 held that the rule is intended to confer a right upon the judgment debtor, even after the property is sold, to satisfy the claim of the decree holder and to compensate the auction purchaser by paying him 5 per cent of the purchase-money. In ***Challamane Huchha Gowda v. M. R. Tirumala and another*** (2004) 1 SCC 453, this Court held that it gives a final opportunity to put an end to the dispute, at the instance of the judgment debtor before the sale is confirmed by the Executing Court and enables him to save his property. Order 21 Rule 89 CPC is, therefore, intended to (i) to save the judgment debtor from the threatened deprivation of his property, (ii) to satisfy the claim of the decree holder and (iii) to compensate the auction

purchaser. Rule 89 of Order 21 CPC also applies to a sale in execution of a decree for payment of money and an order of sale of property under the Partition Act, 1893 is a deemed decree under the Code and, therefore, an application for setting aside sale in execution of such decree is maintainable. It also applies to a decree passed in terms of an award in a Partition suit, so also to a sale in execution of mortgage decree. Order 21 Rule 92 CPC provides for confirmation of sale, as also setting aside the sale, which reads as follows:

“92. Sale when to become absolute or be set aside.- (1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the court shall make an Order confirming the sale, and thereupon the sale shall become absolute:

Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the court shall not confirm such sale until the final disposal of such claim or objection.

(2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the deposit required by that rule is made within sixty days from the date of sale, or in cases where the amount deposited under Rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within

such time as may be fixed by the court, the court shall make an Order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby:

Provided further that the deposit under this sub-rule may be made within sixty days in all such cases where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.

(3) No suit to set aside an Order made under this rule shall be brought by any person against whom such Order is made.

(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

(5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered.

Sub-rule (1) of Rule 92 deals with cases where no application to set aside the sale is made or such an application is made and disallowed. In all these cases, the Court shall make an order confirming the sale. Sub-rule (2) of Rule 92 covers those cases

where an application for setting aside is made and allowed or in an application under Rule 89 requisite deposit has been made, in all such cases, the Court is bound to set aside the sale.

16. A Constitution Bench of this Court in **Jammulu Ramulu** (supra) had occasion to consider the scope of Order 21 Rule 92(2) and Rule 89 CPC. Overruling **P. K. Unni** (supra), this Court held as follows:

“15. A plain reading of Order 21 Rule 92 CPC shows that the court could either dismiss an application or allow an application. Order 21 Rule 89 CPC prescribes no period either for making the application or for making the deposit. The Limitation Act also prescribes no period for making a deposit. However, Article 127 of the Limitation Act prescribes a period within which an application to set aside a sale should be made. Earlier, this was 30 days, now it has been enhanced to 60 days. Unless there was a period prescribed for making a deposit, the time to make the deposit would be the same as that for making the application. This is so because if an application is made beyond the period of limitation, then a deposit made at that time or after that period would be of no use.

16. Normally, when the legislature wishes to prescribe a period for making a deposit, it does so by using words to the effect “no deposit shall be made after ... days” or “a deposit shall be made within ... days” or “no application will be entertained unless a deposit is made within ... days”. Order 21 Rule 92(2) CPC does not

use any such expressions. The relevant portion of Order 21 Rule 92(2) CPC reads as follows:

“92. (2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the deposit required by that rule is made within thirty days from the date of sale, ... the court shall make an order setting aside the sale:”

Thus Order 21 Rule 92(2) CPC is only taking away discretion of the court to refuse to set aside the sale where an application is made and allowed and the  80 deposit has been made within 30 days from the date of sale. It is thus clear that Order 21 Rule 92(2) CPC is not prescribing any period of limitation within which a deposit has to be made.

17. Viewed in this context the intention of the legislature in extending the period under Article 127 of the Limitation Act may be seen. It is very clear from the Statement of Objects and Reasons, which have been set out hereinabove, that the period under Article 127 of the Limitation Act was extended from 30 days to 60 days in order to give more time to persons to make deposits. The legislature has noted that the period of 30 days from the date of sale was too short and often caused hardships because judgment-debtors usually failed to arrange for money within that period. The question then would be whether by merely amending Article 127 of the Limitation Act the legislature has achieved the object for which it increased the period of limitation to file an application to set aside sale.”

The Constitution Bench held that all that Order 21 Rule 92(2) CPC provides is that if the deposit is made within 30 days from the date of sale and an application is filed then the court would have no

discretion but to set aside the sale. The Court held that that does not mean that if the deposit is made after 30 days the court could not entertain the application. If the deposit is made beyond the period of 30 days, but within the period of 60 days, then it will be within the discretion of the court whether or not to grant the application.

17. Law Commission in its 89th report, para 42.35, page 219, Law Commission report 139th report paras 3.1 to 3.6 and 4.1 to 4.5 considered the period of limitation of thirty days for depositing the amount to set aside sale as specified in sub-rule (2) of Rule 92 and suggested enlargement of period of sixty days so as to be consistent with Section 127 of the Limitation Act. Following that the second proviso to sub-rule (2) of Rule 92, as inserted by the Code of Civil Procedure (Amendment) Act, 2002, clarified that the amendment would also apply to all those cases where the period of thirty days within which the deposit was required to be made had not expired before the commencement of the Amendment Act, 2002. The amendment which came into force w.e.f. 01.07.2002 extends the period of deposit up to sixty days, which is in conformity with

Section 127 of the Limitation Act, as amended by the Code of Civil Procedure (Amendment) Act 1976.

18. In **Challamane Huchha Gowda** (supra), the Court was primarily dealing with the question as to whether a mode of application has been prescribed for making an application for setting aside the sale. The Court noted that Order 21 Rule 89 CPC requires an application to be made for setting aside the sale, nothing is stated in the rule regarding the mode of application and then held that *purshis* contains an implicit prayer for setting aside the sale and the absence of a formal application does not amount to non-compliance with the provision. The above view expressed by certain High Courts was found favour by this Court in **Tribhovandas Purshottamdas Thakkar** (supra) and this Court held that Order 21 Rule 89 CPC does not provide that the application in a particular form shall be filed to set aside the sale.

19. We notice, in this case, there was no reference at all to the provisions of Order 21 Rule 89 in the application filed by the appellant on 1.12.2010, be that it may, even then the appellant had not complied with the mandatory requirements of depositing the

amount. Clause (a) of Sub-rule (1) of Rule 89 of Order 21 requires the applicant to deposit in Court 5 per cent of the purchase money for payment to the auction purchaser. Deposit of the requisite amount in the Court is a condition precedent or a *sine qua non* to an application for setting aside the execution of sale and such a amount must be paid within a period specified in the rule and if the deposit is made after the time limit, the application must be dismissed. The deposit made under Rule 89 of Order 21 CPC should be unconditional and unqualified and the decree holder or the auction purchaser should be able to get the amount at once.

20. We have already indicated that the rule is in the nature of a concession shown to the judgment debtor, so he has to strictly comply with the requirements thereof and a sale will not be set aside unless the entire amount specified in rub-rule (1) is deposited within 60 days from the date of the sale and, if it is beyond 60 days, the Court cannot allow the application. We have already found that the appellant-judgment debtor did not pay the amount within the stipulated time and he only made an application on 1.12.2010 without depositing the amount and hence the Court cannot

entertain such an application and bound to confirm the sale which, in this case, the Court did on 23.10.2010.

21. We, therefore, find no error in the judgment and orders of the Executing Court as well as the High Court and the belated offer made by the appellant for depositing the amount now cannot be entertained and the same is rejected.

22. The appeal, therefore, lacks in merits and the same is dismissed, with no order as to costs.

.....J.
(K.S. Radhakrishnan)

JUDGMENT

.....J.
(Dipak Misra)

New Delhi,
December 3, 2012