

Satyanarain Bajoria And Another vs Ramnarain Tibrewal And Another on 8 September, 1993

Equivalent citations: AIR1994SC1583, II(1993)BC568(SC), 1994(1)BLJR662, JT1993(5)SC243, 1993(3)SCALE691, (1993)4SCC414, [1993]SUPP2SCR225, AIR 1994 SUPREME COURT 1583, 1993 (4) SCC 414, 1994 AIR SCW 1253, 1993 SCFBRC 409, 1993 (2) ALL RENTCAS 44, (1993) 5 JT 243 (SC), 1993 (2) UJ (SC) 753, (1993) 2 ALL RENTCAS 441, 1994 (1) BLJR 662, 1994 BLJR 1 662, (1993) 2 LS 23, (1993) 3 RRR 584, (1994) 1 MAD LW 214, (1994) 2 BLJ 374, (1993) 2 LANDLR 545, (1994) 2 PAT LJR 39, (1993) 2 RENTLR 420, (1993) 3 SCJ 299

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Bench: P.B. Sawant, Yogeshwar Dayal

ORDER

Yogeshwar Dayal, J.

1. Special leave granted.
2. With the consent of learned Counsel for the parties the appeal itself was heard and is being disposed of.
3. This appeal has been filed by Satyanarain Bajoria & Another, judgment-debtor, against the order of the High Court dated 8th April, 1986 whereby the High Court dismissed Civil Revision No. 335 of 1986 filed by the judgment-debtor against the order dated 28th November, 1985 passed by the Additional District & Sessions Judge-VI, Munger, who had accepted the appeal filed by the respondents/decreed-holder against the order of the executing court dated 19th July, 1984 passed in Misc. Case No. 28 of 1978 under Order 21 Rule 90 of the CPC whereby the trial court set aside the auction sale in Money Execution Case No. 19/55 of 1968.
4. It appears that the judgment debtor was granted a loan of Rs. 4,000 and a decree for Rs. 8,256.05 ps. was passed against the judgment debtor in 1964. In November, 1964 the judgment-debtor deposited Rs. 8,000 in the trial court. On 4th January, 1965 the judgment debtor deposited a further sum of Rs. 391.55 and thought that he had satisfied the decree. On 29th November, 1965 the decree-holder made an application claiming another sum of Rs. 350. This application was allowed

but thereafter he got his execution application dismissed for default. Thereafter for about three years the decree-holder remained silent and in 1968, filed another Money Execution Case No. 19/55 of 1968 in the executing court claiming another sum of Rs. 350 plus interest. In execution of this application, on 12th September, 1978 the judgment-debtor's property i.e. land, situated in the market, consisting of an area of one decimal was sold in auction for Rs. 1,500 and was purchased by the decree-holder himself. Before the expiry of the period of limitation for filing objections, namely 60 days as provided under Article 127 of the Limitation Act, 1963, as amended by Section 98 of the Amendment Act, 1976 to set aside auction sale in court, the executing court, for non filing or objections, confirmed the sale on 8th November, 1978.

5. The appellants/judgment-debtor on 11th November, 1978 i.e. within 60 days, on coming to know of the sale, filed a petition under Order 21 Rule 90 of the CPC for setting aside the sale. The plea of the judgment-debtor in the application for setting aside the sale was that he had no knowledge of the case whatsoever and all the steps had been taken ex-parte and without the knowledge of the judgment-debtor by concealing facts. No process had been served on the judgment-debtor and reports have been obtained in collusion with the process peon. It was pleaded that the amount of the decree had been satisfied by the judgment-debtor and nothing left unsatisfied. The decree-holder, had suppressed all notices, summonses and got served "balabala" i.e. merely on papers without actual service. It was also pleaded that the notice published in the local paper showing incorrect number of case and incorrect name of court was to misguide the judgment-debtor and due to this irregularity and fraud played, the judgment-debtor could not contest the case in time and now it transpired from the order sheets of the case that the decree-holder had got the property of the judgment-debtor sold.

6. The court, who dealt with the application under Order 21 Rule 90 of the CPC noticed two points for decision. First, whether there had been irregularities or fraud in conducting the said sale and second whether the judgment-debtor had suffered substantial injury by reason of irregularity or fraud. The court also noticed that the point of limitation had not been raised.

7. On first issue, the judgment-debtor examined himself and stated that he had no knowledge about the sale of his land in the execution case and that no notice had been served upon him at all. He learnt about the auction sale from one Permanand Kesari. He also denied any knowledge of sale proclamation and that no drummer went to the spot. According to him the auction land was sort Rs. 6,000 to 7,000 whereas it was sold at Rs. 1,500. He also examined Permanand Kesari as A.W. 2 who stated that he went to the court in November, 1978 where he learnt about the auction sale of the judgment-debtor's property and informed the judgment-debtor. Judgment-debtor also examined Mahendra Pd. Sah as A.W. 3 who stated that the value of the land near the auction sold land was Rs. 12,000 per Katha. A.W. 4, Alakh Roop Lal, Karpardaz was examined to prove the Kebala, Ext. 1, executed in the year 1975 which showed that the value of the land in Bazar area was Rs. 4,000 per decimal.

8. The decree-holder examined five witnesses. The first witness was O.P.W. 1 Pratap Nar Mishra, Karpardaz. This witness sought to prove the fixation of order of attachment and sale proclamation on the property. O.P.W. 2 was Baijnath Rajak who supported O.P.W.1. O.P.W. 3 was Raghunandan

Misra, a court peon, who stated about the service of notice of attachment by beat of drum on 29th August, 1975. He proved his report Ext. 'C' on the attachment notice. This witness also deposed about sale proclamation notice being served through civil courts peon Balmiki Jha. He proved the report of Balmiki Jha, Peon, Ext. C-1. In cross-examination he stated that Balmiki Jha had retired and that he lives in his own house at Sangrampur. Balmiki Jha had not been examined. O.P.W.4 was Jagarnath Sao who stated that the court peon had served notice in his presence. He proved his signatures on the attachment notice. O.P.W. 5 was Ramchandra Vavidas. He deposed that on 5th August, 1978 the court peon had served notice of sale proclamation. He acted as drummer on the date.

9. On appreciation of evidence the executing court took the view that the record does not show that any notice was served on the judgment-debtor under Order 21 Rule 22 on the Code, though notice of sale proclamation was published in the newspaper "Dalit Mitra" but it gave wrong number of the case as well as wrong name of the court. The executing court also held that notices under Order 21 Rule 54 of the Code were also not served as prescribed by the Code.

10. The executing court, on consideration of the evidence, took the view that there was material irregularity in publishing and serving of notices and the land had been sold at a very low value which had resulted in material loss to the judgment-debtor in as much as the land is situated in main market area at Kharagpur which is the headquarters of the District Munger. The executing court also noticed that the application for setting aside of sale had been filed within 3 days of its confirmation and he directed that the decretal amount claimed by the decree-holder be deposited by judgment-debtor by the next date i.e. 7th August, 1984. The judgment-debtor accordingly deposited Rs. 649.45 ps. i.e. the balance decretal amount and also of a sum of Rs. 100 as directed by order dated 19th July, 1984 in favour of the decree-holder in the court. The sale was set aside by order dated 19th July, 1984 and the execution was consigned having fully satisfied.

11. The decree-holder/auction-purchaser being dissatisfied went up in appeal (Misc. Appeal No. 36/84) which was allowed by the lower appellate court, as stated earlier. Lower appellate court took to view that the application under Order 21 Rule 90 of the Code was barred by time inspite of the fact that this point was not taken up before the trial court. It appears the lower appellate court was under the erroneous impression that 30 days is the period of limitation for setting aside the sale in execution of a decree from the date of sale. It will be noticed that it was so under Article 166 of Schedule 1 of the Limitation Act, 1908 but the period of limitation is now 60 days under Article 127 of Schedule 1 of the Limitation Act, 1963 as amended by Section 98 by the Amendment Act 104 of 1976. It read thus :

Art. Description of suit Period of Time from Limitation which period beings to run

127 To set aside a sale Sixty days The date of the in execution of a sale decree, including any such application by a judgment-debtor.

12. Therefore since the sale took place only on 12th September, 1978 the application for setting aside the sale, as provided under the amended law, is within 60 days and thus within time. The sale was thus confirmed even before the expiry of time for filing objections to the same.

13. The lower appellate court took the view that perusal of the order sheets dated 26th March, 1971, 20th July, 1971 and 19th August, 1971 of execution case No. 19/55 of 1968 shows that notices under Order 21 Rule 22 were issued and served on the judgment-debtor. To say the least it was erroneous on the part of the lower appellate court to refer to the order sheets for showing service of notice on the judgment debtor as required under Order 21 Rule 22 of the Code. The proceedings for setting aside the sale under Order 21 Rule 90 of the Code were independent proceedings and the file of proceedings under Order 21 Rule 22 of the Code could not be referred to in such proceedings without actual proof of service as per the various reports of alleged service contained in proceedings under Order 21 Rule 22 of the Code. Without proof of service of notice in these proceedings, the lower appellate court could not have gone merely by order sheets of the execution file. No process-server was examined to prove service of notice under Order 21 Rule 22 of the Code. It will be noticed that the decree was passed as far back as 1964. The present application was filed in 1968 more than 2 years after dismissal of earlier execution application and, therefore, for further proceedings in pursuance of a fresh execution application, the court was duty bound to issue notice and serve notice of the execution application on the judgment-debtor as provided for in Order 21 Rule 22 of the Code which contemplates inter alia that if an application for execution is made more than two years after the date of the decree, the court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show causes, on a date to be fixed, why the decree should not be executed against him. The last order made in the earlier execution application was on 29th November, 1965 and the second execution application was filed more than two years thereafter i.e. in 1968. Therefore, issuing of notice under Order 21 Rule 22 was mandatory. The idea of issuing such a notices is too ascertain whether the averments as to the amount being claimed in the execution application are true or incorrect. Besides, even if the amount was due, the judgment-debtor could have paid it and he was deprived of this opportunity to clear off dues, if any, under the decree. It is only after the service of notice under Order 21 Rule 22 of the Code and failure of the judgment-debtor to pay the decretal amount, as claimed, that the decree-holder takes recourse to proceedings under Order 21 Rule 54 of the Code. Then Order 21 Rule 54 of the Code provides as under :

54. Attachment of immovable property - (1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment-debtor from transferring or changing the property in any way, and all persons from taking any benefit from such transfer of charge.

(1-A) The shall also require the judgment-debtor to attend Court on a specified dated to take notice of the date to be fixed for settling the terms of the proclamation of sale.

(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying

revenue to the Government, in the office of the Collector of the district in which the land is situate and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village.

14. It will be noticed that Sub-rule (1) of Rule 54 of Order 21 of the Code contemplates and order of prohibition to be served on the judgment-debtor from transferring or charging the property in any way first if the property sought to be sold is immovable property. This is for the benefit of the decree-holder. Even at this stage if the judgment-debtor had notice of attachment, he could pay the balance decretal amount and thereafter attachment would either not be effected and if already effected would be vacated. Sub-rule (1-A) contemplates that this order shall require the judgment-debtor to attend court on a specified date, to take notice of the date to be fixed for settling the terms of the proclamation of sale provided under Rule 66 of Order 21 of the Code. There was no evidence that the judgment-debtor was personally served with such a notice. Though sale proclamation after settlement of terms of proclamation after settlement of terms of proclamation ex-parte was published in local newspaper "Dalit Mitra" but that have wrong case number and wrong name of the court. There was also no evidence that any notice was affixed on a conspicuous part of the Court house or that the provisions of Sub-rules (1-A) & (2) of Rule 54 of Order 21 of the Code were complied with. Rule 54 is again for safeguarding the right of the decree-holder as well as the judgment-debtor. By the notice the judgment-debtor is put on notice that his property is attached and would be sold unless he pays off to the decree-holder. The trial court observed that this notice is required to be affixed on a conspicuous part of the property. We do not mean that merely if it is not being affixed on the conspicuous part, the sale would to be set aside but we are only emphasising the requirement of it being affixed on the conspicuous part of the property and on court house. All these stage give an opportunity to the judgment-debtor to pay off dues, if any under the decree. The proclamation of sale in this case was thus settled without notice to the judgment-debtor. The judgment-debtor had the right to participate in the proceedings for settlement of terms of proclamation of sale and atleast to known the date of sale. This is necessary since Order 21 Rule 89 of the Code confers again a right on any person having interest in the property sold, file an application to set aside sale on making deposit as contemplated by Rule 89. Rule 89 of Order 21 of the CPC 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 the 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 per cent of the purchase-money, and

(b) 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

15. The lower appellate court after assuming that there was no proper service of notice under Order 21 Rule 54 of the CPC went on to the question of judgment-debtor's having not pleaded any substantial loss or injury. It will be noticed that it was a case of typical money lender who has evil-eye to grab the property of the judgment-debtor some how or the other. He allows the first application for execution to be dismissed; waits for practically three years to file another execution application claiming a sum of Rs. 350 only sees to it that judgment-debtor is kept ignorant of the proceedings in court; obtains permission to himself buy the property; gets the property sold for recovery of petty amount of Rs. 649.45 ps. and buys the property himself. This again is a typical illustration of fraudulent conduct of decree-holder. In such cases the court will even presume loss and substantial injury to the judgment debtor. In the present case there was evidence of value of the property and both the parties had led evidence in this behalf and it was too late for the lower appellate court to blame the executing court for recording evidence as to the valuation at that stage. The fraud permeates the whole proceedings. At no stage was the judgment-debtor made aware of the pending execution application till even the confirmation of sale and purchase of the property by the decree-holder himself.

16. It will be noticed that so far judgment-debtor was concerned, on calculation, he had practically deposited the entire decretal amount by 4th January, 1965 and there was some mistake in calculation for a petty amount of Rs. 350. No demand notice was even sent to the judgment-debtor to pay it either outside the court or through the court. The judgment-debtor was deliberately being kept in the dark.

17. Learned Counsel for the decree-holder submitted that these are questions of fact since the High Court dismissed the revision petition in limine this Court should not interfere with the questions of fact. If it was merely a case of questions of fact proved on record, learned Counsel for the decree-holder would have been right. It appears lower appellate court had no knowledge whatsoever of how even notice under Order 21 Rule 22 of the Code was required to be served or the evidence in relation thereto being led in proceedings for setting aside of the sale at the instance of the judgment-debtor. The lower appellate court could not read the order sheet or proceedings purporting to be under Order 21 Rule 22 of the Code while dealing with proceedings under Order 21 Rule 90 of the Code and hold that the notices have been served. Lower appellate court again was mixing up the service on judgment-debtor of notice under Order 21 Rule 54 of the Code and of proclamation of sale. The lower appellate court again was ignoring the importance of notice under Order 21 Rule 54 (1-A) and (2) to enable the judgment-debtor to have notice of proceedings for settlement of terms of proclamation under Order 21 rule of the Code. It is true that now it has been specifically clarified by the explanation to Rule 90 of Order 21 of the Code that "the mere absence of, or defect in, attachment of the property sold shall not, itself, be a ground for setting aside a sale

under this rule". But if the judgment-debtor is kept totally ignorant of the execution proceedings rights from the date of execution application till sale, it cannot be merely called a mere irregularity in attachment and thus of no consequence. Proceedings under Order 21 Rule 66 of the Code for settlement of terms of proclamation of sale are very material for both the parties, much more for the judgment-debtor as it is well known that the decree-holder always tries to under value the property whereas the judgment-debtor tries to over-value the property. However, provisions are made in the Code in Sub-rule (2) of Rule 66 of Order 21 that the sale proclamation shall be drawn up after notice to both the decree-holder as well as the judgment-debtor and shall state the time and place of sale and other requirements mentioned therein. No notice was given under Order 21 Rule 54 (1-A) of the Code which was mandatory for the court. In any case no notice for settlement of terms of proclamation of sale was served on the judgment-debtor personally as contemplated by Sub-rule (2) of Rule 66 of Order 21 of the Code.

18. The facts of the case show that the lower appellate court totally messed the points which were required to be determined and merely by assuming that even if notice under Order 21 Rule 54 of the Code is not served, by virtue of explanation to Rule 90 of Order 21 of the Code it is not a material irregularity or illegality to auction sale. The lower appellate court totally misunderstood the importance and efficacy of notices being served in execution proceedings under Order 21 Rule 22; Order 21 Rule 54 (1-A), notice for settlement of terms of proclamation in the presence of the judgment-debtor which led to the finding recorded by it and the finding on fact in the circumstances, is totally vitiated.

19. The whole conduct of the execution proceedings at the behest of the decree-holder shows that every effort was made by decree-holder to see that the judgment-debtor was kept totally ignorant of the execution proceedings right till the sale and its confirmation.

20. In view of the aforesaid illegalities we have no hesitation in assuming substantial injustice and loss to the judgment-debtor.

21. We thus allow the appeal, set aside the judgments of the lower appellate court dated 28th November, 1985 and the High Court dated 8th April, 1986 and restore the order of the executing court dated 19th July, 1984. The appellant would also be entitled to costs.