

Delhi High Court

Santram vs Joginder Singh And Ors. on 25 February, 1986

Equivalent citations: ILR 1987 Delhi 575, 1986 RLR 250

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Bench: J Jain

JUDGMENT J.D. Jain, J.

(1) This revision petition is directed against order dated 15th January 1977 of a Subordinate Judge dismissing the objection petition of the petitioner under Order Xxi Rule 89, Code of Civil Procedure (hereinafter referred to as 'the Code').

(2) The controversy between the parties lies in a narrow compass. The facts germane to the decision of this revision petition in brief are that Shri Joginder Singh, respondent No. I, obtained a mortgage decree for recovery of Rs. 9101- with costs on the basis of an award against Bhoora Mal, respondent No, 2, on 18th July 1968. The decree was in respect of property bearing No. 3013215, Khasra No. 270912616, Beadonpura, Karol Bagh, New Delhi, which belonged to Bhoora Mal and was allegedly mortgaged with the respondent-decree holder vide mortgage deed dated 1st March 1981. The said property was sold by public auction in execution of the decree on 19th July 1971. Smt. Chandra Jinatram Kriplani, respondent No. 3, was the highest bidder at the auction. The petitioner filed objections dated 9th August 1971 under Order Xxt Rules 89 & 90 and Section 151 of the Code challenging the validity and legality of the sale. He raised the following objections (I)that he was the owner of the property in question having purchased the same from the judgment debtor, Bhoora Mal vide registered sale dated 29th January 1962 but he was not imp leaded as a party to the suit and. therefore, the decree was not binding on him and the sale of the property in question which belonged to him was null and void.. He also asserted that the decree obtained by respondent No. I was collusive;

(II)that the auction of the property was vitiated by material irregularities in publication and conduct of the sale; and (III)that without prejudice to his aforesaid protest he was depositing the decretal amount in full Along with costs and a sum equal to 5 per cent of the purchase money and other miscellaneous expenses. However, he made it clear that the deposit of the said amount would not affect any of his rights and defenses as objector.

(3) The auction-purchaser, respondent No. 3, contested the objections, inter alia. on the ground that the petitioner had filed the application both under Rules 89 & 90 of Order Xxi simultaneously which was not permissible under law as the objector could not claim contradictory reliefs in the same application and at the same time. She also controverted the other grounds of attack contained in the aforesaid application of the petitioner. She denied that the objector-petitioner was owner of the property in question by virtue of sale deed dated 29th January 1962 as alleged. "The decree holder too opposed the objections, inter alia, saying that the mortgage decree was pasted on the basis of mortgage deed dated 1st March 1961. Moreover, the objector had the full knowledge of the suit and the subsequent proceedings. (4) It would appear that both the parties adduced evidence in support of their respective contentions. However on 27th August 1976, counsel for the petitioner made a statement that he was withdrawing his objections under Order Xxi Rule 90 and pressed his

application only under Rule 89 thereof. Thus, the only question which survived for determination was whether application of the petitioner under Order Xxi Rule 89 was maintainable in view of the bar contained in sub-rule (2) of Rule 89. The learned Sub Judge upheld the objection of the respondent-auction purchaser to the effect that the petitioner could not make a combined application purporting to be both under Rules 89 & 90 of Order Xxi and as such the objection petition under Rule 89 would be deemed to have been filed only on 27th August 1976 when the objections under Rule 90 were withdrawn. Since the limitation, for making an application under Rule 89 was only 60 days, the same was barred by time on 'the deemed date of its filing. So he dismissed the objections of the petitioner vide impugned order. (5) It would be thus seen that the crucial question which falls for determination in this case is whether it was open to the petitioner to make a consolidated application embodying objections under both the Rules 89 & 90 and if not, what would be its effect on the petition under Rule 89 on withdrawal of the objections under Rule 90. Rule 89 is reproduced below for ready reference "(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) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation or 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) ..... " "

(6) We are not concerned in this review petition with sub rule (1) because the amount of deposit and (the right of the petitioner to deposit the same have not been challenged before me. As for sub-rule (2), it explicitly bars making of or prosecuting an application under Rule 89 where a person applies under Rule 90 to set aside the sale of his immovable property unless he withdraws his application under the latter rule. The reason for the same is not far to seek, (7) On a mere juxtaposition of Rules 89 & 90 it is manifest that while the object of Rule 90 is to challenge the sale on the ground of irregularity or fraud, the object of Rule 89 is totally different, viz. to enable the judgment-debtor to get rid of a sale which has been duly carried out. Thus, Rule 89 postulates a valid sale as against a sale which suffers from a material irregularity as envisaged by Rule 90. It is a kind of concession granted to the judgment-debtor to save his property as a last resort by paying off the decree holder and compensating the auction purchaser also. Thus, Rule 89 is antithesis of Rule 90 and, therefore, an objector is not permitted to take recourse to both of them at one and the same time. The intention of the legislature clearly is that if the judgment-debtor or for that matter any person claiming an interest in the property sold intends to challenge the legality of the sale itself on grounds of material irregularity or fraud in publishing or conducting the sale, he cannot in all fairness be permitted to get rid of the sale by paying off the decretal amount and the stipulated compensation to the auction purchaser at one and the same time. So, looked at the matter from this angle, there can be no escape from the conclusion that a consolidated application purporting to be both under Rules 89 & 90 was bad in law and in view of the prohibition contained in sub-rule (2) of Rule 89 no application under Rule 89 can be said to have come into existence until the application under Rule 90 was withdrawn. (8) The scope, ambit and sweep of sub-rule (2) of Rule 89 came up for

consideration before the Supreme Court in Shiv Prasad v. Durga Prasad and another, . In that case objections to the sale had been filed under Rule 90 prior to the filing of application under Rule 89. The latter application was filed on the last date of limitation. However, it was stated by the applicant that he was withdrawing the earlier application made under Rule 90. The question arose whether the latter application was within time or not. Supreme Court observed that: "THE words used in the sub-rule are "make or prosecute". If it were to be held that the applicant is not entitled merely to prosecute his application under Rule 89 unless he withdraws his application under Rule 90, then the word "make" would become redundant. In order to bring about the true intention of the Legislature effect must be given to both the words. If a person has first applied under Rule 90 to set aside the sale, then, unless he withdraws his application, he is not entitled to make and prosecute an application under Rule 89. The application even if made will be deemed to have been made only on withdrawal of the previous application. If, however, a person has filed an application under Rule 89 first and thereafter another application under Rule 90. he will not be allowed to prosecute the former unless he withdrew the latter."

(9) No doubt, their Lordships were not concerned with a case like the present where a combined application praying for both the reliefs in the alternative was made. Indeed, the petitioner had categorically stated that his prayer under Rule 89 was without prejudice to his objection made under Rule 90 etc. However, the ratio of the decision of the Supreme Court will apply on all fours to the facts of the instant, case inasmuch as once the objection files objection's purporting to be under Rule 90 he is debarred from seeking the relief of setting aside the sale under Rule 89. .Both go ill together being totally antithetical to each other. 581 (10) A Division Bench of Bombay High Court has expressed the same view in Shankar Laxman Katkar v. Dr. Sharad Mahadeo Vable and another, As in the instant case a combined application purporting to be under both Rules 89 & 90 had been filed by the judgment debtor-appellant therein and an objection with regard to the maintainability of the application under Rule 89 under the circumstances was raised by the auction. purchaser. Their Lordships upheld the objection saying that the observations of the Supreme Court would be sufficient to repel the contention of the judgment-debtor. the following observations of their Lordships are very pertinent to notice : IN our opinion, this (i.e. filing of consolidated application under Rules 90 & 89) would not make the slightest difference. These are separate and distinct rules without the one having any nexus with the other. They stand independently of each other, without the one taking recourse to the other. It is therefore, difficult to appreciate how, in the first instance, such a "consolidated" application could be filed merely by putting, in one application what are, under Rules 90 and 89, separate and distinct grounds for setting aside a sale. A party cannot by nicety of argument or ingenuity of Counsel- though both permissible-circumvent the provisions of the law and the clear and unambiguous intention of the legislature appearing in sub-rule (2) of Rule 89, by the advised use of the words "make or prosecute". Even though the petitioner filed one application, what cannot be ignored is that he had, as he must, based his relief, for setting aside the sale under the separate and distinct grounds set out in Rules 90 and 89 respectively. Thus though in fact the petitioner made one application, in law he is deemed to have made two separate application's under Rule 90 and Rule 89 respectively. Clubbing two applications under Rules 90 and 89 in one application would therefore make no difference and can be of no assistance to the petitioner."

(11) I am in respectful agreement with the observations of the learned Subordinate Judge. He has rightly noticed both these authorities in the impugned order. Hence, the present petition is devoid of any merit so far as this aspect of the matter is concerned. (12) The next submission of the learned counsel for the petitioner is that even if the impugned order is found to be absolutely correct with regard to the application for deposit under Order XXI Rule 89, the executing court has totally overlooked the provisions of Order XXXIV Rule 5 of the Code which specifically apply to a mortgage decree. His contention is that in the case of sale of mortgaged property pursuant to a mortgage decree the period of limitation governing the applications under Order XXI Rule 89 would not apply because even without such an application being made the mortgagor judgment-debtor has a right to redeem the mortgage at any time before the sale of the mortgaged property, is confirmed by virtue of the provisions embodied in Order XXXIV Rule 5 of the Code. Since the amount as envisaged in the said rule had already been deposited by the petitioner it was incumbent upon the executing court to have taken notice of this provision of law which has an important bearing in the case of a mortgage decree for setting aside the sale. It is pointed out that the sale has not been made absolute so far as contemplated in Order XXI Rule 92 of the Code and as such this petition deserved to be allowed and the sale of the property in question set aside under the provisions of Order XXXIV Rule 5. (13) This submission raises a very complex but a critical point for the decision of this revision. Rule 4 of Order XXXIV contemplates passing of a preliminary decree in favor of the plaintiff in a suit for sale of mortgaged property. Sub-rule (1) of Rule 5 thereof provides that where on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of the said rule i.e. Rule 5, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of Rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order ordering the plaintiff to deliver up the documents etc. referred to in the preliminary decree. Sub-rule (2) of Rule 5 further lays down that where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of the said rule, the Court shall not pass an order under sub-rule (1) of the same, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court Rs. 500 or payment to the purchaser a sum equal to five per cent of the amount on the purchase-money paid into Court by the purchaser. Sub-rule (3) of the said Rule enjoins upon the Court to pass a final decree directing that the mortgaged property or a sufficient part thereof be sold when payment has not been made in accordance with sub-rule (1). Obviously Rule 5 of Order XXXIV contemplates the passing of a final decree in certain contingencies and as such it would be attracted only where a preliminary decree has been passed under the preceding Rule 4. The question would, therefore, arise, whether the principle underlying this provision will govern a case where only a money decree has been passed initially although the decree authorises the decree holder to realise the decretal amount by sale of the judgment debtors property. (14) In the instant case the decree in question was made on the basis of an award which was made by the Court with the consent of both the parties. It directed the judgment-debtor to pay to the decree holder a sum of Rs. 910 with costs in respect of transaction concerning the mortgage deed dated 1st March, 1961 in respect of the property in question. It further ordered that : "IN case of failure of Shri Bhoora Mal to pay the above amount within the period of two months the said amount shall be recoverable by sale of property ..... Along with the leasehold rights of the land there under and if full amount of the award is not recoverable from the sale of the said property the same will be recoverable from Shri Bhoora Mal personally and from his movable property or any other immovable property."

(15) On a bare reading thereof it is manifest that the decree in question is a money decree but at the same time it directs realisation of the decretal amount by sale of the mortgaged property and even personally from the judgment debtor in case the sale proceeds fall short of the decretal amount and costs etc. Certainly, therefore it cannot be said to be a preliminary decree within the meaning of Rule 4 of Order XXXIV. So provisions of Rule 5 or Order Xxxiv will not in terms apply to such a decree. The same view has been expressed by the Lahore High Court and the Patna High Court in *Mam Chand v. Roshan Lal & another*, Atr 1933 Lahore 48(3) and *Nripendranath Chattenee & others v. Jhumak Mandar and 584 others*, Air 1924 24 Patna 263(4). In the latter case, a Division Bench of Patna High Court observed that "BUT this decree was never passed under Order 34, rule 4, Civil Procedure Code ., and therefore in my opinion it was not open to the decree-holders to apply for final decree under the provisions of Order 34. rule 5.. ..... . The arbitrator passing an award is in no way bound by the provisions of Order 34, rule 4, Civil Procedure Code In this case the arbitrator passed a decree for a sum of money and directed that that decree should be realised by sale of the mortgaged property. In my .opinion, the decree is enforceable as a decree passed by a competent Court, and it wa.s not open to the learned Subordinate Judge dealing with this matter to say that the decree could not be executed unless the procedure indicated in Order 34, rule 5 Civil Procedure Code .. had been complied with."

(16) This, if I may say with respect, is the correct legal position. A preliminary decree contemplated under Order Xxxiv Rule 4 is not an executable decree and the suit remains alive and pending so long as a final decree is riot made in terms of sub-rule (3), Rule 5 of Order XXXIV. The use of the expressions "plaintiff" and "defendant" in Rule 5 is very significant in this respect. (17) The vital question is whether despite non-applicability It terms of Order Xxxiv Rule 5 to a case like the one on nand the mortgagor would still be entitled to redeem the mortgage at any time before the sale is confirmed. This will take us to the substantive law regarding the right of a mortgagor to invoke his equity of redemption at any time before the court makes an order confirming the sale i.e. until the sale becomes absolute. The right of redemption is an incident of a subsisting mortgage and subsists so long as the mortgage deed subsists. It is well settled that the mortgagor's right of redemption and the mortgagee's right of fore-closure or sale are co-extensive. In other words, a mortgage being a security for the debt the right of redemption continues although the mortgagor fails to pay the debt at due date. Any provision inserted to prevent, evade or hamper redemption would be void. This is also implied in the maxim "once a mortgage always a mortgage." The Legislature has, therefore, made the law quite clear, for Rule 5 of Order Xxxiv expressly states that the mortgagor's right of redemption subsists till the confirmation of the sale held in execution of the decree for sale on a mortgage. This fundamental right of a mortgagor cannot, therefore, be taken away even by statutory provisions contained in Rule 89 of Order Xxi and it is only when the sale is confirmed under Rule 92 thereof that the equity of redemption is extinguished and the right of the mortgagor to redeem the mortgaged property comes to an end. Needless to say that the provision contained in Rule 5 of Order Xxxiv are special provisions relating to sale of mortgaged properties whereas provisions contained in Rule 89 of Order Xxi are of general nature applying to all execution sales. So, the former would prevail over the latter on the maxim "General specialibus non derogant". Thus; looked at the matter from this angle too, the provisions of Rule 5 of Order Xxxiv shall be attracted to the facts of lie instant case as against Rule 89 of Order XXI. it being a case of sale of mortgaged property It hardly matters that no preliminary decree was passed in the instant case because on the analogy

of Rule 5 of Order Xxxiv the underlying principle may well be pressed into service in a case like the present as it would manifestly subserve the latter and spirit of the substantive law of mortgages. (18) I may now notice some judicial decisions in this respect. In Smt. Priti Rekha Mitra v. Narayan Chandra Dutta, , while dealing with the question with regard to the point of time until which the equity of redemption can be claimed by a mortgagor in the light of the provisions contained in Rule 5 of Order XXXIV. Mukharji, J" observed that : "READING,therefore, O.21. R. 92 with O.34, R. 5, Civil Procedure Code ., I am of the opinion that the mortgagor can invoke his equity of redemption at any time before the Court makes an order confirming the sale and until the sale becomes "absolute" there under."

The learned Judge further observed that : ".....INa mortgage suit for sale the equity of redemption in a mortgagor survives under Order 34 Rule 5 until the Court makes an order confirming the sale under Order 21 Rule 92. It can be claimed by the mortgagor when an application by the purchaser 586 himself is priding for confirmation of. the sale. The equity of redemption in such cases is not extinguished by the final decree for sale nor by the actual sale itself but survives until the sale is confirmed and made absolute under O. 21, R. 92 of the Civil Procedure Code..... This conclusion is approved by the general principle of law that there should be no clog on the equity of redemption until the sale is concluded finally by Court's order of confirmation or what is said by the sale becoming "absolute" under O.21, R. 92 of the Civil Procedure Code."

Likewise in Bansilal Kanchhedilal and another v. Hukumchand Khurinelal and another, a D

(19) In the said case the mortgaged property was sold in execution of the award passed b

Their Lordships further elucidated that : "BESIDES this case is, as we have already a

(21) Reference in this context may also be made with advantage to S. Veeramma v. B. G. Siddappa & others, 1963(2), Mysore Law Journal 413(8) and Chellappa Chettiar and others v. T. P. Kalyanasundaram and others, The law may thus be taken to be well settled that the provisions of Order Xxi Rule 89 do not stand in the way of the judgment-debtor who is a mortgagor in paying off the mortgage amount and other sums as contemplated in Order Xxxiv Rule 5 at any time before the confirmation of the sale. However, he cannot seek extension of time for this purpose. The substantive right of a mortgagor to redeem the mortgaged property cannot, therefore, be whittled down by resorting to the provisions of Order Xxi Rule 89 which require the deposit to be made within sixty days of the sale. Since the auction sale has not been confirmed as yet the petitioner would be entitled to redeem the same provided he has already paid the various sums stipulated in Order Xxxiv Rule 5(2). He must, however, satisfy the executing Court that he is entitled to redeem the mortgage on account of his having stepped into the shoes of the original mortgagor by virtue of purchase of the mortgaged property equity of redemption. It may be pertinent to notice here that under Section 59A of the Transfer of Property Act mortgagors and mortgages are deemed to include persons deriving title from them respectively, e.g. heirs. executors and administrators etc. who derive their title from a mortgagor or a mortgagee. (22) Before concluding I may make a passing reference to the application (C.M. No. 3130185) made by the petitioner under Order Xli Rule 27 read with Section 151 of the Code. He has therein stated that the decree holder Shri Joginder Singh,

respondent No. 1 herein, has since received the entire decretal amount and made a statement to that effect in the executing Court presided over by Shri Jaswant Singh, Sub-Judge 1st Class, on 5th February 1979 and the decree was recorded as fully satisfied vide order dated 2nd March 1979 of the said Court. Thus, according to the petitioner the mortgaged property stands totally redeemed and this being 3 subsequent event should be taken notice of to do full justice between the parties. 589 (23) This application is vehemently opposed by the auction purchaser, respondent No. 3, inter alia, on the ground that even the payment of decretal amount to the decree holder would not extinguish or adversely affect the rights of the auction, purchaser under the court sale because the decree holder and the judgment debtor cannot collude to the detriment of the auction purchaser and it was the bounden duty of the executing Court to have protected the interest of the auction purchaser before certifying the payment to the decree holder under Order Xxi Rule 2 of the Code. (24) On a consideration of the matter I find considerable merit in this contention. After the sale of mortgaged property in execution of the decree no order can be passed to the prejudice of the auction purchaser without affording him an opportunity to be heard. Moreover, provisions of both Order Xxi Rule 89 and Order Xxxiv Rule 5 contemplate payment of compensation to the auction purchaser at the rate of 5 per cent of the purchase money and that right cannot be snatched by resorting to subterfuge or underhand means. In *Nanhelal & another v. Umrao Singh*, Air 1931 Pc 33, (10) it was held by the Judicial Committee that :

"AN adjustment between the decree-holder and judgmentdebtor come to at any time before confirmation of an execution sale cannot nullify the decree, by taking away the very foundation of the Court's power to execute the decree, viz... the existence of a decree capable of execution.

ORDER21, Rule 2, which provides for certification of an adjustment come to out of Court clearly contemplates a stage in the execution proceedings when the matter lies only between the judgmentdebtor and the decree-holder, and when no other interests have come into being. When once a sale has been effected, a third party's interest intervenes, and there is nothing in this rule to suggest that it is to be disregarded. Therefore after a sale is duly held, the Court cannot refuge to confirm the sale on the ground that the decree-holder and judgmentdebtor say that the decree has been satisfied out of Court."

(25) A perusal of the judicial record would show that an application dated 5th February 1979 was made by the decreeholder, respondent No. 1, for recording satisfaction of the decree and the statement of the decree-holder to that effect was recorded on the same date. Subsequently on 2nd March 1979 the learned Sub-Judge passed an order that "in view of the statement of the parties dated 5th February 1979 the file be consigned to the record room as fully satisfied.". (26) To say the least the said order is absolutely mindless. It betrays not only total non-application of judicial mind by the learned Sub-Judge but also ignorance of law on the subject. It is fundamental to our jurisprudence that the party against whom an order is sought to be made must be afforded an opportunity to be heard. It appears that in unholy haste in which the aforesaid order was passed the learned Sub-Judge did not even think of issuing a notice of the said application to the auction purchaser who had by then acquired a vested right in the litigation. Hence, whatever be the factual position the said order cannot bind or operate to the detriment of the auction purchaser, respondent No. 3. (27) To sum up, therefore, this revision petition succeeds although on a ground different from

that on which the impugned order is founded. Since there is no finding as yet as to whether the petitioner has acquired any right or interest in the mortgaged property by virtue of purchase or otherwise, as alleged, the case is remanded to the executing Court for fresh decision in the light of the observations made above after determining whether the petitioner has acquired any right or interest in the mortgaged property/equity of redemption which would entitle him to redeem the property in question. The parties are directed to appear before the executing Court on 25th March 1986 for further proceedings. (28) Keeping in view all the circumstances of the case, no order is made as to costs in this petition.