

Before S. P. Goyal and G. C. Mital, JJ.

MADAN LAL,—*Petitioner.*

*versus*

AMAR PHUL AND OTHERS,—*Respondents.*

Civil Revision No. 2877 of 1983

September 18, 1985.

*Code of Civil Procedure (V of 1908)—Order XXI, Rule 90 as amended by the Punjab and Haryana High Court—Code of Civil Procedure (Amendment) Act (104 of 1976)—Sections 72 and 97—Sale of property in execution of a decree—Objections which become available to an applicant after the drawing up of proclamation of sale till the date of sale—Whether can be raised after the auction sale—Proviso to Rule 90 added by the High Court amendment—Whether stands repealed after enforcement of the Amending Act of 1976.*

*Held*, that before amendment of rule 90 of order 21 made in the year 1976, after sale of property in execution, the aggrieved person was entitled to file objections, which could include objections in regard to the publication of the proclamation provided substantial injury was shown. Further, a proviso was added by the Punjab High Court in the year 1932 which continued even till after the Amending Act of 1976 so as to narrow down the scope of objections to be filed after the sale is conducted and thereby to avoid delay in execution. As a result of the Punjab amendment, no objection could be entertained against the sale which the applicant could have put forward before the sale was conducted. Therefore, on the basis of the Punjab proviso, objections against the proclamation of sale had to be raised before the auction-sale was conducted. Rule 90 after the amendment of 1976 is differently worded. In this rule, sub-rule 3 has been enacted with a view to save time in execution but this sub-rule is materially different from the proviso added by the Punjab High Court. Sub rule 3 provides that no application to set aside the sale shall be entertained upon any ground, which the applicant could have taken on or before the date on which the proclamation of sale was drawn up. It means that all objections, which became available to an applicant after the drawing up of the proclamation of sale and till the date of sale, can be raised after the auction sale under Order XXI, rule 90 of the Code. There is variance between sub-rule (3) and the proviso added by the Punjab High Court. Section 97 of the Amendment Act relates to repeal and savings. Clause (g) of sub-section 2 of section 97 of the Act saves the applicability of the amended rule to subsisting proceedings for

setting aside sale of any property. Wherever the proceedings are subsisting the old provisions would continue to apply but where the proceedings are not subsisting the amended rule 90 would be applicable and the amendment by the State legislature or High Court would stand repealed because that is inconsistent with the Central amended provision. Therefore, the proviso added by the Punjab amendment would stand repealed after the coming into force of the Amendment Act of 1976.

(Paras 4 and 5)

*Petition under section 115 C.P.C. for the revision of the order of the Court of Shri Ishvar Chand Jain, Addl. District Judge, Hissar dated 30th July, 1983 reversing that of Shri V. P. Chaudhry, H.C.S., Sub Judge, 1st Class, Hissar dated 7th March, 1983 accepting the appeal and setting aside the order dated 7th March, 1983 as well as the auction sale and remanding the case to executing Court for proceedings in accordance with law and directing the parties to appear before the executing Court through their counsel on 10th August, 1983.*

Arun Jain, Advocate, for the Petitioner.

O. P. Sharma, Advocate, for the Respondents.

#### JUDGMENT

G. C. Mital, J.—

(1) Prem Parkash obtained a decree for the recovery of Rs. 5,000 against Amar Phul. In execution thereof, 15 Kanals 3 Marlas of land was sold by Court auction on 13th November, 1982 for Rs. 6,800 in favour of Madan Lal who gave the highest bid. The judgment-debtor filed objections under Order 21 Rule 90 of the Code of Civil Procedure which were dismissed by the executing Court. The executing Court held that the objection regarding proclamation of sale had to be raised before auction was held and objections in that behalf could not be raised after the sale in view of proviso to Rule 90 Order 21 of the Code, as added by Rules and Orders of this Court which is to the following effect :

“Provided further that no such sale shall be set aside on any ground which the applicant could have put forward before the sale was conducted.”

The other objections regarding the conduct of sale did not find favour with the executing Court. On judgment-debtor's appeal, the

learned Additional District Judge set aside the auction after allowing objection petition and sent back the case to the executing Court to proceed afresh in accordance with law. In doing so, it came to the conclusion that in the proclamation of sale 303/2165 share out of the total holding was ordered to be sold and instead, at the time of auction, only 303/2365 share was sold and that according to the proclamation of sale, the auction was to be held at the spot, i.e., in village Kheri, whereas the sale was conducted in village Pabra. The lower Appellate Court did not find any merit in the objections raised on the spot, i.e., in village Kheri, whereas the sale was conducted in village Pabra. The lower Appellate Court did not find any merit in the objections raised on behalf of the decree-holder or auction-purchaser that such like objections could be raised before the auction was held, because both these mistakes were committed at the time of auction.

(2) The auction-purchaser has come to this Court in this revision.

(3) Initially the case came up for hearing before S. P. Goyal, J. and one of the points raised was that to assail the auction on the ground that proclamation had not been drawn in accordance with law. Objection had to be raised before the auction was held in view of the proviso quoted above. In support of his argument, reliance was placed on a Single Bench decision of this Court in *Mal Singh v. Moqha Central Co-operative Bank Ltd.* (1). Some doubt was felt about the correctness of the aforesaid decision and particularly in view of the law as was amended by the Amendment Act No. 104 of 1976. Accordingly, it was ordered that the matter be heard by a larger Bench and that is how the case has been placed before us. Rule 90, as it stood originally, was different. To that a further proviso was added by the Punjab Amendment made on 7th April, 1932, which amendment continued even after partition of India in 1947 and even after the reorganisation of 1966. Now the rule 90, as it stands after the amendment of 1976 is, as follows :—

“(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No applicaion to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up."

(4) Before amendment of rule 90 of order 21 made in the year 1976, after sale of property in execution, the aggrieved person was entitled to file objections, which could include objections in regard to the publication of the proclamation provided substantial injury was shown. As rightly noticed by R. N. Mittal, J. in *Mal Singh's* case (supra) a further proviso was added by Punjab amendment on 7th April, 1932, which continued even till after the amendment Act No. 104 of 1976, which has been quoted above, so as to narrow down the scope of objections to be filed after the sale is conducted, and thereby to avoid delay in execution. As a result of the Punjab amendment, no objection can be entertained against the sale, which the applicant could have put forward before the sale was conducted. Therefore, on the basis of the Punjab proviso, objection against the proclamation of sale had to be raised before the auction-sale was conducted.

(5) By the Central amendment Act No. 104 of 1976, rule 90 is differently worded. In the rule, which has been reproduced above, sub-rule (3) has been made with a view to save time in execution, but sub-rule (3) is materially different from the proviso added by the Punjab amendment. Sub-rule (3) provides that no application to set aside the sale shall be entertained upon any ground, which the applicant could have taken on or before the date on which the proclamation of sale was drawn up. It means that all objections, which became available to an applicant after the drawing up of the proclamation of sale and till the date of sale, can be raised after the auction sale under Order 21 Rule 90 of the Code. Since there is variance between sub-rule (3) and the proviso added by Punjab amendment, it has to be seen as to which of the two would prevail. Section 97 of the Code of Civil Procedure (Amendment) Act No. 104 of 1976 relates to repeal and savings and sub-section (1) thereof is

as follows :—

“97 (1) Any amendment made, or any provision inserted in the principal Act by a State Legislature or a High Court before the commencement of this Act shall, except in so far as such amendment or provision is consistent with the provisions of the Principal Act as amended by this Act, stand repealed.”

Clause (g) of sub-section (2) of section 97 of the Act saves the applicability of the amended rule 90 to subsisting proceedings for setting aside sale of any property. Wherever the proceedings are subsisting the old provision would continue to apply but, where the proceedings are not subsisting, in view of sub-rule (1) of rule 97, the amended rule 90 would be applicable and the said amendment by State Legislature or High Court would stand repealed because that is inconsistent with the Central amended provision. Therefore, the proviso added by the Punjab amendment would stand repealed after the coming into force of sub-rule (3) of section 90 of the amendment, i.e., with effect from 1st February, 1977, when the amendment Act No. 104 of 1976 came into force.

(6) The case with which we are dealing is where the sale took place on 13th November, 1982, i.e., long after the amended rule 90 of the Code came into force and therefore the learned counsel for the auction-purchaser was not right in relying on the Punjab amendment. Adverting to sub-rule (3) of rule 90 of the Code, the judgment-debtor was entitled to raise all objections, which he could have raised after the proclamation of sale had been drawn up. The proclamation of sale is drawn up under Order 21 rule 66 of the Code.

(7) Now it has to be seen on facts, whether the matters on which the lower appellate Court had set aside the sale could be raised before the proclamation of sale was drawn up or relate to matters which arose thereafter. The two matters are that while the judgment debtor's share to the extent of 303/2165 was ordered to be sold but at the time of auction only 303/2365 share was sold. This objection could be raised only after the sale and could not be raised on or before the proclamation of sale was drawn up. The other objection was that the sale was to be conducted where the land was situated, whereas it was conducted in other village. This is also a matter which could be raised only after the proclamation was drawn up and not before. Hence, there is no merit in the contentions

raised on behalf of the auction purchaser that the points on which appeal was allowed by the lower appellate Court could not be raised by the judgment debtor.

(8) In view of the statement of law, which came into being after the amendment Act No. 104 of 1976, the decisions in regard to law prevailing before that date would be wholly irrelevant. The decision of R. N. Mittal, J. in *Mal Singh's case* (supra), and other cases relied therein relate to proceedings before the amendment Act No. 104 of 1976 and, therefore, need no further discussion. As already stated above, the proviso added by Punjab amendment to rule 90 of Order 21, of the Code, stands repealed with effect from 1st February, 1977. Rule 90 as it stands now with effect from 1st February, 1977 would be applicable.

(9) For the reasons recorded above, we do not find any merit in this revision and the same is dismissed leaving the parties to bear their own costs. The Executing Court would now proceed to sell the attached property afresh in accordance with law.

N.K.S.

*Before S. P. Goyal and G. C. Mital, JJ.*

UNITED COMMERCIAL BANK,—*Petitioner*

*versus*

STATE OF JAMMU AND KASHMIR AND OTHERS,—*Respondents.*

*Company Petition No. 48 of 1981*

September 18, 1985.

*Companies Act (I of 1956)—Section 446—Companies Act (VII of 1913)—Section 171—Company in liquidation—Suit or other legal proceedings commenced against the company after the winding up order—Requirement of leave under section 446—Post facto leave—Whether could be granted.*

*Held.* that the change made in the phraseology of section 446 of the Companies Act, 1956 is of no consequence so far as the competency of the Court to grant post facto sanction to continue with the suit instituted after the winding up order is concerned and the