Before Rajendra Nath Mittal J.

PARKASH KAUR—*Petitioner.*

versus

SANDHOORAN AND ANOTHER—*Respondents.*

Civil Revision No. 206 of 1978

October 6, 1978.

Code of Civil Procedure (V of 1908)—Order 21, Rules 89 and 90—Application to set aside sale under Rule 90 filed—Thereafter another application under Rule 89 filed within time—Latter application—Whether maintainable—Application under Rule 90 withdrawn after expiry of 30 days from the date of sale—Application under Rule 89—Whether can be treated within limitation.

Held, that Rule 89(2) of Order 21 of the Code of Civil Procedure, 1908 provides that if a person had made an application under Rule 90 to set aside the sale of immovable property, he shall not be allowed to make an application under Rule 89 unless he withdraws the former application. Under Rule 90 the judgment-debtor or any other person whose interests are affected by the sale can apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting the sale. From these two Rules it is apparent that the judgment-debtor has no right to apply for setting aside the sale under Order 21 Rule 89 in case he had filed an application for setting it aside under Rule 90 and in case he first files an application under Order 21 Rule 89 and thereafter an application under Rule 90, he has no right to prosecute the earlier application. (Para 6)

Held, that in view of Order 21 Rule 89 if an application under Rule 90 is pending in the executing Court, a judgment-debtor has no right to make or prosecute an application under Rule 89 unless he withdraws the application under Rule 90. The limitation for filing an application under Rule 89 or Rule 90 is 30 days from the date of sale. Where, the judgment-debtor files two applications, one under Rule 90 and the other under Rule 89 within limitation and subsequently withdraws the former when the time for filing the application under Rule 89 expires, the latter application can be said to be duly presented on the date of withdrawal of the application under Rule 90. Consequently it cannot be treated to be within limitation and is liable to be dismissed as such. (Para 7)

Petition under section 44 of the Punjab Courts Act for the revision of the order of Shri Mewa Singh, Additional District Judge

Amritsar dated 9th December, 1977, affirming that of Shri Ishwar Chand Aggarwal, P.C.S., Sub-Judge 1st Class, Amirtsar dated 1st April, 1977, confirming the sale of the mortgaged house conducted on 30th August, 1974 and issuing a sale certificate. Out of Rs. 76,000 deposited in court by the auction-purchaser, a sum of Rs. 405 be credited to the Government, Rs. 1,620 be paid to the official auctioner as his remuneration and the balance be paid to the judgment-debtor.

D. N. Awasthy, Advocate, *for the Petitioner.*

Kuldip Singh Bar-at-Law, *for the Respondents.*

JUDGMENT

R. N. Mittal, J.

(1) This revision petition has been filed by the judgment-debtor against the judgment of the Additional District Judge, Amritsar, dated December 9, 1977.

(2) Briefly the facts are that on October 16, 1970, Smt. Parkash Kaur mortgaged a house situated in Katra Sher Singh, Amritsar, to Smt. Sandhooran, for an amount of Rs. 5,000,—*vide* a registered mortgaged deed. There was an arbitration clause in the deed wherein it was provided that any dispute arising between the parties would be referred to arbitration. A dispute arose between the parties regarding the payment of the amount and consequently the matter was referred to the arbitration of Mr. Kartar Singh Bagga, who held that Smt. Sandhooran was entitled to recover the amount of Rs. 5,812.50, with interest thereon by sale of the mortgaged property. The award was filed in the Court and it was made a rule of the Court. Smt. Sandhooran filed an execution application against the judgment-debtor in the Court of Subordinate Judge, First Class, Amritsar, who on July 27, 1974, ordered sale of the property. In pursuance of that order the property was sold on August 30, 1974 and was purchased by Suresh Kumar, respondent.

(3) On the same day, that is, August 30, 1974, Smt. Sandhooran judgment debtor filed an application under sections 47, 60 and 151 read wih Order 41, rule 6 of the Civil Procedure Code, stating that no notice under Order 21, rule 66 of the Code had been served on her and consequently the property could not be sold. She prayed that the sale be stayed. In spite of the application, the property was

sold. Thereafter, on September 16, 1974, another application was filed by the judgment-debtor alleging that the sale of the property was null and void, that there had been material irregularities and fraud in publishing and conducting the sale and that the petitioner's interest had been seriously affected on account of irregularities and fraud. She prayed that the sale of the house be set aside. While the above application was pending, she moved another application on September 23, 1974, under Order 21, rule 89 of the Code stating that she was ready to deposit the decretal amount of Rs. 5,846.50 and Rs. 3,800, 5% of the sale proceeds, and she may be allowed to do so. She further prayed that the sale of the property be set aside. On January 25, 1975, she moved yet another application that the decree-holder had withdrawn the amount deposited by her and, therefore, the sale was liable to be set aside. On November 23, 1974, the counsel for the judgment-debtor made a statement that he did not want to pursue his application dated September 16, 1974. The applications were opposed by the decree-holder.

(4) The executing Court held that notice under Order 21, rule 66 had been served upon the judgment-debtor and that application under Order 21, rule 89 was not maintainable. Consequently, it dismissed the objection petition of the judgment-debtor. She went up in appeal before the Additional District Judge, Amritsar, who dismissed it. She has come up in revision to this Court.

(5) The first contention of the learned counsel for the petitioner is that the application under Order 21 rule 89 was maintainable as the petitioner had not filed any application under Order 21, rule 90, of the Code. He argues that the application dated September 16, 1974 could not be treated under Order 21, rule 90 of the Code. He also submits that in case that application was to be treated under Order 21, rule 90, then the Court should have given option to the petitioner to withdraw either that application or the application under Order 21, rule 89 and to pursue the other application.

(6) I have given a thoughtful consideration to the argument of the learned counsel but regret my inability to accept it. Before discussing the facts of the case, it will be appropriate to refer to the provisions of Order 21, rules 89 and 90. Rule 89 relates to the applications to set aside sale on deposit and rule 90 to applications to set aside sale on the ground of irregularity or fraud. Rule 89(2) provides that if a person had made an application under rule 90 to

set aside the sale of immovable property, he shall not be allowed to make an application under Order 89 unless he withdrew the former application. The said rule reads as follows:—

> "89(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."

Under rule 90, the judgment-debtor or any other person whose interests are affected by the sale, can apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting the sale. From a reading of the above two rules it is apparent that the judgment-debtor has no right to apply for setting aside a sale under Order 21, rule 89, in case he had filed an application for setting it aside under Order 21, rule 90 and in case he first filed an application under Order 21, rule 89 and thereafter an application under Order 21, rule 90, he has no right to prosecute the earlier application. The aforesaid two provisions came up for interpretation before the Supreme Court in *Shiv Prasad* v. *Durga Prasad and another*, (1), wherein it was held:—

> "An application under Rule 89, validly made on the date of its presentation cannot be allowed to be prosecuted until the subsequent application filed under Rule 90 is withdrawn. But it cannot be allowed to be made or be deemed to have been made unless the prior application filed under Rule 90 is withdrawn.
>
> The words used in the sub-rule are "make or prosecute". It 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

(1) A.I.R. 1975 S.C. 957.

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."

Now, it is to be seen whether the application dated September 16, 1974, was under Order 21, rule 90 or not. No doubt, it is true that in the application it has been stated that the sale of the property was void. The reason for saying that it was void, was stated to be that there had been material irregularities and fraud in publishing and conducting the sale. These words are the same which have been used in Order 21, rule 90. Merely from the fact that particulars of fraud or irregularities have not been given, it cannot be held that the application was not under Order 21, rule 90 of the Code. After a reading of the application no doubt is left in my mind that it was an application for setting aside sale under Order 21, rule 90. It may also be mentioned that the petitioner also treated it as such as in her application dated September 23, 1974, under Order 21, rule 89, she reserved her right to the objections filed by her in the Court to set aside the sale. The contention of Mr. Awasthy, learned counsel for the petitioner, that the application dated September 16, 1974, cannot be treated under Order 21, rule 90, has, therefore, no substance.

(7) In view of Order 21, rule 89, if an application under Order 21, rule 90, was pending in the executing Court, the petitioner had no right to make an application under Order 21, rule 89. If she wanted to do so, she should have withdrawn first the application under Order 21, rule 90. The petitioner filed an application under Order 21, rule 89, in spite of the fact that an application under Order 21 rule 90 was pending. The limitation for filing an application under Order 21, rule 89, or rule 90, is 30 days from the date of the sale. She filed both the applications within 30 days of the sale and thus these were within limitation. But as already observed above, the application dated September 23, 1974 was not maintainable in view of the pendency of the application under Order 21, rule 90. The counsel for the petitioner withdrew that application on November 23, 1974. On that date, the time for filing an application under Order 21, rule 89, had passed. The application under Order 21, rule 89 can be said to be duly presented on November 23, 1974, but as the limitation for filing that application had expired, consequently it cannot be treated to be within limitation and is liable to be dismissed as such.

(8) The contention of the learned counsel that it was the duty of the Court to ask for the option of the petitioner as to whether she wanted to proceed with the application under Order 21, rule 89 or under Order 21, rule 90, has also no substance. The petitioner while making an application under Order 21, rule 89, stated specifically therein that she wanted to pursue the earlier application for setting aside the sale. In the circumstances, the application under Order 21, rule 89, was not maintainable. The question of option, therefore, did not arise. Mr. Awasthy referred to a Division Bench judgment of the Allahabad High Court in *Sarvi Begam* v. *Ram Chander Sarup,* (2). In that case the judgment-debtor had in the first instance filed an application under Order 21, rule 89 and then an application under Order 21, rule 90 of the Code. The facts of that case are, therefore, distinguishable. At the time when an application under Order 21, rule 89 was filed, the judgment-debtor had the right to do so, but after filing an application under Order 21, rule 90, he could not prosecute it. Therefore, the observations in that case will not have any applicability to the facts of the present case. I, therefore, reject the contention of the learned counsel.

(9) In the end, it may be mentioned that the learned counsel for the petitioner sought to argue that she was not served with a notice under Order 21, rule 66 of the Code. This question, however, cannot be gone into in the revision petition as both the Courts, after taking into consideration the evidence, held that notice under the said rule had been served upon the petitioner. Mr. Awasthy brought to my notice various orders of the court. I am also convinced that the notice had been served upon her. Therefore, the contention is rejected having no substance.

(10) For the reasons recorded above, the revision petition fails and the same is dismissed with no order as to cost.

N. K. S.

(2) A.I.R. 1925 Allahabad 778.