

Before : M. M. Punchhi, J.

PIARA SINGH AND ANOTHER,—Appellants.

*versus*

CENTRAL BANK OF INDIA AND OTHERS,—Respondents.

Civil Revision No. 194 of 1985

December 20, 1985

*Code of Civil Procedure (V of 1908)—Order XXI, Rules 89 and 92—Sale of immovable property in execution of a decree—Judgment debtor moving an application under rule 89 for getting the sale set aside on deposit—Application accompanied by requisite deposits—Such application—Whether (withdrawable—Order) for allowing the application under rule 89—Whether could be passed without notice to the auction purchaser.*

*Held*, that once the application was made by a proper person falling within the ambit of rule 89 of order XXI of the Code of Civil Procedure, 1908, and was accompanied by deposits as envisaged, the moneys so deposited ceased to be the moneys of the applicant or that of the judgment-debtor, if he was the applicant. No cause is instituted by the filing of an application under rule 89, rather the application under the said rule is made with the clear object of ending a challenge to the court-sale but, at the same time, avoiding its confirmation by the timely deposit of the moneys for payment to the decree-holder and for payment of compensation to the auction-purchaser. On deposits of such moneys, the applicant places himself in the shoes of the auction-purchaser, for he has not only directly satisfied him by making payment of a sum equal to 5 per cent of the purchase price but has indirectly satisfied the decree-holder too, who, in the first instance, had ventured to be satisfied by the payment likely to be made by the purchaser. The Court obviously, in the circumstances when contest recedes, has no option except to allow the application at once. Such abruptness excepted of the Court is also in keeping with the spirit of the rule that there are no two ways to it except the one which would further the object and the purpose of the rule. Such mandate of the law inheres in it a prohibition put on the applicant that, subject to his application being proper in law and accompanied by the requisite deposits, his application was not capable of being withdrawn. It is in this sense that salutary rule is an exception to the other well used rules, inclusive of the rule of withdrawal, operating in the adversary system. Thus, an application made under order XXI, rule 89 when read in the light of rule 92, is not withdrawable, provided, of course, that the application was proper and validly made, accompanied by requisite deposits and in case it is not, it is rejectable.

(Para 12)

*Held*, that no order for allowing the application made under rule 89 can be made unless notice of the application has been given to all the persons affected thereby. There is considerable authority for the proposition that the auction-purchaser is one of the persons affected thereby, for, obviously, under the said rule, a sum equivalent to 5 per cent of the purchase price stands assured for him. He is thus entitled to point out defects in the application or in the measure of deposit. His participation is, however, very limited and only for the purpose of viewing that he is not affected in a manner in which his rights under the rules are in any way, jeopardized. It would be contrary to the spirit of law if he was to shed the benefits conferred on him under rule 89 and the benefit of the auction at the same time. Thus, for this limited purpose, his participation before such application is formally allowed by Court, is necessary, and this means that, though the Court has no option but to allow the application, and that too at once, but it is subject to the reservation that the affected party, which means the auction-purchaser, has been given notice of the application so as to make him aware that he is being compensated under rule 89 and that the Court, passing the formal order, would also hold him entitled to return of the purchase money under rule 93. It is in this way alone that rule 89 can be harmoniously construed so as to carry out its objective. (Para 13)

*PETITION under Section 115 C.P.C. for revision of the order of the court of Shri B. R. Vohra, Additional District Judge, Hissar, dated the 15th November, 1984, reversing that of Shri V. P. Chaudhary, Sub Judge Ist Class, Hissar, dated the 18th January, 1983 accepting the appeal and remanding the case to the trial court (Shri Dhani Ram Yadav, Sub Judge Ist Class, Hissar), and directing the parties through their counsel to appear before the trial Court on 24th November, 1984.*

H. L. Sibal, Senior Advocate with S. C. Sibal, Advocate and R. K. Handa, Advocate, for the Petitioner.

R. K. Aggarwal, Advocate for No. 1. Naginder Singh, Advocate for No. 4. N. C. Jain, Senior Advocate with V. K. Jain, Advocate, for the Respondent.

#### JUDGMENT

*M. M. Punchhi, J.*

(1) As is well known, the Civil Procedure Code which governs the mode of a civil trial in this country is heavily based on the adversary system. That system, as is evident, puts the parties to a fight and the Court then assumes, by and large, the role of an umpire. It has often been observed that if one of the adversaries gives

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in, stopping the game or walking out, the role of umpiring stops too and the adversary entrenched in the battle-field gets, as a result, whatever is his due. Now, do these principles influence interpretation of Order XXI, rules 89 and 92, and if so, to what extent, is the subtle question which has arisen in this revision petition. Necessary facts giving rise thereto follow:—

(2) The Central Bank of India obtained a money decree for the recovery of Rs. 37,753.26 p. against Mohinder Singh respondent on 11th January, 1979. The decree-holder Central Bank of India transferred the decree in favour of a married couple Hari Kishan and Soma Wanti on 26th February, 1982. The transferee-decree-holders brought out an execution petition to execute the decree and in execution thereof, a plot of land apparently belonging to Mohinder Singh judgment-debtor was attached and then sold by auction on 3rd January, 1983. Four days later on 7th January, 1983, Mohinder Singh filed objections under section 47 of the Code of Civil Procedure praying for dismissal of the execution petition. Three days thereafter on 10th January, 1983, Mohinder Singh made a written request to the Court to determine the decretal amount payable by him as to enable him to deposit the same and get the sale set aside. That was in keeping with the provisions of Order XXI, rule 89, Civil Procedure Code. The Executing Court acceded to the request directing the judgment-debtor to deposit Rs. 37,531.31 p. on or before 14th January, 1983. But Mohinder Singh judgment-debtor deposited the same two days earlier on 12th January, 1983. Simultaneously on that day, the judgment-debtor made a formal application under Order XXI, rule 89, Civil Procedure Code, for setting aside the sale after notice to the auction-purchaser and the decree-holder. The Executing Court issued notices of this application for 15th January, 1983. Yet another application was filed by Mohinder Singh judgment-debtor on 18th January, 1983 requiring of the Executing Court that all applications/ objections filed by him earlier to the date be dismissed as withdrawn and sale of the property be confirmed in favour of the auction-purchaser. However on the same day i.e. 18th January, 1983, Piara Singh and Kishan Chand, the present revision petitioners, moved a petition before the Executing Court claiming that they in fact were the owners of the plot which was put to auction and Mohinder Singh judgment-debtor was thus only a Benami-dar. They prayed that the amount already deposited by Mohinder

Singh be not allowed to be withdrawn and be paid to the decree-holder followed by the sale being set aside and the execution petition consigned as fully satisfied. The Executing Court on that very day disposed of both the applications date 18th January, 1983 taking the view that since the function of the Court was to satisfy the decree through execution and the decretal amount had been deposited, the decree stood satisfied and thus set aside the auction sale leaving it open to the judgment-debtor and the present petitioners-objectors to settle their rights over the plot in question at a proper platform, for he took the view that their dispute *inter se* had no relevancy with the execution application.

(3) The auction-purchaser filed an appeal against the order of the Executing Court before the Additional District Judge, Hissar, but without impleading the present petitioners as respondents. Mohinder Singh judgment-debtor also filed an appeal but he took care to implead the respondents. Both appeals were consolidated and were disposed of by a common order by Shri B. R. Vohra, learned Additional District Judge, Hissar. He upset the order of the Executing Court taking the view that Mohinder Singh judgment-debtor was not debarred under any law from withdrawing his earlier petition dated 12th January, 1983 as a prelude to which he had deposited the decretal amount and the five per cent of the purchase money because his withdrawal application had been made before the expiry of 30 days from the date of auction after which the sale was to be confirmed. He further took the view that the provisions of Order XXI, rule 89, Civil Procedure Code, were only a concession to the judgment-debtor to deposit the decretal amount etc. before the sale is confirmed and it was for the judgment-debtor to decide to avail of the concession or withdraw from it. In ultimate conclusion, to took the view that under sub-rule (2) of rule 92 of Order XXI, Civil Procedure Code, the applications of Mohinder Singh judgment-debtor and the present objector-petitioners, both dated 18th January, 1983, could only be decided when all the parties affected had been given notices, and since that was not done, he on upsetting the order required of the Executing Court to investigate the matter and adjudicate thereon in accordance with law. To challenge this order, the objector-petitioners have approached this Court in revision and the jurisprudential question as afore-spelled out has cropped up for determination.

(4) Normally, when a man institutes a cause in a civil Court, he has a right to withdraw it and then suffer its consequences. On

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first impressions, one would apply the same principle to an application under Order XXI, rule 89, Civil Procedure Code, providing for an application to set aside sale on deposit. That rule reads as follows:—

“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 same 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 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.”

(5) This is followed by rule 90 whereunder an application to set aside a sale on the ground of irregularity or fraud can be made by the decree-holder or purchaser or any other person entitled to share any reteable distribution of assets or whose interests are affected by the sale. This applicant can only succeed in the venture if he can prove to the Court's satisfaction that he has sustained substantial injury by reason of such irregularity or fraud. Then

follows rule 91 whereunder the purchaser at any such sale may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. Then follows rule 92 of which clauses (1) and (2) being relevant for present purpose are reproduced hereafter:—

“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 thirty 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.”

(6) On careful analysis of the aforesaid rules, Mr. H. L. Sibal, learned counsel for the petitioners contended that once an application to set aside sale on deposit had been made under Order XXI, rule 89, Civil Procedure Code, and when the Court is satisfied that the deposit required by that rule has been made within thirty days from the date of sale, or in cases where the amount deposited under the rule 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

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Court, the Court has no option but to accept the application, for the sole object of the Court is to execute the decree, which by the step taken by the judgment-debtor becomes readily possible, making it incumbent on the Court to wind up its role. Further it was contended by him that an application under Order XXI, rule 89, Civil Procedure Code, can in no event be disallowed, much less allowed to be withdrawn, when all the essentials of the rule such as deposits as conceived therein, one for the auction-purchaser and the other for the decree-holder, have been made to retrieve the property put to auction-sale.

(7) Mr. N. C. Jain, learned counsel appearing for the auction-purchaser, on the other hand, contended that an application under Order XX, rule 89, C.P.C., could validly have been withdrawn by the unilateral act of the judgment debtor; and all what the Court had to do was to accord formal withdrawal and that the act of withdrawal was complete as soon as intimation in that regard was made to the Court. He further contended that the Court was not bound to accept the application under Order XXI, rule 89, C.P.C., and in any case, before its acceptance, requisite notice to the auction-purchaser was a must under the provisions of rule 92 of Order XXI, C.P.C.

(8) Sardar Nagender Singh, learned counsel appearing for the judgment-debtor, raised a dispute regarding the identity of the plot with which the judgment-debtor had negotiated with the petitioners. He further supported the arguments of Mr. Jain to contend that the judgment-debtor was within his right to have withdrawn the application under Order XXI, rule 89, C.P.C.

(9) The case law cited by the learned counsel for the parties may now be taken stock of. Way back, a Single Bench of the Madras High Court in *Kumukutty and another v. Mannodath*, (1) while discerning the scope of Order XXI, rule 89, C.P.C., observed as follows:—

“But O.21, R. 89, enacts a special provision. Its object is to put an end to every kind of contention and dispute. The judgment-debtor is saved from the threatened deprivation of his property; the decree-holder's claim is satisfied and the auction-purchaser is compensated. The section would be frustrated if the person paying money

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(1) A.I.R. 1930 Madras 921.

under it is permitted to do so under protest. (Then Cl (2) of Rule 89 was quoted). This shows that the two proceedings referred to in this clause are utterly incompatible. If the debtor wants to keep a dispute open, he cannot claim the benefit of this section. In fact, this accords to him a special indulgence. While he is thus favoured, care is taken to provide that the interests neither of the decreeholder nor of the purchaser are sacrificed. It follows from this, that when the judgment-debtor pays the amount specified, he pays it unconditionally."

The above view met with approval by a Full Bench of the Madras High Court in *L. A. Krishna Ayyar v. Arunachalam Chettiar*, (2). Their Lordships of the Full Bench considered the entire case law on the subject and observed as follows:—

"The judgment-debtor or a person interested in the property cannot attach any condition to his deposit under Order 21, Rule 89 and the Court cannot accept the deposit subject to any condition or protest. Once the proper amount has been deposited in time by the person entitled to make the application, *the Court has no option but at once, to make the order setting aside the sale;* \* \* \* \* \*

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I agree with that opinion which I think is obviously right because Rule 89 involves no inquiry at all but Rule 90 does and that inquiry may result in the dismissal of the application, whereas the former rule gives no option to the Court but to set aside the sale."

(Emphasis supplied)

In *Kanda Veloo v. Kumaran Govindn*, (3) a Division Bench of that Court also took the same view by observing that when a deposit and an application are properly made under Order 21, Rule 89, for setting aside a Court-sale by a person competent to make the application and within time, the Court has no option and is bound to set aside the sale. In that case, however, it was taken to have been settled, as a rule, that the application could be allowed

(2) A.I.R. 1935 Madras 842.

(3) A.I.R. 1953 Tram Cochin 529.

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after notice to the auction-purchaser if he was not already aware of the filing of the application.

(10) In *Ram Chandra v. Narain Parshad*, (4) emphasis was laid and if the applicant claiming an interest in the property at the time of making the application under Order XXI, Rule 89, deposits in Court 5 per cent of the purchase price for payment to the auction-purchaser and the amount due to the decree-holder, he was entitled to have the sale set aside.

(11) In *Ittiathi Gopalan v. Nani Amma Ammukutty Amma and others*, (5) a Division Bench of that Court, while determining the nature of the deposit under Order XXI, Rule 89, Code of Civil Procedure, took the view that such money did not belong to the judgment-debtor and was, thus, not an asset of his, which could be liable to be rateably distributed amongst his creditors. Their lordships observed that the deposit thenceforth belonged to the decree-holder alone. With regard to the import of Rule 89, it was observed as follows:

“Proceedings in pursuance of applications under Order 21 Rule 89, proceed on the footing that the execution sale is not affected by fraud and other vitiating circumstances and is valid and binding on the property.

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and when a deposit under Order 21, Rule 89, is made and an application under that Rule is allowed, what takes place, in effect, is a transfer of the rights of the auction-purchaser to the applicant.”

In *Shiv Prasad v. Durga Prasad and another* (6) their lordships observed as follows:—

“The applicant merely has to convey to the Court that he is withdrawing his application under Rule 90 which he had filed prior to the making of the application under Rule 89. Thereupon he becomes entitled to make the latter application. Every applicant has a right to unconditionally

(4) A.I.R. 1935 Lahore 51.

(5) A.I.R. 1957 Travencore Cochin 107. (F) A.I.R. 1940 P.

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

withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting him to withdraw the application. The Court may make a formal order disposing of the application as withdrawn but the withdrawal is not dependent on the order of the Court. The act of withdrawal is complete as soon as the applicant intimates the Court that he withdraws the application."

And the last is the case on which the learned counsel for the respondents rely to contend that even an application under Rule 89 is unilaterally withdrawable. All the other precedents cited by the learned counsel for the parties appear to me beside the point and need not burden this judgment.

(12) One need focus now on the question posed at the very outset. In that context it would first have to be determined whether an application under Rule 89 is withdrawable. Having heard the learned counsel for the parties on the subject, I have come to the considered view that it is not. Once it is noticed that the application was made by a proper person falling within the ambit of that rule and was accompanied by the deposits as envisaged, the moneys so deposited ceased to be the moneys of the applicant or that of the judgment-debtor, if he was the applicant. The view expressed by the Travancore-Cochin High Court in *Ittiathi Gopalan's case* (supra) seems to me sound and acceptable, especially when it was based on a decision of the Patna High Court reported as *Gokul Bihari Das v. Kalandi Senda* (7). The rule laid therein otherwise makes good sense. No cause is instituted by the filing of an application under Rule 89, rather the application under the said rule is made with the clear object of ending a challenge to the Court-sale but, at the same time, avoiding its confirmation by the timely deposit of the moneys for payment to the decree-holder and for payment of compensation to the auction-purchaser. On deposits of such moneys, the applicant places himself in the shoes of the auction-purchaser, for he has not only directly satisfied him by making payment of a sum equal to 5 per cent of the purchase price but has indirectly satisfied the decree-holder too, who, in the first instance, had ventured to be satisfied by the payment likely to be made by the purchaser. The Court obviously, in the circumstances when contest recedes, has no option except to allow the application at once, as held by the

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(7) A.I.R. 1940 Patna 191.

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Full Bench of Madras High Court in *L. A. Krishna Ayyar's case* (supra). Such abruptness excepted of the Court is also in keeping with the spirit of the rule that there are no two ways to it except the one which would further the object and the purpose of the rule. Such mandate of the law inheres in it a prohibition put on the applicant that, subject to his application being proper in law and accompanied by the requisite deposits, his application was not capable of being withdrawn. It is in this sense that this salutary rule is an exception to the other well used rules, inclusive of the rule of withdrawal, operating in the adversary system. Viewed from this light, the observations made by the Supreme Court in *Shiv Prasad's case* (supra), as they seem to me, do not and cannot apply to an application under rule 89, for, that obviously is a marked exception to the general rule. Thus, I am of the considered view that an application made under Order XXI Rule 89, when read in the light of Rule 92, is not withdrawable, provided, of course, that the application was properly and validly made, accompanied by the requisite deposits, and in case it is not, it is rejectable.

(13) Now, coming to the proviso to Rule 92(2) of Order XXI, Code of Civil Procedure, it is noticeable that no order for allowing the application under Rule 89, can be made unless notice of the application has been given to all persons affected thereby. There is considerable authority for the proposition that the auction-purchaser is one of the persons affected thereby, for, obviously, under the said Rule, a sum equivalent to 5 per cent of the purchase price stands assured for him. He is, thus entitled to point out defects in the application or in the measure of deposit. His participation is, however, very limited and only for the purposes of viewing that he is not affected in a manner in which his rights under the Rules are in any way, jeopardized. It would be contrary to the spirit of law if he was to shed the benefits conferred on him under Rule 89 and the benefit of the auction at the same time. Thus, for this limited purpose, his participation, before such application is formally allowed by the Court, is necessary and, in this context, as I discern it, the mandate of the Full Bench of the Madras High Court in *L. A. Krishna Ayyar's case* (supra) means that, though the Court has no option but to allow the application, and that too at once, but it is subject to the reservation that the affected party, which means the auction-purchaser, has been given notice of the application so as to make him aware that he is being compensated under Rule 89 and

that the Court, passing the formal order, would also hold him entitled to return of the purchase money under Rule 93. It is in his way alone that Rule 89 can be harmoniously construed so as to carry out its objective.

(14) Now, coming to the facts of the case in hand, the auction-purchaser was obviously not heard when the Court allowed the application on 18th January, 1983, rightly not permitting Mohinder Singh to withdraw the application and the deposits made under the said Rule. Thus, in this sense, the executing Court was partially in the right and partially in the wrong. Having interpreted the law on the subject in the preceding paragraphs, the application under Order XXI, Rule 89, C.P.C., of Mohinder Singh be now disposed by the executing Court in the presence of the auction-purchaser, for he has obviously now notice of the application as he is aware of it.

(15) At the fag-end, to be fair to the learned counsel for the parties, I need mention that an objection was raised by the learned counsel for the respondents to the maintainability of the revision petition on the ground that the petitioners had no *locus-standi* to maintain it but, when confronted with the proposition that this Court could have *suo motu* revised the order, the voice of objection was allowed to drown. Similarly, the objection of the learned counsel for the petitioners that the auction-purchaser was not an aggrieved party entitling it to challenge in appeal the order of the executing Court, also was not allowed to be advanced any further in view of the specific language of the proviso to Rule 92(2) of Order XXI, Code of Civil Procedure. The objection and the counter objection, afore-referred to, are thus over-ruled.

(16) For the foregoing reasons, the order of the Appellate Authority is revised and modified to convey and clarify the law on the subject and confining the scope of proceedings under Order XXI, Rule 89, Code of Civil Procedure, within the sphere above-indicated. The revision petition, in that sense, is partially allowed, maintaining the order of remand within the aforesaid confines. No costs.

N.K.S.