

CASE NO.:
Appeal (civil) 2598 of 2005

PETITIONER:
M/s. Mahakal Automobiles & Anr

RESPONDENT:
Kishan Swaroop Sharma

DATE OF JUDGMENT: 02/04/2008

BENCH:
Dr. ARIJIT PASAYAT & S.H. KAPADIA

JUDGMENT:
J U D G M E N T
REPORTABLE

CIVIL APPEAL NO. 2598 OF 2005

Dr. ARIJIT PASAYAT, J.

1. Challenge in this appeal is to the judgment of learned Single Judge of the Madhya Pradesh High Court, Indore Bench.

2. Background facts in a nutshell are as follows:

Respondent had sold 7200 sq.ft. land with some construction on 15/11/1986 for Rs.7.20 lacs to the JDs/appellants and was paid only Rs.1.60 lacs. He had agreed to accept the remaining amount of Rs.5.60 lacs in 4 installments in 3 years with interest @ 1.50% per month. A charge was created on this property. Respondent had later filed a Civil Suit No. 13-A/89 (New No. 6-A/1991) for recovery of amount of Rs.6,31,750/- by sale of such property.

JDs/appellants in their written statements had admitted liability to pay Rs.5 lacs as principal and Rs.65,000/- as interest and pendente lite interest @ 1% per month. They disputed that Babulal was the partner of M/s Mahakal Automobiles. Thus, the ADJ on 24/9/1991 gave a judgment and decree under Order XII Rule 6 of the Code, relevant portion of which reads follows:

"As a result application of plaintiff is partly allowed and it is hereby ordered that defendants Nos. 1 and 3 shall pay within 6 months from today Rs.5,65,000/- and interest @1% per month on Rs.5 lacs from the date of institution of suit i.e. 16/6/1989, otherwise the plaintiff would be entitled to get a final decree for recovery of his amount by sale of charged property. Order as to cost would be given at the time of disposal of other points. A preliminary decree be framed accordingly. Description of charged property be also given in preliminary decree."

A preliminary decree was accordingly drawn up. However, it was not drawn in prescribed form No.5-A or 7-C of Schedule of Appendix-D to the Code of Civil Procedure, 1908

(in short 'the Code'). Admittedly, no accounts were to be taken. Simple arithmetical calculation of interest would have specified the actual amount payable.

On 28/4/1992 respondent filed an application for execution. Notices to all JDs/appellants under Order XXI Rule 22 of the Code were issued. On 8/6/1992, JDs/2 appeared through Shri L.P. Bhargava, Advocate while JD/1 appeared through Shri P.K. Modi, advocate. All JDs continued to appear regularly till 16/11/1993. In the meantime two applications; one under Order XXI Rule 58 read with Section 151 of the Code was filed on 8/6/1992 and the second under order XXI rule 50 read with Section 151 of the Code was filed on 2/11/1992 by the JDs which were disposed of on 16/12/1992 and 2/11/1992 respectively. No question as to non-executability of the decree had been raised by the JDs according to the High Court.

On 16/10/1992 the court below directed that name of Babulal Gupta be deleted from the execution application as there had been no decree against him. A question was also raised suo motu by the court whether the decree in its terms being preliminary decree could be executed as it is, or the DH-respondent be directed to obtain a final decree. The executing court granted several adjournments for arguments on this question. On 12/2/1993 the executing court stayed the proceedings of the execution to await the result of proceedings under Order I Rule 10 and Section 151 of the Code before the trial court in the original case which was also pending in the same court. On 8/3/1994 order of the High Court was received in the original case and the execution proceedings were ordered to be restarted. The execution proceedings as well as the civil suit were transferred from court to court and none appeared for the JDs in the execution case, till 14/7/1997.

The High Court by the impugned order set aside the order of the trial court holding that the I.As. filed by the judgment debtors, respondents in the appeal, before High Court were to be dismissed. Auction sale in favour of the respondent-DH was valid and order of its confirmation was upheld.

3. In support of the appeal learned counsel for the appellant submitted as follows:

- (i) Records reveal that no Process Fee was paid by the Decree Holder as per Order dated 4.10.1997.
- (ii) Attachment of Warrant was not as per Order 21 Rule 54 (1A) CPC.
- (iii) No Notice was given to the appellants when execution proceedings got delinked from the suit and got transferred from one court to another.
- (iv) Attachment proceedings were carried out in the absence of the Judgment Debtor.
- (v) No notice was given to the appellant under Order 21 Rules 54 and 66(2). The procedure under Order 21 Rule 54 (1A) and 66(2) is mandatory. Hence, the objections taken by way of IA Nos. 1, 2 and 6 should have been accepted
- (vi) The Court found total absence of drawing up of the proclamation of sale and its terms by judicial application of mind.
- (vii) It was held that the executing court did not follow the mandatory procedure as provided under the Code.

4. It was submitted that the High Court by the impugned order erroneously reversed the judgment on the ground that the appellant could be presumed to have known of the proceeding and it is not a case of complete non issue of service of attachment of warrant and that ratio of the decision in *Deshbandhu Gupta v. N.L. Anand @ Rajinder Singh* [1994(1) SCC 131] does not apply.

5. Learned counsel for the respondent on the other hand submitted that the High Court has analysed the factual position in the background of legal position as set out by this court.

6. When a property is put up for auction to satisfy a decree of the Court, it is mandatory for the Court executing the Decree, to comply with the following stages before a property is sold in execution of a particular decree:

- (a) Attachment of the Immoveable Property;
- (b) Proclamation of Sale by Public Auction;
- (c) Sale by Public Auction

7. Each stage of the sale is governed by the provisions of the Code. For the purposes of the present case, the relevant provisions are Order 21 Rule 54 and Order 21 Rule 66. At each stage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served upon the person whose property is being sold in execution of the decree, and any property which is sold, without notice to the person whose property is being sold is a nullity, and all actions pursuant thereto are liable to be struck down/quashed.

8. The admitted position that has emerged is that:

- (i) There was no notice served upon the Judgment-Debtor under Order 21 Rule 54 (1-A).
- (ii) There was no valuation of the property carried out;
- (iii) There was no proclamation of sale as per the statutory provisions of the M.P. Civil Court Rules, 1961 read with Order 21 Rule 66.
- (iv) There was no publication of the sale.

9. In *Deshbandhu Gupta's* case (supra) it was held as follows:

"The Proclamation should include the estimate, if any, given by either judgment-debtor or decree holder or both the parties. Service of Notice on judgment-debtor under Order 21 Rule 66 (2) unless waived by appellants or remained ex-parte, is a fundamental step in the procedure of the Court in execution, judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verified as accurately and fairly as possible so that the intending bidders are not misled or to prevent them from offering inadequate price or to enable them to make a decision in offering adequate price. In *Gajadhar Prasad Vs. Babu Bhakta Ratan*, this Court after noticing the conflict of judicial opinion among the High Courts, said that a review of the authorities as well as amendments to Rule 66

(2) (e) make it abundantly clear that the Court, when stating the estimated value of the property to be sold, must not accept the ipse dixit of one side. It is certainly not necessary for it to state its own estimate

But, the essential facts which had a bearing on the very material question of value of the property and which could assist the purchaser in forming his own opinion must be stated, i.e. the value of the property, that is, after all, the whole object of Order XXI, Rule 66 (2) (e) CPC. The Court has only to decide what are all these material particular in each case. We think that this is an obligation imposed by Rule 66 (2) (e). In discharging it, the Court normally state the valuation given by both the Decree Holder as well as the Judgment Debtor where they both have valued the property, and it does not appear fantastic."

"The absence of Notice causes irreparable injury to the judgment debtor. Equally publication of the proclamation of sale under Rule 67 and specifying the date and place of sale of the property under Rule 66 (2) are intended so that the prospective bidders would know the value so as to make up their mind to offer the price and to attempt that sale of the property and to secure competitive bidders and fair price to the property sold. Absence of Not to the Judgment Debtor disables him to offer his estimate of the value who better know its value and to publicise on his part, canvassing and bringing the intended bidders at the time of sale. Absence of notice prevents him to do the above and also disables him to know fraud committed in the publication and conduct of sale or other material irregularities in the conduct of sale. It would be broached from yet another angle. The compulsory sale of immovable property under Order 21 divests right, title and interest of the judgment debtor and confers those rights, in favour of the purchaser. It thereby deals with the rights and disabilities either of the judgment debtor or the decree holder. A sale made, therefore, without notice to the judgment debtor is a nullity since it divests the judgment debtor of his right, title and interest in his property without an opportunity. The jurisdiction to sell the property would arise in a Court only where the owner is given notice of the execution for attachment and sale of his property. It is very salutary that a person's property cannot be sold without his being told that it is being so sold and given an opportunity to offer his estimate as he is the person who intimately knew the value of his property and prevailing in the locality, exaggeration at time be possible."

and Another [1987(4) SCC 717] it was held that the court has a duty to ensure that the requirement of order 21 Rule 66 has properly applied. It is incumbent on the court to be scrupulous in the extreme.

11. The records do not reveal that the appellant-judgment debtor was served with a notice as required under Order 21 Rule 54(1)(A) of the Code in the appendix B Forms 23, 24 and 29. It is to be noted that the records reveal that the address of the appellant as contained in the sale deed was different from the address at which the process server purportedly affixed the notice on the door and in open court and at the chorah only. It has also to be noted that under Order 21 Rule 66(2) the service of the notice has to be personally affected on the judgment debtor. That also does not appear to have been done. Interestingly, the valuation of the property as required to be done under the proviso to sub-rule (2) of Rule 66 of Order 21 of the Code has not been done. The same appears to have been valued on the spot at Rs.9,00,000/- and it was not done by the Court. There are admittedly other non-compliance with certain requirements. We do not think it necessary to deal with those aspects in detail in view of the order proposed to be passed. From the records it is revealed that Rs.14,38,893/- and Rs.4,46,926/- have been deposited by the appellant purportedly for satisfaction of the Execution Court Ujjain and Indore respectively. The appellant shall further deposit a sum of Rs.15,00,000/- within 4 months from today. The respondent No.1 shall be entitled to withdraw the amount deposited in the bank with accrued interest. The appellant shall be responsible for payment of the property tax of the property from the date of execution of sale deed i.e. 5.12.1986 till date and the same shall be paid deposited with the concerned authority within the aforesaid period of four months. On payment of the amounts, the title to the property described in the registered sale deed will vest free of all encumbrances on the appellant.

12. If any property of the respondent No.1 is there in the property in question, the same shall vest to respondent No.1 with liberty to remove them as soon as the payment is made.

13. The appeal is disposed of accordingly. No costs.