

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.4557 OF 2012

DIPALI BISWAS & ORS.

...APPELLANT(S)

VERSUS

NIRMALENDU MUKHERJEE & ORS.

...RESPONDENT(S)

J U D G M E N T

V. Ramasubramanian, J.

1. Challenging the order of the High Court confirming the order of the Executing Court dismissing their application under Section 47 of the Code of Civil Procedure, 1908 (*hereinafter referred to as the 'Code'*), the legal representatives of the judgment-debtor have come up with the above appeal. Incidentally, this litigation is exactly half a century old (it started with a suit filed in 1971) and this appeal arises out of the fifth round of litigation at the stage of execution of a simple money decree and we wish that it is the knock out round.

2. We have heard Mr. Rauf Rahim, learned counsel for the appellants, and Mr. Raja Chatterjee, learned counsel appearing for the respondent nos.1-7/auction purchasers.

3. One Ms. Rama Rani Devi, filed a simple suit for recovery of money in Money Suit No.16 of 1971 on the file of the District Munsif Court, Bongaon, District 24 Parganas, West Bengal, against one Sasadhar Biswas, for recovery of a sum of Rs.3000/-. The suit was decreed *ex parte* on 25.07.1974, directing the defendant to pay the decretal amount in six equal instalments with a default clause.

4. Since the decree was not honoured, the decree holder filed an execution petition in Execution Case No.2 of 1975, praying for the attachment and sale of 17 decimal of land (approximately about 7450 Sq.ft.) in Plot No.26/159 under Khatian No.2555 of Mouza Bongaon. It appears that a sale proclamation was issued by the executing court on 16.07.1975 after which Sasadhar Biswas, the Judgment-debtor filed an application in Miscellaneous Case No.151 of 1975 assailing the sale proclamation issued by the executing court, on the ground of material irregularity and fraud. But the same was dismissed on 03.09.1975.

5. An auction sale was held on 30.05.1979, in which two brothers by name, Sachindra Nath Mukherjee and Dulal Kanti Mukherjee became the highest bidders, they having offered a sum of Rs.5500/-, as the highest bid amount. The highest bidders also deposited the money into court.

First round

6. Mr. Sasadhar Biswas, the judgment-debtor then filed an application on 27.06.1979 under Order XXI, Rule 90 read with Section 152 of the Code praying for setting aside the auction sale on the ground of irregularities in the sale proclamation. During the pendency of this petition in Miscellaneous Case No.47 of 1979, the judgment-debtor Sasadhar Biswas entered into a compromise on 19.07.1980, not with the decree holder but with the auction purchasers. The memo of compromise reads as follows:-

“The petitioner and the auction purchaser Opp. party do settle the suit mutually in the following manner.

1) If the petitioner debtor pays the entire money due to the auction purchaser opposite part in cash within 15th December or if he deposits it in their credit in the court and the auction shall be revoked and the original execution case shall be disposed on full satisfaction.

2) Otherwise that is if the petitioner debtor does not pay the entire money due to the auction purchaser opposite party in cash within 15th December on deposits that amount in court within that date then the said auction shall remain effective and this present suit shall be dismissed with costs.

Hence it is prayed that according to the contents of this solenama and for compliance with the conditions of the solenama the final date of this suit may be kept on 16.12.80 on the expiry of the 15th December.”

7. It is relevant to point out that the amount of money deposited by the auction purchasers into court was Rs.5500/-, but the decree debt was around Rs.3360/-. Though the compromise memo entered into by the judgment-debtor with the auction purchasers did not refer to the decree debt, but repeatedly mentioned the words, “*entire money due to the auction purchasers*”, the judgment-debtor admittedly deposited on 15.12.1980, only a sum of Rs.3700/-, purportedly on the basis of the calculation provided by the court officer in terms of Order XXI, Rule 89 of the Code.

8. Since the deadline for payment of the entire money due to the auction purchasers expired on 15.12.1980 and also since the judgment-debtor deposited only a sum of Rs.3700/-, as against the amount of Rs.5500/- deposited by the auction purchasers, the

executing court dismissed the application under Order XXI, Rule 90 in Miscellaneous Case No.47 of 1979.

9. But within four days, the executing court again passed an order on 20.12.1980 recalling the order dated 16.12.1980 and recording full satisfaction in the execution. Shocked at this order, the auction purchasers filed an application on 22.12.1980 for recalling the order dated 20.12.1980, passed purportedly behind their back. This application was dismissed by the executing court on 12.09.1981. Challenging the said order dated 12.09.1981, passed by the executing court, the auction purchasers filed a revision in C.R.No.3577 of 1981 on the file of the High Court. The High Court allowed the revision by an order dated 21.06.1983 and remanded the matter back to the executing court, for re-hearing the application of the auction purchasers for recall of the order dated 20.12.1980.

10. The executing court passed a fresh order dated 11.07.1987 rejecting the application of the auction purchasers on merits, but this order was set aside by the High Court in a revision in C.O.No.2487 of 1987, by an order dated 20.12.1990. By this order

the High Court held that the judgment-debtor failed to honour the commitment made in the compromise memo to deposit the entire amount due to the auction purchasers and that therefore the auction sale should be confirmed in favour of the auction purchasers. It may be relevant to extract Clause No.4 of the operative portion of the order of the High Court in C.O. No.2487 of 1987 dated 20.12.1990. It reads as follows:-

“xxx

xxx

xxx

xxx

4. None of the parties shall have any claim whatsoever as against the applicant in respect of the purchased property which shall be deemed to be his absolute property on and from the expiry of 15th December, 1980.”

11. Thereafter, a mention was made before the learned judge, on behalf of the counsel for the judgment-debtor seeking recall of the order in C.O.No.2487 of 1987 on the ground that the counsel was not present at the time of disposal of the revision petition. Therefore, the leaned Judge again heard the matter and passed a detailed order dated 08.08.1991, reiterating his earlier order. A special leave petition filed against the order dated 08.08.1991, in SLP(C)No.18092 of 1991 was dismissed by this Court on 24.02.1992. The judgment-debtor moved a petition for review before

this Court but the same was also dismissed on 12.08.1992. Thus, the 1st round of litigation kicked off with an application under Order XXI, Rule 90, in the year 1979, came to an end in 1992.

Second Round

12. The judgment-debtor then started the 2nd round by filing a suit in suit No.249 of 1992 on the file of the District Munsif, Bongaon, for a declaration that the auction sale is void but the said suit was dismissed as abated, on 02.12.1992.

Third Round

13. In the meantime, the auction purchasers filed petitions for the issue of sale certificate and the judgment-debtor filed a petition under Order XXI, Rule 29 for stay of execution proceedings. But the application of the judgment-debtor was dismissed and the applications of the auction purchasers were allowed by the executing court by an order dated 31.01.1994. A direction was given for the issue of a sale certificate to the auction purchasers in terms of Order XXI, Rule 94. Accordingly, a sale certificate was issued on 08.02.1994. The sale certificate was also duly registered.

14. Challenging the order dated 31.01.1994 passed by the executing court directing the issue of sale certificate, the judgment-debtor filed a revision in C.O.No.1232 of 1994 on the file of the High Court. Though the High Court entertained the revision and initially granted a stay of further proceedings in the execution, the High Court eventually dismissed the revision petition by an order dated 05.09.2001 holding that the earlier order in C.O.No.2487 of 1987 dated 08.08.1991 had already clinched the issue. With this order, the third round came to an end.

Fourth Round

15. The 4th round began with an application by the auction purchasers seeking delivery of possession. This application was allowed by the executing court on 15.03.2002, directing delivery to be effected by 16.04.2002. Since the judgment-debtor had, in the meantime, constructed a building on the land sold in execution of the decree, the executing court directed the building so constructed illegally, to be demolished.

16. The order of the executing court for delivery of possession was challenged by the appellants herein (*the legal representatives of the*

judgment-debtor) in a Civil Petition No.106 of 2002 before the Additional District Judge, Barasat. The same was dismissed on 26.02.2003. This order was challenged before the High Court in C.O.No.1276 of 2003, but the same was dismissed by the High Court by an order dated 11.02.2005 pointing out that the issue has already been clinched by the previous orders. The special leave petition SLP(C) No.12925 of 2005 filed against the said order, was dismissed by this Court on 18.07.2005. The petition seeking review of the said order was also dismissed by this Court on 10.01.2006. Thus, the fourth round of litigation came to a close.

Fifth Round (present round)

17. Not to be put off by repeated failures, the appellants herein, like the tireless *Vikramaditya*, (*who made repeated attempts to capture 'Betal'*) started the present round (hopefully the final round), by moving a petition in Miscellaneous Case No.15 of 2006 before the executing court under Section 47 of the Code, on the ground that the mandate of Order XXI Rule 64 was not followed in the auction and that therefore a jurisdictional error has crept in and that the same could be corrected at any point of time and at

any stage of the proceeding. This petition filed on 10.02.2006 was dismissed by the executing court by an order dated 20.01.2007.

18. Challenging the said order dismissing their application under Section 47, the appellants filed a revision in C.O. No.1115 of 2007 on the file of the High Court. This revision was dismissed by the High Court by an order dated 28.03.2008, on the ground that the issue, never having been raised earlier, cannot be allowed to be raised at this distance of time. It is against the said order of the High Court dated 28.03.2008, in C.O.No.1115 of 2007 that the legal representatives of the judgment-debtor have come up with the above appeal.

Contentions and our analysis

19. The only *mantra*, by the recitation of which, the appellants hope to succeed in this half-a-century old litigation, is Order XXI, Rule 64 of the Code. This provision enables an executing court to order “*that any property attached by it and liable to sale or such portion thereof as may seem necessary to satisfy the decree, shall be sold and that the proceeds of such sale or a sufficient portion thereof*

shall be paid to the party entitled under the decree to receive the same”.

20. It is the contention of the learned counsel for the appellants that Order XXI, Rule 64 casts not a discretion, but an obligation, to sell only such portion of the property as may be sufficient to satisfy the decree. In support of this proposition, the learned counsel for the appellants cited a few decisions, which we shall now deal with.

In ***Takkaseela Pedda Subba Reddi vs. Pujari Padmavathamma & Ors***¹, this Court held that the, “*executing court derives jurisdiction to sell properties attached, only to the point at which the decree is fully satisfied*”, and that the words, “*necessary to satisfy the decree*”, clearly indicate that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. This Court went further to hold that the issue flowing out of Order XXI, Rule 64 goes to the very root of the jurisdiction of the executing court and that therefore the fact that an objection in this regard was not raised before the executing court is not sufficient to put him out of court.

¹ (1977) 3 SCC 337

21. But the aforesaid decision arose out of a case where the decretal amount for which the properties were to be sold was mentioned in the warrant of sale and sale proclamation as Rs.16,715/-. The lands in two villages namely *Devanoor* and *Gudipadu* were brought to sale. The sale of lands in one village alone fetched Rs.16,880/-. Yet the executing court proceeded to sell the lands in *Gudipadu* also. It is in that context that this Court held as aforesaid.

22. The decision in ***Ambati Narasayya vs M. Subha Rao & Anr²***, while following ***T.P. Subba Reddi*** (supra), went a step further and held that if the property is large and the decree to be satisfied is small, the court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the decree debt and that ***it is immaterial whether the property is one or several.***

23. But the decision in ***Ambati Narasayya*** (supra) also arose out of a particular context. The land that was sold in ***Ambati Narasayya*** (supra) was of the extent of 10 acres and it was sold for Rs.17,000/- for the satisfaction of a claim of Rs.2400/-. The land of

² (1989) Supp. 2 SCC 693

the extent of 10 acres is certainly large enough and is capable of division. But in the case on hand, the extent of land is only 17 decimals, working out to (7450 Sq.ft.).

24. It must be pointed out at this stage that under Order XXI, Rule 66 (1) the executing court should cause proclamation of the intended sale to be drawn up in the language of the court. Under sub rule (2) of Rule 66 of Order XXI, such proclamation should be drawn up after notice to the decree holder and the judgment-debtor.

Order XXI, Rule 66 reads as follows:-

66. Proclamation of sales by public auction.- (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible—

(a) the property to be sold, ***or, where a part of the property would be sufficient to satisfy the decree, such part;***

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

(c) any incumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered;
and

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property:

Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs:

Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given, by either or both of the parties.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

25. It is important to note here that two significant changes were made to Order XXI, Rule 66 by Act 104 of 1976 w.e.f. 01.02.1977. Both these changes were made to sub rule (2) of Rule 66. One of the changes was the insertion of the words “***or where a part of the property would be sufficient to satisfy the decree, such part***” in clause (a) of sub rule (2). The second change was the insertion of two *provisos* under sub rule (2).

26. As an aside, it may be noted that the second *proviso* to sub rule (2) inserted by Central Act 104 of 1976, was redundant in so far as Calcutta is concerned, since Calcutta already had a similar *proviso* inserted through a local amendment.

27. The first *proviso* under sub rule (2) of Rule 66 of Order XXI gives a discretion to the court not to give notice under Order XXI, Rule 66 to the judgment-debtor, if a notice for settling the terms of the proclamation had been given to the judgment-debtor by means of an order under Rule 54.

28. Rule 54 of Order XXI prescribes the method of attachment of immovable property. Sub rule (1A) of Rule 54, also inserted by Act 104 of 1976, mandates that the prohibitory order under sub rule(1) shall require the judgment-debtor to attend court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale. This is why the first *proviso* to sub rule (2) of Rule 66 gives a discretion to the court to dispense with a second notice under Order XXI, Rule 66(2).

29. Keeping in mind the above statutory prescriptions, if we come to the facts of the case, it is seen that the appellants have filed as

additional document in Annexure A-3, the copy of the extract of relevant orders passed in Money Execution Case No.2 of 1975 by the District Munsif Court, Bongaon. This document reveals that on 10.01.1975, the executing court ordered the issue of notice of attachment under Order XXI, Rule 54 of the Code. It was only thereafter that the court directed on 16.07.1975, the issue of sale proclamation under Order XXI, Rule 66.

30. Thereafter, the judgment-debtor filed a petition under Section 47 of the Code on 02.09.1975 (*this was the first petition under Section 47, while the appeal on hand arises out of the second petition under Section 47*).

31. The executing court, at the instance of the judgment-debtor also granted stay of further proceedings on 26.09.1975. But it is not clear from Annexure A-3 of the additional documents filed by the appellants, as to when the said petition under Section 47 was disposed of. However it is clear from the order passed on 22.04.1978 that the decree holder was directed to take further steps.

32. Even after directing the publication of the sale proclamation in the newspaper, the executing court was more than fair to the judgment-debtor, as could be seen from the order passed on 16.03.1979. On the said date the executing court found that in the newspaper publication, the case number was wrongly mentioned. Therefore, the court directed the issue of fresh sale proclamation and fresh publication. It is only thereafter that the judgment-debtor moved a petition on 30.05.1979 for postponement of the auction. It was rejected and the court proceeded with the auction. The decree holder himself participated in the auction after getting permission from the court. However, it is only the third parties who succeeded in getting the sale confirmed.

33. The above sequence of events would show that the judgment-debtor had sufficient opportunity to object to the inclusion of the entire property when an order was passed under Order XXI, Rule 54. Subsequently he had an opportunity to object to the inclusion of the whole of the property, by taking advantage of the amended clause (a) of sub rule (2) of Rule 66 of Order XXI, which speaks about a part of the property that would be sufficient to satisfy the

decree. But the judgment-debtor despite filing a petition under Section 47 on 02.09.1975, did not point out how the property being a vacant land of an extent of 17 decimals could have been divided. It must be pointed out at the cost of repetition that the notice of attachment under Order XXI, Rule 54 was ordered on 10.01.1975 and the sale proclamation under Order XXI, Rule 66 was directed to be issued on 16.07.1975. It is only thereafter that the first petition under Section 47 was filed on 02.09.1975. Therefore, the appellants cannot compare themselves to the judgment-debtors in **T.P. Subba Reddi** or **Ambati Narasayya** (supra).

34. As we have pointed out elsewhere, the objection relating to Order XXI, Rule 64 has been raised by the appellants for the first time in the 5th round of litigation in execution. In the 1st round, the appellants exhausted the gun-powder available under Order XXI, Rule 90, by taking recourse to a compromise with the auction purchasers, after alleging material irregularity in the conduct of the auction. The 1st round which commenced in 1979 came to an end in 1992 with the dismissal of SLP(C) No.18092 of 1991. In the order of the High Court dated 20.12.1990 that was under challenge in the

said SLP, the High Court made it clear that none of the parties shall have any claim whatsoever as against the auction purchaser in respect of the purchased property (we have extracted this in Para 10 above).

35. The 2nd round was kick-started with a suit in Suit No.249 of 1992 for a declaration that the auction sale was void. This is despite the express bar of a separate suit, under Section 47(1) of the Code. But the 2nd round got aborted with the dismissal of the suit due to abatement.

36. The 3rd round started with objections to the issue of sale certificate and it came to an end in the year 2001. The 4th round commenced when the auction purchasers moved the executing court for delivery of possession. Delivery was ordered by the executing court on 15.03.2002. This round came to a close with the dismissal of a SLP in the year 2005 and a review petition in the year 2006, arising out of the dismissal of a revision petition challenging the order of the executing court for delivery of possession. It is only thereafter that the 5th round of litigation was started by the appellants by filing a petition under Section 47 and raising the

bogey of “*jurisdictional error*” on account of non-compliance with the mandate of Order XXI, Rule 64. In other words, the appellants have now exhausted almost all provisions available to a judgment-debtor to stall execution and the case on hand is fit to be included in the syllabus of a law school as a study material for students to get equipped with the various provisions of the Code relating to execution.

Conclusion

37. The appellants cannot be allowed to raise the issue relating to the breach of Order XXI, Rule 64 for the following reasons:-

(i) A judgment-debtor cannot be allowed to raise objections as to the method of execution in instalments. After having failed to raise the issue in four earlier rounds of litigation, the appellants cannot be permitted to raise it now;

(ii) As we have pointed out elsewhere, the original judgment-debtor himself filed a petition under Section 47, way back on 02.09.1975. What is on hand is a second petition under Section 47 and, hence, it is barred by *res judicata*. It must be pointed out at this stage that before Act 104 of 1976 came into force, there was one view that the provisions of Section 11 of the Code had no application to execution proceedings. But under Act 104 of 1976

Explanation VII was inserted under Section 11 and it says that the provisions of this Section shall apply to a proceeding for the execution of a decree and reference in this Section to any suit, issue or former suit shall be construed as references to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree;

(iii) Even in the 5th round, the appellants have not pointed out the lay of the property, its dimensions on all sides and the possibility of dividing the same into two or more pieces, with a view to sell one or more of those pieces for the realisation of the decree debt;

(iv) The observations in paragraph 4 of the order of the High Court dated 20.12.1990 in C.O.No.2487 of 1987 that, “*none of the parties shall have any claim whatsoever as against the applicant in respect of the purchased property which shall be deemed to be his absolute property on and from the expiry of 15th December, 1980*”, has attained finality;

(v) Section 65 of the Code says that, “*where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute*”. The sale of a property becomes absolute under Order XXI, Rule 92(1) after an application made under Rule 89, Rule 90 or Rule 91 is disallowed and the court passes an order confirming the same. After the sale of an immovable property

becomes absolute in terms of Order XXI, Rule 92(1), the Court has to grant a certificate under Rule 94. The certificate has to bear the date and the day on which the sale became absolute. Thus a conjoint reading of Section 65, Order XXI, Rule 92 and Order XXI, Rule 94 would show that it passes through three important stages (*other than certain intervening stages*). They are, **(i)** conduct of sale; **(ii)** sale becoming absolute; and **(iii)** issue of sale certificate. After all these three stages are crossed, the 4th stage of delivery of possession comes under Rule 95 of Order XXI. It is at this 4th stage that the appellants have raised the objection relating to Order XXI, Rule 64. It is not as if the appellants were not aware of the fact that the property in entirety was included in the proclamation of sale. Therefore, the claim on the basis of Order XXI, Rule 64 was rightly rejected by the High Court.

38. In view of the above, the appeal is devoid of merits and, hence, it is dismissed. There will be no order as to costs.

.....**J.**
(Hemant Gupta)

.....**J.**
(V. Ramasubramanian)

New Delhi
October 05, 2021