
(1994) 107 PLR 154

High Court Of Punjab And Haryana At Chandigarh

Case No: Civil Revision No. 159 of 1990

Tirkha Ram

APPELLANT

Vs

Ram Bilas and Another

RESPONDENT

Date of Decision: Jan. 11, 1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) – Order 21 Rule 54, Order 21 Rule 58, Order 21 Rule 66, Order 21 Rule 90, Order 5 Rule 20

Citation: (1994) 107 PLR 154

Hon'ble Judges: V.K. Jhanji, J

Bench: Single Bench

Advocate: Ashok Aggarwal and Anil Khetarpal, for the Appellant; A.K. Mittal, for the Respondent

Final Decision: Allowed

Judgement

V.K. Jhanji, J.

This petition seeks the revision of orders of the Courts below vide which Objections preferred by the petitioner against

attachment and sale of the property were dismissed.

2. In brief, the facts are that money-decree dated 6.10.1984 was passed in favour of Ram Bilas, respondent, for Rs. 16,500/-, i.e. Rs. 15,000/-

as principal and Rs. 1500/- as interest with costs. Future interest was also awarded to the decree-holder at the rate of 6% per annum, from the

date of institution of suit till the realisation of the entire decretal amount. Decree holder, for the realisation of the amount, filed an execution

application. In his application, he sought attachment of the property belonging to the petitioner, i.e. 1/4th share in land measuring 294 kanals 1

marla. Execution application was registered on 26.11.1984 and the Court issued warrants of attachment for 19.1.1985. On 19.1.1985, the

Presiding Officer was on leave and, therefore, the case was adjourned to 31.1.1985 for proper orders. On 31.1.1985, the following order was

passed by the trial Court :-

Present: Sh. Hari Mohan for D.H.

Case is for proper orders and is adjourned to 1.4.1985. Warrants of attachment be re-issued for that date on process-fee and Munadi fee, to be

deposited within 4 days.

On the next date, i.e. 1.4.1985, the Court recorded that attachment had been effected. On an application filed under Order 21 Rule 66 of the

Code of Civil Procedure, notice was ordered to be issued to the judgment-debtor for 7.5.1985. Judgment-debtor was not served for 7.5.1985

and, therefore, he was ordered to be served again for 19.7.1985 on filing of process-fee and registered A.D. cover. Decree-holder was also

required to furnish the correct address of the judgment-debtor. On 19.7.1985, the Court recorded that judgment-debtor has refused to accept

service and he be served through Munadi for 14.9.1985. On 14.9.1985, the executing Court recorded that judgment-debtor has not turned up

despite notice served upon him by way of Munadi, and, therefore, he was ordered to be proceeded against ex-parte, and warrants of sale were

ordered to be issued for 25.10.1985. Consequently, the case was adjourned to 31.10.1985 for awaiting the report. For the sale, notice of

proclamation was to be affixed in the court premises on 26.9.1985, notice at the spot for 5.10.1985, and the auction was to take place at the spot

on 25.10.1985. Since the decree-holder did not deposit the process-fee, sale could not take place, and the Court vide order dated 31.10.1985

ordered that notice of proclamation of sale be affixed in the court premises for 14.11.1985, notice at the spot for 24.11.1985, and sale be held on

the spot on 24.11.1985. A day prior to the sale, i.e. on 23.12.1985, judgment-debtor filed Objections u/s 47 read with Order 21 Rule 58 of the

Code of Civil Procedure, on the ground that no attachment was effected as per provisions of Order 21 Rule 54 of the Code of Civil Procedure.

He further alleged that, no notice was given as provided under Order 21, Rule 66 of the Code of Civil Procedure, correct particulars in the

application for settling the terms of the sale were also not given land belonging to the petitioner judgment-debtor has shown to be 1/4th share in land

measuring 294 kanals 1 marla whereas actual land as shown in the Jamabandi is 1/4th share in land measuring 321 kanals 2 marlas i.e. share of the

petitioner comes to 80 kanals 5 marlas, and out of this, 44 kanals 13 marlas had already been sold and the remaining land is 35 kanals 12 marlas.

The petitioner in his application further averred that proceedings for attachment were kept secret and no notice, as ordered by the Court, was

affixed either in the court-premises or at the spot, nor any proclamation was made for the sale of the land. The prayer of the petitioner in the

application was that proceedings of auction be stayed till decision of the objections. The Court did not stay the auction. As per report submitted by

the auctioneer, auction took place on 24.12.1985 for a sum of Rs. 32,000/-. The decree-holder filed reply to the objections, in which he denied

the allegations made in the objection petition. According to the decree-holder attachment and sale were effected in accordance with law. Another

application was filed by the auction-purchaser that the sale certificate be issued to him. This application too, was contested by the petitioner. The

executing Court, on the objections, framed the following issues :-

1. "Whether land of judgment-debtor has not been attached according to law ? OPJD.

2. Whether purchase of land by Siri Ram is fictitious ? OPJD.

3. Whether judgment-debtor is an agriculturist; if so, to what effect ? OPJD.

4. Whether sale is without notice under Order 21 Rule 66 CPC to the judgment debtor; if so, to what effect ? OPJD.

5. Whether sale has not been properly conducted; if so, to what effect ? OPJD.

6. Relief.

Issues No. 1, 2, 4 and 5 were clubbed together for decision and the executing Court decided all these issues against the petitioner. According to

the executing Court, the property had already been attached during the pendency of the suit under Order 38 Rule 5 of the Code of Civil

Procedure, and for that matter, no fresh attachment was necessary. As regards the sales made by the petitioner, it was found that these were made

after attachment and were of no consequence. As regards notice under Order 21 Rule 66 of the Code of Civil Procedure, the Court found that

petitioner had declined to accept service, on which account notice was served upon him through Munadi and proclamation of attachment and sale

made by the Chowkidar of the village. On merits, the Court found no irregularity in attachment and sale and, thus, dismissed the objection petition.

Against this order, an appeal was preferred before the District Judge, Narnaul, who dismissed the same on the ground that appeal was not

maintainable. Petitioner has now impugned the orders of the Courts below by way of present revision petition.

3. Learned counsel for the petitioner referred to various zimni orders of the executing Court, warrant of attachment and also referred to

proceedings subsequent to the issuance of notice under Order 21 Rule 66 of the Code of Civil Procedure, and contended that petitioner was kept

totally ignorant and no notice under Order 21 Rule 54 or Order 21 Rule 66 was served upon him. He further contended that no sale took place at

the spot and property worth lacs of rupees was sold only for Rs. 32,000/- for the realisation of amount of Rs. 24,000/-. In reply, learned counsel

for the decree-holder, contended that property was re-attached in execution proceedings and even if there is an irregularity in attachment, it would

not vitiate the sale. For this, he placed reliance on a judgment of this Court in Bhagwan Das Pribhdas and Others Vs. Santokh Singh Saran Singh, .

He further contended that petitioner has failed to establish on record any material irregularity in publishing or conducting the sale and in absence of

any material irregularity, the sale cannot be set aside. His other contention was that the order was not appealable and even if the present revision

petition is treated to be one against the order of the executing Court, the same would be barred by time.

4. Having heard learned counsel for the parties I am of the view that the revision petition deserves to succeed. The executing Court did not

consider the objections of the judgment-debtor with regard to attachment of the property on the ground that the property stood already attached

during pendency of the suit. This finding cannot be accepted, firstly because there is no order on record to show that the property was attached

during the pendency of the suit; and secondly, the decree-holder in his reply dated 12-3-1986 to the objections filed by the judgment-debtor has

specifically stated that judgment-debtor was restrained from selling the property, meaning thereby that there was no attachment, but there was only

a restraint order. The order vide which the judgment-debtor was restrained has also not been placed on record. In absence of the order, it is not

clear as to when the order was passed or whether the sales were made by the judgment-debtor before/after passing of the order. The entry in the

Jamabandi with regard to attachment cannot be accepted in the absence of any material supporting the entry. Otherwise too, the decree-holder has

not explained as to why a fresh prayer for attachment was made if the property already stood attached under Order 38 Rule 5 of the Code of Civil

Procedure. So much so, no reference of attachment was made by the decree-holder in his application for execution of the decree. To the contrary,

in his execution application, he made a specific prayer for attachment of the property. The details of the property which was sought to be attached

were also given. Report of the Patwari on the warrants of attachment further reveals that Patwari in his report dated 22-1-1985, brought to the

notice of the Court that attachment had wrongly been effected because in the Jamabandi for the year 1982-83, total land belonging to the

petitioner is 1/4th share in land measuring 321 kanals 2 marlas, i.e. 80 kanals 5 marlas. Report further mentions that petitioner has already sold 27

kanals 1 marla, and the remaining land is only 53 kanals 4 marlas. Despite this report, no action whatsoever was taken by the executing Court to

correct this error. To my mind, the entire proceeding relating to the attachment are fictitious. As already noticed, in earlier part of the judgment, the

warrants of attachment were ordered to be issued for 19-1-1985. Zimni orders further reveal that on 19.1.1985, the Presiding Officer was on

leave and the case was adjourned to 31-1-1985. On 31-1-1985, the executing Court recorded that case be adjourned to 1-4-1985 and warrants

of attachment be re-issued for that date, meaning thereby that no attachment till that date had been effected. However, the proceedings of

attachment show that attachment was allegedly effected on 12-1-1985. If attachment had already been effected prior to 31-1-1985, there was no

occasion for the executing Court to order for re-issuance of warrants of attachment. This circumstance supports the contention of the petitioner

that no attachment was effected at the spot. Otherwise too, the attachment was to be effected in the manner as provided in Order 21 Rule 54 of

the Code of Civil Procedure, which reads as follows:-

R.54 Attachment of Immovable property-

(1) Where the property is immovable, the attachment shall be made by an order prohibiting the judgment debtor from transferring or charging the

property in any way, and all persons from taking any benefit from such transfer or charge.

(2) The Order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the

order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court-house, and also, where the property is

land paying revenue to the Government in the office of the Collector of the District in which the land is situate (and, where the property is land

situated in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village)

As evident from the above-quoted rule, attachment would be not complete unless order of attachment has been issued and in execution of that

order, the other formalities prescribed by the Code have been complied with. Admittedly, no notice was issued to the petitioner before issuance of

order of attachment. Nothing has been brought on record to show that copy of order was affixed on the conspicuous part of the property and

then, upon the conspicuous part of the Court. In the present case, the land is situated in a village, but there is no evidence that copy of order was

affixed on the conspicuous part of the office of Gram Panchayat having jurisdiction over that village. Thus, there was no attachment in the eyes of

law. As far as notice under Order 21 Rule 66, C.P.C. is concerned, the Court ordered for issuance of notice to the judgment-debtor for 7-5-

1985. Since the judgment-debtor was not served, he was again ordered to be served for 19-7-1985 on filing of process-fee and correct address.

Counsel for the decree-holder has not been able to show from the record as to whether any registered A.D. cover with correct address was filed.

On 19-7-1985, on the basis of report on the summons, the Court recorded that judgment-debtor has refused to accept service. The Court did not

seek any explanation from the decree-holder as to why registered A.D. cover with correct address was not filed. This conduct on the part of the

decree-holder is suspicious and is pointer to the fact that he was interested in not allowing the petitioner to know about the proceedings of

attachment and sale. This suspicion gets strengthened from the fact that auction-purchaser is none-else, but the real brother of the decree-holder.

Before ordering service upon a party through Munadi, the Court was required to record satisfaction that the party cannot be served except by way

of substituted service. There is no such satisfaction recorded by the executing Court, In the absence of satisfaction, there was no justification with

the executing Court to summon the petitioner by way of substituted service. Further, Sub-rule (2) of the Rule 66 of Order 21 of the Code of Civil

Procedure, provides that sale proclamation shall be drawn up after notice to the decree-holder and judgment-debtor, and shall state the time, place

of sale and other requirements mentioned therein. In the present case, no notice for settlement of terms of sale proclamation was served on the

judgment-debtor personally, as contemplated by Sub-rule (2) of Rule 66 of Order 21 of the Code of Civil Procedure. The executing Court totally

ignored all these facts which were required to be determined before the sale was to confirmed.

5. Faced with this situation, counsel for the decree-holder, contended that in view of explanation to Rule 90 of Order 21, defect in attachment or

want of notice under Order 21, Rule 66, is of no consequence if no material irregularity or illegality in conducting the sale has been established on

record. It is true that explanation to Rule 90 of Order 21 of the Code, provides that mere absence of, or defect in, attachment of the property sold

shall not, by itself, be a ground for setting aside a sale under this Rule, but as already observed, right from the stage of attachment till publication of

sale, effort was to keep the petitioner totally ignorant, and this cannot be said to be a mere irregularity and, thus, of no consequence, as contended

by counsel for the decree-holder. Bhagwan Das Pribhdas's case (supra), reliance on which was placed by the counsel for the decree-holder, has

no application to the facts of the present case because it only lays down that no attachment is necessary to be made after passing of the decree and

the attachment before judgment may become an attachment for the purposes of execution of the decree. As already noticed, in the present case, it

is not established on record that the property was attached during the pendency of the suit under the provisions of Order 38 Rule 5 of the Code of

Civil Procedure. As regards the contention that the appeal was not maintainable before the District Judge, and even if the present revision petition

is treated to be one against the order of the executing Court, the same would be barred by time, I find that there is no merit in this contention for

the reason that objections were filed under Order 21 Rule 58 read with Section 17 of the Code of Civil Procedure. The order was a composite

one, i.e. dismissing the objections under Order 21 Rule 58 as well as objections u/s 47 of the Code of Civil Procedure. Against the order

dismissing the objections against attachment, appeal was maintainable and, for that matter, the appeal was filed and on dismissal of the appeal, the

present revision petition was filed, which in my view is competent.

6. For the reasons recorded above, the revision petition is allowed, orders of the Courts below are set aside, and in consequence thereof, sale

shall stand set aside. It shall now be open to the executing Court to proceed in accordance with law.