

Smt. Bhanwari Devi and Others Vs Sohan Lal

Court: Rajasthan High Court

Date of Decision: July 22, 1964

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 21 Rule 22, Order 21 Rule 72, Order 21 Rule 72(1), Order 21 Rule 72(2), Order 21 Rule 84

Citation: AIR 1965 Raj 79

Hon'ble Judges: Jagat Narayan, J

Bench: Single Bench

Advocate: Sumer Chand Bhandari, for the Appellant; Chand Mal Lodha, for the Respondent

Final Decision: Dismissed

Judgement

Jagat Narayan, J.

This an execution second appeal by the legal representatives of Dulichand judgment-debtor against an order of the

executing court dismissing their application for setting aside an execution sale which was confirmed on appeal by the District Judge, Biksner.

2. The facts relevant for the disposal of this appeal are these. On 24-9-56 a decree for Rs. 9,577-8-0 together with costs and future interest was

passed against Duli Chand in favour of the decree-holder-respondent. He put this decree into execution on 21-11-58. On 17-11-58 the total

amount due against the judgment-debtor under the decree came to Rs. 14,6574-0. It was prayed that the decree be executed by the attachment

and sale of a house and! a Nohra belonging to the judgment-debtor situated in village Birasar. These two properties were attached in execution of

this decree and were put to sale on 17-5-61. On 12-5-61 the executing court granted permission to the decree-holder to bid under Order 21 Rule

72, C. P. C. The Sales Amin declared the sale in favour of the decree-holder on 17-5-61 for a sum of Rs. 31,000/-.

The decree-holder did not deposit one-fourth of the purchase money forthwith. Nor did the Sales Amin call upon him to do so. The total amount

payable to him on the decree on the date of the sale came to Rs. 16,066.33. The decree-holder had another decree against the judgment-debtor

the amount of which came to Rs. 11,464.75. on 17-11-58. He applied for the execution of this decree also by the attachment and sale of the same

house and Nohra and also prayed for rateable distribution out of the sale proceeds of the first decree mentioned above. The executing court

passed an order of rateable distribution on 21-5-60 in his favour. The amount of this second decree on the date of the sale came to Rs,

12,534.96.

3. When the papers relating to the sale were put up before the executing court on 18-5-51 a sum of Rs. 461.21 was found to be the balance of the

purchase money which the decree-holder had to deposit as follows :-

Total amount payable Rs. 28,601.29

on the two decrees Poundage fees Rs. 1,937.50

Balance payable Rs. 461.21

Total : Rs. 31,000.00

The decree-holder deposited the sum of Rs. 461-21 on the same day. The sale was confirmed after a month and possession was delivered to the

decree-holder over the property which was sold to him.

4. The judgment-debtor filed objections under Order 21 Rule 90, C. P. C. which were all dismissed by the executing court. He preferred an

appeal which was also dismissed. The present execution second appeal was then filed. Out of the grounds taken in the memorandum of appeal

only one was urged and that too faintly. That was that the service of notice under Order 21 Rule 22 C. P. C. was defective inasmuch as it was

published only two days before the judgment-debtor was called upon to appear in court to prefer his objections. A perusal of the record goes to

to show that the judgment-debtor used to reside both at Ratangarh and at Calcutta. Attempts were made to serve the notices by both his

addresses. It has not been suggested that the addresses given by the decree-holder were not correct. But the judgment-debtor chose to evade

service.

The executing court was accordingly compelled to have the notice served by publication in a local news paper. Dull Chand did not appear in Court

to make a statement that when the publication was made he was not residing at Ratangarh. Under the circumstances it is idle for the learned

counsel for the appellants to contend that the publication of notice under Order 21 Rule 22 C. P. C. was in any way defective.

5. The case was heard in part on 2-9-63 and was then adjourned for a month. It was on the adjourned date of hearing that the learned counsel for

the appellants raised a fresh legal point which was not taken by him in the grounds of appeal. It was contended that the sale was a nullity as the

decree-holder-auction purchaser failed to deposit one-fourth of the purchase price as required by Order 21 Rule 84(1) C. P. C. It was argued

that the provision of that section is mandatory even where the purchaser is the decree-holder who has been permitted to bid at the auction under

Order 21 Rule 72 C. P. C. Reliance was placed on the decision of a Division Bench of this Court in Mst. Magi and Others Vs. Babulal and

Others, and on the decision of a learned Single Judge in Poonamchand v. Sumerchand 1961 Raj LW 184.

6. Both these decisions are distinguishable on facts. They are based solely on the decision of their Lordships of the Supreme Court in Manilal

Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, and do not intend to lay down my (sic) different from that

laid down by their Lordships. In the case before their Lordships immovable property which was subject to a mortgage was sold by the executing

court free of the encumbrance even though the mortgage had neither filed any suit nor obtained any decree to recover the money due on the

mortgage. This was wholly erroneous. Further the executing court treated the mortgagee as if he were a decree-holder within the meaning of Rules

72 and 84 of Order 21. Permission was granted to him to bid for the property when in fact no such permission was needed as he was not a

decree-holder. Further he did not deposit 25 per cent of the purchase money when the sale was declared in his favour. Their Lordships held that

Rule 84 (1) was mandatory unless the purchaser happens to be the decree-holder. It was made quite clear by their Lordships that Rule 84 (1) was

not mandatory where the purchaser was the decree-holder. The following observations occurring in paras (7) and (8) of the AIR report may be

referred to in this connection:

(7) The moment a person is declared to be the purchaser, he is bound to deposit 25 per cent of the purchase money unless he happens to

be the decree-holder, in which case the court may not require him to do so (Rule 84).

8. The provision regarding the deposit of 25 per cent by the purchaser other than the decree-holder is mandatory as the language of the rule

suggests. The full amount of the purchase money must be paid within fifteen days from the date of the sale but the decree-holder is entitled to the

advantage of set off. The provision for payment is, however, mandatory (Rule 85), If the payment is not made within the period of fifteen days, the

court has the discretion to forfeit the deposit and there the discretion ends but the obligation of the court to re-sell the property is imperative.

7. In Mst. Magi and Others Vs. Babulal and Others, the purchaser was not the decree-holder. This decision is therefore no authority for the

proposition canvassed on behalf of the appellants. In 1961 Raj LW 184 however the purchaser was the decree-holder and the purchase price

exceeded the decretal-amount. There were other decree-holders also who were entitled to rateable distribution u/s 73. The decree of one

Hastimal was being executed for Rs. 5,610-10-0. In execution of this decree the house of the judgment-debtor was put to sale and was sold in

favour of Hastimal for Rs. 1,931/-, Hastimal having obtained permission under Order 21 Rule 72. Out of the assets obtained by sale Hastimal was

only entitled to a sum of Rs. 793-13-0 and the balance of Rs. 979-13-0 was payable to the other. decree-holders.

Hastimal did not deposit one-fourth of the purchase price under Rule 84. Nor did he deposit the balance of the purchase price by the 15th day as

required by R. 85. The learned Single Judge set aside the sale following the decision of their Lordships in Manilal Mohanlal Shah and Others Vs.

Sardar Sayed Ahmed Sayed Mahamad and Another, He quoted the observations of their Lordships to the effect that the provision regarding the

deposit of 25 per cent. by the purchaser other than the decree-holder is mandatory. But in the later part of his judgment he appears, to have

overlooked the fact that their Lordships held that the deposit of 25 per cent. was only mandatory in the case of a purchaser other than the decree-

holder. He observed--

On a careful consideration, I think that this argument is not correct, because Rule 84(2) lays down that even though the decree-holder may be

entitled to set-off the purchase money under Rule 72, it is for the court to dispense with requirements of Sub-rule (1). In other words, the decree-

holder purchaser cannot claim as of right that since he is entitled to set off certain amount, he is not bound by the rule of depositing 25 per cent. of

the purchase money. The Rule, as framed, clearly indicates that the power is given to the court to exempt the decree-holder from making the

deposit of 25 per cent in a suitable case and if for any reason the court requires the decree-holder to deposit the amount of 25 per cent of the

purchase money, he is bound to obey its order. The dispensation with the requirements of Sub-rule (1) by the court may be express or implied, but

the power is given only to the court and not to the decree-holder purchaser. If he fails to abide by the order of the court, the mandatory provision

of, Sub-rule (1) would apply to him as much as to any other purchaser and there would be no valid sale in his favour.

8. The provision of Rule 85 is however mandatory both in the case of a stranger purchaser and in the case of a decree-holder purchaser and as

this rule had not been complied with the sale was rightly held to be a nullity by the learned Single Judge. Rule 84 runs as follows :-

Rule 84 (1). On every sale of Immovable property the person declared to be the purchaser shall pay immediately after such declaration a deposit

of twenty-five per cent. on the amount of his purchase-money to the officer or other person conducting the sale, and in default of such deposit, the

property shall forthwith be re-sold.

2. Where the decree-holder is the purchaser and is entitled to set off the purchase-money under Rule 72, the Court may dispense with the

requirements of this rule.

9. The requirement of Sub-rule (1) can be dispensed with by the court under Sub-rule (2). That itself shows that the provision contained in Sub-

rule (1) is not mandatory.

10. It will thus be seen that the provision of Rule 84(1) is not mandatory where the purchaser is the decree-holder who has been permitted to bid

under Rule 72. Failure to deposit one-fourth of the purchase money by the decree-holder on the declaration of the sale by the Sales Amin could

therefore at the worst only amount to an irregularity which did not prejudice the judgment-debtor in any way as the decretal amount which he was

entitled to set off under Rule 72 (2) was more than one-fourth the purchase money. Further the balance which the decree-holder could have

deposited by the fifteenth day was deposited on the very next day.

11. Next I come to the question as to whether in the circumstances of the present case the executing court should be deemed to have dispensed

with the requirement of Rule 84(2) on the facts of the present case. That the dispensation may be implied cannot admit of any doubt. Sub-rule (2)

of Rule 84 does not require an express order for dispensation like Sub-rule (1) of Rule 72 which requires express permission to bid. It was

observed by the learned Single Judge in Poonam Chand's case, 1961 Raj LW 184 that the dispensation may be implied. It was so held by a

Division Bench of this Court in Kanhaiyalal Vs. Sansmal and Another, where the point specifically arose for decision. In the case before their

Lordships the purchase price was less than the decretal amount. They observed at p. 41 (of ILR Raj) : (at p. 19 of AIR):

Reading these two rules (72 and 84) together, it seems to us plain common sense that where a decree-holder is permitted to bid at an auction,

there is an implied dispensation also that he need not deposit 25% of the purchase money unless the sale price is more than the decretal amount

Where the sale price is more than the decretal amount, the decree-holder must deposit the excess up to 25 per cent of the purchase money,

depending upon the excess of the sale price over the decretal amount. There is, in our opinion, no sense in insisting upon the decree-holder

depositing 25% of the purchase money, when the purchase-money is less than or only equal to the decretal amount.

12. The observations with regard to a case in which the sale price is more, than the decretal amount are obiter. Rule 72 runs as follows :

Rule 72. (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase

the property.

2. Where a decree-holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions

of Section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part

accordingly.

3. Where a decree-holder purchases, by himself or through another person, without such permission, the Court may, if it thinks fit, on the

application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such

application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall be paid by the decree-

holder.

13. Sub-rule (2) of the above rule gives the decree-holder a right to set off the decretal amount against the purchase price in a case in which he has

been permitted to bid at the auction under Sub-rule (1). In my opinion therefore no express order allowing set-off is required. But the decree-

holder is entitled to set off the amount of decree against the purchase price as of right only at the stage of Rule 85 and not at the stage of Rule 84.

At the stage of Rule 84 he should deposit one-fourth the purchase price unless the court expressly or impliedly dispenses with the requirement. The

court has power to dispense with the requirement of Rule 84 (1) even in a case where the sale price is more than the decretal amount. No hard

and fast rule can be laid down limiting the discretion conferred on the executing court under Rule 84(2). Nor does it appear to me that in making

the above observation their Lordships intended to lay down any such rule. It seems to me that the observations made by them are only applicable

in a case where the court does not choose to dispense with the requirement of Rule 84 (1).

14. The next question to be considered is the stage at which the court is to apply its mind as to whether or not to dispense with the requirement of

Rule 84(1). The court can only exercise its discretion under Rule 84 (2) properly when it comes to know the amount for which the sale is declared

by the Amm. This it only comes to know when the papers are put before it after the declaration of the sale for its acceptance by the court. As was

held in *Gorusingh v. Deokishan*, ILR (1962) Raj 788 the sale under Rule 84 (1) binds the purchaser if the Sales Amin declares it in his favour, but

the court is not bound by it till it has exercised its discretion, expressly or impliedly, under condition No. 3 contained in the sale proclamation

(Form No. 29) App. E., C. P. Code. The court can decline to accept the highest bid, however, only on the ground that the price offered is clearly

inadequate.

At the time of accepting the sale declared by the Sales Amin the executing Court should consider if having regard, to the purchase price and the

decretal amount it should dispense with the requirement of Rule 84(1) wholly or in part. If the court does not dispense with the requirement then

the decree-holder purchaser should forthwith deposit one-fourth the price to comply with the requirement of Rule 84. As has already been

mentioned above the requirement of Rule 84(1) is not mandatory where the purchaser is the decree-holder and a little delay in the deposit of 25

per cent. of the purchase price occasioned by the time taken by the court to make up its mind as to whether or not the requirement of Rule 84 (1)

should be dispensed with cannot prejudice the judgment-debtor in any way and will consequently not affect the sale.

15. In the present case the sale was declared by the Sales Amin on 17-5-61. Papers relating to the sale were put up before the executing court for

its orders on 18-5-61. On the same day the entire balance required to be deposited under Rule 85 was deposited. The court court only decide on

18-5-61 whether or not it could dispense with the requirement of Rule 84(1). In the peculiar circumstances of this case the question as to whether

or not the requirement of Rule 84 (1) was dispensed with under Rule 84(2) becomes immaterial. But should it be necessary to record a finding on

the point I would hold that the executing court impliedly dispensed with the requirement of Rule 84 (1) since it accepted the sale in favour of the

decree-holder and did not require him to make a deposit under Rule 84 (1). But as I have said above this question is purely of a theoretical

importance as the requirement of Rule 84 (1) is not mandatory in the case of a decree-holder-purchaser.

16. In the result the appeal is dismissed with costs.