

## Dharti Narayan Vs Parsidh Narayan and Another

**Court:** Allahabad High Court

**Date of Decision:** Jan. 10, 1966

**Acts Referred:** Civil Procedure Code, 1908 (CPC) â€” Order 21 Rule 89, Order 21 Rule 92

**Citation:** AIR 1967 All 152

**Hon'ble Judges:** S.S. Dhavan, J

**Bench:** Single Bench

**Advocate:** Batuk Lal and S.P. Srivastava, for the Appellant; K.P. Singh, for the Respondent

**Final Decision:** Allowed

### Judgement

@JUDGMENTTAG-ORDER

S.S. Dhavan, J.

This is a judgment-debtor's application u/s 115 of the CPC against an order of the Civil and Sessions Judge, Gyanpur

(functioning as Civil Judge) confirming an order of the Munsif Gyanpur rejecting his application under Order XXI Rule 89 C. P. C. for setting aside

an auction sale in execution of a decree. The applicant's property was sold in execution. The sale took place on 18th September, 1963. On 26th

September he applied, under Order 21, Rule 89, for setting it aside, and on 12th October deposited the decretal amount plus 5 per cent of the

purchase money. An objection was filed by the decree holder that the application was defective because the auction purchaser had not been made

a party nor any notice issued to him. The execution court directed the applicant to take steps for the issue of notice to the auction purchaser by

14th November, 1963. The applicant took no steps, and on 29th November 1963, the court rejected his application. This decision was confirmed

by the learned Civil Judge in appeal, and the judgment debtor has come to this Court in revision.

2. Mr. Batuk Lal who appears for the applicant contended that the decision of the courts below is vitiated by a material irregularity. Learned

counsel argued that the applicant's application under Order XXI, Rule 89 for the setting aside of the sale could not have been rejected by the

court on the ground that he had not taken any steps in getting notice issued to the auction purchaser. Learned counsel argued that there is no

provision in the Code requiring a judgment-debtor making an application under Rule 89 to implead the auction purchaser as a party or serve notice

on him, and all he is required to do is to make the necessary deposits under Rule 89 within 30 days of the date of sale. Learned counsel conceded

that the court cannot set aside the sale without giving notice under Rule 89 to all persons affected thereby, but he argued that the duty to issue this

notice is on the court and not on the judgment-debtor. Learned counsel cited a series of decisions of this Court and of other High Courts in

support of this argument viz. Dip Chand Vs. Sheo Prasad and Others ; AIR 1948 303 (Nagpur) and Alladin v. Karimbux AIR 1955 Raj 51.

3. On the other hand it was contended by Mr. K. P. Singh that the language of Rule 92 clearly implies that notice has to be served by the

judgment-debtor and not by the court. He pointed out that the court is not provided with any special fund for defraying the expenses of serving

notice of an application, and it is for the litigant in every case where notice is required by statute to serve it on persons whose interests are affected

to take the necessary steps.

4. The weight of authority is over-whelmingly in favour of the applicant. In Dip Chand Vs. Sheo Prasad and Others the Court held that the duty of

giving notice rests on the court or its officials. In (1922) 67 Ind Cas 286 (Cal.) the Calcutta High Court was of the view that it is not incumbent on

the judgment-debtor making the application under Rule 89 even to pay any process fee for service of notice of his application on the auction

purchaser. The view of the other High Courts is similar.

5. I think there is good reason for not requiring a judgment-debtor to serve notice on the auction purchaser when he makes an application under

Rule 89 for the setting aside of the sale. He is only concerned with the court which has the power under the Code to sell his property. He is not

concerned with the transfers of the Court. But the very statute which invests the court with the power to sell the property belonging to the

judgment-debtor imposes limitations on this power. One of them is under Rule 92 which provides in effect that the court must set aside its own sale

if the judgment-debtor makes an application under Rule 89 and deposits the requisite amount of money within 30 days from the date of sale. Thus

the Code entitles the judgment-debtor to ask the court to set aside the sale by making the necessary deposit within 30 days of the sale. Once he

has made this deposit he has done all that he is required of him and he is not concerned with what the court must do before setting aside the sale. It

is for the court to give notice to its own transferee before setting aside the sale.

6. In the present case the courts below required the applicant to follow a procedure which was not sanctioned by law. Moreover, in refusing to set

aside the sale after the applicant had made the necessary deposit, the court refused to exercise a jurisdiction which was enjoined by law. On both

these grounds the decision of the courts below is vitiated.

7. The next question is whether I should this case for a re-hearing of the application under Rule 89 after notice to the auction purchaser. I do not

think any remand is necessary. Mr. K. P. Singh stated that he was appearing for both the decree-holder and the auction purchaser. Therefore, the

auction purchaser has received notice of the applicant under Rule 89 in this proceedings, at any rate.

8. Mr. K. P. Singh was unable to state any reason why an order under Sub-rule (2) of Rule 89 should not be passed.

9. I allow this application, set aside the order of the courts below and grant the applicant's application under Rule 89. The sale of the applicants

property is set aside. The decretal amount shall be paid to the decree-holder and 5 per cent of the purchase money to the auction purchaser. The

balance, if any, shall be refunded to the applicant. In the circumstances the applicant shall pay the costs of this revision application to the decree-

holder. The auction purchaser shall bear his own costs.