

(1976) 03 BOM CK 0053

Bombay High Court

Case No: Special Civil Application No. 1193 of 1971

Shankar Laxman Katkar

APPELLANT

Vs

Sharad Mahadeo Vable and
Another

RESPONDENT

Date of Decision: March 5, 1976

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 89, Order 21 Rule 89(2), Order 21 Rule 90

Citation: AIR 1976 Bom 386 : (1976) 78 BOMLR 593 : (1976) MhLJ 911

Hon'ble Judges: Lentin, J; Hajarnavis, J

Bench: Division Bench

Advocate: M.L. Pendse, for the Appellant; V.N. Ganpule and K.J. Abhyankar, for the Respondent

Judgement

Lentin, J.

This Special Civil Application has been filed by the original judgment-debtor against the original decree-holder (viz. respondent No. 1) and the auction-purchaser (viz. respondent No. 2) for setting aside the judgment and order dated 3rd March 1971 passed by the learned District Judge, Ahmednagar, in Civil Miscellaneous Appeals Nos. 6 and 8 of 1970.

2. On 7th November 1968, in Regular Civil Suit No. 29 of 1966, a decree was passed by the learned Civil Judge, Junior Division, Ahmednagar, against the petitioner and in favour of the 1st respondent for possession of a certain strip of land with a structure thereon and for costs in the sum of Rs. 256.15. We are not concerned with the strip of land or structure thereon. On 6th December 1968, the 1st respondent filed a darkhast for possession and recovery of the costs by the sale of certain other lands belonging to the petitioner. On 12th August 1969, during the pendency of the darkhast, the petitioner deposited Rs. 100/- in Court towards the payment of costs. On 13th August 1969, the auction sale was held. The 2nd respondent was declared

to be the highest bidder for Rs. 1,201/- and the petitioner's ;and was sold to him. On 3rd September 1969, the petitioner filed one application in the Court of the Joint Civil Judge, Junior Division, Ahmednagar, being Miscellaneous Application No. 142 of 1969, for setting aside this sale under the provisions of Order 21, Rules 90 and 89 of the Code of Civil Procedure. In this application, the petitioner stated that he had deposited Rs. 100/- on 12th August 1969 and offered to deposit the balance amount of Rs. 230/-. This the petitioner did the next day, namely on 4th September 1969, in the executing Court. On 18th December 1969, the petitioner filed a purshis giving up the relief sought for by him under Order 21, Rule 90 and restricted his relief to Order 21, Rule 89. By his judgment dated 19th December 1969 in Miscellaneous Application No. 142 of 1969, the learned trial Judge set aside the auction sale. Against that judgment, the 2nd respondent, namely the auction purchaser, preferred Miscellaneous Civil Appeal No. 6 of 1970 and the 1st respondent, namely the original decree-holder, preferred Miscellaneous Civil Appeal No. 8 of 1970 before the learned District Judge, Ahmednagar, who, by a common judgment and order dated 3rd March 1971, allowed the appeals, set aside the order of the trial Court and confirmed the auction sale. The learned District Judge held that though the amount was deposited by the petitioner within 30 days from the date of the auction sale, it was not so done at the time of the filling of the application, and hence the provisions of Order 21, Rule 89, were not complied with. He also held that the petitioner's application was barred by the law of limitation. Hence the present Special Civil Application.

3. Mr. Pendse, the learned counsel appearing on behalf of the petitioner, attempted to assail the judgment and order of the learned District Judge on the sole ground that the petitioner's application under Order 21, Rule 89 could not be said to be barred by the law of limitation.

4. In order to appreciate this contention, reference may be made to the provisions of Order 21, Rules 90 and 89, Rule 90 provides for an application for setting aside a sale on the ground of material irregularity or fraud in publishing or conducting it. Rule 89 (1) provides for an application to set aside a sale on the applicant making a deposit in Court. For the purpose of this judgment, nothing turns on sub-rule (1), as it was on sub-rule (2) that Mr. Pendse confined his arguments before us. Sub-rule (2) of Rule 89 is as under:-

"Where a person applies under R. 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule."

5. The phraseology in sub-rule (2) of Rule 89, viz. that the applicant shall not be entitled "to make or prosecute" an application under Rule 89 unless he withdraws his application under Rule 90, is not without significance. Effect must be given to these words. If a person had filed an application under Rule 89 first and thereafter an application under R. 90, he would not be allowed to prosecute the former unless

he withdraw the latter. It is only on the withdrawal of the application under Rule 90 that the petitioner could in law have made an application under Rule 89. The petitioners application insofar as it pertained to Order 21, Rule 90 was given up, which the petitioner did on 18th December 1969. While the petitioner's claim for relief under Rule 90 was pending, the petitioner was debarred not only from prosecuting his application under Rule 89, but he was debarred even from making an application under that rule. This intention of the legislature is brought to the forefront by the words "shall not be entitled to make or prosecute," in Rule 89. Thus even though the petitioner filed his application for setting aside the auction sale under Rules 90 and 89 within 30 days of the auction sale, that portion of the application which pertained to Rule 89, was in law no application at all on the date when it was filed. It was a dead letter. Thus on the withdrawal of the application under Rule 90, the application under Rule 89 could not be said to have revived, and taken effect, from the date it was filed, but must be deemed to have been filed when the petitioner applied for withdrawal of this application under Rule 90. Hence the effective date of the application under Rule 89 was not 3rd September 1969 when it was actually filed, but was in law 18th December 1969 when the petitioner applied for withdrawal of his application under Rule 90. This would be more than 30 days from the date of the auction sale and would attract the provisions of Article 127 of the Limitation Act.

6. In Shiv Prasad Vs. Durga Prasad and Another, it was held that if a person first applied under Rule to set aside the sale, then, unless he withdraw his application, he was not entitled to make and prosecute an application under Rule 89 and that such application, even if made, would be deemed to have been made only on withdrawal of the previous application under Rule 90. In paragraph 9 at page 408 (of SCC) = (at p. 959 of AIR) of the Report, the following observations are pertinent:-

"If a person has first applied under Rule 90 to set aside the sale, then, unless he withdraws his application, he is not entitled to make and prosecute an application under Rule 89. The application even if made will be deemed to have been made only on withdrawal of the previous application"

This ratio and the observations of the Supreme Court, by which we are bound are sufficient to repel Mr. Pendse's contention.

7. However, Mr. Pendse attempted to distinguish the decision in *Shiv Prasad*'s case from the facts of the matter before us on the ground that in the former case, there were two applications - one under Rule 89 and the other under Rule 90 - whereas in the matter before us, the petitioner had filed one "consolidated" application under Rules 90 and 89. In our opinion, this would not make the slightest difference. These are separate and distinct rules without the one having any nexus with the other. They should independently of each other, without the one taking recourse to the other. It is therefore difficult to appreciate how, in the first instance, such a "consolidated" application could be filed merely by putting, in one application what

are, under Rules 90 and 89, separate and distinct grounds for setting aside a sale. A party cannot by nicety of argument or ingenuity of Counsel - though both permissible - circumvent the provisions of the law and the clear and unambiguous intention of the legislature appearing in sub-rule (2) of Rule 89, by the advised use of the words "make or prosecute". Even though the petitioner filed one application, what cannot be ignored is that he had as he must, based his relief for setting aside the sale under the separate and distinct grounds set out in Rr. 90 and 89 respectively. Thus though in fact the petitioner made one application, in law he is deemed to have made two separate applications under R. 90 and R. 89 respectively. clubbing two applications under Rules 90 and 89 in one application would therefore make no difference and can be of no assistance to the petitioner. The very fact that these were distinct applications; though in mere form set out in one application, is also borne out by the fact that on 18th December 1969, the petitioner withdrew that part of his application which pertained to the relief under R. 90, leaving his second prayer for the relief under Rule 89 subsisting.

8. Mr. Pendse next urged that the bar of limitation was saved, inasmuch as having deposited the balance amount of Rs. 230/- on 4th September 1969, namely one day after the filing of the application, the petitioner had on that day, abandoned or must be deemed to have abandoned the relief sought by him under Rule 90. Mr. Pendse elaborated that it was open to the petitioner to unconditionally withdraw his application under Rule 90 by the unilateral act of making the deposit of the balance amount of Rs. 230/- on 4th September 1969.

9. It is not difficult to repel this contention. While there can be no quarrel with the proposition that an applicant can at any time unilaterally withdraw his application under Rule 90, it cannot be said that in this case the petitioner did so merely by depositing in Court the balance amount of Rs. 230/- on 4th Sept. 1969. As observed by the Supreme Court in Shiv Prasad Vs. Durga Prasad and Another, no order of the Court is necessary permitting the applicant to withdraw the application, and the withdrawal is not dependent on the order of the Court. What, however, cannot be lost sight of is that the withdrawal is complete when the applicant intimates to the Court that he withdraws his application. This is brought to the forefront by the observation of the Supreme Court that-

"The act of withdrawal is complete as soon as the applicant intimates the Court that he withdraws the application."

Thus the intimation to the Court must be clear and explicit and without leaving room for doubt, conjecture or speculation. There is no such thing as an implied withdrawal or doing an act which amounts to or is deemed to be a withdrawal. It is incumbent upon the applicant to convey to the Court in unequivocal terms that he no longer desires to press his application and that he applies for dismissal or withdrawal of the same. No such thing was done in this case by the petitioner till 18th December 1969 when he filed his purshis. If the petitioner withdrew his

application on 4th September 1969 as now contended by Mr. Pendse, the purshis filed by him on 18th December 1969, couched in the language it was, was unnecessary, apart from the fact that in this purshis there is no mention that the petitioner had withdrawn his application under Rule 90 on 4th September 1969 as now contended before us. Mr. Pendse's contention must further stand repelled by the conduct of the petitioner after he made the deposit, which leaves no room for doubt that not only did he not withdraw his application on 4th September 1969 but that he had even no intention then of doing so. Even after making the deposit on 4th September 1969, the petitioner persisted in his application under Rule 90 to the extent that even evidence was led by the parties for the Court's decision whether the sale was liable to be set aside on the ground of fraud or material irregularity as contemplated by Rule 90. It was only thereafter and before the Court gave its decision on this aspect that, no doubt advisedly, the petitioner filed his purshis on 18th December 1969 giving up the relief sought by him under Rule 90. It was then and then only that the petitioner intimated to the Court for the first time desire not to press his application under Rule 90 any further.

10. In the result, the Special Civil Application fails and is dismissed. Rule is discharged. There will be no order as to costs.

11. Application dismissed.