(1974) 03 BOM CK 0032

Bombay High Court (Nagpur Bench)

Case No: C.R.A. No. 159 of 1969

Rajaram and another		APPELLANT
	Vs	
Maniram and others		RESPONDENT

Date of Decision: March 13, 1974

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 115

Citation: (1974) MhLj 730

Hon'ble Judges: B.A. Masodkar, J

Bench: Single Bench

Advocate: V.R. Manohar, for the Appellant; S.A. Singh (Mukhtyar), for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

B.A. Masodkar, J.
The present revision has been filed by the original plaintiff-decree-holder Rajaram and the auction Purchaser Bisan against an order made by the District Judge, Chandrapur, in Miscellaneous Appeal No. 2 of 1968, by which that Court allowed the application under Order 21, rule 90 of the CPC originally filed by the judgment-debtor one Sambha Laxman Kose.

2. The material facts appear to be that in Civil Suit No. 56 of 1963 in execution of a decree in the sum of Rs. 1,561.60 which was passed against the said Sambha, in execution thereof the decree-holder, present applicant No. 1, purported to attach Immovable property being the agricultural lands bearing Khasra Nos. 261/1 and 262/1, total area 4.93 acres, which was eventually purchased in a Court auction by the applicant No. 2 Bisan, in the sum of Rs. 8,600. It appears said Sambha, the judgment-debtor, purported to file the present application on January 13, 1967 under Order 21, rule 90, Code of Civil Procedure, for setting aside the sale. Sambha died after about four months after the institution of the said application and his

legal representatives were brought on record. By that application Sambha had stated that the lands in question has fetched inadequate price, in that there was a pucca well for the purpose of irrigation available in the field and the said land would have fetched in due course at least Rs. 3,000 per acre. It was alleged in the application that the decree-holder was actuated with the sole intention to cause irreparable loss to the judgment-debtor and with that objective had committed several acts of mischief. While narrating the items of such mischief''s or irregularities, Sambha pleaded that although the judgment-debtor, in the year 1965, i.e., prior to the attachment, had constructed a pucca well in the field attached for the purpose of irrigation, the decree-holder had omitted to mention its description in the sale statement with the sole intention that the property when sold should fetch less price. Further allegations are there made that in effect the property had fetched low price. There was omission of the correct market price mentioned in the sale proclamation and the bidders were misled. It was further alleged that the dercee-holder at the time of the sale declared that the property had heavy encumbrances which he had never sought to be stated in the sale statement and so that the bidders were refrained from offering fair price. After narrating all these material irregularities in the application, Sambha proceeded to state that the above irregularities caused substantial injury to the judgment-debtor and the question of right of well will arise in case the sale is confirmed and prolong the litigation for the malicious intention of the decree-holder to cause wrongful loss to the judgment-debtor. The application is not drafted by any advocate, as it appears, but contains the basic allegations which are referable to a complaint which can legitimately be made under rule 90 of Order 21 of the Code. To this both the Decree-Holder and the Auction purchaser filed their say by filing written statements at Exh. 26 and 27. The Decree-holder in terms admitted that there is a well in those fields. However, he denied the price would have been Rs. 12,000/- as alleged. General allegations are to be found in the written statement to the effect that there was no material irregularity in publishing or conducting the sale and there was no substantial injury by the sale of this property. It was further stated that mere omission to mention the well does not amount to material irregularity. The statement adds that when the Immovable property is sold, it is sold subject to all the fixtures attached to it. The other allegations regarding the Decree-holder''s attempt to persuade the bidders were denied. The auction-purchaser, by his written statement, similarly made general denials on the same line, but in no uncertain terms admitted that there was a well in those fields. He purported to further Say that there was no material irregularity or fraud nor there was any substantial injury caused to the Judgment-debtor.

3. Therefore, the existence of well in the fields for the purpose of irrigation was a fact not in dispute. It appears even from the evidence of the auction-purchaser Bisan that he had in fact gone to the field prior to the bidding. He had stated that before bidding at the auction, he had personally seen the condition of the land and,

according to him, 3 acres of land was under cultivation and about 2 acres of land was follow.

4. Now, when this matter came to be tried by the first Court, i.e., the Civil Judge (Junior Division), Brahmapuri, though the evidence was recorded of both the sides, the learned Judge made cryptic order by observing that the Applicants evidence of four witnesses did not disclose that the price of the auction was much less than the market price and further that the judgment-debtor had failed to put forward any ground before the commencement of the said sale. In this view, he rejected the application. When the matter went up in appeal, the appellate Judge found that from the record, which was not in dispute between the parties, it was clear that the said Sambha had constructed a well in these fields and this fact was within the knowledge of the decree-holder and its non-mention in the proclamation was a material irregularity which in the view of the learned Judge, had substantially affected the sale itself. After considering the admitted position that there is a well and its mention is not to be found in any document referable to the conduct and publication of the sale, the learned appellate-Judge found that from this fact it is reasonable to conclude that the bid of Rs. 8,600/- cannot be treated to be a fair one and had the mention of the well, which was a source for the purpose of irrigation, been there, it would have attracted many bidders and the sale would have been substantially affected. Before the learned Judge, it appears at the stage of appeal for the first time on behalf of the respondent a plea was raised that the application of Sambha should be defeated because of the bar of second proviso to be found to rule 90 of Order 21 of the Code. The learned Judge observed that the said rule was a rule of estoppel and considering the fact that decree-holder was well aware of the existence of the well and omitted to mention the same and further considering the fact that the auction-purchaser was also aware of the same, it cannot be said that the judgment-debtor was estopped from raising the same or in other words, because of the second proviso, the application was liable to be rejected.

5. Now both these findings are assailed by the learned counsel appearing for the present applicants, i.e., the decree-holder and the auction-purchaser. It has to be remembered that as far as this Court is concerned, the power to interfere u/s 115 of the CPC is very much circumscribed. It cannot be doubted nor disputed that the appellate authority was the Court of full jurisdiction to deal with the matter which has been dealt with and the questions as to the material irregularity and the inference to be drawn from the particular facts and circumstances were all the questions of fact which the appellate-authority was competent to reach upon the record of the case. As to the power of this Court, while exercising the supervisory jurisdiction u/s 115 of the Code, it will be enough to refer to the high authority of the Supreme Court in The Managing Director (MIG) Hindustan Aeronautics Ltd. and Another, Balanagar Vs. Ajit Prasad Tarway, , where their Lordships have observed:

In our opinion that High Court had no jurisdiction to interfere with the order of the first appellate Court. It is not the conclusion of the High Court that the first appellate Court had no jurisdiction to make the order that it made. The order of the first appellate Court may be right or wrong; may be in accordance with law or may not be in accordance with law; but one thing is clear that it had jurisdiction to make that order. It is not the case that the first appellate Court exercised its jurisdiction either illegally or with material irregularity. That being so, the High Court could not have invoked its jurisdiction u/s 115 of the Civil Procedure Code: See the decisions of this Court in Pandurang Dhoni Chougule Vs. Maruti Hari Jadhav, and D.L.F., Housing and Construction Company (P.) Ltd., New Delhi Vs. Sarup Singh and Others, .

This exposition of law is indicative that unless this Court can come to the conclusion that the appellate-authority had no jurisdiction to make the order or it had exercised its jurisdiction illegally or with material irregularity, it is impermissible to interfere with the present order even though the order may be erroneous or may not be in accord with law. I have purposefully referred to the pleadings of the parties to point out that the present applicants had never raised demur by pleading that Sambha, the original judgment-debtor was the person who could have raised all these grounds but had not done so before the commencement of the sale. That ground could have been legitimately raised by way of defence. None of the written statements of the present applicants indicate any such attempt to raise that plea in the said proceedings. After filing the application Sambha died after almost four months, and the litigation was carried on by his legal representatives. It appears from the ordersheets of this execution proceedings that the decree-holder filed the sale application when Sambha was not present and the order-sheet dated October 10, 1966 directed that the sale notice and sale statement was served on the judgment-debtor but he was not present. Thereafter the sale of the attached property was directed to be held on December 14, 1966. Prior to that order-sheet dated June 13, 1966 shows that the judgment-debtor was absent. These order-sheets indicate that Sambha was not present in the Court when the property was being proceeded against. Decree-holder however, appears to be present. There is further admission which is recorded by the appellate Judge that this decree-holder before that Court did not dispute the fact to the extent of the well in these fields. There is further admission that is referred by the written statements filed by both the applicants that there in fact situate a well in the two fields which, were described in the application by Sambha as pucca well for the purpose of irrigation. Not only that there was no plea raised on the basis of the second proviso to rule 90 of Order 21, CPC in the written statements filed by these two applicants, but no issue was also sought in the trial Court. It appears it is only at the stage of appeal before the learned District Judge for the first time that proviso was pressed in aid. While adverting to that submission the learned Judge has applied the rule of estoppel and on the authority of this Court''s decision in Budhamal Hajarimal Vs. Laxmibai Bhr. Baburao, found that this was a case of somewhat similar type. In that case this.

Court refused to apply estoppel by inferring waiver against the judgment-debtor because the mortgagee who was himself auction-purchaser knew of the improvements in the property and for the purposes of sale no statement as to those improvements and its valuation was made. The misdescription thus was referable to the full knowledge of the decree-holder and his purposeful omission from disclosing the same to the Court. Under such circumstances this Court held that there cannot be any estoppel against the judgment-debtor, for, obviously the decree-holder had induced the Court to make a statement as to the valuation of the property which was a misleading statement. Incidentally it may be mentioned that reference was also made to all the cited authorities coming from the Privy Council reported in T. R. Arunachallam v. V. R. R. M. A. R. Arunachallam (15) I A 171 and the ratio of that judgment was also taken into account. After applying the said decisions, the learned Judge has observed that there was no estoppel that can operate against the judgment-debtor on the second proviso of rule 90 of Order 21 of the Code.

6. Faced with this situation, the learned counsel argues that the second proviso is a bar to the jurisdiction of the executing Court and is not a mere rule of estoppel and waiver. The said proviso and the provisions of rule 90 of Order 21, CPC may now be extracted:

90. (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it : provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

Provided also that no such application for setting aside the sale shall be entertained upon any ground which could have been, but was not, put forward by the applicant before the commencement of sale.

The first proviso and the second proviso clearly show in what circumstances the Court may refuse the relief though there may be a ground to set aside the sale because of material irregularity or fraud in publishing or conducting the Court''s sale. The first proviso requires the satisfaction of the Court from the facts proved that the applicant has sustained substantial injury because of such irregularity or fraud. No doubt if there is no evidence to satisfy the requirements of the first proviso, the application cannot be granted. (See B. Olpherts v. Mahabir 10 Indian Appeals 25, T. R. Arunachallam v. V. R R. M. A. R. Arunachallam, Tassaduk Rashu Khan v. Ahmad Hussain 20 Indian Appeals 176 and Shri Radhey Shyam Vs. Shyam Behari Singh,). The ambit and scope of the first proviso takes in thus the satisfaction of the Court upon the proof of irregularity or fraud complained of having bearing on the substantial injury sustained as a result thereof. Mere proof of irregularity or fraud in the publication or conduct of the sale, which may be evidenced by

inadequacy of the price realised in Court''s sale would not, therefore, be sufficient. It would follow that the applicant will have to bear the burden to prove the connection between the two as was the matter in Budhamal''s case, cited supra. At any rate the matter must rest upon the evidence and its appreciation.

7. Here I have referred to some of the circumstances which were very much available on record, in that both the decree-holder and the auction-purchaser were well knowing the existence of a pucca well and that fact was not even disputed at the stage of the trial. The allegation was that this was a well for the purpose of irrigation of the land. The suppression of such a material particular which affects the very value of the land is a material irregularity. That the auction purchaser, who had visited the land and then after full knowledge of the mis-description had participated in the process of auction itself, is also indicative of the result that has followed in the present case. It was, therefore, a possible conclusion of fact that as a result of mis-description there had been the substantial injury sustained by the applicant. Thus the requirement of the first proviso had been properly satisfied in the present case.

8. Coming to the second proviso on which reliance has been placed by the learned counsel, it has to be noticed that even before this particular proviso was a deed, i.e. prior to November 1, 1966, as far as this Court is concerned, there was constant view against entertaining the applications coming from the judgment-debtors who had not raised objection before the sale itself took place and that was based on the doctrine of estoppel and waiver. (See: Paikuji v. Prabhakar 1958 N L J Note No. 55, Govind v. Ramchandra 1958 NLJ Note No. 24, Mahomed Abdulla Vs. Sakharam Habaji Mistry, and Sakharlal Jamnadas Vs. Pirojsha Sorabji Patel,). Thus, when this rule was amended and the second proviso was added, the principle of estoppel was statutorily incorporated in the body of rule 90, itself. The above catena of decisions of this Court and the addition of the second proviso is indicative that by that proviso an inquiry was contemplated upon proper pleadings as to whether the application filed by the applicant should be thrown out if he was aware of the defect in the conduct of sale proceedings and by his conduct had waived the objections which he could have taken because he did not raise the same at the proper time. It cannot be said that this is matter which could be considered without material pleadings and the evidence coming forth from the parties. In other words, like any other plea, the plea of estoppel and waiver has to be made and the party against whom such a plea is made should be given an opportunity to meet the same. It is not as if that the proviso takes away the jurisdiction of the Court inquiring into the application made under Order 21, rule 90 of the Code. It is a bar to give relief though there may be a material irregularity or fraud in publishing or conducting the Court''s sale. No doubt the words of the second proviso are dissimilar to the first proviso but that is because of the concept of estoppel itself. The first proviso deals with further facts to be established by such an applicant while the second proviso deals with the well recognised rule of estoppel and waiver that can operate against an applicant upon

proof thereof. The party trying to take aid of the second proviso must, therefore, raise it by way of defence. If no such defence is raised, as in the present case, it is not conceivable that the plea based on the second proviso can be treated as a plea of law reaching to, or affecting the very jurisdiction to give relief.

9. The plea, therefore, that this was an application which should not have been entertained and, therefore, the order made in appeal must be treated as without jurisdiction is not available to the present applicants, for, the same said plea was not made by these applicants in their written statements. They have not led any evidence to indicate that deceased Sambha was aware of the defects which he put in the form of application before the Court confirming the sale. There is hardly any material to conclude that Sambha had consciously waived all these objections including the misdescription of his property which has ultimately affected the auction price in this particular sale. It is too late, therefore, for the present applicants to say that the approach of the learned appellate Judge while applying the second proviso should be treated as an approach which lacks initial jurisdiction or at any rate was in wrong exercise of its admitted jurisdiction. I am not inclined to think that any such thing is available from the order made by the learned appellate Judge.

10. In the result, it has to be found that there is no merit in the present revision and the same would stand dismissed with costs.