# GOPAL KRISHNA DAS

*v.*

# SAILENDRA NATH BISWAS & ANR.

*February* 26, 1975

[Y. V. CHANDRACHUD, R. S. SARKARIA AND A. C. GUPTA, JJ.]

*Civil Procedure Code—Order* 21 *Rule* 71—*Meaning of deficiency of price accrued by reason of the auction purchasers' default—Whether deficiency should be attributable to the default of auction purchaser—Section* 12(2) *of Limitation Act* 1963—*Time requisite for obtaining certified copy—Whether means time properly required or includes time spent negligently.*

The appellant was one of the joint owners of the premises in question. In execution of a money decree obtained against the appellant his share in the property was put to sale and was purchased by the father of the first respondent for Rs. 77,000. The purchaser deposited 25 per cent of the purchase price. The property was put to sale once again and was in fact knocked down for a sum of Rs. 700/- in favour of the father of respondent No. 1. The appellant made an application under Order XXI Rule 71 of C.P.C. for recovering the deficiency in the price realised in the second sale from the purchase. Order XXI Rule 71 C.P.C. reads as under :—

> "Any deficiency of price which may happen on a re-sale by reason of the purchaser's default and all expenses attending such re-sale, shall be certified to the Court by the Officer or other person holding the sale, and shall at the instance of either the decree holder or the judgment debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money."

The proclamation of sale for the first sale stated that the premises were free from encumbrances. Proclamation for the second sale, however, states that the entire ground floor excepting two road-side shops, was let out.

The Learned Single Judge allowed the application of the appellant and directed the purchaser to pay the deficiency with interest. The Division Bench of the High Court allowed the appeal and dismissed application filed by the appellant under Order XXI Rule 71 for recovering from the auction purchaser the deficiency in the said price. On appeal by certificate under Article 133(1)(a) & (c) it was contended before this Court by the appellant that he was entitled to recover from the first respondent the deficiency in the price realised in the second sale under Order XXI Rule 71. The respondent contended that the appellant can recover the defficiency in the second sale only if it can be attributed to default of the auction purchaser.

HELD :

The application of Order XXI rule 71 is limited to cases in which the deficiency of price has occurred by reason of the auction purchaser's default. Property once put to sale in execution proceedings may have to be resold for reasons which may or may not be connected with the default of the auction purchaser. It is not enough that the resale is occasioned by the default of the auction purchaser. It is further necessary that the resale must result in a deficiency of price which deficiency is attributable to the default of the auction purchaser. In the first proclamation of sale there was no mention of the lease. In the second proclamation the lease has been mentioned. In the city of Calcutta where premises are situated, the West Bengal Premises Tenancy Act, 1956 was in force at the time of the second sale. Under that Act tenants enjoyed the privileges of standard rent and immunity from eviction. The reference in the second sale proclamation to a lease and to the fact that substantial part of the property was in occupation of the tenant was bound to affect the marketability of the property. Order XXI rule 71 is intended to provide an expeditious remedy to the judgment debtor or the decree holder who has suffered a detriment due to the default of the auction purchaser. [729C, G; 731B-D]

A (2) The appeal before the Division Bench was not time barred. The time requisite for obtaining certified copy means time properly required and an appellant cannot in computation of the period of limitation for filing the appeal ask for exclusion of time which was spent negligently. In the present case settlement of the draft decree was adjourned from time to time by an officer of the court on being properly satisfied that there was good reason for adjournment. The Auction purchaser cannot be blamed for the time thus spent in settling the draft of the decree under appeal. [734F-G]

B CIVIL APPELATE JURISDICTION : Civil Appeal no. 10, 2332 & 2333 of 1968.

From the Judgment & Order dated the 21st March, 1967 of the Calcutta High Court in Appeal Nos. 9, 10 and 43 of 1959.

*P. K. Sen* and *G. S. Chatterjee,* for the appellant.

C *A. K. Sen, P. K. Chatterjee, Rathin Das* and *Mrs. Anjana Sen;* for respondent No. 1

The Judgment of the Court was delivered by

CHANDRACHUD, J. Premises No. 4-A, Chowringhee Road, Calcutta, belonged to the appellant Gopal Krishna Das and four others, each having an undivided one-fifth share therein. In 1951, one Ganga D Prosad Gupta obtained two money-decrees against the appellant and another person in the total sum of Rs. 12,378. In execution of these decrees, the undivided one-fifth share of the appellant was put to sale on June 16, 1954 and was purchased by Pashupati Nath Biswas, the father of the first respondent, for Rs. 77,040. Pashupati Nath Biswas deposited Rs. 19,260 in the court, being 25% of the purchase price and later he deposited a further sum of Rs. 15,000. He however, failed E to pay the balance of the purchase price whereupon the appellant made an application that the property be put to a fresh sale. Accordingly, the property was put to sale on March 20, 1957 and once again Pashupati Nath Biswas was the highest bidder. But whereas in the first sale he had offered a bid of Rs. 77,040 this time the sale was knocked down in his favour for a paltry sum of Rs. 700. The second sale was confirmed on May 29, 1957.

F

In the meanwhile, on May 16, 1957 the Sheriff certified under Order XXI, Rule 71 of the Code of Civil Procedure that the deficiency in the price realised in the second sale due to the default of the auction purchaser, after giving him credit in the sum of Rs, 15,000 paid by him in the first sale, amounted to Rs. 61,340 apart from the cost and expenses of the sales.

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On June 28, 1957 the appellant made an application under Order XXI, Rule 71 C.P.C. for recovering the deficiency from Pashupati Nath Biswas. A learned single Judge of the Calcutta High Court allowed that application and direct by an order dated August 19, 1958 that Pashupati Nath Biswas do pay to the appellant a sum of Rs. 42,080 with interest at 6% per annum. This order was challenged H by Pashupati Nath Biswas in appeal No. 10 of 1959.

The auction purchaser had also filed an application asking that the appellant be restrained from taking execution proceedings for recover-

ing the deficiency in price. That prayer was rejected. It may be mentioned that pursuant to an application dated April 13, 1957 filed by the auction purchaser himself, it was directed by an order dated May 21, 1957 that a sum of Rs. 22,000 be paid by the Sheriff out of the sale proceeds lying with him, to the Official Receiver in satisfaction of the decree obtained by Ganga Prosad Gupta against the appellant, in execution of which the two sales were held. Ganga Prosad Gupta's estate, it seems, had come to be vested in the Official Receiver, he is the second respondent to these appeals. The auction purchaser prayed that the Sheriff do pay to him the balance after deducting therefrom the sum of Rs. 22,000 and the cost and the expenses of the Sheriff. This prayer was also rejected. The auction purchaser filed appeal No. 9 of 1959 against the order rejecting this application.

The appellant then filed an application for an order directing that the Sheriff do pay to him all the moneys lying with him after deducting the cost and the expenses of the sales. That application was allowed by the learned single Judge on December 11, 1958. The auction purchaser challenged that order in appeal No. 43 of 1959.

The three appeals were heard together and disposed of by a Division Bench of the Calcutta High Court by three separate judgments. By its judgment dated March 21, 1967 the Division Bench allowed appeal No. 10 of 1959 and dismissed the application filed by the appellant under Order XXI, Rule 71 for recovering from the auction purchaser the deficiency in the sale price. The two other appeals were disposed of consistently with that judgment. The auction purchaser Pashupati Nath Biswas having died on April 16, 1964, the first respondent Sailendra Nath Biswas came on the record of the appeals as his Executor and legal representative. On December 15, 1967 the High Court granted to the appellant leave to file an appeal to this Court under Article 133(1)(a) and (c) of the Constitution.

Questions raised in the High Court by the rival parties as regards the disbursement by the Sheriff of the balance remaining with him after satisfying Ganga Prosad Gupta's decree are incidental to the main controversy arising out of the appellant's application under Order XXI, Rule 71, Code of Civil Procedure. The real question for decision is whether the appellant is entitled under Order XXI, Rule 71, to recover from the first respondent the deficiency in the price realised in the second sale.

The scheme of the Code in relation to execution sales is like this : Under Order XXI, Rule 64 any Court executing a decree may order the sale of a property in satisfaction of the decree. Order 21, Rule 66 provides that the Court shall cause a proclamation of the intended sale to be made. Sub-Rule (2) of Rule 66 specifies the details which are required to be mentioned in the proclamation of sale. The person declared to be the purchaser must under Order XXI, Rule 84, pay immediately after the declaration a deposit of 25% of the purchase-money. In default of such deposit the property has to be re-sold forthwith. By Rule 85 the full amount of purchase-money has to be paid by the purchaser within 15 days from the date of sale. If the

A purchaser commits a default, the deposit is liable to be forfeited to the Government by virtue of Rule 86 and the property is liable to be re-sold. A re-sale of property, in default of payment of the purchase-money, can be made only after the issue of a fresh proclamation as provided in Rule 87. Under Order 21, Rule 71 :

> "Any deficiency of price which may happen on a re-sale
> B by reason of the purchaser's default, and all expenses attending such re-sale, shall be certified to the Court by the officer or other person holding the sale, and shall, at the instance of either the decree holder or the judgment debtor, be recoverable from the defaulting purchaser under the provisions relating to the execution of a decree for the payment of money."

C It is clear on a careful reading of Rule 71 that its application is limited to cases in which the deficiency of price has occurred by reason of the auction purchaser's default. Property once put to sale in execution proceedings may have to be re-sold for reasons which may or may not be connected with the default of the auction purchaser. A re-sale consequent on the failure of the auction purchaser to deposit 25% of the purchase price immediately after he is declared to be the D purchaser of the property or a re-sale consequent upon his failure to deposit the balance of the purchase price within 15 days of the sale are instances when the re-sale is occasioned by the default of the auction purchaser. On the other hand, re-sale consequent upon the setting aside of the sale on the ground of material irregularity in publishing or conducting the sale as provided in Order XXI, Rule 90, E may not be attributable to the default of the purchaser. The provisions of Order XXI, Rule 71, come into play only if the property is required to be resold on account of the default of the action purchaser. If the re-sale is not due to the auction purchaser's default, there can be no question of mulcting him with the deficiency in the price realised in the re-sale.

F The words : "Any deficiency of price which may happen on a re-sale by reason of the purchaser's default" occurring in Rule 71 therefore mean : "Any deficiency of price which on a re-sale may happen by reason of the purchaser's default". As stated before, the question of holding the auction purchaser liable to make good the deficiency in price can arise only if the re-sale is occasioned by his default. But though, this is necessary, it is not enough to meet the requirements of Rule 71. What is necessary is that the re-sale occasioned by the G auction purchaser's default must result in a deficiency of price, which deficiency is attributable to his default. A resale may have to be held because the auction purchaser has committed default in paying the deposit of 25% under Order XXI, Rule 84, or because of his default in paying the full price which 15 days of the sale as required by Rule 85. And yet the deficiency of price realised in the re-sale may not be attributable to his default as, for example, where the H market value of the property is reduced to the discovery or disclosure of an infirmity in the right, title and interest of the judgment-debtor in the property put to sale. An encumbrance existing on the property at

the time of the first sale but not disclosed in the proclamation of that sale will have no bearing on the price realised in the auction sale, unless the existence of the encumbrance was otherwise known to the bidders. The disclosure of that encumbrance in the sale proclamation accompanying the re-sale must, on normal commercial considerations, have a direct impact on the price of the property put to sale. In such a case the deficiency of price realised in the re-sale will be attributable not necessarily to the default of the auction purchaser but to circumstances extraneous to his default. Order XXI, Rule 71, concerns itself not with that class of cases but with those in which the deficiency of price realised in the re-sale is attributable to the default of the auction purchaser.

Even a broad and non-too-meticulous examination of the two proclamation of sale in the instant case is enough to conclude that the deficiency in price realised in the re-sale cannot be said to have happened on account of the auction purchaser's default. The first sale was held on June 16, 1954 and the proclamation of sale accompanying it is dated May 10, 1954. The second sale was held on March 20, 1957 for which the relevant sale proclamation is dated February 8, 1957. Both the proclamations mention that what was being put to sale was the right, little and interest of the appellant, Gopal Krishna Das, in the undivided one fifth share in the particular property. But there is a material difference in the terms of the two proclamations in regard to the encumbrances existing on the property. The proclamation of 1954 sets out in a tabular form encumbrances like leases and mortgages to which the property was previously subjected, as appearing from the affidavit of one Damodar Mullick. The proclamation then says :—

> "It appears from the said affidavit that all the Mortgages have been reconveyed. The lease has expired. The sale is in respect of the undivided 1/5th share of Purna Ch. Das. It appears from the said affidavit that the 1/5th share of Gopal Kr. Das in the said premises is free from encumbrances."

The proclamation of 1957, relying on an affidavit of one Sudhansu Kumar Roy says undoubtedly that the appellant's one-fifth share was free from encumbrances but the tabular statement of encumbrances included in the proclamation refers to a Term Lease and Agreement of 1955 and the proclamation says :

> "The lease of 1955 is for five years from October, 1955 and the same is in respect of the Restaurant "Bombay Crown" containing the entire ground floor excepting two road side shops and was executed by one Abde Ali Abdul Hussain in favour of Ashlifaq and Jaffar Hussain."

It is notorious that properties in possession of tenants who enjoy the protection of Rent Acts do not fetch the same price as properties of which the purchaser can obtain vacant possesion. In the

A city of Calcutta where the property in question is situated, The West Bengal Premises Tenancy Act, XII of 1956, was in force, at the time of the second sale. Under that Act the tenants enjoyed the privileges of standard rent and immunity from eviction save on stated grounds. It is unnecessary to enter into refinements arising out of the West Bengal Act but even the sub-tenants would appear B to enjoy thereunder a certain amount of immunity from eviction. Reference may in this behalf be made to sections 13(2), (4), (5) and section 16 of the Act of 1956.

The reference in the second sale proclamation to a live lease and sub-lease and to the fact that a substantial part of the property was in occupation of the tenant or the sub-tenant was bound to affect C the marketability of the property. The paltry price realised in the second sale may justifiably be attributed to the disclosure of encumbrances in the second proclamation, which were not mentioned in the first proclamation. It is not without significance that apart from the auction purchaser there were no bidders at the second sale. The paucity of bidders may reasonably be taken to reflect the fall in the value of the property in the estimation of prospective bidders.

D Order XXI, Rule 71 is intended to provide an expeditious remedy to the judgment-debtor or the decree-holder who has suffered a detriment due to the default of the auction purchaser. The officer or other person holding the sale has to certify to the Court the deficiency of price which on the re-sale has happened by the purchaser's default and all expenses attending the re-sale. Upon such certification the amount becomes recoverable from E the defaulting purchaser at the instance of the decree-holder or the judgment-debtor, "under the provisions relating to the execution of a decree for the payment of money". The Code has not made the certificate conclusive of the facts stated therein and consequently it is permissible to the purchaser who is alleged to have defaulted to challenge the correctness of the certificate in all its F particulars. But the object of certification, as evidenced even more clearly by the provision that the proceeding to recover the amount will be governed by provisions relating to the execution of a money-decree, is to eschew an elaborate inquiry into the competing causes culminating in the deficiency of price. This object can be achieved only if the property successively put to sale is in material respects identical, that is to say, if the right, title and interest G of the judgment debtor is put to sale under substantially the same description. If that happens it is easy to predicate that the deficiency of price has resulted on account of the purchaser's default. But if, as here, what was shown as unencumbered in the previous proclamation is expressly described in the later proclamation as being subject to an encumbrance which on a reasonable assessment, is calculated to affect the market value of the property, the pro- H ceeding ceases to be a simple enough matter like the execution of a money-decree and assumes the form of a contentious claim open to diverse defences as in a substantive suit. The speedy remedy intended to be provided by Order XXI, Rule 71 will lose its meaning and

purpose if the executing court seized of the claim against the alleged defaulting purchaser has to embark upon a comparative evaluation of the causes that led to the deficiency in the price. Such meat is not for the executing court.

Counsel for the appellant relied on certain decisions to fasten liability on the auction purchaser but those decisions will not help. In *Annavajhula Venkatachellamayya* v. *Rama Girjee Milakanta Girjee*(1), a purchaser in a court auction of the judgment-debtor's right to get a re-conveyance of certain lands on payment of a specified sum was, on default in payment of the balance purchase money, held liable to pay the deficiency in price on re-sale under Order XXI, Rule 71, C.P.C., though the date stipulated for making the payment in order to get the re-conveyance happened to be shortly after the court sale and before the expiry of the 15 days within which the auction purchaser could deposit the balance of the purchase-money. Wallis C.J. observes in his judgment that the sale and the re-sale were of the judgment-debtor's interest as it existed at the date of the sale and the re-sale and that the depreciation which occurred in the meantime was one for which the auction purchaser was exclusively responsible. In his concurring judgment Kumaraswami Sastriyar J. observes that having regard to the fact that there is no warrant of title in a court auction, the maxim *caveat emptor* applies and therefore the purchaser cannot avoid the sale so long as the judgment-debtor has some saleable interest in the property, howsoever small. The learned Judge further observes that the objections which a defaulting purchaser can urge are practically confined to those which can be urged in an application for setting aside the sale under Order XXI. Relying on these observations it is contended on behalf of the appellant that since in the instant case the judgment-debtor had a saleable interest the auction purchaser cannot avoid his liability to make up the deficiency in price on the ground that the deficiency was caused by the disclosure of the encumbrance. We are unable to appreciate the relevance of the maxim *caveat emptor* on a question like the one before us. The auction purchaser is not attempting to avoid the sale. Far from it. He adheres to his purchase but disputes his liability for the deficiency. There is no question of any failure on his part to take due care at the time of the first sale because that sale was held in 1954 whereas the encumbrance referred to in the second proclamation was stated to have been created in 1955.

*Madho* v. *Watsalubai*(2), on which the appellant relies, was a case in which the existence of a maintenance charge and the right of residence were omitted to be mentioned in the sale proclamation. The High Court at Nagpur held that the auction purchaser could not avoid his liability to make good the deficiency in the sale price as the decree-holder in whose favour the charge was created had reiterated again and again that she was willing to waive the charge. Hidayatullah J. who decided the case further observes in his judgment that

1) I.L.R. 41 Mad. 474. (2) I.L.R. [1947] Nag. 939.

A on a comparison of the two sale proclamations he found that the existence of the charge was not mentioned in either. Naturally, the deficiency in price could not be attributed to the existence of the charge.

In *Nelluri Brahmaiah* vs. *Mohd. Sheik Mohiddin and Anr.*,(1) the auction purchaser disputed his liability for the deficiency on the ground B that the judgment debtor had no saleable interest in the property. This contention was based on the circumstance that though the property was situated in Venkatapuram it was wrongly described as lying within the limits of Borrampalem. There was no dispute about the boundaries, about the survey number or the area and it was not suggested that there was any other property of the particular description C in Borrampalem. The High Court of Andra Pradesh held that in these circumstances the property could be easily identified, that the location of the property put to sale was known to everyone concerned and therefore it was difficult to posit that the judgment-debtor had no saleable interest in the property.

The decisions in *Baijnath Sahai* vs. *Moheep Narain Singh*(2) and D in *Gangadas Dayabhai* vs. *Bai Suraj*(3), are more to the point. These cases arose under section 293 of the Code of 1882 corresponding to Order XXI, Rule 71, of the Code of 1908. In the Calcutta case, at the first sale no encumbrance upon the properties sold was notified. In the re-sale two encumbrances were notified. The second sale was held because the auction purchaser had committed a default in paying the balance of the purchase-price in the first sale. The price fetched E in the second sale resulted in a deficiency for which the auction purchaser was sought to be made liable. Apart from the circumstance that the decree-holder was himself to blame for not mentioning the encumbrances in the first proclamation and was therefore attempting to obtain an advantage of his own wrong, the Calcutta High Court expressed the legal position correctly by saying that "the re-sale contemplated by s. 293 of the Code of Civil Procedure must be a sale F of the same property that was first sold, and under the same description, and any substantial difference of description at the sale and the re-sale in any of the matters required to be specified by s. 287 to enable intending purchasers to judge of the value of the property should disentitle the decree-holder to recover the deficiency of price under s. 293." In the Bombay Case the errors in the two proclamations were so confusing that the deficiency in the price could not, it G was held, be attributed to the default of the purchaser. The description in the second proclamation being materially different from that in the first, the re-sale was not of the same property and the auction purchaser, though he had defaulted in paying the balance of the purchase-price was absolved from making good the deficiency.

It was contended that Pashupati Nath Biswas, the auction pur- H chaser, being in possession of a part of the property must be deemed

(1) [1964] (1) Andhra Law Times, 321. (2) I. L. R. 16 Cal. 535.
(3) I. L. R. 36 Bom. 329.

to have been aware of the lease and the sub-lease and therefore he is estopped from relying upon the same as having led to the deficiency in price. No estoppel can arise against the auction purchaser on the question whether the deficiency in price can be recovered from him. The question which arises under Order XXI, Rule 71 is whether the deficiency can be attributed to the default of the auction purchaser or whether it can be reasonably attributed to any other supervening circumstance. This is not a case in which the auction purchaser can be said to be taking advantage of his own wrong. He cannot therefore be estopped from contending that the disclosure of the encumbrance is the operative cause of the fall in price.

We may mention that the matter under consideration arose out of the Ordinary Original civil jurisdiction of the Calcutta High Court and therefore the Original Side Rules of the High Court would govern the matter. That will, however, not make any difference to our decision because Chapter XXV, Rule 7 of the Rules of 1914 provides by the Third clause for re-sale of the property in default of the payment of the price by the purchaser within the stipulated time. The Third clause of Rule 7 provides : "Where the proceeds of the re-sale are less than the price bid by such defaulting purchaser, the difference shall be leviable from him under the rules contained in Order XXI of the Code for the execution of a decree for money." The Fifth clause of Rule 7 also provides that the sale is made under and subject to all other provisions contained in the Code of Civil Procedure relating to sales in execution of decrees. Order XXI, Rule 71 of the Code would therefore apply.

It was finally contended on behalf of the appellant that the appeal filed by the auction purchaser from the judgment of the single Judge to the Division Bench of the High Court was barred by limitation. We see no substance in this contention. The time requisite for obtaining certified copies undoubtedly means "the time properly required" and an appellant cannot in the computation of the period of limitation for filling the appeal ask for exclusion of time which was spent negligently. But the facts and dates mentioned to us by the appellant's counsel show that the settlement of the draft decree was adjourned from time to time by an officer of the court on being property satisfied that there was good reason for adjournment. The auction purchaser cannot be blamed for the time thus spent in settling the draft of the decree under appeal. The argument must therefore fail.

For these reasons we confirm the judgments and dismiss these appeals with costs. Costs shall be in one set.

P.H.P. *Appeals dismissed.*