

SMT. PARKASH KAUR

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v.

SMT. SANDHOORAN AND ANR.

MARCH 31, 1993

[J.S. VERMA, P.B. SAWANT AND N.M. KASLIWAL, JJ.]

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Code of Civil Procedure, 1908: Order XXI Rule 89, 90—Order XXI Rule 89(2)—Scope—Word 'withdraws' construed—Whether the application made under Rule 89 of Order 21 time barred—Case law discussed.

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The Subordinate Judge, Amritsar directed sale of the property/house which was mortgaged by the appellant to respondent No.1 Smt. Sandhooran for a sum of Rs. 5,000. The property was sold by auction wherein it was purchased by respondent No.2. The appellant made an application in the Court alleging that no notice under Order XXI Rule 66 has been served on her.

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Thereafter, on 16.9.1974, the appellant made an application, construed to be made under Order XXI Rule 90 C.P.C., in the Court for setting aside the sale on the ground of material irregularity and fraud in publishing and conducting the sale.

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On 23.9.1974 the appellant made an application under Order XXI Rule 89 C.P.C. within the prescribed period of limitation.

The Court made an order directing the appellant to deposit the requisite amount of money. The appellant deposited the requisite amount of money on 25.9.1974.

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Thereafter, the Court, acting on the application made under Order XXI Rule 89 C.P.C., made an order on 19.10.1974 directing payment to the decree-holder of the decretal amount together with five per cent of the sale proceeds.

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On 8.11.1974 the auction purchaser raised an objection that the application under Order XXI Rule 89 C.P.C. could not be prosecuted without withdrawing the prior application made under Order XXI Rule 90 C.P.C.

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A Then, on 23.11.1974, the Court recorded an express statement of the counsel for the appellant withdrawing the appellant's prior application construed as made under Order XXI Rule 90 C.P.C.

B Sub Judge, Amritsar, on 1.4.1974, dismissed the application made under Order XXI Rule 89 C.P.C. though the same had apparently been acted upon and in substance allowed.

The Additional District Judge dismissed the appeal.

The High Court also dismissed the revision filed by the appellant.

C Hence this appeal by special leave by the judgment debtor/appellant contending that the High Court committed an error in taking the view that the application made under Order XXI Rule 89 C.P.C. even though filed on 23.9.1974 and the deposit of the requisite amount being made on 25.9.1974 within time, would be deemed to have been made much later i.e. D on 23.11.1974, beyond the prescribed period of limitation.

Appeal allowed,

E HELD : The Court relied on *Shiv Prasad v. Durga Prasad*, [1975] 3 SCR 526 in which the effect of the bar contained in Rule 89(2) of Order XXI C.P.C. was considered. [902-B]

It was held :-

F "The applicant merely has to convey to the Court that he is withdrawing his application under Rule 90 which he had filed prior to the making of the application under Rule 89. Thereupon he becomes entitled to make the latter application. Every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting him to withdraw the application. The Court may make a formal order disposing of the application as withdrawn but the withdrawal is not dependent on the order of the Court. The act of withdrawal is complete as soon as the applicant intimates the Court that he withdraws the application". [903 C-D]

H The Court held in the instant case that the withdrawal of the prior application made under Order XXI Rule 90 C.P.C. is the unilateral act of the judgment debtor, for which no permission of the Court is necessary,

the act of withdrawal is compete as soon as the applicant intimates the A court that he withdraws the application and no order of the Court is necessary for permitting such a withdrawal. [903-F]

In the present case, the withdrawal of application dated 16.9.1974, construed as an application made under Order XXI Rule 90 C.P.C., was complete by the unilateral and unqualified act of withdrawal by the appellant, latest on 25.9.1974 when after making the application under Order XXI Rule 89 C.P.C. the deposit of the requisite amount of money was made in Court pursuant to the Court's order dated 23.9.74, made on that application. [903-H, 904-A]

Further, the Court itself acted on the application under Rule 89 by making the order on 19.10.74 for payment of the amount due to the decree holder out of the deposit made by the Judgment debtor. In such a situation, the application made by the appellant under Order XXI Rule 89 C.P.C. would be deemed to have been made on 25.9.1974, when there was effective withdrawal of the prior application under Rule 90 by making the deposit. In accordance with the direction of the Court given on 23.9.1974. Admittedly, on 25.9.1974 the application under Order XXI Rule 89 C.P.C. was within time. [905 A-B]

Shiv Prasad v. Durga Prasad, [1975] 3 SCR 526, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 819 of 1979.

From the Judgment and Order dated 6.10.1978 of the Punjab and Haryana High Court in Civil Revision No. 206 of 1978.

S.K. Bhattacharya for the Appellant.

S.S. Rana and Ms. B. Rana for the Respondents.

The following Order of the Court was delivered:

The short question involved for decision in this appeal is, whether the appellant has been rightly denied the benefit of Order XXI Rule 89 CPC. The High Court has taken the view, that the application made by the J.D/appellant under Order XXI 89 CPC, even though filed in the Court on 23.9.1974 within the prescribed period of limitation, would be deemed H

A to have been made only on 23.11.74, in view of a prior application under Order XXI Rule 90 CPC being withdrawn only on 23.11.74; and on that date an application under Order XXI Rule 89 CPC was time barred. The correctness of the view taken by the High Court, on the facts in the present case, is assailed in this appeal.

B On 16.10.1970 the appellant mortgaged her house to respondent No.1 Smt. Sandhooran for a sum of Rs.5,000. On 4.1.1973 it was held that the mortgagee was entitled to recover the amount of Rs.5,812.50 with interest, by sale of the mortgaged property. On 27.7.74, the Sub-ordinate Judge, Amritsar directed sale of the property. On 30.8.1974 the property was sold

C by auction, wherein it was purchased by respondent No.2 Suresh Kumar for a sum of Rs.76,000. On 30.8.1974 the appellant made an application in the court alleging that no notice under Order XXI Rule 66 has been served on her. Then, on 16.9.1974, the appellant made an application in the Court for setting aside the sale, on the ground of material irregularity and fraud

D in publishing and conducting the sale. Even though no provision of law was indicated under which the application was made, yet that application was construed as made under Order XXI Rule 90 CPC. Thereafter, on 23.9.1974, the appellant made an application under Order XXI Rule 89 CPC, within the prescribed period of limitation. The deposit of the requisite amount of money was, however, not made on that day, and the Court

E made an order directing the appellant to deposit that amount. This deposit was made on 25.9.1974. Thereafter, the Court, acting on the application made under Order XXI Rule 89 CPC, made an order on 19.10.1974 directing payment to the decree holder of the decretal amount of Rs.5,846.50 together with Rs.3,800, which was five per cent of the sale

F proceeds. It appears that, thereafter, in the reply filed by the auction purchaser on 8.11.1974, the objection was raised that the application under Order XXI Rule 89 CPC could not be prosecuted without withdrawing the prior application made under Order XXI Rule 90 CPC. It was then, on 23.11.1974, that the Court recorded an express statement of the counsel for the appellant withdrawing the appellant's prior application made on

G 16.9.1974, construed as made under Order XXI Rule 90 CPC.

The Sub Judge, Amritsar thereafter made an order on 1.4.1974 taking the view that the appellant's application made under Order XXI Rule 89 CPC was liable to be dismissed, even though the same had apparently been

H acted upon, and in substance allowed, by directing payment of the amount

due to the decree holder from the deposit made by the J.D./appellant, the only direction remaining to be made was for refund to the auction purchaser of the amount deposited by him. The appeal preferred by the judgment debtor/appellant to the Addl. District Judge was dismissed on 9.12.1977, and a further revision by her to the High Court was dismissed on 6.10.1978. In these circumstances this appeal has been filed by special leave under Article 136 of the Constitution. A
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The contention of the learned counsel for the judgment debtor/appellant is, that the High Court committed an error in taking the view, that the application made under Order XXI Rule 89 CPC, even though filed on 23.9.1974 and the deposit of the requisite amount being made on 25.9.1974 within time, would be deemed to have been made much later i.e. on 23.11.1974, beyond the prescribed period of limitation. It is submitted by learned counsel for the appellant, that on the facts of the present case, it is clear that the bar contained in sub-clause 2 of Rule 89 of Order XXI CPC was lifted latest on 25.9.1974, when the deposit was made by the judgment debtor in pursuance to the court's order dated 23.9.1974, which is evident from the fact that the Court itself acted on that application and made the order on 19.10.1974 for payment of the amount due to the decree holder from the deposit made by the judgment debtor. It was submitted, that in such a situation there is no scope for taking the view, that the application can be deemed to have been made much later on 25.11.1974, as held by the High Court. In reply learned counsel for respondent no. 2, auction purchaser contended, that there is no infirmity in the High Court's view in the present case. The learned counsel submitted that the express withdrawal of the prior application made under Order XXI Rule 90 CPC, having been made by the judgment debtor/appellant on 23.11.1974, the application made under Order XXI Rule 89 CPC cannot be deemed to have been made prior to 23.11.1974, on which date the application was admittedly time barred. Strong reliance has been placed by learned counsel for respondent No. 2 on the bar contained in sub-clause 2 of Rule 89 of Order XXI, to support the view taken by the High Court. C
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Having heard both sides we are satisfied that this appeal has to be allowed.

Sub clause 2 of Rule 89 of Order 21 CPC is as under:

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A "Where a person applies under Rule 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."

B In a similar situation, the effect of the bar contained in the above provision came up for consideration in *Shiv Prasad v. Durga Prasad* [1975] 3 S.C.R. 526. It was held therein as under:

C "The words used in the sub-rule are "make or prosecute". If it were to be held that the applicant is not entitled merely to prosecute his application under Rule 89 unless he withdraws his application under Rule 90, then the word "make" would become redundant. In order to bring about the true intention of the Legislature, effect must be given to both the words. 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. If, however, a person has filed an application under Rule 89 first and thereafter another application under Rule 90, he will not be allowed to prosecute the former unless he withdrew the latter.

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F In our judgment, an application under Rule 89 validly made on the date of its presentation cannot be allowed to be prosecuted until the subsequent application filed under Rule 90 is withdrawn. But it cannot be allowed to be made or be deemed to have been made unless the prior application filed under Rule 90 is withdrawn."

G The settled meaning of this provision is therefore no longer *res integra*. The question is, whether in the present case the bar contained in Order XXI Rule 89(2) CPC can operate for the purpose of supporting the view taken by the High Court that the application made under Order XXI Rule 89 must be deemed to have been made only on 23.11.1974, and not earlier. It may be mentioned, that in *Shiv Prasad* (supra) after indicating

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the true meaning of Order XXI Rule 89(2) CPC, the court proceeded A further to say, as under:

"Even on the interpretation of Rule 89(2) which we have put we are not prepared to accept the contention put forward on behalf of the appellant that an application under Rule 90 does not stand withdrawn until an order to that effect is recorded by the Court. *The applicant merely has to convey to the Court that he is withdrawing his application under Rule 90 which he had filed prior to the making of the application under Rule 89. Thereupon he becomes entitled to make the latter application. Every applicant has a right to unconditionally withdraw his application and his unilateral act in that behalf is sufficient. No order of the Court is necessary permitting him to withdraw the application. The Court may make a formal order disposing of the application as withdrawn but the withdrawal is not dependent on the order of the Court. The act of withdrawal is complete as soon as the applicant intimates the Court that he withdraws the application.*"

(emphasis supplied) E

The above extract from that decision clearly indicates, that withdrawal of the prior application made under Order XXI Rule 90 CPC is the unilateral act of the judgment debtor, for which no permission of the Court is necessary; the act of withdrawal is complete as soon as the applicant intimates the court that he withdraws the application; and no order of the Court is necessary for permitting such a withdrawal. In that decision itself, the court proceeded to take the view, on the facts therein, that the application under Rule 90 would be deemed to have been withdrawn much before the formal order was made by the Court to that effect, since the conduct of the applicant therein was sufficient to lead to that inference. F G

In our opinion the position in the present case, on facts, is similar to that in *Shiv Prasad*, and it must be held that withdrawal of the application dated 16.9.74, construed as an application made under Order XXI Rule 90 CPC, was complete by the unilateral and unqualified act of withdrawal H

A by the appellant, latest on 25.9.1974 when after making the application under Order XXI Rule 89 CPC the deposit of the requisite amount of money was made in Court pursuant to the Court's order dated 23.9.1974, made on that application.

B It was submitted by learned counsel for the respondent, that the application under Order XXI Rule 89 CPC made on 23.9.1974 does not indicate an unqualified withdrawal because of the language used therein, which indicates the appellant's intention to pursue the remedy available to her under Rule 90. In our opinion, the fact that after the filling of that application the Court made an order directing the appellant to deposit the requisite amount and the appellant without any protest or reservation deposited that amount on 25.9.1974, is sufficient to indicate that whatever reservation, if any, the appellant may have had at the time of making the application on 23.9.1974 was abandoned when the deposit was made on 25.9.1974 in obedience to the court's order. This is the only logical inference to draw from the conduct of the appellant in making the deposit on 25.9.1974. This view finds support also from the fact, that the court itself so construed the conduct of the appellant, inasmuch as it made an order thereafter on 19.10.1974 for payment of the amount due to the decree holder from that deposit. This order of payment to the decree holder could not have been made, otherwise. Apparently no grievance was made by any one against the making of that order, and we must proceed on the basis that it was properly made. In such a situation, the Court in, thereafter, recording express withdrawal of the application under Rule 90 by the counsel for the appellant on 23.11.1974, was merely recording an accomplished fact which had happened much earlier, and not a withdrawal on that date itself. This appears to have been done, in view of the objection taken in the reply filed by the auction purchaser on 8.11.1974, since no express order had been made earlier by the Court recording the fact of withdrawal of the application under Rule 90 by the judgment debtor.

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G We are, therefore, unable to sustain the view taken by the High Court, that the application under Order XXI Rule 89 CPC in the present case is deemed to have been made only on 23.11.1974, when it was time barred, and not earlier, even though it was filed within time on 23.9.1974 and was complete in all respects on 25.9.1974, when the deposit was made

H by the appellant in accordance with the direction of the Court. This is more

so, in view of the fact, that the Court itself acted on the application under Rule 89 by making the order on 19.10.1974 for payment of the amount due to the decree holder out of the deposit made by the judgment debtor. In such a situation, in our view, the application made by the appellant under Order XXI Rule 89 CPC would be deemed to have been made on 25.9.1974, when there was effective withdrawal of the prior application under Rule 90 by making the deposit in accordance with the direction of the Court, given on 23.9.1974. Admittedly, on 25.9.1974 the application under Order XXI Rule 89 CPC was within time.

On the above view, the payment to the decree holder having already been made as far back as October, 1974, the only direction which remains to be given is for refund of the sale price to the auction purchaser in view of the judgment debtor's application under Rule 89 being allowed. By an order dated 26.3.1979 modified by an order dated 29.10.1980, the appellant was directed by this Court to deposit in all a sum of Rs. 20,000 which was to be kept in fixed deposit in any nationalised bank. It is stated that the order has been complied with, and the deposit has been made, and in addition a sum of Rs. 2,000 has been deposited by the appellant as security.

In the view we have taken in this matter, the entire deposit so made by the appellant under the direction of this court, together with the accretions thereto in the nature of interest, have to be refunded to the appellant. We direct accordingly. We also direct that the amount of Rs. 76,000 deposited by the auction purchaser as the sale price in the executing Court, together with the accretions thereto, in the nature of interest, be paid to the auction purchaser. In addition, the auction purchaser will also be paid a sum equal to 5% of the sale price amounting to Rs. 3,800, already in deposit in the executing Court, together with accretions thereto, if any, by way of interest.

Consequently the appeal is allowed in the above manner. In the circumstances of the case, no order as to costs.

S.K.

Appeal allowed.