REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
SPECIAL LEAVE PETITION (CIVIL) NO. 25797 OF 2004

SUKUMAR DE .....PETITIONER(S)

VERSUS

BIMALA AUDDY & ORS. .....RESPONDENT(S)

J U D G M E N T

A.K. SIKRI, J.

1.This case has a chequered history. However, we do not find it necessary to narrate all the events leading to the filing of the present Special Leave Petition, as the issue in the present Special Leave Petition, which arises out of impugned judgment dated 8.6.2004 of the High Court of Calcutta, is a narrow one. In fact, as would be noticed hereafter, the order in question is discretionary in nature and the grievance of the petitioner is that in the facts and circumstances of the present case no such discretion should have been exercised by the High Court thereby granting one more opportunity to the respondents to pay the decretal amount with interest, the effect of which was to nullify the auction of the property in the execution proceedings which was bought by the petitioners herein.

2.The facts which needs to be traversed for this purpose are recapitulated below:

Way back in the year 1965, a money suit No. 20 of 1965 was instituted by

one Smt. Bimala Bala Sen, (since deceased) (hereinafter to be referred as the decree holder) for a sum of Rs. 6,100/-, being refund of earnest money. An *ex parte* decree was passed on 23.12.1967 against Respondent Nos. 1 to 4, 6 and 7 herein (hereinafter to be referred as the judgment debtors). This decree was in the sum of Rs. 6,600/- (Rs. 6,100/- money claimed + Rs. 500/- as cost). The judgment debtors filed an application for setting aside the *ex parte* decree which was dismissed and appeals thereagainst were also dismissed. This decree thus, became final. Execution Case was filed on 24.9.1970 by the decree holder.

3.In this execution proceedings, some objections were filed by the judgment debtors. The Executing Court even gave opportunity to the judgment debtors to deposit decretal amount. However, ultimately on 7.7.1990, the property namely 11 Cottahs of land with a two storied pukka building situated at 46 and 48, R.K. Chatterjee Road, Kasba, Calcutta was put to auction and the petitioners were the highest bidders therein with the bid of Rs. 1.5 lakhs. On 9.7.1990, auction sale was confirmed. The petitioner deposited poundage fee alongwith challan of one-fourth of the bid amount i.e. Rs. 37,500/-. On the very next day, one of the judgment debtors namely Respondent No. 4 herein filed an application in the execution case for intimation as to how the decreetal amount be deposited. This petition was however, rejected by the Executing Court on 8.8.1990. Against this order, Revision Petition was filed before the High Court under Section 115 of the Code of Civil Procedure. On 9.11.1990, it was registered as C.O. 3515/1990. In the meantime, on 12.11.1990, the petitioner deposited entire purchase money and sale certificate was

issued in their favour by the Executing Court.

4. The revision petition of the judgment debtors (C.O. 3515/1990) was finally heard by the High Court and allowed on 10.4.1992. The High Court in the said order noted the submission of the judgment debtors to the effect that at the time of auction of the property value thereof was more than Rs. 8,00,000/- which was sold for a partly amount of Rs. 1.5 lakhs. It was also pleaded that as the judgment debtors could not obtain particulars of the auction sale through their lawyers, they could not file an application under Order 21 Rule 89 of C.P.C. for depositing the requisite amount in the execution case and get the sale set aside. On coming to know of the auction sale, they moved the application for ascertaining the dues for the purpose of filing application under Order 21 Rule 89 of the C.P.C. But the Executing Court instead of giving information put the said application to a future date i.e. on 8.8.1990 and thereafter dismissed the same. The High Court noted the provisions of Rule 89 of Order 21 of the C.P.C., as per which a person interested in setting aside the sale can deposit in Court a sum equal to 5 percent of the auction purchaser and also for payment through the decree holder, the amount specified in the proclamation of sale. On this basis, the High Court concluded that it was necessary that the amount should be determined before the deposit is made. Though it is the responsibility of the applicant to see that the correct amount is deposited, however, some sort of ministerial work has got to be done before the determination of the correctness of the amount. Therefore, the Executing Court was in error by not disclosing the amount which was to be deposited and the

judgment debtors should not suffer because of the mistake of the Court. On these grounds, the order of the Executing Court was set aside with direction that the Court below should proceed from the stage when the application for determination of the amount to be deposited was filed on 10.7.1990. Direction was given to the Court to determine the amount to be deposited by the applicant/ judgment debtor and then permitting him to deposit the amount as per order passed, according to law.

5. After receiving the order, aforesaid order of the High Court, the Executing Court gave the direction to the Shristadar to submit a report of the calculation of the amount. He, accordingly gave his report stating that the judgment debtors had to pay a sum of Rs. 1.14 lakhs. Direction was given to the JD's to deposit the amount. This order was challenged by the judgment debtors questioning the calculations made and submitted that decretal amount of Rs. 6,600/- could not become Rs. 1.14 lakhs even after adding interest etc. The High Court vide orders dated 22.9.1992 set aside this order of the Execution Court as well on the ground that calculations were wrong. Directions were given to the Executing Court to make the calculation afresh.

6. Fresh calculations were made by Shristadar on 24.9.1992 significantly reducing the amount due under decree to Rs. 42055.87/- from earlier calculation of Rs. 1.14 lakhs. On that very day, the trial court directed the judgment debtors to deposit the said amount by "November 1992". This order was also challenged by the judgment debtors by approaching the High Court by means of a revision

petition questioning the calculations. The High Court even granted stay of the impugned order initially. This revision petition kept pending for quite some time and is ultimately decided by the impugned order only on 8.6.2004. Before the High Court, the petitioner or the decree holder did not appear despite services of notice. High Court noted that the calculations are correctly arrived at. At the same time it deemed it proper to give one opportunity to the judgment debtors to deposit the amount and the operative portion of the said order reads as under:

> "Accordingly we dispose of the Revisional application by modifying the order passed by the learned executing Court on 24.9.1992 in the manner indicated herein below. The judgment debtor shall deposit with the executing court a sum of Rs. 42,055,87 as calculated by the office of the executing Court, within one month from date. On deposit of the said sum, the sale shall stand set aside. The learned executing court shall take steps to disburse to the purchaser and the decree holder their respective dues as contemplated under clauses (a) of sub rule (1) of rule 89 of Order 21 of the Code. In addition to the above, the executing court shall make over to the judgment debtors the stamps purchased by the auction purchaser for the purpose of the sale certificate so that the amount of the stamps may be recorded by the judgment debtor in accordance with the provisions of section 54 of the Indian Stamp Act, 1899. The learned executing court shall pass an order of the basis whereof the judgment debtor would be entitled to receive back the amount of the stamp duty although the same had been purchased in the name of the auction purchaser who will be entitled to receive back the cash value thereof. The learned executing Court is directed to take steps to dispose of the matter expeditiously since the same has been pending for a long time."

7. In sum and substance the position which emerges on the auction of the property in question can be summarised as below:

> The property was put up on auction on July, 1970 and the bid of the

petitioner in a sum of Rs.1.5 lakhs was the highest. The auction sale was confirmed on 9.7.1990. Under Order 21 Rule 89 C.P.C., a chance is given to the applicant to deposit the amount payable including 5 percent for the successful auction purchases and on deposit of that amount the Executing Court will set aside the sale on 10.7.1990 itself. The Respondent No. 4/ judgment debtor has filed the application requesting the executing court to intimate the amount to be deposited so that he could file application under Order 21 Rule 89 of CPC. Though this application was rejected, the order of the executing court was set aside by the High Court allowing the revision of the judgment debtor and directing the executing court to intimate the same to the judgment debtor. In the first instance, the amount calculated was Rs. 1.14 lakhs which turned out to be wrong calculations, in as much as the High Court set aside the said order and on re-calculation, the amount payable was calculated at Rs. 42,055.87/-. The Executing Court had directed the judgment debtors to pay this amount which was to be paid by 11.11.92. However, before that the judgment debtor filed another revision petition. This revision petition is decided by the impugned order passed on 8.6.2004. No doubt, the amount calculated is found to be correct but the High Court chose to give one opportunity to the judgment debtor to deposit the amount as upto that stage the

controversy regarding actual payment had not been settled.

8. In these circumstances, exercise of discretion in the aforesaid manner cannot be found to be erroneous and contrary to law which warrants interference of this Court under Article 136 of the Constitution of India. Further, we do not find any substantial question of law. It is also to be kept in mind that immediately after the impugned order of the High Court the judgment debtors had deposited the amount. There should not be made to lose the property, in the aforesaid circumstances.

9. We thus, dismiss the Special Leave Petition *in limine.*

.....J.
[K.S. RADHAKRISHNAN]

.....J.
[A.K. SIKRI]

New Delhi
October 28, 2013.

ITEM NO.1-B COURT NO.7 SECTION XVI

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).25797/2004

SUKUMAR DE Petitioner(s)

VERSUS

BIMALA AUDDY & ORS. Respondent(s)

Date: 28/10/2013 This Petition was called on for pronouncement of Judgment today.

For Petitioner(s)
Ms. Mridula Ray Bharadwaj, Adv.

For Respondent(s)
Mrs. Sarla Chandra, Adv.

Hon'ble Mr. Justice A.K. Sikri pronounced the judgment of the Bench comprising Hon'ble Mr. Justice K.S. Radhakrishnan and His Lordship.

The special leave petition is dismissed *in limine*.

(N.S.K. Kamesh)
Court Master

(Renuka Sadana)
Court Master

(signed reportable judgment is placed on the file)