

Bench:

Mr. Justice Bhishmadev Chakrabortty

And

Mr. Justice Md. Akhtaruzzaman

First Miscellaneous Appeal No.58 of 2017

(Arising out of FMAT No.425 of 2014)

with

Civil Rule No.559(FM) of 2014

Md. Anwar Hossain appellant

-Versus-

Md. Monzur Murshid and others

..... respondents

Mr. Md. Sagir Hossain with Mr. Sikder Guljer
Ahmed, Advocates

..... for the appellant

Mr. Md. Emdadul Hasan, Advocate

..... for respondent 1

Mr. Md. Imam Hasan with Mr. Md. Shahinul
Islam, Advocates

..... for respondent 2

Judgment on 10.12.2023

Bhishmadev Chakrabortty, J.

Since the parties to the appeal and the Rule are same and common question of fact and law are involved in both, these have been heard together and are being disposed of by this judgment.

This appeal, at the instance of auction purchaser, is directed against the judgment and order dated 20.04.2014 passed by the District Judge, Rajshahi in Miscellaneous Case No.18 of 2012 allowing the miscellaneous case filed under Order 21 rule 89 read with section 151 of the Code of Civil Procedure (the Code) setting aside the auction sale dated 10.02.2010 passed in Miscellaneous Case No. 29 of 2006.

At the time of issuing the Rule, the appellant filed an application for stay of the impugned judgment and order upon which aforesaid Rule was issued and the parties were directed to maintain *status quo* in respect of the possession of the suit land which still subsists.

Facts relevant for disposal of the appeal as well as the Rule, in brief, are that respondent 2 Bangladesh House Building Finance Corporation (the Corporation) filed Miscellaneous Case No.29 of 2006 under article 27(1) of President Order No.07 of 1973 (PO 07 of 1973) before the District Judge, Rajshahi against the defendant. It was stated in the case that the defendant applied for a loan to the Corporation and accordingly loan of Taka 3,10,000.00 was sanctioned at 5% interest. The defendant subsequently failed to pay the installments and accordingly the Corporation instituted the aforesaid miscellaneous case against the borrower for recovery of Taka 6,90,907.28 by selling the mortgaged property through auction. In the case an *ex parte* order was passed on 14.11.2007 and the property was attached with permission to sell it for realization of the debt. The Corporation took steps to sell the property in auction and obtained an order of the Court on 22.11.2009 to that effect. The present appellant participated in the bid and became the highest bidder. His bid was accepted and accordingly he deposited the required amount to the Court. The borrower-debtor then filed Miscellaneous Case No.06 of

2010 under Order 21 rule 90 of the Code for setting aside the auction sale stating grounds that he appointed Md. Imaz Uddin attorney to look after the case property but he was sentenced to suffer imprisonment for life in a criminal case and had been in jail from 08.06.2008 to 08.06.2009. After being enlarged on bail he prayed for setting aside the auction sale dated 10.02.2010. The auction purchaser (appellant) appeared in the miscellaneous case and submitted written objection denying the facts of the miscellaneous case. The debtor thereafter filed an application in the miscellaneous case to withdraw it which was allowed by the learned Court. The debtor then filed Miscellaneous Case No.18 of 2012 under Order 21 rule 89 of the Code. In the said miscellaneous case, the debtor made out a similar case like the earlier one. It was further contended that previously he filed the miscellaneous case under Order 21 rule 90 of the Code erroneously which could have been under Order 21 rule 89. In the subsequent miscellaneous case, the debtor deposited price of auction sale Taka 8,66,407.50 with 5 % interest as required by the law and prayed for setting aside the sale. The auction purchaser contested the miscellaneous case denying the statements made therein. It was further stated that the case was barred by limitation and as such not maintainable. However, the learned District Judge after hearing both the parties allowed the said miscellaneous case, set aside the auction sale dated 10.02.2010 and released the property in favour of the

debtor by its judgment and order dated 20.04.2014. Against the aforesaid judgment and order, the auction purchaser approached this Court with the present appeal with an application for stay. The appeal was admitted and Rule was issued with an order to maintain *status quo* in respect of possession in the case property.

Mr. Md. Sagir Hossain, learned Advocate for the appellant as well as petitioner in the Rule takes us through the materials on record. He then refers to the provisions of rules 89, 90 and 92 of Order 21 of the Code and submits that the present miscellaneous case filed by the debtor was hopelessly barred under sub-rule 2 of rule 92 of Order 21 of the Code. He submits that to file a miscellaneous case under Order 21 rule 89 of the Code, the applicant is to deposit the price of auction sale with 5% interest thereon within 30 days from the date of sale. But in the case in hand, the auction was held on 10.02.2010 and the miscellaneous case under Order 21 rule 89 of the Code was filed on 15.07.2012 which is beyond the period of limitation. The sale of the mortgaged property in favour of the appellant was confirmed. Since, the sale has been confirmed, the instant miscellaneous case for setting aside the auction sale is not maintainable. Learned District Judge without considering the above point of fact and law allowed the miscellaneous case which is required to be interfered with by this Court and, therefore, the impugned judgment should be set aside.

Mr. Emdadul Hasan, learned Advocate for respondent 1 debtor opposes the appeal as well as the Rule and submits that although a miscellaneous case under Order 21 rule 90 of the Code for setting aside the auction sale was filed on misconception of law but subsequently it was withdrawn and the present miscellaneous case under Order 21 rule 89 of the Code was filed within the period of limitation by depositing the required amount. The learned Judge correctly allowed the miscellaneous case and set aside the auction sale and as such it cannot be interfered with.

Mr. Md. Imam Hasan, learned Advocate for respondent 2 Corporation as well as opposite party 2 in the Rule adopts the submissions of respondent No. 1 and further submits that previously a miscellaneous case under Order 21 rule 90 of the Code was filed wrongly without going through the provisions of law. Subsequently, it was withdrawn and a fresh application under Order 21 rule 89 of the Code was filed. Since the judgment debtor had chosen a wrong forum, the delay in depositing the amount and filing of the miscellaneous case was condoned by the learned Judge under section 14 of the Limitation Act. He refers to the case of Gour Chand Mullick Vs. Pradyumna Kumar Mullick and others, AIR 1945, Calcutta 6 and submits that a miscellaneous case for the same purpose may be filed under Order 34 rule 5 of the Code where no limitation is prescribed. A Court can not dismiss a miscellaneous case under Order 21 rule 89 of

the Code in limine being barred by limitation and can be proceeded with according to law as if it was filed under Order 34 rule 5. Although the application was filed under Order 21 rule 89 of the Code, the Court can treat it as an application under Order 34 rule 5 of the Code and dispose of it on merit. Here the debtor filed a miscellaneous case earlier which was withdrawn and on the same day the subsequent miscellaneous case was filed, and as such the Court rightly held that the miscellaneous case under Order 21 rule 89 of the Code is not barred by limitation. He then refers to the case of Md. Selim Hossain (Md) Vs. Shahabuddin Ahmed and others, 20 BLC (AD) 115 and submits that in the referred case the certificate was issued in favour of the decree holder but thereafter the judgment-debtor deposited the amount of auction sale with 5% interest which was accepted by the Court and the property was released. In view of the *ratio* laid in the aforesaid cases the District Judge committed no error in allowing the miscellaneous case. The appeal, therefore, having no merit would be dismissed and the Rule issued be discharged.

We have considered the submissions of the parties, gone through the impugned order, annexures appended with the application and the cases cited.

It transpires that in Miscellaneous Case No.29 of 2006 filed under article 27(1) of PO 07 of 1973 the Corporation obtained an *ex*

parte order against the debtor and the schedule property mortgaged to it was attached. According to the order of the Court, the Corporation subsequently published a notice on 10.05.2010 to put the property into auction. The present appellant participated in the bid and became the highest bidder. He deposited the total amount of auction sale to the Court on 25.02.2010. The debtor filed a miscellaneous case under Order 21 rule 90 of the Code on 10.03.2010 for setting aside the auction sale and release his property. But subsequently he found that he opted a wrong forum then withdrew Miscellaneous Case No. 06 of 2010 on 24.05.2012 which is evident in order No.77. On perusal of the application of present Miscellaneous Case No.18 of 2012 it is found that the aforesaid case was filed on 24.05.2012 and there is a note of the *sharestadar* dated 25.05.2012 to that effect. In view of the above fact, it is clear that the debtor filed the subsequent miscellaneous case on that very day of withdrawal of the previous one. It was not registered on 24.05.2012 due to the fault of the *sharestadar* which is found in order No. 80 dated 15.07.2012. Therefore, it cannot be said that subsequent miscellaneous case under rule 89 of Order 21 of the Code was filed beyond the period of limitation or the money was deposited out of time or it was in contravention with the provision of sub-rule 2 of rule 92 of Order 21 of the Code.

Moreover, sub-rule 2 of rule 89 of Order 21 reads as follows:

“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.”

The aforesaid Rule prescribes that a debtor is entitled to withdraw the miscellaneous case filed under Order 21 rule 90 of the Code to file a fresh miscellaneous case under Order 21 Rule 89 of the same Code. In the instant case, the debtor did the same thing.

Admittedly, the debtor was the owner of the scheduled property mortgaged to the Corporation. The reason of failure to make payment was categorically stated in the miscellaneous case which appears reasonable and acceptable. Our Appellate Division in numerous cases allowed the debtors, whose mortgaged property was put into auction, the deposition of auction money with 5% interest and set aside the sale and the property in favour of its original owner was released. On perusal of the orders passed by the learned District Judge we do not find that the sale was confirmed and as such the submission of Mr. Hossain to that effect bears no substance.

Therefore, we find substance in the submission of Mr. Imam Hossain, learned Advocate for respondent 2. The instant miscellaneous case under Order 21 rule 89 of the Code can safely be treated as an application under Order 34 rule 5 of the Code where no limitation is provided. The *ratio* of the cases referred to by him also match this case. We, therefore, find no illegality in withdrawing

Miscellaneous Case No.16 of 2010 and filing of the instant Miscellaneous Case No.18 of 2012 under order 21 rule 89 of the Code and it is not barred by limitation. Learned District Judge on correct appreciation of fact and law allowed the miscellaneous case and set aside the auction sale releasing the property in favour of respondent 1, judgment-debtor.

Therefore, we find no merit in this appeal. Accordingly, the appeal is dismissed and the Rule is discharged. However, there will be no order as to costs.

The order of *status quo* stands vacated.

Communicate this judgment and order to the concerned Court.

Md. Akhtaruzzaman, J.

I agree.