

Karmegam Vs. 1.Dharmalingam

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Court : Chennai

Decided On : Oct-14-2014

Judge : The Honourable Ms.Justice V.M.Velumani

Appellant : Karmegam

Respondent : 1.Dharmalingam

Judgement :

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT DATED : 14.10.2014 CORAM THE HONOURABLE MS.JUSTICE V.M.VELUMANI C.R.P.(MD)No.1224 of 2013 & M.P.(Md.Nos.1 & 2 of 2013 Karmegam .Petitioner versus 1.Dharmalingam 2.Mohammed Moosa .Respondents Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, to set aside the fair and decretal order, dated 10.10.2012, made in E.A.No.360 of 2008 in E.P.No.144 of 2007 in O.S.No.77 of 1990, on the file of Principal Sub-Court, Dindigul.

!For Petitioner : Mr.S.Natarajan ^For Respondent No.1 : Mr.A.Hariharan For Respondent No.2 : Mr.G.Gomathi Sankar Date of reserving the Judgment : 31.07.2014 Date of pronouncing the Judgment: 14.10.2014 :

ORDER

This civil revision petition has been filed to set aside the fair and decretal order, dated 10.10.2012, made in E.A.No.360 of 2008 in E.P.No.144 of 2007 in O.S.No.77 of 1990, on the file of Principal Sub-Court, Dindigul.

2.The revision petitioner is the defendant, whereas the fiRs.respondent is the plaintiff and the second respondent is the third party, auction purchaser in O.S.No.77 of 1990 on the file of Sub-Court, Dindigul.

3.The fiRs.respondent filed the suit in O.S.No.77 of 1990 for recovery of money from the petitioner, his two brothers and their mother.

The petitioner filed written statement on 12.12.1990 and thereafter, the petitioner and others did not contest the suit and ex-parte decree was passed on 04.09.1997.

The fiRs.respondent filed E.P.No.144 of 2007 for attachment and sale of two immovable properties belonging to the petitioner.

4.In E.P.No.144 of 2007, the petitioner entered appearance.

He did not file any counter, even though number of opportunities were given to the petitioner.

Finally, he was set ex-parte and orders were passed for sale of the immovable properties belonging to the petitioner.

The fiRs.respondent/decreed holder was given permission to bid in auction sale.

The auction sale was conducted on 25.06.2008.

The fiRs.respondent was the successful bidder for Item No.1 and the second respondent was the successful bidder for Item No.2.

5.The petitioner filed E.A.No.360 of 2008 in E.P.No.144 of 2007 in O.S.No.77 of 1990 under Order XXI Rule 90 CPC, to set aside the auction sale conducted by the Court, on 25.06.2008 on the ground that irregularities were committed in conducting the auction sale and the properties worth about Rs.5,00,000/- were sold for Rs.45,000/- for the fiRs.item and Rs.46,000/- for the second item of the property.

6.The fiRs.respondent in his counter denied all the allegations of the petitioner.

According to the fiRs.respondent, the petitioner did not contest the suit, as he did not have any valid defence.

In the E.P.also, ample opportunities were given to the petitioner to set out his case.

The petitioner even after taking number of adjournments, did not file any counter affidavit in the E.P and therefore, he was set ex-parte.

7.After following the procedure, the properties were sold as per law and rules.

There is no irregularity in conducting the auction sale.

The properties were sold for proper price.

The petitioner only with a view to drag on the proceedings, has filed the application under Order XXI Rule 90 CPC and prayed for dismissal of the said E.A.8.The second respondent in his counter affidavit, has stated that the petitioner has filed the application only to drag on the proceedings.

There is no irregularities in conducting the auction sale and the properties were sold for the correct price as fixed by the Court.

The auction sale was conducted only after proper publication.

9.The learned Judge after considering the materials on record and hearing the arguments of the learned counsel for the petitioner and the respondents, by the order dated 10.10.2012, dismissed E.A.No.360 of 2008 on the ground that the petitioner was aware of the entire proceedings and that the petitioner did not point out any irregularity in the procedure in conducting the auction sale by the Court and did not furnish any security as per law.

10.Aggrieved by the order dated 10.10.2012, made in E.A.No.360 of 2008, the petitioner has filed the present civil revision petition.

11.Heard Mr.S.Natarajan, learned counsel for the petitioner, Mr.A.Hariharan, learned counsel for the fiRs.respondent and Mr.G.Gomathi Sankar, learned

counsel for the second respondent.

12.The learned counsel for the petitioner argued that the impugned order is liable to be set aside for the following reasons: (i) The learned Judge has failed to properly appreciate the provision of Order XXI Rule 90 CPC, for setting aside the auction sale, as there is material irregularities.

(ii) The properties worth about Rs.5,00,000/- were sold for a very low price of Rs.45,000/- each.

(iii) The relevant particulars and details were not mentioned in the proclamation of sale and there are material irregularities in conducting the auction sale.

(iv) No notice was given to the petitioner, when the upset price was reduced.

(v) The particulars relating to the market value of the property, the value as per the plaintiff, the defendants and the Court, were not given and the procedures contemplated under Order XXI Rules 64 to 68 CPC were not followed.

(vi) Proper publication was not given as per Order XXI Rule 52 read with Section 67 CPC, giving date, time and place of auction relating to the sale of the property.

(vii) The guideline value given by the petitioner was not considered by the Court below.

(viii) The conclusion of the learned Judge that the petitioner failed to furnish the security along with petition is contrary to law, as there is no mandatory provision compelling the petitioner to give security, when the petitioner filed petition under Order XXI Rule 90 CPC.

13.In support of his submission, the learned counsel for the petitioner relied on the following Judgments: (i) Sukumar De versus Bimala Auddy and Others [2014 (1) SCC584(ii) BanaRs.Das and Another versus Kanshi Ram and Others [AIR 1963 SC1165 (iii) Desh Bandhu Gupta versus N.L.Anand & Rajinder Singh [1994 (1) SCC131 (iv) Smt.Ganga Bai versus Vijay Kumar and Others [AIR 1974 SC1126 (v) Pappu Ramireddy versus Pappu Lakshmi Narayana Reddy and Another [2009 (16) SCC346 (vi) U.Sowri Reddy (Dead) By LRs.versus B.Suseelamma and

Others [2011 (14) SCC126 14. Per contra, the learned counsel for the fiRs.respondent argued that (i) the civil revision petition is not maintainable, as the order rejecting the application to set aside the auction sale is appealable under Order XLIII Rule 1 (j) of CPC; (2) the application filed by the petitioner to set aside the auction sale is barred by limitation, as the said application was not filed within 60 days from the date of sale; (3) there is no irregularity in the procedure adopted in conducting the auction sale; (4) the petitioner was aware of each stage of auction sale and did not object any of the order passed by the learned Judge; (5) the properties are sold for proper market value; and (6) the application has been filed only to drag on the proceedings.

15. To substantiate his case, the learned counsel for the fiRs.respondent relied on the following Judgments: (i) Mohideen Pitchai & Another versus Salim [2012 (3) LW596 (ii) Ram Karan Gupta versus J.S.Exam LTD.and Others [AIR 2013 SC24 (iii) Annapurna versus Mallikarjun and Another [2014 (6) SCC397 (iv) Mrs.Anjalina D'Souza versus The Laxmi Vilas Bank LTD.and Others [AIR 1995 KARNATAKA30

16. The learned counsel for the second respondent argued that there was no irregularity in conducting auction sale.

Due publicity was given with all the particulaRs. The second respondent is a bona fide purchaser, who has paid the entire amount.

The petitioner knowing fully well about the E.P.proceedings and the sale of the property, did not take any steps to conduct the case and the E.P.purposely.

Only after 18 yeaRs.he has filed a petition in E.A.No.360 of 2008, for setting aside the sale under Order XXI Rule 90 CPC without depositing the amount as required by law.

The sale was confirmed and the sale certificate was also issued in his favour and the E.P.was closed.

At this stage only to drag on the proceedings, the petitioner has filed the above civil revision petition and therefore, prayed for dismissal of the civil revision petition.

17.I have carefully perused the materials on record, the Judgments relied on by the learned counsel for the petitioner as well as the fiRs.respondent and the arguments of the learned counsel for the petitioner and the respondents.

18.I am not extracting the relevant portions of the Judgments relied on by the learned counsel for the petitioner and the fiRs.respondent, as I am dismissing the civil revision petition on the ground that the impugned order is appealable under Order XLIII Rule 1(j) of CPC and the revision is not maintainable.

19.A joint reading of Order XXI Rules 90 and 92 of CPC makes it clear that the Rule 90 sets out the grounds on which a person can file an application to set aside the auction sale.

Rule 92 empowers the Court to allow or reject the said application and to set aside the sale or confirm it.

20.It is useful to extract Order XXI Rules 90 and 92 CPC:- ".90.

Application to set aside sale on ground of irregularity or fraud.- (1) Where any immovable property has been sold in execution of a decree, the decree holder, or the purchaser, or any other 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.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation : The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule.

Sale when shall become absolute or be set aside.- (1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an Order confirming the sale, and thereupon the sale shall become absolute: [Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.].(2) Where such application is made and allowed, and where, in the case of an application under Rule 89, the deposit required by that rule is made within [sixty days].from the date of sale, [or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an Order setting aside the sale].: Provided that no Order shall be made unless notice of the application has been given to all persons affected thereby: [Provided further that the deposit under this sub-rule may be made within sixty days in all such cases where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.].(3) No suit to set aside an Order made under this rule shall be brought by any person against whom such Order is made.

[(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

(5) If the suit referred to in sub-rule (4) is decreed, the court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an Order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered.].".

21.The headings of these Rules itself reveal that Rule 90 sets out the grounds on which an application to set aside the auction sale can be filed and Rule 92 contemplates orders that can be passed on the application filed under Rules 89, 90 or 91 CPC.

22. In the decision reported in AIR 1995 KARNATAKA 30 cited supra, this issue was considered and giving cogent reasons, it was held that in an application filed under Order XXI Rule 90 CPC, the Courts are empowered to pass orders only under Rule 92 CPC.

Paragraph No.16 of the said Judgment reads as follows: ".16. In view of the aforesaid discussion, it is clear that the order rejecting I.A.No.II filed by the petitioner under Rule 90 of Order XXI, CPC must be considered to be an order made under Rule 92 of Order XXI, CPC from which an appeal shall lie under Order XLIII, Rule 1(j).CPC.

The revision petition is therefore not maintainable."

In the said decision, the decision of this Court reported in AIR 1975 Madras 36 [V.A.Narayana Raja versus O.R.M.MSV.M.Meyappa Chittiar].and two other Judgments reported in AIR 1929 Cal 407 (DB) [Ansarali versus Bhim Shankar Dutta Tewari].and AIR 1932 Nagpur 14 [Balakrishna versus S.M.Chitnavis].were considered and followed.

The decision reported in AIR 1995 KARNATAKA 30 cited supra and other Judgments referred to in the said decision are squarely applicable to the facts of the present case.

23. For the above reason, I hold that the impugned order is passed only under Order XXI Rule 92 CPC and is appealable under Order XLIII Rule 1(j) CPC and the civil revision petition is not maintainable.

24. In the result, this civil revision petition fails and the same is dismissed.

No costs.

Consequently, connected miscellaneous petitions are closed.

25. If the petitioner files an appeal against the impugned order, the appellate Court shall exclude the period during which the civil revision petition was pending in this Court, while calculating the delay if any, in filing the appeal.

As I have not decided the issue on merits, if an appeal is filed, the appellate Court shall consider the appeal on merits and in accordance with law.

It is open to the petitioner to raise in the Appeal all the grounds available to him as per law.

The Registry is directed to return the impugned order to the learned counsel for the petitioner after substituting the same by a Xerox copy.

To The Principal Sub-Court, Dindigul.

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