Ashok Kumar vs Babu John

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Court : Kerala

Decided On : Jun-22-2022

Judge : Honourable Mr. Justice Anil K.Narendran,Honourable Mr.Justice P.G. Ajithkumar

Appeal No. : RP/307/2016

Appellant : Ashok Kumar

Respondent : Babu John

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN & THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR WEDNESDAY, THE 22ND DAY OF JUNE 2022 / 1ST ASHADHA, 1944 R.P NO. 307 OF 2016 AGAINST THE JUDGMENT DATED 18.03.2016 IN F.A.O.NO.306 OF 2013 OF HIGH COURT OF KERALA REVIEW PETITIONER/2ND RESPONDENT IN FAO: ASHOK KUMAR SON OF KRISHNA PILLAI, 'KRISHNA' PLAVILA, MEDICAL COLLEGE P.O., THIRUVANANTHAPURAM. BY ADV SRI.D.KISHORE RESPONDENTS/APPELLANT & 1ST RESPONDENT IN FAO:

1 BABU JOHN SON OF JOHN, IDEAL COTTAGE, MRA-83-4, PAROTTUKONAM, NALANCHIRA, THIRUVANANTHAPURAM - 695 001. 2 A.K. RAMAKRISHNAN, SON OF ANANDHANARAYANAN, TC 25/342, AMMAN COIL ROAD, PUTHENCHANTHA, VANCHIYOOR VILLAGE, THIRUVANANTHAPURAM-695 035. R1 BY ADV SRI.B.KRISHNA MANI THIS REVIEW PETITION HAVING COME UP FOR FINAL HEARING ON 06.06.2022, THE COURT ON 22.06.2022 DELIVERED THE FOLLOWING:

ORDER

Ajithkumar, J.

The 2nd respondent in F.A.O.No.306 of 2013 has filed this review petition invoking the provisions of Order XLVII, Rule 1 of the Code of Civil Procedure, 1908 stating that there occurred errors, that are apparent on the face of the record, in the judgment dated 18.03.2016 allowing the appeal. The petitioner seeks to review and recall the said judgment.

2. The petitioner is the auction purchaser. The appeal

was filed by the 1st respondent seeking to set aside the order

of the Execution Court dismissing E.A.No.87 of 2011, which was one filed under Order XXI, Rule 90 and Section 151 of the Code. This Court as per the impugned judgment allowed the appeal and dismissed the connected appeal, F.A.O.No.27 of 2014, which was filed by the review petitioner. The operative part of the judgment reads thus.-

Accordingly, we dismiss F.A.O.No.27 of 2014 and allow F.A.O.No.306 of 2013 and the sale conducted on 26.05.2011 in E.P.No.24 of 2008 in O.S.No.30 of 2003 on the file of the Sub Court, Nedumangad, is set aside. The court below will proceed with E.P.No.24 of 2008 from the stage of proclamation of sale with notice to the parties concerned and in accordance with the provisions of Order XXI, C.P.C.

3. The petitioner would contend that there occurred

several errors in the impugned judgment and but for acting upon such erroneous facts, the appeal would not have been allowed, and therefore, the said judgment is wrong.

4. On 25.05.2016, notice was ordered to the respondents.

5. Heard the learned counsel appearing for the petitioner and also the learned counsel appearing for the 1 st respondent. None appeared for the 2nd respondent.

6. As many as 17 grounds are raised in the memorandum of a review petition. During the course of arguments, the learned counsel appearing for the petitioner zeroed in on four aspects, which are,-

(1) Existence of a building having 2500 sq.ft. in the property sold in the auction was mistakenly noted; there is no building in the property.

(2) Lack of pleading with reference to Order XXI, Rule 90(2) of the Code, which says that apart from irregularity or fraud in publishing or conducting the sale, substantial injury to the

judgment debtor on account of such irregularity or fraud

should be proved if to set aside the sale. Despite pointing out the lack of pleadings, court did not consider it;

(3) Upset price fixed by the court for the sale of the

property on 26.05.2011 was Rs.10,50,052/- whereas the court erroneously observed that the upset price fixed was Rs.13,50,052/- and that carried away the court so as to find that there occurred substantial injury to the 1 st respondent; and

(4) The bar created by Order XXI, Rule 90(3) of the Code

and also Explanation VII to Section 11 are attracted in this case, since the 1 st respondent did not raise any such objection while settling the proclamation, but the court failed to consider it.

7. The learned counsel appearing for the petitioner highlighted the aforesaid points and on placing reliance on the decisions in Subrahmanya Bhat v. Santhosh Kumar [2010

(2) KLT 59], Ram Maurya v. Kailash Nath and others

[(1999) 9 SCC 276], Dheerendra Nath Gorai and others v. Sudheer Chandra Ghosh and others [AIR 1964 SC 1300], Iyyunni v. Anto [1994 (1) KLT 583], Saheb Khan v. Mohammed Yousufuddin and others [(2006) 4 SCC 476], Radhy Shyam v. Shyam Behari Singh [(1970) 2 SCC 405] and Dhanalakshmi Bank v. Divakaran [2000

(2) KLT 231] contended that the aforesaid aspects escaped the notice of this Court while rendering the impugned judgment, and therefore, there are enough grounds to review the same.

8. The learned counsel appearing for the 1 st

respondent, on the other hand, contended that except for one or two inadvertent mistakes occurred on account of clerical errors, there occurred no error entailing review of the impugned judgment. The learned counsel submitted that the grounds urged in the review petition are in the nature of grounds for an appeal, which are not amenable to the review

jurisdiction under Order XLVII, Rule 1 of the Code. Accordingly, the learned counsel took the stand that this review petition is devoid of any merit. It was further submitted that the entire decree debt was already deposited by the 1st respondent in the Execution Court and there is absolutely no reason to sustain the sale.

9. At the outset, we may point out that deposit of the decree debt after confirmation of the sale is not a reason to set aside the sale

10. All the aforesaid decisions, except the one in

Dhanalakshmi Bank v. Divakaran (supra), which are relied on by the learned counsel for the petitioner to stress his point that as long as the judgment debtor proves that he was put to substantial injury as a result of the irregularity or fraud in publishing and the conduct of sale, a prayer for setting aside

the sale under Order XXI, Rule 90 of the Code, cannot be entertained. That is the invariable rule contained in Order XXI, Rule 90(2) of the Code. It is submitted that in the application filed by the 1st respondent, I.A.No.87 of 2011 in E.P.No.24 of 2008 in O.S.No.30 of 2003, in which the order dated 12.09.2013 that was impugned in the appeal was passed, there was no pleading that he sustained any injury, much less substantial injury. But this Court did not take into account that aspect while rendering a finding that the 1 st respondent sustained substantial injury on account of the irregularity. In the impugned judgment, this Court has considered the said aspect in great detail. This Court took the view that it was the duty of the court executing the decree under Order XXI, Rule 64 of the Code to see that such portion of the property, that is sufficient to satisfy the decree alone is sold and in that matter, the court need not wait for the matter being taken up by the

judgment debtor. In order to answer the said point, this Court

has adverted to the proposition of law laid down by the Apex

Court as well as this Court in Thankamma v. Leelamma [2008 (2) KLT 500], Ambati Narasayya v. M.Subba Rao [AIR 1990 SC 119] and Chandradas v. A.Nizar [2009 (4) KLT SN 8). In view of the fact that this Court has thus considered the said question in detail, which is of much relevance while considering an application for setting aside a sale, the review petitioner cannot be heard to contend that such an aspect escaped the notice of the court while rendering the impugned judgment.

11. The property sold is 25 cents of land comprised in

Re-survey No.261/10-1 of Vattapara village, which was item No.1, among the two items of property attached. Nobody has a case that there exists a building in that property. But the Court observed that the existence of the residential building in the property sold was omitted to be mentioned in the proclamation schedule. It is wrong and the impugned

judgment therefore is sought to be recalled. It may be noted

that the said aspect was noticed by this Court from what has

been stated in the impugned order. It was observed by the Execution Court in the order in E.A.No.87 of 2011 at page 5 that the judgment debtor-1st respondent herein raised a contention in the petition that the existence of the building was not noted in the proclamation schedule. It is obvious that while raising that contention, there was a mistaken impression for the 1st respondent that the property sold was not item No.1 (25 cents of land), but it was item No.2 (11 cents of land) on which a building does exist. It was that mistake which has been carried in the impugned judgment as well. The question is whether such a mistake has resulted in arriving at a wrong decision.

12. Another mistake pointed out is also apparent from the records. The upset price fixed was Rs.10,50,052/-.

However, it was noted at page 17 of the impugned judgment

that the upset price was Rs.13,50,052/-. Obviously, that is a clerical mistake. Again the question is whether that has influenced the ultimate decision in the appeal.

13. The essential reason for this Court in finding that

there was an irregularity in the sale is that item No.1 (25 cents of land) was sold ignoring the order of the Execution Court dated 07.04.2011 that item No.2 will be sold first. The 1st respondent filed E.A.No.124 of 2010 in E.P.No.24 of 2008 seeking to release one of the properties from attachment and in that petition, the Execution Court ordered that item No.2 (11 cents of property) will be sold first and only if the sale proceeds thereof was insufficient to satisfy the decree, item No.1 (25 cents of property) need to be proceeded against.

The Execution Court, however, in disregard of that order

proceeded to sell item No.1 (25 cents of property). That has been found to be a glaring irregularity, resulting in substantial injury to the 1st respondent. The mistaken statement in the

judgment regarding the existence of the building or regarding

the upset price did not influence much in arriving at such a decision. Even if those two aspects were not points for consideration, the result would not have been different.

14. The last contention of the petitioner is that having

failed to raise similar objections, while the proclamation was settled, the right of the 1 st respondent to raise such objections in the petition for setting aside the sale is foreclosed under

Order XXI, Rule 90(3) and also Explanation VII of Section 11

of the Code, but it was not considered in the impugned judgment. It may be noted that this is a case where item No.1 (25 cents of property) was sold ignoring the specific order to sell item No.2 (11 cents of property) first. That irregularity along with the consequence thereof, namely, the substantial injury thereby resulted to the 1st respondent-judgment debtor was the essential reason for allowing the appeal and setting aside the sale.

15. In Dhanalakshmi Bank v. Divakaran (supra) this Court held,

Any objections that could be raised by the judgment

debtors on the basis of any alleged defect in the proclamation stands barred not only by Section 11 of the Code of Civil Procedure read with Explanation VII

thereof but also by the express bar contained in Order

XXI Rule 90(3) of the Code of Civil Procedure. Order

XXI 21 Rule 90(3) clearly provides that no application to set aside the sale under Rule 90 shall be entertained upon any ground which the claimant could have taken on or before the date on which the proclamation of sale was drawn up.

Of course, the 1st respondent did not raise such contentions in the objection to the proclamation schedule he has filed before the execution court. As held in Ambati Narasayya (supra) it is the statutory obligation of the execution court to satisfy itself that no sale is allowed without complying with the statutory requirements. The court should ensure that no property more than that is required to satisfy the decree shall be sold. It is a mandate of the law binding the court, and therefore, the bar created by Order XXI, Rule 90(3) and Explanation VII of Section 11 of the Code shall not stand in the way of raising such material and fundamental defects, which are occurred on the part of the court itself as a reason to set aside the sale. Therefore, the said omission on the part of the court cannot be a reason for a review.

16. In Parsion Devi v. Sumitri Devi [(1997) 8 SCC

715] the Apex Court after referring to Thungabhadra Industries Ltd. v. Govt. of A.P. [AIR 1964 SC 1372], Meera Bhanja v. Nirmala Kumari Choudhury [(1995) 1 SCC 170] and Aribam Tuleshwar Sharma v. Aribam Pishak Sharma [(1979) 4 SCC 389] held thus: Under Order XLVII Rule 1 of the Civil Procedure Code a

judgment may be open to review inter alia if there is a

mistake or an error apparent on the face of the record. An error which is not self-evident and has to be detected by a process of reasoning, can hardly be said to be an error apparent on the face of the record justifying the Court to exercise its power of review under Order XLVII

Rule 1 CPC. In exercise of the jurisdiction under Order

XLVII Rule 1 CPC it is not permissible for an erroneous decision to be "reheard and corrected". A review petition, it must be remembered, has a limited purpose and cannot be allowed to be 'an appeal in disguise'.

17. This principle was reiterated in Sasi (D) Through LRs. v. Aravindakshan Nair and others [(2017) 4 SCC 692] and followed by this Court in Babu M. and others v. Union of India and others [2017 (3) KLJ NOC 13].

18. Viewed in the light of the law laid down by the

Apex Court and this Court in the decisions referred to above, none of the other grounds raised in the review petition falls within the scope and ambit of Order XLVII Rule 1 of the Code. Accordingly, we find that the petitioner failed to make out a case for a review of the judgment dated 18.3.2016.

19. Therefore, the review petition fails and the same is dismissed. Sd/- ANIL K. NARENDRAN, JUDGE Sd/- P.G. AJITHKUMAR, JUDGE dkr