

Fathima Beevi, vs Joly John,

Fathima Beevi, vs Joly John,

SooperKanoon Citation : sooperkanoon.com/1571053

Court : Kerala

Decided On : Mar-07-2022

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

Appeal No. : FAO/1/2022

Appellant : Fathima Beevi,

Respondent : Joly John,

Judgement :

C.R.

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN & THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR MONDAY, THE 7TH DAY OF MARCH 2022 / 16TH PHALGUNA, 1943 AGAINST THE ORDER DATED 26.10.2021 IN E.A.NO.205 OF 2019 IN E.P.NO.39 OF 2018 IN O.S.NO.279 OF 2010 ON THE FILE OF THE ADDITIONAL SUB COURT, KOTTAYAM APPELLANT/PETITIONER:

FATHIMA BEEVI, AGED 81 YEARS, W/O.SAID MUHAMMAD RAWTHER, PUTHENPURAYIL VEEDU, PADINJATTUM BHAGOM KARA, ATHIRAMPUZHA VILLAGE, KOTTAYAM, NOW RESIDING AT MUNDAKKAYAM VILLAGE, MUNDAKKAYAM P.O., WARD NO.21, HOUSE NO.A 379, KANNANTHANANM BUILDING, REPRESENTED BY HER SON AND POWER OF ATTORNEY HOLDER, MR.NAUSHAD.P.S., AGED 58 YEARS, W/O.SAID MUHAMMAD RAWTHER, PUTHENPURAKKAL HOUSE, ATHIRAMPUZHA P.O., KOTTAYAM-686 502. BY ADVS. VIJAI MATHEWS JOSEPH THEKKEKURUVANAL

RESPONDENT/RESPONDENT: JOLY JOHN, AGED 51 YEARS, PAZHURAKATHU HOUSE, ARPPOOKARA KARA, ARPPOOKARA VILLAGE, KOTTAYAM TAUKE, PIN-686 008. BY ADVS. C.L.JOSEPH (KTYM) LUKE J CHIRAYIL THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR FINAL HEARING ON 21.02.2022, THE COURT ON 07.03.2022 DELIVERED THE FOLLOWING:

JUDGMENT

Ajithkumar, J.

This is an appeal preferred under Order XLIII, Rule 1(j) of the Code of Civil Procedure, 1908. The appellant challenges the order dated 26.10.2021 by which the Additional Sub Court, Kottayam, dismissed E.A.No.205 of 2019 filed by the appellant seeking to set aside sale held on 13.3.2019 in E.P.No.39 of 2018 in O.S.No.279 of 2010.

2. O.S.No.279 of 2010 was filed by the respondent

herein seeking a decree of specific performance with an alternative relief of return of the advance amount paid. The amount said to have been paid as advance is Rs.3,50,000/-. The suit was settled in the Lok Adalath. An award was accordingly passed allowing the respondent to realise an amount of Rs.4,50,000/-. The award further stipulated that, in default of payment of the said amount on or before

20.02.2012, the respondent would be entitled to realise the decree amount along with interest at the rate of 18% per annum. The appellant did not make payment in terms of the

said award. Therefore, this award was put in execution. In E.P.No.39 of 2018 filed before the Additional Sub Court, Kottayam, two items of property belonging to the appellant were attached. Her property was eventually brought on sale. Two items of property are 1.38 Ares of land comprised in Re- survey No.494/3/2 (A-Schedule) and 1.10 Ares land along with a building comprised in Re-survey No.85/5 and 85/6 (B- Schedule) of Athirampuzha Village. After the proclamation was settled and proclaimed, the property was put in auction. The respondent, after obtaining leave under Order XXI, Rule 72 of the Code, bid the property in auction. The appellant thereafter filed E.A.No.205 of 2019 under Order XXI, Rule 90 of the Code seeking to set aside the sale. The Execution Court dismissed E.A.No.205 of 2019 on 26.10.2021. That order is under challenge in this appeal.

3. On 04.01.2022, when this case came up for admission, urgent notice was ordered to be served on the respondents. The respondents entered through their learned counsel.

4. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondents.

5. The point that arises for consideration is as to

whether the sale of property conducted by the execution court on 13.03.2019 in E.P.No.39 of 2018 in O.S.No.279 of 2010 is liable to be set aside on the ground of material irregularity or fraud resulting substantial injury to the appellant?

6. As per Order XXI, Rule 90 of the Code, where an

immovable property has been sold in execution of a decree, any person, who got aggrieved of such sale, may apply to the court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting of the sale. Sub-rule (2) insists that such a sale shall not be set aside even on proving irregularity or fraud in publishing or conducting the sale unless the court is satisfied that the

applicant has sustained substantial injury by reason of such irregularity or fraud. Sub-rule (3) provides that 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.

7. The learned counsel appearing for the appellant

would contend that the sale is vitiated for five reasons, namely, (i) the decree (award) put in execution is against public policy, and therefore, not executable; (ii) there was no valid attachment of the property; (iii) sale of one item of the property alone was enough to satisfy the decree and hence sale of both items of the property is illegal; (iv) the sale was for an unconscionable low price; and (v) notice under Rule 66 of Order XXI of the Code was not properly served on the appellant.

8. The submission of the learned counsel appearing

for the appellant is that the award of the Lok Adalath is against the provisions of law inasmuch as interest allowed in it is at an usurious rate of 18% per annum. It is also alleged that the appellant without understanding the real terms had entered into the compromise which led to the award. Therefore, the same is against public policy and non-

executable. In view of that matter, the sale of the property

held in execution of that award becomes fraudulent and liable

to be set aside.

9. We are afraid, this Court, in an appeal against an

order in a petition for setting aside sale filed under Order XXI,

Rule 90 of Code, can entertain such a contention. In *K.N.Govindankutty Menon v. C.D.Shaji* [AIR 2012 SC 719], the Apex Court held that in view of the unambiguous language of Section 21 of the Legal Services Authorities Act, 1987, every award of

the Lok Adalat shall be deemed to be a decree of a Civil Court and as such it is executable by that Court. It is true that in view of the provisions contained in sub-section (4) of Section 20 of the Legal Services Authorities Act, the settlement arrived at shall be guided by principles of justice, equity, fair play and other legal principles. The appellant pleads non est factum to challenge executability of the award. But that plea can be raised only in an appropriate proceeding, and cannot be in an execution proceedings. The Execution Court has no jurisdiction to inquire into such

vitiating factors and go behind the decree, on the basis of a finding thereon.

10. There is no quarrel with the proposition that a decree or order can be challenged on the ground of fraud of

such a nature, even in a collateral proceedings. In *A.V.Papayya Sastry v. Government of AP* [(2007) 4 SCC 221] the Apex Court held: fraud avoids all judicial acts. A judgment, decree or order obtained by playing fraud on the Court, Tribunal or authority is a nullity and non-est in the eye of the law. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings. But, the contention of the appellant is that the award is opposed to public policy since the interest awarded is 18% per annum. Can an award of a Lok Adalat or a decree be said to be a fraud upon court for the reason that it contains a clause for charging default interest?

11. In *Deepa Bhargava and Another v. Mahesh Bhargava and others* [(2009) 2 SCC 294] the Apex Court

held that even assuming that the term stipulating payment of

interest in the event the entire amount was not paid within a period of six months is penal in nature, the Execution Court was bound by the terms of the decree. Interest becomes leviable either under a statute or under a contract. The stipulation to pay interest at the rate of 18% per annum cannot, by itself, be said to be unreasonable. In the above circumstances, it cannot be said that the award put in execution is opposed to public policy, illegal or vitiated by fraud.

12. The learned counsel appearing for the appellant submitted that for want of a valid attachment, the sale has become invalid. The procedure for attachment of an immovable property in execution of a decree is as provided in

Order XXI, Rule 54 of the Code. Sub-rule (2) says that 'the order of attachment shall be proclaimed at some place on or

adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the court house, and also, where the property is land

paying revenue to the government, in the office of the Collector of the District in which the land is situate and, where the property is land situate in village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village'. Other than that there is no mandate of giving notice to the judgment-debtor before the attachment. But the order of attachment shall be given to the judgment-debtor. When that

notice is issued, sub-rule (1A) of Rule 54 insists that the order

shall also require the judgment-debtor to attend Court on a specified date to take notice of the date to be fixed for settling the terms of the proclamation of sale. This requirement is more clear from a perusal of form No.24 in Appendix-E to the Code.

13. The learned counsel for the appellant would

contend that the procedure for attachment as provided in the said rule has not been gone through, and no notice on attachment was served on the appellant. For such reasons also, the sale is sought to be set aside. The learned counsel appearing for the respondent, on the other hand, would contend that even if there occurred some flaw in the process of effecting attachment, the same would not vitiate the sale. It was further contended that attachment of a property is not always mandatory and for want of attachment, sale of an immovable property will not be invalid.

14. One of the modes of execution of a decree is sale

of property. Section 51(b) of the Code contains the provision enabling a court executing a decree to sell the property. It says that a decree may be executed by attachment and sale or by sale without attachment of any property. Two obvious instances of sale without attachment are, sale in execution of a decree for sale of a mortgaged property and sale in execution of a charge decree. From a literal interpretation of Section 51(b), it is not able to say that there cannot be any other instance of sale without attachment. The object of Rule 54 of order XXI of the Code is to prohibit the judgment-debtor from transferring or creating encumbrance over the property after attachment. There is no provision making attachment a condition precedent for the sale. Therefore an execution court

is empowered to bring an immovable property on sale in execution of any decree even if there is no attachment.

15. The issue can be looked at from another angle also.

Section 64 of the Code prohibits any private alienation, once the property is attached by a Court. Any such alienation or encumbering after attachment is void as against the claims arising out of the attachment. As per deeming provision under Section 65 of the Code, on confirmation of the sale, the property shall be vested in the purchaser as on the date of sale. Therefore the very purpose of the attachment is only to preserve the property for being vested with the auction purchaser on sale free of any encumbrance. In other words, if there is no attachment, there is a risk of impairment to the title in the interregnum.

16. In Kerala Ceramics Ltd. v. Sebastian [1970

KLT 949], the question whether a sale without attachment is valid or not was considered by a learned Single Judge of this Court. It was held that a court may, on application of a decree holder, order execution of the decree by attachment and sale

or by sale without attachment of any property. A court has thus power to direct the sale of the property even without any attachment. This position was more

elaborately considered by a Division Bench of this Court in Ummer and another v. Pariparamban Abdul Azeez [2015 (2) KLT 596]. After considering also the effect of the Explanation to Rule 90 of

Order XXI of the Code, which provides that the mere absence

of, defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale, held that sale of a property without attachment is not void. We respectfully accept the said view. Hence, we reject the contention of the learned counsel for the appellant that the sale in question is void for want of a valid attachment.

17. The other points urged by the learned counsel for

the appellant, namely, sale of one item of the property alone was enough to satisfy the decree and hence sale of both items of the property is illegal; the sale was for a very low price; and notice under Rule 66 of Order XXI of the Code, can be considered together.

18. The learned Counsel for the appellant would submit

that in spite of the definite stand in the objection she had filed, that the property would fetch more value and B- Schedule property should be excluded from auction, the court proceeded to sell entire area in auction. It is contended that the provisions of Rule 64 of Order XXI of the Code obligates the court conducting a sale to ensure that the property sufficient to satisfy the decree alone is sold, in execution of a decree. Therefore, if sale of the entire property was not required to satisfy the claim under the decree, the sale would get vitiated.

19. Order XXI, Rule 64 of the Code reads as follows:

'64. Power to order property attached to be sold and proceeds to be paid to person entitled.- Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the

proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.'

20. In *Ambati Narasayya v. Subba Rao* [AIR 1990 SC 119], the Apex Court held that,

'In all execution proceedings, the Court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the Court.

21. Therefore, it is the obligation of the court to ensure

that only such portion of the property which is sufficient to meet the claim in the execution petition alone is sold. The words 'necessary to satisfy the decree' in Rule 64 clearly indicate that no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. It follows that the issue as to whether the property brought on sale is sufficient portion or excess is a matter touching jurisdiction of the court and not merely one of propriety or regularity. Any

violation of the Rule therefore will vitiate the process and the sale would be illegal and coram non iudice.

22. The learned counsel appearing for the appellant

contends that the property would fetch more than Rs.50 lakhs, whereas it was sold for a paltry sum of Rs.16 lakhs. It is alleged that the property happened to be sold for such a low price since the upset price was fixed as Rs.16 lakh only. An auction sale always is in the nature of a distress sale. So, it is unlikely to get its exact

market price in a court auction. Whether or not the sale was for a sufficient price, may not always be a decisive factor while deciding a petition under Rule 90 Order XXI of the Code. It was held by a three-Judge Bench of the Apex Court in *Kayjay Industries (P) Ltd. v. Asnew Drums (P) Ltd. and others* [(1974) 2 SCC 213] that inadequacy of price in an auction sale cannot demolish every court sale. Therefore, the fact that the property was sold for a comparatively low price alone cannot be a reason to set aside the sale. But the question is whether the court exercised its jurisdiction legally while settling the proclamation

since the invariable rule is that the Court can sell such portion of the property which is sufficient to meet the claim in the execution petition alone.

23. The suit originated on an agreement to sell

B-Schedule property. It is 1.10 Ares land along with a building comprised in Re-survey No.85/5 and 85/6 of Athirampuzha Village. The agreement was that the appellant would sell that property for a sum of Rs. 9 lakhs. That property along with A-Schedule which is 1.38 Ares of land comprised in Re-survey No.494/3/2 of Athirampuzha Village was brought on sale. By fixing the upset price of each of the said properties at Rs. 8 lakhs, total upset price was fixed at Rs. 16 lakhs. The decree debt for which sale was conducted was Rs. 9,42,750/-. Yet the Execution Court brought at the first instance itself both items of the property on sale. It is obvious that the Court did not apply its mind in the matter. The Execution Court ought to have perused all the materials on record before concluding as to what is the approximate value of the property. It shall be a reasoned order. On the basis of such estimation the Court should decide what

portion of, or whole of the property need be sold.

24. The Apex Court in *Desh Bandhu Guptha v.*

N.L.Anand & Rajinder Singh [(1994) 1 SCC 131] sounded a note of caution that while fixing the estimated value of the property to be sold, the Court must not accept merely the ipse dixit of one side. It is certainly not necessary for it to state its own estimate. Rule 66(2)(e) requires the court to state only the nature of the

property so that the purchaser should be left to judge the value for himself. But, the essential

facts which have a bearing on the very material question of

value of the property and which could assist the purchaser in forming his own opinion must be stated, i.e., the value of the property, that is, after all, the whole object of Order XXI, Rule 66(2)(e) of the Code. The court should normally state the valuation given by both the decree holder as well as the

judgment debtor where they both have valued the property,

and it does not appear fantastic.

25. Therefore it is required only to state the estimated value of the property along with the valuation made by both

decree-holder and the judgment-debtor. More importantly the Court should decide what portion of the property needs to be sold. In this case it was two separate items even as per the proclamation schedule. Hence, it cannot be said that the

property was not divisible. From the order settling proclamation it is quite unable to see that the Court had applied its mind whether sale of one item of the properties was sufficient to satisfy the decree. When the decree-holder himself agreed to purchase B schedule property in 2010 for an amount of Rs.9 lakhs, fixing its estimated value as Rs.8 lakhs in 2019 appears curious. That itself is enough to show that

the Court did not apply its mind while settling the proclamation. That resulted in selling both items of property for an amount of Rs.16,00,200/-, while the decree debt was only Rs.9,42,750/-. This is a glaring instance of wrong exercise of jurisdiction resulting in failure of justice. The sale has become void for that reason.

26. Touching to the above issue the learned counsel appearing for the respondent has fallen back on Order XXI

Rule 90(3) of the Code, which provides that "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 of which the proclamation of sale was drawn up". The Apex Court in *Desh Bandhu Guptha* (supra) held that Order XXI Rule 90(3) of the Code is a special rule brought on statute by 1976 Amendment Act and it is like a "caveat emptor" that the

judgment debtor be vigilant and watchful to vindicate pre-sale

illegalities or material irregularities. He should not stand by to procrastinate the execution proceedings. If he does so, Rule 90(3) forewarns him that he pays a penalty for obduracy and contumacy. Equally it is a reminder that the court should be strict to comply with the procedural part under Rule 54(1A) before depriving the judgment debtor of the remedy under

Order XXI, Rule 90 of the Code. Here is a case where the Court

failed to discharge its duty by non complying with the mandatory provisions in Order XXI, Rule 64 of the Code and therefore the Rule 90(3) of Order XXI of the Code does not debar the appellant from raising such a contention.

27. In *Shalimar Cinema v. Bhasin Film Corporation*

[(1987) 4 SCC 717] the Apex Court held that the court has a duty to see that the requirements of Order XXI, Rule 66 are properly complied with. It is incumbent on the court to be scrupulous in the extreme. No action of the court or its officer should be such as to give rise to the criticism that it was done in a casual way. Therefore, a proclamation of sale drawn casually without compliance of the mandatory requirement and a sale held in furtherance thereof is not a sale in the eye of law. We, therefore, remind the courts in the State to scrupulously follow the directions contained in the aforesaid decisions while settling and publishing proclamation and conducting sale.

28. The requirement of Rule 66(1) of Order XXI is that

a proclamation can be drawn by the execution court only after giving notice to the decree holder and the judgment debtor. Only after giving such notice and hearing views of both sides, the court is expected to draw up the proclamation for the sale. The Apex Court in *Desh Bandhu Guptha* (supra) held,

the proclamation should include the estimate, if any, given by either judgment debtor or decree holder or both the parties. Service of notice on judgment debtor under Order XXI Rule 66(2), unless waived by appearance or remained ex parte, is a fundamental step in the procedure of the court in execution. Judgment-debtor should have an opportunity to give his estimate of the property. The estimate of the value of the property is a material fact to enable the purchaser to know its value. The purpose and requirement of such a notice was reiterated in *Mahakal Automobiles v. Kishan Swaroop Sharma* [(2008) 13 SCC 113]. After referring to the above- said decisions, this Court in *Kannadasan v. Radhakrishnan* [2018 (3) KLT SN 69] held that,

'10. Above discussion indicates a discernible rule that service of notice on the judgment-debtor is a fundamental part of the procedure touching upon the jurisdiction of the Execution Court to take further steps to sell his immovable property. Therefore, notice under

Order XXI Rule 66(2), unless proviso is applied (if not

already issued under Order XXI Rule 22), and service is mandatory. It is made manifest by Order XXI Rule 54 (1-A) brought on statute by 1976 Amendment Act with peremptory language that before settling the terms of the proclamation the judgment-debtor shall be served with a notice. The omission thereof renders the further action and the sale in pursuance thereof void unless the judgment-debtor appears without notice and thereby waives the service of notice.'

29. Although, it has been vehemently contended that

no notice as provided in Rule 66(2) of Order XXI of the Code was given to the appellant, the evidence on record shows otherwise. It may be true that a formal notice in form No.28 in Appendix E to the Code was served personally on the

appellant. It is seen from the proceedings in the Execution Petition that the appellant had been appearing through her Counsel before the Court. Rule 7 of the Civil Rules of Practice, 1971 (Kerala) says that except where otherwise provided by the Code or these rules, or any law for the time being in force, any notice directed to be given to any party shall be in writing, and may be served by the party or his pleader or agent on the other party, or his pleader or agent personally, his signature being taken in acknowledgment of such service; or by registered post, prepaid for acknowledgment to the

address for service of the party or agent. The appellant has no case that a copy of the draft proclamation schedule was not given to her Counsel appearing before the Execution Court. It is seen that the learned Counsel took time to file objection to the draft proclamation schedule. Having received a copy of the draft proclamation schedule and availed an opportunity to file objections, the appellant cannot be heard to contend that no notice as provided in Rule 66(2) of Order XXI of the Code was given to the appellant.

30. We held above that the sale of both items of property, without considering whether sale of one of the items would have been sufficient to satisfy the decree, is bad in law

and liable to be set aside. Accordingly, we set aside the order

of the execution court dated 26.10.2021 in E.A.No.205 of 2019 in E.P.No.39 of 2018 in O.S.No.279 of 2010 of the Additional Sub Court, Kottayam, and allow the appeal. The Execution Court may restore E.P.No.39 of 2018 in O.S.No.279 of 2010 on file and proceed with in accordance with law. The respondent has deposited in Court the auction price after

deducting the decree debt for which set off was allowed. The Execution Court shall allow the respondent to get a refund of that amount. Sd/- ANIL K. NARENDRAN, JUDGE Sd/- P.G. AJITHKUMAR, JUDGE dkr

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com