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Court : Karnataka

Decided On : Nov-04-1993

Reported in : ILR1994KAR145; 1994(2)KarLJ207

Judge : Shivashankar Bhat, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 - Order 21 - Rule 90

Appeal No. : C.R.P. No. 3741 of 1987

Appellant : Siddappa

Respondent : Mariyappa

Advocate for Def. : T.P. Satishchandra Kumar, Adv. for R-2 to R-4

Advocate for Pet/Ap. : M. Papanna, Adv.

Disposition : Petition allowed

Judgement :

ORDER

Shivashankar Bhat, J.

1. Petitioner is the auction purchaser. The 3rd respondent is the decree holder. The rest of the parties are either judgment debtor or his legal representatives.

2. The decree holder obtained a money decree and in execution of the same the property in question was brought to sale. The sale in the spot was on 23.6.1982. The final bid was offered in the Court precinct on 24.9.1983. The sale was for Rs. 1,500/- subject to an encumbrance of Rs.7,000/-. The sale was confirmed on 29.6.1985.

3. Misc. No. 17/86 was filed by the judgment debtors on 3.9.1986. The said petition was purported to be under Section 47 C.P.C. questioning the sale held in execution of the decree and the confirmation of the sale. The Judgment Debtors contended that the decree holder had filed a suit in O.S.No.234/74 and Execution No. 104/78 and the suit was for arrears of interest only arising out of simple mortgage. They contended that such a decree cannot be obtained by splitting up the mortgage and therefore the mortgage property cannot be sold by executing the decree in view of Order 34 Rule 14 C.P.C. and Section 67 of the Transfer of Property Act. However, this contention was given up before the lower Court, as is clear from a reading of the order under Revision. This apart, this plea was raised certainly out of desperation and not at a proper stage. Sri M. Papanna, learned Counsel for the petitioner, brought to my notice that such a plea was raised even in the earlier execution proceedings and the same was negated on 7.4.1982. Obviously, because of this the plea was not pursued before the Court once again, as is clear from the order under Revision, as already noted.

4. It was mainly contended that the sale of the immovable property cannot be finalised in the absence of a proper final bid being offered in the Court and the final bid should be accepted by the Presiding Officer. Rule 138 of Civil Rules of Practice was also not complied with in this regard. This was the contention urged before the lower Court, as is clear from para 5 of the order under Revision.

5. Before proceeding further, I may refer to the order of the Trial Court dated 7.4.1982 made on I.As 9 and 10 in the same execution proceedings, wherein the Court has held that the decree holder is entitled to sell the property for realisation of the decretal amount.

6. In the order sheet of the Executing Court dated 29.6.1985 it is recorded as under: -

'Heard on I.As 16 and 17. Since the averment made in I.A.16 is not tenable, I.A.16 is rejected. So, in view of my order on I.A.16, the question of staying the proceedings does not arise as prayed in I.A.17. Hence I.A.17 is also rejected. The sale which is already held in this execution petition is confirmed. E.F.S. is entered. File.'

From this, the Trial Court pointed out that the order sheet does not disclose whether any sale had been taken place in the Court either on 24.9.1983 or on 29.6.1985 and therefore there is no sale in the eye of law. For this the Trial Court relied upon a Decision of this Court in CHANNABASAPPA v. NANJUNDAPPA ILR 1986 KAR 35 and Anr. Decision in KRISHNAPPA, K.P. v. B. GANGAPPA 1982(1) KLJ 356. The Trial Court also negated the contention of the present petitioner as to the maintainability of the petition under Section 47 C.P.C. The petitioner had contended that the petition was barred by limitation since it should have been filed under Order 21 Rule 90 C.P.C. within 60 days from the date of sale. The Trial Court proceeded as if the petition can be entertained under Section 47 C.P.C. as stated by the judgment debtors in their Misc. case.

7. To appreciate the aforementioned contentions, it is necessary to advert to the contentions urged by the judgment debtors. The challenge to the confirmation of sale is based only on the ground that there was no sale proceedings in the Court precinct and the provisions of Rule 138 of Civil Rules of Practice were not complied with. Rule 138 of Civil Rules of Practice provides that the final bid should be offered before the Presiding Officer at the Court house. In other words, the sole contention against the confirmation of the sale is that the sale was conducted in violation of legal requirements. The question is, whether such a challenge could be advanced by recourse to Section 47 C.P.C. or the challenge comes within the provisions of Order 21 Rule 90 C.P.C.?

8. Order 21 Rule 90(1) C.P.C. read as under-

'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.'

Rule 90(2) reads as under: -

'(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.'

The above provision in Sub-rule (1) provides for a party to file application for setting aside a sale on the ground of material irregularity or fraud in publishing or conducting it. In other words, if there is any material irregularity or fraud in conducting the sale, the same shall have to be questioned by recourse to Order 21 Rule 90 C.P.C.

9. It is also true that Section 47 C.P.C. is quite widely worded, which provides for determination of all questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree. In view of Explanation (ii) thereto, it is clear that even the purchaser of the property at a sale in execution is deemed to be a 'party' to the suit.

10. Learned Counsel for the judgment debtors contended that Section 47 C.P.C. is quite comprehensive and the Miscellaneous Case filed by them before the Trial Court was perfectly in order falling under Section 47 C.P.C. That is the view expressed by the Trial Court also.

11. There are two provisions in C.P.C. - one under Section 47 and another under Order 21 Rule 90 - to challenge a sale that has taken place in execution proceedings. While Section 47 seems to be widely worded, application of Order 21 Rule 90 is confined to same aspects of the possible disputes that may arise between the parties. It is one of the principles of interpretation that when there is a specific provision and also a general provision in respect of a particular matter, to the extent the specific provision applies, the general provision will not be attracted. In other words, to the extent of the specific provision, the scope of general

provision will be carved out and taken away.

12. The purpose of Order 21 Rule 90 C.P.C. is to provide for a speedy and early disposal of the dispute about the manner in which a sale is conducted. That is why a shorter limitation is provided to file an application under this provision. If Section 47 C.P.C. is to cover the subject, there will be uncertainty about the finality of the sale and obviously the Legislature thought it fit and inexpedient to keep such a matter in suspense for a considerable period of time.

13. The view I have taken is supported by the Decision of the Full Bench of Madras High Court in A.P.V. RAJENDRAN v. S.A. SUNDARARAJAN : AIR1980 Mad123 the Court has held as follows:-

'..... Notwithstanding the wording of Section 47 which is enough to cover all applications to set aside sales on the ground either of illegality or of irregularity, its scope has naturally to be restricted so as to give due effect to Order 21, Rule 90 C.P.C. Thus, if, the sale is sought to be set aside on the ground of material irregularity in publishing and conducting the sale within the meaning of Order 21, Rule 90, then Section 47 cannot come into play at all, and the sale could be set aside only by invoking Order 21, Rule 90.....'

Thereafter, after referring to a Decision of the Supreme Court and another Decision of the Calcutta High Court, at page 129, the Madras High Court has pointed out;

'According to the Supreme Court, though the settlement of the sale proclamation preceded the publication and conduct of the sale, in so far as the irregularity in the settlement of sale proclamation relates to the essential steps to be taken by the Court in the matter of publishing and conducting the sale, it has to be taken as an irregularity in the publication itself.'

14. However, learned Counsel for the judgment debtor relied on two Decisions of this Court, to which I have already referred to in para 6 of this order, for the proposition that order sheet is conclusive as to whether there was a proper sale conducted in the Court precincts as per Rule 138 of the Civil Rules of Practice.

15. In the second Decision, viz., Krishnappa's Case, it was held that there was no proper sale conducted in the Court. The challenge to the same was put forth by an application under Order 21 Rule 90 C.P.C. as could be seen from the narration of facts at page 357. The situation was the same even in the first case viz., Channabasappa's Case. Challenge to the confirmation of sale was under Order 21 Rule 90 C.P.C. In the instant case, admittedly the sale was confirmed on 29.6.1985 and the same was sought to be challenged by filing the Misc. Case on 3.9.1986. This is clearly beyond the period of limitation prescribed for filing of an application under Order 21 Rule 90 C.P.C.

16. For the reasons stated above, I reverse the order of the Executing Court. Misc. case filed by the judgment debtors are held as barred by limitation.

17. Revision Petition is allowed.

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