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P.Sheela Vs. Vamadevan

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Court : Kerala

Decided On : Jul-01-2015

Judge : Honourable Mr.Justice C.K.Abdul Rehim

Appellant : P.Sheela

Respondent : Vamadevan

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM & THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN WEDNESDAY, THE1T DAY OF JULY201510TH ASHADHA, 1937 OP (FC).No. 847 of 2010 (R) ---------- AGAINST THE

ORDER
IN OP10052003 of FAMILY COURT, NEDUMANGAD DATED0810-2010 PETITIONER/DECREE HOLDER/AUCTION PURCHASER: ---------- P.SHEELA,D/O.PONNAMMA, BHAGAVATHY VILASOM VEEDU, MUNDAKKAL, MURUKKUMPUZHA THIRUVANANTHAPURAM. BY ADV. SMT.K.KUSUMAM RESPONDENT/SURETY/4TH JD: ---------- VAMADEVAN, S/O.MADHAVAN, RESIDING AT METHOD, MEKKUMARA PUTHEN VEEDU, METHOD ANAD, NEDUMANGAD. R1 BY ADV. SRI.M.H.HANIL KUMAR R1 BY ADV. SRI.N.G.GIREESAN THIS OP (FAMILY COURT) HAVING BEEN FINALLY

HEARD ON0107-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: OP (FC).No. 847 of 2010 (R) ---------- APPENDIX PETITIONER'S EXHIBTS: EXT.P1 TRUE COPY OF E.P.52/07. EXT.P2

ORDER

38 RULE1PETITION. EXT.P3 UNDERTAKING/BOND BY RESPONDENT. EXT.P3(A) TAX RECEIPT EXT.P4 TRUE COPY OF DECREE. EXT.P5 TRUE COPY OF DECREE EXT.P5 TRUE COPY OF EA.124/08 EXT.P6 HAND WRITTEN COPY OF B DIARY IN EP.52/07 EXT.P7 TRUE COPY OF THE IMPUGNED

ORDER

DATED810.10 IN EA12408 SETTING ASIDE SALE. /TRUE COPY/ P.S TO JUDGE cl C.K.ABDUL REHIM & K. RAMAKRISHNAN, JJ.

..... O.P.(FC).No.847 of 2010 ..... Dated this the 1st day of July, 2015.

JUDGMENT

Ramakrishnan, J: This original petition is filed by the counter petitioner/decree holder/auction purchaser in E.P.No.52/2007 in O.P.No.1005/2003 of Family Court, Nedumangad against the order in E.A.No.124/2008 invoking the supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

2. It is alleged in the petition that the petitioner herein filed O.P.No.1005/2003 on the file of the Family Court, Thiruvananthapuram against her husband and his in-laws for a decree for return of gold ornaments, paternity, past and future maintenance and also for divorce. While the case was pending, a petition was filed under Order XXXVIII Rule 1 of the Code of Civil Procedure for arrest of the first respondent in the original petition before judgment and he was arrested and produced before the trial court. The respondent herein appeared and had undertaken to produce the first defendant in the case, who is none other than the uncle of the respondent, O.P.(FC).No.847 of 2010 2 and executed Ext.P3 bond and offered Ext.P3 (a) tax receipt as security for the plaint claim and for the appearance of the first defendant. Thereafter neither the respondent nor the surety

appeared. The court below disposed of the original petition ex parte and Ext.P4 ex parte decree was passed against the defendants in that proceedings granting maintenance and other monetary reliefs to the petitioner declining the prayer for divorce. Thereafter, she filed execution petition before the Family Court against the respondent also showing him as 4th respondent and that petition was closed because the necessary steps for execution could not be taken. Thereafter the property regarding the present respondent was procured and filed fresh E.P namely Ext.P1 in which the respondent appeared and filed EA.No.124/2008 seeking adjournment of the sale. The court below conducted the sale and after about two years, allowed the petition for adjournment of the sale treating it as an application to set aside the sale and accordingly, the sale was set aside as per Ext.P7 order, which is being challenged by the petitioner.

3. Heard learned counsel for the petitioner and the respondent. O.P.(FC).No.847 of 2010 3 4. Learned counsel for the respondent vehemently argued that the respondent stood as surety and as per the provisions of Order XXXVIII Rule 1, if the surety has undertaken the responsibility of the defendants and if any default was committed by the defendants, the surety can be proceeded against for the claim made by the petitioner against the defendants. It is on that basis that the execution petition was filed. No objection was filed by the respondent to the execution petition. Thereafter when the property was proclaimed for sale, the respondent herein filed E.A.No.124/2008 for adjournment of the sale. The court below passed no orders in that application and conducted the sale and permission was granted to the petitioner and accordingly, she participated in the auction and purchased the property in the auction. But sale confirmation was not effected and as per the Rules, once no application for setting aside the sale is filed within the period provided, the court has no other option but to confirm the same, which has not been done in this case. But later the impugned order passed by the court below treating the application for adjournment as one for setting aside the same which is unsustainable in law and the same is liable to be set O.P.(FC).No.847 of 2010 4 aside.

5. On the other hand, counsel for the respondent submitted that in fact he was not a party to the proceedings and he had not executed any bond undertaking the

liability of the defendant in the suit proceedings and he had only stood as surety for producing the defendant on the next hearing date and no bond was executed for the entire suit claim as well. If at all the respondent could not be produced, the court can only enforce that bond and not for the purpose of realizing the decree amount by sale of the property. Further, he had filed Ext.P5 petition stating all these facts and sought adjournment of the sale till the disposal of the petition. In that, the court below passed an order stating that the sale could be conducted subject to the decision in the EA. Ultimately, the sale was conducted and the petitioner participated in the auction and purchased the property. Thereafter EA was elaborately heard and order was passed. So there is no illegality committed by the court below .

6. We have gone through the entire records and also the order passed by the court below. Whenever an application has been filed for adjournment of the sale or for considering the O.P.(FC).No.847 of 2010 5 objections before conducting the sale, the court has got duty to consider those objections and only after considering those objections it ought to have posted for further steps for sale of the property. But on going through the affidavit filed along with the petition, it can be seen that the judgment debtor had raised several contentions regarding executability of the decree against him and sale of the property for the decree in a proceedings in which he was not a party. So under the circumstances, the entire procedure followed by the court below culminated in sale of the property and permitted the petitioner to participate in the auction etc are not proper. The court cannot said to be of fault, especially when the EA was kept alive, in not confirming the sale. Under such circumstances, we feel that the procedural error committed by the court below has to be corrected by setting aside Ext.P7 order and also the sale conducted by the court below in which the petitioner had purchased the property and the matter has to be remitted to the court below for fresh disposal of the objections raised by the petitioner in EA.No.124/2008 afresh after considering the objections raised by both the parties. So the entire proceedings including sale of the property which was purchased O.P.(FC).No.847 of 2010 6 by the petitioner are set aside and the matter is remitted back to the court below for considering the objections raised by the respondent herein regarding executability of the decree against him and proceeding against his estate for realisation of the amount due to

the petitioner and pass appropriate orders in that application untrammelled by the observations made by the court below in Ext.P7 order and dispose of the EP as expeditiously as possible, at any rate, within a period of two months from the date of receipt of a copy of this judgment. Parties are directed to appear before the court below on 29.7.2015. Send back the records also to the court below immediately. With the directions and observations, this original petition is disposed of. Office is directed to communicate a copy of this judgment to the concerned court immediately. Sd/- C.K.ABDUL REHIM, JUDGE. Sd/- K. RAMAKRISHNAN, JUDGE. /true copy/ P.S to Judge cl O.P.(FC).No.847 of 2010 7

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