

Cherotty Vs. Charu

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Court : Kerala

Decided On : Jan-08-2008

Reported in : 2008(1)KLJ329; 2008(1)KLT532

Judge : K.T. Sankaran, J.

Acts : Code of Civil Procedure (CPC) - Order 21, Rule 72

Appeal No. : C.R.P. No. 872 of 2004

Appellant : Cherotty

Respondent : Charu

Advocate for Def. : Babu S. Nair, Adv.

Advocate for Pet/Ap. : T. Sethumadhavan,; Pushparajan Kodoth and; K. Jayesh Moh

Disposition : Petition dismissed

Judgement :

ORDER

K.T. Sankaran, J.

1. In the partition suit filed by the petitioner herein, a preliminary decree was passed declaring 1/4 share to the plaintiff, 1/4A share each to defendants 2 and 3

and 1/4 share to defendants 3 to 7 together. On the application of the plaintiff, final decree was passed on 29-8-1989.

2. E.P. No. 2 of 1999 was filed by the petitioner for delivery of the property allotted to him. Delivery was effected and the Execution Petition was closed on 4-10-1999. As per the final decree, the petitioner was also held entitled to realise a sum of Rs. 10,487.50 as the value of the tress cut by the second defendant. E.P. No. 149 of 2000 was filed by the petitioner for realisation of the amount from the second defendant. The executing court passed an order to sell the property allotted to the second defendant, which was made a charge for realisation of the amount due to the plaintiff. Sale was scheduled to be held on 25-09-2002. The petitioner had obtained leave of the Court under Rule 72 of Order XXI of the Code take place for want of bidders. When the Execution Petition was taken up on 28-9-2002, the court below passed the following order.

Petition for sale of immovable property.

Sale not conducted. The petitioner did not participate in the auction even after getting permission. Hence this petition is dismissed

The above order is under challenge in this Civil Revision Petition.

3. I am of the view that the court below was not justified in dismissing the Execution 16 Petition on the ground that the petitioner decree holder did not participate in the auction. In the Execution Petition filed by the petitioner, his prayer was to realise the amount by sale of the property. When an Execution Petition is filed, it is the duty of the, executing court to execute the decree. It was not incumbent on the decree holder to apply for leave to bid. Even if no such leave was sought for, the court was bound to proceed with the execution and to realise the amount by sale of the property. Leave granted to the petitioner to bid at the auction only enables him to participate in the auction. It does not cast an obligation on him to bid at the auction. He may choose to bid or abstain from bidding. The Court cannot compel the decree holder, who has obtained leave under Order XXI Rule 72 of the Code of Civil Procedure, to bid at the auction. The option rests with the person who has obtained leave and the Court cannot compel him to be

present at the auction and to offer his bid. Dismissal of the Execution Petition on the ground that the decree holder did not participate in the auction was illegal.

4. The order passed by the court below is unsustainable. The Civil Revision Petition is allowed and the order impugned is set aside. The court below shall proceed with the Execution Petition in accordance with law.

5. It is brought to my notice that the petitioner had filed another Execution Petition as E:P. No. 212 of 2003 and that Execution Petition was dismissed on the ground of limitation. It is made clear that dismissal of E.P. No. 212 of 2003 is not a ground for not proceeding with the execution proceedings in E.P. No. 149 of 2000.

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