Francis Vs. John Britto

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SooperKanoon Citation : sooperkanoon.com/727886

Court : Kerala

Decided On : Oct-21-2004

Reported in : 2004(3)KLT1113

Judge : S. Sankarasubban and; A.K. Basheer, JJ.

Acts : Limitation Act, 1960 - Sections 5 and 127 - Schedule - Article 127; Code of Civil Procedure (CPC) , 1908 - Order 21, Rule 89

Appeal No. : C.R.P. No. 637 of 2004

Appellant : Francis

Respondent : John Britto

Advocate for Def. : C.A. Rajeev,; K.V. Sadananda Prabhu,; V.P.K. Panicker

Advocate for Pet/Ap. : Anil K. Narendran, Adv.

Judgement :
ORDER

S. Sankarasubban, J.

1. Both these cases are connected. Appellant in the appeal and the petitioner in the Civil Revision Petition is the same person. State Bank of Travancore filed O.S. No. 129 of 1984 and obtained a decree for recovery of money. During the

execution proceedings, the second defendant died and deceased defendant's legal heirs were impleaded. The decree schedule property consisting of 42 cents of land at Chettikkadu Muri was brought to sale. In the Court auction conducted on 3.10.2002, the petitioner was the auction purchaser for Rs. 84,001/-. As provided under the auction notice, the petitioner remitted the entire amount in time and the matter was posted to 5.12.2002 for confirmation of the auction.

2. On 3.12.2002, beyond the time limit of 60 days from the date of the sale, the first respondent, who is the fifth judgment debtor deposited an amount of Rs. 4,205/- being 5% of the purchase price. The purchaser filed E.A. No. 510 of 2002 under Order XXI Rule 89 of the Code of Civil Procedure to set aside the sale in favour of the petitioner. In E.A.No.510 of 2002, the date of sale was mentioned as 4.10.2002, instead of 3.10.2002. To the above application, the petitioner filed objection. In the objection, the petitioner has categorically contended that E.A. No. 510 of 2002 is not maintainable, as the deposit was made beyond 60 days. The petitioner further contended that with ulterior motive the first respondent mentioned the date of auction as 4.10.2002 and in addition to this he has absolutely no interest in the decree schedule property.

3. On 27.1.2003, after a lapse of more than one month, the first respondent filed E.A. No. 58 of 2003 under Section 151 of the Code of Civil Procedure seeking an order to treat E.A. No. 510 of 2002 for setting aside the sale, as filed within time or in the alternative condone one day's delay in making the deposit and filing the said E.A. To E.A.No.58 of 2003, the petitioner filed a detailed objection contending that the delay in depositing the purchase money cannot be condoned by invoking the inherent powers and there is no provision to condone the said delay. Along with E.A. No. 58 of 2003, the first respondent also filed E.A. No. 59 of 2003 to amend the date of auction mentioned in E.A. No. 510 of 2002 as 3.10.2002 instead of 4.10.2002. To the above application as well, the petitioner filed a detailed objection.

4. According to the petitioner, without properly appreciating the various contentions raised by the petitioner, the Court below by its order dated 12.2.2004 allowed E.A.No.58 of 2003 and consequently allowed E.A. No. 510 of 2002

thereby setting aside the sale. In the above circumstances C.R.P. No. 637 of 2004 is filed against the order in E.A. No. 58 of 2003 while F.A.O.No.86 of 2004 is filed against the order in E.A. No. 510 of 2002. By the impugned order, the Court below condoned the delay of one day in filing the application. The Court below held that so far as the petition under Order XXI Rule 89 of the Code of Civil Procedure is concerned, it is governed by Article 127 of the Limitation Act by which the petition has to be filed within 60 days. It was also of the view that there was no provision for condoning the delay. In spite of this, the Court below allowed the petition on the ground that the judgment debtor should not suffer because of the delay in the Court. According to the judgment debtor, E.A.No.510 of 2002, was filed for setting aside the sale conducted in the E.P. on 3.10.2002 by depositing the amount due to the decree holder and 5% thereon due to the auction purchaser. The deposit was made on 3.12.2003 on the 61st day. It was not due to any fault on the petitioner that the deposit had to be on the 61st day of the sale. In fact, money was arranged for deposit on 29.11.2002. A request for issue of chalan was filed by the petitioner's advocate on 29.11.2002 itself. But the Court ordered issuance of the chalan only on 2.12.2002. The chalan was received from the office only at 4.30 P.M. By that time, time for deposit in the treasury was over. On the next day itself, the deposit was made and the application was also filed to set aside the sale. The delay in deposit and filing the application to set aside the sale were not due to any laches on the part of the petitioner. The Court below took into consideration this and condoned the delay in the interest of justice.

5. We heard learned counsel for the petitioner and learned counsel for the respondents.

6. According to us, the order passed by the Court below is not correct. Under Article 127 of the Limitation Act, a petition to set aside the sale has to be filed within 60 days of sale. Section 5 of the Limitation Act does not apply to execution proceedings. Hence that cannot apply to the delay. There is no dispute even by the Court below that the application wad filed on the 61st day. The Court below went wrong in holding that the delay happened due to the delay in the office of the Court. This is not a matter that is to be taken into consideration. What we have to see is whether the petition has been filed within 60 days. If it is not filed within 60

days, the petition is not maintainable.

7. Question arose in the decision reported in Devineni Durgamba v. M/s. Raj Kumar Financiers, AIR 1998 AP 365 as to whether Section 4 of the Limitation Act applies to the petition filed under Order XXI Rule 89 of the Code of Civil Procedure. The Court held that the benefit' under Section 4 of the Limitation Act is available only to suit, appeal or application and not to the deposits required to be made under Rule 89 or Rule 92(2) of the Code of Civil Procedure. In Rustomji on Limitation 7th Edition at page 1345, it is stated thus: 'Delay in applying within the period of 60 days prescribed by Article 127 cannot be excused as Section 5, Limitation Act, is not applicable to such cases. The Court has no discretion to enlarge the 30 days where a definite period of limitation has been provided by law within which action must be taken, the Courtis not entitled to extend such period by purporting to act under Section 151, C.P.C.' In Mohan Lal v. Hari Prasad Yadav and Ors., (1994) 4 SCC 177, the Supreme Court has held thus: 'It is settled law that an application to set aside sale under Order 21 Rule 89 of the Code is governed by Article 127 of the Limitation Act. Section 5 of the Limitation Act has no application on its own wordings'. The Court went on to consider whether time can be extended under Section 148 of the Code of Civil Procedure and it was held that Section 148 of the Code of Civil Procedure would not be applicable for the reason that the time for making an application under Rule 89 of Order 21 of the Code is not fixed by the Court. Hence, we are of the view that the orders passed by the Court below are not correct. Hence, the impugned orders are set aside and the E.A. is dismissed.

C.RP. and R.F.A. are disposed of as above.