Bahuleyan Vs. Moosa

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Court : Kerala

Decided On : Oct-18-2005

Reported in : 2006(4)KLT882

Judge : K.T. Sankaran, J.

Acts : Code of Civil Procedure (CPC) (Amendment) Act, 1976; Code of Civil Procedure (CPC) , 1908 - Order 21, Rules 66(1), 66(2), 72A, 90 and 90(3)

Appeal No. : F.A.O. No. 202 of 2003

Appellant : Bahuleyan

Respondent : Moosa

Advocate for Def. : T.A. Ramadasan, Adv.

Advocate for Pet/Ap. : Sebastian Davis and; A. Antony, Advs.

Judgement :

K.T. Sankaran, J.

1. The judgment debtor, whose application for setting aside the court auction sale under Rule 90 of Order XXI was dismissed by the Executing Court, challenges the order in this appeal. The suit was filed by the first respondent for amounts due to him as per an equitable mortgage created by the appellant/petitioner. The suit was

compromised and a compromise petition was filed by the parties. The trial Court passed a decree in terms of the compromise.

2. In execution of the compromise decree, E.P. No. 91 of 2002 was filed by the decree holder for sale of the immovable property belonging to the judgment debtor. It would appear that there was attachment of the property, though it was not necessary since the suit was on mortgage. The Executing Court passed an order to sell the immovable property for realisation of the decree debt. A proclamation was issued fixing the date of sale as 7-1-2003. On 7-1-2003, the judgment debtor paid a sum of Rs. 25,000/- towards the decree debt. Though he prayed for adjournment of the sale, the Executing Court did not grant that prayer. As per the order in E.A. No. 9 of 2003 dated 7-1-2003, the decree holder was allowed to participate in the auction. It would appear that the sale was adjourned to 17-2-2003. On that day, auction was held and the decree holder bid at the auction for a sum of Rs. 4,00,100/-.

3. E.A. No. 578 of 2003 was filed by the judgment debtor under Rule 90 of Order XXI to set aside the sale. He filed E.A. No. 580 of 2003 for appointing a commissioner to value the property. According to the judgment debtor, the property is worth Rs. 22 lakhs. The Executing Court dismissed the application for the issue of a commission on 20-8-2003 and on that date itself dismissed E.A. No. 578 of 2003 filed by the judgment debtor to set aside the sale. The Executing Court confirmed the sale on 25-08-2003.

4. The contention of the judgment debtor is that the Executing Court did not fix the reserve price under Rule 72-A of Order XXI of the Code of Civil Procedure and, therefore, the sale is vitiated. It is further contended that the Executing Court erroneously fixed the upset price of the property at Rs. 4 lakhs while the amount sought to be realised was more than Rs. 7 lakhs and the value of the property sought to be sold was more than Rs. 20 lakhs. It is also contended that sale of a portion of the property was sufficient to satisfy the decree and it was not necessary to sell the whole property including the residential house belonging to the judgment debtor where he is residing with his wife and children, aged mother and a dumb sister.

5. Learned Counsel for the decree holder, on the other hand, contended that in spite of the compromise decree, the judgment debtor did not pay the decree amount as stipulated in the compromise and he deliberately evaded payment. The Executing Court duly published and conducted the sale. The publication was made in the newspaper fixing the date of sale as 7-1 -2003. There was no irregularity or illegality in publishing and conducting the sale. There was no other bidder and as permitted by the executing Court, the decree holder bid in auction for a reasonable price. It is also contended that the objections now raised by the judgment debtor ought to have been raised by him before sale and those objections are not available to be raised now in view of Sub-rule (3) of Rule 90 of Order XXI of the Code of Civil Procedure.

6. To appreciate the contentions raised by the judgment debtor as well as the decree holder, first of all it is necessary to ascertain the nature of the decree. The compromise petition mentions that the plaintiff shall have a charge over the plaint schedule property to the extent of the decree amount and interest. It is also provided in the compromise petition that upon payment of Rs. 4,16,500/- the plaintiff shall hand over the original of the title deeds and the documents relating to the plaint schedule property and shall take steps to 'release' the attachment order. It is also seen from the compromise petition that attachment before judgment was made. If the decree is a mortgage decree, as held by this Court in several decisions, the property cannot be sold in lots, unless the decree specifically provides for the same. In such cases, the judgment debtor cannot put forward a contention that a portion of the property alone should be sold for realisation of the decree debt. If it is not a mortgage decree, the judgment debtor can raise such a contention. Similarly, if it is not a mortgage decree, the judgment debtor cannot raise a contention that the reserve price should be fixed under Rule 72-A of Order XXI of the Code of Civil Procedure. Going by the plaint, the suit is a mortgage suit. An equitable mortgage was created and there is no dispute over it. It is true that in the decree a provision is made creating a charge. Even without a charge being created, the mortgage can be enforced and any encumbrance created after the creation of the mortgage will only be subservient to the mortgage. So also, the fact that there was attachment before judgment, which was quite unnecessary in the case of a mortgage, does not change the character of the suit or the decree

therein. Therefore, I am of the view that the decree is a mortgage decree.

7. Now, the question to be decided is whether the sale is vitiated due to the failure to fix the reserve price under Rule 72-A of Order XXI of the Code of Civil Procedure. Rule 72-A mandates that a mortgagee of immovable property shall not bid or purchase property sold in execution of a decree on the mortgage unless the Court grants him leave to bid for or purchase the property. It is also mandatory under Rule 72-A that the Court shall fix a reserve price as regards the mortgagee and the reserve price shall be not less than the amount due under the decree, unless the Court otherwise directs. The Executing Court has not passed any order fixing the reserve price. Though permission was granted to the decree holder to bid at the auction, the executing Court did not bestow its attention to the necessity of fixing reserve price, nor did the decree holder bring it to the notice of the Court. When the auction took place, since the Executing Court had fixed the upset price, the decree holder could make a bid at Rs. 4,00,000/- and there was nobody else to bid at the auction. To my mind, this has resulted in material irregularity in conducting the sale. The sale is liable to be set aside on that short ground.

8. Counsel for the decree holder contended that the upset price fixed by the Court was the same as reserve price and there was no irregularity or illegality in conducting the sale. Since an upset price has already been fixed, it must be taken, according to the counsel, that the Executing Court applied its mind and allowed the decree holder to bid at the auction for an amount of not less than Rs. 4 lakhs. He relied on the decision of the Madras High Court in Dr. A.U. Natarajan and Anr. v. Indian Bank, Madras : AIR1981 Mad151 , to contend that the reserve price is the same as the upset price. A Division Bench of this Court had occasion to consider this question in Nedungadi Bank Ltd. v. Ezhimala Agrl. Products : AIR2004 Ker62 , wherein it was held as follows:.We however are of the view that the terms 'reserve price' and 'upset price' though analogous and almost homologous are not synonymous. While understood in the context in which the expression is employed in the code, 'reserve price' means a price reserved at an auction as the minimum amount realisable by sale of the property so as to realise the entire mortgage debt or a proportionate portion of the mortgage debt a price which will remain static during the sale unless the court on grounds of genuine

diffidence on the side of the decree holder chooses to reduce the same. Fixation of reserve price is peculiar to situations where court grants permission to mortgagee-decree-holders to bid in the auction. Upset price and reserve price are certainly the lowest price for which the properties will be sold in auction. But the term 'reserve price' is exclusive to mortgagee-purchasers. The term 'upset price', is used generally in respect of purchases by all others including third parties. When upset price has been fixed, the bid should commence with that price and the sale will ultimately be held for an amount higher than that price. But in the case of reserve price, the bid can commence with the upset price which may be an amount below the reserve price. But the moment the mortgage-decree holder avails the leave granted to him by the court, the sale will be knocked down in his favour for the reserve price, though nothing prevents a conscientious decree-holder from bidding and purchasing for a higher amount.

In view of the decision of this Court, I am not inclined to agree with the counsel for the decree holder that the upset price is the same as reserve price. In Nedungadi Bank's case, this Court had referred to the decision of the Madras High Court in : AIR1981 Mad151 .

9. 'Upset price' is a term which is not defined in the Code of Civil Procedure. In paragraph 11 of the judgment in : AIR2004 Ker62 , discussion is made as to what is the meaning of 'upset price'. I respectfully follow the same.

10. The question whether the Executing Court was bound to fix the upset price was a vexed question before the CPC Amendment of 1976. After the amendment of 1976, the second proviso to Rule 66(2) of Order XXI was inserted, which reads as follows:

Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties.

Even before the amendment of 1976, the Supreme Court considered this question in Gujadhar Prasad and Ors. v. Babu Bhakta Ratan and Ors. : [1974]1SCR372 .

After considering the decisions of the various High Courts, the Supreme Court summarised the principles in paragraph 15 of the judgment, which reads as follows:

15. A review of the authorities as well as the amendments to Rule 66(2)(e) make it abundantly clear that the Court, when stating the estimated value of the property to be sold, must not accept merely the ipse dixit of one side. It is certainly not necessary for it to state its own estimate. If this were required it may, to be fair, necessitate insertion of something like a summary of a judicially considered order, giving its grounds, in the sale proclamation which may confuse bidders. It may also be quite misleading if the Court's estimate is erroneous. Moreover, Rule 66(2)(e) requires the Court to state only the facts it considers material for a purchaser to judge the value and nature of the property himself. Hence, the purchase should be left to judge the value for himself. But, essential facts which have a bearing on the very material question of value of the property and which would assist the purchaser in forming his own opinion must be stated. That is, after all, the whole object of Order 21, Rule 66(2)(e), Civil Procedure Code. The Court has only to decide what all these material particulars are in each case. We think that this is an obligation imposed by Rule 66(2)(e). In discharging it, the Court should normally state the valuation given by both the decree holder as well as the judgment debtor where they have both valued the property; and these do not appear fantastic. It may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised, which could reasonably be expected to effect valuation. What could be reasonably and usefully stated succinctly in a sale proclamation has to be determined on the facts of each particular case. Inflexible rules are not desirable on such a question.

The same principle has been incorporated by inserting the second proviso to Rule 66(2) by the CPC Amendment Act of 1976. If the estimate made by the Court is erroneous, the intending purchaser would be misled by such estimation and the likelihood of the property being sold for a lesser price is on the higher side. The Supreme Court held that if the Court thinks it fit to fix the upset price, it is always better to pass a judicially considered order stating the grounds. But, after the introduction of the second proviso to Rule 66(2), the executing Court is not bound

to make an estimate of its own and fix the upset price. It is sufficient if the value of the property as estimated by the decree holder and the judgment debtor are shown in the sale proclamation. The question of fixing the upset price came up for consideration before the Supreme Court in Shalimar Cinema v. Bhasin Film Corporation and Anr. : AIR 1987 SC2081 . The Supreme Court held that the Court has a duty to see that the requirements of Order XXI Rule 66 are properly complied with. Though it may not be necessary for the Court to make a valuation and enter it in the sale proclamation in every case, it is desirable, at least in cases of sale of valuable property, that the court makes its valuation and enter it in the sale proclamation. In Desk Bandhu Gupta v. N.L Anand and Rajinder Sing : (1994)1SCC131 , the Supreme Court held that the Court should apply its mind to the need for furnishing the relevant and material particulars in the sale proclamation and that record should indicate application of judicial mind. The Supreme Court held as follows:

Moreover, Rule 66(2)(e) requires the court to state only 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 21, Rule 66(2)(e), CPC. The court has only to decide what are all these material particulars in each case. We think that this is an obligation imposed by Rule 66(2)(e). In discharging it, 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. It may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised, which could reasonably and usefully be stated succinctly in a sale proclamation has to be determined on the facts of each particular case. Inflexible rules are not desirable on such a question. It could also be angulated from another perspective. Sub-rule (1) of Rule 66 enjoins the court that the details enumerated in Sub-rule (2) shall be specified as fairly and accurately as possible.

It was further held that non-application of mind by the Executing Court to the mandatory requirements under the Code amounts to material irregularity. The

Supreme Court took the view that Rule 90(3) is not applicable where the procedure for sale adopted by the executing Court is in violation of the mandatory requirements of the Rules. This Court in K.V. Thomas v. Malabar Industrial Co. Ltd. 1962 KLT 315, held:

While proceeding against the property of a judgment debtor for compulsory sale in execution, law and fairness require the court to ensure that the judgment debtor is not unduly harassed in his misfortune and to adopt all reasonable means to secure a reasonable price of the property at the court sale.

In the case on hand, the judgment debtor had filed objections before the Executing Court wherein it-was stated that the value of the property as estimated by the decree holder is too low, that there is a pucca residential house having four bed rooms and that there are other improvements in the property sought to be sold which were not noticed in the draft sale proclamation. The judgment debtor estimated the value of the property at Rs. 22 lakhs, in the objections to the draft sale proclamation filed by him before the executing Court. It was also stated in the objections to the draft sale proclamation that the property sought to be sold is the residential compound of the judgment debtor and that sale of a portion of the property excluding the house would be sufficient to satisfy the decree. The Executing Court did not advert to the objections to the draft sale proclamation and did not pass any order to incorporate in the sale proclamation the objections raised by the judgment debtor regarding value of the property and the nature of the improvements. The result is that the sale proclamation contained only the value as suggested by the decree holder and the intending purchasers were put in dark as to the nature and value of the property and the valuation suggested by the judgment debtor. No judicially considered order was passed by the Court and, therefore, there was no material for ascertaining the real value of the property by the intending purchasers. This also has materially affected the proceedings in court auction sale. The fact that no bidders were available, according to me, is an indication of lack of necessary data available in the sale proclamation. In the light of the facts mentioned above, I am unable to accept the contention of the decree holder that the bar under Sub-rule (3) of Rule 90 of Order XXI of the Code of Civil Procedure would apply to the facts of the case.

11. Though an application was filed by the judgment debtor to appoint a Commissioner to assess the real value of the property, the executing Court dismissed that application. The consideration of the question involved in the case has materially been affected by the dismissal of the application for the issue of a commission. A Commissioner could be appointed to assess the real value of the property and it would have helped the Court to ascertain whether there was material irregularity or fraud in publishing and conducting sale. Though the low valuation of the property by itself may not be a sufficient ground for setting aside the sale, certainly it is a relevant fact while deciding the questions to be considered under Rule 90 of Order XXI of the Code of Civil Procedure in the facts and circumstances of the case. The executing Court was not justified in dismissing the application for issuing a commission.

12. From the records, it is seen that when the sale was scheduled to be held on 7-1-2003 at 2 p.m. The decree holder was not present to bid at the auction, though his application for permission to bid in auction was granted by the Court on that date. On 7-1 -2003 he filed an application to adjourn the sale to another date, wherein he stated that he could not attend the auction in time due to traffic block. On the date of sale, namely, 7-1-2003, in spite of the newspaper publication, there was no bidder. Even on the adjourned date, namely, on 17-2-2003, there was no other bidder available and the decree holder bid the property in auction. Had the Executing Court fixed the reserve price, the property would not have been sold for a low price. Normally, the reserve price would not be less than the decree amount. The consequence of not fixing the reserve price is that though the appellant/judgment debtor lost his residential property, still his liability under the decree is not fully discharged. I am fully satisfied that the proceedings in the conduct of sale were materially irregular and that the mandatory requirements of a court auction sale were not satisfied in the case. Consequently, the sale held on 17-2-2003 and the confirmation of sale on 25-8-2003 were illegal. The executing Court was not justified in dismissing E.A. No. 578 of 2003. I am of the view that the grounds under Rule 90 of Order XXI are made out by the judgment debtor and the execution sale is liable to be set aside. It is also apposite to note here that the decree holder is a financier and the property which is sold in auction is the residential property of the judgment debtor.

Accordingly, F.A.O. is allowed and the order in E.A. No. 578 of 2003 is set aside. E.A. No. 578 of 2003 is allowed and the court auction sale is set aside. The executing Court shall proclaim and sell the property in auction after complying with all the mandatory legal requirements.