

K. Dandayutham Chettiar Vs. S.M.E. Ramasamy and anr.

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Court : Chennai

Decided On : Jul-01-1994

Reported in : (1994)2MLJ448

Appellant : K. Dandayutham Chettiar

Respondent : S.M.E. Ramasamy and anr.

Judgement :

ORDER

Thanikkachalam, J.

1. This revision is directed against the order passed in E.A. No. 412 of 1980 which in turn arose out of the order passed in E.P. No. 47 of 1978 in O.S. No. 110 of 1977. The petitioner herein is the court auction purchaser. The 1st respondent herein is the defendant. The 2nd respondent is the plaintiff. The plaintiff filed O.S. No. 110 of 1977 against the defendant and the said suit was decreed on 20.9.1977. The decree-holder file E.P.No.47 of 1978 and brought to sale the properties belonging to the judgment-debtor. In the court auction sale held on 5.9.1979 the 2nd respondent purchased the properties for a sum of Rs. 40,005. The sale was confirmed on 11.11.1979. Thereafter, the judgment-debtor defendant filed E.A. No. 412 of 1980 to set aside the sale under Order 21, Rule 90, C.P.C. However the execution court dismissed the said E.A. No. 412 of 1980. Aggrieved, the judgment-debtor filed C.M.A. No. 98 of 1991 as against the order

passed in E.A. No. 412 of 1980 and in the appeal the appellate court set aside the order passed by the executing court in E.A. No. 412 of 1980, and allowed the appeal filed by the judgment-debtor. In the result, the auction sale was set aside. It is against that order, the present revision has been preferred by the court auction purchaser.

2. Learned Counsel appearing for the petitioner/court auction purchaser submitted as under:

It is not correct to state that the property was purchased in the court auction under the name of the petitioner herein as benami for the decree-holder. The decree-holder and the auction purchaser are divided brothers who are living separately and carrying on business separately without any connection between them. The above said fact taken along with other evidence clearly shows that the finding of the lower appellate court on the allegations of the first respondent that the property has been purchased in the name of the petitioner benami is wholly unsustainable in law. The 7th item of encumbrance noted in the sale proclamation is not relatable to the properties in question, and the same cannot be characterised as irregular or illegal in the light of the encumbrance certificate which had been handed over by the first respondent at the time of mortgage of the property in question. The decree-holder and his wife were not aware of the fact that the 7th item of encumbrance does, not relate to the property in question. The said finding is not based on any legally acceptable evidence but is opposed to positive material which go to show that the said encumbrance has been shown as related to the properties in question even at the time of mortgage of the property. The finding that the mention of the 7th item of encumbrance has been purposely and wantonly made by the decree-holder is perverse and unsustainable. Even assuming that the mention of the said encumbrance could be said to constitute irregularly, the lower appellate court ought to have held that the first respondent/judgment-debtor had waived the same which is obvious from his conduct before executing court and therefore ought to have held that the first respondent/judgment-debtor is estopped from challenging the validity of the sale proclamation. There is no waiver on the part of the first respondent by him and therefore cannot be the subject matter of alleged irregularity at his instance. There had been a prejudice to the first

respondent/judgment-debtor on account of the alleged irregularity in the sale proclamation. The said finding is, besides being contrary to law, is opposed to the concurrent finding of both the courts that the price fetched for the property is proper and cannot be said to be inadequate. There has been no irregularity in the publicity of the sale and the price fetched for the property is fair and reasonable. For all these reasons it was submitted that the lower appellate court was not correct in setting aside the sale.

3. On the other hand, learned Counsel appearing for the respondent submitted as under:

The sale proclamation was not drawn up properly according to the procedure. No proper advertisement for sale was made. It is not correct to state that the judgment-debtor waived his right to question the irregularities committed in the sale proclamation. The inclusion of item No. 7 in the encumbrance in the proclamation is a depressing factor in selling the property. Simply because several adjournments were sought for by the judgment-debtor on payment of certain amount would not by itself would go to show that the judgment-debtor waived his right in questioning the irregularities occurred in the sale proclamation. Defendants 1 and 2 are brothers. The property was purchased in the name of the 2nd respondent for the benefit of the 1st respondent. The property in question was sold for lesser price. The property would fetch more than Rs. 2,00,000. The additional document filed by the judgment-debtor before the first appellate court is implied proof that the auction sale held by the court caused prejudice to the judgment-debtor. For all these reasons it was submitted that the first appellate court was correct in setting aside the sale.

4. I have heard the rival submissions.

5. The judgment-debtor is questioning the sale on three grounds, viz., (i) that the property was sold for undervalue, (ii) that encumbrance No. 7 in the sale proclamation relating to door No. 24 which is not the subject-matter of hypothecation and (iii) that there has been no proper proclamation and publication of sale.

6. According to the judgment-debtor the property is worth more than Rs. 2,00,000. The property had been sold subject to the encumbrance for a sum of Rs. 40,005. The encumbrance over the property is to the tune of Rs. 40,000. The judgment-debtor has examined two witnesses. The property in question is in Karur T.S. No. 972. The properties are situated in door Nos. 26, 26-A and 26-B. In the counter by the judgment-debtor it is stated that the properties are worth about Rs. 1,00,000. The value of the property was shown as Rs. 50,000 subject to the encumbrances in the sale proclamation. The properties were brought to sale on 7.2.1979 and nobody came forward to purchase the properties. Thereafter, E.A. No. 46 of 1979 was filed to reduce the upset price to Rs. 50,000. This was accepted by the court. After the value of the properties was fixed at Rs. 50,000 and when the properties were brought to sale again there was no bidder. The decree-holder filed an application to reduce the sale price. The judgment-debtor filed a counter stating that the value already fixed by the executing court is correct and no further rectification is necessary. Considering all these aspects even the first appellate court came to the conclusion that the judgment-debtor failed to establish that the value of the property would be about Rs. 2,00,000. It was pointed out that no documentary evidence was produced by the judgment-debtor to show that the value of the properties would be Rs. 2,00,000 and the properties were sold for undervalue.

7. According to the judgment-debtor the sale proclamation was not properly drawn up and proper advertisements were not given for sale. It remains to be seen that properties in question were brought to sale on several occasions and the judgment-debtor filed E.A. No. 275 of 1985, E.A. No. 320 of 1979 and E.A. No. 274 of 1979 for adjournment of sale. Accordingly sale was adjourned on various dates after payment of certain amounts by the judgment-debtor. According to the judgment-debtor the 7th item of encumbrance noted in the sale proclamation which has no relevance to the property in question acted as a depressing factor. Otherwise, according to the judgment-debtor, the property would have fetched more value. It is true that the 7th item in the sale proclamation is not related to the properties in question. The mentioning of the 7th item of the encumbrance in the sale proclamation cannot be characterised as irregular or illegal since the encumbrance certificate was given by the judgment-debtor at the time of mortgage.

of the property in question. According to the decree-holder he and his wife were not aware of the fact that the 7th item of encumbrance does not relate to the property in question. It is not correct to state that the 7th item of encumbrance was entered in the sale proclamation purposely and wantonly by the decree-holder. It is also significant to note that the mention of the 7th item in the sale proclamation would not amount to material irregularity within the provisions of Order 21, Rule 90, C.P.C. The judgment-debtor sought for several adjournments and hence the judgment-debtor accepted to proceed with the sale on the same proclamation. Therefore, according to the decree-holder the judgment-debtor waived his right in questioning the irregularities mentioned in the sale proclamation. It remains to be seen that not only the 1st respondent/judgment-debtor had not objected to the mentioning of the 7th item of encumbrance in the sale proclamation when it was drawn after notice to him, the 1st respondent had also stood by it and specifically stated that the said proclamation may continue to be in force. The conduct of the 1st respondent clearly amounts to waiver or acquiescence on his part with reference to the validity of the proclamation. Since the encumbrance was handed over by the judgment-debtor to the decree-holder at the time of mortgage, the judgment-debtor would have had the knowledge of the inclusion of the 7th item in the encumbrance certificate. The courts below concurrently gave a finding that the price fixed for the property is proper and cannot be said to be inadequate. Both the courts have held that there has been no irregularity in the publication of the sale and the price fetched for the property is fair and reasonable. If that is so, no prejudice would have been caused to the judgment-debtor in the auction sale held on 5.9.1979. In *Shyani Sundar v. Kaluram* , it was held that the waiver of the necessity for a fresh proclamation necessarily implies a waiver of objection to any defect appearing on the fact of the sale proclamation.' *P.C. Kandaswamy v. Narayana* : AIR1934 Mad260 , it was held that 'it is not necessary to give the exact amount of the encumbrance.' In *Hardani Lal v. Ram Nath* : AIR1929 All704 , it was held, it is as much the duty of the judgment-debtor as of the decree-holder to see that the sale proclamation is prepared correctly. If the former sleeps over his right he has only to blame himself if he suffers loss through wrong proclamation.'

8. It is stated that the 1st respondent and the 2nd respondent are brothers and the 2nd respondent purchased the properties in the court auction for the benefit of the

1st respondent. On the side of the respondent it was represented that they are divided brothers living separately and carrying on business separately without any connection whatsoever. The 1st respondent stated to be the son of the first wife to his father and the 2nd respondent is stated to be the son through the second wife of his father. The first respondent executed a release deed in favour of the 2nd respondent releasing his right over the family properties in favour of the 2nd respondent. There is no evidence on record to show that the purchase money of the 2nd respondent came from the 1st respondent. It was pointed out that the 2nd respondent discharged the amount due to the 1st respondent and his wife. The lower appellate court pointed out that no document was produced to show that discharge of loans due to the 2nd respondent and his wife. The property was sold in court auction subject to the encumbrances. In such circumstances in what manner the auction purchaser discharged the prior loan is immaterial. On top of it under the Benami Abolition Act, it is not possible at this stage to plead benami transaction between the 1st respondent and the 2nd respondent. For all these reasons I consider that the first appellate court was not correct in reversing the order passed by the executing court. Many of the findings given by the first appellate court are based upon surmises and conjectures. Therefore the order passed by the first appellate court is set aside and the order passed by the executing court in dismissing E.A. No. 412 of 1980 stands restored. The order passed by the first appellate court in C.M.A. No. 19 of 1981 stands set aside. The revision is allowed. No costs.