

M. Kandasamy Vs. U. Baskar

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Court : Chennai

Decided On : Sep-16-1999

Reported in : (1999)3MLJ558

Appellant : M. Kandasamy

Respondent : U. Baskar

Judgement :

ORDER

S.S. Subramani, J.

1. Judgment-debtor in C.S.No. 770 of 1988 on the file of this Court is the revision petitioner.
2. The property was sold on 2.12.1998 and the present application has been filed by petitioner to direct resale of property on the ground that the sale was conducted not in accordance with law and there are so many irregularities. It is mentioned that the sale was conducted on 2.12.1998 and the sale was also confirmed and auction purchaser also made application for getting delivery of the property by filing E.P.No. 39 of 1998. It is at that time, present application was filed to have the resale of property and postpone delivery by two weeks.
3. The same was seriously opposed by auction purchaser. In his objection, the maintainability of the petition itself was challenged on the ground that decree-

holder was not made as party. It is further stated that various contentions in the petition are not true and he has deposited the entire amount within the time stipulated under law.

4. By the impugned order, application of judgment-debtor was dismissed.

5. I heard the learned Counsel for revision petition.

6. One of the main reason for dismissing the application is that decree-holder who is a necessary party to the proceedings under Section 47 of Code of Civil Procedure is not impleaded. Learned Counsel for petitioner submitted that he is not aggrieved with the conduct of decree-holder since he has taken proper steps and he is aggrieved only by the subsequent sale where the proceedings is taken against law. I do not think that the submission of learned Counsel could be accepted. According to me, application under Section 47 of Code of Civil Procedure itself is not maintainable without decree-holder as a party.

7. In *Desk Bandhu Gupta v. N.L. Anand and Rajinder Singh* : (1994)1SCC131 , in paragraph 5 of the judgment, the contention raised was one of the joint purchasers not made as party to application under Section 47 read with Order 21, Rule 90 of Code of Civil Procedure. In that context, Honourable Supreme Court in para 5 held thus:..The application to set aside the execution sale is primarily against the decree-holder since he is a person at whose instance and benefit the execution proceedings were initiated and the sale was held to discharge his decree debt. Therefore, primarily he is the person entitled to be heard and since he is in-charge of publishing the notices and to conduct the sale, it is he that lays before the court the steps taken or the procedure followed in service of notice or conducting the sale and to establish that they have been done properly, regularly and in accordance with the law. The auction-purchaser gets a right only on confirmation of sale and till then his right is nebulous and has only right to consideration for confirmation of sale. If the sale is set aside, apart from the auction-purchaser, the decree-holder is affected since the realisation of his decree debt is put off and he would be obligated to initiate execution proceedings afresh to recover the decree debt. Therefore, in the proceedings under Section 47 or Order 21, Rule 90, the decree-holder is the affected necessary party. Though the auction-purchasers

need to be impleaded eonominee as respondent as the property was purchased jointly at the court sale, it is enough that one among them had been impleaded as a party. It is not necessary to implead all the joint purchasers.

[Italics supplied]

8. Learned Counsel for petitioner submitted that in this case, decree-holder has withdrawn the amount due to him and decree has been satisfied and even if court sale is set aside, he is not going to be affected. I do not find any merit in the said submission. When court sale is set aside, naturally the question of right inter se between decree-holder and auction purchaser also not to be considered and whatever protective orders to be given to auction purchaser, will have to be rendered. It can only be in the presence of decree-holder. Without decree-holder, an application under Section 47 is not maintainable. Again, when the confirmation of sale is challenged, the position of the auction purchaser is as stated in the decision of the Honourable Supreme Court.

9. Eventhough Section 47 has been amended under Act 104 of 1976 and auction purchaser also now has been deemed to be party to the proceedings, even in such a case, without decree-holder, this question cannot be decided. Explanation 2 has been added to Section 47 by virtue of the amendment. But the explanation must be read along with Section 47(1) of the Code, 'when questions has to arise between parties to the suit.'

10. I refer to the earlier decision of this Court even prior to the amendment to Section 47. The same is reported in Annamalai Mudali v. Ramasami Mudali : AIR1941 Mad161 , wherein the Full Bench held that Section 47 does not apply to a case where the dispute arises between a party and his own representative or between the two persons who both represent the same party.

11. In Kedar Nath v. Arun Chandra : AIR1937 All742 , a Full Bench of Allahabad High Court held that auction purchaser is a representative of judgment-debtor and a dispute between auction purchaser and judgment-debtor cannot be decided under Section 47 of Code of Civil Procedure unless decree-holder is also interested.

12. In *Laxminarayan Devastan v. Khanderao* : AIR1954 Bom446 , where dispute was between decree-holders and their representatives, it is held that Section 47 will not apply.

13. What is the effect of amendment, came for consideration before Allahabad High Court and the same is reported in *Prabhu Dayal v. Ram Niklal* : AIR1979 All193 . In paragraph 7 of the judgment, their Lordships extracted the relevant portion of Section 47 under Act 104 of 1976 and thereafter in para 8, what is the effect of amendment was considered, which read thus,

8. On the strength of the above amendment it was argued that the purchaser at a sale in execution of a decree was a party to the suit and consequently the dispute between him and the judgment-debtor was a question which arose between the parties to the suit in which the decree was passed and hence the first condition for applying Section 47, C.P.C. was fulfilled. This argument is fallacious and cannot stand scrutiny. On proper analysis the first condition, as stated above, which must be fulfilled as condition precedent to Section 47, C.P.C. is that all questions must arise between the parties to the suit or their representatives and not between a party and his own representative. To express it symbolically, if the parties are A and B, the dispute must arise between their representatives but not between A and his own representative, or between B and his own representative. In other words, 'the- 'inter se 'dispute between a party and his own representative is outside the domain of Section 47. It follows that a question that arises between the judgment-debtor and his representative cannot be said to arise between the parties to the suit. The test is whether the controversy has arisen between the parties arrayed against each other or between one of such party and his own representative. The two must be pitted against each other in hostile camps. The effect of the amendment is only to treat the purchaser at a sale in execution of the decree as a party to the suit but its effect is not to place him in a position antagonistic to the very party of whom he is a representative....

[Italics supplied]

14. In view of the submission of learned Counsel for petitioner that decree-holder is not interested or that he has no grievance against decree-holder and

consequently, decree-holder need not be impleaded will also take away the jurisdiction of Section 47 of Code of Civil Procedure since court has been asked to decide the dispute between judgment-debtor and his own representative i.e., auction purchaser. If that contention is accepted, that the very application is misconceived before lower court.

15. Even on merits I do not find any illegality in the order. Lower court has considered and held that the proceedings were conducted in accordance with law and purchaser also discharged his duty as per provisions of Code of Civil Procedure by depositing the entire amount in time.

16. In the result, the revision petition is dismissed, however without costs. Consequently, C.M.P.No. 15227 of 1999 is also dismissed.

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