

Radhakrishnan Vs. Vinayaka Chits Represented by Its Foreman Ayyadurai and ors.

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Court : Chennai

Decided On : Apr-24-2001

Reported in : (2001)3MLJ155

Appellant : Radhakrishnan

Respondent : Vinayaka Chits Represented by Its Foreman Ayyadurai and ors.

Advocate for Pet/Ap. : Mr. D. Rajagopal

Judgement :

ORDER

N.V. Balasubramanian, J.

1. This civil revision petition is directed against the order in E.A.No. 133 of 1997 in E.P.No. 161 of 1994 in Chit Case No. 14 of 1993, dated 30.11.1999 on the file of the Subordinate Judge's Court, Thanjavur.

2. The facts leading to the filing of the civil revision petition are, the first respondent in the civil revision petition is carrying on chit business and the petitioner has taken a chit for a sum of Rs. 45,700. The petitioner did not pay the chit amount, which led the first respondent herein to file a petition for arbitration before the Joint Sub Registrar-I, (Chit Arbitrator), Thanjavur claiming the chit

arrears of Rs. 30,000. The petitioner herein did not appear before the Arbitrator and an ex parte decree was passed by the Arbitrator on 7.12.1993. The first respondent herein filed E.P.No. 161 of 1994 in Chit Case No. 14 of 1993 before the learned Subordinate Judge, Thanjavur, for execution of the award obtained by it for a sum of Rs. 30,000 with interest and costs. There was also an application for attachment of the property of the petitioner, and in that application, the property was attached ex parte by an order dated 24.11.1995. The petitioner herein filed I.A.No. 276 of 1995 to set aside the ex parte order of attachment dated 24.11.1995. Since the first respondent herein was not present on 7.6.1996, the learned Subordinate Judge, by order dated 7.6.1996, allowed the application filed by the petitioner. Thereafter, the first respondent proceeded with the sale of the suit property and the sale proclamation was settled on 1.8.1996. Thereafter the petitioner filed a petition to dismiss the execution petition on the ground that the settlement of sale proclamation was made on 1.8.1996 fixing the date of hearing as 9.8.1996 and for filing the sale papers, the case was adjourned to 29.8.1996 and then to 19.9.1996 and 27.9.1996. The petitioner has also stated that the attachment of property was not in force on the date when the sale proclamation was settled, and hence, the execution petition should be dismissed.

3. The first respondent herein has filed an objection stating that though the ex parte order was set aside, the attachment was not lifted by the Court and the attachment of property was still in force when the sale proclamation was settled.

4. Learned Subordinate Judge considering the objections raised by the petitioner herein as well as the first respondent, held that the sale proclamation has become final and without setting aside the order settling the sale proclamation, the application filed by the petitioner herein to dismiss the execution petition is not maintainable in law. Learned Subordinate Judge referred to Section 47 of the Code of Civil Procedure and held that all questions arising between the parties regarding execution, discharge or satisfaction of the decree should be redressed under Section 47 of the Code of Civil Procedure and therefore the application is not maintainable. As against the said order, the present civil revision petition is filed by the petitioner.

5. Mr. D. Rajagopal, learned Counsel appearing for the petitioner vehemently argued that the learned Subordinate Judge has allowed the application to set aside the order of attaching the property and since the attachment over the property has been lifted, there was no attachment at all, and without an order of attachment, it is impermissible to bring the property for sale in public auction. Learned Counsel referred to Order 21, Rule 66 of the Code of Civil Procedure and submitted that the pre-condition under Order 21, Rule 66 of the Code is that the property should have been attached by the Civil Court. Learned Counsel also submitted that the Court executing a decree need not sell the entire property and it would be sufficient to sell a portion of the property to satisfy the decree claim. He therefore submitted that the application filed under the Section 47 of the Code of Civil Procedure is maintainable in law.

6. Mr. S. Parthasarathi, learned Counsel appearing for the first respondent submitted that the prior attachment is not a pre-condition for bringing the property for Court auction sale.

7. I have carefully considered the submissions of the learned Counsel for the petitioner and the learned Counsel for the first respondent. The facts are not in dispute. There was an ex parte arbitration award dated 7.12.1993 against the petitioner herein and two others for a sum of Rs. 30,000 with interest and costs. It is not brought to the attention of this Court that the award has been set aside. The first respondent herein has filed a petition under Order 21, Rule 11(2) of the Code of Civil Procedure for execution of the award, to realise a sum of Rs. 35,385.40 being the award amount with interest and costs and to attach the immovable property belonging to the civil revision petitioner and to bring the property for sale in Court auction and to realise the award amount under Order 21, Rules 22, 54 and 64 of the Code of Civil Procedure. There was an earlier ex parte order of attachment of the property in question, dated 24.11.1995 and the petitioner herein filed E.A.No. 276 of 1995 in Chit Case No. 14 of 1993 to set aside the order dated 24.11.1995. Learned Subordinate Judge, by order dated 7.6.1996, allowed the application, E.A.No. 276 of 1995. However, the Executing Court, viz., learned Subordinate Judge, Thanjavour proceeded with the execution proceedings in E.P.No. 161 of 1994, and as seen from the petition filed under Section 47 of the

Code of Civil Procedure, the matter was adjourned to 27.6.1996 and it was further adjourned to 12.7.1996. The matter was again adjourned to 1.8.1996. On 1.8.1996, learned Subordinate Judge, Thanjavur settled the proclamation of sale and the matter was adjourned to 9.8.1996, and further adjourned to 19.9.1996 and then to 27.9.1996. The civil revision petitioner thereafter filed the petition under Section 47 of the Code of Civil Procedure on 3.10.1996 to dismiss the execution petition on the ground that the attachment of the property was lifted by the learned Subordinate Judge by order dated 7.6.1996 and without the attachment of the property in question, the property could not be brought for sale. The first respondent herein has filed a memo of objection stating that the property was attached during the process of Court and even though the ex parte order was set aside, the attachment was not raised, and hence, learned Subordinate Judge was right in settling the sale proclamation.

8. Learned Subordinate Judge was of the view that the order dated 1.8.1996 settling the sale proclamation has become final and without taking any steps to set aside the order dated 1.8.1996, the petition filed under Section 47 of the Code of Civil Procedure to dismiss the execution petition is not maintainable in law.

9. In so far as the provisions of law are concerned, Section 51 of the Code of Civil Procedure deals with the powers of the Court to execute the decree, and under that Section, the Court has the power to execute a decree by attachment and sale of any property or by sale without attachment of any property. Order 21, Rule 11(2) of the Code of Civil Procedure provides for the form of written application, and under the Rule, the application shall contain, inter alia, the modes in which the assistance of the Court is required to realise the decree amount, and it is open to the petitioner to seek assistance of the Court to execute a decree by delivery of the property specified in the decree, or by attachment and sale or by sale without attachment of any property. Order 21, Rule 54 of the Code provides for the attachment of immovable property and the Rule provides that the attachment of property should be made. Order 21, Rule 55 of the Code provides for the removal of attachment after satisfaction of decree. Order 21, Rule 57 of the Code provides for the determination of attachment. Order 21, Rule 57 of the Code of Civil Procedure says that where any property has been attached in execution of a

decree, and if the Court, for the reasons recorded, passes an order dismissing the application for the execution of the decree, the Court is empowered to pass an order for continuation of the attachment. The Court is also empowered to pass an order stating that the attachment should cease to have its effect after a particular period. Order 21, Rule 64, of the Code of Civil Procedure, on which heavy reliance was placed by Mr. D. Rajagopal, learned Counsel for the petitioner, provides that any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree shall be sold. Order 21, Rule 66 of the Code provides for the proclamation of sales by public auction. Explanation to Sub-rule (3) of Rule 90, Order 21 of the Code of Civil Procedure provides that the mere absence of or defect in the attachment of the property shall not be a ground for setting aside a sale under Order 21, Rule 90 of the Code.

10. A co-joint reading of the various Rules clearly indicates that it is not a pre-condition for bringing an immovable property for sale by the executing Court that there must be a prior attachment of the said property. Though Order 21, Rule 64 of the Code of Civil Procedure enables the Court to bring the property for sale which has been attached, the powers of the Court to bring the property for sale are found in Section 51 of the Code of Civil Procedure, and under that Section, the Court has the power to bring the property without attachment of any property. Assuming on the facts of the case that there was no attachment of the property in question, I am of the view that the omission to attach the property or the act of the Court in lifting the attachment would not vitiate the sale. I am of the view that bringing the property for Court auction sale without attachment would only amount to an irregularity which would not vitiate the sale. I am of the view that Order 21, Rule 66 of the Code of Civil Procedure has to be read along with Section 51 of the Code which empowers the executing Court to execute a decree by attachment and sale of the property or by sale without attachment of the property. That apart, Order 21, Rule 90 of the Code of the Civil Procedure clearly provides that no Court sale should be set aside on the ground that there was no attachment or defect in the attachment of the property. I am therefore of the view that the absence of an order of attachment of the property is not a ground to set aside the sale. I have already held that it is only an irregularity and the defect is not attaching the property would

not go to the root of the matter which would vitiate the auction sale. In this view of the matter, I am unable to accept the contention of Mr. D. Rajagopal, learned Counsel for the petitioner that the order of the learned Subordinate Judge in bringing the property for sale without prior order of attachment is a nullity. I am of the view that the absence of an Order of attachment would not vitiate the further proceedings to bring the property for sale. Moreover, the petitioner herein was present at the time of settling the sale proclamation, and the sale proclamation was settled in his presence and the order settling the sale proclamation has become final. It is relevant to notice here that the petitioner has not raised any objection at the time of settling the sale proclamation. I am of the view that the conduct of the petitioner in not raising any objection at the time of settlement of sale proclamation is relevant and his further conduct in not taking any steps against the order settling the sale proclamation should also be taken note of in considering the case of the petitioner. The award was passed in the year 1993 and the execution petition was filed in the year 1994 and the execution petition is pending for nearly six years. I am therefore of the view that the learned Subordinate judge was correct in dismissing the application filed by the petitioner herein on the ground that the petitioner has raised a belatedly objection after participating in the proceedings for settlement of sale proclamation.

11. Learned Counsel appearing for the petitioner also relied upon the decision of the Supreme Court in *T.P.S. Reddi v. Padmavathamma and Ambati Narasayya v. M. Subba Rao* wherein the Supreme Court has held that the duty cast upon the Court under Order 21, Rule 64 of the Code of Civil Procedure is to sell only such portion of the property that would satisfy the decree and not the entire property. I find that the objection raised by the petitioner was not raised by him before the executing Court at the time of settlement of sale proclamation. The petitioner herein has not furnished the relevant particulars before the executing Court regarding the market value of the property and he has also not furnished any information whether a portion of the property can be sold which would satisfy the entire award amount. Since the petitioner has not raised any objection before the executing Court, I am of the view that it is not open to the petitioner to raise the said contention before this Court.

12. In this view of the matter, the civil revision petition is liable to be dismissed, and accordingly, it is dismissed. However, the civil revision petitioner is granted time till 31st July, 2001 to pay the entire award amount along with interest and costs as on 31st July, 2001 due to the execution petitioner and if the entire amount is paid on or before 31.7.2001, the property in question need not be brought for sale. However, it is made clear that if any portion of the said amount is not paid on or before 31.7.2001, it is open to the first respondent herein to proceed with the auction sale of the property in question. With the above observations, the civil revision petition is dismissed. The first respondent is entitled to costs of a sum of Rs. 500. Consequently, C.M.P. No. 14537 of 2000 is closed.

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