Subramanya Bhat Vs. Santhosh Kumar

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Court : Kerala

Decided On : Mar-03-2010

Reported in : 2010(1)KLJ779,2010(2)KLT59

Judge : S.S. Satheesachandran, J.

Acts : Limitation Act - Schedule - Article 137; ;Code of Civil Procedure (CPC) , 1908 - Section 47 - Order 20, Rule 90 - Order 21, Rules 67(1), 69(2), 89, 90 and 92; ;Constitution of India - Article 227

Appeal No. : W.P. (C) No. 18337 of 2008

Appellant : Subramanya Bhat

Respondent : Santhosh Kumar

Advocate for Def. : K.G. Gouri Sankar Rai and; Devan Ramachandran, Advs.

Advocate for Pet/Ap. : V.V. Asokan, Adv.

Disposition : Petition allowed

Judgement :

S.S. Satheesachandran, J.

1. The Writ Petition is filed seeking the following reliefs:

a) Call for the records of the case leading to Ext.P9 order and set aside the same by means of an appropriate writ or order.

b) Pass an order directing the Munsiff Court, Kasargode to keep in abeyance all further proceedings in O.S. No. 344 of 2007 until a final decision is taken by this Hon'ble Court in this matter.

c) Grant such other orders or reliefs that this Hon'ble Court may deem fit to grant under the facts and circumstances of this case.

2. Petitioner is the auction purchaser, who purchased 1/5th right held by the 1st respondent judgment debtor in a property having an extent of 26 cents in Re-survey No. 5/3B and 52 cents comprised in Re-survey No. 7/3 of Kumgbadje village, which was brought to sale in E.P. No. 137/06 in O.S. No. 284/05 by the decree holder, the 2nd respondent bank. After depositing the sale price, sale over the property was confirmed and later a sale certificate was issued in favour of the petitioner. To get separate possession of the property petitioner instituted a suit for partition O.S. No. 344/07 before the Munsiff's Court, Kasargode seeking division of the 1/5th share which belonged to the 1st respondent, obtained by him under the sale certificate. That suit is still pending adjudication. Meanwhile, the 1st respondent/judgment debtor moved an application, E.A. No. 404/07, before the execution court under Section 47 of the Code of Civil Procedure (for short 'the Code') to set aside the sale. Sale was impeached on the ground that there was no fresh proclamation after adjournment of the sale fixed beyond a period of 30 days from the date of proclamation, and it violated the mandatory provision under Sub-rule (2) of Rule 69 of Order XXI of the Code. Petitioner/auction purchaser resisted that application filing objections. The learned Munsiff, after hearing both sides, found merit in the challenge raised by the 1st respondent/judgment debtor and set aside the sale vide Ext.P9 order. Propriety and correctness of Ext.P9 order is challenged in the Writ Petition invoking the supervisory jurisdiction vested with this Court under Article 227 of the Constitution of India.

3. I heard the counsel on both sides. The parties are hereinafter referred to as the auction purchaser and the judgment debtor.

4. The learned Counsel appearing for the auction purchaser contended that the application filed under Section 47 of the Code by the judgment debtor was barred by limitation. At no point of time the sale was adjourned for a period exceeding 30 days from the date of publication of the proclamation, though there were one or two adjournments from the date fixed for conducting of the sale submits the counsel. Sale was confirmed after the period prescribed for setting aside the sale under Rules 89 and 90 of Order XXI of the Code, and without any objection from the judgment debtor, is the further submission of the learned counsel. If at all there was any irregularity in the conducting of the sale the remedy of the judgment debtor was to move an application under Order XXI Rule 92 of the Code and having not taken recourse to that remedy, the application moved under Section 47 of the Code, five months after the confirmation of the sale, according to the counsel, is not at all maintainable. Relying on Pathummal Kunju v. Aiyappan Sanku Panicker 1956 KLT 954, learned Counsel contended that the omission to issue a fresh proclamation as required by Rule 69(2) of Order XXI of the Code amounts to a mere irregularity, and sale conducted cannot be set aside on the basis of such irregularity in the absence of proof of substantial injury sustained by the judgment debtor. If there was any breach of any provision relating to the publication or the conduct of the sale unless it is shown that there is illegality as to the flouting of the mandatory provisions in conducting of the sale such sale can be considered only as vitiated by material irregularity, and no application under Section 47 of the Code would lie to set aside such a sale is the submission of the counsel. Mere irregularities in the conducting of the sale fall within the scope of Rule 90 of Order XX and not under Section 47 of the Code submits the counsel relying upon S.A. Sundararajan v. A.P.V. Rajendran : AIR 1981 SC 693.

5. Per contra, learned Counsel appearing for the judgment debtor banking upon Sub-rule (2) of Rule 69 of Order XXI of the Code, contended that omission to have a fresh proclamation when the sale was adjourned beyond a period of 30 days from the date fixed, after the publication of the previous proclamation settled, is not a mere irregularity, but something which vitiates the sale with illegality. Sale conducted without a fresh proclamation after sale fixed was adjourned beyond the period 30 days, after publication of the proclamation, is void and it is liable to be set aside on an application under Section 47 of the Code is the; submission of the

counsel. Period of limitation to move an application under Section 47 of the Code to declare a sale as void and for restoration of possession by judgment debtor is governed by Article 137 of the Limitation Act and such an application need be filed within three years from the date of dispossession is the submission of the counsel, relying upon Mrs. Achamma Cyriac v. K.F.C. and Ors. 1996 (1) Kar LJ 755. Where the sale in the present case is indisputably shown as having been conducted beyond the period of 30 days from the previous date fixed for sale, after proclamation, without drawing a fresh proclamation as mandated by Sub-rule (2) of Rule 69 of the Code, learned Counsel submitted that Ext.P9 order passed by the court below setting aside such sale as illegal is unimpeachable, and the challenge raised against that order is devoid of any merit.

6. The dispute presented, no doubt lies within a narrow compass: 'whether a sale conducted without complying the provision under Sub-rule (2) of Rule 69 of Order XXI of the Code is liable to be set aside as void, or voidable, at the instance of the judgment debtor in an application filed under Section 47 of the Code?' Some of the facts leading to the sale, which has been set aside as illegal under Ext.P9 order by the court below require to be taken note of for resolving the dispute canvassed. The draft sale proclamation was approved on 19.10.2000 by the execution court directing publication, and fixing the sale on 23.11.2006. On the date fixed for sale, 23.11.2006, the judgment debtor moved an application E.A. No. 300/06 for adjourning the sale making a part payment of Rs. 5,000/-. Acceding to his request, sale was adjourned to 24.11.2006. A fresh proclamation as directed by the court was thereafter published and the sale was fixed on 18.1.2007. Again the judgment debtor moved an application E.A. No. 28/07 making a part payment of Rs. 5,000/-, and heeding to his request sale was adjourned to 2.2.2007. Sale was not conducted on 2.2.2007 and it was adjourned to 22.2.2007. Sale was adjourned from 22.2.2007 to 1.3.2007. In the sale conducted on 1.3.2007, the auction purchaser, as being successful bidder purchased the property for a value of Rs. 42,000/-. After a fresh proclamation was drawn on 4.12.2006 and published, fixing the sale on 2.2.2007, there were two adjournments of sale, first to 22.2.2007 and then to 1.3.2007. The period of both the adjournments taken together reckoned from the date fixed from previous sale (2.2.2007) exceed the period of 30 days in the conducting of sale on the basis of proclamation made and, thus, there was

violation of the mandate under Sub-rule (2) of Rule 69 of Order XXI of the Code, is the case of the judgment debtor for impeaching the sale as void, which had been accepted by the court below for setting aside the sale under Ext.P9 order.

7. Before examining the question whether a challenge against the sale, in the circumstances presented, would lie under an application moved under Section 47 of the Code, the bar of limitation in entertaining such an application pressed into service by the auction purchaser to assail Ext.P9 order requires to be answered. The bar of limitation in entertaining the application moved under Section 47 of the Code is canvassed on the ground that the judgment debtor failed to challenge the sale as provided under Order XXI Rule 90 of the Code and that the case set up that the sale conducted without a fresh proclamation beyond a period of 30 days from the date fixed for sale, at the most, is a material irregularity coming within the sweep of the above rule. The question whether the adjournment of the sale beyond the period of 30 days from the date previously fixed without fresh proclamation falls under a material irregularity no doubt call for serious consideration. But the maintainability of the petition moved under Section 47 of the Code depend a lot on the question whether there is only a material irregularity in the publishing and conducting of the sale or the confirmation of the sale in view of some illegality is void. It is futile to contend that an application under Section 47 of the Code is barred for the reason that an application under Order XXI Rule 90 of the Code was not filed within the period of 60 days for the purpose of impeaching the sale. As rightly contended by the learned Counsel for the judgment debtor, an application under Section 47 of the Code can be filed within a period of three years from the date of dispossession on the basis of the confirmation of the sale and sale certificate issued. Challenge canvassed that the petition moved by the judgment debtor under Section 47 of the Code was barred by limitation as he had not filed an application under Order XXI Rule 90 of the Code within the time, cannot be approved, but it has to be stated that the maintainability of the petition, no doubt, has to be examined with reference to the question whether the conducting of the sale is vitiated by material irregularity or it is illegal and void.

8. The maintainability of the petition under Section 47 of the Code has to be examined with reference to the challenge canvassed by the petitioner that the sale

conducted without fresh proclamation after the sale was adjourned beyond the period of 30 days from the previous date fixed for sale is void as it was done in violation of Sub-rule (2) of Rule 69 of Order XXI of the Code. In this context, it is necessary to examine what is the cardinal distinction in a challenge against the sale under Section 47 as different from Order XXI Rule 90 of the Code.

9. When an application is filed under Section 47 of the Code, the judgment debtor is impeaching the sale on the ground that it is void for any illegality or in any event voidable on a ground other than those referred to under Order XXI Rule 90 of the Code. In a case where the judgment debtor invokes Section 47 of the Code for impeaching a sale, Order XXI Rule 90 of the Code has no application. Since the challenge canvassed to impeach the sale is built upon the ground that there was no fresh proclamation when the sale was adjourned beyond a period of 30 days from the previous date of sale, the question emerges for consideration whether the sale conducted is vitiated by material irregularity as contemplated under Order XXI Rule 90 of the Code or the sale so conducted is void or voidable at the instance of judgment debtor on a ground other than those covered by the above rule. The Apex Court in Dhirendra Nath v. Sudhir Chandra : AIR 1964 SC 1300 approving the observations made by Justice Coleridge in Holmes v. Russsell (1841) 9 Dowl. 487 has held that the test evolved in the above case can be followed to determine whether the defect in conducting of the sale is a material irregularity or a nullity. Justice Coleridge in the above referred case has observed thus:

It is difficult sometimes to distinguish between an irregularity and a nullity; but the safest rule to determine what is an irregularity is to see whether the party can waive the objection; if he can waive it, it amounts to an irregularity; if he cannot, it is a nullity.

10. In the given facts of the case, it has to be analysed whether the conducting of the sale without drawing up of a fresh proclamation after the expiry of 30 days from the previous date fixed for sale is a material irregularity or not. In the context, it is also profitable, to take note of the observations of the Apex Court in S.A. Sundararajan v. A.P.V. Rajendran : AIR 1981 SC 693 wherein also the earlier decision in Dhirendra Nath v. Sudhir Chandra : AIR 1964 SC 1300 was relied upon

to conclude that errors committed in the settling of the sale proclamation are mere irregularities and such errors cannot render a sale void. In that view of the matter the Apex Court held that in such circumstances an application under Section 47 of the Code is not entertainable. It is also to be noted that when a judgment debtor is making an application under Section 47 of the Code he is impeaching the sale on the ground that it is void for illegality or on other grounds rendering the sale voidable. When the sale is impeached on other grounds that render it voidable at the option of the judgment debtor such grounds must be other than those referred to in Order XXI Rule 90 of the Code.

11. In Saheed v. Aluminium Fabricating Co. 1985 KLT 991, a Division Bench of this Court has drawn a distinction between an application filed under Section 47 of the Code and also that of Order XXI Rule 90 of the Code in the following lines:

It is the material irregularity or fraud which affects the method and manner of publishing the proclamation and the actual conduct of the sale that clothes the court with a jurisdiction to set aside the sale under Order 21 Rule 90 Code of Civil Procedure. Where Order 21 Rule 90 applies, Section 47 is not available. However, where there is inherent illegality in the execution application, such as want of leave of court appointing a receiver, it is a matter arising in execution, outside the purview of Order 21 Rule 90 and thus within the scope of Section 47 of the Code.

12. The facts involved in the case would show that there was drawing up of proclamation more than once. Sale fixed on 23.11.2006 was adjourned by the judgment debtor making a part payment of Rs. 5,000/-. Later, after drawing up a fresh proclamation the sale was refixed on 18.1.2007. On that day also the sale was adjourned with the judgment debtor making a part payment of Rs. 5,000/-. The adjourned date of sale was refixed as 2.2.2007. From 2.2.2007 the sale was adjourned to 23.2.2007 and then to 1.3.2007. On 1.3.2007 the sale was finally conducted and the writ petitioner purchased the property in auction as a successful bidder. In this backdrop Sub-rule (2) of Rule 69 of the Code has to be considered. The above Sub-rule reads thus:

Where a sale is adjourned under Sub-rule (1) for a longer period than 'thirty days' a fresh proclamation under Rule 67 shall be made, unless the judgment debtor consents to waive it.

13. The judgment debtor in the present case has not given any consent waiving the fresh proclamation though he had made a part payment on 18.1.2007, the previous date fixed for sale, and so much so the sale conducted without a fresh proclamation drawn up beyond the period of 30 days from 18.1.2007 is void, is his case. An omission to issue a fresh proclamation at the most is only a material irregularity in the conducting of the sale. It does not vitiate the sale conducted as void. This has been held so in Jelher Sarkar v. Mahipal Naik : AIR 1948 Cal. 203 and also by this Court in Pathummal Kunju v. Aiyappan Sanku Panicker 1956 KLT 954. It has to be noted that even where the place of sale is changed and no fresh proclamation is issued, it has been held, it is only an irregularity which renders the sale voidable on proof of substantial injury. (See Fasahat Ali v. Board of Revenue : AIR 1957 All. 449). If it was only a material irregularity affecting the sale voidable at the option of the judgment debtor, then such a sale can be set aside only under Order XXI Rule 90 of the Code, on proof of substantial injury. Mere material irregularity in the conducting of the sale arising from the omission to draw up a fresh proclamation will not enure to the benefit of the judgment debtor to contend that the sale proceeded with such omission and confirmed later can be impeached under Section 47 of the Code. Before conducting the present sale, the Court had proclaimed the sale not once but twice. Even on the second occasion, the sale was adjourned on part payment of the decree debt made by the judgment debtor. There were two adjournments, each of them for a period less than 30 days before the sale was finally conducted on 1.3.2007. If at all there was any material irregularity in conducting of such sale in flouting Sub-rule (2) of Rule 69 of Order XXI, the judgment debtor was bound to impeach such sale moving an application within the time provided under Order XXI Rule 90 of the Code establishing the substantial injury enabling him to set aside the sale under that Rule. An application, at his instance, to impeach the sale under Section 47 of the Code on the ground of omission to draw up a fresh proclamation in conducting the sale beyond the period of 30 days from the previous date fixed for sale is not entertainable as that omission is only a material irregularity which does not render the sale void, but only make it voidable. That omission falls within 'material irregularity' covered by Order XXI Rule 90 of the Code and the sale vitiated by

such a flaw can be set aside only where it is shown that the judgment debtor suffered substantial injury on account of such irregularity in the conducting of the sale.

14. The order passed by the learned Munsiff entertaining the application by the judgment debtor under Section 47 of the Code and setting aside the sale is liable to be set aside. I do so. E.A. No. 246/07 moved by the judgment debtor shall stand dismissed, and the order confirming the sale shall stand restored.

Writ Petition is allowed.