IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

TUESDAY, THE 16TH DAY OF JUNE 2015/26TH JYAISHTA, 1937

CRP.No. 390 of 2010

AGAINST THE ORDER IN E.A.490/2009 IN EP 140/2006 IN OS 137/2005 of SUB COURT, TIRUR DATED 07.06.2010

REVISION PETITIONER/2ND RESPONDENT:

NHARAKKATT VALIYAPEEDIYAKKAL SAIDALAVI,
S/O.BEERANKUTTY, NHARAKKATT VALIYAPEEDIYAKKAL HOUSE,
K.PURAM P.O., THANALUR VILLAGE, PIN-676307
MALAPPURAM DISTRICT, KERALA. (DIED. LRs IMPLEADED)

ADDL.P2. NABEESU, W/O. NHARAKKAT VALIYAPEEDIYAKKAL SAIDALAVI,
NHARAKKAT VALIYAPEEDIYAKKAL HOUSE, K.PURAM P.O.,
THANALUR VILLAGE, MALAPPURAM DISTRICT, KERALA.

ADDL.P3. BEERANKUTTY, S/O.-DO- -DO-

ADDL.P4. SUHARA, D/O. -DO- -DO-

ADDL.P5. SAJIRA, D/O. -DO- -DO-

ADDL.P6. NOUSHAD N, S/O. -DO- -DO-

ADDL.P7. NOUJEESHA, D/O. -DO- -DO-

(ADDL.P2 TO P7 ARE IMPLEADED AS THE LEGAL HEIRS OF THE DECEASED PETITIONER AS PER ORDER DTD. 25.06.2014 IN I.A.2462/13 IN CRP 390/10).

BY ADV. SRI.JAMSHEED HAFIZ

RESPONDENTS/PETITIONERS/1ST RESPONDENT:
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1. MUNDAKKURA MOHAMMEDKUTTY,
S/O.KAMMU, OZHUR AMSOM AYYAYA DESOM, OZUR P.O.
TIRUR TALUK, PIN-676313, MALAPPURAM DISTRICT.

2. MANAF, S/O.MUNDAKOORA MUHAMMEDKUTTY,
OZHUR AMSOM AYYAYA DESOM, OZUR P.O., TIRUR TALUK
PIN-676313, MALAPPURAM DISTRICT.

3. T.AVARANKUTTY, S/O.SAIDUTTY,
THADATHIL HOUSE, THANALUR AMSOM DESOM,
THANALUR P.O.
TIRUR TALUK, PIN-676307, MALAPPURAM DISTRICT
KERALA.

R1 & R2 BY ADV. SRI.S.SHANAVAS KHAN
R3 BY ADV. SMT.K.N.RAJANI
R3 BY ADV. SRI.J.VIVEK GEORGE

THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 16-06-2015, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

P. BHAVADASAN, J.

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C.R.P. No. 390 of 2010

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Dated this the 16th day of June, 2015.

ORDER

Auction purchaser challenges the order dated 7.6.2010 in E.A. 490 of 2009 in E.P. No. 140 of 2006 in O.S. No. 137 of 2005 whereby a sale was set aside by the court below.

2. Most of the facts are not in dispute. Respondents 1 and 2 before this Court suffered a money decree at the hands of the third respondent. The decree was put in execution and the property belonging to the judgment debtor was brought to sale. It is not in dispute that 7 ½ cents was sold after following the necessary procedures. Sale was held on 10.3.2008 and it was confirmed on 21.5.2008. Delivery was taken on 30.9.2009 and the execution petition was closed. A month thereafter comes the present petition under Section 47 of the Code of Civil Procedure to set

aside the sale on the ground of material irregularity and fraud.

3. The judgment debtors in their petition, i.e., E.A.490 of 2009 contended that the sale is vitiated due to several irregularities that crept in during sale. They say that proper value was not shown and 7 ½ cents need not have been sold and the value of the property shown is also not correct. They also contended that at any rate, a portion of the property alone needs to be sold to satisfy the decree.

4. It is contended by the respondents in the said petition that the petition is misconceived and it is intended to be one under Order XXI Rule 90 of C.P.C. under the label of Section 47 of C.P.C. Therefore, none of the grounds are sustainable.

5. Before the court below, the petitioners produced Exts.A1 to A4. The court below was greatly impressed by the contentions

taken by the judgment debtors and set aside the sale. Same is under challenge in this revision.

6. Learned counsel appearing for the revision petitioner points out that there has to be legal distinction between the grounds under Order XXI and Rule 90 and Section 47 of C.P.C. Though the doctrine of election may not apply, it does not mean that one can telescope into the other. Emphasizing on Section 47 of C.P.C., it was contended that in fact Section 47 relates to a pre-sale situation and Order 21 Rule 90 deals with a post-sale situation. Two are distinct and they do not overlap. Referring to the execution application filed by the judgment debtors, it was pointed out that the ground taken to have the sale set aside falls within the ambit of Order XXI Rule 90 of C.P.C. and therefore it cannot be labelled as one under Section 47 of C.P.C. to set aside the sale. Learned counsel in support of his contention relied on the decisions reported in **S.A.**

Sundararajan v. A.P.V. Rajendran (AIR 1981 SC 693), **Rajarethna Naikkan v. Parameswara Kurup** (1997(1) K.L.T. 777) and **A.G.M. Constructions (P) Ltd. v. Shibu Kumar** (2010(4) K.L.T. 189). On facts, learned counsel went on to point out that a petition under Section 47 of C.P.C. is not maintainable.

7. In reply, learned counsel for the respondents contended that so long as the doctrine of election does not apply, the judgment debtors are free to either apply under Section 47 of C.P.C. or under Order XXI Rule 90 C.P.C. to set aside the sale. Learned counsel tried to draw support from the decision reported in **A.G.M. Constructions (P) Ltd. v. Shibu Kumar** (2010(4) K.L.T. 189).

8. The issue was considered in detail in the decision reported in **S.A. Sundararajan v. A.P.V. Rajendran** (AIR 1981 SC 693), wherein it was held as follows:

"7. Our attention has been invited by the appellant to the Madras amendment made in 1952 in Rule 66 of Order XXI whereby a new sub-rule (2) has been substituted for the original provision. It has not been shown to us, however, that the substituted provision makes any material difference so far as the point under consideration is concerned. It is urged out that an opportunity has been provided under the substituted provision to a judgment-debtor to participate in the drawing up of the sale proclamation, and, therefore there is no further right to complain against the sale proclamation under Rule 90 of Order XXI. But that right was also available in some what similar terms under the original provision. Whether or not a judgment debtor, to whom notice has been issued under Rule 66 of Order XXI to participate in the proceeding and who does not do so, should be permitted thereafter to challenge the sale under A. 90 of O. XXI, is a matter to be determined by other considerations. It is sufficient to point out that the application for setting aside the sale on the grounds taken by the appellant is

> referable to Rule of 90 of Order XXI, and, therefore, not to S. 47."

For the purpose of this case, it therefore follows that the date of drawing up of the proclamation was held to be the relevant date.

9. Order XXI Rule 90 of C.P.C. reads as follows:

> "R. 90. Application to set aside sale on ground of irregularity or fraud.-(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.
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> (2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under the rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation. - The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule."

A petition to set aside the sale under Order XXI Rule 90 of C.P.C. will have to be filed within 60 days going by Article 127 of the Limitation Act. It is significant to notice the wording in Order XXI Rule 90 sub clause (3). The Explanation further clarifies the position in this regard. Those facts cannot be lost sight of when one deals with a petition either under Section 47 or under Order XXI Rule 90 of C.P.C.

10. There can be no dispute regarding the fact that Section 47 of C.P.C. would apply to pre-sale situation. If any authority is required, that is given by the decision reported in **A.G.M.**

Constructions (P) Ltd. v. Shibu Kumar (2010(4) K.L.T. 189). In the said decision, in paragraph 21, this court attempted to catalogue the various conditions under which Section 47 of C.P.C. may apply. However, this Court was very clear in its view that Section 47 of C.P.C. cannot take in the grounds under Order XXI Rule 90 of C.P.C.

12. On going through the execution application filed in the execution petition filed by the judgment debtors, the learned counsel appearing for the petitioners seems to be fully justified in his submission that most of the grounds are ones falling under Order XXI Rule 90 of C.P.C. To be more precise, the grounds taken are that the whole property need not have been sold, upset price has not been fixed and value of improvements has not been shown. These are all matters which are falling within the irregularity in the conduct and publication of sale squarely covered by Order XXI Rule 90 of C.P.C.

13. Learned counsel appearing for the revision petitioner may be justified in his submission that while filing an application under Order XXI Rule 90 of C.P.C., sale is accepted, but it is sought to be assailed on certain vitiating circumstances. It cannot be said that the sale that is assailed under Order XXI Rule 90 of C.P.C. is a void sale. If the sale is void, there is no need to assail the same. On the other hand, Section 47 of C.P.C. is invoked, it contemplates that the person who challenges the sale does not accept the sale at all.

14. As already stated, most of the grounds relied on by the court below for allowing the application fall within the ambit of Order XXI Rule 90 of C.P.C. The court below was greatly impressed by the fact that no upset price has been fixed. A perusal of Order XXI Rule 66 of C.P.C. Will show that it is not incumbent on the part of the court to fix upset price. All that is needed

is to mention the value shown by the judgment debtor. For the above reasons, none of the grounds relied on by the court below is sustainable in the case on hand.

This Revision is allowed and the impugned order is set aside and E.A. shall stand dismissed.

P. BHAVADASAN,
JUDGE

sb.