IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN

&

THE HONOURABLE MR. JUSTICE SUNIL THOMAS

WEDNESDAY, THE 24TH DAY OF JUNE 2015/3RD ASHADHA, 1937

FAO.No. 197 of 2013 ()

(AGAINST ORDER IN EA NO.1020/2008 IN EP NO.295/1992 IN O.S. NO.110/1990 OF THE PRINCIAPL SUB COURT PALAKKAD DATED 11/4/2013)

APPELLANT(S)/PETITIONER:

AKHIL, AGED 16 YEARS,
(MINOR D.O.B. 3.7.1996), S/O.LATE T.RAMESH,
REPRESENTED BY MOTHER/NATURAL GUARDIAN & NEXT FRIEND
MRS.SELIN, AGED 42 YEARS, W/O.T.RAMESH,
RESIDING AT QUARTERS NO.176 B, OLD RAILWAY COLONY
NEAR RAILWAY STATION, OLAVAKKODE
PALAKKAD TALUK & DISTRICT.

BY ADV. SRI.A.KUMAR

RESPONDENT(S)/RESPONDENTS/:DECREE HOLDER/AUCTION PURCHASER

1. BANK OF INDIA,
KODUMBA BRANCH, KODUMBA, PALAKKAD TALUK & DISTRICT.

2. C.MURALIDHARAN ALIAS C.MURALI,
S/O.CHAMIYAPPAN, 33/397/15, KOZHIPARAMBA
ARAYAKULAM, VADAKKANTHARA, PALAKKAD TALUK & DISTRICT.

R1 BY ADV. SRI.C.A.JOY
R2 BY ADV. SRI.R.SREEHARI
R2 BY ADV. SRI.P.B.KRISHNAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 18-06-2015, ALONG WITH FAO. 198/2013, THE COURT ON 24/6/2015 DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.

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F.A.O. Nos. 197 & 198 of 2013

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Dated this the 24th day of June, 2015

JUDGMENT

Sunil Thomas, J.

These appeals are directed against the common order in E.A. Nos.1020/2008 & 1029/2008 of the Sub Court, Palakkad. The minor son of the original judgment debtor represented by the mother and the mother herself are the respective petitioners in the above applications filed under Order 21 Rule 90 and Order 21 Rule 89 of of the Code of Civil Procedure.

2. The first respondent bank obtained a decree in O.S. No.110/1990 for a sum of Rs.72,786.05 with 12% interest by decree dated 30/7/1990 against oneRamesh. E.P.No.295/1992 was laid against the judgment debtor. Pending the execution proceedings, Ramesh died on 10/11/2006. His wife, the

appellant in FAO No.198/2013 was thereafter brought on record as the second judgment debtor. The property, which belonged to the original judgment debtor Ramesh having an extent of 6 cents with a house therein was brought for sale and sold on 10/7/2008 for a sum of Rs.2,75,000/-. It was purchased by the second respondent in the present appeals and the balance deposited by him on 23/7/2008. The sale was confirmed on 15/9/2008 and the sale certificate was issued on 14/11/2008.

3. Thereafter, the second judgment debtor, on whom the notice of execution had been served by substituted service, but had remained absent, filed E.A. No.1029/2008 on 11/12/2008 under Order 21 Rule 89 contending that there was material irregularity in the proceedings and seeking setting aside of sale on deposit. On the same day, through the same counsel, E.A. No.1020/2008 was filed by the minor son represented by the mother, under Order 21 Rule 90 alleging material irregularity and seeking setting aside of sale. Both the applications were dismissed by the court below by a common order, which is assailed in these appeals.

4. Heard and examined the records.

5. For a proper appreciation of the appeals, some of the relevant facts are also essential to be brought on record. Initially, E.P. No.295/1992 was filed against the original judgment debtor, Ramesh. He appeared and contested the proceedings. The property was sold in execution on 15/7/1994. He filed an application to set aside the sale which was dismissed by the Execution Court. This was challenged in C.M.A. No.140/1995 before this Court. This court set aside the sale and remanded the matter to enable the judgment debtor to take out a commission, to prove the value of the property. Thereafter, an advocate commissioner was appointed by the execution court and the property was evaluated. The commission report is on record. Thereafter it was sold in execution. After the second sale, present proceedings were initiated with the second judgment debtor ,the wife, in the party array, consequent to the death of the original judgment debtor.

6. It is on record that another parallel proceeding also took place in the meanwhile. One Ramkumar filed O.S. No.350/1994 against the original judgment debtor herein (Ramesh) and obtained money decree on 21/8/1996. In the execution

proceedings, the wife and the son who are the appellants herein were impleaded. Both, though served with notice, did not contest the proceedings. The property, which forms a larger extent including the properties sold in the present proceedings, was sold in court auction and delivered on 7/9/2007 to the judgment debtor, who himself was the auction purchaser.

7. The wife of Ramesh thereafter purchased the property from the decree holder therein by Ext.B7 registered document dated 13/9/2007 for a sum of Rs.80,000/-. The above document refers to the entire suit proceedings culminating in the decree, the execution proceedings, the sale and the delivery of the property. Ext.B6 further discloses that an agreement for sale dated 26/7/2007 was entered into between the decree holder Ramkumar and the wife of judgment debtor Ramesh, for the sale of the property which the decree holder expected to be sold in execution and delivered to him. Evidently, the above document Ext.B7, which was entered into by the judgment debtor herself, outside the court while remaining ex parte, regarding the property which was expected to be sold in execution and delivered from the judgment debtor, indicates that Ext.B7 was

brought into existence under highly suspicious and doubtful circumstances. It is also record that the property, which the second judgment debtor purchased for herself and on behalf of her own minor son for Rs.80,000/-, was thereafter sold along with the other adjoining property by Ext.B8, for a total consideration of Rs.58 Lakhs.

8. The main contentions of the appellants herein were that the minor son was not impleaded in the execution proceedings, that notice was not served on the second judgment debtor wife, that the value for which the property was sold was very low and,thus, there were material irregularities in the execution proceedings which vitiated the sale.

9. The learned counsel for the appellants vehementally contended that the minor son was not impleaded as a party in the proceeding and that wife alone was impleaded, on whom notice was also not served. Lower court records reveal that the notice of execution to the second judgment debtor was taken by process server to the house situated in the property which was later sold in execution. The process server has recorded that she was not available in that address and hence it

was returned on 5/7/2007. Thereafter, E.A. No.696/2007 was filed by the decree holder asserting that the second judgment debtor was residing in the same house and that she was avoiding service. It was allowed and substituted service was effected by paper publication, on 4/12/2007. Thereafter, sale proclamation was affixed at her house on 23/5/2008. After, the sale was effected,I.A. No.980/2008 was filed in E.P. No. 295/1992 for delivery of the property. It is also on record that in E.A. No.980/2008, when the process server went to her house on 17/11/2008, the house was found locked. Notice was repeated and on getting information that she was working in the railway office, the process server went to her office on 2/7/2009, tendered it, but was refused by her. The notice was again taken to her same address in house No. 6/545 and was affixed at her house, on 17/9/2009. In spite of that, there was no appearance.

10. All the notices were sent in the same residential address in which the original judgment debtor had been residing, as evidenced by the commission report. The above facts disclose that even though she was residing in the same

house, repeated notices could not be served on her. This has to be appreciated in the background that she, who was served with notice in the other suit O.S. No.340/1994, also remained absent and at the same time, entered into private sale transaction with the decree holder, without any demur. It is clear that repeated notices were sent to the second judgment debtor, which were served by affixture. Due notice was also served by paper publication.

11. The second judgment debtor has no case that, she was not residing in that house during the relevant time or that she was residing in any other house. She has also no case that the address shown in the execution proceedings was wrong. On the other hand, Exts.B1 to B8 show that she was residing in the very same house, Evidently, there was sufficient, due and proper service and the only conclusion that can be drawn is that she was deliberately evading the notices. She has set up another case that in the execution proceedings, her name was shown as "Saleena" whereas her actual name was "Selin". She relied on Exts.A1 and A2 to prove that her name was wrongly spelled in the execution proceedings. It is true that the records show

that her name was wrongly spelt in the execution proceedings. However, that is immaterial, since her address disclosed the name of her husband Ramesh and the remaining part of address including the house number, remained correct. There is absolutely nothing on record to show that any of the notice was returned on the ground that the name differed . On the other hand, the process server from the court properly identified her complete address, went to her house and either the found house to be locked or she was not available and on one occasion, it was personally tendered to her who refused to accept the notice. This shows that no prejudice was caused to her, due to mere difference in the spelling.

12. Another contention of her was that the minor was not made party to the proceedings. This contention of the judgment debtor was negatived by the court below on the ground that since the mother and natural guardian of the minor was in the party array, there was substantial representation in the proceedings. It was contended by the learned counsel for the appellants that this finding of the court below is not correct since the mother had filed a Guardian O.P. No.24/2008 to

appoint her as the guardian of the minor, which was allowed only on 25/9/2008. It was contended that the property was sold on 10/7/2008 and hence, the appointment of her as the guardian can only take effect from the date of appointment and cannot relate back to any anterior date.

13. GOP.24/2008 was filed to appoint her as the guardian for the purpose of alienation of the property. Even prior to that, she was the natural guardian of the minor and was in the party array and hence could have effectively defended the execution proceedings. Hence the court below was justified in holding that no prejudice was caused to her. Above all, the very fact that by Ext.B7, she had purchased the entire right over property of the minor even before the GOP was allowed, takes away her entire defence.

14. Another contention of the judgment debtor was that the property was sold for a very low price. According to her, the commissioner fixed the value of the property at Rs.50,000/- per cent in the year 2001 and it was sold after seven years in 2008 for a paltry sum of R.2,75,000/-. According to her, even in 2001, the property was worth more and thereafter there has been a

steep increase in the price. According to her, the property was worth Rupees Twelve Lakhs. The commission report discloses that the commissioner had given an interim report stating that the commissioner needed the assistance of an expert to assess the property. But, it was not granted. Still the commissioner valued the property at Rs.50,000/- per cent. There is absolutely no record to show on what basis the commissioner arrived at such a price. Above all, the very fact that the wife, the second judgment debtor, herself purchased 11 cents of property, which includes the property which was sold in the present case in 2007, for a sum of Rs.80,000/-, itself cuts at the very root of her defence that it was knocked off for a very low price of Rs.2,75,000/-.

15. The above facts disclose that there is absolutely no merit in the applications filed for setting side the sale. No material irregularity has been brought out and the appellants are not entitled for any relief. It is also pertinent to note that the applications were filed after the statutory period. Hence,there is no merit in the appeals.

16. Both the appeals are dismissed with costs payable to

the contesting auction purchaser/2nd respondent in each of the appeals.

Sd/-
THOTTATHIL B.RADHAKRISHNAN
Judge

Sd/-
SUNIL THOMAS
Judge

dpk

/true copy/ PS to Judge.