IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE SUNIL THOMAS

FRIDAY, THE 19TH DAY OF JUNE 2015/29TH JYAISHTA, 1937

FAO.No. 281 of 2013 ()

E.A.NO.40/13 IN E.A.NO.18/11 (E.P.118/05) IN O.S.844/95 OF THE SUB COURT, NEYYATTINKARA DATED 16.07.2013

APPELLANTS/PETITIONERS:
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1. SAUDAMINI
M.N.HOUSE, CHARUMMOODU, THONNAKKAL
THALAKKONAM, MANGALAPURAM, VEILOOR VILLAGE.

2. SYAM S.,
M.N.HOUSE, CHARUMMOODU, THONNAKKAL
THALAKKONAM, MANGALAPURAM, VEILOOR VILLAGE.

3. ARUL JYOTHI.S
M.N.HOUSE, CHARUMMOODU, THONNAKKAL
THALAKKONAM, MANGALAPURAM, VEILOOR VILLAGE.

BY ADVS.SRI.G.S.REGHUNATH
SRI.K.RAJESH KANNAN
SRI.A.S.SHAMMY RAJ
SRI.P.SHANES

RESPONDENT/COUNTER PETITIONER:

A. VADAMONY
T.C.26/2146, STATUE ROAD, THIRUVANANTHAPURAM-695 002.

R BY ADV. SRI.R.S.KALKURA
R BY ADV. SRI.M.S.KALESH
R BY ADV. SMT.A.V.PRIYA
R BY ADV. SRI.HARISH GOPINATH

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON 19-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

THOTTATHIL B. RADHAKRISHNAN &
SUNIL THOMAS, JJ.

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F.A.O.No.281 of 2013

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Dated this the 19th day of June, 2015

JUDGMENT

Thottathil B. Radhakrishnan, J.

We have heard the learned counsel for the appellants and the learned counsel for the respondent.

2. The widow and children of the judgment debtor in a decree for money, granted on the strength of a promissory note, are the appellants. Respondent is the decree holder. As we proceed, we shall state the reason why this litigation is now in the form of an appeal.

3. The proceedings show that the suit was initially contested by the defendant. Thereafter, it appears that the defence was withdrawn and decree on consent was granted for recovery of the plaint claim and interest pendente lite at 12% and thereafter, at 6%. The suit is on a demand promissory note of Rs.1,00,000/-. The demand promissory note is dated 14.01.1995.

4. The decree was put in execution. The property covered by the attachment was brought to sale. The sale was conducted on 04.07.2008 and it was knocked down in favour of the decree

holder. The property sold in auction is a parcel of 5 cents and a partly constructed building. For whatever be the reason, there was no order recorded by the executing court in terms of Order XXI Rule 92 of the C.P.C. confirming the sale, though the Court was bound to do that. It is only on confirmation of sale that the sale would become absolute. Only when sale becomes absolute by the process shown in Order XXI Rule 92 of the C.P.C., would the grant of certificate of purchase under Order XXI Rule 94 arise. While the matters stood so, the judgment debtor died on 16.09.2010. Four days thereafter, on 20.09.2010, the sale was confirmed. Therefore, the order confirming the sale was issued by the executing court with a dead man being shown as the respondent in the party array. The order confirming the sale under Order XXI Rule 92 of the C.P.C is a judicial act, though there may be a plausible approach that what follows while issuance of certificate under Order XXI Rule 94 of the C.P.C could be treated as a ministerial act. The fact of the matter remains that as on the date when the sale was confirmed, the judgment debtor's name alone was shown as the respondent and he remained dead. There is no dispute on this.

5. Thereafter, the decree holder applied for impleadment of the legal representatives of the judgment debtor. Initially objections were raised. In the absence of all the legal representatives, additional applications were filed. Ultimately, the judgment debtors, on being impleaded, filed an application invoking Section 47 of C.P.C. and seeking relief as against the action levied in execution. That was done only on 05.02.2013. The executing court dismissed that application of the legal representatives of the judgment debtor and held that the action by the executing court was not liable to be interfered with under Section 47 of the C.P.C.

6. The legal representatives of the judgment debtor carried a revision to this Court against the aforesaid order. It appears that objections were raised by the Registry that the revision was not maintainable and that it is an appealable order. May be, the view then was that the order is one seeking to set aside a sale and therefore, would be appealable as an order against which an appeal lies. This appears to be on the assumption that the order was issued on an application under Order XXI Rule 90 of the C.P.C. This happened because the impugned order

proceeded as if the application was under Order XXI Rule 89 or Rule 90 of C.P.C. It is on this premise that the revision was returned and the matter was again presented as an appeal. This is how this matter comes before us as an appeal against the order impugned.

7. Before proceeding, we may record that we have examined the application. It does not quote either Rule 89 or Rule 90 of Order XXI C.P.C. It stands as an application invoking Section 47 of the C.P.C.

8. With the aforesaid situation in hand, when the matter came up for admission on 11.09.2013, the appellants were directed to place before the court below a fixed deposit receipt issued by a nationalized bank for Rs.2,00,000/-. That was done. Thereafter, on 13.12.2013, this Court recorded the submission on behalf of the appellants that they are prepared to wipe off the entire decree debt and settle the transaction finally. We may here recall that the decree holder himself is the auction purchaser.

9. As already noted, the fact of the matter remains that the order confirming the sale was issued only with a dead person being shown on the array as the judgment debtor. That order

cannot be carried for further proceedings, as against the legal representatives of that dead person without their participation at the stage from which it ought to have gone after impleadment, that is to say, from the stage while confirming the sale. We may at once recall that the statutory direction under Order XXI Rule 92 of the C.P.C. requires the Court to pass an order confirming the sale where no application is made under Rules 89, 90 or 91 or where such application is made and disallowed. Therefore, stricto senso, when the time limit to file an application under any among those Rules of Order XXI had run out and no such application had been filed, the Court was duty bound to confirm the sale. But, that does not mean that the sale would stand absolute without such confirmation having been ordered. The clear wordings of the latter part of Rule 92 of Order XXI are that the Court shall make an order confirming the sale and thereupon the sale has become absolute. In this view of the matter, the judicial order purportedly confirming the sale on 29.01.2010 has to be treated as ineffective and not binding on the legal representatives of the judgment debtor. The sale held on 04.07.2008 and knocked down in favour of the decree holder has to be treated as not confirmed through any such judicial order until now.

10. The aforesaid situation would lead to the eligibility of the appellants who are the legal representatives of the judgment debtor to contest the proceedings from the stage when the sale is taken up for confirmation. Though this is now before us as an appeal against an order, the spread up jurisdiction under Section 115 of the C.P.C. and Article 227 of the Constitution of the India enables us to issue such orders as are necessary to secure the ends of justice as between the parties to the case. As already noted, money has been made available in the form of fixed deposit. The decree holder’s case before the trial court was only one of lending on the basis of a promissory note. We are of the view that ends of justice would be satisfied if the decree holder is adequately compensated and the sale is left without confirmation, enabling the appellants to hold on to the property of their predecessor. If appropriate orders as to payments are made in favour of the decree holder, the sale can be ordered to be not confirmed.

11. As noted above, the demand promissory note is dated 14.01.1995. It was for an amount of Rs.1,00,000/-. That lending and creation of the demand promissory note were after the

amendment of Section 80 of the Negotiable Instruments Act as per Act 66 of 1988 with effect from 30.12.1988. By that amendment, the rate of interest on a negotiable instrument could be granted at 18% where no rate is specified. The demand promissory note as between the plaintiff and the defendant had an agreed rate of 12%. Taking that as a yardstick and the fact that 20 years have now gone through after the lending and the issuance of the demand promissory note, we are of the view that a total amount of Rs.5,00,000/-, including costs and incidentals, also by appropriation of amounts parked in fixed deposit already made would be adequate compensation to the decree holder in due discharge and satisfaction of the decree.

In the result, this appeal is allowed and the impugned order is vacated. As a consequence, the confirmation of sale ordered by the court below on 20.09.2010 is vacated and it is ordered that if the judgment debtors deposit before the executing court or pay to the decree holder outside Court an amount of Rs.5,00,000/- (Rupees five lakhs only) on or before 31.07.2015, the court below will record the due execution and satisfaction of the decree and drop the proceedings for confirmation of the sale in question. If such deposit or payment is not made, the executing court shall confirm the sale conducted on 04.07.2008 as if there is no application either under any among Rules 89, 90 or 91 of Order XXI of the C.P.C. To enable this, the court below will release the fixed deposit receipt which the appellants have placed before it, so that such funds could also be utilized by the appellants to pay off the decree holder in terms of this judgment.

Sd/-

THOTTATHIL B. RADHAKRISHNAN
Judge

Sd/-

SUNIL THOMAS
Judge

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