IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.N.RAVINDRAN
&
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

THURSDAY, THE 19TH DAY OF FEBRUARY 2015/30TH MAGHA, 1936

Ex.FA.No. 49 of 2014 ()

E.A.998/09 IN EP.193/2000 IN OS.33/1997 OF PRINCIPAL SUB COURT, IRINJALAKUDA.

APPELLANT/PETITIONER/3RD PARTY:
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1. SINIMOLE CHIRAYATH (MINOR) AGED 16 YEARS
   D/O VARGHESE, CHIRAYATH THRISSURKKARAN HOUSE
   THALORE DESOM, THRIKKUR VILLAGE, MUKUNDAPURAM TALUK
   (MENTALY RETARDED) REP. BY NEXT FRIEND AND SISTER
   KUNJUMOLE, AGED 23, D/O VARGHESE
   CHIRAYATH, THRISSURKKARAN HOUSE, THALORE DESOM
   THRIKKUR VILLAGE, MUKUNDAPURAM TALUK

2. KUNJUMOLE, AGED 23 YEARS
   D/O VARGHESE, CHIRAYATH THRISSURKKARAN HOUSE
   THALORE DESOM, THRIKKUR VILLAGE, MUKUNDAPURAM TALUK

   BY ADV. SRI.T.RAJASEKHARAN NAIR

RESPONDENTS/RESPONDENTS/DECREE HOLDER/JUDGMENT DEBTOR:
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1. MANAGER, PANJAB NATIONAL BANK
   PUKUKKAD BRANCH, THRISSUR-685 001.

2. VARGHESE
   CHIRAYATH THRISSURKKARAN HOUSE, THALORE DESOM
   THRIKKUR VILLAGE, MUKUNDAPURAM TALUK-685 001

3. SHYNIW/O VARGHESE,
   CHIRAYATH THRISSURKKARAN HOUSE
   THALORE DESOM, THRIKKUR VILLAGE,
   MUKUNDAPURAM TALUK-685 001.

   R1 BY ADV. SRI.SANTHEEP ANKARATH, SC, PUNJAB NATIONAL BANK

THIS EXECUTION FIRST APPEAL HAVING BEEN FINALLY HEARD ON 19-02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P.N.RAVINDRAN & ANIL K.NARENDRAN, JJ.

Ex.F.A.No.49 OF 2014

DATED THIS THE 19th DAY OF FEBRUARY, 2015

JUDGMENT

P.N.RAVINDRAN, J.

The appellants are the daughters of respondents 2 and 3. The second respondent is their father and the third respondent their mother. In this appeal, they challenge the order passed by the Court of the Principal Subordinate Judge of Irinjalakuda on 25.6.2014 in E.A.No.998 of 2009 in E.P.No.193 of 2000 in O.S.No.33 of 1997. By that order, the court below dismissed an application filed by the appellants under section 47 of the Code of Civil Procedure to set aside a sale held on 22.1.2002. The brief facts of the case are as follows:

2. The second respondent herein availed a loan from the Pudukkad Branch of the Punjab National Bank in the year 1994 on the security of 23.431 cents of land situated in Sy.No.510 of Thrikkur Village, Thrissur Taluk, Thrissur District. When the second respondent committed default in repayment of the loan, the bank instituted O.S.No.33 of 1997 in the Court of the Principal Subordinate Judge of Irinjalakuda on 10.2.1997 praying for a decree allowing it to realise the sum of ₹4,39,370/- with interest and costs from the defendants and their assets.

In the suit, besides the second respondent, the third respondent herein and another were joined as defendants 2 and 3. The defendants did not contest the suit, with the result the suit was decreed ex parte on 14.6.2000. The decree in O.S.No.33 of 1997 is extracted below.

> "This suit coming on this day for final hearing, before me in the presence of above advocates and the defendants set ex parte, the Court doth order and decree that the plaintiff is allowed to realise a sum of Rs.4,39,317/- with interest at the rate of 20.5% per annum from the date of suit till realisation with costs of the suit from the defendants 1 and 2 jointly and severally. The amount shall be paid or deposited in Court within three months from this date. On failure to pay the amount or to deposit it in time, the decree debt shall be realisable by sale of the plaint schedule immovable property or any sufficient part thereof in public auction and the sale proceeds shall be paid into Court. From out of the sale proceeds the plaintiff will be given the decree debt including future interest and costs. If the sale proceeds are not sufficient to satisfy the decree debt, the balance shall be recoverable from the defendants 1 and 2 personally. The balance of sale proceeds if any after discharging the decree debt will be paid to the first defendant."

By that decree, the plaintiff bank was allowed to realise the sum of ₹4,39,317/- with interest at 20.5% per annum from the date of suit till realisation and costs of the suit from defendants 2 and 3 jointly and severally and by sale of the plaint schedule property, which was mortgaged with the plaintiff-bank as security for the loan.

3. Though the second respondent herein, the first defendant in the suit filed I.A.No.1396 of 2002 to set aside the ex parte decree passed in the suit, that application was dismissed for the reason that neither he nor his counsel were present when it was taken up for evidence on 24.9.2004. The decree holder bank had in the meanwhile filed E.P.193 of 2000 on 17.8.2000 to execute the decree and to realise the sum of ₹7,96,530/-, the amount due under the decree as on the date of the execution petition. In that execution petition, after notice to the judgment debtors, the plaint schedule property was brought to sale and sold on 22.1.2012 and purchased by the decree holder bank for ₹7,97,000/-. The sale held on 22.1.2002 was confirmed by order passed on 12.9.2002. Pursuant to the confirmation of the sale, delivery of the property was also effected on 24.3.2004. The appellants herein however claim they are residing in the house situate therein. After the sale was confirmed and delivery was effected, the second appellant herein filed Consumer Complaint No.514 of 2009 before the Consumer Disputes Redressal Forum, Thrissur complaining about the disconnection of electricity connection to the residential building situate in the plaint schedule property and prayed for an order directing the Kerala State Electricity Board and the Assistant Engineer, KSEB, Ollur to restore the electricity connection to the residential building. The appellants did not prosecute C.C.No.514

of 2009. More or less simultaneously, the third respondent herein (the second defendant in the suit) filed W.P.(C)No.21333 of 2009 in this Court wherein she had prayed for an order directing the bank not to initiate securitisation proceedings against the property which had already been purchased by the bank in execution of the decree. She also prayed for an order directing the KSEB to restore electricity connection to the building situate therein. W.P.(C)No.21333 of 2009 was heard and dismissed by Ext.B1 judgment delivered on 5.10.2009. The judgment is extracted below in full.

> "1. Prayer in the writ petition is to direct the 1st respondent Bank not to initiate securitisation proceedings against the property which was already bid in auction in execution of a civil decree. The petitioner, inter alia, sought directions against the authorities of the Kerala State Electricity Board to re-connect Electrical supply to the building situated within the property. Pleadings of the petitioner in brief is as follows. In the year 1994 the petitioner's husband availed a commercial loan from the 1st respondent Bank to the tune of Rs.5 lakhs for doing some business. The petitioner's husband left abandoning his family in the year 1996 and his whereabouts are not known. The petitioner is left with two children, one among them mentally retarded and destituted, and she is not in a position to make any repayment. The 1st respondent Bank filed a civil suit and obtained decree, in execution of which the Bank bid in auction of the property. The sale stood confirmed as on 22.1.2002. Contention is that property has not been

delivered so far. Petitioner is seeking direction for permitting to pay off the liability and to direct the 1st respondent Bank to return the property which they have bid in auction from the civil court. Further contention of the petitioner is that the Electricity Board had disconnected supply and the petitioner has been put to miseries. According to the petitioner she is ready and willing to pay the entire liability if some waiver in interest is allowed.

2. In the counter affidavit filed by the 2nd respondent it is stated that the petitioner had approached this court suppressing all material facts and the writ petition is filed as a sheer abuse of the process of the court. According to respondents 1 and 2 the Bank obtained a decree as early as on 14.6.2000 and filed execution petition for realisation of a sum of Rs.7,94,028/-. In the execution proceedings the sale was conducted on 22.1.2002 and was confirmed on 12.9.02. Thereafter the property was taken possession and delivered to the Bank through Amin deputed from the civil court on 23.3.04. Except a small portion of residential building occupied by tenants, the entire property has been actually delivered to the Bank. With respect to the portion occupied by the tenants also, symbolic delivery was effected. Contention of the petitioner that Ext.P2 is a notice issued under the provisions of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act 2002 (SARFAESI Act) is disputed. What is intimated through Ext.P2 is only about further sale proposed with respect to the property. According to the respondents the Bank is the absolute owner of the property at present. It is further stated that in spite of several opportunities given to the petitioner to

settle the account, the petitioner had not availed such opportunities and even the OTS benefit granted during the year 2004 has not been materialised due to default on the part of the petitioner.

3. It is submitted by the learned counsel for petitioner that she had offered an amount of Rs.3 lakhs, after filing the writ petition. But the Bank had refused to accept the same. According to the learned counsel the petitioner is ready and willing to pay the amount provided the property is given back to her.

4. Having considered rival contentions and facts and circumstances of the case it is evident that the sale with respect to the property in question stands concluded and the property is now in absolute ownership and possession of the respondent Bank. It is also evident that the Bank had recovered the amount due under the loan transaction, by purchasing the property in auction sale. Facts being so, I am afraid this court can interfere with the matter at this stage and issue any direction to the Bank to settle the loan account by accepting any amount from the petitioner. On the other hand a re-conveyance of the property by way of sale by the Bank to the petitioner, alone is the possible way. But such a recourse is totally dependent upon the decision of the respondent Bank, for which the petitioner has to make proper representation before the authorities concerned. (emphasis supplied)

5. Under the above circumstances the writ petition is dismissed without prejudice to the right of the petitioner to approach the respondents 1 and 2 seeking re-conveyance of the property on affording payment on a reasonable basis, proportionate to the amount for which the property was

> sold in execution, along with interest or expenses whatever incurred by the Bank. It is for the authorities of the respondent Bank to take a decision on such offer, if made. I am sure that the authorities of the 1st respondent Bank will deal with such a representation if received, without any further delay."

4. The learned single Judge had while dismissing the writ petition taken note of the contention raised by the decree holder bank that except a small portion of residential building occupied by tenants, the entire property has been actually delivered over to it and with respect to the portion occupied by the tenants, symbolic delivery was effected. The learned single Judge held that as the sale has been held and confirmed and the property has been delivered over, this Court cannot issue a direction to the bank to settle the loan account by accepting any amount from the third respondent, that a reconveyance of the property by way of sale alone is possible, but such a course is totally is dependent upon the decision of the bank, for which she will have to make a representation before the authorities concerned.

5. After W.P.(C)No.21333 of 2009 was disposed of, the bank took steps to sell the property purchased by it in the court auction by inviting tenders. The tender submitted by one Sri P.P.Jose, who had quoted ₹45,00,000/- was accepted. The successful bidder thereafter retracted from his offer and filed O.S.No.445 of 2004 in the Court of

the Principal Subordinate Judge of Irijualakuda for a decree directing the defendants therein (the Manager, Punjab National Bank, Puthukkad and Chief Manager, Punjab National Bank, Ernakulam) to repay the sum of ₹4,59,590/- deposited by him as earnest money. The suit was decreed after trial by judgment delivered on 23.3.2012 mainly relying on the fact that the building in the plaint schedule property is occupied by tenants. The second respondent herein (the first defendant in the suit) had in the meanwhile filed O.S.No.2144 of 2011 in the Court of the Munsiff of Irinjalakuda for a permanent prohibitory injunction restraining the plaintiff from trespassing into the plaint schedule property or from committing acts of waste therein or from doing anything to diminish its value and utility. The said suit is even now stated to be pending. The appellants had in the meanwhile filed E.A.No.998 of 2009 in E.P.No.193 of 2000 in O.S.No.33 of 1997 under section 47 of the Code of Civil Procedure for an order setting aside the sale held on 22.1.2002 and it was dismissed by the impugned order.

6. As stated earlier, the appellants are none other than the children of respondents 2 and 3 (defendants 1 and 2 in the suit). In the affidavit filed in support of the application they contended that the first appellant is a minor and a mentally ill person, that she is also blind, that the plaint schedule property having an extent of 23.431 cents of land situate in Sy.No.510 of Thrikkur Village and the building

therein was purchased by them and the third respondent (the second defendant in the suit) as per Ext.A1 sale deed dated 21.9.1997 registered as document No.4722/97 of SRO, Nellayi, that thereafter they partitioned the property as per Ext.A2 partition deed registered as document No.4366/98 of SRO, Nellayi, that as per the partition deed, the A schedule was allotted to the third respondent and the B schedule which consists of 11 cents of land with the residential building therein was jointly allotted to the appellants. They contended that even before the suit was decreed, they had become absolute owners and were in possession of the property and therefore the judgment debtor had no saleable interest therein. They contended that the second respondent left the company of the appellants and the third respondent about 10 years back and that the sale was held flouting the prescribed procedure. It was further contended that the reserve price fixed was low, that the decree holder purchased the property without obtaining the permission of the court, that no encumbrance certificate was obtained and verified before the sale was held and that the property would fetch more than ₹15,00,000/-.

7. The first respondent-bank opposed the application by filing written objections. They disputed the averment that the minor first appellant is mentally ill and blind. They contended that the application is bad for suppression of material facts, that it was only after the suit

was instituted on 10.2.1997 and summons was served on the first defendant, that the first defendant executed Ext.A1 sale deed in favour of his wife and the appellants and that the sale is not binding on them. They contended that the second respondent (the first defendant) had equitably mortgaged the plaint schedule property in favour of the first respondent. They also contended that the sale is not in any way vitiated and that they purchased the property with the express permission of the court. The court below considered the rival contentions and dismissed the application by order passed on 25.6.2014. Hence this appeal.

8. When this appeal came up for admission hearing on 9.10.2014, Sri Santheep Ankarath, Advocate took notice for the first respondent. Having regard to the nature of the dispute raised, the Division Bench dispensed with notice to the other respondents. Later when the appeal came up on 14.10.2014, after hearing learned counsel on both sides, this Court directed the learned counsel appearing for the first respondent-bank to file a statement setting out the amount due as on 22.1.2002, the date on which the sale was effected and also the amount that would be payable under the decree as on 31.12.2014, if the decree had remained unsatisfied. This Court also directed that such a statement shall be filed on or before 27.10.2014. The learned counsel appearing for the first respondent

bank has accordingly filed a statement dated 27.10.2014. The said statement is extracted below in full.

" By order dated 14.10.2014, this Hon'ble Court directed me to file a calculation statement. Based on the instructions given to me by the Bank, I am filing this statement.

14.6.2000	:	Subordinate Judge's Court, Irinjalakuda decreed O.S.No. 33/1997 and allowed the plaintiff to realise a sum of ₹4,39,317/-with interest at the rate of 20.5% per annum from the date of suit (10.2.1997) till realisation with costs of the suit.
Principal amount.	:	₹4,39,317.00
Interest on principal amount from 10.2.1997 till the date of decree (14.6.2000)	:	₹3,15,210.00
Costs of the suit	:	₹ 35,670.00
Other expenses approved by the Court	:	₹ 3,831.00
Interest on principal amount from the date of decree (14.6.2000) till 31.12.2014	:	₹13,10,188.00
Expenses incurred by the bank	:	₹ 1,00,000.00
		₹22,04,216.00
22.1.2002	:	Date of sale
12.9.2002	:	Confirmation of sale
22.3.2004	:	Delivery of the property."

9. When the appeal thereafter came up for further hearing

on 8.12.2014, this Court referred the parties to mediation. The mediation talks failed and the dispute was not settled. The appeal has thus come up before us for hearing today.

10. We heard Sri T.Rajasekharan Nair, learned counsel appearing for the appellants and Sri Santheep Ankarath, learned counsel appearing for the first respondent. Sri T.Rajasekharan Nair, learned counsel appearing for the appellants submitted that the appellants are ready and willing to deposit the amount mentioned in the statement dated 27.10.2014 filed by the learned counsel appearing for the first respondent-bank and therefore, subject to such deposit being made, the impugned order may be set aside, the appeal may be allowed and the sale held on 22.1.2002 may be set aside. The learned counsel contended that the interests of the appellants were not protected by their parents, that the appellants had become owners of the property on 21.9.1997 long before the sale was held, that the judgment debtor had no saleable interest in the property as on the date of sale, i.e., 22.1.2002 and therefore for that reason also, the sale held on 22.1.2002 is liable to be set aside. The learned counsel contended that as the interests of the minors had not been protected and the first appellant continues to be a minor and is also suffering from yet another disability and the bank's concern should be only to realise the amount due to it under the decree, nothing stands in the

way of this Court from setting aside the sale and by such a course of action, the bank's right will not in any way be prejudiced.

11. Per contra, Sri Santheep Ankarath, the learned counsel appearing for the first respondent bank submitted that the suit was instituted on 10.2.1997 and it was after summons was served on the first defendant, that he sold the plaint schedule property which had been equitably mortgaged with the bank to the appellants and their mother, the second defendant, that the request similar to the one now made was made by the third respondent/second defendant who had filed W.P.(C)No.21333 of 2009 before this Court seeking similar reliefs, that this Court has in Ext.B1 judgment delivered on 5.10.2009 in W.P.(C)No.21333 of 2009 held that this Court cannot direct the bank to settle the loan account by accepting any amount from the petitioner, that only a reconveyance of the property is possible, that such reconveyance is totally dependent upon the decision of the first respondent-bank and therefore the appellants who stand on the same footing as the second defendant cannot in another jurisdiction request this Court to direct the bank to reconvey the property to them on payment of the amount due as on 31.12.2014 or the amount due as on date. The learned counsel submitted with reference to the contents of Ext.B1 judgment that after the sale was held on 22.1.2002 and it was confirmed on 12.9.2002, except a small portion of the residential

building kept by the defendants, possession of the entire property was delivered over to the bank and that in respect of the portion of the building occupied by the defendants, symbolic delivery was effected and that as the bank is the owner thereof, the appellants cannot seek or be granted the relief prayed for by them. The learned counsel also submitted that after the sale was confirmed and delivery was also effected, mutation was effected in the revenue records, that the bank had taken steps to sell the property in public auction, that the property was sold and purchased by one P.P.Jose, that he later backed out of the transaction and filed O.S.No.445 of 2010 for a decree directing the bank to refund the earnest money deposited by him, that the said suit was decreed after trial on the ground that the bank is not agreeable to give possession after evicting the tenants (the appellants themselves) who are in possession of a portion of the building and that in view of the conduct of the appellants and the attendant circumstances, no interference is called for with the impugned order. The learned counsel also submitted that appellants have filed P.O.P.No.2 of 2012 in the Court of the Subordinate Judge of Irinjalakuda seeking a declaration that the judgment and decree in O.S.No.33 of 1997 on the file of the Court of the Principal Subordinate Judge of Irinjalakuda and the sale held on 22.1.2012 in E.P.No.193 of 2000 are not binding on the plaint schedule property or the right of the appellants over the plaint schedule property and for a permanent prohibitory injunction restraining the defendants from forcibly evicting the appellants therefrom or from committing acts of waste therein or from selling the plaint schedule property and the said suit is pending. The learned counsel submitted that in that suit, the court below has passed an interim order directing both parties to maintain the status quo.

12. We have considered the submissions made at the Bar by the learned counsel on either side. We have also gone through the pleadings and the materials on record as also a copy of Ext.B1 judgment in W.P.C.No.21333 of 2009, a copy of order passed by the court below on 24.9.2014 dismissing I.A.No.193 of 2000 in O.S.No.33 of 1997 and a copy of the judgment in O.S.No.445 of 2010. From the materials before us, it is evident that it was after the suit was instituted on 10.2.1997 and summons was served on him that the first defendant executed Ext.A1 sale deed on 21.9.1997 conveying the property to the appellants and the third respondent. The first defendant had equitably mortgaged the property in favour of the plaintiff-bank. He could have therefore in our opinion conveyed the property to others. Any such conveyance will not also stand in the way of the bank from proceeding against the mortgaged property. The very same contentions which were put forward by the appellants herein were put forward by their mother, the third respondent herein,

the second defendant in W.P.(C)No.21333 of 2009. The third respondent is also a transferee under Ext.A1 sale deed. She had in W.P.(C)No.21333 of 2009 sought an order from this Court, directing the bank to reconvey the property, after accepting the amount due to the bank. That request was expressly turned down by this Court after holding that reconveyance depends entirely on the volition of the bank. A reading of Ext.B1 judgment in W.P.(C)No.21333 of 2009 discloses that this Court had in another jurisdiction declined the very same request made by the third respondent herein for reconveyance and had observed that the only course open to the third respondent (the second defendant in the suit) is to move the bank seeking reconveyance and that upon such request being made, it is for the authorities of the bank to take a decision on the request. The situation on the case on hand is similar. Though the learned counsel for the appellants submitted that as the interests of the bank can be protected by securing the amount due to it, there is no reason why the bank should not effect a reconveyance and this Court should not set aside the sale upon such deposit being made, we are of the opinion that in view of Ext.B1 judgment of this Court and the findings therein, which settled the rights of the third respondent who is similarly placed as the appellants, this Court cannot set aside the sale on deposit of the amount due as on 31.12.2014 or as on today being made. That apart, the materials before us show that the present application filed by the appellants is only another attempt by the judgment debtor to see that the bank does not enjoy the fruits of the decree. The suit was decreed on 14.6.2000. The sale in question had held on 22.1.2002. More than 13 years have passed thereafter. It was only in the year 2009, that the appellants came forward with E.A.No.998 of 2009 praying that the sale may be set aside. One of the grounds raised in the application was that the sale is vitiated by irregularity. What exactly is the irregularity is not specifically set out. As held by the court below, the appellants have only raised vage grounds which have not been substantiated. We are therefore of the considered opinion that the impugned order does not merit any interference. There is also yet another reason why we are not persuaded to interfere with the impugned order. The appellants, one of whom is a minor and is also stated to be under a disability and have no known sources of income have offered to pay a lumpsum amount of more than ₹25 lakhs. Though the learned counsel for the appellants submitted that a few philanthropic parishioners have come forward to advance the requisite funds, we are not persuaded to accept that submission. It is evident from the offer made by the appellants who have no known sources of income that they have been set up by their father with a view to further protract the proceedings. As stated earlier, the appellants have instituted P.O.P.No.2 of 2012 in the Court of the Subordinate Judge of Irnjalakuda and their father has instituted O.S.No.2144 of 2011 before the Munsiff Court, Irinjalakuda and both the suits are pending. From the totality of the circumstances, we are of the opinion that the instant application is yet another attempt by the appellants and their parents to somehow or the other prevent the bank from enjoying the property of which it is the absolute owner since 22.1.2002.

For the reasons stated above, we hold that there is no merit in the appeal. The appeal fails and it is accordingly dismissed. No costs.

SD/-
P.N.RAVINDRAN,
JUDGE

SD/-
ANIL K.NARENDRAN,
JUDGE

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