

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE ANTONY DOMINIC
&
THE HONOURABLE SMT. JUSTICE P.V. ASHA

TUESDAY, THE 17TH DAY OF NOVEMBER 2015/26TH KARTHIKA, 1937

FAO.No. 301 of 2014 ()

AGAINST THE ORDER IN EA.687/13 IN EP.337/06 IN OS 185/1999 of
PRINCIPAL SUB COURT, ERNAKULAM DATED 29.8.2014

APPELLANT(S)/PETITIONER:

K.G.GOPINATH SHENOY, AGED 66 YEARS
S/O. GIRI SHENOY, RESIDING AT KOCHMMADOM, KUTHIYATHODU
THURAVOOR, ALAPPUZHA DISTRICT.

BY ADVS. SRI.T.MADHU
SRI.D.M.SAJEEVAN
SRI.R.D.SHENOY (SR.)

RESPONDENT(S)/RESPONDENT:

SUDHA KARAN @ SUDAN, AGED 61 YEARS,
S/O. KUMARAN, RESIDING AT KAITHAVALAPPIL, NAYARAMBALAM
KOCHI, ERNAKULAM DISTRICT - 682 509.

R1 BY ADV. SRI.K.JAYAKUMAR (SR.)
R1 BY ADV. SRI.P.B.KRISHNAN
R1 BY ADV. SRI.N.AJITH
R1 BY ADV. SRI.P.M.NEELAKANDAN
R1 BY ADV. SRI.P.B.SUBRAMANYAN

THIS FIRST APPEAL FROM ORDERS HAVING BEEN FINALLY HEARD ON
17-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

ANTONY DOMINIC & P.V.ASHA, JJ.

F.A.O.No.301 of 2014

Dated this the 17th day of November, 2015

JUDGMENT

Antony Dominic, J.

1.This appeal is filed by the judgment debtor in E.P.337/06 in O.S.185/99 on the file of the Sub Court, Ernakulam who is aggrieved by order dated 29.8.2014 passed in E.A.687/13 filed under Order XXI Rule 90 of the Code of Civil Procedure. By the said order, E.A.337/06 filed with a prayer to set aside the sale of an immovable property, having an extent of 5.086 cents of land in Cochin Corporation and a building thereon for ₹27,15,000/-, held on 15.7.2013, was dismissed.

2.Briefly stated, facts of the case are that the respondent decree holder had filed O.S.185/99 against the appellant. The suit was decreed and he filed E.P.337/06 for execution of the decree. Two other persons had also filed O.S.Nos.81/98 and 84/98 before the Sub Court, Ernakulam. O.S.Nos.81/98 and 84/98 were also decreed and for execution of these decrees E.P.Nos.578/04 and 348/04 were filed. In

E.P.578/04, on an application made by the decree holder, an order was passed by the execution court that sale of the immovable property mentioned above would be conducted in respect of all the three decrees.

3.Subsequently, E.A.752/10 was filed by the decree holder in E.P.337/06 for ratable distribution among all the decree holders and an order to that effect was passed on 16.9.2010. Similar order was also passed on 22.6.2011 in the EA filed by the decree holder in E.P.348/04. Mean while, the proclamation was settled in the execution petitions and on the showing of the appellant himself, the proclamation settled in E.P.348/04 was with notice to him under Order XXI Rule 66. It is also stated that in E.P.337/06, the proclamation was settled, however without notice to the judgment debtor as provided under Rule 66.

4.The property was thereafter sold in court auction on 15.7.2013 and the decree holder purchased the property with leave of the court for ₹27,15,000/-.

It was thereafter that the appellant filed E.A.687/13 in E.P.337/06 under Order XXI Rule 90, praying to set aside the sale conducted on 15.7.2013. The contention raised by the appellant was that in E.P.337/06, in which the property was sold, proclamation was settled without notice under Rule 66 and therefore, the sale held is vitiated for material irregularity.

5.However, by the impugned order, the execution court dismissed the petition citing two reasons. First reason stated is that though the proclamation settled in E.P.337/06 was without notice under Rule 66 to the judgment debtor, the judgment debtor had notice under Rule 66 in respect of the very same property in E.P.348/04 in O.S.84/98. Secondly, it is stated that the petition under Order XXI Rule 90 was defective in as much as though the sale was in respect of the three decrees, the judgment debtor should have impleaded the other two decree holders also and in the absence of which, petition could not be entertained. It is challenging this order passed by the execution court, this appeal is filed.

6. We heard the senior counsel for the appellant on 16.11.2015. On account of the absence of the counsel for the respondent decree holder, the case was adjourned to today. Even today, there was none representing the respondent and therefore, we did not have the benefit of hearing the counsel for the respondent.

7. As we have already stated, two reasons have been stated by the execution court to dismiss E.A.687/13 filed in E.P.337/06 in O.S.185/99. One is that the judgment debtor ought to have impleaded the decree holders in O.S.Nos.81/98 and 84/98. In so far as this finding of the execution court is concerned, as rightly contended by the learned senior counsel, it is not necessary that in an application filed under Rule 90, the other decree holders, though they are also interested in the proceedings, should have been impleaded. On the other hand, according to us, if the court is satisfied that the interest of other persons also are likely to be affected, it was the duty of the court under Rule 92 to have issued notice to such of those interested persons. This position

has been clarified in the judgment in Alladin v. Karimbux [AIR 1955 Rajasthan 51], where, it has been held thus:

"(12) The consensus of opinion, therefore, of all High Courts is that if an application is made under O.21 R.90 within 30 days of the date of sale, it is the duty of the court to dispose it of and the fact that there is no formal array of parties in the heading would not make the application barred by limitation, and that it is the duty of the court under the proviso to O.21 R.92 (2) to give notice to all parties affected by the application."

Therefore, we cannot approve the aforesaid reason of non-joinder stated by the execution court for rejecting E.A.687/13.

8.The second reason stated to reject the contention that in the absence of notice under Order XXI Rule 66 issued while settling the sale proclamation in E.P.337/06, the sale is vitiated for material irregularity, is that the judgment debtor had notice of proclamation of sale in E.P.348/04 in O.S.84/98. while examining the correctness of these reasons, it

is necessary to make reference to the provisions of Order XXI Rule 90 which reads thus:

"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.

(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 this 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."

9. Reading of this provision shows that the Code has enjoined the courts from setting aside sale in execution on the ground of irregularity or fraud in publishing or conducting the sale, unless, on the facts proved, the court is satisfied that the applicant had sustained substantial injury by reason of such irregularity or fraud. This, therefore, shows that even if irregularity or fraud is made out in an application under Rule 90, the court will be entitled to set aside the sale conducted only if substantial injury is proved to have been caused by reason of the irregularity or fraud. We are also conscious of the principles laid down by the Full Bench of this Court in Govinda Menon v. Varkey [1970 KLT 440], where, it has been held that where no notice was issued regarding settlement of proclamation which led to the sale, the sale is not void but has to be set aside in an appropriate proceedings on application made under Order XXI Rule 90. It is also true that our attention was invited by the learned senior counsel for the appellant to the principles laid down by the Andhra Pradesh High Court in Mannem Peda Narisi Reddi v. Maddivenkayya

[AIR 1977 AP 234] which show that for non-compliance of the mandatory provisions of order XXI Rule 66 (2), an auction sale made was held to be illegal.

10. Bearing in mind the provisions contained in Rule 90 and the judgments referred to above, let us now examine the facts of this case to see whether, on the facts proved, the appellant has succeeded in satisfying the court that he has sustained substantial injury by reason of the non-issuance of the notice under Rule 66. As we have already stated, with reference to the facts, there were three decrees and three execution petitions. Ratable distribution was ordered in E.P.337/06 and 348/04. The Court had also passed an order that the sale will be conducted in respect of all decrees. From the counter affidavit filed in this appeal, we find that the decree holders had filed a joint proclamation in the three execution petitions under Order XXI Rule 66. Admittedly, the joint proclamation was in respect of 5.08 cents of land along with the building which ultimately was sold on 15.7.2013. It also is the admitted case that Rule 66 notice was served on the appellant in

E.P.348/04 and his complaint is only that the proclamation which led to the sale on 15.7.2003 was in E.P.337/06 and that in that EP, there was no notice under Rule 66. Since the proclamation was joint and the property was one and the same and as the appellant had notice in E.P.348/04, the appellant had every opportunity to raise his objections. In other words, the absence of notice under Rule 66 in E.P.337/06 has not caused any injury, much less any substantial injury, which is the mandatory requirement under Rule 90 of Order XXI for setting aside the sale conducted in execution of a decree. Therefore, we fully endorse the findings of the execution court that the sale was not liable to be set aside.

11. For all the above reasons, though we agree with the counsel for the appellant that non-impleadment of the decree holders in O.S.Nos.81/98 and 84/98 was not fatal to E.A.687/13, we find that on the facts proved, the appellant has not established that any substantial injury has been caused to him for want of notice under Rule 66 of Order XXI CPC. We,

therefore, do not find any reason to interfere with the order under appeal.

Appeal fails and is accordingly dismissed.

Sd/-
ANTONY DOMINIC, Judge.

Sd/-
P.V.ASHA, Judge.

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PS to Judge