

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:14.09.2015

CAV ON:13.10.2015

CORAM

THE HON'BLE MR.JUSTICE C.S.KARNAN

C.M.A.No.952 of 2014
and
M.P.Nos.1 and 2 of 2014

Order Reserved on 14.09.2015 Judgment Pronounced on 10.2015 .

K.Sridhar ... Appellant

vs

1.Sekar
2.Murugan
3.Subramani @ Subramaniyan
4.A.Geetha
5.Jayalakshmi
6.K.Selvakumar
7.P.Saraswathi

... Respondents

Prayer: Civil Miscellaneous Appeal filed under Order 43 R 1 (j) of CPC, against the fair and decreetal order dated 21.10.2013 passed in unnumbered in E.A.No.--/2013, in E.P.No.5 of 2013 in O.S.No.48 of 2006, on the file of I Additional District and Sessions Court, Cuddalore.

For Appellants : Mrs.Chithra Sampath
(Senior Counsel)
for Mr.T.S.Baskaran

For Respondents: Mr.R.Gururaj for R1
No Appearance for R2 to R6
R7 not ready notice

JUDGMENT

The short facts of the case are as follows:

The appellant viz., Mr.Sridhar, submits that the scheduled mentioned property/subject matter of the property belonging to the respondents 2 to 7 as Joint Family property, the respondents 3 to 7 had executed a General Power of Attorney to and infavour of the 2nd respondent herein and he had mortgaged the said property with the 1st respondent herein. The said loan amount with interest had not been repaid, hence the 1st respondent had initiated a suit for the recovery of the said loan amount and the said suit was decreed. On the strength of the decree and judgment the subject matter of the property had been auctioned on 01.10.2012. The appellant herein had participated in the said public auction and he was the highest bidder and knocked for a sum of Rs.40,20,000/- and he had remitted the entire auction amount into the Court Deposit. Under the circumstances the respondents 5 to 7 had filed an application under Order 21 Rule 90 of Civil Procedure Code, the said application had been numbered as E.A.No.103 of 2012, which reveals that a partition suit in O.S.No.183 of 2010 is pending on the file of Additional District Munsif Court, Cuddalore, among the share holders.

2. The appellant further submits that the 3rd respondent herein had filed an application in E.A.No.90/2012 under Section 47, Civil Procedure Code and revealed that there is some modification in the rate of interest over the said loan principal amount. The 1st respondent had not disclosed about the partition suit and also not disclosed the application in E.A.No.90/2012. In the above mentioned facts had been disclosed to the appellant then the appellant would have retrained from the above auction proceedings. The 1st respondent/deeree had maintained his silence in order to realise his decree amount in a clandestine fashion. Further, the respondents 2 to 5 have stated in the plaint in O.S.No.183 of 2010 that the respondents 2 to 7 had executed a General Power of Attorney to receive a loan from the bank and not from a private individual, as such the 2nd respondent herein/Power Agent is wholly responsible for the said loan amount besides the said loan amount had not been received for the welfare of the Joint Family.

3. The appellant further submits that the General Power of Attorney dated 15.07.1998 had been executed in favour of the 2nd respondent by respondents 3 to 7 when the 3rd respondent herein was a minor, as such the loan amount will not be found on the 3rd respondent. Further as per the mortgage deed the rate of interest i.e., 12% for the said mortgage amount but the Civil Court had passed a decree with interest at the rate of 18.5%. In order to rectify the decree regarding rate of interest, a supplementary application in I.A.No.672 of 2012 is pending inquiry. As per section 34, the rate of interest i.e., 6% among the private individuals. The suit for recovery had been filed against all the respondents but the Court summon was served on the 2nd respondent alone since he was the power agent of all the

other respondents. A similar method had been adopted also in the auction proceedings. However, the auction notices were served on the respondents 2 to 7, as such the auction is valid and sustainable under law but the respondents 3 to 7 had not shown any saleable interest pertaining to the said property. The appellants had purchased the said property out of this own funds.

4. The appellant further submits that the General Power of Attorney had been executed to and in favour of the 2nd respondent herein is under dispute in addition to that an application filed under section 47 of CPC for modification in the date of interest, further the respondents 3 to 7 have not shown any saleable interest, hence the appellant had filed an application in Order 21, Rule 91 and prayed to cancel the auction dated 01.10.2012 pertaining to the subject matter of the property. The said application had been rejected without numbering since the same has not been filed within 60 days besides section 5 CPC will not apply to the execution proceedings. Further, the Execution Court mentioned that first limitation may be taken note of only then it can be considered for numbering, subsequently the Execution Court dismissed the section 5 application, since the same is not applicable under Order 21 of CPC besides the appellant was not a party in the Execution Proceedings in E.P.No.9/2009 in O.S.No.48 of 2006. Thereafter, the appellant has filed in E.A.No.-- of 2013 in E.P.No.5 of 2013 (District Court in E.P.No.9 of 2009 and prayed to set aside the auction dated 01.10.2012 and to refund the sale amount of Rs.40,20,000/- after less poundage and the sale certificate amount of Rs.2,81,400/-. The same was dismissed on merits after hearing the arguments on both sides.

5. Against the said dismissal order, the above appeal has been filed. The highly competent counsel Mr.T.S.Baskaran, appearing for the appellants submits that the appellant had purchased a suit property in the Court auction believing that the judgment debtor had all the rights to deal with the property. The appellant after knowing the facts regarding suit for partition in O.S.No.183 of 2010 among the respondents immediately he had filed an application to set aside the public auction and refund of the auction amount which had been deposited by the appellant herein. Further, the 2nd respondent had acted beyond the terms and conditions of the Power of Attorney. The 1st respondent/deed holder clandestinely not revealed the facts stating that Section 47 application is pending enquiry and which had been filed by the 3rd respondent. The learned judge had also failed to follow the legal procedure i.e., prior to taking a decision on the section 47 application and connected execution of the application and brought the property on public auction, therefore, the auction is not valid and also not sustainable under law. Hence, the learned counsel

entreats the Court to allow the above appeal and set aside the auction proceeding and further directs the Execution Court to refund the auction amount.

6. The very competent counsel Mr.R.Gururaj, appearing for the 1st respondent submits that the decree and judgment passed in O.S.No.48 of 2006 passed by the 1st Additional District and Sessions Judge is now made final and against the decree and judgment there is no appeal as of now. Further the said decree had been executed by way of bringing the subject matter of property and public auction on 01.10.2012. The appellant being the highest bidder and knocked a sum of Rs.40,20,000/- and the same deposited in the Court. After a lapse of one year the appellant has filed an application to set aside the auction proceedings since there is no irregularities or illegalities or short comings in the said auction proceedings or in the original decree and judgment. The rate of interest had been fixed by the trial Court which is admissible and not of exorbitant interest. The respondents had filed a petition under section 47 of Civil procedure Code to modify the rate of interest is not appropriate and the Executive Court has no jurisdiction to modify the rate of interest. Further, the Executive Court had not granted an interim stay in the said 47 application or in the Execution Application in E.A.No.103 of 2012. Therefore, the public auction was conducted on 01.10.2012 is fit to be operated any further. The respondent now raising legal points viz., the 3rd respondent/Subramani @ Subramaniyan that he was a minor at the time of executing the General Power of Attorney and also executing the market. The Executive Court has no jurisdiction or internal power in the instant case to set aside or modify the decree but the duty of the Executive Court is to examine the Court in a procedural manner. The respondents remedy lies elsewhere and not before the Execution Proceedings Court by way of filing supplementary application. Hence, the very competent counsel entreats the Court to dismiss the above appeal.

7. From the above discussion, this Court is of the views:

(i) The decree and judgment order passed in O.S.No.48 of 2006 is now finalized and not challenged by the judgment debtor, as such the said decree is executable. Accordingly, the Execution Proceedings Court executed the decree by way of bringing the subject matter of the property by way of public auction dated 01.10.2012. The appellant is the highest bidder and agreed to pay a sum of Rs.40,20,000/- as auction amount, the same has been deposited in the Court;

(ii) Now the duty of the Executive Court has to complete the execution proceedings by way of executing the sale deed and deliver the property;

(iii) In order to maintain public justification then the duty of the Court is to execute the same in order to maintain public confidence and the decorum of the Court, hence the appellant need not refrain from his original stand;

(iv) Both parties are not permitted to file an appeal against this Court order;

(v) As per the decree, the decree holder is entitled to receive this amount as well as the judgment debtors are entitled to receive the balance of amount if any after filing necessary application subject to withdrawals if any.

8. Considering the facts and circumstances of the case and arguments advanced by the very competent counsel on either side and on perusing the typed set of papers and the views of this Court in (i) to (v) mentioned above, the above appeal is dismissed. There is no order as to costs. Consequently, connected miscellaneous petitions are closed.

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s/d-
Assistant Registrar (CO)

True Copy

Sub-Assistant Registrar

To

1. The I Additional District
and Sessions Court,
Cuddalore.

2. The Section Officer,
VR Section, High Court, Madras.

+ 1 cc to Mr. T. S. Baskaran, Advocate SR 56307

+ 1 cc to Mr. R. Gururaj, Advocate SR 56411

msm(co)
prk14/10

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