

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 27.07.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(NPD)No.255 of 2011
and
M.P.No.1 of 2011**

Murugan

.. Petitioner

Vs.

1.Thukkaram Mudaliar

2.Rajasekaran

.. Respondents

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the fair and decreetal orders passed in C.M.A.No.1 of 2009, dated 26.08.2010, on the file of the Court of Subordinate Judge, Ranipet, Vellore District in confirming the fair and decreetal orders passed in E.A.No.73 of 2006 in E.P.No.4 of 2005 in O.S.No.266 of 1984 dated 16.02.2009, on the file of the Court of District Munsif-cum-Judicial Magistrate, Arcot, Vellore District.

For Petitioner : Mr.A.Muthukumar

For Respondents : Mr.A.Palaniappan (for R1)

Mr.C.Umashankar (for R2)

ORDER

The petitioner has filed this Civil Revision Petition to set aside the fair and decreetal order of the learned Subordinate Judge, Ranipet, Vellore District made in C.M.A.No.1 of 2009 dated 26.08.2010, confirming the fair and decreetal order passed in E.A.No.73 of 2006 in E.P.No.4 of 2005 in O.S.No.266 of 1984 dated 16.02.2009, on the file of the District Munsif-cum-Judicial Magistrate, Arcot, Vellore District and allow the said E.A. by allowing this civil revision petition.

2.The case of the revision petitioner is that he is the brother of the 1st respondent/decreed holder namely Thukkaram Mudhaliar. The schedule mentioned property belonged to the revision petitioner's father namely Subramaniya Mudaliyar. The said Subramaniya Mudaliyar borrowed the decree amount from the 1st respondent and the same was sold under Court auction sale on 04.09.2006 to satisfy the said decree amount. In the said money suit in O.S.No.266 of 1984, the revision petitioner stood arrayed as 4th defendant. The auction purchaser namely Rajasekaran, the 2nd respondent herein is none other than the sister's son of the petitioner. The said Court auction

sale in favour of the 2nd respondent is illegal and the same was an output product of the collusion between the other defendants, further the sale was conducted without issuing notice under Order 21 Rule 22 of C.P.C. That apart, there were also some material irregularities committed by the Executing Court with regard to the procedure followed in auctioning the property. Moreover the execution petition, as well as the suit itself is bad for non-joinder of necessary parties and hence the decree is non executable. Therefore, the revision petitioner herein has filed an execution application in E.A.No.73 of 2006 under Order 23, Rule 19 of CPC, praying to set aside the sale in favour of 2nd respondent. The said Interlocutory Application was resisted by the respondents and the same was on erroneous approach, dismissed by the execution Court. Aggrieved over the same the revision petitioner filed Civil Miscellaneous Appeal in C.M.A.No.1 of 2009 before the Learned Subordinate Judge, Ranipet. However, the Learned Subordinate Judge having failed to appreciate the material irregularities involved in the above sale, has dismissed the revision petitioner's appeal. Hence challenging the dismissal of the revision petitioner's civil miscellaneous appeal, the present Civil Revision Petition is preferred.

3.I heard Mr.A.Muthukumar, learned counsel appearing for the petitioner and Mr.A.Palaniappan, learned counsel appearing for the 1st respondent and Mr.C.Umashankar, learned counsel appearing for the 2nd respondent and perused the records.

4.The learned counsel for the revision petitioner submitted that the sale in favour of the 2nd respondent is bad in Law, since made without adopting the procedures enumerated under Law. The 2nd respondent's mother being one of the legal heirs of the deceased Subramaniya Mudaliyar was not made as a party to the suit. Further, there was no notice issued to the judgment debtors, by the Execution Court under Order 21, Rule 22 of C.P.C. The proclamation effected by the Execution Court in column No.2 was not filled up and there was no beat of Tom Tom effected in that locality. The proclamation was not widely published, in pursuance of the collusion between the 2nd respondent and other defendants. Therefore, the sale is liable to be set aside, however both the Courts erred in dismissing the revision petitioner's application to set aside the sale in favour of the 2nd respondent, which was held on 04.09.2006.

5.Per contra, the learned counsel for the respondents submitted that there was neither any material irregularity nor violation of any provision of C.P.C. nor on observance of procedures in the Court auction and the corresponding sale made by the Executing Court. Only appreciation of the above said facts, both the Courts have rightly dismissed the revision petitioner's application to set aside the sale.

6.On perusal of the typed set of papers it is seen that the revision petitioner herein stood arrayed as 4th respondent in the above execution proceedings in E.P.No.4 of 2005 and the 4th defendant in the main suit. Thus it is noticed that all along the revision petitioner being a party to the suit proceedings, but has never chosen to raise the ground of non-joinder of parties. Whereas, after Court auction and completion of sale has raised such a ground in his application made under Order 21, Rule 90 of CPC to set aside the sale. Therefore, this Court is not inclined to accept the revision petitioner's plea of non-joinder of necessary parties. If at all he is really interested to safeguard other's interest and right over the auctioned property, very well he would have raised such objection at an earlier point of time in the suit proceedings.

7. In so far as the claim of the revision petitioner that no notice was issued in the execution proceedings, it is seen that the respondents' counsel namely T.V. Anandachary undertook to file Vakalat in favour of the revision petitioner. However, since there was no appearance made by the respondents 2 to 5, they were called absent and set ex-parte on 06.04.2005. Therefore the said claim of non serving of notice to the revision petitioner is unsustainable.

8. The records further reveal that sale proclamation was fixed at Rs.2,50,000/- and the contesting respondents endorsed their no objection to sell petition mentioned 1st item of property. The proclamation was fixed on 04.09.2006 and the notice for proclamation was duly served on the revision petitioner. Having fixed 04.09.2006 as the date of sale, the notice of proclamation was caused on 19.08.2006 and the same was also admitted by the revision petitioner during the cross examination. It is also seen that the formalities of affecting Tom Tom and publication was dully followed. Therefore this Court does not find any irregularity in the procedure followed by the Executing Court.

9. At this juncture, it is needless to say that the petitioner earlier had an opportunity to deposit the decretal amount under Order 21

Rule 89 of C.P.C. But without exhausting the said provision, the revision petitioner has chosen to file an application under Order 21, Rule 90 of CPC. Order 21 Rule 90 of CPC states as follows:

“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.”

Therefore, this Court comes to the conclusion that the revision

petitioner's application is not a bonafide one and the same is liable to be dismissed. It is needless to say that a sale can be set aside as per Order 21, Rule 90 of CPC only in the event of any material irregularity in conducting the sale which resulted in substantial injury to the judgment debtor.

10. In this context it would be relevant to look into the decision of the Hon'ble Apex Court in the matter of **Saheb Khan v. Mohd. Yusufuddin and Ors.**, reported in **2006 (3) CTC 198**, wherein it was held as follows:

“Therefore before the sale can be set aside merely establishing a material irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the Court that material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of the sale, it would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity for fraud in publishing or conducting the sale”.

11. Admittedly in the case on hand, there is no material

irregularity or collusion or fraud established by the revision petitioner to substantiate his petition under Order 23, Rule 19 of CPC. Only on proper appreciation of the said facts, both the Courts have rightly dismissed the revision petitioner's application to set aside the sale dated 04.09.2006. In view of the same, the concurrent findings of the Courts below are not called for any interference by this Court and the same is hereby confirmed.

12. In result, the civil revision petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

27.07.2017

Speaking order
Index:Yes

vs

To

1. The Subordinate Judge,
Ranipet, Vellore District.

2. The District Munsif-cum-Judicial Magistrate,
Arcot, Vellore District.

M.V.MURALIDARAN, J.

VS



**Pre-Delivery order made in
CRP(NPD)No.255 of 2011
and
M.P.No.1 of 2011**

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