

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.02.2017

CORAM :

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

CRP (NPD) Nos.2754 and 2755 of 2007
and
M.P.No.2 of 2007

Apachiappan .. Petitioner in both the CRPs

Vs.

1.Archana Finance
Rep. by Partner, Ramaswamy
Arjundas Stanes Nagar 3rd Street
Tiruppur.

2. A.Marappan .. Respondents in both the CRPs

COMMON PRAYER: Revision Petitions under Section 115 of the Code of Civil Procedure against the fair and decretal orders dated 29.08.2006 in C.M.A.Nos.58 and 59 of 2006 passed by the learned Additional District Judge, Coimbatore, confirming the orders dated 07.07.2006 in E.A.Nos.7 and 8 of 2006 in E.P.No.84 of 2001 in O.S.No.372 of 1991 passed by the Sub Judge, Tiruppur.

For Petitioner : Mr.C.R.Prasanan

For Respondents : Mr.V.P.Sengottuvel

ORDER

These civil revision petitions are filed under Section 115 of the Code of Civil Procedure against the fair and decretal orders dated 29.08.2006 in C.M.A.Nos.58 and 59 of 2006 passed by the learned Additional District Judge, Coimbatore, confirming the orders dated 07.07.2006 in E.A.Nos.7 and 8 of 2006 in E.P.No.84 of 2001 in O.S.No.372 of 1991 passed by the Sub Judge, Tiruppur.

2. The facts in a nutshell are as under: The revision petitioner is the defendant in the suit in O.S.No.372 of 1991 filed by the first respondent/plaintiff based on a mortgage. The said suit was decreed and on the strength of the same, the first respondent/deGREE holder filed E.P.No.84 of 2001 seeking execution of the decree in the above said suit. The first respondent brought the suit property for sale by auction on 14.12.2005 and the second respondent herein is the auction purchaser.

3. It is stated that after auction and before confirmation of sale, the petitioner filed two applications before the learned Subordinate Judge, Tiruppur, seeking reliefs as stated infra: (i) E.A.No.7 of 2006 to dispense with the furnishing of security on the ground that the

property worth Rs.30 Lakhs has been sold for Rs.4,90,000/- in the court auction; and (ii) E.A.No.8 of 2006 to set aside the sale held on 14.12.2005.

4. The learned Subordinate Judge, Tiruppur, by order dated 07.07.2006 made in E.A.No.7 of 2006, held that the petitioner had not made out any valid ground for dispensing the furnishing of security and, thus, granted one month's time to the petitioner either to deposit or furnish immovable property as security, failing which it was stated that the petition will stand dismissed automatically.

5. In E.A.No.8 of 2006, the learned Subordinate Judge, Tiruppur, by order dated 07.07.2006, held that even though the petitioner take part in the execution proceedings, at no stage before the auction sale, he raised an objection with regard to the fixation of upset price or produced any document in support of his claim, and, therefore, at the belated stage, such a plea cannot be countenanced. It was, in effect, held that if the petitioner failed to furnish security as directed in E.A.No.7 of 2006, the application in E.A.No.8 of 2006 would also stand dismissed automatically.

6. Assailing the said order, the petitioner filed C.M.A.Nos.58 and

59 of 2006 before the learned Additional District Judge, Coimbatore, who, by order dated 29.08.2006, upheld the order passed by the learned Subordinate Judge, Tiruppur, and dismissed the appeals. Hence, the present revisions for the relief stated supra.

7. The learned counsel for the petitioner vehemently contended that when the petitioner has prayed for setting aside the sale under Order XXI Rule 90 of the Code of Civil Procedure on the ground of material irregularity, the Courts below ought not to have insisted upon furnishing of security as a pre-condition and in any event, dismissing an application filed under Order XXI Rule 90 of the CPC, on the ground that the conditional order directing furnishing of security has not been complied with is erroneous.

8. He further contended that the property mortgaged or sold by way of auction itself a sufficient security and there is no need for furnishing any further security and in any event, even if a portion of the said property is sold, it would have been suffice to meet the amount claimed by the decree holder.

9. On the other hand, the learned counsel for the respondents justified the orders passed by the Courts below and reiterated the

reasons that found favour with the Courts below and prayed for dismissal of the present revisions.

10. I heard Mr.C.R.Prasanan, learned counsel for the petitioner and Mr.V.P.Sengottuvel, learned counsel for the respondents in both the Civil Revision Petitions and perused the orders passed by the Courts below and the documents available on record.

11. One of the issues raised in these revisions is whether the proviso as introduced by the Hon'ble High Court before the introduction of the Act 104 of 1976 still continuous to hold the field or not and assuming the answer to the said issue is in the affirmative, whether the same is in contravention or inconsistent with the amended provisions under Order XXI Rule 90 of the Civil Procedure Code.

12. Before advertng to the merits of the issues raised, it is apposite to refer to Order XXI Rule 90 of the Civil Procedure Code, as it has stood before the introduction of the amendment and after the introduction of the amendment.

13. Order XXI Rule 90 of the Civil Procedure Code, as it has stood prior to the amendment, is as follows:

“Rule 90: Application to set aside sale on ground or irregularity or fraud:

(1) Where any immovable property has been sold in execution of a decree, the decree holder or any 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:

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(High Court Amendment-Madras)--After the first paragraph and before the present proviso to the rule, insert the following:

Provided that the Court may, after giving notice to the appellant, call upon him before admitting the application, either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or to that realised by the sale, whichever is less, or to deposit such amount in Court;

Provided also that the security furnished or the deposit made as aforesaid, shall be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale.”

14. The above Rule after the Amending Act reads as follows:

“Rule 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.”

15. A learned Single Judge of this Court, on an interpretation of the above said two provisions, in *R. Jeyaraman vs. K.P.V.*

Sundaramoorthy, 2009 5 LW 621, held as under:

“9. Order 21 Rule 90 provides for an opportunity for a party to set aside the same on the grounds mentioned therein. The proviso has been added in order to avoid unwanted and unnecessary applications and also to give certain certainty to the decree obtained. As seen above an application under Order 21 Rule 90 can be filed only on the ground mentioned therein. A perusal of the explanation to the amending Act would show mere defect in the attachment of the property sold shall not by itself a ground for setting aside the sale. Therefore by reading of the above said provisions herein before or after the amending Act, this Court is of the opinion that it cannot be construed that the proviso entered by way of amendment by the Hon'ble High Court is either contrary or inconsistent to the amending Act. In other words, the proviso only occupies the unoccupied field which cannot be construed as contrary to the provisions of the Principal Act.

.....

*11. Therefore on a consideration of the above said legal position, this Court is of the opinion that the proviso as it stood prior to be introduced of the Act 104 of 1976 continuous even thereafter. In the judgment in G.K. Brothers v. Hindi Pracharak Prakashan and Ors., AIR 1989 Allahabad 173, the Allahabad High Court has held that **the provisions which requires the deposit of sale consideration is not inconsistent with Act 104 of 1976.** Consequently, the Allahabad High Court has held that the proviso would not come within the mischief of Section 97(1) of the Act 104 of 1976.”*

(emphasis supplied)

16. I am, therefore, of the firm view that the Courts below are empowered to direct the applicant to either furnish security or deposit amount in Court, even before admitting the application under Order XXI Rule 90 of the Code of Civil Procedure.

17. In the case on hand, in the light of the power conferred on him, the learned Subordinate Judge, rightly held that the application to dispense with furnishing security is not maintainable and granted the petitioner one month's time to furnish security and as the petitioner did not choose to furnish the amount, the application seeking to set aside the sale was dismissed.

18. With regard to the plea of the petitioner that property worth Rs.30,00,000/- has been sold for Rs.4,90,000/- in the court auction, it is to be noted that even though the petitioner participated in the proceedings before the Courts below, he never chose to challenge the price fixed by the Court below on the ground that the upset price does not reflect the actual value of the property and has not produced any document to show the guideline value prevailing to substantiate his plea that the rate fixed by the court below is meagre.

19. The only point which may lead towards the petitioner is because of non furnishing of security by the petitioner, without going into the merits of the application filed under Order XXI Rule 90 of the Code of Civil Procedure to set aside the auction sale, the Courts below have passed the order dismissing the said application.

20. On an overall conspectus of the issue and in the interest of justice, with a view to give a last chance to the petitioner to comply with the order of the courts below directing to furnish security, solely on the ground the application under Order XXI Rule 90 CPC to set aside the sale was dismissed without going into merits, both the civil revision petitions are disposed of with the following directions:

- a) While confirming the order of the Court below in C.M.A.No.58 of 2006 and E.A.No.7 of 2006, the petitioner is granted one month's time from the date of receipt of a copy of this order to furnish security as ordered by the Executing Court;
- b) If the petitioner complies with the direction (a), supra, order passed in C.M.A.No.59 of 2006 and E.A.No.8 of 2006, shall stand set aside and the said application (E.A.No.8 of 2006) under Order XXI Rule 90 shall be restored to the file of

the Executing Court and the Executing Court is directed to proceed further in the matter, on merits and in accordance with law, after giving fresh notice to the petitioner and the respondents and conclude the proceedings within two months thereafter. No costs. Consequently, M.P.No.2 of 2007 is closed.

16.02.2017

Note: Issue order copy on 02.01.2018

vs

Index : Yes

Internet : Yes

To

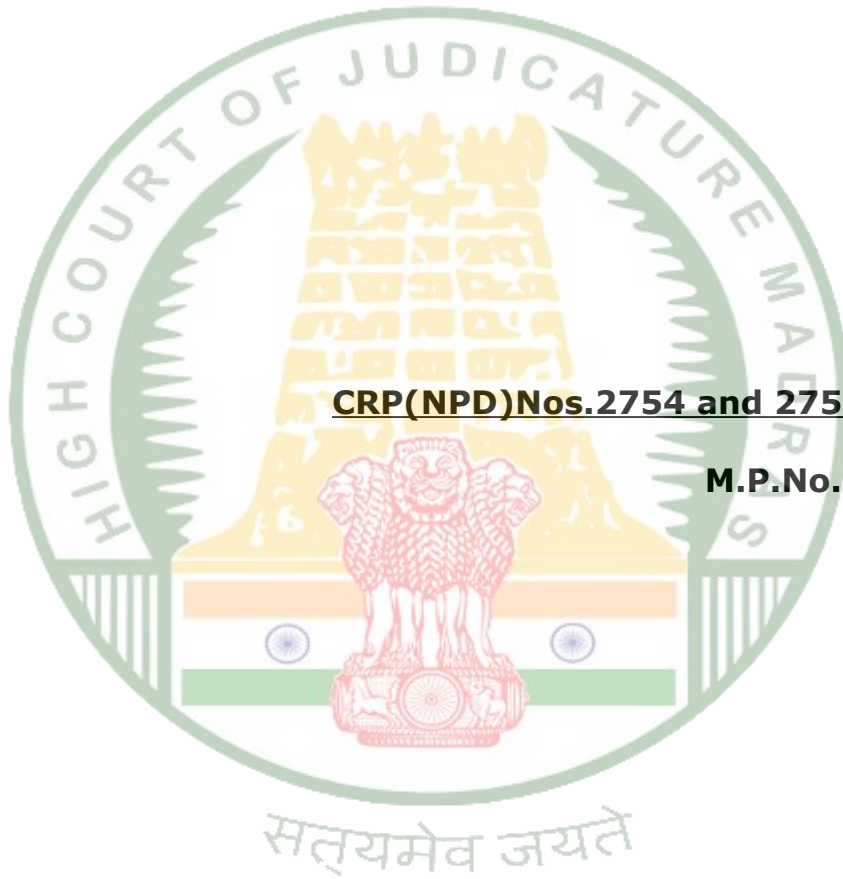
1. The Additional District Judge
Coimbatore.

2. The Sub Court,
Tiruppur.

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M.V.MURALIDARAN,J.

VS



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