IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 04.07.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP(NPD)No.4589 of 2013

V.Gunasekaran .. Petitioner

Vs.

1.R.A.N.M.Muthusamy Mudaliar Chits Funds (P) Ltd.,
Rep. by its Director, Shanmugam
35-B, Easwaran Kovil Street,
Erode-1.

2.G.Rajasekar

3.R.Jayamala

4.State Bank of India (Main Branch),
Rep. by its Manager,
D4, State Bank Road,
Erode-1. .. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against judgment and decreetal order of the Principal District Judge, Erode in E.A.No.41 of 2013 in E.P.No.24 of 2009 in A.O.P.No.77 of 2008, dated 18.09.2013.

For Petitioner : Mr.V.Raghavachari

For Respondents : Mr.K.J.Parthasarathy (for R1)

Mr.S.Sethuraman (for R4)

No Appearance (for R2 and R3)

<u>O R D E R</u>

The auction purchaser is the civil revision petitioner before this Court, challenging the order of rejection passed in E.A.No.41 of 2013 in E.P.No.24 of 2009 in A.O.P.No.77 of 2008, dated 18.09.2013, on the file of the Principal District Judge, Erode.

2.The case of the petitioner/auction purchaser is that the petition mentioned property was brought for auction sale by the Principal District Court, Erode on 23.04.2012, in which this petitioner also participated as one of the bidders and purchased the properties for a total consideration of Rs.16,80,000/-. After purchasing the said property, this petitioner also paid a sum of Rs.1,34,400/- towards sale certificate charges within the period on 23.04.2012. After sale proclamation was made for the Court auction sale of the petition mentioned property, the petitioner has purchased the properties for valuable consideration. On proper verification of the property, there was no encumbrance was found in the sale proclamation or encumbrance certificate. He took part in the Court auction on good faith and under bonafide belief participated in the Court auction sale, since there is no risk and encumbrance in the petition mentioned property. Therefore, the petitioner has purchased the property in the Court auction sale with the total consideration sale of Rs.16,80,000/-, after the sale, the said Execution Petition was posted for confirmation of sale on 02.07.2012. At that time, the 4th respondent/ State Bank of India, Erode has filed a petition in E.A.No.19 of 2012 under Order 21 Rule 90 CPC stating that the judgment debtor in the execution petition has already mortgaged the same property and borrowed a loan of Rs.20,00,000/- and executed the loan agreement dated 10.09.2008, but, thereafter, the loan was not paid. The 4th respondent/Bank has taken symbolic possession of the mortgaged property under SARFAESI Act. Though, the 4th respondent has sought the prayer for setting aside the Court auction sale in the said application, this petitioner/auction purchaser has already filed his counter expressing his willingness to get the purchase money back. But, after hearing the said petition in E.A.No.19 of 2012 filed under Order 21 Rule 90 CPC, the learned Judge has dismissed the said application on 30.10.2012.

3.The petitioner has also come forward by saying that in fact the petitioner/auction purchaser has not aware of the mortgaged loan by the owner of the petition mentioned property, who is the judgment debtor in the Execution Petition. But, in the case on hand, the respondents 2 and 3 are the decree holders and the judgment debtors were set exparte in the execution petition and the property was already mortgaged and the bank has taken symbolic and actual possession of the property. Therefore, this petitioner has come forward by saying that the wilful concealment and non disclosure of the existence of the mortgage debt in the sale proclamation, is a fraud committed on him. Therefore, the negligence, carelessness and inadvertence and failure on the part of the respondents to take steps to bring into book about the existence of mortgage in the execution proceedings has mislead and kept the petitioner in dark. Therefore, all the respondents wantonly and purposely failed to take steps to show the real and true state of affairs and the condition of the property and created an illusion that the petition mentioned property is free of encumbrance to show that it could easily be sold. In the said circumstances, this petitioner has filed the present application in E.A.No.41 of 2013 for setting aside the Court auction sale held on 12.04.2012 and sought for the return back the amount of Rs.16,80,000/- along with the amount of Rs.1,34,400/-.

4.On receipt of the notice in the said petition, the first respondent/decree holder has filed his counter statement denying the entire allegations and states that the petition itself is abuse of process of law, since the petitioner having participated in the bid on 12.04.2012 and paid the bid amount and the sale has also been confirmed on 23.04.2012, the present petition has filed under Section 47 and Section 151 of C.P.C. is not at all maintainable. The petitioner is stopped from challenging the sale as fraudulent one, since the 4^{th} respondent bank is a third party and not a party to the execution proceedings. Therefore, the claim petition filed by the 4^{th} respondent has already dismissed by the same Court. Therefore, the 1^{st} respondent states that the 4^{th} respondent Bank has nothing to do with the execution petition, since the 4^{th} respondent as a party in the petition is legally unsustainable.

5.The 1^{st} respondent also states that there are enabling provisions under Order 21 Rule 90 of C.P.C. to set aside the sale on the ground of fraud or material irregularity in conducting the sale within 30 days from the date of sale or under Order 21 Rule 91 of C.P.C. to set aside the sale within 60 days from the date of sale on the basis of the absence of saleable interest of the judgment debtor over the Court auction property. But, the petitioner did not prefer any such petition, now the petitioner has preferred the petition after lapse of more than 6 months. Therefore, the respondent come forward by saying that this petition filed by the petitioner under Section 47 of C.P.C. is barred by limitation.

6.The 1st respondent also states that the sale proclamation contains all the encumbrances pertaining to the auctioned property. Further, it is the duty of the auction purchaser to make all possible enquiries to find out any encumbrances regarding the property before auctioned the property, since, the Court namely, the Principal District Court, Erode has conducted the Court auction and there is no fraud in the Court auction. All the encumbrances pertaining to the auctioned property has been clearly disclosed in the same proclamation in accordance with law and there is no wilful concealment of any of the encumbrance. Therefore, the petition filed by the petitioner/ auction purchaser is with an ulterior motive. Therefore, the 1st respondent prayed for dismissal of the petition filed by the petitioner, since the 4th respondent Bank has no way connected in the present Execution Petition.

7.The 2nd respondent also filed a counter affidavit, which is adopted by the 3rd respondent denying the entire allegations of the petitioner stated that the petitioner should have searched all details and taken steps before joining the bidders list. The petitioner is aware of the entire proceedings in A.O.P.No.77 of 2008, since the Execution and auction proceedings are done collusively by the petitioner and the respondents 1 and 4. Even now, the 4th respondent has not given possession of the house hold articles with ulterior motive to trouble the respondents 2 and 3. The petitioner has also states that the petitioner has to prove the fraud and it is the duty of the petitioner to file a separate suit. Therefore, the petition under Section 47 of C.P.C. is not maintainable. Therefore, the respondents 2 and 3 prayed for dismissal of the petition.

8.On the side of the petitioner, PW1 examined and documents in Exs.P1 to P12 marked. On the side of the respondents, no oral and documentary evidence adduced.

9.Considering both side cases, the learned Principal District Judge, Erode was pleased to dismiss the application, on the ground that this property was already auctioned the sale deed property and this petitioner, who is the auction purchaser participated in the Court auction and bid the property and paid the entire amount and sale certificate also given to him. But, now he cannot come forward with the present application seeking for setting aside the same and return back the amount. Since, the 4th respondent Bank is no way to connection with the present execution petition and the 4th respondent has come forward with the application in E.A.No.19 of 2012 was dismissed by the very same Court and hence the learned Judge dismissed the petition in E.A.No.41 of 2013. Challenging the said order, the present petitioner/auction purchaser filed the present civil revision petition before this Court.

10.I heard Mr.V.Raghavachari, learned counsel appearing for the petitioner, Mr.K.J.Parthasarathy, learned counsel appearing for the 1st respondent and Mr.S.Sethuraman, learned counsel appearing for the 4th respondent. There was no representation on behalf of the respondents 2 and 3.

11.Admittedly, the petitioner, who is the auction purchaser has bid the property and when the auction sale held by the learned

Principal District Judge on 23.04.2012. After purchasing the property, this petitioner has paid a sum of Rs.16,80,000/- and he has also paid a sum of Rs.1,34,400/- towards sale certificate charges. In fact, the sale certificate also issued in favour of the petitioner/auction purchaser. After purchasing the said property in the auction sale, the 4th respondent State Bank of India, Erode Branch has filed a petition in E.A.No.19 of 2012 under Order 21 Rule 90 of C.P.C. stating that the judgment debtor in the execution petition in E.P.R.No.24 of 2009 already mortgaged the same property and borrowed a sum of Rs.20,00,000/- from the 4th respondent Bank and executed the loan agreement dated 10.09.2008. But, later on, he has not paid the loan amount. Therefore, suppressing the fact that the judgment debtor has borrowed a hand loan from the 1st respondent Chit Funds and the property was brought for auction sale in the Court.

12.The petitioner also states that in fact, the 4th respondent Bank has also taken the symbolic possession of the mortgaged property under the SARFAESI Act. Therefore, the very auction of the property by the learned Principal District Court, Erode, is not valid. Hence, this petitioner/auction purchaser sought for the prayer for setting aside the auction sale dated 23.04.2012 and seeking direction to return back the amount paid by the petitioner/auction purchaser.

13.Whether the petition filed by the petitioner/auction purchaser is maintainable before the Court below or not?

14.The provision under Section 47 and Section 151 of C.P.C. stated as follows:

> "**47. Questions to be determined by the Court executing decree**.- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.
>
> (2) (Omitted by Amendment Act, 1976.)
>
> (3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court."
>
> **151.Saving of inherent powers of Court**.- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

15.The above Section 47 states that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. Therefore, all the questions determined in the execution petition should be considered by the petitioner/auction purchaser.

16.It is the case of the petitioner/auction purchaser that the 1st respondent/decree holder has suppressed the encumbrance made by the judgment debtor with the 4th respondent bank, since the petitioner having right to file an application under Order 21 Rule 90, since the provision says that if any fraud committed in the auction sale, the aggrieved person have the right to file an application under Order 21 Rule 90 of C.P.C. But, this petitioner has filed petition under Section 47 and Section 151 of C.P.C., since he has not sought for the relief of setting aside the sale on the ground of fraud, but this auction purchaser sought for the set aside sale on the only ground that the auction property was already mortgaged with the 4th respondent Bank and the 4th respondent bank also taken the symbolic possession and therefore, he sought for the return of his amount to the tune of Rs.16,80,000/-.

17.It is the case of the petitioner/auction purchaser is that it is admitted fact that the auction sale was conducted by the learned Principal District Judge, Erode for getting return back the amount. Therefore, the application filed by the petitioner is maintainable and the same should be decided as per Section 47 and Section 151 of C.P.C.

18.The Order 21 Rule 66 of C.P.C. stated as follows:

> "66.**Proclamation of sales by public auction**. – (1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.
>
> (2) Such proclamation shall be drawn up after notice to the decree holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible-
>
> (a) the property to be sold [or, where a part of the property would be sufficient to satisfy the decree, such part];
>
> (b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;
>
> (c) any incumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property;

[Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor, by means of an order under Rule 54 it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs:

Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given, by either or both of the parties.]

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any

person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto."

19.As per Order 21 Rule 66 clause (c) says that any encumbrance to which the property is liable to be set aside, but in the present case in hand, the Executing Court and the judgment debtor ought to have give the particulars about the encumbrance, but both of them were failed to give the encumbrance in respect of auction sale property. The judgment debtor in the Execution Petition has already mortgaged the property in 2009 itself. He has also executed the mortgaged agreement in favour of the 4th respondent/Bank on 10.09.2008 itself. In fact, the 4th respondent/Bank has also taken symbolic possession of the mortgaged property under SARFAESI Act. Thus being the case, the very first encumbrance made by the judgment debtor alone is right to proceed, but in this case, the decree holder is the 2nd encumbrance.

20.As per Section 47 of CPC, this Court has held that

"..... Notwithstanding the wording of Section 47 which is enough to cover all applications to set aside sales on the ground either of illegality or of irregularity, its scope has naturally to be restricted so as to give due effect to O.21, R.90 C.P.C. Thus, if the sale is sought to be set aside on the ground of material irregularity in publishing and conducting the sale within the meaning of Order 21, Rule 90, then Section 47 cannot come into play at all, and the sale could be set aside only by invoking Order 21, Rule 90."

21.The learned Principal District Judge has stated that the possession of the property is already taken by the bank in the year 2010 itself. If the auction purchaser has made reasonable enquiry by visiting the suit properties before purchase of the property, he would have known about the possession taken by the Court commissioner in the year 2010 itself. Without making such reasonable enquiry he purchased the property, now it cannot be contended that he made reasonable enquiry and there was a fraud committed on him. Further, in the earlier application in fact, the petitioner has opposed the application filed by the bank. Now, he filed the application under Section 47 of C.P.C. In fact, the entire allegations of the petitioner clearly indicate the non disclosure of the existence of the mortgage debt in the sale proclamation which is amounts to fraud committed on him. In this regard, even assuming that such non disclosure of the existence of the mortgage in the proclamation is material irregularity and fraud, the sale ought to have been set aside under Order 21 Rule 90 of C.P.C. within the period of limitation as contemplated under Article 129 of Limitation Act and accordingly, the learned Judge dismissed the application filed by the petitioner.

22.But, it is my absolute view that the Court has issued sale proclamation under order 21 Rule 66 of C.P.C., it is pointed out the Court that as per Order 21 Rule 66 clause (c) of C.P.C. that any encumbrance to which the property is liable to be noted by the Court. But, the Court should not say that the petitioner before purchasing the property on the Court auction sale, he would make reasonable enquiry and he would have known about the possession taken by the Court commissioner in the year 2010 itself. The Court must be noted that there is any encumbrance in the auction property and that should be properly initiated and then only bring the property for auction sale.

23.It is not the ordinary sale between two individual persons, but it is the Court auction and the Court alone should aware and inform the encumbrance, but in this case, the Court should not direct the auction purchaser to made visit in the suit schedule of property and he should known about the encumbrance in the property.

24.Per contra, the 1st respondent / decree holder produced several judgments in the case of

(1) ***Ramalingam Pillai v. Sankara Iyer (Died) and others*** reported in ***AIR 1964 MADRAS 424***

(2) ***Natarajan v. M/s.Chandmull Amarchand by Powr-of-Attorney, K.Milopchand and another*** reported in ***(1971) 1 MLJ 474***

(3) ***Gnanabaranam Pillai v. Rathinam Pillai*** reported in ***AIR 1972 Madras 364***

(4) ***Gulzari Lal v. Sheo Charan Lal and others*** reported in ***AIR 1935 Allahabad 889***

"(a) Execution – Sale confirmed and becoming absolute – Application to set aside sale on ground that judgment-debtor had no saleable interest is not competent."

(5) ***A.N.Marudachalam Chettiar v. S.A.Veera Boyan*** reported in ***AIR 1964 MADRAS 9 (V 51 C 3)***

"The very authority relied upon by learned counsel for the appellant had laid it down, in the most clear and unambiguous terms, that where a third party subsequent to the confirmation of the sale finds that no right, title or interest has passed, and he loses possession of the property, he has a right to recover back the purchase money from the decree-holder by a separate suit under the Common law. Such a suit is not barred because of the remedies provided for under the processual law, or because of any provisions of O. XXI or S. 47 of the C.P.C."

(6) ***Thakar Lal v. Nathulal and others*** reported in ***AIR 1964 RAJASTHAN 140 (V 51 C 39)***

"(25) Now so far as the first question is concerned, we are inclined to hold the view in general agreement with the learned single Judge that no remedy is open to the auction-purchaser in execution in such a case. The principal reason which induces us to take this view is this. We have already referred to Rules 91 to 93 of Order 21 Civil Procedure Code which contemplate a return of the purchase-money only where the sale is sought to be set aside before it is confirmed under Rule 92. We have also referred to the circumstances that the Codes of 1877 and 1882 contained a provision which might have availed the auction-purchaser in this behalf even after the sale had been confirmed, but that provision was deliberately omitted by the Legislature from the present Code."

25.All the judgments produced by the 1st respondent is that a defect or irregularity in the sale proclamation will be an irregularity in publishing and conducting the sale and that will attract Order 21 Rule 90 of C.P.C. and not comes under Section 47 of C.P.C.

26.It is absolutely made clear that the Court auction purchaser namely, the petitioner were kept in the dark about the rights of the respondent and they having proceeded bonafidely by participating in the public sale by depositing a large sum of about Rs.75,000/- by having perused their rights and secured the confirmation of such sale. In fact, the petitioner/auction purchaser has paid a sum of Rs.16,80,000/- and also paid a sum of Rs.1,34,400/- towards sale certificate charges within the period as directed on 23.04.2012 by the Executing Court.

27.The petitioner has deposited a sum of Rs.16,80,000/- for sale deed and another sum of Rs.1,34,400/- towards sale certificate charges are all lying in the Court are Malik sale conducted by the

Court. Once the executing court has brought the property as public auction sale, then called the petitioner and others to participate in the auction sale, but the seller viz., the Court and the decree holder ought to have give the full encumbrance about the property. In fact, the judgment debtor were played fraud on the Court by suppressing mortgaging of the property with the 4th respondent/Bank.

28.Therefore, the view taken by the learned Principal District Judge, Erode, is totally wrong, since the innocent purchaser has paid the huge amount of Rs.16,80,000/- and also deposited a sum of Rs.1,34,400/- towards sale certificate charges. Therefore, the sale made by the Court dated 23.04.2012 is totally not maintainable and this petitioner/auction purchaser have no right to file the petition under Order 21 Rule 90 of C.P.C., but to approach the Court by way of filing the petition under Section 47 and Section 151 of C.P.C., since this Court held in the judgment rendered in the case of ***A.P.V.Rajendran v. S.A.Sundararajan*** reported in ***AIR 1980 Madras 123*** states that notwithstanding the wording of Section 47 which is enough to cover all applications to set aside the sales on the ground either of illegality or of irregularity, its scope has naturally to be restricted so as to give due effect to Order 21 Rule 90 of C.P.C.

Thus, if the sale is sought to be set aside on the ground of material irregularity in publishing and conducting the sale within the meaning of Order 21, Rule 90, then Section 47 cannot come into play at all, and the sale could be set aside only by invoking Order 21, Rule 90 of C.P.C., but in the present case, the only remedy available under Sections 47 and 151 of C.P.C. and the petitioner/auction purchaser is rightly approached the Court. Therefore, the order passed by the learned Principal District Judge, Erode in E.A.No.41 of 2013 in E.P.No.24 of 2009 in A.O.P.No.77 of 2008 dated 18.09.2013 is liable to be set aside. Accordingly, the same is set aside.

29.In the result:

(a) this civil revision petition is allowed, by setting aside the order passed in E.A.No.41 of 2013 in E.P.No.24 of 2009 in A.O.P.No.77 of 2008 dated 18.09.2013, on the file of the learned Principal District Judge, Erode;

(b) the learned Principal District Judge, Erode is hereby directed to return back the amount deposited by the petitioner/auction purchaser a sum of Rs.16,80,000/- and Rs.1,34,400/-, within a period of eight weeks from the date of receipt of a copy of this order;

(c) the 1st respondent is at liberty to proceed the execution proceedings in E.P.No.24 of 2009 against the Judgment Debtor. No costs.

04.07.2017

Index:Yes
Speaking Order

vs

To

The Principal District Judge,
Erode.

M.V.MURALIDARAN, J.

vs

Pre-Delivery order made in
CRP(NPD)No.4589 of 2013

04.07.2017