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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 26.07.2018

Pronounced on : 02.08.2018

CORAM

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

C.R.P. (MD) (PD) No.1485 of 2018

and

CMP (MD) No.6430 of 2018

T.Mohan

.. Petitioner

vs

1.Shriram Chits Tamil Nadu Ltd.,
No.117, Melaperumal Maisthiri Veethi,
Madurai.

2.Paul

.. Respondents

Prayer: Civil Revision is filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 01.04.2014 passed in E.A.No.208 of 2010 in E.P.No.21 of 2003 on the file of the learned I Additional Sub Judge, Madurai.

For Petitioner : Mr.T.Pon Ramkumar

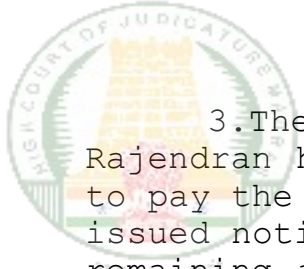
For Respondents : Mr.R.V.Rajkumar (for R2)

R1 - No Appearance

O R D E R

The judgment debtor is the civil revision petitioner before this Court, challenging the order in E.A.No.208 of 2010 in E.P.No.21 of 2003 dated 01.04.2014, on the file of the learned I Additional Subordinate Judge, Madurai.

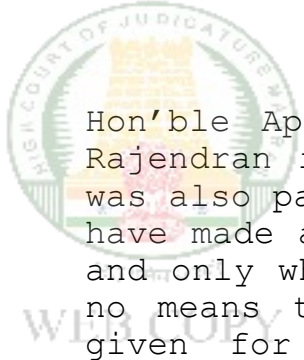
2.The case of Revision Petitioner/Judgment Debtor is that one Rajendran who is the friend of revision petitioners' son had taken Chit with 1st respondent chits for period of 40 months time for a sum of Rs.5,00,000/, in which Rajendran had also become member and taken the chit in auction for a sum of Rs.3,50,000/- and agree to repay the remaining terms installment. Further that said Rajendran had executed pro-note dated 18.01.2000 for a sum of Rs.3,37,500/-, for which revision petitioner and his son Rajesh stood as guarantor and that for collateral security, the original documents in respect of property in R.S.No.69/2A, Nehru Street, Tahsildhar Nagar, Sevalur District, 4th Street, Managiri Village, Madurai belong to the revision petitioner and his wife were given to 1st respondent chit.



3. The further case of revision petitioner that the said Rajendran herein had properly paid 25 dues and thereafter he failed to pay the dues between 26 to 40. Hence, the 1st respondent chits had issued notice dated 16.05.2001 directing the said Rajendran to repay remaining amount of Rs.1,84,840/- along with interest at the rate of 24%. But he did not pay. Since he had not turned up, 1st respondent chits had preferred C.D.No.129 of 2001 on the file of the Deputy Registrar of Chits, Madurai South under Section 64(1)(A) of Indian Chit Funds Act, 1982. In the said chit case an exparte award dated 21.01.2002 was passed and the revision petitioner was also directed to pay a sum of Rs.1,95,631/- to the 1st respondent chits. The further case of revision petitioner he was not aware of said exparte award. On the other hand the 1st Respondent Chits filed an Execution Petition in E.P.No.21 of 2003 on the file of the learned I Additional Subordinate Judge, Madurai to execute the exparte award.

4. The further case of the revision petitioner that on receipt of notice in execution proceedings revision petitioners' son started to repay the award amount in the name of revision petitioner on installment basis. Pending execution proceedings said property given for security purpose have been brought for auction and auction was conducted on 04.03.2010. On coming to know the said facts son of revision petitioner immediately approached the 1st respondent chits and repaid the entire amount and on 10.03.2010 revision petitioners' son preferred application in the name of revision petitioner in E.A.No. 208 of 2010 to set aside the said auction held on 04.03.2010. Pending application the 1st respondent chits had also issued "No Due Certificate" towards the C.D.No.129/2001 and the same was also brought to the knowledge of the Executing Court and thereafter, the matter was kept pending without any progress for more than 4 years. On the other hand the revision petitioner had sold the said property on 12.09.2011 to a third party. All of sudden a counter affidavit was filed by the 2nd respondent alone and E.A. preferred in the name of revision petitioner was dismissed by order dated 01.03.2014 and sale certificate was issued in the name of auction purchaser/2nd respondent on 21.07.2014, based on which in the month of June 2017 the said auction purchaser/2nd respondent made attempt to take possession of property, during which it was objected by the 3rd party purchaser. The 3rd party purchaser gave complaint against the revision petitioner and his family members and he was arrested and released on bail. The further case of the revision petitioner is that after he released on bail he came to know all the above facts and thereafter he obtained the certified copies and preferred the present Civil Revision Petition.

5. The learned counsel for the revision petitioner would contend that very petition filed in C.D.No.129 of 2011 itself not maintainable for reason that no prior notice was issued to this revision petitioner. Further he would contend that straight away upset price fixed as Rs.1,77,000/- which is very much lower than guideline value, which is against the provisions contemplated under Civil Procedure Code and guidelines issued by this Hon'ble Court and

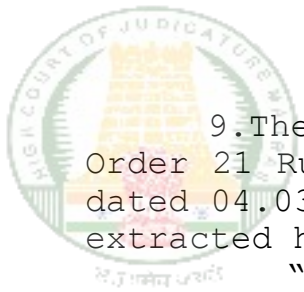


Hon'ble Apex Court. Further he would contend that admittedly one Rajendran is the liable to pay arrears amount and an exparte award was also passed to that extent. If so then 1st respondent chit should have made attempt to recover the same from the said Rajendran first and only when execution court come to conclusion that Rajendran had no means to repay the said amount, then only the property which given for collateral purpose should have been brought to the auction. But in the present execution petition the 1st respondent chits straight away proceed with the property of the revision petitioner.

6. Further it is contended by the learned counsel for the revision petitioner on perusal of "No Due Certificate" issued by the 1st respondent chits execution court ought to have terminated the execution petition instead passing proceeding with the same. Further it is contended that his application to set aside auction was dismissed by the trial court on two grounds. One is that the set aside application that the present petition is to prolong the proceedings and the same cannot be accepted, and that the right of party should not be taken away by stating that application to set aside is prolong the proceedings. Second Ground is that provisions of Order 21 Rule 89 of C.P.C. was not complied. It is contended that application preferred to set aside the auction was on the ground that already amount has been paid to the 1st respondent chits and they had also issued receipt of No Objection Certificate. Hence, the petitioner herein was not advised by the counsel to deposit the auction amount along with 5% interest. Hence, the same cannot be ground to reject the grievance of the petitioner. Further, the learned counsel for revision petitioner rely up on Judgment passed by this Hon'ble Court reported in 2018 (1) CTC 818 to support his contention.

7. Per contra, the learned counsel appearing for the 2nd respondent/auction purchaser would submit that there is no error in the order passed by the learned 1st Additional Subordinate Judge, Madurai in dismissing the petition filed by the revision petitioner under Order 21 Rule 89 of CPC. He would further contend that the deposit of auction amount along with 5% of the said auction amount is mandatory and any application under Order 21 Rule 89 of C.P.C. without such deposit is not maintainable. Therefore the trial Court is perfect in dismissing the application filed by the revision petitioner. He would also relied upon the Judgment of Hon'ble Apex Court in SLP(Civil) No.34402 of 2011, Ram Karan Gupta Vs. J.S. Exim Ltd and others to support his contention.

8. This court paid its anxious consideration to the rival submissions made by Mr.T.Pon Ramkumar, learned counsel for the revision petitioner and Mr.R.V.Rajkumar, learned counsel appearing for the 2nd respondent and perused the materials available on record. There was no representation for the 1st respondent, despite service



9. The revision petitioner has filed E.A.No.208 of 2010 under Order 21 Rule 89 and Section 151 of C.P.C. to set aside the auction dated 04.03.2010. For better appraisal Order 21 Rule 89 of C.P.C. is extracted here under:

"Order XXI - Rule - 89- Application to set aside sale on deposit.-

(1) Where immovable property has been sold in execution of a decree, 1 [any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person,] may apply to have the sale set aside on his depositing in Court,-

(a) for payment to the purchaser, a sum equal to five per cent. of the purchase-money, and

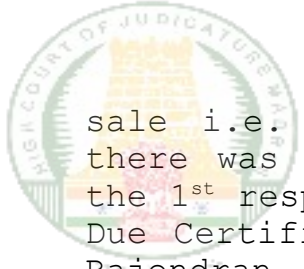
(b) for payment, to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale."

10. Thus there could be no quarrel on the proposition that to maintain application under Order XXI Rule 89 of C.P.C. deposit of the auction amount and 5% interest there on is mandatory. However, before applying the legal provisions and testing their applicability, the court has to look into the facts and circumstances of that particular case. In the present case admittedly the revision petitioner is not the borrower. He is only the guarantor. Further, the revision petitioners' son has made payments in the name of the revision petitioner in the execution petition. It is also stated in the affidavit filed in support of E.A.No.208 of 2010 that the revision petitioner has paid Rs.1,00,000/- in 20 installments and another sum of Rs.40,000/- as deposit which fact is not disputed by the 1st respondent chit company. It is not even disputed by the 2nd respondent/auction purchaser in the aforesaid E.A.No.208 of 2010. No materials are also placed before this court also to deny the same.

11. Further the perusal of records would show that the decree amount is Rs.1,95,631/- and the claim made in the Execution Petition along with subsequent interest is Rs.2,60,002.10/-. It is also stated that after deducting the deposit amount paid by the revision petitioner in execution petition auction amount was fixed as Rs.1,77,000/-, which facts were also not disputed by either of the respondents before the trial court. Thus there was substantial payment of money by the revision petitioner even before the auction



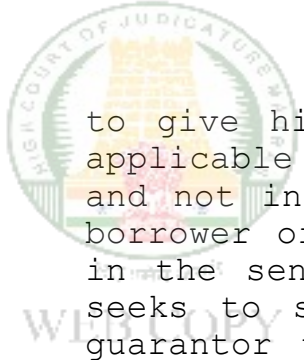
sale i.e. 04.03.2010. After the auction sale i.e. on 04.03.2010 there was payment of balance amount by the revision petitioner to the 1st respondent chits and 1st respondent chits had also issued "No Due Certificate" dated 31.03.2010 in the name of original borrower Rajendran towards C.D.No.129/2001. Thus the entire due has been settled. The said fact were not disputed by either of the respondents, either before executing court or before this court. Thus the amount due to the 1st respondent chits stands settled by the revision petitioner who stood as guarantor.

12.It is contended by the revision petitioner that he filed the present Execution Application to set aside auction immediately on 10.03.2010 within 6 days of the court auction i.e. 04.03.2010. It is further contended that entire dues were settled and "No Due Certificate" dated 31.03.2010 issued by the 1st respondent chit, which is also within a month of auction sale.

13.Taking note of the peculiar facts and circumstances of above case this court while exercising its power under Article 227 of Constitution of India has to see that ultimately substantial justice is done to the parties. Though the petitioner had preferred petition under Order 21 Rule 89 of C.P.C. read with Section 151 of C.P.C. to set aside the sale, he cannot be equated to that of borrower who fail to repay his dues and who cause inconvenience to the auction purchaser and then who seek to set aside the sale so as to compel such defaulting borrower to pay extra amount of 5% of auction amount.

14.Though the application has been filed under order 21 Rule 89 read with Section 151 of C.P.C, in the considered opinion of this Hon'ble Court it is need not be strictly be treated as an application filed under Order 21 Rule 89 of C.P.C. The object of application of Order 21 Rule 89 of C.P.C. to give an opportunity to the defaulting borrower or any person claiming under him to seek to set aside the sale after depositing the auction amount along with 5% more and is also with view to safeguard the interest of the auction purchaser. In the instant case revision petitioner is not defaulting borrower, he is only a guarantor. Furthermore he had paid the entire dues to the creditor before and immediately after auction sale. Therefore, even without invoking Order 21 Rule 89 of C.P.C., he can seek to set aside of auction sale under Section 151 of C.P.C. invoking inherent power of the civil court as he is not the person who actually borrowed the money and as he is only a guarantor and as he had repaid the entire dues on behalf of borrower, more particularly with view of safeguarding his property. Interestingly, the present application was filed by the revision petitioner not only under Order 21 Rule 89 of C.P.C. but also under Section 151 of C.P.C.

15.The purpose and the object of Order 21 Rule 89 of C.P.C. is to safeguard the interest of the auction purchaser and also not to defeat the right of the borrower or any one claiming under him, but



to give him an opportunity. Order 21 Rule 89 of C.P.C. would be applicable to the defaulting borrower or a person claiming under him and not in the cases where there is no default on the part of the borrower or the guarantor. In the instant case there is no default in the sense that the entire amount due has been paid and person seeks to set aside is not the dues defaulting borrower, but the guarantor who had paid entire due amount. Therefore, there is no need for the guarantor who had paid entire dues to invoke Order 21 Rule 89 of C.P.C., in order to set aside the sale. In other words he can maintain the application to set aside the auction under Section 151 of CPC itself.

16.It is a settled principle of law mentioning wrong provisions will not bar the courts from granting relief to the parties. Equally it is a settled law that the civil court while exercising its power under Section 151 of C.P.C. and this Hon'ble Court while exercising powers under Article 227 of Constitution of India could pass such orders to render substantial justice.

17.Right to hold property is a constitutional right of every citizen guaranteed under Article 300A of Constitution of India. That could not be easily infringed as if in the case on hand, A person who stood as guarantor and who paid entire dues of the borrower cannot be made to loose his constitutional right of his property simply because, the borrower failed to make payment and allowed the property of guarantor to be sold in court auction. The case relied up on by the revision petitioner reported in 2018 (1) CTC 819, if applied to the case on hand, the revision petitioner would be in a better footing. In that case borrower remained absent allowing property of guarantor to go in court auction. Further without any appropriate valuation the property was sold in the court auction in the execution proceedings. Original borrower was allowed to go caught free. Further the chit company did not intend to prosecute the borrower. There this court intervened and passed the following orders:

"38.In the result:

(a) this Civil Revision Petition is allowed and the impugned order in E.A.No.48 of 2001 in E.P.No.1 of 2000, dated 10.08.2005, on the file of the learned 1st Additional Subordinate Judge, Cuddalore, is set aside and the auction sale dated 19.06.2000 is also set aside;

(b) the petitioners/guarantors are hereby directed to deposit the entire auction sale amount of Rs.1,75,000/- along with the interest at the rate of 9% per annum from the date of auction i.e. on 19.06.2000 to till date, before the Executing Court namely, the learned 1st Additional Subordinate Judge, Cuddalore, within a period of eight weeks from the date of receipt of a copy of this order;

(c) the auction purchaser shall be entitled to claim the amount by making necessary application before the Executing Court;



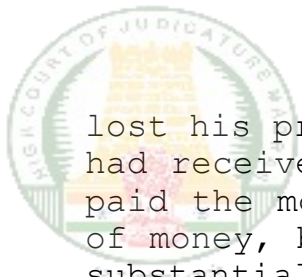
(d) the Executing Court namely, the learned 1st Additional Subordinate Court, Cuddalore, is directed to pass orders for proclamation informing the Registrar of Registration Department for making necessary entry to this effect and further make over to the petitioners/guarantors the stamps purchased by the auction purchaser for the purpose of sale certificate;

(e) the learned Executing Court shall pass an order on the basis whereof the petitioners/guarantors would be entitled to receive back the amount of the stamp duty although the same has been purchased in the name of the auction purchaser, who will be entitled to receive back the cash value thereof;

(f) the learned Executing Court is directed to complete the said exercise within a period of three months from the date of deposit of the said amount of Rs.1,75,000/- with interest at the rate of 9% per annum from the date of auction i.e. on 19.06.2000. No costs. Consequently, connected miscellaneous petition is closed."

18.The revision petitioner is in a better position. The amount due to Chit Company stands settled by the Revision Petitioner. Yet another factor which needs to be noted is that the auction was conducted on 4.3.2010. E.A.No.208 of 2010 was filed by the revision petitioner to set aside auction on 10.3.2010, "No Due Certificate" was issued by the 1st respondent chit on 31.3.2010 Neither of the respondents have contested the said application till January 2014. No counter was filed by the 1st respondent either disclosing fact or disputing fact towards settlement of loan amount. The 2nd respondent alone filed a counter in January 2014 not disputing the merits of claim of revision petitioner, but only on technical ground of maintainability of application that set aside petition that without making deposit of auction amount along with 5% is not maintainable. It is also seen from the orders passed by the executing court that executing court had not gone into the merits of the claim of the revision petitioner, but had simply accepted the technical plea of maintainability raised by the 2nd respondent/auction purchaser and have dismissed the application. In considered opinion of this court it is not correct, more particularly No Due Certificate was issued by the 1st respondent chits, and there is no dispute on that.

19.The right to hold the property is a constitutional right. When it is deprived, it should be done in a manner known to law and following the mandate fixed by law to deprive the same. The Courts should exercise the caution while dealing with these type of issues such as here where a person has lost his property. Undoubtedly, the present case is a real fraud committed by the borrower, because of the same petitioner/guarantor had lost his property and knocking this Court to save his right to hold his property and for setting aside the sale, the petitioner or aggrieved persons must show that there was a substantial injury suffered by the said sale. In the present case, the revision petitioner, who stood as a guarantor had



lost his property. Whereas the 1st respondent, who had lend the money had received the dues. The 2nd respondent auction purchaser, who had paid the money towards the auction sale can be compensated in terms of money, but wherein if the sale is not set aside, there will be a substantial injury caused to the petitioner/guarantor.

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20.Hence the interest of auction purchaser needs to be protected. Therefore the amount deposited by him before the executing court pursuant to the auction held on 04.03.2010 have to be refunded to him along with a reasonable interest, which this court determines at the rate of 9% per annum. Thus for the reasons discussed supra this court in the interest of substantial justice interferes with the orders passed by the court below in E.A.No.208 of 2010 in E.P.No.21 of 2003 dated 01.03.2014 and accordingly, the same is liable to be set aside.

21.In the result:

(a) this Civil Revision Petition is allowed and the impugned order in E.A.No.208 of 2010 in E.P.No.21 of 2003 dated 01.03.2014, on the file of the learned 1st Additional Subordinate Judge, Madurai, is set aside and the auction sale dated 04.03.2010 is also set aside;

(b) the revision petitioner/guarantor is hereby directed to deposit the entire auction sale amount of Rs.1,77,000/- along with the interest at the rate of 9% per annum from the date of auction i.e. on 04.03.2010 till the date of deposit, before the Executing Court namely, the learned 1st Additional Subordinate Judge, Madurai, within a period of two weeks from the date of receipt of a copy of this order;

(c) the 2nd respondent/auction purchaser shall be entitled to claim the amount by making necessary application before the Executing Court;

(d) the Executing Court namely, the learned 1st Additional Subordinate Court, Madurai, is directed to pass orders for proclamation informing the concerned Registrar of Registration Department for making necessary entry to this effect and further cancel the entry regarding the sale certificate dated 21.07.2014 issued in favour of 2nd respondent/auction purchaser;

(e) the Executing Court is directed to complete the said exercise within a period of two weeks from the date of deposit of the amount by revision petitioner as directed in clause (b).

(f) the revision petitioner is entitled to make necessary application before the executing court seeking refund of the amount deposited by the 2nd respondent/auction purchaser, pursuant to the auction held on 04.03.2010, which application shall be decided by the Executing Court after giving notice and sufficient opportunity



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to the 1st respondent chits, which exercise shall be completed within a period of two months from the date of such application. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(Crl. side)

/True Copy/

Sub Assistant Registrar(CS-III)

To

The 1st Additional Sub Judge, Madurai.

+1cc to M/S.AL.Kannan, Advocate SR.No. 76936

+1cc to M/S.R.V.Rajkumar, Advocate SR.No. 77488

order made in
C.R.P. (MD) (PD) No.1485 of 2018
and
CMP (MD) No.6430 of 2018
02.08.2018

vsv

JM/SKN RSK/SAR 3/20.08.2018/9P/4C