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C.R.P. (MD) (NPD) Nos. 928 & 1740 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 20.11.2019

Delivered on : 17.12.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.R.P. (MD) (NPD) Nos. 928 & 1740 of 2011

&

M.P. (MD) Nos. 1 & 2 of 2011

P. Sukumar

...Petitioner in both CRPs

Vs

1. S. Abdul Khader Jailani

2. A. Sundarapandian

...Respondents in both CRPs

Prayer in C.R.P. (MD) (NPD) No. 928 of 2011: Civil Revision Petition is filed under Article 227 of the Constitution of India against the order of dismissal passed by the learned District Munsif Cum Judicial Magistrate, Bodinayakkanur in E.A.No.95 of 2010 in E.P.No.46 of 2008 in OS.No.167 of 2006 dated 23.03.2011.

Prayer in C.R.P. (MD) (NPD) No. 1740 of 2011: Civil Revision Petition is filed under Article 227 of the Constitution of India against the order of dismissal passed by the learned District Munsif, Bodinayakkanur in E.A.No.32 of 2010 in E.P.No.46 of 2008 in OS.No.167 of 2006 dated 23.03.2011.

For Petitioner : Mr. T. Antony Arulraj
(in both CRPs) Mr. I. Vel Pradeep

For Respondents : Mr. R. Suriyanarayanan
(in both CRPs)

C O M M O N O R D E R

The Judgement Debtor is the revision petitioner in the above Civil Revision Petitions. The above Civil Revision Petitions give rise to an issue as to whether the payment of the entire decree amount pursuant to orders of Court would be in compliance of the provisions of Order XXI Rule 89 of the Code of Civil Procedure. The facts preceeding the filing of the above Civil Revision Petitions are herein below narrated and the parties are referred to in their status in the above Civil Revision Petitions.

2. The 1st respondent herein had filed a suit on a promissory note in O.S.No.167 of 2006 on the file of the District Munsif, Bodinayakkanur. The plaintiff had claimed a sum of Rs.93,750/-

<https://hcservices.ecourts.gov.in/hcservices/>



together with interest at the rate of Rs.1 per Rs.100/- from the date of suit till date of payment.

3. After contest the suit was decreed by Judgement and Decree dated 22.08.2009 and instead of interest at the rate of Rs.1 per Rs.100/-, the learned Judge had ordered an interest at the Rate of 50 Paise per Rs.100/-.

4. After passing of the Judgement since no amounts were paid by the revision petitioner, the 1st respondent initiated execution proceedings in E.P.No.46 of 2008 on the file of the District Munsif, Bodinayakkanur to attach the property of the Judgement debtor and bring it for sale. The revision petitioner had filed a response on 20.03.2009 *inter alia* contending that the property in question was an undivided property to which, apart from the revision petitioner his two brothers were also entitled to. He would further contend that since he had incurred a lot of debts, his brothers had extended financial assistance to him and inconsideration there of, he had orally released his right in the suit property in favour of the defendants.

5. The suit property was sold in Court auction to the 2nd respondent herein on 23.11.2009 for a sum of Rs.1,50,300/-. He had paid the balance sale consideration and the sale was confirmed on 22.01.2010. The petitioner, in the meanwhile had already initiated proceedings for setting aside the auction sale in E.A.SR.No.3773 of 2010. The said application was returned giving the petitioner two weeks time to comply with the returns and even before the period of two weeks came to a close the sale had been confirmed. Thereafter by an order dated 29.07.2010, delivery was ordered to the 2nd respondent.

6. Challenging these orders, the revision petitioner herein had filed C.R.P.NPD.(MD)No.1748 of 2010 and this Court by order dated 01.11.2010 was pleased to pass the following order:

*"6. Therefore, the Civil Revision Petition is allowed, the impugned orders are set aside **on condition that the petitioner deposits the entire decree amount and re-present the application for setting aside on or before 15.11.2010.** Upon the petitioner complying with the above condition, the application for setting aside shall be taken up for hearing and shall be disposed of in accordance with law. Till then further proceedings shall stand stayed. Consequently, connected Miscellaneous Petition is closed. No costs."*

7. Pursuant to the disposal of the above Civil Revision Petition, the revision petitioner herein had deposited the said

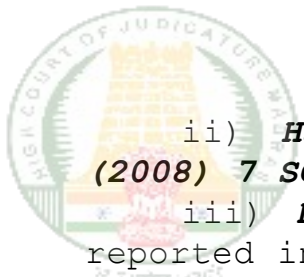


sum of Rs.1,29,135/-. On such deposit, the learned District Munsif, Bodinayakkanur took up the application in E.A.No.95 of 2010 for hearing and the same was ultimately dismissed by order dated 23.03.2011 on the ground that the revision petitioner had failed to comply with the provisions of Order XXI Rule 89 (1) of the Code of Civil Procedure and therefore this petition was not maintainable. Challenging the said order the revision petitioner is now before this Court in C.R.P.NPD.(MD)No.928 of 2011. The auction purchaser had also filed E.A.No.32 of 2010 seeking delivery of possession. In the light of the dismissal of E.A.No.95 of 2010, the learned Judge had also allowed E.A.No.32 of 2010 and challenging this order C.R.P.NPD.(MD)No.1740 of 2011 is filed.

8. The revision petitioner would contend that he had complied with the orders of this Court passed in C.R.P.NPD.(MD)No.1748 of 2010 by depositing the sum of Rs.1,29,135/-. A reading of the order would indicate that on such payment the Court was to pass orders on merits. The order contemplated the payment of the decree amount in view of the pre-condition specified under the provisions of Order XXI Rule 89 (1) of the Code of Civil Procedure. He would further submit that the suit is filed on the basis of promissory note and the revision petitioners who are the owners of the property have come forward to setting aside the order at the earliest point of time and it was only on account of the Judicial process that the petition has been prolonged to date. The learned counsel for the petitioner in support of his arguments would rely upon the Judgement of the Honourable Supreme Court in **Sukumar De Vs. Bimala Auddy and others** reported in **2014 (1) SCC 584**. He would contend that the facts of this case would apply on all fours to the case on hand. He would therefore pray that both the Civil Revision Petitions should be allowed.

9. Mr.R.Suriyanarayanan, learned counsel arguing on behalf of the respondents/plaintiffs would contend that compliance of the provisions of Order XXI Rule 89 (1) of the Code of Civil Procedure was a pre requisite for considering an application filed under the said provision. He would contend that failure to comply with any one of the contingencies would ensure the dismissal of the petition in limine. He would further submit that even as per the order in C.R.P.NPD.(MD)No.1748 of 2010, the learned Judge had only directed the deposit of the decree amount but had not opined that the payment as contemplated under the above provisions of the Code of Civil Procedure stood waived. Therefore, he would contend that the petition deserves to be dismissed. In support of his arguments, he would rely upon the following Judgements:

i) **P.K.Unni Vs. Nirmala Industries and others** reported in **(1990) 2 SCC 378**.



- ii) **Hardeo Rai Vs. Sakuntala Devi and others** reported in (2008) 7 SCC 46.
- iii) **M/s. Hanuman Bux & Another Vs. Subodh Singh and others** reported in AIR 2010 PATNA 148.
- iv) **Ram Karan Gupta Vs. J.S. Exim Ltd. and others** reported in 2013-1-L.W. 456.

10. He would therefore contend that the petitioner having failed to make the payment as contemplated under the provisions of Section 89 (1) of the Code of Civil Procedure, the petitions deserve to be dismissed and was accordingly dismissed and one cannot find fault with the said decision. This Court considering the earlier order of this Court in C.R.P.NPD.(MD)No.1748 of 2010 and its compliance in letter and spirit by the Judgement debtor attempted to settle the issues between the parties. However the Auction purchaser was steadfast in not settling the matter. Therefore, this Court proceeded to pass orders.

11. In order to appreciate and render a finding in respect of the case on hand it is necessary to extract a few provisions of the Code of Civil Procedure, the Madras High Court Amendments and the Civil Rules of Practice. Order XXI Rule 89 (1) of the Code of Civil Procedure would read as follows:

"89. Application to set aside sale on deposit- (1) *Where immovable property has been sold in execution of a decree, [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 deposition 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.*

12. The High Court Amendments (Madras) had introduced a proviso which was to be inserted at the end of the Sub-Rule 1 of Rule 89 of Order XXI of the Code of Civil Procedure which would read as follows:

"Provided that where the immovable property sold is liable to discharge a portion of the decree debt, the payment under clause (b) of this sub-rule need not exceed such amount as under the decree the owner of the property sold is liable to pay."

13. The general rules about the sale of property under the orders of the Court are found in Rules 189 to 203 of the Civil



Rules of Practice. The rules which have application to the Provision of Order XXI Rule 89 (1) are Rules 197, 198, 199 and 201, which provisions are extracted herein below:

"197. An application under rule 89 of Order XXI, of the Code shall be as in Form No.72.

198. Costs.-At the adjourned hearing, the Court may make an order directing the payment to the applicant of the costs and expenses of the sale and to the person appointed to sell the property of his commission, if any, and providing for the application of the balance of the sale proceeds. If under rule 81 of Order XXI, of the Code, a vesting order is required, the order shall also direct that the property sold shall vest in the purchaser.

199. Payment of poundage etc., when sale set aside.-

(1) If the sale is set aside under rule 89 of Order XXI of the Code, the Court may make an order for payment by the judgement debtor of the poundage and other costs and interest, if any, not covered by the proclamation of sale.

(2) If the sale is set aside under rule 90 of Order XXI, of the code, the Court shall determine whether any and what party is responsible therefor, and may order such party to pay the costs and expenses of the sale, and may make an order that any other party entitled to have the property sold may have the conduct of the sale and may make an order for the resale of the property.

(3) If the sale is set aside under rule 91 of Order XXI of the code, the Court may make an order for payment by the execution creditor of the poundage and other costs of the sale.

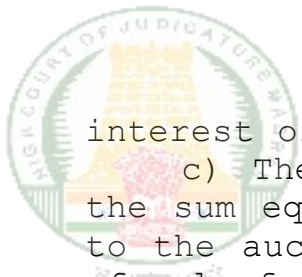
Note:-the auction purchaser is entitled to the refund of the purchase money paid by him without any deductions on account of poundage in all the cases in which the sale is set aside for no fault of his.

201. Default by applicant.- If at any time, it is made to appear to the Court that the applicant has failed to comply with any order of the Court, or any of the provisions of the Code or these rules, or is not proceeding with due diligence, the Court may make such order as to the application for sale, for the suit or matter and the costs thereof as it thinks fit."

14. A reading of the provisions of Order XXI Rule 89 (1) postulates the following:

a) The immovable property should have been sold;

b) An application to set aside the sale should be made by any person claiming an interest in the property sold either at the time of sale or at the time of making application or acting in



interest of such persons;

c) The application should be made on depositing into Court, the sum equal to 5% of purchase money which is a payment intended to the auction purchaser and the amount specified in proclamation of sale for payment to the decree holder.

15. Therefore, only on the existence of the above contingencies an application under Order XXI Rule 89 (1) would lie. The High Court Amendments (Madras) has introduced a proviso to Order XXI Rule 89 (1), wherein, it is stated that if a property that had been sold is liable to discharge a portion of decree debt the payment contemplated under clause (b) need not exceed such amount as under the decree.

16. A reading of Rule 198 would indicate that the payment to be made towards cost and expenses of the sale has to be made in the next hearing. Rule 198 therefore contemplates that the orders would be passed by the Court directing the executing Court to give details of the cost and expenses of sale in the next hearing. From a reading of all the above provisions, it would appear that an application to set aside the sale otherwise than on the ground of irregularity or fraud shall be moved by the petitioners only after depositing the amounts described under (a) and (b) of Order XXI Rule 89 (1). The facts on hand has a bit of a history. The Judgement debtor, after the Auction Purchaser/2nd respondent herein had paid balance sale consideration, filed an application to set aside the sale. However, the said application was not numbered and was returned for compliance and a period of two weeks was given for the petitioner to comply with the return. Though the period of two weeks was given to the revision petitioner herein to rectify the the return, however, even before the time could expire the sale was confirmed and consequently delivery was also ordered.

17. Challenging this order of confirmation of sale and delivery of possession the petitioner had approached this Court in C.R.P.NPD.(MD)No.1748 of 2010. This Court in its order had rejected the argument of the respondents that since the pre-condition of making the deposit was not satisfied by the petitioner herein therefore the set aside petition was not maintainable. The learned Judge had observed that from the records it appeared that even at the pre numbering stage within the two weeks of return on the sale of the said application the Court had confirmed the sale and ordered delivery. This Court had observed that the petitioner had not been given any opportunity even while returning the application and therefore the order should be set aside. The order confirming the sale and ordering delivery was set aside on condition that the revision petitioner deposits an entire decree amount into the Court. The order would further make it clear that upon the petitioner complying with the above condition the application would be taken up for hearing and



disposed of in accordance with law.

18. It is after the passing of this order that the revision petitioner after complying with the orders of this Court in C.R.P.NPD.(MD)No.1748 of 2010 had got the application numbered as E.A.No.95 of 2010 numbered. The 2nd respondent, auction purchaser had taken out a defense that the petitioner has not fulfilled the conditions stipulated under Order XXI Rule 89 (1) of the Code of Civil Procedure, though the period of 60 days had lapsed. He would also contend that though the petition would state that lodgement schedule had been filed along with the petition, however, the same has not been filed along with the petition. He therefore sought to have the application dismissed. The learned District Munsif, from a perusal of the records would show, dismissed the application solely on the ground that the petitioner has not complied with the provisions of Order XXI Rule 89 (1) of the Code of Civil Procedure. A reading of Order XXI Rule 89 (1) (a) would indicate that 5% of the purchase money has to be paid to the purchaser, Rule 89 (1) (b) would further indicate that the amount specified in the proclamation of sale has to be paid to the decree holder. Nowhere in the order or the counter has these amounts been quantified. However, if the execution petition is perused, it is seen that the decree amount is a sum of Rs.1,22,585.87/-.

19. The Honourable Supreme Court in the Judgement in **Sukumar De Vs. Bimala Auddy and others** reported in (2014) 1 SCC 584 had observed as follows:

"Though it is the responsibility of the applicant to see that the correct amount deposited, however, some sort of ministerial work has got to be done before the determination of the correctness of the amount. Therefore, the executing Court was in error by not disclosing the amount which was to be deposited and the judgement-debtors should not suffer because of the mistake of the Court."

20. The Honourable Supreme Court had therefore directed the High Court to determine the amount that was supposed to be deposited by the applicant/Judgement debtor. After it was remitted back, the calculation was made and the Judgement debtor had challenged the calculation. On challenge the High Court had set aside the order of the Executing Court including calculations. While re-calculating, the Court below had granted time for the Judgement debtor to make the payment and that was the subject matter of challenge before the High Court and later before the Honourable Supreme Court. The Honourable Supreme Court had passed the above observation while dealing with this proceedings. In my considered opinion, the facts of the instant case would also



indicate that nowhere had the Executing Court quantified the amount that was to be paid by the Judgement debtor/ revision petitioner herein. Further it is also to be borne in mind that even before the 60 days, the application under Order XXI Rule 89 (1) had been moved and the same was returned immediately and before the time granted for making the deposit had expired, the sale was confirmed. This order was challenged in revision. This Court by order dated 01.11.2010 in C.R.P.NPD.(MD)No.1748 of 2010 had granted time till 15.11.2010 to the revision petitioner to make the deposit of the entire decree amount. The records would also indicate that the above sum has been paid within this stipulated time. Therefore, there has been a compliance on the side of the revision petitioner. It was well open to the Court below to return the papers stating that the 5 % deposit had not been made. However, from the records it appears that the Executing Court had not returned the papers demanding the compliance of the provisions of Order XXI Rule 89 (1) of the Code of Civil Procedure. It is needless to state that in the Judgement in **Challamane Huchha Gowda Vs. M.R.Tirumala and another** reported in **(2004) 1 SCC 453**, the Honourable Supreme Court has held as follows:

"9. Execution is the enforcement by the process of the Court of its orders and decrees. This is in furtherance of the inherent power of the Court to carry out its orders or decrees. Order 21 of CPC deals with the elaborate procedure pertaining to the execution of orders and decrees. Sale is one of the methods employed for execution. Rule 89 of Order 21 is the only means by which a Judgment Debtor can escape from a sale that has been validly carried out. The object of the rule is to provide a last opportunity to put an end to the dispute at the instance of Judgment Debtor before the sale is confirmed by the Court and also to save his property from dispossession. Rule 89 postulates two conditions: they are depositing-(1). of sum equal to five percent of the purchase money to be paid to the purchaser, (2). of the amount specified in the proclamation of sales less any amount received by the decree holder since the date of such proclamation, in the Court. If these two conditions are satisfied the Court shall make an order for setting aside the sale under Rule 92(2) or Order 21 of CPC on an application made to it. In other words then there will be compliance of Court's order or decree that is sought to be executed. Because the purpose of the Order 21 is to ensure that carrying out of the order and decree of the Court, once the Judgment Debtor carries out the order or decree of the Court, the execution proceedings will correspondingly come to an end. It is to be noted that



the Rule does not provide that the application in a particular form shall be filed to set aside the sale. Even a memo with prayer for setting aside sale is sufficient compliance with the said rule. Therefore, upon the satisfaction of the compliance of conditions as provided under Rule 89, it is mandatory upon Court to set aside the sale under Rule 92. And the Court shall set aside the sale after giving notice under Rule 92(2) to all affected persons."

21. In that case also the Judgement Debtor had paid the entire decree amount and the amount contemplated under Order XXI Rule 89 (1) (a), namely, the 5% deposit. However, the Honourable Supreme Court has held that the Appellate Court had not considered the payment of the entire decree amount and had rejected the application. The Honourable Supreme Court upheld the order passed by the Executing Court which had accepted the payment and set aside the sale. However in the instant case the Judgement debtor has complied with the provisions of Order XXI Rule 89 (1) (b) by depositing the entire decree amount pursuant to the order of this Court in C.R.P (NPD) (MD) No.1748 of 2010 but has however failed to comply with the provisions of Order XXI Rule 89 (1) (a) of the Code of Civil Procedure.

22. Therefore considering the Judgments relied on the side of the Auction Purchaser, though the revision petitioner has acted bonafide in moving the application without much delay after depositing the amounts as directed by this Court however since the mandatory provision of Order XXI Rule 89 (1) (a) of the Code of Civil Procedure has not been complied with this Court is constrained to hold against the Judgement debtor.

23. Accordingly, the Civil Revision Petitions stands dismissed. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

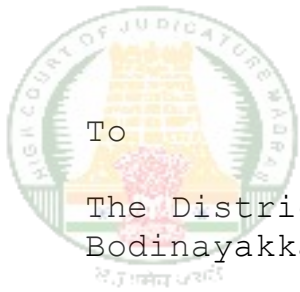
Assistant Registrar (CS-III)

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Sub Assistant Registrar (CS)

KAN



C.R.P. (MD) (NPD) Nos. 928 & 1740 of 2011

To

The District Munsif Cum Judicial Magistrate,
Bodinayakkanur.

+1 CC to Mr.T.ANTONY ARUL RAJ, Advocate (SR-105705[F] dated
18/12/2019)

+2 CC to Mr.R.SURIYANARAYANAN, Advocate (SR-105835[F] dated
19/12/2019)

order in
C.R.P. (MD) (NPD) Nos. 928 & 1740 of 2011 &
M.P. (MD) Nos. 1 & 2 of 2011
17.12.2019

KM/ (09.01.2020) 10P 5C