BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 23.04.2019
(Reserved on 11.04.2019)
CORAM :
THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.M.S.A(MD)No.3 of 2016
and
C.M.P(MD)No.1457 of 2016

Sam Jacob ... Appellant

vs.

1)Salet Renjitha Bai
2)R.Sivathanu Pillai
3)Rengammal
4)Mathavan ... Respondents

Appeal Petition filed under Order 42 Rule 1 read with Section 100 of the Civil Procedure Code, against the order dated 24.07.2015 passed in CMA.No.16 of 2013 on the file of the District Judge, Kanyakumari at Nagercoil, confirming the fair and decretal order passed by learned I Additional Judge, Nagercoil, in E.A.No.91/2011 in E.A.No.525/2010 in E.P.No.69/2009 in O.S.No.210/1998 dated 24.07.2013.

For Appellant : Mr.M.Gnanagurunathan for Mr.K.Samidurai

For R1 : Mr.Issac Mohanlal, Senior Counsel for Mr.M.P.Senthil

For R2 to R4 : No appearance

JUDGMENT

This appeal has been filed to set aside the order dated 24.07.2015 passed in CMA.No.16 of 2013 on the file of the learned District Judge, Nagercoil, confirming the fair and decretal order passed by learned I Additional Judge, Nagercoil, in E.A.No.91/2011 in E.A.No.525/2010 in E.P.No.69/2009 in O.S.No.210/1998 dated 24.07.2013.

For convenience, the parties are referred to as per their rank in this appeal.

1. The petition schedule property comprising 11 cents land with house belonged to the second respondent. The money creditor 4^{th} respondent instituted a suit in O.S.No.210 of 1998 on the file of the Sub Court, Nagercoil, against the second and third respondents for recovery of Rs.1,34,000/- being the money borrowed on Pro-Note along with the interest accrued.

2. The brief facts of the case is that the Trial Court ordered Attachment of Property vide Order in I.A.No.241 of 1998 in O.S.No.210 of 1998. The Suit was decreed in favour of the fourth respondent on 12.04.2002. The decree holder/fourth respondent filed the execution petition for execution of sale of suit property vide E.P.No.69 of 2009. The property was auctioned by the Court on 25.02.2010 and the first respondent turned out to be the successful bidder and the bid amount for sale was Rs. 25,10,000/-. The first respondent incidentally is also the wife of the advocate who represented the fourth respondent decree holder in the Suit. The Sale certificate was issued in favour of the first respondent on 26.04.2010. The delivery of possession was effected and handed over to the first respondent by the Court Ameen on 31.01.2011 as per the order in E.A.No.525 of 2011 and the Suit amount deposited in the Court. It is averred that the first respondent is in possession and enjoyment of the property since then.

3. Aggrieved by the handing over possession of the suit property, the appellant filed E.A.No.91 of 2011 in E.A.No.525 of 2011 in E.P.No.69 of 2009 under Order 2 Rules 99 & 100 of CPC stating that (i) he had entered into a sale agreement dated 14.12.2006 with the second respondent in respect of the Suit Property. This is approximately 4½ years after the suit was decreed in favour of the fourth respondent. (ii) Appellant had filed O.S.No.81 of 2008 in District Court, Nagercoil for Specific Performance of the said Agreement. The second respondent judgment debtor did not participate in the proceedings. Ex Parte Decree was passed by the Court on 03.04.2009. Thereafter, EP No.24 of 2009 was filed by the appellant for execution of sale. And the sale deed was executed in favour of the appellant by the Court on 07.07.2010.

4. The Trial Court dismissed the EA.No.91 of 2011 filed by the appellant in O.S.No.210 of 1998 on 24.07.2013 and the same was confirmed by the Appellate Court vide Order dated 24.07.2015 in CMA.No.16 of 2013 preferred by the Appellant against the order of the Trial Court. Against the said Order of the Appellate Court, this CMSA is filed before this Court.

5. The appellant would submit that he entered into an agreement with the second respondent judgement debtor in respect of the schedule property for a sale consideration of Rs. 33,50,000 on 14.02.2006. An amount of Rs.5,00,000/- was paid as advance on the same day. The appellant was aware of the attachment of the schedule property and the same found mention in the agreement of sale dated 14.12.2006. It is submitted that the second respondent judgement debtor failed to execute the sale deed and the appellant had filed a suit in O.S.No 81/2008 for specific performance before the District and Sessions Judge, Nagercoil. The Suit was decreed in favour of the appellant on 03.04.2009 ex parte as the second respondent judgment debtor did not participate in the suit proceedings. Upon obtaining the decree in OS.No.81/2008, the remaining sale consideration of

Rs.28,50,000/- was deposited before the District Court on 16.04.2009.

6. The appellant would further submit that the second respondent failed to execute the sale deed as per the decree dated 03.04.2009 in O.S.No.81/2008. Therefore, EP.No.24/2009 was filed for execution of sale deed and the learned District and Sessions Judge, Nagercoil, had executed the sale deed in favour of the appellant on 07.07.2010 as Document No.2654/2010. Eventually, it was averred, a day before the execution of the sale deed, the second respondent had surrendered possession of the schedule property to the appellant through his agent and the appellant had become the bonafide purchaser of the scheduled property and the appellant had effected mutation in his name and got Patta No.5224 and has been periodically remitting property tax and house tax. It was also submitted that improvement by renovation at an expense of Rs.8.50 lakhs was undertaken by him on the schedule property.

7. The appellant pointed out that the order dated 12.04.2002 in IA.No.24/1998 in O.S.No.210/1998 was decreed exparte in favour of the fourth respondent and EP.No.69/2009 was filed by him for recovery of a meagre amount of Rs. 2,35,316/-. It was submitted that while the property comprising 11.5 cents commanded a value of over Rs.35,00,000/-, the entire property was brought for auction to meet the EP Amount of only Rs.2,35,316/-. It was averred that the first respondent had participated in the auction on 26.02.2010 and purchased the property for a sum of Rs.25,10,000/-. The appellant allege that the first respondent is the wife of the advocate for the fourth respondent decree holder and that the entire property was brought for auction to recover the meagre amount of Rs.2,35,316/- only to favour the Advocate despite the bar of good conduct and the possession taken on 31.01.2011.

8. The appellant assailed the conclusion of the court that dispossession of the scheduled property is not proved and also the dismissal of the application filed under Order 21 Rule 99 of CPC as not maintainable. It was submitted that the appellant was dispossessed of the schedule property. It was argued that loss of right and control over the right of the land have to be treated as dispossession within the meaning of Order 21 Rule 99 of CPC and they relied on the decision of the Hon'ble Apex Court in the case of Ashan Devi & Anr vs Phulwasi & Ors reported in 2003 (12) SCC 219. On the factual side, they submitted that at the time of taking possession through the court, renovation work was going on in the property for and on behalf of the first respondent and the mason One Mr. Viyagulamuthu who was present there, after clearing his belongings from the property, had helped the authorities to take possession of the schedule property. In support of the above fact, they had submitted the report of the Ameen in EP.No.69/2009. It was also pointed out that the said mason was examined by the appellant as PW5. Attention was also drawn to the decision of this Court in the case of R.Chandrasekaran vs S.Karthick & Ors, wherein it is held

that when dispossession of the occupants is illegal and erroneous, status quo ante has to be restored.

9. The appellant also assailed the conclusion of the District Court that the schedule property was already under attachment in a suit filed by the fourth respondent and therefore the purchase agreement of the appellant with the judgement debtor is pending suit and hence the sale and purchase of the schedule property is void. It was contended that alienation of property under court attachment is not void in all circumstances and that the same is void only to the extent of the claims enforceable under the attachment. In the context, it was again reiterated that the enforceable claim that was proclaimed in the auction was only Rs.2,35,316/- whereas, the property subjected to auction is over Rs. 35 lakhs at around the time of the auction. In support of their arguments, they relied on the decision of the Hon'ble Supreme Court in the case of Balakrishna Gupta & Ors vs Swadeshi Polytex Limited & Anr reported in 1985 SCC 13 & 14 and the decision in K.D.P Properties Private Limited, Chennai vs The Sub Registrar Arasaradi SRO & Anr. They also drew the attention of this to Section 64 of CPC to support their contentions. They also adduced the decision of the Hon'ble Supreme Court in the case of Kerala State Financial Enterprises vs Official liquidator, High Court of Kerala, wherein, it was observed that attachment by itself does not create any charge in property and that the order of attachment is for achieving a limited purpose and subject to further orders. A distinction was also drawn by the appellant between attachment before judgement and attachment for execution of a decree. It was argued that an attachment before judgement, as in the instant case, is only to safeguard the interest of the plaintiff.

10. The appellants objected to the conclusion of the District court that only the judgement debtor can plead excessive execution after having held that the excessive execution is against the settled principles of law. On maintainability of his application under Order 21 Rule 99 of CPC, the appellant submitted that the Hon'ble Supreme Court and this Court had repeatedly held that the application under Order 21 Rule 99 should be considered and tried like a suit and determine all the questions relating to dispute including the execution citing the decision of the Hon'ble Supreme Court reported in AIR 2002 Supreme Court 3083, 3084 & 3085. The attention of this court was also drawn to the observations of various forums that the CPC came to be amended and this provision inserted only to avoid multiplicity of proceedings.

11. The appellant pleaded that disproportionately excessive execution in the instant case is without jurisdiction and therefore void and relied on the decision of the Hon'ble Supreme Court in the case of Ambati Narasaya vs M.Subba Rao & Anr reported in 1991 (1) L.W. Page 602. It was argued that under Order 21 Rule 64, it is not just the duty, but an obligation cast on the court to first decide whether auction of the entire property is necessary or only a portion is enough to satisfy the decree. It was contended that the

sale effected without examining this aspect is illegal and without jurisdiction. They adduced the decision of the Hon'ble Supreme Court in the case of Sai Enterprises vs Bhimreddy Laxmiah & Anr reported in 2007-3-L.W.Page 20 wherein it was held that the expression "necessary to satisfy the decree" in Rule 64 indicates the legislative intent that no sale can be allowed beyond the decreetal amount mentioned in the sale proclamation. It was advanced that it is immaterial whether the property is one or several and if the property is one, if a separate portion could be sold without violating any provision of law, only such portion of the property should be sold. It was pointed out that this Court in the case of K.J.Prakash Kumar & Ors vs Rasheeda Yasin & Anr reported in 2009-2-L.W. Page 376 held that if Order 21 Rule 66 (2) of CPC is not adverted to and the entire property is brought to auction and sold, then the sale would be vitiated by material irregularity.

12. The appellant also alleged fraud on the act of getting the full property sold by auction for a meagre decreetal sum. It was averred that the first respondent auction purchaser had acted fraudulently by consciously suppressing to the court that she is the wife of the advocate of the 4th respondent decree holder. The malafide act of the Advocate Mr.Justin in not taking the permission of the court in terms of Order 21 Rule 73 is to evade the specific bar under the rule. It was argued that fraud vitiates all proceedings and any forum at any stage can treat such acts borne with fraud as non est and rectify the illegality. They adduced the following case laws in support of their arguments.

1. 1994-1-L.W. Page 21 SC
2. 2011-2-CTC, Page 88 HC Mad
3. 2012-2-LW 851 HC Mad
4. 2011 (9) Scale 295 SC
5. 1994-1-L.W.21 SC
6. 2011 (2) CTC Page 88 HC Mad

13. The appellant pleads that the the lower court erred in not drawing adverse inference, as the respondents 1 & 4 could not be examined in the witness box despite a specific pleading by the appellant on the ground of non maintainability of the application under Order 21 Rule 99 CPC. They relied on the decision of the Hon'ble Supreme Court in the case of Ishwar Bhai C.Patel @ Bachu Bhai Patel vs Harihar Behra & anr reported in 1999-SAR (CIVIL) in support of this contention.

14. The appellant contends that having found irregularities in the auction sale, the court ought to have set aside the sale and it is wrong to suggest that the Order 21 Rule 90 is not the only recourse to the appellant. It was argued that only one cent ought to have been sold to recover the decree amount of Rs. 2,35,316/- for which sale is proclaimed and the balance extent has to be reverted back to the appellant from whose hands the property was taken over by the bailiff at the time of dispossession.

15. Per contra, the first respondent would submit that the sale agreement dated 14.12.2006 between the second respondent and the appellant is purportedly signed 4½ years after the award of decree in favour of the fourth respondent pendente lite and therefore hit by the doctrine of Lis Pendence. It was argued that Section 52 of the Transfer of Property Act prohibits such dealing with property even if there is no knowledge about the pendency of the suit. It was submitted that the appellant had full knowledge of the attachment and the very attachment order is referred in the sale agreement entered into between the second respondent judgement debtor and the appellant Penedente Lite Purchaser. The first respondent relied on the following decisions in support of their view.

1. Banumathi @ Karunaiammal's Case : 2002 (5) CTC 483
2. Shri. Rajasthani Jain Samaj Educational Trust Case : 2007 (1) MLJ 80
3. Usha Sinha Case : 2008 (4) LW 103
4. A.V.Raju Case : 2011 (1) LW 911
5. Thangeswari Case : 2011 (2) CTC 149

16. It was submitted that the suit property in O.S.No 210 of 1998 was attached by Order in IA.No.241 of 1998 dated 03.02.2002 and under such a circumstance, the subsequent sale agreement dated 14.12.2006 is a void one under the provisions of Sec 64. Of CPC and relied on the following judgements.

1. Nalli Textiles Case : 2001 (3) MLJ 512
2. Chinnasamy's case : AIR 2003 (MAD) 46
3. Ramasamy's Case : 2005 (3) CTC 640
4. Kumaresan's Case : 2018 (1) MWN (Civil)
5. Jeyamani's Case : 2017 (3) T.N.C.J

17. The first respondent further submits that the application filed in E.A.No.91 of 2011 in E.A.No.525 of 2011 in EP.No.69/2009 under Order 21 Rule 99 & 100 of CPC by the appellant is not maintainable as Rule 102 of Order 21 makes it clear that such applications under Rules 98 & 100 of Orders 21 of CPC shall not apply to Pendente Lite transfers. Therefore, it was argued that the only remedy available to the appellant is filing an application under Order 21 Rule 90 (3) of CPC to set aside the sale of the suit property. And that was not invoked by the appellant within the period of limitation which is 60 days of the date of confirmation of sale as provided under Article 127 of Limitation Act. They relied on the following decisions in support of their case.

1. Mohideen Pitchai's Case :2012 (3) LW 596
2. Annapurna's case : 2014 (2) MWN (Civil) 110
3. UCO Bank's Case : 2004 (1) CTC 10
4. K.M.Balasubramanian's case : 2017 (1) MWN (Vivil) 372
5. K.Palanisamy's case : 2005 (1) CTC 585

18. Regarding the allegation of the appellant that the first respondent purchaser is the wife of the lawyer of the decree holder it was submitted that there is no such restriction under law for a

Lawyer's wife to purchase properties in Court Auction. It was argued that Order 21 Rule 73 of CPC only restricts 'Ófficer' or 'other persons' having any duty to perform in connection with the sale and placed reliance on the following cases.

1. K.Bashyam's Case : 1946 MLJ 218
2. Alagirisami's Case : 1886 I.L.R 10 Mad 111

19. Regarding the question of Excessive Execution raised by the appellant, it was submitted that the the property is a house site with a house therein lying in a single stretch hence indivisible and inevitable. It was also argued that the appellant does not have the locus to raise that question on behalf of the Judgement Debtor.

20. The first respondent further submitted that the appellant himself has admitted in the MOA that the possession of the scheduled property was surrendered and the key handed over through his agent a day before the execution of the sale deed by the Court which is barred by law in view of the attachment and therefore, there is no question of possession of the appellant and subsequent claim of dispossession. It was alleged that the same is staged only to create an encumbrance on the property to escape from the legal disposal of the property by the Court for recovery of the debt. It was also argued that the appellant's execution of the sale deed through the Court instead of from the original owner who voluntarily had handed over possession is strange and suspicious. Therefore, it was argued, that the appellant has not come to the court with clean hands and as such, the appellant cannot claim any equity for the pendente lite purchase.

21. In the additional written argument filed on behalf of him, the appellant had drawn the attention of this court the observations of this court relied by the first respondent in Bhasyam's Case and also to Chapter II Part VI of the Bar Council of India Rules under Section 49 (1)(c) of the Advocates Act, 1961, to drive home the point that the advocate cannot participate in the bid the property sold in any legal proceedings in which he is professionally engaged.

22. Heard the counsels for both the parties and perused the records and the cases cited. As many as 40 case laws were relied by the appellants and the first respondent put together. On perusing each one of them, I could see that each of the citations supported their arguments. But not one case is in all fours with the facts and circumstances of the case on hand. While the ratio of certain cases tend to apply to the instant case, the unique factual matrix of the case make most other redundant and some distinguishable in the context of the case. Therefore, it became necessary that only the case laws that are held relevant in the context of the case are discussed in this order.

23. The CMSA raised many questions regarding the correctness of the proceedings in O.S.No.210 of 1998 and O.S.No.81/2008 before the lower courts. Owing to the factual matrix of the case, no purpose

will be served in searching objective answers to those questions even when they are academically relevant but that can be of no consequence to the case on hand. In view of the citations having limited applications on the unique facts of this case and the redundancy of searching objective answers, I proceed to record the findings without any specific reference to the citations and search for answers that I consider relevant to the case on hand.

24. Question of Excessive Execution: As contended by the appellant with various case laws, there is no doubt that the auction sale of the entire property valued many times the decree sum of Rs.2,35,316/- is excessive execution and is in blatant violation of the CPC and the same is rightly concluded in the impugned order in CMA.No.16 of 2011. The plea of the non severability of the schedule property advanced by the first respondent to defend the excessive execution is unconvincing. Regarding severability, if division is possible without violating any law, it has to be severed and sold on auction. As rightly pointed out by the learned counsel for the appellant, the procedures set out in CPC and the case laws relied by them indicate the legislative intent of restricting the court from resorting to excessive execution. However, the same does not cause any injury to the appellant and the appellant has no reason to be agitated. I agree with the learned senior counsel Mr.Issac Mohanlal for the first respondent that the appellant, not being a party to the suit and the execution of sale has no locus to plead excessive execution. If at all some one is aggrieved by the vice of excessive execution, it is the second respondent judgement debtor. The reason why he chose not to agitate is obvious in view of his strategic non participation in both the suits. The second respondent judgment debtor chose to stay silent in O.S.No.210 of 1998 for the reasons known only to him despite notices.

25. Question of Dispossession : Whether the execution of possession of the scheduled property by the Court Ameen on 31.01.2011 amounted to dispossession of the property from the appellant. The answer is, 'No' for two reasons. One, the purported delivery of possession of the schedule property to the appellant by the second respondent judgment debtor without the leave of the court is barred by Section 52 of the Transfer of Property Act as well as Section 64 of CPC. In other words, agreement of sale without the leave of the court is hit by the doctrine of lis pendence making the delivery of possession void. Two, the appellant omitting to implead the fourth respondent decree holder in OS.No.81/2008 is a fatal error rendering the decree void. Besides, obtaining the ex parte decree in OS.No.81/2008 without the participation of the second respondent judgment debtor may point to collusion. Therefore, as contended by the learned Senior Counsel for the first respondent, the appellant has not approached this court with clean hands.

26. Applicability of the Doctrine of Lis pendence : In my view, the agreement for sale dated 14.12.2006 and the purported delivery of possession per se is not hit by the doctrine of lis

pendence in view of the charge of excessive execution adopted for a meagre decree sum sticking to the sale. However, the failure of the appellant to take the permission and leave of the court to purchase the property or deliver possession is hit by the doctrine of lis pendence in view of Section 64 of CPC and Section 52 of the Transfer of Property Act. There is no denial that the appellant is aware of the attachment as the same form part of the purported agreement of sale. The reason why the appellant chose not to take the permission and leave of the court for the sale and delivery of possession when he is aware of the attachment is obvious. It appears that one of the reasons is that it is a part of the strategy of obtaining relief through decree in parallel suit.

27. Maintainability of EA.No.91/2011: The EA is filed under Order 21 rule 99 of CPC. In terms of Rule 102 of CPC, the Order 31 Rule 98 and 100 are not applicable to pendente lite matters. The appellant is aware of the court attachment of the schedule property as the same finds mention in the purported agreement dated 14.12.2006. The agreement of sale is signed after 4½ years of the decree in O.S.No 210/1998. The second respondent judgment debtor ought to have participated in the proceedings in OS.No.81/2008 or the appellant aware of the lis pendence ought to have impleaded himself in O.S.No.210/1998. They failed to do so for their own considered reasons. Therefore, in my view, as rightly pointed out by the learned senior counsel for the first respondent, the remedy for the appellant, if at all is there, is to set aside the auction sale by moving an application under Order 21 Rule 90 (3) of CPC. When the agreement of sale dated 14.12.2006 itself is void in view of not taking the leave of the court in O.S.No.210/1998 and decree dated 03.04.2009 in OS.No.81/2008 is voidable for the fatal error of omission to include the fourth respondent decree holder in the Suit OS.No.81/2008. As rightly pointed out by the learned counsel for the first respondent, the appellant failed to take steps to question the proclamation of sale of the suit property made under Order 21 Rule 66 of CPC or the Sale by Auction under Order 21 Rule 77 of CPC. As such, the appellant does not seem to have locus to move an application under Order 21 Rule 90 (1) of CPC at this stage, as the appellant is hit by the disqualification under Order 21 Rule 90 (2) and 90 (3) of the CPC.

28. Propriety of the Auction purchaser: A question is raised on the propriety of the first respondent auction purchaser to bid for the property in auction as she happened to be the wife of the Advocate of the fourth respondent decree holder in the context of Order 21 Rule 73 CPC. The first respondent defended the purchase and relied on the decision of this Court in K.Bashyam's case reported in 1946 MLJ 218 and the Alagirisami's case reported in 1886 I.L.R 10 Mad 111 wherein, it is held that there is no bar on the advocate to bid litigated property even where he is professionally engaged. I fear the decisions are outdated and has no utility. As rightly pointed out by the learned counsel for the appellant in the additional written submission, Section II of the Bar Council of

India Rules, 1975 framed under Section 49(1)(c) of the Advocates Act, 1961 (Rule 22 to be precise) bars an advocate from the bidding or purchase of litigated property in which he is professionally engaged. In the same breath, I am to add that the auction sale even if it is held to be improper after due process, does not cause any injury or prejudice to the appellant.

29. Allegation of fraud: Allegation of fraud and collusion was levelled on the process of the auction sale of the schedule property in view of the question of propriety of the first respondent auction purchaser. I fear that the allegation of fraud is far fetched. For the reasons discussed above, the appellant is neither injured nor prejudiced by the auction sale of the property. It is only the second respondent judgment debtor whose interest could be prejudiced if the auction sale is collusive and improper. But court auctions are reasonably transparent. The second respondent and the appellants could have very well participated in the bidding process unless they chose not to do so. So, in my view, unless there is an allegation and evidence of rigging the bidding process fraud cannot be alleged and mere impropriety will not amount to fraud.

30. All but the question whether the application filed by the appellant under Order 21 Rule 99 of CPC is maintainable or not is of no consequence to the case on hand when looked into the specific factual context of the case and the prejudicial interests of the participants. Therefore, I find that there is no infirmity in the impugned order dated 24.07.2015 of the learned District Judge in CMA.No.16 of 2013 that culminated in the dismissal of the application of the appellant on the ground of non maintainability of the application under Order 21 Rule 99 of CPC.

31. In view of the above discussions, the CMSA is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

/ True Copy /

Sub Assistant Registrar(CS)

To

1) The District Judge,
Kanyakumari at Nagercoil.

2) The I Additional Sub Judge, Nagercoil.

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+1 CC to M/s.K.SAMIDURAI, Advocate (SR-61916[F] dated 23/04/2019)
+1 CC to M/s.M.P.SENTHIL, Advocate (SR-62007[F] dated 24/04/2019)

Judgment made in
C.M.S.A(MD)No.3 of 2016
23.04.2019

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ES/KK/02.05.2019/11P/7C