IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH, NAGPUR

MISC. CIVIL APPLICATION NO.243 OF 2020
IN
WRIT PETITION NO.1426 OF 2018 (D)

(Keshavrao s/o Domaji Tidke Vs. Vinod s/o Gulabrao Gotmare (since deceased) thr. LR's Smt. Pushpa wd/o Vinod Gulabrao Gotmare and others)

Office Notes, Office Memoramda of Coram, appearances, Court's orders of directions and Registrar's Orders.	*Court's or Judge's orders.*

Shri D.L. Dharmadhikari, Advocate for Applicant.

CORAM: ROHIT B. DEO, J.
DATE: 13th MARCH, 2020.

This application is taken out for review of the judgment dated 22.10.2019 in Writ Petition 1426/2018. I heard the learned counsel Shri D.L. Dharmadhikari.

2] The first ground is that at the time of hearing it was not pointed out to the Court that the application under Section 47 read with Order XXI Rule 90 of the Civil Procedure Code filed by the original judgment debtor Shri Vinod Gotmare was time barred.

3] Apart from the fact, that the said submission does not appear to be correct in law, such contention was not advanced in the High Court for that matter before the two courts below.

4] The other ground taken in support of the review application is again based on the provisions of Article 127 and 128 of the Limitation Act, 1963. According to the review applicant, the application moved by the judgment debtor for setting aside the said certificate was beyond time. Again, such a contention was neither raised before the courts below nor was raised before me in the writ petition.

5] The last submission is that the judgment of the Hon’ble Apex Court in *Chilamkurti Bala Subrahmanyam v. Samanthapudi Vijaya Lakshmi and another* reported in *2017 (6) SCC 770* was not considered. I have perused the judgment. Assuming that the said judgment was cited by the learned counsel, the said judgment does not take the case of the applicant any further.

6] The facts which were involved in Writ Petition 1426/2018 were glaring. The borrower Vinod Gotmare availed loan from State Bank of India. On the premise that the borrower did not repay the loan, the State Bank of India instituted Special Civil Suit 263/1984 for recovery of the amount of Rs.39,458/-. The suit was decreed and State Bank of India initiated Execution Proceedings 25/1985 in which land bearing 3 acres owned by the borrower was put to auction.

7] The Executing Court issued notice of auction on 02.11.1996. On 06.11.1996 the borrower approached the Bank, one time settlement was entered into, and the Bank agreed to accept Rs.30,000/- towards satisfaction of the decree. The borrower immediately deposited the amount of Rs.30,000/- and relied on the promise of the Chief Manager of State Bank of India that the execution proceedings shall be withdrawn. State Bank of India did not bother to withdraw the execution proceedings nor did the State Bank of India intimate the Court that the decree stood satisfied. In such a situation, notwithstanding that the borrower satisfied the decree, the Executing Court proceeded with the auction. Notably, the State Bank of India did not depute any representative to attend the auction nor did the State Bank of India take any step to stop the auction although the decree was satisfied. The borrower came to know of the auction sale only when he received notice from the Tahsildar of the application moved by the auction purchaser for mutation. The borrower filed objection to the mutation notice on 14.07.1997 and on 14.08.1997 preferred an application under Section 47 read with Order XXI Rule 90 of the CPC. The State Bank of India stated that it has no objection to setting aside the auction sale.

8] The Executing Court rejected the application under Section 47 read with Order XXI Rule 90 of the CPC on the premise that the borrower was negligent and allowed the auction sale proceeding to continue. This order was set aside in appeal. The auction purchaser challenged the appellate order in Writ Petition 1426/2018 which came to be dismissed by the order of which review is sought.

9] The learned counsel Shri D.L. Dharmadhikari would submit, relying on the decision in *Mangilal Narsingdas Gattani v. Shaligram Ukarda Payghan* reported in *2002 (Supp.2) Bom.C.R. 598* and in *Kausar Sultana Sk.*

Shakeel v. City Financial Consumer Finance India Limited, New Delhi and others reported in *2017 (2) Mh.L.J. 801*, that the Executing Court could not have entertained the application which was time barred. Reliance is placed *inter alia* on paragraphs 3, 4, 6 and 7. I have already noted that the auction sale went ahead in view of conduct which was clearly fraudulent. It is trite law, that fraud vitiates every judicial act. The fact that the auction went ahead despite the borrower having satisfied the decree lead to no inference other than of fraud. While the review applicant may argue that the blame for the fraud lies at the door step not of the review applicant but the Bank, that does not detract from the fact that the auction sale is null and void. The borrower was not aware of the auction. The State Bank of India did not depute its representative. It was not brought to the notice of the Court that to permit the auction to proceed would not only be fraudulent, the property of the borrower would stand virtually ex-appropriated for non-existent debt. Shri D.L. Dharmadhikari would submit that the ratio of the decision in Chilamkurti Bala Subrahmanyam 2017 (6) SCC 770 is that the sale cannot be set aside by merely establishing a material irregularity or fraud, the applicant must further established to the satisfaction of the Court that the material irregularity or fraud has resulted in substantial injury to the applicant. Shri D.L. Dharmadhikari is inviting my attention to paragraph 14 of the said decision which reads thus:

> ***14.*** *A charge of fraud or material*

> *irregularity under Order 21 Rule 90 must be specifically made with sufficient particulars. Bald allegations would not do. The facts must be established which could reasonably sustain such a charge. In the case before us, no such particulars have been given by the respondent of the alleged collusion between the other respondents and the auction-purchaser. There is also no material irregularity in publishing or conducting the sale. There was sufficient compliance with Order 21 Rule 67(1) read with Order 21 Rule 54(2). No doubt, the trial court has said that the sale should be given wide publicity but that does not necessarily mean by publication in the newspapers. The provisions of Order 21 Rule 67 clearly provide if the sale is to be advertised in the local newspaper, there must be specific direction of the court to that effect. In the absence of such direction, the proclamation of sale has to be made under Order 21 Rule 67(1) "as nearly as may be, in the manner prescribed by Rule 54 sub-rule (2)". Rule 54 sub-rule (2) provides for the method of publication of notice and reads as follows:*
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> *"54. (2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the courthouse, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village."*

10] The submission of the learned counsel Shri D.L. Dharmadhikari that in the present case it was neither pleaded nor established that there was an injury is noted only for rejection. The case of the auction purchaser was that although there was no debt in existence, although the decree stood satisfied in entirety before the auction sale, the State Bank of India, permitted the auction sale to proceed. In such factual matrix to even suggest that there was no injury suffered by the borrower or that something additional was required to be pleaded or established, is only rubbing salt in the wound. The auction purchaser believed the Senior Officer of the State Bank of India and deposited Rs.30,000/- towards full and final settlement prior to the auction. Shockingly enough, although the State Bank of India accepted Rs.30,000/- from the borrower and gave effect to the one time settlement, the State Bank of India went ahead and withdrew Rs.53,250/- deposited by the auction purchaser. It is manifests that in the entire process not only the borrower, the review applicant has also been taken for a right. But then, that would not render the auction sale legal. It is always open for the applicant purchaser to initial appropriate action against the State Bank of India.

11] The application is dismissed.

JUDGE

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