

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.09.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A.No.45 of 2011

A.Selvi

... Appellant/Defendant

-vs-

1. A.Sellamuthu

2. S.Matheswaran Respondents/Plaintiff/ Not a party

Memorandum of Grounds of Civil Miscellaneous Second Appeal filed under Order XXI, Rule 90 read with Section 100 of the Code of Civil Procedure, against the fair and decretal order dated 19.04.2010 passed in C.M.A.No.35 of 2008 on the file of the learned Subordinate Judge, Tiruchengode, confirming the fair and decretal order dated 5.12.2007 passed in R.E.A.No.127 of 2007 in R.E.P.No.52 of 2006 in O.S.No.506 of 2004 on the file of the learned District Munsif, Tiruchengode.

For Appellant :: Mr.T.L.Thirumalaisamy

For Respondents:: No appearance for R1
Mr.N.Manokaran for R2

JUDGMENT

Heard learned counsel for the parties through video conferencing due to the Covid-19 pandemic.

2. This civil miscellaneous second appeal has been directed against the fair and decretal order dated 19.04.2010 passed in C.M.A.No.35 of 2008 by the learned Subordinate Judge, Tiruchengode, confirming the fair and decretal order dated 5.12.2007 passed in R.E.A.No.127 of 2007 in R.E.P.No.52 of 2006 in O.S.No.506 of 2004 by the learned District Munsif, Tiruchengode, raising the following substantial questions of law:-

- (i) Whether the Courts below are correct in law in bringing the entire property for sale when 1/4th of the value of the property as mentioned in sale proclamation will be sufficient to satisfy the decree?

- (ii) Whether the sale proclamation is correct in law without mentioning the existence of 2 houses in the property?
- (iii) Whether the Courts below are correct in law in dismissing the application filed under Order 21 Rule 90 of C.P.C., on the ground of non-compliance of conditional order without considering the grounds raised and deciding the application on merits?
- (iv) Whether the Courts below are correct in law in dismissing the application on the ground that the appellant have not filed any objection at the time of auction?

3. Mr.T.L.Thirumalaisamy, learned counsel appearing for the appellant/judgment debtor, arguing on the above questions, pleaded that when the first respondent/plaintiff filed the suit in O.S.No.506 of 2004 for recovery of a sum of Rs.77,610/- including interest, on the basis of the promissory note dated 15.11.2000 executed in favour of the first respondent for Rs.60,000/-, although heavy objection was raised that there was no such borrowal, the suit was decreed on 27.4.2004 for payment of the suit amount with interest at the rate of 9% per annum from the date of filing till the date of the decree and thereafter, at the rate of 6% per annum till the date of realisation. Later on R.E.P.No.52 of 2006 was filed on 14.3.2006 by the first respondent/deGREE holder. After receiving summons, the appellant/judgment debtor appeared and contested the case, however, for not filing the counter affidavit, the executing Court proceeded with the matter by setting her ex parte. Thereafter, proclamation of sale was also ordered by the executing Court. When the first respondent/deGREE holder quoted a sum of Rs.75,000/- towards the value of the property, which is much below the market value, the executing Court directed the Court Amin to find out the actual value of the property, who also, after inspection of the property, fixed Rs.3,60,000/- as its market value. However, the executing Court, fixing Rs.4,00,000/- without the valuation done by an official valuer, brought the sale of the suit property by way of public auction on 26.4.2007. The second respondent/auction purchaser bid for a sum of Rs.4,00,400/-. But the Court, without discharging its duty to find out fairly the actual value of the property, allowed the second respondent to deposit one-fourth of the sale amount on the date of auction and the second respondent also deposited the said amount on the same day. The executing Court, giving sixty days time, posted the case for confirmation of sale on 27.6.2007.

4. When the matter was taken up on 27.6.2007 for confirmation of sale, the appellant herein filed the R.E.A.No.127 of 2007 under Order XXI, Rules 90 & 64 of the Code of Civil Procedure seeking for cancellation of the auction sale held on 26.4.2007, on the ground that a material irregularity

had taken place in the auction sale of the property. It was also the claim of the appellant in R.E.A.No.127 of 2007 that when the actual market value of the property was running into Rs.20 lakhs including the two residential houses situated in the suit property having an extent of 1 acre, 83 cents, the first respondent/decreed holder has conveniently left out the two houses from being shown, therefore, it would amount to a material irregularity in ordering the proclamation of sale of the suit property. The executing Court, without taking any care to find out whether the suit property having an extent of 1 acre, 83 cents is also having the two houses and put together, the value of the property would be more than Rs.4,00,400/-, wrongly confirmed the sale, as a result the appellant/judgment debtor has been put to grave prejudice. When Order XXI, Rules 90 & 64 of the Code of Civil Procedure would clearly mandate the executing Court to sell only so much of the property of the judgment debtor required to satisfy the decree debt, the mandate provided in Rule 64 has been completely given a go-by. Moreover, the material irregularity shown by the appellant that the two houses situated in the suit property having an extent of 1 acre, 83 cents have also been ignored, as a result, huge prejudice has been caused to the appellant. Therefore, the application filed by the appellant under Order XXI, Rules 90 & 64 deserves to be allowed, he pleaded.

5. Mr.N.Manokaran, learned counsel appearing for the second respondent/auction purchaser submitted that when the first respondent/plaintiff/decreed holder advanced a huge amount of Rs.60,000/- to the appellant by obtaining the promissory note dated 15.11.2000, for the reason best known to the appellant, she refused to pay the money. Therefore, the first respondent filed the suit for recovery of the said amount and the same was also decreed on 27.4.2004 with interest at the rate of 9% per annum from the date of filing of the suit till the passing of the decree and thereafter, at the rate of 6% per annum till the date of realisation. That decree was not respected and complied with by the appellant/judgment debtor. Hence, after waiting for two long years, R.E.P.No.52 of 2006 was filed on 14.3.2006 before the executing Court. After receiving summons, the appellant entered appearance on 25.8.2006. For the reason best known to her, she took number of adjournments without even filing any counter affidavit thereon. Therefore, the executing Court proceeded with the matter by setting her ex parte on 20.2.2007. When the proclamation of sale was ordered, after the appellant was set ex parte, giving the value of the property at Rs.75,000/- in 2007, the executing Court, without accepting the said value, directed the Amin of the Court to inspect the suit property and find out the real value thereon. Accordingly, the Court Amin, after inspecting the suit property, fixed the value of the property at Rs.3,60,000/-. But the executing Court,

without accepting the value fixed by the Court Amin, enhanced the value to Rs.4,00,000/- and posted the matter for proclamation of sale on 26.4.2007. Thereafter, the second respondent/auction purchaser entered into the scene and bid for Rs.4,00,400/-. Finding that the second respondent had expressed his willingness to purchase the suit property for higher value, the auction was held accepting the bid amount of Rs.4,00,400/- offered by the second respondent on 26.4.2007. The second respondent also paid one-fourth of the bid amount on the same day. Thereafter, the executing Court, giving sixty days time, posted the matter for confirmation of sale on 27.6.2007. Till then, the appellant did not even take care of the property or moved any application. Peculiarly, when the matter was posted for confirmation of sale on 27.6.2007, the appellant filed R.E.A.No.127 of 2007, without even producing any document reflecting the value of the property, indicating a huge amount of Rs.20 lakhs as the value of the property. Secondly, when the sale was not confirmed, it was always open for the appellant/judgment debtor to pay the suit decree amount. But she has taken time repeatedly for making the payment. When the matter stood adjourned for enquiry and also for making the payment, the appellant made only a part payment of Rs.45,000/- on 21.11.2007. Finding the said response from the appellant, the executing Court also adjourned the matter to 5.12.2007 for payment of the entire balance amount. But ironically, when the matter was taken up on 5.12.2007, the appellant did not even make any payment as per the conditional order. Therefore, when the conditional order to make the entire payment was not complied with, the R.E.A.No.127 of 2007 was dismissed.

6. Responding to the argument advanced by the learned counsel appearing for the appellant that the Court has miserably failed to follow the mandate under Order XXI, Rules 90 & 64 of the Code of Civil Procedure, Mr.Manokaran, referring to Order XXI, Rule 90(3) pleaded that no application to set aside the sale under this rule shall be entertained upon any ground. The appellant could have taken this plea before the date on which the proclamation of sale was drawn up. Therefore, when the matter was posted for auction sale on 26.4.2007, the appellant who entered appearance, after receiving notice in the R.E.P.No.52 of 2006, on 25.8.2006, did not even bother to contest the case and she remained absent, resultantly, the matter was proceeded ex parte. Thereafter also, at no point of time, the appellant approached the executing Court with any document showing the real value of the property, as she pleads today. Hence, no infirmity can be found. Secondly, when the executing Court also, after the sale of the suit property was made, posted the matter for confirmation of sale on 27.6.2007, the appellant did not move any application. Finally, she came to the Court to make the entire payment. But even after enjoying

the sufficient time granted by the Court for making the entire sale amount, only with a view to drag on the matter, paid only a sum of Rs.45,000/- on 21.11.2007. In spite of the above payment, the Court again adjourned the case to 5.12.2007 for payment of the entire balance amount. But again, after enjoying all the opportunities granted by the executing Court, the appellant has not even come forward to pay the money. Hence, the application filed by the appellant under Order XXI, Rules 90 & 64 cannot be espoused.

7. This Court also finds that when the money suit was decreed on 27.4.2004 directing the appellant/judgment debtor to pay the decretal amount, it is not known why after entering appearance on receipt of notice in R.E.P.No.52 of 2006 on 14.3.2006, the appellant remained absent and allowed the executing Court to proceed with the matter ex parte. Secondly, when the executing Court, after fixing the value of the property at Rs.4,00,000/-, posted the matter for auction of the suit property on 26.4.2007, the second respondent, bidding a sum of Rs.4,00,400/-, took part in the auction sale and his bid was accepted. On the date of sale, he had also deposited one-fourth of the amount and thereafter the executing Court, again giving sixty days time, posted the matter on 27.6.2007 for confirmation of sale. But it is not known why the appellant, being party to all the proceedings and following the matter, has not come forward to settle the entire decretal amount. This Court also finds that even after filing the R.E.A.No.127 of 2007, when opportunities were given to the appellant to pay the entire amount, she paid only a sum of Rs.45,000/- on 21.11.2007. Even on 5.12.2007, when the matter was again adjourned, she did not pay the entire amount. Therefore, this Court is unable to find any irregularity or merit in the application filed by the appellant. Moreover, when the appellant was all the time enjoying the time repeatedly granted by the executing Court for payment of admitted amount, without making the payment, she is not legally entitled to move the application under Order XXI, Rules 90 & 64 of the Code of Civil Procedure. For all the aforementioned reasons, the civil miscellaneous second appeal fails and it is dismissed answering the substantial questions of law against the appellant. Consequently, M.P.No.1 of 2011 is also dismissed. No costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

To

1. The Subordinate Judge,
Tiruchengode.
2. The District Munsif,
Tiruchengode.

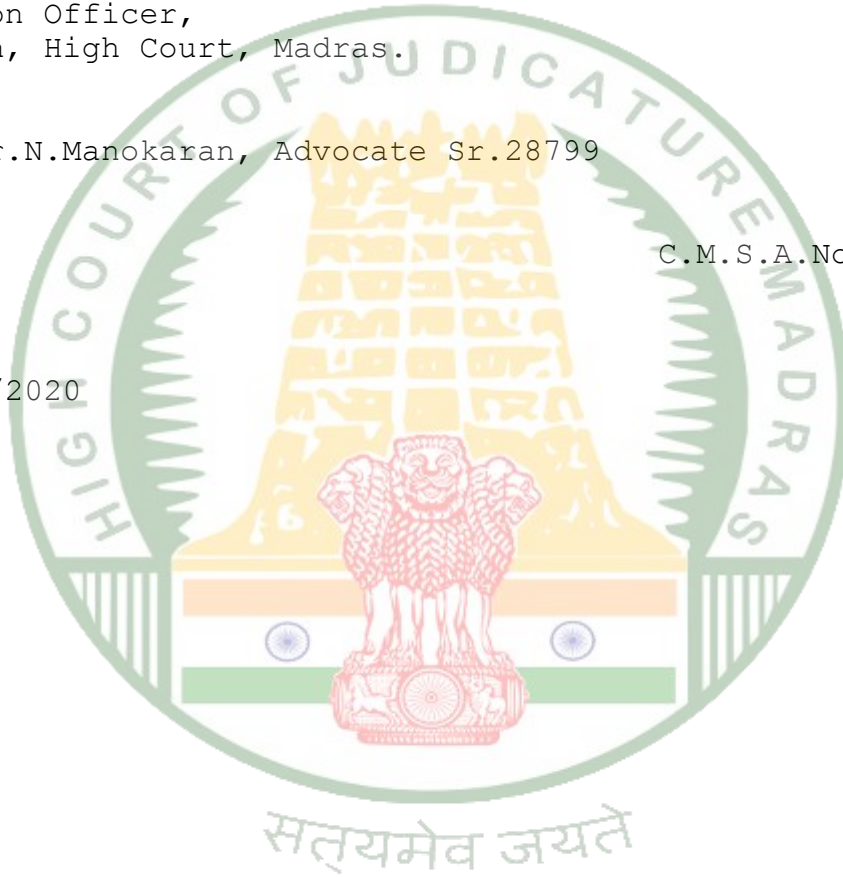
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The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.N.Manokaran, Advocate Sr.28799

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