

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.10.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD).No.3590 of 2016

1.K.Suseela

2.K.Saradha

.. Petitioners

Vs.

1.Ponnusami

2.Thangavelu (died)

3.Arukani

4.Gomathi

5.Baskaran

.. Responidents

[RR 3 to 5 brought on record as LR's of the deceased R2 viz., Thangavelu, vide order of this Court dated 16.09.2021 made in C.M.P.No.13198 & 13200 of 2021 in C.R.P.(NPD).No.3590 of 2016]

Prayer: This Civil Revision Petition is filed under Section 115 of Civil Procedure Code, against the judgment and decree dated 19.07.2016 made in A.S.No.30 of 2016 on the file II Additional District Court, Erode confirming the fair and decretal order dated 28.08.2015 made in E.A.No.56 of 2015 in

E.P.No.55 of 2013 in O.S.No.41 of 2012 on the file of the Sub Court, Perundurai.

For Petitioners : Mr.N.Manokaran

For R1 : No appearance

For R2 : Died

For RR 3 to 5 : Mr.I.C.Vasudevan

ORDER

(The matter is heard through “Video Conferencing/Hybrid Mode”).

This Civil Revision Petition is filed against the judgment and decree dated 19.07.2016 made in A.S.No.30 of 2016 on the file II Additional District Court, Erode, confirming the fair and decretal order dated 28.08.2015 made in E.A.No.56 of 2015 in E.P.No.55 of 2013 in O.S.No.41 of 2012 on the file of the Sub Court, Perundurai.

2.The petitioners are defendants in O.S.No.41 of 2012 on the file of the Sub Court, Perundurai. The 1st respondent filed the said suit for recovery of money based on promissory note. The petitioners filed written statement on 26.08.2011. After contest, the suit was decreed by the judgment and decree

dated 24.07.2013. The petitioners did not file any appeal. The 1st respondent filed E.P.No.55 of 2013 to execute the decree to attach and bring the property for attachment and sale of the property. The petitioners entered appearance in the E.P. but, did not file any counter. Subsequently, they were set exparte and property sought to be sold was attached. The 1st respondent filed sale papers and the same was sent to the petitioners. They entered appearance through the same counsel. The Court amin fixed the value of the property at Rs.7,00,000/- (Rupees Seven Lakhs only). The proclamation of the sale was served on the petitioners and property was sold as per the order of the Executing Court. After auction purchase by 2nd respondent, the petitioners filed E.A.No.56 of 2015 in E.P.No.55 of 2013 in O.S.No.41 of 2012, contending to set aside the auction held on 23.01.2015 and to fix the auction price at Rs.13,00,000/- (Rupees Thirteen Lakhs only). According to petitioners, the value of the property is more than Rs.13,00,000/- and Court fixed low value of Rs.7,00,000/-. The 2nd respondent by offering Rs.500/- (Rupees Five Hundred only) more than upset price, purchased the property. According to petitioners, 45 days notice was not given to them before sale after serving notice of sale and prayed for setting aside the sale and fix the upset price of Rs.13,00,000/-. The respondents 1 & 2 filed separate counter affidavits and contended that

the Court aamin fixed the correct value and the petitioners have not filed any document to show that the value of the property is worth more than Rs.13,00,000/-. The petitioners received sale notice on 23.07.2014 itself and prayed for dismissal of E.A. filed by the petitioners.

3.The learned Judge considering the materials on record, dismissed the E.A.No.56 of 2015.

4.Against the said order of dismissal dated 28.08.2015, the petitioners filed A.S.No.30 of 2016 on the file of the II Additional District Court, Erode.

5.Before the Appellate Court, the 1st respondent and 2nd respondent filed separate written arguments. The learned First Appellate Judge considering the order of the learned Judge passed in E.A., held that the petitioners have not produced any material to substantiate their case that property is worth more than Rs.13,00,000/- and held that Executing Court has followed the correct procedure by adjourning the E.P. by 60 days after auction sale. On these findings, the appeal filed by the petitioners was dismissed by the Appellate Court.

6. Against the said judgment and decree dated 19.07.2016 made in A.S.No.30 of 2016, the petitioners have come out with the present Civil Revision Petition.

7. The learned counsel appearing for the petitioners contended that the learned Judge erred in ordering sale of entire 41 cents of property worth Rs.13,00,000/- for the realisation of decretal amount to the tune of Rs.2,58,912/-, when the Court aamin has fixed the value of the property at Rs.7,00,000/-, which is more than decretal amount and therefore, the sale cannot be allowed beyond decretal amount. The Court can bring only a portion of the property to satisfy the decretal amount as per mandatory provisions of Order XXI Rule 64 & 66 of C.P.C. In view of the irregularities and illegalities, the First Appellate Judge ought to have set aside the sale instead of dismissing the appeal. In support of his contention, the learned counsel relied on the following judgements of the Hon'ble Apex Court and prayed for allowing the Civil Revision Petition.

(i) A Division Bench judgment of the Hon'ble Apex Court reported in

1989 Supp (2) SCC 693, (Ambati Narasayya Vs. M.Subba Rao and another), wherein, the Hon'ble Apex Court at paragraph Nos.7 & 9, has held as follows:

“...7.It is of importance to note from this provision that in all execution proceedings, the Court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even 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. This, in our opinion, is not just a discretion, but an obligation imposed on the Court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction.

9.We may again hark back to the case of the

appellant. The amount claimed in the execution petition was about Rs.2,400. To realize that amount the land measuring 10 acres was sold for Rs.17,000. The appellate court has stated that the land being one, could not have been divided. Shri Ganesh, learned counsel for the respondent sought to justify that view. But we find it difficult to appreciate that reason. It seems to be against common sense. The land is not indivisible. Nor division is impracticable or undesirable. Out of 10 acres, the Court could have conveniently demarcated a portion and sold it. Unfortunately, no such attempt was made and it was not even thought of. The Court has blind fold sold the entire property. This is a usual feature which we have noticed in most of the execution cases. We must deprecate this tendency. There is a duty cast upon the Court to sell only such property or a portion thereof as necessary to satisfy the decree. It is a mandate of the legislature which cannot be ignored. We cannot, therefore, sustain the impugned sale. It must be set aside being in contravention of the provisions of Rule 64, Order XXI CPC.”

(ii) A Division Bench judgment of the Hon'ble Apex Court reported in ***(2005) 10 SCC 235, [S.Mariyappa (Dead) by LRS. and others Vs. Siddappa and another]***, wherein, the Hon'ble Apex Court at paragraph Nos.2 & 3, has

held as follows:

“...2.In our view, the High Court has rightly not accepted all the other objections which had been filed by the Appellants. However, one objection needed serious consideration was that before selling property, the Executing Court had not considered whether sale of only a part of the property would be sufficient to meet the decretal debt of approximately Rs. 8000. The property sold is one acre of agricultural land. It appears to have been sold off for a paltry sum of Rs. 1,500 plus a prior mortgage debt of Rs. 7,000. We had called for the proceedings of Executing Court and have gone through the same. We find that, at no stage, the Executing Court considered whether a sale of only a part of the property would be sufficient to meet the decretal debt.

3.In the case of [Desh Bandhu Gupta v. N.L. Anand & Rajinder Singh](#), it has been held by this Court as follows:- (SCC pp. 146-47 & 150, paras 14 & 17)

"14. Proviso to Sub-rule (4) of Rule 17 of Order 21 provides the procedure to receive the application for

execution of the decree. In the case of a decree for payment of money, the value of the property attached shall, as nearly as may be, correspondent with the amount due under the decree. Rule 64 of Order 21 charges the Executing Court that it may order attaching of any property to the extent that "such portion thereof as may seem necessary to satisfy the decree would be sold". It is also enjoined under Sub-rule (2)(a) of Rule 66 of Order 21 that where a part of the property would be sufficient to satisfy the decree the same be sold by public auction. Form 27 of appendix E of the schedule also directs the court auctioneer to sell so much of the said property as shall realise the sum in the said decree and costs. The Code, therefore, has taken special care charging the duty on the Executing Court and it has a salutary duty and a legislative mandate to apply its mind before setting the terms of proclamation and satisfy that if part of such property as seems necessary to satisfy the decree should be sold if the sale proceeds or

portion thereof is sufficient to payment to the decree-holder or the person entitled under the decree to receive the amount and so much of that property alone should be ordered to be sold in execution. *In Ambati Narasayya v. M. Subba Rao*, this Court held that it is the duty cast upon the court under Order 21 Rule 64 to sell only such property or a portion thereof as may be necessary to satisfy the decree. It is a mandate of the legislature which cannot be ignored. Therein for execution of a decree of a sum of Rs. 2,000 and costs, the appellant's 10 acres land was brought to sale which was purchased for a sum of Rs. 17,000 subject to discharge of a prior mortgage of Rs. 2,000. This Court held that without the court's examining whether a portion of the property could be sold, the sale held was not in conformity with the requirement of Order 21 Rule 64 and it was held to be illegal and without jurisdiction. The sale was set aside and the court was directed to put the judgment-debtor in possession of the land and to refund the same

amount to the auction-purchaser. Further direction was given to execute the decree in accordance with law. *In Mangal Prasad v. Krishna Kumar Maheshwari* a shop was sold to realise a decree debt of about Rs. 29,000 and the sale price at the auction was Rs. One lakh and odd. This Court finding that it is excessive execution, set aside the sale and directed return of the same amount to the auction-purchaser with interest @ 12%. *In Takaseela Pedda Subba Reddy v. Pujari Padmavathamma*, to recover the decree debt in two decrees, the properties situated in two different villages were brought to sale. In the first instance the property in 'D' village fetched a sum of Rs. 16,880, which was sufficient to satisfy the decretal amount. The property in 'G' village was also sold which fetched a sum of Rs. 12,000. This Court set aside the sale of 'G' village. Admittedly the site in sale is to the extent of 550 sq. yards, situated in a commercial area around which the petroleum installations are established. Though, as contended by Shri Madhava

Reddy, that there may be building regulation for division of the property into portions, but the court made no attempt to sell a portion of the property, may be 100 yards or 150 yards out of it, or whether undivided portion thereof would have satisfied the decree debt. It could be legitimately concluded that the court did not apply its mind at all to this aspect as well.

17. Under Section 47 all questions relating to execution, discharge or satisfaction of the decree should be determined by the Executing Court alone. The pre-sale illegalities committed in the execution are amendable to the remedy under Section 47. Post-sale illegalities or irregularities causing substantial injury to the judgment-debtor are covered under Order 21, Rule 90. Sub-rule (1) thereof covers the field of material irregularities or fraud in publicity or conducting the sale. Sub-rule (2) enjoins proof thereof and the court should find that by reason thereof the applicant sustained

substantial injury. The total absence of drawing up of the proclamation of sale and settlement of its term by judicial application of mind renders the sale a nullity being void, it is covered by Section 47. The non-application of mind whether sale of a part of the property would satisfy the decree debt is a material irregularity doing substantial injury to the appellant attracting Order 21, Rule 90. In either case the sale is liable to be set aside. It is true that there is distinction between mere irregularity and material irregularities and the sale is not liable to be set aside on proof of mere irregularity. It must be material irregularity and the court must be satisfied that on account thereof substantial injury was sustained by the appellant. The sale of 550 sq. yards for recovery of a paltry sum of Rs. 7,780.83, without selling a portion thereof, cause substantial injury to the appellant."

8. Though the 1st respondent entered appearance through counsel, there is no representation for him.

9. Pending Civil Revision Petition, the 2nd respondent died on 11.12.2019 and the respondents 3 to 5 were brought on record as the legal heirs of the 2nd respondent as per the order of this Court dated 16.09.2021 made in C.M.P.No.13198 & 13200 of 2021 in C.R.P.(NPD).No.3590 of 2016.

10. The learned counsel appearing for the respondents 3 to 5 submitted that even though notice was served on the petitioners, they did not participate in settling the proclamation of sale. They have also not furnished any material to show that the value of the property is more than Rs.13,00,000/-. The Court taking into consideration the value of the property at Rs.7,00,000/- as fixed by Court a min, fixed the upset price at Rs.7,00,000/-. The property sought to be sold is 41 cents of agricultural land and it is not capable of dividing into several portions. The learned Judge considered the same and ordered sale of the entire property. The 2nd respondent participated in the public auction and his bid of Rs.7,00,500/- was accepted and he deposited the entire bid amount and there is no violation of provisions of Order XXI Rule 64 & 66 of C.P.C. in conducting the public auction. The petitioners having failed to participate in settling the proclamation of sale and having failed to state that the portion

of the property is sufficient to realise the decretal amount, cannot raise the said issue for the first time in the Civil Revision Petition and prayed for dismissal of the Civil Revision Petition.

11.Heard the learned counsel appearing for the petitioners as well as the learned counsel appearing for the respondents 3 to 5 and perused the entire materials on record.

12.From the materials on record, it is seen that the 1st respondent filed suit for recovery of money based on promissory note against the petitioners. After contest, the suit was decreed by the judgment and decree dated 24.07.2013. The 1st respondent filed E.P.No.55 of 2013 for attachment and sale of the property mentioned in the E.P. belonging to petitioners. The E.P. Court issued notice to the petitioners for attachment of the properties belonging to the petitioners. The petitioners did not file any counter objecting the said attachment. Similarly, the petitioners did not participate at the time of proclamation of sale and also did not file any materials to show that the value of the property is worth Rs.13,00,000/-. In view of the failure on the part of the petitioners to participate in the proclamation of sale and not producing

any material to show the value of property, it is not open to the petitioners to challenge the sale on the ground that value of property fixed is low and prayed for fixing value of the property at Rs.13,00,000/-.

13.At the same time, the contention of the learned counsel appearing for the petitioners is that even when the value of the property is fixed at Rs.7,00,000/-, the Court erred in ordering sale of entire 41 cents as the decretal amount is only Rs.2,58,912/-. The E.P. filed is only for the decretal amount of Rs.2,58,912/- and cost of Rs.20,079/-. The Court, as per Order XXI Rule 66, ought to have ordered sale of the portion of the property, which will be sufficient for realisation of the amount claimed in the E.P. has considerable force. The judgements relied on by the learned counsel appearing for the petitioners are squarely applicable to the facts of the present case. The learned Judge has failed to comply the mandatory provision of Order XXI Rule 64 & 66 2(A) of C.P.C., which reads as follows:

“Rule 64 Order XXI of Code of Civil Procedure 1908 : Power to order property attached to be sold and proceeds to be paid to person entitled:-

Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may see necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

Rule 66 Order XXI of Code of Civil Procedure 1908 : Proclamation of sales by public auction":-

2(a) the property to be sold or, where a part of the property would be sufficient to satisfy the decree, such part;”

As per this Rule, Court can order sale of entire property or portion of the property, which will be sufficient for realisation of the amount claimed in the E.P. In the present case, the property is 41 cents agricultural punjai land and the learned Judge ought to have considered the fact that sale of portion of 41 cents will be sufficient to satisfy the amount claimed in the E.P.

14.The Court amin has fixed the value of the property at Rs.7,00,000/- and the same was accepted by the learned Judge. Having accepted the value of the property at Rs.7,00,000/-, the learned Judge ought to have held that sale of portion of the property will be sufficient to satisfy the amount claimed in the E.P.

15.The learned Judge committed irregularity in ordering sale of the entire 41 cents. For the above reason, the order of the learned Judge passed in E.A.No.56 of 2015 and the order passed by the Appellate Court in A.S.No.30 of 2016, confirming the order passed in E.A.No.56 of 2015 are liable to be set aside and hence, they are hereby set aside. The learned Judge is directed to take the E.P. on file after giving opportunity to the parties and order sale of sufficient portion of the suit property to realise the decretal amount as claimed in the E.P.

16.With the above directions, this Civil Revision Petition is allowed.
No costs.

krk

Index : Yes / No
Internet : Yes / No

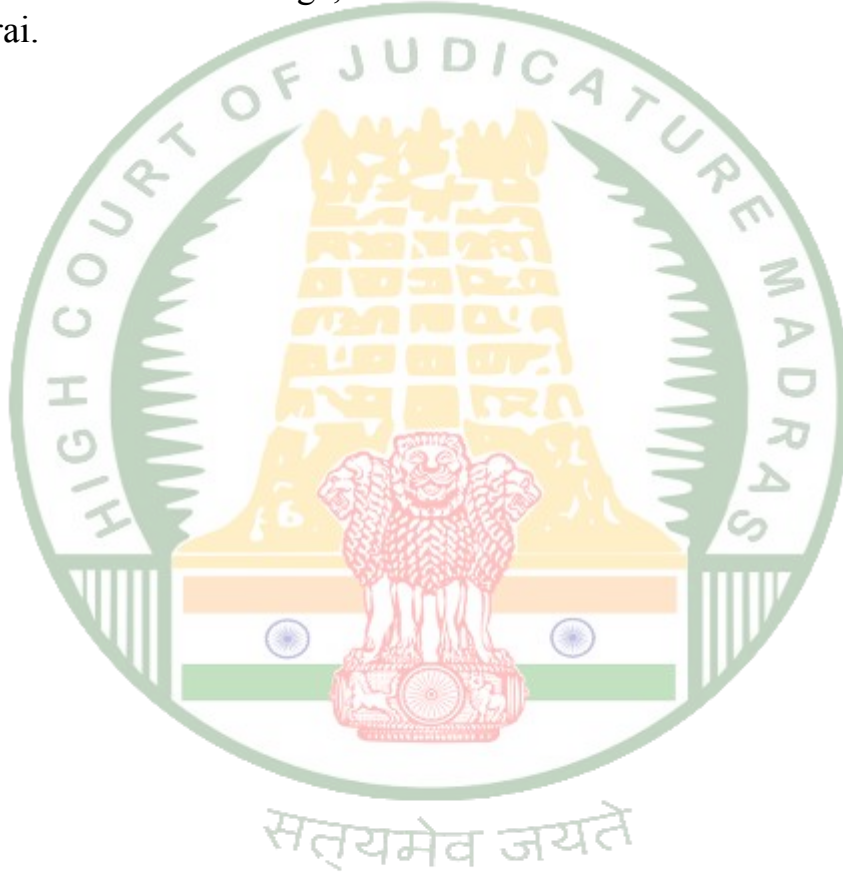
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To

1.The learned II Additional District Judge,
Erode .

2.The learned Subordinate Judge,
Perundurai.



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V.M.VELUMANI, J.
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