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C.R.P.Nos.3062 & 3063 of 2008

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.12.2022

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THE HONOURABLE MR. JUSTICE N. ANAND VENKATESH

C.R.P.Nos.3062 & 3063 of 2008

C.R.P.No.3062 of 2008

S.Sambavi

... Petitioner

Vs.

1.Balasundaram (Died)

2.D.R.Balaji

3.K.B.Banumathi

4.B.Kandasami

5.R.Sumathi

... Respondents

[Respondents 3 to 5 brought on record as LR's of the deceased R1 viz., Balasundaram vide Court order dated 08.12.2022 made in CMP No.9182 of 2022 in CRP No.3062 of 2008]

Prayer : Civil Revision Petition is filed under Article 227 of the Constitution of India, against the order in E.A.No.5437 of 2007 dated 31.03.2008 in E.P.No.978 of 2002 on the file of the X Assistant Judge, City Civil Court, Chennai in O.S.No.7146 of 2000.



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For Petitioner : Mr.P.Sankaranarayanan

For Respondents : Mr.B.Premkumar for R1

Mr.R.Rajesh for R2

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D.R.Balaji

... Petitioner

Vs.

1.Balasundaram (Died)

2.S.Sambavi

3.K.B.Banumathi

4.B.Kandasami

5.R.Sumathi

... Respondents

[Respondents 3 to 5 brought on record as LR's of the deceased R1 viz., Balasundaram vide Court order dated 08.12.2022 made in CMP No.10422 of 2022 in CRP No.3063 of 2008]

Prayer : Civil Revision Petition is filed under Article 227 of the Constitution of India, against the order in E.A.No.5437 of 2007 dated 31.03.2008 in E.P.No.978 of 2002 on the file of the X Assistant Judge, City Civil Court, Chennai in O.S.No.7146 of 2000.

For Petitioner : Mr.R.Rajesh

For Respondents : R1 - unclaimed
Mr.P.Sankaranarayanan for R2



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ORDER

WEB COPY The issue involved in both the Civil Revision Petitions are common and hence they are taken up together, heard and disposed of through this common order.

2.The decree holder is the petitioner in C.R.P.No.3062 of 2008 and the Auction Purchaser is the petitioner in C.R.P.No.3063 of 2008. Both have challenged the fair and final order passed by the Court below in E.A.No.5437 of 2007 allowing the application filed by the judgment debtor under Order XXI Rule 89 of C.P.C. for setting aside the sale on deposit of the decree amount and 5% of the purchase money paid by the auction purchaser.

3.The brief facts of the case is that the petitioner in C.R.P.No.3062 of 2008 filed a suit for recovery of a sum of Rs.70,400/- against the judgment debtor along with further interest on the principal amount. This suit in O.S.No.7146 of 2000 came to be decreed by Judgment and Decree dated 16.04.2001. Since the Decree was not complied with by the judgment debtor, the decree holder filed E.P.No.978 of 2002 to recover the amount by bringing the property of the judgment debtor for sale.



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WEB COPY 4. In the above Execution Petition, auction was conducted on 08.08.2007, in which several bidders participated and the petitioner in C.R.P.No.3063 of 2008 was the highest bidder and he also deposited the entire bid amount.

5. The judgment debtor initially filed an Application under Order XXI Rule 90 of C.P.C. to set aside the sale on the ground that the sale is vitiated due to fraud. When this application was pending, the judgment debtor filed E.A.5437 of 2007, under Order XXI Rule 89 of C.P.C. to set aside the sale on deposit. The earlier application that was filed by the judgment debtor under Order XXI Rule 90 of C.P.C., was withdrawn during the pendency of the application in E.A.No.5437 of 2007, on 01.11.2007. Subsequently, the application filed in E.A.No.5437 of 2007 was taken up for hearing and the Court below on considering the facts and circumstances of the case and after taking into account the deposit of the entire decree amount and 5% of the purchase money, allowed the application through a fair and final order dated 31.03.2008. Aggrieved by the same, the decree holder and the auction purchaser have filed the above Civil Revision Petitions.



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6.Heard Mr.P.Sankaranarayanan, learned counsel appearing on behalf of the petitioner, Mr.B.Premkumar, learned counsel appearing on behalf of the 1st respondent and Mr.R.Rajesh, learned counsel appearing on behalf of the 2nd respondent in CRP No.3062 of 2008 Mr.R.Rajesh, learned counsel appearing on behalf of the petitioner, Mr.B.Premkumar and Mr.P.Sankaranarayanan, learned counsel appearing on behalf of the 2nd respondent in CRP No.3063 of 2008.

7.The short issue that arises for consideration is as to whether the judgment debtor could have maintained the application under Order XXI Rule 89 of C.P.C. without withdrawing the application that was earlier filed in E.A.No.5437 of 2007 under Order XXI Rule 90 of C.P.C. to set aside the sale on the ground of fraud.

8.The learned counsel appearing on behalf of the petitioners submitted that Order XXI Rule 89 (2) of C.P.C. mandates that an application cannot be filed under Order XXI Rule 89 of C.P.C. without withdrawing the application that was already filed under Order XXI Rule 90 of C.P.C.



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9.Per contra, the learned counsel appearing on behalf of the judgment debtor submitted that the entire decree amount was deposited and 5% of the purchase money that was due and payable to the auction purchaser was also deposited and hence, the Court below was perfectly right in setting aside the sale on such deposit. The learned counsel submitted that the order passed by the Court below does not suffer from any perversity and hence does not require the interference of this Court.

10.Order XXI Rule 89 and Order XXI Rule 90 of C.P.C. provides different scenarios for setting aside an auction sale. Insofar as Order XXI Rule 89 of C.P.C. is concerned, the sale can be set aside if the judgment debtor deposits the entire decree amount and also deposits 5% of the purchase money. Whereas, an application under Order XXI Rule 90 of C.P.C. can be maintained where, the judgment debtor seeks to set aside the sale on the ground of irregularity or fraud.

11.Order XXI Rule 89 (2) of C.P.C. provides that where the judgment debtor has already filed an application under Order XXI Rule 90 of C.P.C. to set aside the sale on the ground of fraud, he cannot be



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allowed to make or prosecute an application under Order XXI Rule 89 of C.P.C., unless he withdraws the application. In the present case, the application under Order XXI Rule 89 of C.P.C. was filed on 21.09.2007 and the earlier application that was filed under Order XXI Rule 90 of C.P.C. was withdrawn subsequently on 01.11.2007. Therefore, the very maintainability of the application filed under Order XXI Rule 89 of C.P.C. in E.A.No.5437 of 2007 has been put to challenge.

12.In the considered view of this Court, the procedure is a hand maid of justice and the provisions of C.P.C. should not be interpreted to such an extent that it causes injustice to the parties. In the present case, the judgment debtor has deposited the entire decree amount and he has also deposited 5% of the purchase money and in view of the same, there can be no prejudice to either the decree holder or the auction purchaser, since they will receive whatever was due and payable to them.

13.It will be apposite to take note of the judgment of the Apex Court in ***Shiv Prasad vs. Durga Prasad and Another*** reported in **1975 1 SCC 405** and the relevant portions are extracted hereunder:



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2. The appellant filed Execution Case No. 12/1967 in the Saharanpur Court for realization of Rs. 11,795 the amount due under the decree, Rs.3,528.10 p. the costs in the suit and the appeal together with the costs of the execution. In the said execution, the attached properties were sold and purchased by the appellant on November 29, 1967 for Rs. 16,000 with the leave of the Execution Court. The first-respondent filed on December 12, 1967 an application under Order 21 Rule 90 of the Code for setting the sale aside. This application was registered as Miscellaneous Case No. 3/1967 in Execution Case No. 12/1967. The period of 30 days from the date of sale expired during holidays. Respondent No. 1 on the re-opening date i.e. on January 1, 1968 instituted Miscellaneous Case No. 1/1968 by an application made under Order 21 Rule 89 of the Code. The amount as was necessary to be deposited for the setting aside of the sale under Rule 89 was deposited in the Execution Court by respondent No. 1. In his application under Order 21 Rule 89 of the Code a statement was made by respondent No. 1: "The applicant has also given an application under Order 21 Rule 90 and the applicant withdraws the same." On the same date, i.e. on January 1, 1968 respondent No. 1 also filed a separate application stating therein that he had filed an application under Order 21 Rule 90 of the Code for cancellation of the auction held on November 29, 1967 which was pending and that he had filed an application under Order 21 Rule 89 of the Code also. The further statement was that the applicant "now



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withdraws the application under Order 21, Rule 90, and does not want to press the same". A sum of Rs.2,000 by way of security had been deposited by respondent No. 1 while making that application. The prayer in this petition was also for the return of the said sum of money.

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8. On the correct interpretation of sub-rule (2) of Rule 89 and on determination of its true scope it will be noticed that on the facts and in the circumstances of this case respondent No. 1's application under Rule 89 has rightly been allowed.

9. Order 21 Rule 89(2) reads as follows:

Where a person applies under Rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this Rule.

The words used in the sub-rule are "make or prosecute". If it were to be held that the applicant is not entitled merely to prosecute his application under Rule 89 unless he withdraws his application under Rule 90, then the word "make" would become redundant. In order to bring about the true intention of the Legislature, effect must be



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given to both the words. If a person has first applied under Rule 90 to set aside the sale, then, unless he withdraws his application, he is not entitled to make and prosecute an application under Rule 89. The application even if made will be deemed to have been made only on withdrawal of the previous application. If, however, a person has filed an application under Rule 89 first and thereafter another application under Rule 90, he will not be allowed to prosecute the former unless he withdrew the latter.

14.The mandate under Order XXI Rule 89 (2) of C.P.C. was only to ensure that the judgment debtor does not ride two horses parallelly in the opposite direction and thereby, attempt to prevent the decree holder from getting the fruits of the decree. Obviously, an application under Order XXI Rule 89 of C.P.C. cannot be prosecuted and decided when an application under Order XXI Rule 90 of C.P.C. is pending. In the instant case, by the time, the application filed under Order XXI Rule 89 of C.P.C. was prosecuted and decided by the Court below, the earlier application that was filed under Order XXI Rule 90 of C.P.C. was withdrawn by the judgment debtor. Hence, there was no bar for the Court below to take into consideration such withdrawal of the application filed in E.A.5437 of 2007 and to pass orders in the application that was filed under Order XXI Rule 89 of C.P.C. in E.A.5437 of 2007. This Court does not find any



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infirmity or illegality in the order passed by the Court below and the order has rendered substantial justice to both the parties and hence does not require the interference of this Court exercising its revisional jurisdiction.

15.In the result, both the civil revision petitions stand dismissed. If the decree holder and the auction purchaser have not withdrawn the amount till now, they are entitled to file an application for payment out before the Court below and withdraw the amount. The Court below need not order notice to the judgment debtor and the application can be straight away allowed and the parties can be allowed to withdraw the amount lying in the credit of the suit. No Costs.

08.12.2022

Internet : Yes
Index : Yes
Speaking Order / Non Speaking Order
ssr

To

The X Assistant Judge, City Civil Court, Chennai.



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N. ANAND VENKATESH, J.

ssr

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