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CRP.No.1235 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 31.01.2023

CORAM:

THE HONOURABLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.No.1235 of 2016 and
CMP.No.6742 of 2016

Raja

... petitioner

Vs.

1.Muthapillai(died)

2.Kaliyamurthy

3.Devaki

4.Aivazhagan(died)

5.Amutha

6.Kavitha

7.Minor A.Eswari

Rep. By guardian/next friend Mother-Kavitha

8.minor A.Thirumalaiarasu

Rep. By guardian/next friend Mother-Kavitha

(R3 to 5 brought on record as LR's of the deceased R1
vide court order dated 21.06.2021 made in CMP.No.
5722 of 2021 in CRP.No.1235 of 2016)

(R6 to 8 brought on record as LR's of the deceased
R4 Viz., Arivazhagan vide court order dated 08.12.2022
in CMP.Nos.11295, 11297 of 2022 in
CRP.No.1235 of 2016)

... Respondents

PRAYER:

Civil Revision Petition filed under Section 115 of CPC to set aside the fair
and decretal order dated 18.03.2016 made in EA.No.25 of 2015 in EP.No.106 of
2007 in OS.No.79 of 2005 on the file of the learned Sub Court, Kallakurichi by
allowing this civil revision petition.



CRP.No.1235 of 2016

For Petitioner : Mr.N.Manokaran

For Respondents

For R3 & 5,

6 to 8 : Mr.V.Gunasekar

ORDER

This civil revision petition has been filed to set aside the fair and decretal order dated 18.03.2016 made in EA.No.25 of 2015 in EP.No.106 of 2007 in OS.No.79 of 2005 on the file of the learned Sub Court, Kallakurichi, thereby allowed the petition and set aside the sale in favour of the petitioner herein.

2. The second respondent filed suit for recovery of money against the first respondent herein on the strength of the pronote executed by him. It was decreed by the judgment and decree dated 03.04.2007. On the strength of the decree passed in OS.No.79 of 2005, the decree holder filed execution petition in EP.No106 of 2007 as against the first respondent herein. While pending the execution petition, the judgment debtor filed appeal suit along with condone delay petition in IA.No.38 of 2008 and the same was dismissed for default. In order to restore the condone delay petition, the judgment debtor filed another application in IA.No.175 of 2009 and the same was also dismissed. Aggrieved by the same, the judgment debtor preferred appeal in CMA.No.1833 of 2010 and the same was allowed on payment of cost of Rs.3,000/-. However, the cost was not paid and as



CRP.No.1235 of 2016

such, the appeal was also dismissed. Therefore, in the execution petition, the suit property was subjected for auction sale on 21.11.2012. The petitioner is being the highest bidder, purchased the property. He had deposited the entire sale price by two instalments. Accordingly, on 22.11.2012, he had paid a sum of Rs.1,73,990/- and on 26.11.2012, he paid the remaining sale consideration of Rs.6,56,330/-. The judgment debtor challenged the sale in the civil revision petition before this Court in CRP.No.4509 of 2012 and this Court dismissed the civil revision petition and observed that the sale cannot be set aside since already the auction purchaser had deposited the entire sale consideration in the execution petition. Further observed that the judgment debtor is at liberty to work out his remedy before the execution court by filing an appropriate application in accordance with law.

2.1 Utilising the said observation, the judgment debtor again filed another application under Section 47 of CPC to set aside the sale dated 21.11.2012. The execution court converted the said application into application under Order 21 Rule 89 of CPC for the reason that the decree amount should be deposited within a period of 60 days as contemplated under Order 21 Rule 92 sub clause (2) of CPC. Therefore, the application filed under Section 47 of CPC is not barred by limitation and converted into application under Order 21 Rule 89 of CPC. Further, at the time of the interim order passed by this Court in CRP.No.4509 of 2012, imposed



CRP.No.1235 of 2016

condition to deposit a sum of Rs.1,96,462/-. Accordingly, the judgment debtor had deposited the said amount on 10.01.2013. After converting the application filed under Section 47 of CPC into application under Order 21 Rule 89 of CPC, the execution court set aside the sale and allowed the said application on condition that the judgment debtor shall deposit 5% of the sale price into court on or before 18.04.2016. Aggrieved by the same, the present civil revision petition has been filed.

3. The learned counsel for the petitioner would submit that the application which was filed under Section 47 of CPC cannot be converted into application under Order 21 Rule 89 of CPC since the application filed under Section 47 of CPC itself is impermissible in law and it is clear violation of the order passed by this Court in CRP.No.4509 of 2012, thereby confirmed the auction sale dated 21.11.2012. This Court, while dismissing the civil revision petition, observed that the judgment debtor is at liberty to approach the execution court for appropriate relief in order to withdraw the said amount. Unfortunately, the judgment debtor wrongly construed the order observed by this Court and again filed application under Section 47 of CPC to challenge the auction sale. The application filed under Section 47 of CPC is clearly barred under Order 21 Rule 90(3) of CPC. No application to set aside a sale shall be entertained upon any



CRP.No.1235 of 2016

ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn. After confirmation of sale, the only remedy available to the judgment debtor is only to file an application under Order 21 Rule 89 of CPC within a period of 60 days. Admittedly, the present application has been filed after two years from the date of the sale and as such, it cannot be converted into application under Order 21 Rule 89 of CPC.

4. Heard, the learned counsel for the petitioner and the learned counsel for respondents 3, 5 & 6 to 8.

5. The petitioner is the auction purchaser. The first deceased respondent was the judgment debtor. He lost his appeal remedy as against the money decree obtained by the decree holder and challenged the auction sale before this Court in CRP.No.4509 of 2012 and this Court dismissed the civil revision petition and confirmed the auction sale by an order dated 12.08.2014. While admitting the civil revision petition, this Court granted interim order on condition that the judgment debtor shall deposit a sum of Rs.1,96,462/-. Accordingly he had deposited the said amount on 10.01.2013. However, the civil revision petition was dismissed by this Court and confirmed the auction sale and observed that the judgment debtor is at liberty to approach the execution court by an appropriate application. Once the sale



CRP.No.1235 of 2016

was challenged by the judgment debtor before this Court and the same was confirmed, he is estopped from challenging the auction sale once again by way of application under Section 47 of CPC. The court below converted the said application into application under Order 21 Rule 89 of CPC on the ground that the judgment debtor had deposited the entire decree amount within a period of 60 days from the date of the auction sale before the execution court.

6. The application under Section 47 of CPC itself is barred under Order 21 Rule 90(3) of CPC. It is clear that no application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn out. In fact, the judgment debtor never raised any objection at the time of auction. After confirmation of the auction sale, remedy open to him is only under Order 21 Rule 89 or Rule 90 of CPC. The application filed under Section 47 of CPC cannot be converted into Order 21 Rule 90 of CPC. In this regard, the learned counsel for the petitioner relied upon the Full Bench Judgment of this Court in the case of ***A.P.V.Rajendran Vs. S.A.Sundararajan and others*** reported in 1980 AIR (Madras) 123, wherein it is held as follows:

13. It is true, the above decisions lay down that where the court sales are challenged as invalid for want of notice under



CRP.No.1235 of 2016

WEB COPY

Rule 22 or Rule 66 of order 21 C.P.C, or other illegalities, the challenge has to be considered only under [section 47](#) and not under 0.21,R.90 C. P. C. Whether Or not that failure to give notice is an illegality In a matter, which in entirely irrelevant for the present purpose, because it is only certain kinds of irregularities that are covered by Order 21, Rule 90 C. P. C. and if the C. P. C. omission is of any other kind of irregularity not covered by Order 21, Rule 90 C. P. C., whether it renders the whole sale a nullity or not, It is not brought within the wording of that rule. Though [Section 47](#) is very wide in Its terms and in one sense all questions relating to the execution, discharge or satisfaction of the decree that arise between the decree holder and the judgment-debtor are within the purview of that section, nevertheless that section ought to be so interpreted as not to render redundant the other provisions contained in the Code, particularly Rules 89, 90 and 91 of Order 21, and as between the Judgment-debtor and the decree-holder only such applications to set aside an auction purchase made by the decree-holder as do not come within the purview of Rules 89, 90 and 91 of Order 21 are within the scope of Section 47 of the Code .Not withstanding the wording of [Section 47](#) which is enough to cover all applications to set aside sales on the ground either of illegality or of irregularity, its scope has naturally to be restricted so as to give due effect to Order 21, Rule 90 C. P. C. Thus, if the sale is sought to be set



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aside on the ground of material irregularity in publishing and conducting the sale within [Section 47](#) cannot come into play at all, and the sale could be set aside only by invoking Order 21, Rule 90. But if the sale is claimed to be void for certain illegality or avoidable on ground of material irregularities not referred to in O. 21, Rule 90 then [Section 47](#) has to be invoked and in such cases Order 21, Rule 90, C. P. C. cannot come into Play at all.

14. Thus the main question to be considered in this case is whether the defect or irregularity in the preparation and settlement of sale proclamation is an irregularity in publishing and conducting the sale within the meaning of Order 21, Rule 90, C. P. C. even though the appellant has purported to file an application for setting aside the sale under Sec. 47, as contended by the learned counsel for the appellant. The defects or irregularities alleged by the respondent in his application for setting aside the sale related mainly to the dawning up of the sale proclamation and they are (1) certain payments made earlier had not been given credit to while mentioning the amount due; (2) the sale proclamation did not contain neither place and the date of auction nor did it contain the quantum of taxes payable on the property and (3) the upset price for lot I had been improperly reduced. These defects have been found to exist by the lower court and the sale has been set aside only on these grounds. In this case, the defects found proved relate



CRP.No.1235 of 2016

to matters which are to be set out in the sale proclamation and which are covered by Rule 66 of Order 21.

7. In the above case, originally the petition was filed under Order 21 Rule 90 of CPC and thereafter it was converted into application under Section 47 of CPC. From the above, it is clear that the judgment debtor cannot escape the period of limitation by framing his application as one under Order 21 Rule 90 of CPC.

8. Further, the application under Section 47 of CPC is also not maintainable. In order to challenge the auction sale, which was already confirmed by this Court, the provision under Section 47 of CPC mandates determination by an execution court, questions arising between the parties or their representatives relating to the execution, discharge or satisfaction of the decree and does not contemplate any adjudication beyond the same. The purview of scrutiny under Section 47 of the CPC qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness are plethoric. Therefore, the executing court cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Unless it is set aside



CRP.No.1235 of 2016

by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties. Therefore, the execution court ought not to have converted the application filed under Section 47 of CPC into application under Order 21 Rule 89 of CPC since it is clearly barred by limitation. That apart, the judgment debtor failed to deposit the entire sale price, a sum equal to 5% of the purchase money as per the mandate of Order 21 Rule 89 sub clause (1) of CPC within the stipulated period of one month from the date of sale i.e. 21.11.2012. After dismissal of the civil revision petition by this Court in CRP.No.4509 of 2012 and thereby confirmed the auction sale, the pending of the civil revision petition cannot extend the period of limitation as required under Order 21 Rule 89 of CPC.

9. In view of the above, this Court finds infirmity in the order passed by the court below and the same is liable to be set aside. Accordingly, the fair and decretal order dated 18.03.2016 made in EA.No.25 of 2015 in EP.No.106 of 2007 in OS.No.79 of 2005 on the file of the learned Sub Court, Kallakurichi is set aside and this civil revision petition is allowed. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

31.01.2023

Speaking/non-speaking

Index : Yes/No

Internet : Yes



CRP.No.1235 of 2016



WEB COPY



CRP.No.1235 of 2016

G.K.ILANTHIRAIYAN, J.

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To
The learned Sub Court,
Kallakurichi

CRP.No.1235 of 2016



WEB COPY



CRP.No.1235 of 2016

31.01.2023