IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.02.2023

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P.Nos.3813 of 2018 and 1397 of 2019
and C.M.P.Nos.21203 of 2018 and 9179 of 2019

1. Chinnamani
2. Selvaraj
3. Kavitha
4. Veerathal .. Petitioners **in both C.R.Ps**

Vs.

1. Kumaravel
2. Chellamuthu
(R2 impleaded as
party respondent vide
Court orders dated 09.12.2021
made in C.M.P.No.1987 of 2019
in C.R.P.No.3813 of 2018
and in C.M.P.No.13004 of 2019
in C.R.P.No.1397 of 2019) .. Respondents **in both C.R.Ps**

Common Prayer:- Civil Revision Petitions filed under Section 115 of CPC to set aside the petition and order passed in E.P.No.95 of 2015 in O.S.No.24 of 2010 dated 03.09.2018 and E.P.No.95 of 2015 in O.S.No.24 of 2010 21.03.2018, on the file of the Sub-Court, Udumalpet.

In both C.R.Ps

For Petitioners : Mr.B.Kumarasamy

For Respondents

R1 : Mr.J.Hariharan for Mr.V.Nicholas

R2 : Mr.N.Manokaran for Mr.M.N.Balakrishnan

COMMON ORDER

These Civil Revision Petitions have been filed as against the petition and order passed in E.P.No.95 of 2015 in O.S.No.24 of 2010 dated 21.03.2018 and 03.09.2018 on the file of the Sub-Court, Udumalpet, thereby conducted an auction sale on 23.03.2018 and issued sale certificate on 03.09.2018.

2. The petitioners are the defendants in the suit filed by the first respondent herein in O.S.No.24 of 2010 for recovery of money to the tune of Rs.1,00,000/- with interest at the rate of 12% per annum. In the said suit, the petitioners, on receipt of summons, failed to appear before the Trial Court and also failed to file any written statement. Therefore, they were set exparte and an exparte decree was passed in favour of the first respondent herein.

3. On the strength of the decree, the first respondent herein filed an execution petition in order bring the suit property for auction sale. In the execution petition, the petitioners received notice and remained exparte. Therefore, the execution Court conducted an auction sale on 23.03.2018 and issued sale certificate on 03.09.2018. Aggrieved by the auction sale and issuance of sale certificate, the present Civil Revision Petitions are filed.

4. The learned counsel for the petitioners would submit that the execution petition itself was filed for a sum of Rs.1,94,617/-. The market value of the suit property on the date of auction was around Rs.85 lakhs. The total extent of the property is 4.30 acres. Therefore, the execution Court failed to fix the upset price on the guideline value. The proviso to sub rule (4) of Rule 17 of Order 21 CPC, provides for procedure to receive the application for the execution of the decree for the payment of money due and liable. The value of the property to be attached shall, as nearly as may be, correspond with the amount due under the decree. It is mandatory duty of the executing Court to consider the objections raised

by the parties and make such order it thinks fit. An acre of land is worth about Rs.7,37,000/- and market value of the suit property is Rs.85 lakhs. The entire property which was auctioned by the Execution Court is ad-measuring 4.30 acres. He further submitted that even before the Trial Court, the petitioners were kept in dark, since the counsel appearing for the petitioners colluded with the counsel appearing for the plaintiff and the petitioners remained absent and set exparte. Therefore, they lodged a complaint before the Bar Council of Tamil Nadu and the counsel were barred by the Bar Council of Tamil Nadu from practicing as Advocate.

5. In support of his contentions, he relied upon the Judgment of the Hon'ble Supreme Court of India reported in ***2004 (3) CTC 671*** in the case of ***S.Mariyappa (Dead) by Lrs and Others Vs.Siddappa and Another,*** in which the Hon'ble Supreme Court of India cited the Judgment reported in ***1994 (1) SCC 131*** in the case of ***Desh Bandhu Gupta Vs. N.L.Anand and Rajinder Singh*** and held that 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 and hence the

sale and the confirmation of sale was set aside. Further, in the case of ***Ludiana Improvement Trust Vs Ujjgar Singh*** reported in ***2008(3) RCT(Civ) 1803*** it was held that the execution Court has to apply mind, while ordering attachment and sale of property by way of public auction. Court is recover to attach only such property price of which is corresponding with the amount due under the decree. Before proclamation is drawn upon, the Court has to apply its mind to the effect that whether the entire property should be sold or part thereof would be sufficient to satisfy the decree.

6. Per contra, the learned counsel for the first respondent would submit that as per the decree, he filed an execution petition in order to bring the subject property for auction sale. In fact, before the execution Court, the petitioners received notice and failed to appear before the execution Court. Therefore, they were set exparte and the Court fixed the upset price of Rs.7,00,000/- as per the Court amina. Accordingly, the auction was conducted on 23.03.2018 and sale certificate was issued and confirmed the sale. Thereafter, the sale certificate was issued in favour of

the auction purchaser i.e., the second respondent herein. Therefore, no irregularity was committed by the Court below while auctioning the property. Now, the entire amount has been deposited and the execution amount was also realized by the first respondent. The remaining amount is still lying in the account of the execution Court.

7. The learned counsel for the second respondent would submit that the petitioners without even following the procedure as contemplated under Order 21 Rule 90 CPC, straight away challenged the Court auction sale and the issuance of sale certificate by way of these petitions. The petitioners did not even raise their objections at the time of fixing the upset price for the subject property. Even after conducting the auction purchase, the execution Court, only after complying with the Section 120 of the Limitation Act, confirmed the sale only on 25.06.2018 and issued sale certificate on 03.09.2018, in favour of the second respondent.

8. As per sub section 2 Rule 90 Order 21 of CPC states that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. The sub section 3 Rule 90 Order 21 of CPC states that there is no application to set aside the sale under this rule and it 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 up.

9. Admittedly, the petitioners failed to raise any objections even before the Execution Court at the time of fixing upset price for the property and also fixing the date for auction. In support of his contention, he relied upon the Judgment of the Hon'ble Supreme Court of India reported in ***2017 6 SCC 770*** in the case of ***Chilamkurti Bala Subrahmanyam Vs Samanthapudi Vijaya Lakshmi and Another.***

10. Heard the learned counsel for the petitioners, the learned counsel for the first respondent and the learned counsel for the second respondent.

11. The petitioners are the defendants in the suit filed by the first respondent for recovery of money. The petitioners failed to appear before the Trial Court and also failed to file any written statement. Therefore, they were set exparte and an exparte decree was passed in favour of the first respondent. On the strength of the decree, the first respondent filed an execution petition before the Execution Court in E.P.No.95 of 2015 in O.S.No.24 of 2010. In the execution petition, the petitioners were duly served with notices. Even then, they failed to appear before the Execution Court and they remained exparte. After following the procedures as contemplated under the Code of Civil Procedure, the Execution Court had adjourned the matter to 06.02.2018, for fixing upset price. On 06.02.2018, on receipt of valuation from the first respondent and the Court amina, it fixed a sum of Rs.7,00,000/- as upset price for the suit property and the date for proclamation and sale was fixed as 21.03.2018. On 23.03.2018, the second respondent purchased the suit property for a sum of Rs.7,02,000/- and deposited the sale amount.

12. Thereafter, the execution Court also granted 60 days to the petitioners, in order to challenge the sale as contemplated under Section 120 of the Limitation Act and adjourned the matter to 25.06.2018 for confirmation of sale and issuance of sale certificate. Till 25.06.2018, the petitioners did not raise any objection and did not file a petition under Order 21 Rule 90 of CPC in order to set aside the sale. Thereafter, only on 03.09.2018, the sale certificate was issued in favour of the second respondent.

13. It is relevant to extract the provisions under Order 21 Rule 90 CPC

*“ **Application to set aside sale on ground of irregularity or fraud:***

(1) Where any immovable property has been sold in execution of a decree, the decree holder or the purchaser or any other person entitled to share in a ratable distribution of assets or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it, unless upon the facts proved, the Court is satisfied that the

applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under tis rule shall entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

14. Thus, it is clear that the applicant must go and establish to the satisfaction of the Court that the material irregularity or fraud, as the case may be, has resulted in causing substantial injury to the applicant. Though, the petitioners have suffered substantial injury by reason of sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale. Bald allegation would not be helpful to set aside the sale. In the case on hand, no such particulars have been given by the alleged collusion between the first and second respondent. There is no material irregularity in publishing or conducting the sale.

15. It is relevant to extract the portion of the Judgment of the Hon'ble Supreme Court of India reported in ***2017 6 SCC 770*** in the case of ***Chilamkurti Bala Subrahmanyam Vs Samanthapudi Vijaya***

Lakshmi and Another.

> *"24) The law on the question involved herein is clear. It is not the material irregularity that alone is sufficient for setting aside of the sale. The judgment debtor has to go further and establish to the satisfaction of the Court that the material irregularity or fraud, as the case may be, has resulted in causing substantial injury to the judgment- debtor in conducting the sale. It is only then the sale so conducted could be set aside under Order 21 Rule 90(2) of the Code. Such is not the case here.*
>
> *25) In the light of aforesaid discussion, we are of the considered view that none of the objections raised by respondent No.1 had any merit and nor any of the objections constituted any kind of material irregularities so as to enable the Court to set aside the sale under Order 21 Rule 90(2) of the Code. So far as the plea of fraud was concerned, admittedly, it was not raised and, therefore, it did not fall for consideration.*
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> *26) Learned Counsel for the respondent has placed reliance on the decisions in Gajadhar Prasad & Ors. Vs. Babu Bhakta Ratan & Ors., (1973) 2 SCC 629, Ambati Narasayya vs. M. Subba Rao & Anr., 1989 Supl(2) SCC 693, Desh Bandhu Gupta vs. N.L. Anand & Rajinder Singh, (1994) 1 SCC 131 and Saheb Khan vs. Mohd. Yousufuddin & Ors.,(2006) 4 SCC 476. We have gone through these cases and find that all are distinguishable on facts. When we have held on facts that there are no material irregularities noticed in the case and that there was compliance of the provisions of Order 21 Rules 64 to 68 then, in our view, the law laid down in these decisions are of no help to the respondent-judgment debtor"*

16. Therefore, the petitioners failed to raise any objections before the Execution Court in order to prove that there was material irregularity, so as to enable the Court to set aside the auction sale. So far as the plea of fraud was concerned, it was not raised and therefore, it did not fall for

consideration.

17. Pending suit, the first respondent filed an application in I.A.No.127 of 2010 for attaching the subject property and the same was attached by an order dated 22.04.2010. Even then, pending attachment, part of the property was sold out by the petitioners in favour of one Thirumalaisamy by the registered sale deed dated 30.03.2011. The said Thirumalaisamy filed a petition in I.A.No.91 of 2018 under Order 21 Rule 90 CPC before the execution Court and it is pending.

18. Further, there was no fraud played by the respondents while purchasing the suit property. Further, without raising any objection while fixing upset price and while conducting auction sale and also without filing any application under Order 21 Rule 90 of CPC, the petitioners straight away cannot maintain these petitions, challenging the auction sale and sale certificate issued to the second respondent.

19. Therefore, these Civil Revision Petitions are devoid of merits and are liable to be dismissed. Accordingly, these Civil Revision

Petitions are dismissed. Consequently, connected Miscellaneous petitions are closed. No costs.

22.02.2023

Speaking/Non-speaking order
Index : Yes/No
Internet : Yes/No
mn

G.K.ILANTHIRAIYAN,J.

mn

To

The Sub-Court, Udumalpet.

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