BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 07.09.2023

PRONOUNCED ON : 05.10.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.R.P(MD).No.530 of 2012

Raghavan (died)

2.Calist Prema

3.R.Mervin

4.Merlin .....Petitioners

Vs

1.Sivakumar

2.Kingsly David

3.Mergin ....Respondents

(Petitioners 2 to 4 and 3rd respondent are brought on record as legal heirs of the deceased 1st petitioner vide Court order dated 26.04.2023)

PRAYER:- Civil Revision Petition filed under Section 115 of Code of Civil Procedure, to set aside the fair and decreetal order dated 29.10.2011 in CMA.No.2 of 2011 on the file of the Sub Court, Padmanabhapuram reversing the fair and decreetal order dated 12.01.2011 passed in E.A.No. 29 of 2010 in E.P.No.81 of 2008 in O.S.No.125 of 2006 on the file of the Principal District Munsif Court, Padmanabhapuram by allowing this civil revision petition.

For Petitioners	: Mr.C.Dhanaseelan
For R1	: Mr.S.S.Thesigan
For R2	: Mr.V.M.Balamohan Thambi
For R3	:Mr.S.Sivakumar

O R D E R

The first respondent in a suit for recovery of money is the revision petitioner herein challenging an order of the Subordinate Court, Padmanabhapuram dismissing his application under Order 21 Rule 90 of C.P.C reversing the order passed by the Executing Court.

(A).Factual Matrix:

2.The second respondent herein as plaintiff had filed O.S.No.125 of 2006 on the file of the Principal District Munsif Court, Padmanabhapuram for the relief of recovery of money of a sum of Rs.36,000/-. It was alleged by the plaintiff that the first defendant and the second defendant are husband and wife and they had fraudulently induced the plaintiff to deposit the money in their financial company and in returning the said amount.

3.The plaintiff had further contended that the first defendant with an intention to defraud the depositors, had transferred the suit mentioned property in favour of the third defendant who is none other than his father-in-law. The plaintiff further contended that the third defendant is formaly impleaded in the case only because of the fact that the property now stands his name.

4.The defendants filed a written statement disputing the claim and after contest, the suit was decreed as prayed for on 15.02.2007.

5.In order to execute the said decree, the plaintiff had filed E.P.No.81 of 2008 to bring the property standing in the name of the third defendant for auction through Court. In the execution proceedings, the first defendant (the claim petitioner) was set exparte. The second defendant who is the wife of first defendant had filed vakalat through her Counsel. Since the third defendant had passed away, the decree holder had filed E.A.No.256 of 2008 to record his daughter, (the second defendant) as the legal representative of the third defendant. Since no counter was filed by the second defendant, the petition was allowed on 22.01.2009. The second defendant /second respondent later remained exparte and a test batta was ordered on 25.08.2009.

6.The schedule properties was brought to Court auction on 03.02.2010 in which, the first respondent in the revision petition namely Sivakumar was the successful bidder. The first defendant/first respondent had filed E.A.No.29 of 2010 on 10.02.2010 under Order 21 Rule 90 of C.P.C to set aside the sale on the ground that he had not received any notice in the execution proceedings and he came to know about the Court auction only when the notice was pasted.

7.It was further alleged that all the legal heirs of the deceased third defendant were not impleaded, despite a memo was filed by him on 20.01.2020. He had further contended that the suit schedule properties had already been attached in a different proceedings. The valuation of the property is more than two crores and the properties had been sold for just Rs.5,00,000/-.

8.The decree holder had filed a counter disputing all the allegations and contended that the second defendant/second respondent who was already a party in the execution proceedings had not raised any objection with regard to non-impleadment of the other legal heirs. It was further contended by the decree holder that the property that is brought to auction belongs to the third defendant and hence, the first respondent cannot file application under Order 21 Rule 90 of C.P.C. It was further contended that the property was properly valued and all the procedures were strictly followed before bringing the properties for auction.

9.The first defendant/revision petitioner in the meantime had filed first appeal before the Subordinate Court, Padmanabhapuram with a delay. In order to condone the delay, the revision petitioner had filed I.A.No.63 of 2010 for stay. Pending condone delay application, the Appellate Court had directed the appellant on 20.04.2010 to deposit the entire decree amount. In compliance with the said order, the appellant had deposited the said amount on 22.04.2010 and thereafter an order of interim stay was granted by the First Appellate Court on 23.06.2010. However, it is submitted by the learned counsel for the revision petitioner, on a later point of time, the condone delay application was dismissed and the appeal was not numbered.

(B).Orders of the Courts below:

10.The Executing Court allowed the application filed under Order 21 Rule 90 on the following grounds:

(i)The ameen had valued the land at Rs.40,000/- per cent and building at Rs.5,00,000/-. Since the total extent of the land was 40 cents, the value of land itself was Rs.16,00,000/- and the valuation of the building was Rs.5,00,000/- and therefore, the total value of land and building as per ameen report was Rs.21,00,000/-. However, by mistake, the value of the land was not taken into consideration and the value of the building alone was referred as upset price in the sale proclamation. The property was sold for Rs.5,03,500/-. This was not brought to the notice of the Court by the decree holder.

(ii)The amount due as per execution petition was only Rs.46,606/-. For recovery of the said amount, entire property need not have been sold. Therefore, there is excessive execution.

(iii)The other legal heirs of the deceased third defendant have not been impleaded.

11.Based upon the above said findings, the Executing Court had set aside the sale on the ground of material irregularity and fraud.

12.The auction purchaser was not made as a party in I.A.No.29 of 2010 but he filed CMA.No.2 of 2011 before the Subordinate Court, Padmanabhapuram challenging the setting aside of the sale after obtaining leave of the Court.

13.The First Appellate Court had reversed the order passed by the Executing Court on the following grounds:

(i)The third defendant being the owner of the property, the first defendant has no locustandi to file an appeal under Order 21 Rule 90 of C.P.C.

(ii)The daughter of the deceased third defendant is already a party to the execution proceedings. Though she had appeared through Counsel, she had not pointed out that the availability of other legal heirs. Therefore, the second defendant alone was recorded as legal representative of the third defendant. Hence, there was a substantial representation of the estate of the third defendant.

(iii)The auction purchaser was not impleaded as one of the parties to the petition under Order 21 Rule 90 of C.P.C.

(iv)There is no evidence to show that there is fraud or material irregularity in conducting the auction sale.

14.Based on the above said findings, the First Appellate Court had reversed the order of the Executing Court. Challenging the same, the present revision petition has been filed by the first defendant /first respondent in the execution proceedings.

(C).Contention of the Counsels in this Revision:

15.The learned counsel appearing for the revision petitioner had contended as follows:

(i)The amount sought to be recovered under the execution proceedings was just Rs.46,000/- for which a property worth Rs. 21,00,000/- (as per ameen report) was auctioned. Therefore, it is a case of clear material irregularity causing substantial injury to the first defendant.

(ii)The first defendant was not issued with any notice as contemplated under Order 21 Rule 66(2) of C.P.C.

(iii)The application under Order 21 Rule 90 of C.P.C has been filed in time and the entire amount has also been deposited as per the conditional order passed by the First Appellate Court.

(iv)The report of the ameen was not properly considered and the Court committed a mistake in fixing Rs.5,00,000/- as the upset price. The mistake of the Court should not prejudice any one.

(v)The findings of the Executing Court with regard to fixation of the upset price has not been reversed by the Appellate Court. When a fraud is brought to the notice of the Court, it is the duty of the Court to interfere. The fraud is borne out of the Court records and there is no necessity for the revision petitioner to prove the same.

(vi)In the plaint, it was contended that the properties belong to the first defendant which he had clandestinely transferred it to the third defendant to avoid payment to the depositors. It was further alleged in the plaint that the third defendant is only a formal party. The trial Court in its judgement in paragraph No.12 has pointed out that the first defendant had transferred the property to the third defendant only to evade payment to the depositors. Therefore, the right of the first defendant to file an application under Order 21 Rule 90 of C.P.C cannot be questioned. That apart, when fraud is brought to the notice of the Court in proclamation and conduct of sale, the Court has got inherent power to set aside the sale. Hence, he prayed for allowing the revision petition and to set aside the sale.

16.Per contra, the learned counsel appearing for the decree holder and the auction purchaser had contended in unison as follows:

(i)In the application filed under Order 21 Rule 90, the revision petitioner has specifically admitted that the property in dispute belongs to the third defendant. After death of the third defendant, it devolved upon his daughter namely the second defendant. The first defendant is the husband of the second defendant. He has no right whatsoever over the property in dispute. Therefore, the first defendant has no locustandi to file an application challenging the sale.

(ii)Pending execution proceedings, immediately after death of the third defendant, an application was filed by the decree holder to record the second defendant as legal heir of the deceased third defendant.

(iii)Despite providing many opportunities, the second defendant did not file any counter and ultimately the said application was allowed. Now the revision petitioner cannot be heard to contend that there are some other legal heirs of the deceased third defendant.

(iv)If the property had been undervalued, the said fact ought to have been brought to the notice of the Court before proclamation of the sale and cannot be raised after sale in view of bar under Order 21 Rule 90(3) of C.P.C.

(v)In an application under Order 21 Rule 90, the auction purchaser is a necessary party. However, the first defendant had filed the said application without impleading the auction purchaser. Therefore, the said application itself is not maintainable.

17.The learned counsel appearing for the auction purchaser had relied upon a judgement of the Hon'ble Supreme Court reported in ***2015 SAR (Civil) 61 (Guttikonda Venkataramaiah Vs. Godavarthy Venkateswarlu & another*** and judgement reports in ***2014 SAR (Civil) 207 (Sadashiv Prasad Singh Vs. Harendar Singh & others)*** to contend that the rights of the auction purchaser should be protected.

18.The learned counsel appearing for the decree holder had relied upon a judgement of this Court reported in ***(2009) 8 MLJ 286 (Chandira Vs. Subramanian)*** to impress upon the Court that when the defendant had not raised any objection at the time of fixing of the upset price, he cannot agitate the sale alleging irregularity after the sale has been completed. Hence, they prayed for dismissing the revision petition.

19. I have carefully considered the submissions made on either side and perused the material records.

(D).Discussion:

(D.1)Irregularity and Fraud:

20.The revision petitioner herein had filed E.A.No.29 of 2010 on 10.02.2010 to set aside the Court auction sale held on 03.02.2010 invoking Order 21 Rule 90 of C.P.C. As per Article 127 of Limitation

Act, an application to set aside the sale in execution of the decree should be filed within a period of 60 days. In the present case, the application has been filed in time and there is no dispute about it.

21.After auction sale, the decree holder, the purchaser or any other persons whose interest are affected by sale can apply to the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting the sale. The applicant should not only prove material irregularity or fraud, but prove that he sustained substantial injury in view of such irregularity or fraud. As per Order 21 Rule 90(3) of C.P.C, such an application to set aside the sale cannot be entertained on any ground which an applicant could have taken on or before the date on which the proclamation of sale was drawn. Therefore, it is clear that if the applicant had any grievance about valuation or upset price, it should have been raised before the date of proclamation of sale.

22. The Execution Court in Paragraph No.12 of the order has pointed out that the total extent of the property that was brought to auction was 40 cents with a house property. The ameen had valued the land at Rs.40,000/- per cent and has also indicated that the total value of the land as Rs.16,00,000/-. The ameen in his report had pointed out the

valuation of the building as Rs.5,00,000/-. Without considering the value of land (Rs.16,00,000/-) mentioned by the ameen in his report, the Executing Court had taken into consideration only the valuation of the building and fixed the upset price at Rs.5,00,000/-. The property has been sold at Rs.5,03,500/-. These findings recorded by the Executing Court from the Court documents have not been reversed by the First Appellate Court. The decree holder or the auction purchaser is not in a position to dispute these findings of the Executing Court.

23.For a property worth Rs.21,00,000/- as per ameen report, the Executing Court had fixed the upset price at Rs.5,00,000/-. Even if the defendants had remained exparte, the Executing Court ought to have carefully considered the ameen report and should have fixed the upset price at least at Rs.21,00,000/-. The mistake committed by the Court was not pointed out by the decree holder. The auction purchaser had purchased the property at Rs.5,03,500/-. The Court has fixed only $1/4^{th}$ of the value of the property as upset price. Therefore, it is clear that there was a material irregularity in fixing the upset price of the property even on the face of the record without there being any application on the side of the parties. This material irregularity would certainly cause substantial injury to the parties concerned.

(D.2).Inherent Power of the Court to set aside sale:

24.As per affidavit filed in support of the petition under Order 21 Rule 90 of C.P.C, the revision petitioner had categorically admitted that the property in dispute belonged to the deceased third defendant. It is admitted by all the parties that the present revision petitioner is the son-in-law of the third defendant and the husband of the second defendant. It is also an admitted fact that they are residing in the property which was brought to auction. It is not the case of the revision petitioner that the property belongs to him and he had executed a sham and nominal document in favour of his father-in-law. Therefore, it is clear that the petitioner under Order 21 Rule 90 of C.P.C would not have any locustandi to file the said application because he would not be prejudiced by the sale of the said property. However, when fraud stares upon the Court, the Court can invoke its inherent power to set aside the sale. The application of the revision petitioner could be treated as an information to the Court and when a fraud is brought to the notice of the Court, it is the duty of the Court to scan the said allegation to arrive at the truth.

25.The Hon'ble Division Bench of this Court in a judgment reported in ***A.I.R 1923 Madras 635 (Raghavachariar Vs. Murugesa Mudali and others)*** has held as follows:

> *"....But, in my judgment, the Court has an inherent power to refuse to allow the sale to be carried out if it is satisfied that the Court has been misled either in giving leave to bid or in fixing the reserve price. This is only an instance of the inherent power possessed by all the Courts to prevent an abuse of the processes of the Court, but, of course, the Court will not use that inherent power unless it has had all the facts fully before it and is satisfied that is has been misled. I think the pinciple is that, in order to show that the Court has been misled, it is necessary to show either actual mis-statements to the Court or non-disclosure to the Court of relevant facts unknown to the Court and which there was a duty to bring before the Court. "*

26.The learned Single Judge of Punjab High Court in a judgment reported in ***AIR 1963 PUNJAB 230 (V 50 C 75) (Punjab Mercantile Bank Ltd., Vs. Sardar Kishan Singh)*** in Paragaraph No.15 has held as follows:

> "15.....As *Rule 90, it is said that Dharam Singh is not a person who had any interest which can be said to be affected by the sale, in terms of that provision. He certainly had no interest in the property sought to be sold. Such a person must*

be one who has an existing or present interest which is affected by the sale of the property, (vide Basanta Ku-mar Roy v. Charu Chandra Pal, AIR 1958 Cal 543) which Dharam Singh admittedly does not possess. It was also argued that the petition was barred by limitation as provided by Article 166 of the Limitation Act. It was further contended that if Dharam Singh has no rights either under Order 21, Rule 90, or under Section 47, Code of Civil Procedure, he cannot interfere with the auction-sale by moving this Court under Section 151,

There is no doubt, force in this argument, and the logical result of this argument is that Dharam Singh cannot assail the validity of the auction-sale. But Dharam Singh comes into the picture only to the extent that he is instrumental in revealing a fraud on the Court. Even if Dharam Singh has no locus standi, the Court has an ample reserve of inherent powers to satisfy itself suo motu that its process has been abused. Because the source of information happens to be a person who has no locus standi, the Court cannot close its eyes and decline to exercise its inherent powers to set aside the sale on being satisfied that as a result of conspiracy a fraud-has been perpetrated and its process has been abused."

27.The Judgment of the Punjab High Court cited above was quoted in approval in a judgement of our High reported in ***1965 (Vol.78) LW 498 (A.P.Ismail Rowther Vs. Mynoon Bivi and others)*** which is extracted as follows:

> *“....Now the Court had to consider whether that person had any locus standi to bring the application. The Punjab High Court held:*
>
> *“Even if the person who brought to light the fraud: had no locus standi either under S.47 or Or.21, R.90, the Court had an ample reserve of inherent power to satisfy itself suo motu that its process had been abused. Because the source of information happened to be a person who had no locus standi, the Court could not close its eyes and decline to exercise its inherent powers to set aside the sale on bring satisfied that as a result of conspiracy a fraud had been perpetrated and its process had been abused.”*
>
> *It is clear from the two decisions cited above that the Court has got inherent powers to set aside a sale, even though the petitioner had locus standi or not to file an application for setting aside the sale”.*

28.The Hon'ble Supreme Court in a judgment reported in ***(1996) 5 SCC 550 (Indian Bank Vs. Satyam Fibres (India) Pvt. Ltd)*** in Paragraph No.23 has held as follows:

> *“23.Since fraud affects the solemnity, regularity and orderliness of the proceedings of the Court and also amounts to an abuse of the process of Court, the Courts have been held to have inherent power to set aside an order obtained by fraud*

practised upon that Court. Similarly, where the Court is misled by a party or the Court itself commits a mistake which prejudice a party, the Court has the inherent power to recall its order. The Court has also the inherent power to set aside a sale brought about by fraud practised upon the Court (Ishwar Mahton v.Sitaram Kumar) or to set aside the order recording compromise obtained by fraud."

29.In view of the judgements cited supra, it is clear that in a case where a fraud or material irregularity in publishing or conducting a Court auction sale is brought to the notice of the Court, whether the applicant is having locustandi or not, the Court has to exercise its inherent power to see that the benefits do not accrue to the decree holder or the auction purchaser as the case may be. Dismissing such an application on the ground of locustandi would only result in perpetrating the material irregularity or fraud.

(D.3).Excessive Execution:

30.As per the execution petition, the decree amount of Rs.46,000/- was sought to be recovered from the defendants. However, property worth Rs.21,00,000/- has been brought to auction which is clearly an excessive execution and is in violation of Order 21 Rule 64 of C.P.C. If there is a dispute with regard to the valuation of the property, the judgement debtor is expected to point out the same before drawing of sale proclamation in view of the bar under Order 21 Rule 90(3) of C.P.C. However, when there is no dispute with regard to the valuation of the property and the same is correctly reflected in the ameen report, the Court cannot ignore the said valuation and fix the upset price which is 1/4th of the total value of the property. Therefore, this Court is not inclined to accept the contention of the learned counsel appearing for the decree holder and the auction purchaser that the first defendant had remained exparte in the execution proceedings and hence he will not be entitled to raise the issue of fixation of lesser upset price to the property.

(D.4) Rights of the Auction Purchaser:

31.The Hon'ble Supreme Court in a judgement reported in ***(1994) 1 SCC 131 (Desh Bandhu Gupta Vs.N.L.Anand & Rajinder Singh)*** in Paragraph No.5 has held as follows:

> *5...The auction-purchaser gets a right only on confirmation of sale and till then his right is nebulous and has only right to consideration for confirmation of sale. If the sale is set aside, apart from the auction-purchaser, the decree-holder is affected since the realisation of his decree debt is put off and he would be obligated to initiate execution*

proceedings afresh to recover the decree debt. Therefore, in the proceedings under Section 47 or Order 21 Rule 90, the decree-holder is the affected necessary party. Though the auction-purchasers need to be impleaded eo nomine as respondent as the property was purchased jointly at the court sale, it is enough that one among them had been impleaded as a party. It is not necessary to implead all the joint purchasers."

32.Though the sale was conducted on 03.02.2010, it is an admitted fact that the sale is yet to be confirmed. Therefore, the right of the auction purchaser is yet to get crystallized. The auction purchaser had challenged the order of the Execution Court before the Appellate Court successfully. Hence, before the Revisional Court, the auction purchaser cannot raise a plea that he was not heard by the Executing Court.

33.The first defendant admittedly had deposited the entire decree amount on 22.04.2010 pursuant to the order of the First Appellate Court in a stay petition pending condone delay application. When an application is pending under Order 21 Rule 90 of C.P.C, the Court has no power to pass an order confirming the sale in view of Order 21 Rule 92 of C.P.C.

34.When a sale is yet to be confirmed and the judgement debtor had already deposited the entire decree amount, this Court is of the considered opinion that no prejudice would be caused to the auction purchaser in setting aside the sale.

35.The First Appellate Court had reversed the order of the Executing Court mainly on the ground that the revision petitioner has no locustandi and the deceased third defendant had been substantially represented through his daughter. However, the First Appellate Court had not reversed the finding of the Executing Court with regard to fraud and material irregularity.

36.The auction purchaser has deposited Rs.5,03,500/- towards sale consideration, Rs.30,300/- towards sale certificate. The Executing Court had directed the judgment debtor to pay a sum of Rs.15,135/- towards poundage charges. For all these three category of charges, the Executing Court had directed the judgment debtor to pay interest at the rate of 5% from the date on which they were deposited till the date of order in E.A.No.29 of 2010.

37.This Court finds that in the interest of justice, the rate of interest could be enhanced from 5% to 6%.

(E).Conclusion:

38.The order of the First Appellate Court is set aside and decreetal order of the Executing Court in E.A.No.29 of 2010 dated 12.01.2011 is restored with regard to Clauses 1 to 4. As far as Clauses 5 & 6 are concerned, the interest is enhanced from 5% to 6% and the said amount shall be deposited by the judgment debtor within a period of 30 days from the date of copy of this order.

39.This Civil Revision Petition is allowed with the above said observations. No costs.

05 .10.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
msa

To

1.The Subordinate Judge
Padmanabhapuram

2.The Principal District Munsif,
Padmanabhapuram

3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

R.VIJAYAKUMAR,J.

msa

Pre-delivery order made in

C.R.P(MD).No.530 of 2012

05.10.2023