



WEB COPY



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 04 .07.2023

Delivered on : 08.08.2023

CORAM

**THE HONOURABLE MRS JUSTICE K. GOVINDARAJAN
THILAKAVADI**

C.R.P(MD)No.1013 of 2022

and

C.M.P(MD)No.4042 of 2022

P.Maniraj

... Petitioner/Respondent/
Petitioner/Plaintiff

Vs.

1.Suresh Kannan

... Respondent/Petitioner/
Proposed Respondent/Proposed
Respondent

2.A.Johny Ford

3.D.Mahendra Kmar

4.E.Esakki Raja

... Respondent/Respondent/
Respondent/Defendants

Civil Revision Petition is filed under Section 115 of Civil Procedure Code, to set aside the fair and decretal order dated 03.12.2021 passed in E.A.No.2 of 2019 in E.P.No.42 of 2017 in O.S.No.12 of 2015 by the Principal District Judge, Thoothukudi.

For Petitioners

For R1

For R2

:Mr.K.Jeyamohan

:Mr.V.Meenakshi Sundaram

for Mr.G.Mohankumar

:No appearance



ORDER

WEB COPY

This civil revision petition is filed against the fair and decreetal order dated 03.12.2021 passed in E.A.No.2 of 2019 in E.P.No.42 of 2017 in O.S.No.12 of 2015 by the Principal District Judge, Thoothukudi.

2.The brief facts, leading to the filing of this Civil Revision Petition, are as follows:-

The petitioner is the plaintiff in the suit in O.S.No.12 of 2015 and the respondents 2 to 4 are the defendants. There was a sale agreement dated 08.02.2012 entered between the petitioner and the respondents 2 to 4 agreed to sell the suit property for a sum of Rs.12,50,000/- and the petitioner paid a sum of Rs.10,00,000/- to the respondents 2 to 4 as advance by cheque and he was always ready to pay the balance amount. However, the respondents 2 to 4 did not come forward to register the sale deed and hence, the petitioner was constrained to file the above suit for specific performance against the respondents 2 to 4 in O.S.No.12 of 2015 before the Principal District Court, Thoothukudi. Subsequently, the case was referred to Lok Adalat and there was a settlement between the parties and an award was passed on 12.11.2016 recording the terms of settlement. In accordance with the terms of settlement, the second respondent ought to have paid a sum of Rs.8,00,000/- within a period of one year and the first installment of



Rs.2,00,000/- to be paid in the month of January 2017 to the petitioner. It was also recorded that any delay in payment, would carry 6% interest. It is further stated that the respondents 2 to 4 did not come forward to pay the amount as per the Lok Adalat award. Hence, he preferred an execution petition in E.P.No.42 of 2017 before the Principal District Court, Thoothukudi, for attachment and sale of the suit property by Court auction. On 24.07.2019 the suit property was brought for auction with an upset price of Rs.11,50,000/-. Since there was no bidder in the said auction, the auction again was again conducted on 06.11.2019, in which, the first respondent was the highest bidder in the said auction for a sum of Rs.10,31,000/- and he immediately deposited a sum of Rs.2,57,750/- being 25% of the value of the sale. It is further stated that he was hoping that the first respondent will pay the remaining 75% amount within the time stipulated.

3.To his shock and surprise, the first respondent instead of paying the remaining amount, he filed an application in E.A.No.2 of 2019, to set aside the Court auction conducted on 06.11.2019 and to return the $\frac{1}{4}$ the sale consideration along with poundage amount of Rs.2,57,750/-. In the said application, the first respondent stated that on seeing Dinamalar Newspaper advertisement, dated 06.11.2019, he came to know that the Indian Overseas Bank, Main Branch, Thoothukudi, has a charge over the suit schedule properties through registered mortgage deed, dated 27.03.2012. In the said



petition, it is further alleged that the aforesaid details were not mentioned in the sale proclamation. Therefore, the petitioner contested the said application by filing his counter stating that there was no suppression of facts and that along with sale Isthyar he had included the updated Encumbrance Certificate and sale affidavit disclosing that the property is under mortgage before the Indian Overseas Bank. However, on 03.12.2021, the learned Judge allowed the said application by giving an erroneous conclusion that the petitioner has suppressed the material fact and thereby set aside the sale held on 06.11.2019 by granting relief to the first respondent to get back the deposit of 1/4th of the sale consideration and also to recover the poundage amount of Rs.2,57,750/- from the petitioner. Assailing the said order, the petitioner has filed the above revision.

4.In pursuant to the order passed in the above application, the first respondent is taking steps to withdraw the amount deposited before the Court and also taking steps to initiate recovery against the petitioner to recover the poundage amount. Hence, the order passed in E.A.No.2 of 2019 is liable to be set aside.

5.On the other hand, the learned counsel appearing for the first respondent would submit that the first respondent was not aware of the fact that the schedule property was already mortgaged with the Indian Overseas



Bank, Thoothukudi Main Branch, through registered mortgage deed, dated 27.03.2012.

WEB COPY

6.The learned counsel appearing for the respondent/auction purchaser would submit that the respondent/auction purchaser has contested in the Court auction held on 06.11.2019 and he was a successful bidder of EP schedule property for sale consideration of Rs.11,50,000/- and he had paid a sum of Rs.2,57,750/- being 25% of the value of the sale price, which is in the Court deposit. It was brought to the knowledge of the auction purchaser that the Indian Overseas Bank, Main Branch, Thoothukudi, had charge over the schedule property, through Dinamalar newspaper dated 06.11.2019 and upon seeing the on-line Encumbrance Certificate, it was found that the schedule property was already mortgaged with the Indian Overseas Bank, Main Branch, Thoothukudi, through a registered mortgage deed, dated 27.03.2012. The above encumbrance created over the schedule properties in the year 2012, was not stated in the sale proclamation, which is a grave irregularity on the part of the petitioner/plaintiff. If the schedule property was brought to the auction by the Indian Overseas Bank, Main Branch, Thoothukudi, the petitioner may not be able to acquire title over the property since the bank have first charge. Therefore, the respondent/auction purchaser was not inclined to pay the balance sale consideration to buy the schedule property and hence, sought for a relief to set aside the same.



7.The Execution Court, after considering the above facts granted the relief in favour of the respondent/auction purchaser to get back the deposited 1/4th of sale consideration and also to recover the poundage amount of Rs.30,960/- from the petitioner.

8.Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the first respondent and also perused the materials available on record.

9.It is not in dispute that the schedule property was mortgaged by the petitioner with the Indian Overseas Bank, Main Branch, Thoothukudi, and the Bank had charge over the schedule properties. According to the respondent/auction purchaser, the said fact came to his knowledge only on seeing the newspaper, on 06.11.2019 and upon verifying the online Encumbrance Certificate. In spite of the said encumbrance, the petitioner has brought the schedule properties for the Court auction in order to execute the decree obtained from the Lok Adalat. The petitioner ought to have mentioned the encumbrance over the schedule property in the execution proceedings by mentioning the same in the sale Isthyar, but failed to do so. Due to the above non-disclosure of the encumbrance by the petitioner, the respondent/auction purchaser is seriously prejudiced. All material and relevant particulars should be furnished in the sale proclamation. Non



disclosure of the encumbrance a material irregularity on which ground the sale can be set aside.

WEB COPY

10. Order 21 Rule 90 of C.P.C provides for an application to set aside the sale on the ground of irregularity or fraud. Sub-rule(1) enables the decree holder, the auction purchaser or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale to apply to the Court to set aside the sale by an immovable property on the ground of material irregularity or fraud, either in publishing or conducting it. Sub Rule (3) mandates that no application to set aside the 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 up.

11. In the present case, the petitioner has brought the property for auction by concealing the fact that the property was already mortgaged with the Indian Overseas bank, Main Branch, Thoothukudi. In the sale Isthyar, the petitioner ought to have mentioned about the encumbrance found in the property. But the petitioner failed to do so. Therefore, the Execution Court has rightly set aside the sale held on 06.11.2019, which is in accordance with law. Therefore, there is no infirmity in the order passed by the Execution Court, since the petitioner failed to mention the encumbrance over the schedule property, which was brought for Court auction. The



respondent/auction purchaser is entitled to recover the poundage amount of Rs.30,960/-from the petitioner for the inconvenience caused to him.

WEB COPY

12. Therefore, there is no interference in the order dated 03.12.2021 passed by the Execution Court, in E.A.No.2 of 2019 in E.P.No.42 of 2017 in O.S.No.12 of 2015, warranted by this Court. Accordingly, the civil revision petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

08.08.2023

NCC:Yes/No
Index:Yes/No
Internet:Yes/No
Ns
To

- 1.The Principal District Judge,
Thoothukudi.
- 2.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



WEB COPY



K.GOVINDARAJAN THILAKAVADI, J.

Ns

C.R.P(MD)No.1013 of 2022
and
C.M.P(MD)No.4042 of 2022

08.08.2023