

(1989) 08 MAD CK 0011

In the Madras High Court

Case No : C.M.P. No's. 9477 and 9478 of 1989

Ashok Kumar Kedia

APPELLANT

Vs

Balaji Builders and Another

RESPONDENT

Date of Decision : 29-08-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 84, Order 21 Rule 85, Order 26 Rule 15, 148
Companies Act, 1956 — Section 457(1)

Citation : AIR 1990 Mad 232 : (1989) 2 LW 366

Hon'ble Judges : Sathiadev, J;Padmini Jesudurai, J

Bench : Division Bench

Advocate : Vedantham Srinivasan, for the Appellant; R.G.R. Prasad and P. Balachander, for the Respondent

Judgement

1. These petitioners are filed to set aside the Order dated 20-4-1989 in O.S. No. 87 of 1989 and to implead the petitioner herein as second

respondent in the appeal, O.S. No. 87 of 1989 came to be filed against the order in Application No. 1385 of 1989 in Application No. 5578 of

1988 in C.S. No. 34 of 1983. It was in Application No. 5578 of 1988, the highest offer made by the appellant at Rs. 23,00,000/- was accepted,

and it was directed to deposit the amount with the plaintiff Hank on or before 10-3-1989, and that the plaintiff could appropriated Rupees

15,00,000/- as per order dated 26-7-1988. The remuneration of the auctioneer was fixed at RS 50,000/- Thereafter the appellant filed

Application So. 1385 of 1989 asking for extension of time till 5-4-1989 for paying the balance amount stating therein the reasons which had

necessitated the request for extension of time. This was rejected by a cryptic order ""no grounds to extend time are made out. Dismissed. ""It is

against this Order dated 14-3-1989. O.S.A. No. 87 of 1989 was filed and it was allowed for reasons stated therein by taking note of the fact that

amounts had since been deposited. It is thereafter these petitions are filed stating that though the petitioner herein is ranked as fifth defendant in the

suit, without impleading the defendants, the application for extension of time had been filed, and in the appeal also, they were not impleaded, and

that presently there is an offer for Rs. 23,50,000/- from one Priya Exports (P.) Ltd. and if the Order in the C.S.A. is set aside, it could enable

defendants to get a better price and reduce the liability to the plaintiff Bank.

2. Mr. Yedantham Srinivasan, learned counsel for the petitioner, submits that, in Application No. 1385 of 1989, and in the appeal, defendants

ought to have been impleaded as parties: but plaintiff would point out that the highest offer made by the appellant was accepted by agreement

arrived at between the parties: and therefore, non-im-pleadment cannot be complained of. In the order of the learned Judge dated 3-3-1989, it is

stated as follows:--

.....The earnest money deposited by the unsuccessful bidders was refunded by the auctioneers and all the parties agreed that the sale of

machineries, raw materials, plot and buildings may be confirmed in favour of the highest bidder viz., M/s. Sri Balaji Builders.....

Yet, what Mr. Vedantham Srinivasan, learned Counsel would submit is that, it was on the specific understanding that the amount be deposited by

10-3-1989, a consent having been given thereafter the highest bidder cannot ask either for extension in their absence or reply upon the said order

to deposit the amount later on. In (it is) seen from the order that it was the Court which fixed the date for depositing the amount, and the consent of

parties was confined only to the price for which the property could be sold. Therefore, if acceptable reasons exist, the Court has the jurisdiction to

extend the time and need not look to the consent of parties. As would be pointed out later on, even in a case where any compromise is arrived at

between the parties, still the Court has the jurisdiction to extend time. Hence, it cannot be contended that the Court has no jurisdiction to extend

the time; but as to whether the circumstances of the case warrant extension of time or not, is left to the Court to decide; and if it is to reject it or

grant it; it must state the reasons, so that the parties may know as to why in

spite of certain materials placed before it, their pleas are rejected, and equally, the other party could know as to why the petition is ordered. *Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another*, wherein it was held that non-payment of the price on the part of the defaulting purchaser renders the sale proceedings as a complete nullity, and that the inherent powers of the Court cannot be allowed to circumvent the mandatory provisions of O. 21, Rules 84 and 85 of the Civil P.C. and relieve the purchaser of their obligation to make the deposit. *Navalkha and Sons Vs. Ramanuja Das and Others*, is relied upon to emphasise that it is the duty of the Court to satisfy itself that having regard to the market value of the property. The price offered is reasonable and adequate. In the said decision itself, it was held that, one other principle equally well settled is that, once the Court comes to the conclusion what the price offered is adequate: no subsequent higher offer can constitute a valid ground for refusing confirmation of sale, and that this discretion in confirming a sale is not to be interfered with, unless the Court had gone wrong on principle. Yet another decision relied upon is *Smt. Jatan Kumar Golcha Vs. Golcha Properties (P) Ltd.*, wherein in construing S. 457(1)(c) of the Companies Act. it was held that it is implicit in that rule that, if the directions which have to be given by the Court would affect any person prejudicially, he must be served with a notice of summons under the general rule of natural justice, and that no order should be made affecting the rights of parties without affording a proper opportunity to it to represent the case.

In *Smt. Periyakkal and Others Vs. Smt. Dakshyani*, while dealing with the extent and power of Court under S. 148, C.P.C., it was held that even if parties enter into a compromise and invite the Court to make an Order in terms of the compromise and stipulate the time for deposit which they have agreed to, still the Court has the jurisdiction to extend the time in appropriate cases because even though the Court could not rewrite a contract between the parties, but it will relieve against a forfeiture clause if circumstances justify where the contract of the parties has merged in the order of the Court, and thereafter, the Court's freedom to act to further the ends of justice would surely not stand curtailed.

3. Therefore, having given consent for the offer made by the appellant, it is not

now open to the petitioner to claim that there is an offer from Priya Exports (P.) Ltd., which would enable defendants to get another Rupees 50,000/-. Regarding the time within which the amount has to be deposited, it was the learned Judge who fixed the date, and it was not one arrived at by consent of parties. Even so, as held in Smt. Periyakkal and Others Vs. Smt. Dakshyani, the Court has the jurisdiction under S. 148, C.P.C. to grant extension of time, provided valid grounds are made out.

The petition filed by appellant had referred to the amounts set apart by it having been utilised as advance tax, and that on the order passed, it had remitted Rs. 4,00,000/- on 10-3-1989 and will be remitting another sum of Rupees 2,00,000/- on 13-3-1989 and because of the financial year ending, the entire amount could not be made ready within the short notice, and the balance will be remitted by 15-4-1989 and it undertakes to pay interest at 12% on the balance of the amount till date of payment. These reasons, were found to be acceptable and reasonable and it resulted in the appeal being allowed, when by then the appellant had deposited the amount with the plaintiff Bank. Having agreed for the price for which the property could be sold, it is not now open to the petitioner to claim that still higher amount could be realised. There is no affidavit filed by Priya Exports (P.) Etd. This is not even a case wherein the entire amount offered is deposited into Court and asking for setting aside the sale. This is not a case wherein, as some times happened, double the amount is offered, and that the Court had been completely misguided in assessing the market value by auction. In any event, there is no need to look at the present offer made from any of these perspectives, because the defendants had agreed to accept the offer made by the appellant.

4. Regarding the non-impleadment, it is always just and fair to implead all the parties to a proceeding in every interlocutory application, but it is unfortunate that a practice is existing to implead only some of the parties in applications, claiming that the others im-pleaded in the main matter are not necessary parties in the concerned application. Petitioners in such applications take the risk of what they do, by non-impleadment. Since they had expressed their agreement the appellant had not impleaded the defendants, and they being not prejudiced; this cannot be a ground to set aside the order.

5. One other aspect requires to be touched upon so that it could be of future guidance, while fixing remuneration of auctioneers. In the initial stages of the proceedings, tenders were called for and thereafter the auctioneers were directed to conduct a public auction. In the instant case, the auctioneer's remuneration was fixed at Rs. 50,000/-. The cost of publication of the notices in newspapers, issue of notices etc., and the entire cost incurred by the auctioneer, are all to be borne only by defendants, who are now coming forward with an offer, and if accepted according to them, would get another Rs. 50,000/-. It is a very valuable amount as far as a party in distress is concerned. For the holding of an auction, with all the expenses being borne by the judgment-debtor; it is highly unreasonable to fix the remuneration at Rs. 50,000; -on any percentage basis.

Remuneration necessarily means, conveyed in money value, for the services rendered, a reasonable and just compensation. It could never be disproportionate, exorbitant, unreasonable, unjust and unbearable upon the debtors, who are called upon to pay for those services. When a necessity arises to follow a particular procedure, any order of a Court, which results in parties to the proceedings, incurring expenses; then the basic duty of the Court is not to mulct parties to proceedings with expenses, which are disproportionate and highly unreasonable. Illegible because they happen to be litigants and look to Court for relief; it cannot penalise parties by compelling them to part with amounts, for the nature of services rendered by auctioneers appointed by Courts to carry out certain functions. There are instances in which when an Advocate Commissioner is appointed by Court, he claims huge amounts by way of expenses and insists upon luxurious arrangements to be made, and the total amount involved turns out to be more than double the fees received by the Counsel for both the parties in the conduct of the proceedings. Litigants have a just grievance against Courts, when they deal with their properties or when orders of this nature are being passed wherein huge amounts are sliced off, for enlisting the services of certain persons, to get ride off the problems faced by them.

6. It must be remembered that, when tender system is adopted; it is the Court which settles the terms of the notice, fixes the time within which it should be done and decides as to which offer to be accepted, etc., and parties to the proceedings bear the expenses relating to publication etc.

The limited service rendered by an auctioneer or an Advocate, under such circumstances, is to act as a conduit pipe and not to take any risk whatever on any factor. Yet, on a so-called percentage basis, they collect huge amounts, which parties in distress cannot bear. It may be that the litigation involves huge amounts or the value of the property involved in the sale may be every valuable one; but it is the nature of the services rendered which alone could be taken into account, and remuneration must be fixed reasonably and fairly. That is the elementary duty of a Court which had taken charge of the affairs of the party in distress. Equally, when auction is resorted to taking into account the serious (sic) involved in holding the auction on a part particular day, the just amount could always be arrived at. The time taken in holding the auction could not have been more than an hour, and the number of bidders being handful and the like, the Court which is incharge of the properties, must be extremely (sic) frugal in managing them.

6A. It may be that a percentage is evolved, but even then it is in the discretion of the Court to fix remuneration. If it finds that in applying a particular yardstick it leads to a remuneration which is disproportionate, unreasonable, unjust and extortionate, certainly a Court has the jurisdiction to fix reasonable and just amount alone. It may be that the defendants owned valuable properties. It is only when they have fallen into bad days, they get involved in litigation, and to get out of the difficult situation faced by them, they look to the judiciary for relief and salvation. Even if actions of the Court are to boarder miserliness in managing their estate; it will not be against interest of justice; whereas if the properties of a person in distress is managed in a lavish manner, unmindful of the fate of the parties in distress, by applying yardsticks which would have no relevance to the quantum of work involved, the particularly there being no risk taken by the auctioneers in carrying out the task; any remuneration fixed which is extortionate, would be doing injustice. There are millions of people working in this Country in several occupations, who do not get this much of amount for the entire year, out of their hard and sustained work. Seldom, a lawyer gets this much of fees even for a complicated case. A surgeon who does the heart operation and saves a life, would not get this much of remuneration for the delicate and risky job done by him. For the entire

year of a Judgeship in a High Court, this much of amount is not saved by a Judge.

7. Therefore, while fixing remuneration, it is the nature and the extent of work involved, and the risk factor, if any, and whether there is any need to take any independent decision involving application of mind, etc., etc., will have to be taken into account, and not on some percentage basis, it could be worked out as an universal rule. Remuneration means "to pay for services rendered." The services so rendered will have to be assessed, depending upon the facts and circumstances of the case, and Order should contain reasons as to how and in what manner, the quantum has been arrived at. particularly when monumental amounts are directed to be paid.

8. It is rather surprising that, when Mr. N. G. R. Prasad, learned Counsel for the first respondent, was asked to deal with this point on the expectation that he would denounce when such a huge amount is paid out; he had not chosen to make any submissions, in spite of being asked about it. All these have come to be stated in this order, not on submissions made by any counsel; but on the conscience of the Court being taken aback when half a lakh of rupees is parted with, for a meagre service rendered; and for which amount, these applications have come to be filed to lessen the liability of the debtors to that extent, because it has become more dearer and valuable for them than its monetary value. With the experience gained a Court could certainly foresee what is the likely work involved in issuing a Commission or in directing sale or property to be carried out either by tender or by auction, and it could easily decide on a fixed remuneration, and give it only to those who are willing to do that at that rate. If later on due to certain developments which could not be foreseen, it had resulted in increased service to be rendered, that could always be assessed at a just and reasonable amount. For holding an auction, a fixed remuneration of Rs. 2,000/- could have been awarded, because what was expected to be done was to invite the tenders and no other. It was later on directed to be sold in public auction. When every expenditure is borne by the party in distress, if an unanticipated work had come to be done by the auctioneer, then an added remuneration could have been ordered, so that the ultimate amount arrived at, is within reasonable limits. What is of paramount consideration is the interests of the parties to the proceedings, and not that of the Advocate Commissioner or the Auctioneer or

Receiver;

9. Therefore, these petitions are dismissed. No costs.

10. Petitions dismissed.