

(1995) 03 MAD CK 0119

In the Madras High Court

Case No : Writ Petitions No"s. 7088 and 7089 of 1985 and W.M.P. No"s. 10724 of 1985 and 3295 of 1987

DEVAKI AMMAL (DECD.) AND OTHERS

APPELLANT

Vs

TAX RECOVERY OFFICER AND OTHERS.

RESPONDENT

Date of Decision : 25-03-1995

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 34 Rule 5

Citation : (1996) 140 CTR 119 : (1996) 218 ITR 518

Hon'ble Judges : Raju, J

Bench : Division Bench

Judgement

RAJU J. - The above writ petitions have been filed by the same writ petitioner, who claimed to be the wife of the late M. Natesan, who was an assessee to Income Tax and the defaulter. After her death, the legal representatives have been brought on record. Common submissions have been made and, therefore, the writ petitions are dealt with together.

The Income Tax dues recoverable from the later M. Natesan having fallen into arrears, the Income Tax Officer concerned appears to have issued a certificate dated March 22, 1971, pursuant to which the properties bearing door No. 15, Kandappa Pillai Street, Madras-31, and door No. 4, Dr. Guruswami Mudaliar Road, Madras-31 came to be attached in terms of the provisions contained in Schedule II to the Income Tax Act, 1961 (hereinafter referred to as "the Act"), for attachment and sale of the immovable properties of the defaulter. On January 2, 1985, the petitioner and her sons appear to have been issued with a notice for settling the terms of sale proclamation of the property situate at No. 15, Kandappa Pillai Street, Madras-31, since by then the defaulter had died. The petitioner appears to have given a letter agreeing to have the property bearing door No. 15, Kandappa Pillai Street, Madras-31, sold in public auction. On March 18, 1985, the sale notice in respect of that property has been issued along with a proclamation of sale of even date. On April 25, 1985, the petitioner appears to

have presented a petition to the Commissioner of Income Tax (Tax Recovery), praying for postponement of the auction sale. The sale was fixed originally to be held on April 26, 1985, and it was proceeded with and conducted on that day, in which the third respondent, who got subsequently impleaded as a party respondent, was the successful bidder for a sum of Rs. 70,500. There is no controversy over the position that the successful bidder has remitted the amounts due in respect of the purchase made by him in accordance with law. While that be the position, on May 9, 1985, the petitioner presented a petition under rule 61 of the Rules in the Second Schedule to the Act praying for setting aside the sale, but without complying with the stipulation contained in proviso (b) which obliges an application made by the defaulter under the rule to be disallowed unless the applicant deposits the amount recoverable from him in execution of the tax recovery certificate. By an order dated June 13, 1985, the application dated May 9, 1985, came to be rejected for non-compliance with the proviso (b) to rule 61 of the Second Schedule. Thereupon, on June 17, 1985, an order of confirmation of sale was also made by the sale officer. While that be the position, the petitioner has moved this court on July 2, 1985, praying for a writ of certiorari to call for and quash the proceedings of the first respondent dated June 13, 1985, rejecting the application. On July 23, 1985, this court in W.M.P. No. 10724 of 1985, granted stay of further proceedings. On March 25, 1987, the stay petition came up for orders along with an application filed by the third respondent for vacating the stay and by an order dated March 25, 1987, it was directed that the issue of sale certificate be stayed pending disposal of the writ petition. The writ petitioner also filed W.P. No. 7089 of 1985, for a writ of declaration declaring that the proviso to rule 61 of the Second Schedule to the Act which imposed a condition of pre-deposit of the arrears as a condition precedent for entertaining an application for setting aside the sale as unconstitutional.

During the pendency of the above writ petitions on July 2, 1992, the petitioners appear to have paid to the department the entire arrears as per the recovery certificate, as a consequence of which, on July 16, 1993, the attachment in respect of the other property bearing door No. 4, Dr. Guruswami Mudaliar Road, Madras-31, was said to have been raised. The first respondent, as also the third respondent, has filed separate counter-affidavits opposing the claim of the writ petitioner on several grounds, both factual and legal. At the time of hearing of the writ petitions, learned counsel for the petitioner has to fairly concede that he cannot substantiate the challenge with reference to the provisos to rule 61. A cursory perusal of provisos (a) and (b) to rule 61 of the Second Schedule to the Act would go to show that they are almost akin to similar provisions contained in rules 89 and 90 of Order XXI of the Civil Procedure Code, 1908. That apart, imposing a condition of the nature obliging the defaulter to pay the arrears as per the tax recovery certificate is meant to avoid frivolous and routine applications being mechanically filed for setting aside a sale and such stipulations cannot be considered to be either arbitrary or unreasonable. For all the reasons

stated, I do not see any merit in W.P. No. 7089 of 1985 and the same shall stand dismissed.

So far as W.P. No. 7088 of 1985 is concerned, learned counsel for the petitioner vehemently contended that inasmuch as the writ petitions have been field in this court, challenging the order passed rejecting the application for setting aside the sale and stay of further proceedings have been obtained and inasmuch as the sale certificate has not been issued in favour of the successful bidder notwithstanding his remittance of the amount due from him pursuant to the acceptance of his bid and confirmation of the sale, the entire proceedings pertaining to the sale must be considered to be in a fluid state and has not reached finality and inasmuch as the petitioner has paid the entire arrears due as per the tax recovery certificate on July 26, 1992, the Tax Recovery Officer must be directed to consider the petition for setting aside the sale once over again. Learned counsel further argued that there were certain irregularities in the form of misdescription of the property by a wrong statement of its location and that the property also has not fetched proper value and that, therefore, this court must ensure that equity and justice are rendered to the petitioner by passing such an order of direction the first respondent to reconsider the petition for setting aside the sale.

The first respondent has filed a detailed counter-affidavit, in which while traversing the factual claims made regarding the value of the property and also the misdescription regarding the location of the property, it is stated that in the public notice of sale, etc., the location of the property has been properly given as Chetpet and not as Shenoy Nagar, that the property which is a tiled house is found located on the banks of Cooum and it is known for being innundated during the rainy season and that, therefore, that was the only reasonable price that it could fetch and, therefore, there is no merit in the contentions on behalf of the petitioner. It was also contended in the counter-affidavit that no exception could be taken to the order passed by the first respondent since in the absence of the pre-deposit as stipulated in proviso (b) to rule 61 of the Second Schedule to the Act, the first respondent is obliged and has no discretion left with him except to reject the application filed under rule 61 to set aside the sale and that, therefore, the petitioner is not entitled to successfully challenge the impugned order dated June 13, 1985. It has also been contended by learned senior counsel appearing for the Department that the fact that in 1992, the arrears have been paid and the attachment with reference to the other property has been raised is no justification to restore the application dated June 13, 1985, properly and validly rejected for non-compliance with proviso (b) to rule 61 of the Rules in the Second Schedule to the Act. In support of the claims made on behalf of the petitioner, reliance has been placed on the decisions reported in *Varadarajan v. Muthu Venkatapathi Reddy*, AIR 1953 Mad 587 and *S.V. Ramalingam and Others Vs. K.E. Rajagopalan and Another*, . Mr. Janarthana Raja, learned counsel appearing for the third respondent in addition to referring to the other rules which provide for various opportunities at every point of time to the defaulter to

salvage his position placed reliance upon the decision of the learned single judge of the Karnataka High Court reported in *M.R. Anthony Swamy Vs. Commissioner of Income Tax, Karnataka-I and Others*, .

In *Varadarajan v. Muthu Venkatapathi Reddy*, AIR 1953 Mad 587, a Division Bench of this court held that the restoration of a petition under Order XXI, rule 90, dismissed for default would make the confirmation of sale already made pursuant to the order of dismissal ineffective and that such an order of confirmation may be treated as automatically vacated or even may be considered to be null and void. No exception could be taken to this proposition of law. If the sale has been confirmed after the dismissal of an application under Order XXI, rule 90, for default the restoration of the application so dismissed sets at naught the proceedings taken on the basis of the order of dismissal. The decision reported in *S.V. Ramalingam and Others Vs. K.E. Rajagopalan and Another*, is one rendered in the context of an application made under Order XXXIV, rule 5 of the Civil Procedure Code, 1908, before the High Court in a pending appeal proceedings against the challenge made to the court auction sale of the properties of the judgment debtor. On a review of the case law as also the peculiar provisions contained in Order XXXIV, rule 5 of the Civil Procedure Code, 1908, which gave the right of redemption to the mortgagor. A learned single judge of this court held that the appeal preferred by the judgment debtor before the High Court had the effect of rendering the sale and its confirmation fluid and nebulous and that the finality of the sale was rendered at large and as such, the petitioners would be entitled to exercise the right conferred on them under Order XXXIV, rule 5, to redeem the mortgage. In *M.R. Anthony Swamy Vs. Commissioner of Income Tax, Karnataka-I and Others*, , a learned single judge of the Karnataka High Court had an occasion to deal with a challenge to the sale made in the context of rejection of a claim under rule 61 for setting aside the sale. This was a case where in the sale was of immovable property of the defaulter during the pendency of an appeal against an order of assessment since the assessee defaulter could not obtain stay of recovery proceedings. The sale was held and also came to be confirmed in favour of the auction-purchaser, but subsequently the order of assessment came to be set aside. It is in that context that the claim of the defaulter was considered by the learned single judge. It was held that the sale cannot be set aside unless the material irregularity resulted in a substantial injury to the assessee and while relying upon the decisions of this court reported in *S. Chokalingam Asari Vs. N.S. Krishna Iyer and Others*, and *Janak Raj Vs. Gurdial Singh and Another*, , it was held that if public auctions held by a court or public authorities have to be reversed lightly and mechanically, there would be no inducement to the intending purchasers to buy at execution sales and consequently, the property would not fetch its proper price at such sales and that, therefore, courts must see that the title of the stranger purchasers also should be protected, even though in any individual case it may work some hardship, since such object of protecting the purchasers also is conceived in the interests of the general body of judgment-debtors.

So far as the facts on hand in this case is concerned, it cannot be ignored that proviso (b) to rule 61 obliges the authority concerned to disallow an application for setting aside the sale unless as a condition for such filing pre-deposit of the arrears as per the certificate issued by the tax Recovery Officer is deposited. In this case, it is an indisputable fact that no amount whatsoever has been paid leave alone the payment of the arrears as per the certificate from the materials made available before this court, it is seen that the auction sale was initiated to recover a sum of Rs. 5 lakhs odd as on that date. Consequently, the rejection of the application as per the statutory mandate by the first respondent on June 13, 1985, could not be said to be illegal nor could the order of confirmation which followed as an inevitable consequence on June 17, 1985, be said to be contrary to law. The question for consideration in the light of the submissions made on behalf of the petitioner is as to whether the filing of the writ petition and its pendency could be said to have rendered the sale proceedings remain in a fluid state without attaining finality or that this court can direct fresh consideration of the petition perfunctorily filed under rule 61 without complying with the essential prerequisite for setting aside the sale. Unlike the case dealt with by the Division Bench in *Varadarajan v. Muthu Venkatapathi Reddy*, AIR 1953 Mad 587, it cannot be stated in this case that the confirmation came to be made on account of an order which has been or which has got to be set aside, inasmuch as the confirmation in this case came to be made only on account of dismissal of the application necessitated by the dictates of the very rule, under which the application for setting aside the sale came to be filed. The learned judgment dealing with the case which resulted in the decision reported in *S.V. Ramalingam and Others Vs. K.E. Rajagopalan and Another*, was concerned with an application for setting aside the sale on the ground of the sale having been vitiated on account of material irregularities in the conduct of the sale under Order XXI, rule 90 of the Civil Procedure Code, 1908. So far as the provisions of the Second Schedule to the Act are concerned, an application to set aside a sale on the ground of non-service of notice or any irregularity, unlike the provisions contained in Order XXI, rule 90, cannot be merely filed raising certain grounds of irregularity only, but has to satisfy the condition relating to the pre-deposit of the amount recoverable in execution of the certificate. Otherwise, it cannot be considered to be an application in the eye of law and if as per the mandate contained in the proviso (b) to rule 61, the application was rejected and as a consequence of the same under rule 63, there has been confirmation merely because after seven years of the confirmation of the sale, the defaulter has paid the arrears of tax that is no extenuating circumstance to give a go-by to the specific requirement of the proviso (b) to rule 61 and impress the application otherwise perfunctory with legality for consideration afresh. As rightly pointed out by learned counsel for the third respondent his client also has paid a sum of Rs. 70,500 plus the additional amounts by way of incidental charges as early as in 1985, and consideration of equity does not lie only in favour of the petitioner and the same should weigh more in favour of the third respondent. With reference to the valuation as noticed supra, the location of the property as found

disclosed in the counter-affidavit filed by the first respondent is pressed into service and it is contended that there is no material to the contra also. For the above reasons and circumstances, I am unable to countenance the claim made on behalf of the petitioner on some abstract considerations of equity alone ignoring the equity that has to be taken into account in favour of the third respondent also, whose money has been locked up with the Department all along for no fault of his. The principles laid down by the learned judges, in the decisions reported in *Varadarajan v. Muthu Venkatapathi Reddy*, AIR 1953 Mad 587 and *S.V. Ramalingam and Others Vs. K.E. Rajagopalan and Another*, , in my view will have no application to the situation of the particular rules with which we are concerned. As pointed out earlier, it may not be proper at this stage to direct the restoration of an application rejected as early as on June 13, 1985, for valid and justifying reasons.

Even that apart, I am of the view that the petitioner may not be entitled to any indulgence in the hands of this court in exercise of its jurisdiction under article 226 of the Constitution of India. As rightly pointed out by learned senior counsel for the department, even after the petition alleging irregularities and also the request for postponement of the sale in April, 1985, and the rejection of the petition on May 9, 1985, the petitioner herself has filed another petition dated May 14, 1985, and in paragraphs 8 to 10 thereof it is stated as hereunder :

"8. I am an elderly lady and I am also sick. I have no other resources except the above property which has been provided to me by my parents and brothers. The above property does not belong to my husband and he has no interest therein. The said property is also not liable to attachment for his tax arrears.

9. Myself and my children are agreeable to utilise the entire property left behind by my husband, viz., the property at No. 15, Kandappa Pillai Street, Chetput, Madras-31, towards the tax arrears of my husband. We are agreeable to the above property being sold and the entire amount utilised for settlement of the tax arrears of my husband. We have no other resources available with us.

10. In these circumstances, I pray that the Honble Commissioner be pleased to direct that the entire sale proceeds of the property at No. 15, Kandappa Pillai Street, Chetput, Madras-31, be adjusted against the tax arrears of the late M. Natesan and the balance of arrears, if any, be written off."

The averments would show that even as late as on May 14, 1985, the petitioner was prepared to have the sale in respect of the property in question proceeded through without demur and save for herself the other item which was also attached and this court cannot in the teeth of this factual position come to the rescue of the petitioner or her heirs at this stage.

For all the reasons stated above, W.P. No. 7088 of 1985, fails and shall stand dismissed. No costs. Connected W.M.P., if any, also dismissed.