

(1998) 02 MAD CK 0077

In the Madras High Court

Case No : C.R.P.No.3387 of 1992 and C.M.P.No.17316 of 1992

K. Veereswaran

APPELLANT

Vs

N. Subramanian Chettiar and 22 others

RESPONDENT

Date of Decision : 10-02-1998

Acts Referred:

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

Citation : (1998) 2 CTC 393 : (1998) 3 MLJ 673

Hon'ble Judges : K. Govindarajan, J

Bench : Single Bench

Advocate : Mr. K. Srinivasan, for the Appellant; Mr. Jyothimani and Mr. R. Kannan, for the Respondent

Final Decision : Dismissed

Judgement

K. Govindarajan, J.

1. The first respondent herein obtained a decree in O.S.No.622 of 1972 against the respondents 2 to 23. After obtaining the decree he filed

E.P.No.366 of 1978 and brought the properties of the respondents 2 to 23 for sale. The sale was conducted on 15.10.1990. The petitioner herein

purchased the said properties. The first respondent filed an application in E.A.No.866 of 1990 in E.P.No.366 of 1978 in the above suit on the file

of the learned III Additional Sub-Judge at Madurai, to set aside the said sale held on 15.10.1990, and deposited the entire amount within 30 days

from the date of the said sale, which is in time. That application was resisted by the petitioner on the ground that the applicant in E.A.No.866 of

1990 has no interest in the said properties and so he cannot entertain that application to set aside the sale. The court below rejected the case of the

petitioner herein and respondents 2 to 23, and allowed that application.

Aggrieved against the same, the petitioner herein has filed the above revision.

2. Admittedly, the first respondent deposited the entire auction sale amount within 30 days from the date of the said sale. The only question arises

in this revision for consideration is whether the first respondent can maintain the said application under Order 21, Rule 89 of the code of Civil

Procedure.

3. It is not in dispute that the first respondent is the tenant in respect of a portion of the building in the suit properties. The learned counsel

appearing for the petitioner has submitted that the first respondent who is only a lessee cannot sustain the application as he has no interest in the

said property.

4. Under Order 21, Rule 89 of the Code, a person who is having title or interest in the property can come forward with such application. Order 21

, Rule 89 of the Code reads as follows:-

Application to set aside sale on deposit:- (1) Where immovable property has been sold in execution of a decree, (any person claiming an interest in

the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person), may apply to have

the sale set aside on his depositing in Court:-

(a) for payment to the purchaser, a sum equal to five percent of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less

any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(High Court Amendment: (Madras):- In sub-rule (1) as it stood before A.A. No.104 of 1976 for the word "any person, either owning, before

such sale", substitute the words "the judgment-debtor or any person deriving title from the judgment-debtor or any person holding an interest in the

property".

At the end of sub-rule (1), insert the following proviso:

"Provided that where the immovable property sold liable to discharge a portion of the decree debt, the payment under clause(b) of this sub-rule

need not exceed such amount as under the decree the owner of the property sold is liable to pay" (1936)

(2) Where a person applies under Rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be

entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the

proclamation of sale.

5. A lease is not a mere contract but is a transfer of interest in the property and creates a right in rem. Such an interest of a tenant is a right to

property. In *Kally Dass Ahiri v. Monmohini Dassee*, 1897 (24) Cal. 440 it has been held as follows:-

A man who being owner of land grants a lease in perpetuity carves a subordinate interest out of his own and does not annihilate his own interest.

This result is to be inferred by the use of the word "lease", which implies an interest still remaining in the lessor. Before the lease the owner had the

right to enjoy the possession of the land, and by the lease he excludes himself during its currency from that right, but the determination of the lease

is the removal of that barrier, and there is nothing to prevent the enjoyment from which he had been excluded by the lease.

6. The estate of the lessor and lessee are estates of inheritance, and the interest of the lessor and the lessee after their death vest in their heirs,

executors or devisees.

7. Following the decision of the Calcutta High Court in *Paresh Nath Singha v. Nabogopal Chattopadhyaya*, ILR 1901 Cal. (F.B.), the Division

Bench of this Court in *Bodapati Adenna v. Bodapati Chinna Ramayya*, 54 M.L.J. 445, has held that a lessee subject to whose lease immovable

property has been sold in Court auction can apply Under O.21, R.89 of the Code to have the sale set aside.

8. In view of the above discussions and decisions, the submission made by the learned counsel appearing for the petitioner cannot be sustained.

Accordingly, this revision is dismissed. No costs. Consequently, C.M.P.No.17316 of 1992 is closed.