(2011) 12 MAD CK 0025

In the Madras High Court

Case No : C.M.S.A. (MD) No. 44 of 2011 and M.P. (MD) No. 1 of 2011

Mohideen Pitchai and Noorammal APPELLANT

Vs

Salim RESPONDENT

Date of Decision : 23-12-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 65, Order 21 Rule 66, Order 21 Rule 90, Order 21 Rule 91, Order 43 Rule 1(j)

Citation : (2012) 3 LW 596

Hon'ble Judges : T. Mathivanan, J

Bench : Single Bench

Advocate : R.G. Shankar Ganesh, for the Appellant; N.C.R. Janagan, for the Respondent

Final Decision : Dismissed

Judgement

T. Mathivanan, J.—This Civil Miscellaneous Second Appeal is directed against the judgment and decree, dated 01.06.2011 and made in CMA No. 7 of 2010 on the file of the learned Principal District Judge, Theni, confirming the order, dated 22.02.2010 and made in E.A. No. 208 of 2009 in E.P. No. 15 of 2006 on the file of the learned Subordinate Judge, Uthamapalayam. The facts, which are absolutely necessary for the disposal of this appeal as under:-

The appellants herein are the defendants in O.S. No. 138 of 2004. The respondent herein is the plaintiff in the suit. The respondent herein has instituted the suit in O.S. No. 138 of 2004 on the file of the learned Subordinate Judge, Uthamapalayam, for recovery of a sum of Rs. 2,53,866/-, which includes interest as against the appellants herein.

2. The suit was decreed as prayed for on 18.03.2005. Subsequent thereof, the respondent/plaintiff has initiated execution proceedings in E.P. No. 15 of 2006 on the file of the Court of first instance, wherein the property of the appellants/ defendants was sold in court auction.

3. The respondent, being the decree-holder has purchased the property on 20.10.2008, after getting necessary permission from the Court of first instance in E.A. No. 5 of 2008 on 20.02.2008. The sale, dated 20.10.2008 was confirmed on 22.12.2008 and a sale certificate was also issued in favour of the respondent/ plaintiff on 4.2.2009. But only under this circumstance, the appellants/ defendants came out with an application in E.A. No. 208 of 2009 under Order 21 Rule 90, to set aside the sale, which took place on 20.10.2008 on the ground of material irregularity and fraud. That application was resisted by the respondent/ plaintiff and on hearing both sides, it was dismissed on 22.02.2010.

4. Impugning the order of dismissal, the appellants have preferred a revision in CRP(MD) No. 876 of 2010. But that revision petition was dismissed on the ground of maintainability and this court has also found that against the order passed under Order 21 Rule 90 of the Code of Civil Procedure, appeal alone would He under Order 43 Rule 1(j) of the Code of Civil Procedure. Accordingly, the appellants have preferred an appeal in CMA No. 7 of 2010 before the learned Principal District Judge, Theni. After hearing both sides, the learned Principal District Judge, Theni, has proceeded to dismiss the appeal in CMA No. 7 of 2010 on 01.06.2011, confirming the order passed by the Court of first instance, in E.A. No. 208 of 2009.

5. Being aggrieved by the order passed in CMA No. 7 of 2010, the appellants/ defendants/ Judgement Debtors have approached this court by way of this Civil Miscellaneous Second Appeal.

6. Heard Mr. R.G. Shankar Ganesh, the learned counsel appearing for the appellants and Mr. N.C.R. Janagan, the learned counsel for the respondent.

7. On the grounds of Memorandum of Civil Miscellaneous Second Appeal, the following substantial questions of law have been formulated for the consideration of this court:-

(1) Whether the period of limitation of 60 days has to be calculated from the date of sale conducted by the Central Nazir or from the date of hearing subsequent to sale?

2. Whether the application under Order 21 Rule 90 CPC has to be filed within the period of 60 days when fraud and material irregularity has been pleaded by the appellants?

3. Whether reserve price has to be mentioned when the decree holder himself purchases the property in court auction sale?

4. Whether quoting of lesser price be a ground to set aside the sale?

8. The substantial questions of law 1 and 2 are identical in nature. Similarly, the questions of law 3 and 4 are also identical in nature.

9. As it is manifested from the records, the suit in O.S. No. 138 of 2004 filed by the respondent/plaintiff herein was decreed for a sum of Rs. 2,53,866/- [Rupees

Two lakhs Fifty three thousand eight hundred and sixty six only]. The appellants being the defendants and judgment debtors have not challenged the decree and judgment made in the suit. Hence, the respondent has initiated the execution proceedings in E.P. No. 15 of 2006 for realising of Rs. 3,98,790-50/-. That execution petition was contested by the appellants. But ultimately they were defeated.

10. It also reveals from the records that even after fixing the upset price, none had come forward to bid the auction and hence, the respondent/plaintiff/decree holder had sought permission of the Court of first instance in E.A. No. 5 of 2008. Accordingly, permission was also granted on 20.02.2008 to bid the auction.

11. It also appears from the records that the applications to fix the up set price viz., E.A. No. 117/2006, 28 of 2007, 4 of 2008, 42 of 2008, 43 of 2008 and 44 of 2008 were filed and in all the above said proceedings, the appellants had participated.

12. It is also relevant to note here that the appellants had never chosen to object the respondent/plaintiff from participating in the auction.

13. As observed earlier, the respondents/ plaintiff was duly permitted by the Court of first instance in E.A. No. 5 of 2008 to bid the auction on 20.2.2008. Accordingly, the sale was conducted on 20.10.2008 and the respondent/plaintiff/ decree holder had also purchased the property on the sale date itself.

14. Subsequent to that, on 22.12.2008, a sale certificate was also issued in favour of the respondent/plaintiff/decree-holder. Under this circumstance, the appellants had come forward with an application in E.A. No. 208 of 2009 under Order 21 Rule 90 CPC, for setting aside the sale on the ground of material irregularity and fraud. The Court of first instance, after analysing of the facts and circumstances and on perusing the materials available on record, had found that there was no fraud or material irregularity in conducting the sale and that the petition filed under Order 21 Rule 90 CPC was barred by limitation, as contemplated under Article 127 of the Limitation Act.

15. The first appellate Court viz., the learned Principal District Judge, Theni, has also endorsed the view taken by the Court of first instance and found that the appellants had miserably failed to prove their plea of fraud and material irregularity and that the petition made in E.A. No. 208 of 2009 under Order 21 Rule 90 had been barred by limitation, under Article 127 of the Limitation Act.

16. Mr. R.G. Shankar Ganesh, the learned counsel appearing for the appellants has based his argument on the following grounds:-

(i) the Court of first instance, instead of giving finding that the petition to set aside the sale under Order 21 Rule 90 CPC should be filed within 60 days from the date of date of confirmation of the sale, it has wrongly concluded that the petition under Order 21 Rule 90 CPC should have been filed within 60 days from the date of sale.

(ii) the Execution Court has not followed the proper procedure at the time of auction.

(iii) The respondent has failed to produce the encumbrance certificate to show that the property, which was brought for auction was subject to several encumbrances.

(iv) Since, the auction purchaser is the decree holder, the sale itself is not legally sustainable, and that the property was knocked down for a meagre price and in fact, the property would fetch more than Rs. 16,00,000/-. This itself would to go show that there was material irregularity in conducting the auction.

17. Based on the submissions made by Mr. R.G. Shankar Ganesh, the learned counsel appearing for the appellants, a prime question arises for the consideration of this court is:-Whether the period of limitation of 60 days shall have to be calculated from the date of sale or from the date of confirmation of sale?

18. In this regard, it is imperative on the part of the court to extract Rule 90 of Order 21 of Civil Procedure Code:-

Rule 90:-

Application to set aside sale on ground of irregularity or fraud.-

(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the application could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation- The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule.

19. Article 127 of the Limitation Act 1963, provides limitation of 60 days and running/starting point of limitation is the date of sale.

20. Obviously, the application in E.A. No. 208 of 2009 seems to have been filed under Order 21 Rule 90 CPC on the ground of fraud and material irregularity and hence, Article 127 of the Limitation 1963 would be certainly made applicable to the present case on hand.

21. On coming to the first question of law i.e., whether the limitation of 60 days

has to be calculated from the date of sale by the Central Nazir or from the date of hearing subsequent to the sale, it is quite relevant to refer Rule 65 of Order 21 of CPC.

22. Rule 65 contemplates that the sale by whom conducted and how made:- Save as otherwise prescribed, every sale in execution of a decree shall be conducted by an officer of the Court or by such other person as the court may appoint in this behalf, and shall be made by public auction in manner prescribed."

23. On coming to the instant case on hand, undoubtedly, the sale was conducted by the Deputy Nazir on 20.10.2008. The appellants have not chosen to produce any documentary evidence to show that the Deputy Nazir, who conducted the sale on the above said date, had committed material irregularity or fraud in publishing or conducting the sale. They have also failed to convince the court that they have sustained substantial injury by the reason of the material irregularity or fraud.

24. It is also not the case of the appellants that the Deputy Nazir, who conducted the sale was not authorised to accept the bid on the date of the sale itself i.e., on 20.10.2008. In the absence of any proof, with regard to the above subject, there may not be any impediment to conclude that the actual sale would be the date of sale, as contemplated under Article 127 of the Limitation Act 1963.

25. It is also not the case of the appellants that the respondent/decree-holder/ auction purchaser, had quoted gross undervaluation of the property and there was blind acceptance thereof by the court. Equally, it is also not the case of the appellants that the Deputy Nazir, who had conducted the sale had no authority to accept the bid or conclude the sale. Under this circumstance, the contention of the appellants does not assume importance and this court therefore finds that their plea of fraud or material irregularity in conducting the sale are baseless.

26. Order 21 Rule 66 CPC deals with the proclamation of sales by public auction.

(1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible-

(a) the property to be sold or where a part of the property would be sufficient to satisfy the decree, such part;

(b) the revenue assessed upon the estate or part of the state, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government.

(c) any encumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered; and

(e) every other thing which the Court considers material for a purchaser to known in order to judge of the nature and value of the property;

Provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs:

Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given, by either or both of the parties.

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner herein-before prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule(2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto.

27. But the appellants have not contended that Rule 66 of Order 21 CPC has been violated by the executing court.

28. Mr. R.G. Shankar Ganesh, the learned counsel appearing for the appellants has adverted to that the executing court ought to have concluded that the application filed under Order 21 Rule 90 CPC ought to have been made within 60 days from the date of confirmation of sale and that the executing court has not followed the procedure enunciated for conducting auction of sale.

29. He has also canvassed that notwithstanding the fact that the property, which was brought for sale was subject to encumbrance, the respondent/plaintiff/ decree holder had failed to produce the encumbrance certificate.

30. He has also maintained that despite the value of the property on the higher side, the trial Court had proceeded to sell the property for a meagre amount and for these reasons, there was material irregularity and fraud in the auction conducted in respect of the subject property and hence, he has urged to allow this appeal, after setting aside the order of dismissal of the application in E.A. No. 208 of 2009.

31. In support of his contention, he has also placed reliance upon the decision in A. Poongavana Naicker Vs. S. Muthurama Naidu and Others, In this case, in an execution of a decree certain, properties belonging to the judgment-debtor were brought to public auction by an order, dated 27th October, 1950 and the Central

Nazir in carrying out the Court orders, concluded the sale, when the highest bidder had made his proposal, and the whole matter came to a close on 1st November, 1950, the Subordinate Judge, who was on leave when the administrative act of the Nazir was in progress on his return from leave next day (2nd November, 1950) ordered the sale to be conducted from day to day and this order was overruled by the District Judge by an order asking the Subordinate Judge to accept the sale as concluded or to reject the same without interfering with the procedure by an order of the type he made.

32. On considering the nature of the facts of that case, this court has observed as follows:-

(i) It is not clear from the decision of the learned Judge as to whether he was aware on 2nd November, 1950, when he directed that the sale should go on from day to day, that the Central Nair had completed the bid on 1st November, 1950. If the Subordinate Judge, after knowing that the Central Nazir had completed the sale, or in other words, the properties were knocked down to the highest bidder, still thought that the sale should be held thereafter from day to day, it is tantamount to holding that the Subordinate Judge did not accept the Central Nazir''s conclusion of the sale and therefore, the sale had not become concluded and the order of the Subordinate Judge refusing to interfere at a later stage is erroneous in the exercise of his jurisdiction. If, on the other hand, the Subordinate Judge did not know that the Central Nazir had accepted the highest bid and according to the Central Nazir the sale had become complete and directed the sale to go on, then it is open to the Subordinate Judge, after knowing the correct state of facts, either to accept the sale as concluded or not. Since, it is difficult to find out and the parties are not able to clarify the situation as to under what impression the Subordinate Judge made the order dated 2nd November, 1950, in my opinion, the order of the Subordinate Judge cannot stand. Hence, this court has set aside the order of the Subordinate Judge and direct him either to accept or reject the final conclusion of the sale by the Central Nazir, if he did not know that at the time he passed the order on 2nd November, 1950, that the Central Nazir had finally concluded the sale. This court has also held that it is open to the Subordinate Judge in the exercise of his judicial discretion to accept the Nazir''s final acceptance or reject the same.

33. On a harmonious reading of this decision with the instant case on hand, this court is of view that the said decision cannot be made applicable to the instant case on hand, because the facts and circumstances narrated therein are entirely different.

34. Mr. R.G. Shankar Ganesh, the learned counsel appearing for the appellants has also placed reliance on an another decision in Lathislal vs. Lawarance Yesudhasan [2007 (2) CTC 632]. In this case, the Judgment-debtor had filed an application under Order 21 Rule 90, to set aside the sale on 6.10.2004 and the said application was returned on 8.10.2004 for certain compliances by giving a week''s time for representation. In the meantime, the court confirmed the

auction sale on 11.10.2004. Under this circumstance, this court has held that the court should have awaited till 15.10.2004 to enable the Judgement Debtor to represent application under Order 21 Rule 90, as week''s time granted for representation of returned application would expire on 15.10.2004 and for the reasons stated above, the order of confirmation of sale, dated 11.10.2004 was set aside as erroneous.

35. This decision is also not made applicable to the instant case on hand.

36. He has also quoted another decision in T. Narayanan Vs. The Official Liquidator High Court as the Liquidator of Sri Visalakshi Mills Pvt. Ltd. and Others, In this case, the Hon''ble Division Bench of this court has held that:-

It is pertinent to point that on 10.09.2009, when the two bidders were present, they were not ready with EMD. Hence, the sale was adjourned to 15.09.2009 calling upon them to be present with EMD. It is true that these are all procedural formalities. But, when the sale was made in favour of the bidders without making proper publicity of the sale and that too when the value found in the valuation report was found to be low, the sale cannot be upheld, and in the interest of all, it should have been made only after making property publicity."

37. It is also held that:-

It should not be forgotten that the Court can set aside the sale even though the same was confirmed, if the interest of the creditors at large, contributories and all concerned is affected. Merely because of the confirmation of the sale, the court will not become functus officio. In the instant case, no doubt this would cause inconvenience or even a loss to the highest bidder, but the same cannot be helped since in the instant case, the sale was conducted in the court premises, but not in a business house. Though the sale is not attacked on any ground of irregularity or fraud in the conduct of the sale, when the court is able to notice that there was neither just nor proper exercise of the judicial discretion, the sale has to be set aside on that ground.

38. The ratio, which has been applied in the above cited decisions, cannot be made applicable to the instant case on hand, because, there is no iota of evidence to show that the sale was made in favour of the respondent/decree holder, without making proper publicity of the sale. No such evidence is also forthcoming on the part of the appellants that the valuation of the property was found fault.

39. Apart from this, the appellants have attacked the sale only on the ground of material irregularity or fraud. For this also, they have not evinced any interest to substantiate their case.

40. It appears that the suit was decreed in the year 2005. As already observed, no appeal was filed against the judgment and decree and hence, the decree has become final. The execution petition seems to have been filed in the year 2006. The date of sale is 20.02.2008.

41. Article 127 of the Limitation Act, makes its clear that the period limitation to set aside the sale under Order 21 Rule 90 is 60 days, but the appellants have not chosen to file the application in E.A. No. 208 of 2009 within 60 days, reserving from the date of sale i.e., from 20.10.2008. Hence, this application is barred by limitation.

42. In this connection Mr. N.C.R. Janagan, the learned counsel appearing for the respondent/caveator has placed reliance upon in UCO Bank Vs. Dr. Ugra Pandian and Others, . In this case, the Division Bench of this court held as follows:-

9. To file an Application under Order 21, Rule 91 of the Code, limitation is contemplated under Article 127 of the Limitation Act. In the present case, though the sale was held on 13.04.1990 and confirmed on 11.06.1990, the application was filed only on 24.07.1990. As contemplated under Article 127 of the Limitation Act, the said Application should have been filed within 60 days from the date of sale. But, in this case, admittedly, the application was filed, after four months.

43. In para 11 of the same judgment, the Division Bench of this court, has made reference to the decision of Allahabad High Court in Gulzari Lal Vs. Sheo Charan Lal and Others, and held that:-

Article 181 of the Limitation Act, 1963 is a residuary article and cannot be applicable as there is a specific article which is applicable and all applications made under Civil Procedure Code, to set aside a sale in execution of a decree are governed by Article 166. As stated already, under the new Act, namely, the Limitation Act, 1963, Article 127 deals with setting aside a sale on execution of a decree, including any such application by a judgment-debtor. It contemplates 60 days of Limitation from the date of the sale.

44. The learned counsel appearing for the respondent/caveator has also placed reliance upon an another decision in P. Narayanan Vs. K. Baskaran and Palani Asari,] In this case, the appellant had filed a petition under Order 21 Rule 90 praying to set aside the sale. The learned Principal District Munsif Court, Nagercoil, had dismissed the petition and it was affirmed by the first appellant court. This court has further held that in order to set aside a Court sale, petition has to be filed within 60 days from the date of sale as per Article 127. Details of fraud must be specifically pleaded. Since, the alleged fraud has not at all been proved on the side of the appellant/petitioner/judgment debtor, it is needless to say that as per Article 127 of the Limitation Act, 1967, this petition is clearly barred by limitation. No material irregularity has occurred in conducting the sale of the property in dispute.

45. This court is able to find that the sale was conducted on 20.02.2008 and on that date itself, the respondent/plaintiff/decree-holder had purchased the property in the court auction. Then, it was confirmed on 22.12.2008 and thereafter, the sale certificate was issued on 4.2.2009.

46. As envisaged in the above cited decisions and as contemplated under Article 127 of the Limitation Act, 1967, the petition for setting aside the sale under Order 21 Rule 90 CPC should have been made within 60 days i.e., on or before 19.12.2008. But the appellants have filed the application in E.A. No. 208 of 2009 only on 22.12.2009. Hence, it is clearly barred by limitation.

47. It may be pertinent to point out here that the suit in O.S. No. 138 of 2004 was instituted on 30.12.2003. It may be also pertinent to note here that the respondent/plaintiff/ decree-holder has produced the encumbrance certificate for the period from 1.11.1992 to 31.12.2004 i.e. for 13 years.

48. It may be also be quite relevant to note that the encumbrance specified in their applications has not been specified in the encumbrance certificate produced by the respondent/plaintiff. The appellants have miserably failed to prove the fact that the encumbrance certificate, dated 10.12.2008, which was produced by them, is related to the property brought for sale.

49. Under this circumstance, this court would like to have reference to Rule 191 of the Civil Rules of Practice:-

191. Search of encumbrances:-In the case of sale of immovable property, the applicant shall cause a search to be made in the office of the Registrar of Assurances of the district or sub-district in which the property is situate. If a previous search has been made in the suit or matter, the search shall be made from the date on which the previous search was made, so that the whole period shall be not less than 12 years, or if no search has been made then for a period of not less than 12 years (prior to the date of the execution application on which the sale is ordered).

Note to Rule 191 of Civil Rules of Practice: It is contemplated that "in connection with a proposal of the High Court to amend rule 140, now rule 191 of the Civil Rules of Practice, with regard to the period which should be covered by the encumbrances certificate by sub- situating the words "prior to the date of the execution application on which the sale is ordered" for the words "prior to the date of the order for sale" an objection has been raised that the amendment will be a source of hardship and will also be impracticable inasmuch as Sub Registrar''s Offices, which are generally situated for away from the court-house, take nearly a month, after the date of application to issue an encumbrance certificate and the certificate is issued only upto the date of the application for the certificate. It has been represented that it will be sufficient, if the certificate relates to the period upto the date of suit, since all alienations subsequent to that date are pendente lite and will not be binding on the property as well as the auction purchaser. The High Court is of the opinion that any rule requiring the production of encumbrance certificates must in order to comply with the provisions of the Code be upto the date of the application for execution, as clause (3) of rule 66 of Order XXI, requires the application for execution to be accompanied with the necessary information as to encumbrances in the form of a verified statement. It is, therefore, obviously impossible to accept the view that the certificate need only, be produced upto the date of the suit as it will contravene the provisions of the Code.

50. It is also contemplated that:-

There is nothing in the rules which requires the production of the encumbrance certificate along with the execution application. The sale proclamation is settled some days after the application and it is always open to the party to file it before the date fixed for settling the proclamation. The Subordinate courts, are therefore, requested to fix the date for settling the sale proclamation with due regard to the time, which will be required to produce the encumbrance certificate, the distance of the registration office and other circumstances. The Hon''ble the judges also observed that there is no prohibition against an encumbrance certificate being obtained until the date of the decree as soon as it is passed and a supplemental certificate being obtained between the date of the decree and the date of the application for execution.

51. With regard to the alleged encumbrance, as stated by the appellants in their application, the Court of first instance, has clearly found that the appellants have not produced any documents to show that the property was mortgaged with GIC Housing Finance Limited, Madurai, for a sum of Rs. 2,70,000/-as loan.

52. Further, it was also argued on behalf of the appellants that in the suit O.S. No. 101 of 2006, the subject property was attached, but in order to prove their contention, they have also miserably failed to produce any documentary evidence.

53. This has been clearly found by the Court of first instance in the order in E.A. No. 208 of 2009 and therefore, it cannot be heard to say that several encumbrances made by the appellants in respect of the property would nullify the sale.

54. This court has carefully considered the materials available on record. Having regard to the related facts and circumstances, this court is of considered view that the appellants have miserably failed to establish their claim, for setting aside the sale. Keeping in view of this finding, this court has considered that this Civil Miscellaneous Second Appeal deserves to be failed. In the result, this Civil Miscellaneous Second Appeal is dismissed with costs and the orders of the courts below are confirmed. Consequently, connected Miscellaneous Petition is closed.

