
(1993) 08 MAD CK 0052
In the Madras High Court
Case No : C.R.P. No. 162 of 1987

P. Paramasivam

APPELLANT

Vs

Venkatachala Gounder, Periasamy and N. Ramasamy

RESPONDENT

Date of Decision : 02-08-1993

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 72, Order 21 Rule 90, 151, 47

Citation : (1993) 08 MAD CK 0052

Hon'ble Judges : Pratap Singh, J

Bench : Single Bench

Advocate : S. Sethuratnam, for the Appellant; A. Muthukrishnan, for the Respondent

Judgement

Pratap Singh, J.—This Civil Revision Petition is directed against the judgement in C.M.A. No. 4/86 on the file of the Subordinate Judge, Namakkal, reversing the order passed in R.E.A. No. 892/81 in R.E.P. No. 204/79 in O.S. No. 2147/73 on the file of District Munsif, Rasipuram. Short facts are In execution of the decree in O.S. No. 2147/73 property was brought to sale and was sold in court auction. The judgment debtors filed petition under O.21, R.90 read with S.47 Code of Civil Procedure, praying for setting aside the Court auction sale held on 29.10.81, alleging that there were material irregularities in the proclamation and sale and that the auction purchaser was none other than the undivided son of the decree holder and hence the sale was only a benami sale of the decree holder in the name of auction purchaser. After enquiry, the learned District Munsif had dismissed the petition. Aggrieved by that order, the petitioners in the trial court filed appeal in C.M.A. 4/86 before the Subordinate Judge, Namakkal. After hearing the parties, the learned Subordinate Judge had given a finding that the court auction purchaser had purchased the property on behalf of the judgment-debtor from out of the income of the joint family properties, without obtaining permission from the Court and so it was liable to be set aside. Holding, so, the lower Appellate Court had allowed the Civil Miscellaneous Appeal and set aside the court auction sale. Aggrieved by the said Judgment, the second respondent

in the Court below, viz, the court auction purchaser has come forward with this Civil Revision Petition.

2. Mr. S. Sethuratnam, the learned Senior Counsel, appearing for the revision petitioner, would submit that it cannot be construed that the court auction purchaser purchased the property on behalf of the judgment debtor from out of the joint family funds. He would further submit that this petition was filed under O.21, R.90, C.P.C and not under O.21, R.72, C.P.C. and while so, the question whether the Court auction purchase was on behalf of the decree holder ought not have been canvassed before the Courts below. I have heard the learned counsel for the respondents on the above aspects.

3. I have carefully considered the submissions made by rival counsel. In Suresh Babu v. Balasubramanian and another (1981-I-MLJ-1) it was held that obtaining of the permission under O.21, R.72 is mandatory, before a decree holder could bid at the auction and purchase the property and if the decree holder without obtaining such permission or in spite of refusal of such permission bid at the auction and purchased the property, he contravened a mandatory provision of law and in such a case, the appellant need not establish any substantial injury.

4. The lower appellate court has discussed the evidence with regard to the above aspects of the case in detail in para 9 of the judgment. It is not in dispute that the auction purchaser is none other than the undivided son of the decree holder. The lower appellate Court has pointed out that the decree holder had not stated in his evidence or in his counter that his son purchased the property in the court auction with his private funds in his personal capacity. The lower appellate Court has further pointed out that neither the auction purchaser viz. the son had given such evidence. When the decree holder and auction purchaser are father and son and belong to an undivided Hindu joint family and when there is no evidence that he has got any private funds, the presumption is that he made the purchase from out of the joint family funds. The lower appellate court had drawn the inference that for the joint family the decree holder had purchased the property in the name of his son. On the materials placed before the Court, this inference is well founded. It is not in dispute that no permission to bid in the auction was obtained by the decree holder. So the finding of the lower appellate court that the court auction sale is not valid, since the auction purchaser had purchased it on behalf of the decree holder, cannot be assailed.

5. Though the application was filed under O.21, R.90 and S.151, C.P.C., one of the grounds taken to set aside the sale is that the auction purchaser is the undivided son of the decree holder in the name of the auction purchaser. So the ground which one can take under O.21, R.72 had been taken. While so, because the relevant provision was not quoted, the relief cannot be denied. Failure to mention O.21, R.72 is not fatal to the case of the respondent. None of the submissions made by Mr. Sethuratnam finds acceptance with me and hence this civil revision petition will have to be dismissed. In view of the above, the Civil Revision Petition fails and shall stand dismissed. No costs.