
AIR 1988 Mad 114 : (1987) 100 LW 918

Madras High Court

Case No: C.R.P. No"s. 1023 of 1985, 15185 of 1986 and 6415 of 1987

L. Balu

APPELLANT

Vs

Periasami and Others

RESPONDENT

Date of Decision: June 25, 1987

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 64, Order 21 Rule 72, Order 21 Rule 92, Order 43 Rule 1, 151

Citation: AIR 1988 Mad 114 : (1987) 100 LW 918

Hon'ble Judges: Padmini Jesudurai, J

Bench: Single Bench

Advocate: T.D. Vasu, for the Appellant; N. Sivamani and S. Jagadeesan, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

1. The above revision by the judgment-debtor is directed against the order passed by the 11 Additional Subordinate Judge, Salem in E.P. 67 of

1984 in O.S. 143 of 1981, confirming the sale in respect of Items 2 and 3, on the ground that the sale of these items; amounted to excessive

execution being in violation of O. 21, R. 64, C.P.C.

2. The first respondent filed O.S. 143 of 1981 on the file of the Subordinate Judge, Salem, against the petitioner and respondents 2 and 3 for

recovery of a sum of Rs. 99,275 with future interest. The suit was decreed. The first respondent filed E.P. 67 of 1984 under O. 21, Rr. 43, 64, 66

and 68, C.P.C. in respect of three items of properties. Items 1 and 2 were Immovable properties, while Item 3 was the negative print of a Tamil

film with sound track. The value of the first item was shown in the E.P. as Rs. 30,000, the second item as Rs. 30,000, and the third item as Rs.

10,000. The execution petition was for a sum of Rs. 1,37,425. During the pendency of the execution petition, the petitioner had paid a sum of Rs.

30,000 making the balance to be realised as Rs. 1,07,425. All the three items were brought for sale. Item 1 was sold for Rs. 1, 15,000. Thereafter

the sale of Items 2 and 3 were held. The 4th respondent herein purchased items 2 and 3. On 11-2-1985 the sale in respect of items 2 and 3 in

favour of the fourth respondent was confirmed. The petitioner challenges the correctness of the above order of confirmation.

3. Thiru T. D. Vasu, learned counsel for the petitioner, contended that the balance of the decree amount that was outstanding on the date of the

sale was adequately met by the sale of item 1 and that the court officer ought not to have gone ahead with the sale of items 2 and 3, and that this

excessive execution was in, contravention of O. 21, R.64, C.P.C. and the decisions of the Supreme Court and of this court and that therefore the

sale in respect of items 2 and 3 ought not to have been confirmed.

4. Per contra, Thiru N. Sivamani, learned counsel for the first respondent, contended that the present revision itself was not maintainable in view of

the fact that this was an order passed under O. 21, R. 92, C.P.C. which was an appealable order under O. 43, R. 1(j) and that the petitioner ought

to have filed, a regular appeal within the prescribed time and the present revision filed under S. 115, C.P.C. was not maintainable.

5. When the main C.R.P. was heard, the petitioner, feeling doubtful as to whether the impugned order was an appealable one or not and whether

the present revision would lie, filed C.M.P. 15185 of 1986 under S. 151, C.P.C. seeking permission of this Court to convert C.R.P. No. 1023 of

1985 into a civil miscellaneous appeal. Learned counsel for the first respondent filed counter and objected to the same on the ground that even if

such conversion was permitted, the same could be done only if the conversion was sought for, within the period of limitation fixed for filing an

appeal. In the instant case, the application was filed out of time without any separate petition under S. 5 of the Limitation Act, to have the delay

condoned. Thereupon, the petitioner has filed C.M.P. 6415 of 1987 to condone the delay of 559 days in filing C. M.P. 15185 of 1986.

6. The following questions arise for consideration:

1. Whether the order passed by the executing Court under O. 21, R. 92, C.P.C. confirming the sale on the ground that no petition to set aside the

sale had been filed is an appealable order?

2. Whether the sale of items 2 and 3 is in violation of O. 21, R. 64, C.P.C.?

7. O. 43, R. 10) makes appealable

an order under R. 72 or R. 92 of O. 21 setting aside or refusing to set aside a sale.

A reading of the above sub-rule clearly indicates that an appeal would lie only against two categories of orders, viz., one setting aside the sale and

the other refusing to set aside the sale. Either of the above two contingencies would arise only if an application is made to set aside the sale either

under R. 72 or under the rules covered by R. 92 of O. 21, viz., Rr. 89, 90 and 91. Under O. 21, R. 72, C.P.C. a sale could be set aside when the

decree-holder either bids for or purchases the property without the necessary permission-of the Court. On an application either by the judgment-

debtor or any other person whose interests are affected by the sale, the Court could set aside the sale or refuse to set aside the sale. Both these

orders would be appealable orders under O. 43, R. 1(j). Similarly, when the sale is sought to be set aside under O. 21, R. 89, 90 or 91, by an

application, under the circumstances enumerated in the above rules, the Court could either set aside the sale or refuse to set aside the sale. Both

these orders also would be appealable orders under O. 43, R. 1(j). These would be the only orders that would be appealable under O. 43. R. 1

(j). Excluding these kinds of orders, O. 21, R. 92, C.P.C. contemplates a different kind of order, viz., confirming the sale, even when no

application to set aside the sale has been made. When the sale is sought to be confirmed on the ground that no application to set aside the sale has

been made, the question of the Court setting aside the sale or refusing to set aside the sale does not arise. When an order of confirmation is made

on the ground that no application to set aside the sale has been made, it cannot be stated that such an order would come within the purview of

O. 43, R. 1(j). It is significant that the wording in O. 43, R. 1(j) is not general in nature so as to include all kinds of orders passed under R. 92. It,

is limited to orders, setting aside or refusing to set aside the sale. When therefore, a sale is confirmed without any such contingency having arisen.

viz., when no application for setting aside the sale has ever been made, it should be taken that such an order of confirmation will not come under O.

43, R. 1(j) and it is not, therefore, an appealable order. The remedy open to the aggrieved party would be by a revision invoking the inherent

powers of this Court. In the instant case the order itself makes it clear that the sale was confirmed on the ground that no application for setting

aside the sale was made in respect of items 2 and 3. The present revision, therefore, is maintainable.

8. The question that remains to be considered is whether the sale in respect of items 2 and 3, when admittedly the sale proceeds of item 1 were

sufficient to satisfy the amount outstanding at the time of sale is in conformity with law.

9. Learned counsel for the petitioner placed reliance upon a decision of the Supreme Court in *Takkaseela Pedda Subba Reddi Vs. Pujari*

Padmavathamma and Others, wherein, from the words necessary to satisfy the decree in O. 21, R. 64, C.P.C. the Supreme Court inferred that

the executing Court derives jurisdiction to sell the properties attached only to the point at which the decree is fully satisfied and no sale could be

allowed beyond the decretal amount mentioned in the sale proclamation. Where the sale fetches a price equal to or higher than the amount

mentioned in the sale proclamation and is sufficient to satisfy the decree, no further sale should be held and the Court should stop at that stage. On

the above principles, the Supreme Court held that the fact that the judgment-debtor did not raise an objection on this ground before the executing

Court is not sufficient to put him out of Court, because his was a matter which went to the very root of the jurisdiction of the executing Court to sell

the properties and the non-compliance with the provisions of O. 21, R. 64. C.P.C. was sufficient to vitiate the same, so far as the properties sold

after the decree amount had been realised "The above decision has been followed by this Court in Subba Naicker v. Durairaj, (198) 98 MLW

352 wherein the Court directed the executing Court to sell item 3 first if it was found that the sale proceeds were not sufficient to satisfy the decree,

the sale of the other item, s could be conducted. In the instant case, the amount to be realised, after giving credit to the payment of Rs. 30,000,

made after the filing of the E.P. was Rs. 1,07,42-5. Item 1 had been sold for Rs. 1,15,000. It is obvious, therefore, that the amount outstanding

had been fully realised. The Execution Court therefore, ought not to have proceeded with the sale of items 2 and 3. Sale of items 2 and 3,

therefore, amounts to excessive execution and is in violation of O. 21, R. 64, C.P.C.

10. In the result, the revision is allowed and the order of confirmation of sale in respect of items 2 and 3 is set aside. No costs. In view of the

above order, C.M.P. 15185 Of 1986 and 6415 of 1987 are dismissed.

11. Order accordingly.