

Thankamma Vs Leelamma Abraham

Court: High Court Of Kerala

Date of Decision: Feb. 29, 2008

Acts Referred: Civil Procedure Code, 1908 (CPC) – Order 21 Rule 64, Order 21 Rule 66, Order 21 Rule 66(2), Order 21 Rule 89, Order 21 Rule 90

Citation: (2009) 2 CivCC 66 : (2008) 1 KLJ 907 : (2008) 2 KLT 500 : (2011) 7 RCR(Civil) 1181

Hon'ble Judges: Harun-UI-Rashid, J

Bench: Single Bench

Advocate: T.C. Mohandas, for the Appellant; Bechu Kurian Thomas, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

Harun-UI-Rashid, J.

This Civil Revision Petition is directed against the judgment dated 7-6-2006 in C.M.A. No. 66 of 2005 on the file of

the District Court, Kottayam. The execution court passed an order dismissing E.A. No. 407 of 2003 in E.P No. 324 of 2000 in O.S. No. 135 of

1997 on the file of the Principal Sub Court, Kottayam. E.A. No. 407 of 2003 was filed by the revision petitioner/judgment debtor under Order

XXI Rule 90 C.P.C. to set aside the court sale conducted on 2-6-2003.

2. O.S. No. 135 of 1997 is a suit for realisation of an amount of Rs. 47,656/- with 12% interest from 21-3-1994 to 20-11-1999 and future

interest at 6%. The respondent/deGREE-holder in execution of the decree in the said suit attached 41 cents of land belonging to the judgment debtor

and the execution court sold the said property in Court auction held on 2-6-2003. The decree-holder bid the auction and purchased the property

for Rs. 83,509/-. A petition for setting aside the sale was filed by the judgment debtor inter alia contending that there was no proper publication,

that the sale is vitiated by fraud and that the petitioner sustained substantial injury as the property was sold for inadequate price. It was also

contended that there were valuable trees in the property and that the decree-holder had deliberately withheld publication as a result of which the

intending purchasers were not able to participate in the auction. The judgment debtor also contended that the property was sold at the rate of Rs.

2000/- per cent whereas the property fetched more than Rs. 20,000/- per cent on the date of sale. She also contended that a portion of the

property alone was sufficient to satisfy the decree and that by the sale of the entire property, she was put to substantial injury.

3. In the objection filed by the respondent/decreed-holder, it is stated that the petitioner had also filed another E.A. u/s 47 C.P.C. for the very same

relief and as such, the petition is not maintainable. It is also stated that there was no objection from the side of the judgment debtor regarding the

value of the property at the time when Rule 66 notice was issued and that there was proper publication.

4. In support of and opposition to the petition for setting aside the sale, the parties were examined as PW1 and CPW1. The court below examined

the contention of the decreed-holder that the petition for setting aside the sale filed under Order XXI Rule 90 C.P.C. is not maintainable in view of

the earlier application filed u/s 47 C.P.C. The court below noticed the fact that E.A. No. 407 of 2003 was filed on 1-9-2003 under Order XXI

Rule 90 C.P.C. and that the application u/s 47 C.P.C. was filed subsequently on 13-10-2004. Following the decision of this Court that there is no

legal bar in simultaneously prosecuting the two applications and that when an application u/s 47 C.P.C. is filed challenging the sale to be void for

illegality or voidable on the grounds other than those contemplated under Order XXI Rule 90 C.P.C, the court below found that there cannot be

any bar in maintaining Order XXI Rule 90 application. The court below held that there was proper publication in conducting the sale. The court

below also held that at the time of proclamation, it was open to the revision petitioner to raise objection regarding the value of the property and that

having failed to raise any such objection, she is not entitled to challenge the sale on that ground in view of Order XXI Rule 90(3) C.P.C. The court

below further held that there is no irregularity, illegality or fraud in either publication or conduct of sale and that the revision petitioner failed to

establish that by reason of the sale she has sustained any substantial injury. The revision petitioner preferred C.M.A. No. 66 of 2005 before the

District Court, Kottayam. By the impugned order, the District Court confirmed the order passed by the execution court and dismissed the appeal.

The appellate court held that there was proper publication of notice and that the judgment debtor has not proved the substantial injury or

irregularity. The appellate court also held that no evidence was let in to prove the increase in price.

5. The transaction between the parties relates to an agreement executed on 24-12-1993 for sale of 41 cents of land. The land was sold for a

consideration of Rs. 2250/- per cent. Rs. 47,500/- was received by the revision petitioner from the respondent as advance amount. Since the sale

did not take place, the suit was instituted by the respondent and the present decree was passed for recovery of an amount of Rs. 47,500/- with

interest at 12% from 21-3-1994 to 20-11-1999 and future interest at 6% with costs. During the pendency of the execution petition for realisation

of the decree amount, certain payment were effected by the revision petitioner. According to her, an amount of Rs. 2500/- was paid on 27-5-

2002. Rs. 5000/- was paid on 10-10-2002, Rs. 1000/- on 16-12-2002, Rs. 2000/- on 2-11-2002, Rs. 5000/- on 29-11-2003 and another Rs.

5000/- on 10-4-2003. The property was sold on 2-6-2003 and purchased by the decree-holder for Rs. 83,509/-. The court sale took place ten

years after the agreement entered into between the parties fixing the price at Rs. 92,250/-.

6. The agreed price of the property as per the original agreement dated 24-12-1993 is Rs. 2,250/- percent which works out to a total amount of

Rs. 92,250/-. The property was sold in court auction for Rs. 83,509/- on 2-6-2003. There is a gap of ten years. It is common knowledge that

there has been three to five fold increase in the price of properties in Kerala during the gap of ten years. In some areas, the increase is much more

than that. No doubt, there was a sharp increase in the price of land throughout the state. The judgment debtor as RW. 1 gave evidence to the

effect that the price of the property per cent at the time of sale was more than Rs. 20,000/-. The property which was sold on 24-12-1993 at Rs.

2250/- per cent was sold in court auction after ten years for Rs. 83,509/- which is less than the agreed price in 1993.

7. The estimate of the value of the property is a material fact to enable the purchaser to know its value. It must be verified as accurately and fairly

as possible so that the intending bidders are not misled or to prevent them from offering inadequate price or to enable them to make a decision in

offering adequate price. The Supreme Court in *Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh*, held that the court, when stating the

estimated value of the property to be sold, must not accept merely the ipse dixit of one side. It is certainly not necessary for it to state its own

estimate. Rule 66(2)(e) of Order XXI C.P.C. requires the court to state only the nature of the property so that the purchaser should be left to

judge the value for himself. But, the essential facts which have a bearing on the very material question of value of the property. and which could

assist the purchaser in forming his own opinion must be stated, i.e., the value of the property, that is, after all, the whole object of Order XXI, Rule

66(2) C.P.C. Compulsory sale of immovable property under Order XXI C.P.C. divests right, title and interest of the judgment debtor and confers

those rights in favour of the purchaser. In the present case, the execution court had completely overlooked compliance of the mandatory procedure

and accepted ipse dixit of the decree holder. Fixation of Rs. 75,000/- as valued suggested by the decree holder and sale of the property; for Rs.

83,509/- had deprived the valuable rights of the judgment debtor. It is a case of non-application of judicial mind and abdication of judicial duty.

Though the insertion of an order judicially passed need not be made in the sale proclamation, the record should indicate that a judicial order has

been passed showing that it had applied its mind to the need for determining all the essential particulars, which would reasonably be looked for by

an intending purchaser. The relevant and material particulars should be inserted in the sale proclamation as accurately and precisely as possible. It

should not merely accept unhesitatingly the ipse dixit of one or either side or both. Where the court mechanically conducts the sale or routinely

signs assent to the sale papers, not bothering to see if the offer is too low and a better price could have been obtained, and in fact the price is

substantially inadequate, there is the presence of both the elements of irregularity and injury. It shall be the endeavour of the court, throughout the

entire process of sale, to obtain the adequate price of the property put in for sale. Obtaining of inadequate price in auction sale no doubt amounts

to "substantial injury" contemplated under Sub-rule (2) of Rule 90 of Order XXI C.P.C.

8. Non-application of mind is a material irregularity which vitiates the sale. Sale of land at Rs. 83,509/- after ten years of the transaction between

the parties at Rs. 92,250/- is bad. The drawing up of the proclamation of sale and settlement of its term by non-application of judicial mind renders

the sale a nullity, being void. The execution court has a salutary duty and a legislative mandate to apply its mind before settling the terms of

proclamation and satisfy that if part of such property as seems necessary to satisfy the decree should be sold if the sale proceeds or portion thereof

is sufficient for payment to the decree holder, so much of that property alone should be ordered to be sold in execution. It is a mandate of the

legislature which cannot be ignored. Non-application of mind to the question whether sale of a part of the property would satisfy the decree debt is

a material irregularity causing substantial injury to the judgment debtor attracting Order XXI Rule 90 C.P.C. In this case, a portion of the property

put to sale would have been sufficient to satisfy the decree. Sale of the entire property; for an amount of Rs. 83,509/- caused substantial injury to

the judgment debtor. The procedure adopted by the execution court bristles with several irregularities touching the jurisdiction of the courts. They

are not only material irregularities causing substantial injustice, but are in violation of the mandatory requirements of the rules.

9. The contention that a portion of the property would fetch the decree amount, even if not raised proclamation of sale, can be taken up in

proceeding under Order XXI Rule 90 C.P.C. is examined in Gnan Das v. Paulin Moaraes reported in 1998(2) KLT 88, a Division Bench of this

Court held that when the property attached is large, and the decree to be satisfied is small, a duty is cast on the court to ascertain whether the

decree would be satisfied by selling the small portion. No action of the court or its officers should be such as to give rise to the criticism that it was

done in an indifferent casual way. Non-discharge of its statutory duty renders the entire proceedings illegal and without jurisdiction. It is a mere

irregularity, but a matter which goes to the very root of jurisdiction of the court.

10. The court below has committed grave error and acted without jurisdiction in not addressing itself to the question as to whether one item of

property or portion of the properties it sold would the decree amount. The Division Bench in the decision cited supra held that Order XXI Rule

90(3) C.P.C. would not bar such a petition since the very question of jurisdiction of the court is involved. The court can even suo motu consider

such question, if it has committed an illegality which goes to the very root of the jurisdiction of the court. Even if no application is filed under Order

XXI Rule 89, 90 or 91 C.P.C., the court can look into the question whether it has acted in excess of its jurisdiction, when the question of

confirmation of sale comes up for consideration under Order XXI Rule 92 C.P.C.

11. The words ""necessary to satisfy the decree"" in Order 21 Rule 64 C.P.C. clearly indicate the legislative intent that no sale be allowed beyond

the decretal amount mentioned in the sale proclamation. In all execution proceedings, the court has to first decide whether it is necessary to bring

the entire property to sale or such portion thereof as may be necessary to satisfy the decree. If the property is large and the decree to be satisfied

is small, the court must bring only such portion of the property the proceeds of which would be sufficient to satisfy the claim of the decree holder.

The Supreme Court in Balakrishnan Vs. Malaiyandi Konar, held that the mandate contained in Rule 64 of Order 21 C.P.C. is not just a discretion,

but an obligation imposed on the court and that the sale held without examining this aspect and not in conformity with this mandatory requirement

would be illegal and without jurisdiction. Therefore, I hold that the sale conducted is not in conformity with the statutory requirements and,

therefore, illegal and without jurisdiction.

12. The procedure prescribed in the CPC in settling the sale proclamation and in publishing the same would pin point the importance of the

existence of a proper proclamation of sale in court auction. If the court fixes an upset price which does not reflect at least an approximately real

value of the property, the intending bidder would be misled by the same and this would, sometime, result in fetching a low price at the court auction

sale. A Division Bench of this Court in P.K. Kuruvilla v. Corporation Bank reported in 2008(1) K.H.C. 258 held that fixing upset price in a

mechanical manner would be against the mandate of Rule 66 of Order XXI C.P.C. This Court quoted with approval the decision of the Supreme

court in Desh Bandhu Gupta's case cited supra that Rule 90(3) C.P.C. has no application where sale was held in violation of the mandatory

requirements of the Rules. The facts narrated above would show that the court below had not complied with the mandatory requirements of Rule

64 and 66 of Order XXI C.P.C.

13. Learned Counsel appearing for the revision petitioner pointed out that the revision petitioner had brought to the notice of the appellate court

that objections were raised under Rule 66 C.P.C. on 19-9-2001 and that the court rejected the contentions stating that the records did not

indicate that any such objections were filed. From the oral evidence tendered by the judgment debtor, I find that she is the proprietor of a petty tea

shop who was making every effort to save her property from court auction. She and her family were able to make both ends meet from the income

she derived from the tea shop and from the auctioned property. Before the court below, the revision petitioner had expressed her readiness and

willingness to pay the balance decree amount. According to her, the decree holder did not receive the amount with the mala fide intention to

purchase the property in court auction at a low price. This Court tried to ascertain from the counsel for the revision petitioner whether the revision

petitioner was prepared to deposit the sale price, sale commission and interest on the sale price from the date of deposit till date of payment and

also the cost of stamp paper, if any. The revision petitioner has expressed her readiness to deposit the entire amount specified in the interim order

passed by this Court and has deposited the amount as directed by this Court.

14. In the light of the facts and circumstances mentioned above, I am of the view that the court below was not right in dismissing the application for

setting aside the sale. The sale is vitiated by material irregularity within the meaning of Rule 90 of Order XXI C.P.C. The revision petitioner

sustained substantial injury by reason of such irregularity.

15. In the result, the Civil Revision Petition is allowed, setting aside the impugned order passed by the court below. The application to set aside the

sale is allowed. The decree holder is entitled to appropriate the decree amount deposited by the revision petitioner. The revision petitioner shall

deposit the balance amount, if any, as directed by this Court in the interim order dated 9-4-2007 before the execution court within one month from

today. There will be no order as to costs.