

HIGH COURT OF KERALA

Division Bench: Hon'ble Mr. Justice Anil K. Narendran & Hon'ble Mr. Justice Harisankar V. Menon

Date of Decision: 5th April 2024

FAO No. 26 of 2022

Parties Involved:

APPELLANT:

ANITHA KUPLY

VERSUS

RESPONDENTS:

MARIKKAR PLANTATIONS (P) LTD.

M/S NEST REALITIES INDIA (P) LTD

MR. FM SHAMEER MARICKAR

Legislation and Rules:

Code of Civil Procedure, 1908 (CPC) - Order XXI Rule 90

Subject: Appeal against the order setting aside the sale of property under Order XXI Rule 90 of CPC, involving issues of material irregularity in sale proclamation, and the rights of third-party apartment purchasers.

Headnotes:

Execution of Decree – First Appeal Against Execution Court Order – Appeal challenging the order of the execution court setting aside property sale under Order XXI Rule 90 CPC. The sale involved property charged to realize a

decree amount, where the execution court found irregularities in property description and the judgment debtor's lack of absolute saleable interest. The appellant (decree holder) argued that the property description could not be altered during execution and the respondents (judgment debtors) failed to object at the time of sale proclamation. [Paras 1-8]

Material Irregularity in Property Sale – Held, the execution court correctly identified material irregularity in the sale process. Noted discrepancies in property description and the presence of a multi-storied apartment complex on the property. The rights of third-party apartment purchasers were affected. The decree holder's awareness of these facts and failure to disclose them constituted a material irregularity, despite the judgment debtors' silence during the execution proceedings. [Paras 9-10]

Application of Order XXI Rule 90(3) CPC – Court observed that the rule may not apply in cases of material irregularity where mandatory requirements of the rule are violated. Emphasized the importance of accurate property descriptions and consideration of third-party rights in execution sales. [Paras 10-11]

Decision – Dismissal of Appeal – Upheld the execution court's order setting aside the property sale. Acknowledged the decree holder's right to pursue legal avenues for executing the decree. [Para 13]

Referred Cases:

- Dhanalakshmi Bank Limited v. Divakaran [2000 (2) KLT 231]
- K.V. Antony v. Catholic Syrian Bank Ltd. [1994 (2) KLJ 339]
- Narasayya v. Subba Rao [AIR 1990 SC 119 : 1990 (1) KLJ 213]
- Nirmala v. Sundaresan [2023 (5) KHC 282]

Representing Advocates:

For Appellant: P. Thomas Geeverghese, Chacko Simon, Tony Thomas (Inchiparambil), E.S. Firos, Sidharth Sabu

**For Respondents: Sindhu S Kamath, Krishna Prasad. S, Swapna S.K.,
Rohini Nair, Suraj Kumar D.**

J U D G M E N T

Harisankar V. Menon, J.

The decree holder in E.P.No.130 of 2018 in O.S.No.130 of 2016 on the file of the Additional Sub Judge, Kottayam, is the appellant herein. This appeal is filed against the order dated 09.11.2021 in E.A.No.2 of 2020 in E.P.No.130 of 2018, by which the execution court has set aside the sale under Order XXI Rule 90 of the Code of Civil Procedure, 1908 (for short, CPC), at the instance of the judgment debtors (respondents herein).

2. The decree sought to be executed was a compromise decree whereby the plaint schedule property was charged for the realisation of Rs.54,15,228/- with interest at 10% per annum, chargeable cumulatively with monthly interest from 1st February, 2018, from the judgment debtors. It is seen that the case was posted for proclamation and the sale of decree scheduled properties on 04.03.2020 and on the same day it was purchased by the decree holder. The property sold in auction was having a total extent of 39.68 Ares.

3. Later, the judgment debtors 1 to 3 filed E.A.No.2 of 2020 in E.P.No.130 of 2018 in O.S.No.130 of 2016 under Order XXI Rule 90 of CPC for *setting aside* the sale. In the above petition, it is pointed out by the applicants-judgment debtors 1 to 3, that the description of the property in the schedule as 36.44 Ares comprised in resurvey No.218/2 and 84 square meters of land comprised in resurvey No.219/8 was not correct, since out of the total extent, 2.01 Ares is situated in resurvey No.218/2-2, 43 square meters in resurvey No.218/2-3, 34 Ares in resurvey No.218/2-4, 2.40 Ares in resurvey No.219/5 and 84 square meters in resurvey No.219/8-1. It is also pointed out that the judgment debtors were not having an absolute saleable interest in the property, since the property of 39.68 Ares belongs to the first judgment debtor, wherein the second judgment debtor had constructed an

apartment building complex having a total builtup area of 2.5 lakhs square feet comprising of 165 apartments, several of which were already sold out to third parties with undivided right in the land. Therefore, it was pointed out that the property cannot be said to belong to the first judgment debtor absolutely and the property was having a market value of Rs.3 crores and the apartments were having a market value of more than Rs.75 crores, which aspect was purposefully and fraudulently suppressed by the decree holder in the execution petition, because of which the upset price happened to be fixed at Rs.40,00,000/- alone. It is further pointed out by the judgment debtors that no notices were served on the purchasers of the apartments because of which their interests are also affected. Ultimately, it was prayed that the sale not being in accordance with law, ought not to have been confirmed, since there is an irregularity and lapse in the preparation of the sale proclamation which goes to the root of the matter. The judgment debtors specifically pointed out that the decree-holder had interest only in a three bed room apartment bearing No.12(A) TB1 having a super built-up area of 1465 sq.feet on the 13th floor of “Nest Orchid Apartments” along with a car parking area, the sale of which alone is sufficient to satisfy the decree.

4. The decree holder also filed objections contending that the petitions filed under Order XXI Rule 90 of CPC as above are not maintainable either in law or on facts, that the same property scheduled and charged by the compromise decree passed was alone put for sale, that the judgment debtors agreed that the decree-holder shall be entitled to sell the decree scheduled property for recovering the amount due to her, that as the decree scheduled property was put to sale, the judgment debtors are estopped from raising any objection against the same, that sale has been published and conducted in compliance with the law, that the description of the property in the proclamation schedule, valuation and fixation of upset price by the court was in the presence of the judgment debtors and therefore, the judgment debtors ought to have taken the grounds now raised at the time of drawing up the proclamation for sale.

5. The trial court by the impugned order dated 09.11.2021, found that it is the duty of the decree holder to provide a proper description of the property and to ensure that only such portion of the property to satisfy the decree is sold, the violation of which mandatory requirements definitely amounts to material irregularity, which makes the sale vitiated. It is further found that merely because the judgment debtors remained silent during the execution proceedings, it cannot be said that the burden cast upon the decree

holder has been discharged. Therefore, the trial court found that since the description of the property was not correct and since the property sold in execution fetches a high value, as also since the judgment debtors did not have a saleable interest over the whole decree scheduled property, there is material irregularity in publishing and conducting the sale, on account of which the sale requires to be *set aside*. Therefore, the application filed by the judgment debtors 1 to 3 was allowed by the execution court.

6. It is against the said order dated 09.11.2021 in E.A.No.2 of 2020 in E.P.No.130 of 2018 in O.S.No.130 of 2016 that the present appeal is filed by the decree holder-auction purchaser before this Court.

7. Heard the learned counsel appearing for the appellant-auction purchaser-decree holder and the learned counsel appearing for the respondents-petitioners-judgment debtors.

8. It is contended by the learned counsel for the appellant that the property auctioned in the sale is a decree scheduled property charged by consent and therefore, the appellant or the respondents cannot alter the property description during the execution proceedings. The learned counsel relied on Order XXI Rule 90(3) of CPC and submitted that the grounds raised in the application for setting aside the sale filed before the execution court were “pre-existing circumstances”, which could have been pointed out by the judgment debtors while finalising the sale proclamation and since they remained silent, subsequently, an application under Order XXI Rule 90 of CPC cannot be entertained. It is also pointed out that the finding that the properties are worth much more than the decree debt is made without considering the mortgagescharges on the property, since the respondents (judgment debtors) did not point out the mortgages in favour of the Kerala Transport Development Finance Corporation. The learned counsel for the appellant also relied on the decision of this Court in **Dhanalakshmi Bank Limited v. Divakaran [2000 (2) KLT 231]** to contend that the embargo under Order XX1 Rule 90(3) of CPC applies to the facts and circumstances of the case. He also relied upon another judgment of this Court in **K.V. Antony v. Catholic Syrian Bank Ltd. [1994 (2) KLJ 339]**, wherein the importance of Order XXI Rule 90(3) of CPC has been reiterated.

9. The learned counsel for the respondents-judgment debtors relied on the decision of the Apex Court in **Narasayya v. Subba Rao [AIR 1990 SC 119 : 1990 (1) KLJ 213]** to contend that the execution court ought to have noticed that for the realisation of a small amount compared to the

value of the property, the entire property through the description in the execution petition ought not have been permitted to be sold in auction. The learned counsel also relied on the decision rendered by a Division Bench of this Court in **Nirmala v. Sundaresan [2023 (5) KHC 282]** in which one of us [Anil K. Narendran, J.] was a party to contend that the limitation under Order XXI Rule 90(3) of CPC may not apply in all cases especially when the sale was being conducted in violation of the mandatory requirements of the rule or is vitiated by material irregularity.

10. It is seen that the execution petition was filed for the realisation of an amount of Rs.54,15,228/- with interest from 1st February, 2018. As against this, the property that was placed for sale was a property extending to 39.68 Ares wherein a multistoried residential apartment building complex was already constructed, having a total built-up area in excess of two lakh sq.meter, comprising 165 apartments. It is also noticed that out of the above apartments, many have already been sold in favour of the purchasers on account of which their rights are also affected. The decree-holder was aware of the existence of the multi-storied apartment complex in the property in question. This is especially so when the entire dispute was with respect to an apartment in the 13th floor which was agreed to be purchased by the decree holder. However, these aspects were not brought to the notice of the execution court while drawing up the proclamation of sale. In our considered view, this is a material irregularity which goes to the root of the matter. It is true that Order XXI Rule 90(3) of CPC provides that no application to *set aside* a sale shall be entertained upon any grounds which the applicant could have taken on or before the date on which the proclamation of sale was drawn up. This Court in **Nirmala [2023 (5) KHC 282]** reiterated that where the sale was held in violation of mandatory requirements of the rule or is vitiated by material irregularity, Order XXI Rule 90(3) of CPC would not be applicable.

Paragraph 20 of the said decision reads thus;

“20. Similarly, as provided under Order XXI Rule 90(3) of the CPC, no application to set aside the sale under this Rule shall be entertained upon any ground on which the applicant could have taken on or before the date on which the proclamation of sale was drawn up. In **P.K.Kuruvila v. Corporation Bank [2008 (1) KHC 258 : 2008 (1) KLT 604]** this Court held that where the sale was held in violation of mandatory requirements of the rule or is vitiated by material irregularity, Order XXI Rule 90(3) of the CPC would not be applicable. Notably, in the decision in **Nani Gopal Paul v. T.Prasad Singh and others [AIR**

1995 SC 1971] the Apex Court held that normally an application to set aside the sale has to be filed within the period of limitation and the said procedure need not be insisted upon when obvious and manifest illegality was committed in conducting court sale.”

Thus it is clear that when there is a material irregularity, the embargo under Order XXI Rule 90(3) of CPC may not have any application. Here a perusal of the facts and circumstances of the case would reveal that while drawing up the proclamation of sale on the basis of the petition filed, the execution court has not taken into consideration of the fact that for the realisation of the amount of around Rs.60 lakhs, a multi-storied apartment complex building and the property wherein that apartment complex is situated are put for sale. It might be that the judgment debtors could have pointed out this, earlier. However, the decree holder was also aware about the existence of the actual facts and figures while filing the execution petition as well as while drawing the proclamation for sale and she chose not to disclose the same. This definitely amount to a material irregularity, since the rights of many third parties (purchasers of individual apartments) are also involved. The provisions under Order XXI Rule 90(3) of CPC may not apply in such a situation.

In such circumstances, we are of the considered opinion that the order dated 09.11.2021 in E.A.No.2 of 2020 in E.P.No.130 of 2018 in O.S.No.130 of 2016 on the file of the Additional Sub Court, Kottayam cannot be found fault with. Hence, the present appeal is dismissed. Needless to say that the appellant-decree holder would be free to proceed in accordance with law, as regards the decree passed by the trial court.

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