

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

TUESDAY, THE 1ST DAY OF FEBRUARY 2022 / 12TH MAGHA, 1943

CRP NO. 156 OF 2020

AGAINST THE JUDGMENT DATED 12.06.2020 IN CMA 31/2019 OF DISTRICT
COURT, KOZHIKODE

PETITIONERS/APPELLANTS:

- 1 K. JAYARAJAN
AGED 52 YEARS
S/O. PADMANABHAN NAIR,
KEEDOTH HOUSE,
CHEVARAMBALAM P.O.,
CHEVAYUR, KOZHIKODE - 17.

- 2 CHANDHANAMPURATH SHEENA (DIED)
AGED 51 YEARS
W/O. K. JAYARAJAN,
KEEDOTH HOUSE, P.O. CHEVAYUR,
CHEVAYUR AMSOM AND DESOM,
KOZHIKODE TALUK, PIN - 670 017.

- ADDL. 3 YATHU KRISHNA
AGED 14 YEARS (MINOR)
S/O. LATE CHANDANAMPURATH SHEENA & K. JAYARAJAN,
REPRESENTED BY NATURAL GUARDIAN,
THE 1ST PETITIONER K. JAYARAJAN,
AGED 52 YEARS, KEEDOTH HOUSE,
CHEVARAMBALAM,
P.O. CHEVAYUR, KOZHIKODE-17

- ADDL. 4 RADHA
AGED 67 YEARS
M/O. LATE CHANDANAMPURATH SHEENA,
CHANDANAMPURATH HOUSE,
P.O. MEDICAL COLLEGE,
KOZHIKODE, PIN- 673 008.

(ADDITIONAL R3 & R4 ARE IMPEADED AS THE LEGAL HEIRS OF
DECEASED R2 AS PER ORDER DATED 03.01.2022 IN
I.A.NO.1/2021)

BY ADVS.
T.KRISHNANUNNI (SR.)
VINOD RAVINDRANATH

SMT.MEENA.A.
SRI.K.C.KIRAN
SMT.M.R.MINI
SRI.M.DEVESH
SRI.ASHWIN SATHYANATH
SHRI.ANISH ANTONY ANATHAZHATH
SHRI.THAREEQ ANVER

RESPONDENT/RESPONDENT:

SAMBASIVAN
AGED 63 YEARS,
S/O.P.C.NARAYANAN,
MEPPEKKATTIL PARAMBA,
CHEVAYUR AMSOM AND DESOM,
KOZHIKODE TALUK, PIN - 670 017.

BY ADV SRI.R.BINDU (SASTHAMANGALAM)

THIS CIVIL REVISION PETITION HAVING COME UP FOR
HEARING ON 03.01.2022, THE COURT ON 01.02.2022
DELIVERED THE FOLLOWING:

CR

ORDER

The appellants in C.M.A.31/2019 on the file of the District Court, Kozhikode have filed this Civil Revision Petition under Section 115 of the C.P.C. In C.M.A. 31/2019, the petitioners herein challenged the dismissal of E.A.No.425/2018 in E.P.No.494/2017 in O.S.No.93/2014 on the file of the Additional Sub Cour, Kozhikode. The sole respondent herein is the decree holder in the above suit.

2. Heard both sides in detail and perused the lower Court records.

3. The relevant facts for the determination of the case are under:

The decree holder herein filed a suit

for the specific performance of an agreement for the sale of 5 cents of property. The matter was settled in the Adalath and the petitioners/defendants in the suit agreed to pay a sum of Rs.6,50,000/-. Since the judgment debtors failed to pay the amount as per the award passed in the Adalath, E.P.No.494/2017 was filed. In execution of the decree, the property offered to be sold was proceeded and thereafter the decree holder auctioned the property. Sale confirmed and sale certificate also was issued.

4. E.A.No.425/2018 was filed by the judgment debtors to set aside the sale under Order XXI Rule 90 C.P.C. The Execution Court dismissed the above petition. The above order was challenged in C.M.A.31/2019. The

learned District Judge, who heard the above C.M.A. also confirmed the order of the Execution Court on the ground that, the challenge raised in the petition as regards to non-compliance of issuance of notice under Rule 66 is meritless. In paragraph No.9 of the impugned judgment (Judgment in C.M.A.31/2019) the appellate court observed as under:

I have gone through the entire case records. The notice under Rule 66 was served to the judgment debtors properly but they neither appeared nor raised any objections.

Further, it was found by the learned District Judge as under -

Since there was no objection the decree holder was directed to produce the draft sale proclamation, encumbrance certificate and others

on 22.07.2018. The proclamation was published for effecting sale on 30.04.2018. In the meanwhile on 05.03.2018, EA 206/18 was allowed advancing the hearing and permitting the decree holder to take part in auction and adjourned to 03.04.2018 for report of the publication. On 04.04.2018 the property was sold in auction and posted for confirmation of sale on 04.06.2018. On 04.06.2018 the case was adjourned by notification to 20.06.2018. On that day sale was confirmed and EP was closed.

5. Admittedly, E.A.No.425/2018 was filed on 10.09.2018, almost three months after the confirmation of the sale, therefore, the learned District Judge found that this petition is otherwise barred by limitation. It is not in dispute that as provided under Order XXI Rule 90 C.P.C, 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. As per Article 127 of the Limitation Act, 60 days time is the period provided to set aside a sale in execution of a decree from the date of sale. Thus it appears that E.A.425/2018 filed under Order XXI Rule 90 C.P.C. is barred by limitation. Therefore, the District Judge is justified in dismissing the appeal.

6. In this matter, after filing E.A.No.425/2018, the judgment debtors filed

E.A.No.149/2019 and E.A.No.150/19 for setting aside the ex parte order after condoning the delay of 306 in filing the same. Those applications were dismissed by order dated 14.02.2019. Again E.A. No.151/2019 was filed and the judgment debtors sought permission to deposit the decree amount with interest for setting aside the sale and the same was also dismissed.

7. It is zealously argued by the learned Senior Counsel, Adv. Sri Krishnanunni, appearing for the judgment debtors/petitioners, that admittedly, E.A. No.425/2018, if treated as one filed under Order XXI Rule 90 of C.P.C, the above petition is barred by limitation. However, he contended that in view of the specific

contention raised in E.A.No.425/2018, this petition should be treated as one filed under 47 of the C.P.C. Therefore, the limitation is governed by residuary Article 137 of the Limitation Act and the period to set aside the sale as provided under Section 47 of C.P.C. is within three years from the date of sale. The legal position is not in dispute on the point that, if the application is one filed under Section 47 of C.P.C., the same is governed by Article 137 of the Limitation Act and the period is three years. In this connection, the learned counsel placed a decision reported in **1997 ICO 4118, Gnan Das v. Paulin Moraes**, with a view to highlight the duty of the court when dealing with application under Order XXI Rule 90 C.P.C and Rule 64 of C.P.C. In the

said case, the Division Bench of this Court considered a case where the sale was not confirmed. I do not think that the ratio of the said decision has any relevance to the facts of this case.

8. Another decision reported in **2008 (2) KHC 670, M/s. Mahakal Automobiles and Another v. Kishan Swaroop Sharma**, has been highlighted to contend that, if there is a failure to issue a notice under Order XXI Rule 66(2), the same is fatal and therefore, the same can be challenged under Section 47 of C.P.C. Another decision reported in **2016(2) KHC 515, Babu John v. A.K. Ramakrishnan and Another**, also placed to contend that sale conducted in violation of the mandate of Rule 64 and Rule 66 of Order XXI C.P.C cannot be sustained merely on the

fact that there was failure on the part of the judgment debtors to object the sale proceedings.

9. Before addressing the question as to whether this petition is to be treated as one filed under Section 47 of the C.P.C, it is worthwhile to mention that, if the petitioner filed E.A.425/2018 by invoking Section 47 of C.P.C, instead of Order XXI Rule 90 C.P.C, there is no reason for the judgment debtors to file a civil miscellaneous appeal before the District Court. It is the well settled law that an order passed in application filed under Order XXI Rule 90 C.P.C. is one under Rule 92 of C.P.C. and the same is appealable as per Order XLIII Rule 1(j) of C.P.C. (appeal from orders). Thus by conduct, indent and

spirit, the petitioners herein filed a petition under Order XXI Rule 90 C.P.C. to set aside the sale and after having failed in getting the sale set aside before the Execution Court and before the Appellate Court, this Revision Petition has been filed. When it is noticed that, if the petition, E.A. 425/2018, is treated as one filed under Order XXI Rule 90 C.P.C, the same is unsustainable in view of the bar of limitation, when the matter is argued before this Court, the learned Senior Counsel submitted that this petition is to be treated as one filed under Section 47 of C.P.C. The learned counsel for the respondent refuted this contention and submitted that the contention now advanced shall not sustain.

10. In this context, the pertinent question arises for consideration is; **whether the grounds to set aside a sale as enumerated in Order XXI Rule 90 of C.P.C. are also available in a petition filed under Section 47 C.P.C. to set aside a sale?**

11. At this juncture, it is necessary to have reference to certain decisions on this point. In the decision reported in **1997(1) KLT 777, G. Rajarethna Naikkan v. P.N. Parameswara Kurup**, this Court had occasion to consider the difference between Section 47 and Order XXI Rule 90 of C.P.C. In the said decision Full Bench decision of Madras High Court, reported in **AIR 1980 Madras 123, A.P.V. Rajendran v. S.A. Sundararajan and Others**, which was the subject matter of appeal in the decision reported in **AIR 1981**

SC 693, S.A. Sundararajan v. A.P.V.

Rajendran, was referred, where it was held as under:

Notwithstanding the wording of S.47 which is enough to cover all applications to set aside sales on the ground either of illegality or of irregularity, its scope has naturally to be restricted so as to give due effect O.XXI, R.90 CPC. Thus, if the sale is sought to be set aside on the ground of material irregularity in publishing and conducting the sale within the meaning of O.XXI, R.90, then S.47 cannot come into play at all and the sale could be set aside only invoking Order XXI, Rule 90. But if the sale is claimed to be void for certain illegality or voidable on ground of material irregularities not referred to in O.XXI, R.90, then S.47 has to be invoked and in such case, O.XXI, R.90 CPC cannot come into play at all.

12. After referring the above ratio this Court also endorsed the said principle in para 4 of the judgment as under:-

When a judgment debtor makes an application under Order XXI Rule 90 of the C.P.C, he accepts the factum of the sale and seeks to challenge it on the ground that the sale is vitiated by material irregularity or fraud in publishing or conducting the sale. When an application under Section 47 C.P.C. is made by a judgment debtor challenging the sale, he claims the sale to be void for illegality or in any event voidable on grounds other than those referred to in Order XXI Rule 90 of C.P.C and in a case where the judgment debtor invokes Section 47 of the C.P.C, Order XXI Rule 90 of the C.P.C could not be applied. Errors committed in settling the sale proclamation which are mere irregularities cannot be

described as errors which render a sale void and hence, the application made in that case could not be treated as one under Section 47 of CPC.

13. In the decision reported in **1985 KLT 991, K.P.M. Saheed v. Aluminium Fabricating Company**, the Division Bench of this Court had indicated the distinction between Order XXI Rule 90 and Section 47 of C.P.C as under:-

It is the material irregularity or fraud which affects the method and manner of publishing the proclamation and the actual conduct of the sale that clothes the Court with a jurisdiction to set aside the sale under Order 21 Rule 90 C.P.C. Where Order 21 Rule 90 applies, Section 47 is not available. However, where there is inherent illegality in the execution

application, such as want of leave of Court appointing a receiver, it is a matter arising in execution, outside the purview of Order XXI Rule 90 and thus within the scope of Section 47 of the Code.

14. In fact, the period of limitation to set aside a sale under Order XXI Rule 90 C.P.C. is governed by Article 127 of the Limitation Act. The period provided is 60 days from the date of sale. Similarly, while filing an application under Section 47 of the C.P.C., then also article 137 governs the period of limitation and the same is three years from the date of sale.

15. In the decision reported in **AIR 1998 Ker 201, Mohammed Khan And Anr. v. Graceamma Philip And Ors.**, a Single Bench of this Court while considering an application

under Section 47 to declare a sale conducted after seven years, categorically held that it is a mischief under Order XXI Rule 90 of C.P.C .

16. In the decision rendered in **2008 (2) KHC 657, Prakasan K.D. v. State Bank Of Travancore and others**, another single bench of this Court considered the distinction of Section 47 and Order XXI Rule 90 C.P.C. and held that, if the sale is vitiated by material irregularity or fraud in publishing and conducting the sale, which attracts Rule 90 Order XXI of C.P.C. The very maintainability of the execution petition would very well be taken by invoking Section 47 of C.P.C.

17. Thus the law emerges is that **it is the material irregularity or fraud which**

affects the method and manner of publishing the proclamation and the actual conduct of the sale that clothes the Court with a jurisdiction to set aside the sale under Order XXI Rule 90 C.P.C. Where Order XXI Rule 90 applies, Section 47 is not available. However, where there is inherent illegality in the execution application, the same is a matter arising in execution, outside the purview of Order XXI Rule 90 and thus within the scope of Section 47 of the Code. To put it otherwise, when a judgment debtor makes an application under Order XXI Rule 90 of the C.P.C, he accepts the factum of the sale and seeks to challenge it on the ground that the sale is vitiated by material irregularity or fraud in publishing or conducting the sale. When an application under Section 47 is made, by a judgment debtor challenging the sale, he

claims the sale to be void for illegality or in any event voidable on grounds other than those referred in Order XXI Rule 90 of C.P.C and in a case where the judgment debtor invokes Section 47 of the C.P.C, order XXI Rule 90 of the C.P.C could not be applied. Errors committed in settling the sale proclamation which are mere irregularities cannot be described as errors which render a sale void and hence, the application made in that case could not be treated as one under Section 47 of CPC.

18. Here the learned counsel for the petitioners/judgment debtors attempted to bring patent illegality in publishing and conducting the sale on the ground that no notice under Order XXI Rule 66 was issued. However, the records of the court below, as

rightly observed by the District Judge, would go to show that Order XXI Rule 66 notice was issued to the judgment debtors and for which, they did not raise any objection and thereafter the sale was confirmed.

19. Apart from non issuance of Order XXI Rule 66, nothing is argued to contend that the sale is vitiated by patent illegality or irregularity in any other manner so as to invoke the power under Section 47 C.P.C. to set aside the sale.

20. It is relevant note that the judgment debtors, the petitioners herein filed OP(C).517/2019 before this Court challenging order in E.A.No.149/2019 referred earlier, and this Court dismissed the said original petition holding that

there is nothing in the application also to show that any material irregularity was committed in the conduct and sale of the immovable property. The draft proclamation of sale produced before this Court at the time of hearing also shows that the property comprised of the house also.

21. In the above original petition the plea raised by the learned counsel for the petitioners herein the redeem the property after paying the entire amount also was negatived on the ground that the decree holder was not amenable for the same. The said order is not challenged so far and the same attained finality.

22. Thus it appears that even treating the petition as one filed under Section 47 of C.P.C, for argument sake, then also the

same is unsustainable, since it is found that Order XXI Rule 66 notice already issued in this case. So this Revision Petition is found devoid of any merits and same deserves dismissal. I have to observe that the petitioners herein are obstructing the delivery of the property after confirming the sale years back and after issuance of sale certificate by filing petitions before the trial court and original petitions before this Court.

23. In view of the matter, this Revision Petition is dismissed.

Having considered the grievance of the decree holder, I direct the Execution Court to expedite the delivery within a period of three weeks from the date of receipt or production of copy of this judgment by the

decree holder before the Execution Court.
The Registry is direct to forward a copy of
this judgment to the Execution Court for
compliance.

sd/-

A. BADHARUDEEN

JUDGE

SPV

APPENDIX

RESPONDENT'S ANNEXURE:

ANNEXURE R1(a):- TRUE COPY OF THE JUDGMENT PASSED
BY THIS HON'BLE COURT IN O.P.(CIVIL)
NO.597/2019 DATED 04.04.2019.

//TRUE COPY//

PA TO JUDGE