



2023/KER/51374

"C.R."

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN

&

THE HONOURABLE MR.JUSTICE P.G. AJITHKUMAR

WEDNESDAY, THE 23RD DAY OF AUGUST 2023 / 1ST BHADRA, 1945

F.A.O.NO. 6 OF 2021

AGAINST THE ORDER DATED 20.11.2020 IN E.A.NO.844 OF 2019
IN E.P.NO.51 OF 2017 IN ARBITRATION CASE NO.18 OF 2015 OF
THE III ADDITIONAL DISTRICT COURT, THRISSUR

APPELLANT/PETITIONER/JUDGMENT DEBTOR:

MOHAMMED MOIDEEN, AGED 50 YEARS, S/O.
ARAVASSEERY ISMAIL, VADANAPILLY P.O., THRISSUR
DISTRICT-680 614.

BY ADV G.SREEKUMAR (CHELUR)

RESPONDENT/RESPONDENT/DECREE HOLDER:

MABEN NIDHI LTD., BUILDING NO.5/421, NEAR HIGH
SCHOOL JUNCTION, REPRESENTED BY ITS MANAGER,
VALAPPAD P.O., THRISSUR DISTRICT-680 567.

BY ADVS.
SRI.V.B.UNNIRAJ
SMT.R.S.GEETHA
SMT.K.SEEMA
SMT.P.ANITHA

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR
FINAL HEARING ON 10.08.2023, THE COURT ON 23.08.2023
DELIVERED THE FOLLOWING:

**JUDGMENT****“C.R.”****P.G. Ajithkumar, J.**

The appellant has filed E.A.No.844 of 2019 in E.P.No.51 of 2017 in Arbitration Case No.18 of 2015 for setting aside the sale held on 21.05.2005 selling 4.05 Ares of land comprised in Sy.No.176/3 of Vadanappally Village belonging to him. That petition was dismissed by the III Additional District Judge, Thrissur as per the order dated 20.11.2020. The said order is under challenge in this appeal filed under Order XLIII, Rule 1(j) of the Code of Civil Procedure, 1908.

2. After the appearance of the respondent, the matter was referred for mediation as per the order dated 11.02.2021. The mediation took place in the Ernakulam Mediation Centre, High Court of Kerala was unsuccessful.

3. Heard the learned counsel appearing for the appellant and the learned counsel appearing for the respondent.

4. The appellant would contend that 4.05 Ares of land along with a double-storied building was sold for a meagre



amount of Rs.7,50,100/-; whereas the said property worths Rs.65 lakhs. It is alleged that the proclamation schedule was drawn up without mentioning about the building thereon even and stating a low price. It is also alleged that there was no proper proclamation. When the sale was conducted with such serious irregularities and thereby a property worth Rs.65 lakhs was sold just for an amount of Rs.7,50,100/-, that resulted in substantial injury to the appellant.

5. The petition for setting aside the sale was resisted by the respondent-decree holder contending that having given sufficient opportunity to file objection to the proclamation schedule, the appellant could not seek to set aside the sale on such grounds. It was further contended by the respondent that the respondent-decree holder purchased the property for a commensurate price and no evidence to substantiate that the property would have fetched more value is let in. In such circumstances, the respondent took the stand that the plea for setting aside the sale by the appellant was not liable to be allowed.



6. The amount due under the arbitral award is Rs.20,82,897/-. In order for realisation of such an amount, the execution petition was filed by the respondent and the property belonging to the appellant, who is the 2nd judgment debtor, was brought on sale. It is seen that the appellant had filed an objection to the draft proclamation schedule. The court has settled the proclamation thereafter, however, estimating the value of the property to be sold as Rs.7,50,000/- and the sale proclamation was accordingly published. The respondent-decree holder had bid the property. The specific contention of the appellant is that the building in the property was not separately stated in the proclamation schedule and the price estimated was very low. PW1 is the wife of the appellant. She deposed before the court that the property is worth Rs.5 lakhs per cent. The learned counsel appearing for the appellant would submit that when sale of two cents of property would have fetched such a price, the decree holder brought the whole of 4.05 Ares and the building thereon on sale. It is accordingly contended that the



sale was held totally in disregard to the mandatory provisions of Rule 64 of Order XXI of the Code and therefore the sale is liable to set aside.

7. The learned counsel appearing for the respondent, on the other hand, would submit that the sale was held after giving notice to the appellant and after considering his objections. The property was sold for the value it actually fetches. Touching to the above, the learned counsel appearing for the respondent has fallen back on Order XXI Rule 90(3) of the Code, which provides that "no application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date of which the proclamation of sale was drawn up. The Apex Court in **Desh Bandhu Guptha v. N.L.Anand and Rajinder Singh [(1994) 1 SCC 131]** held that Order XXI Rule 90(3) of the Code is a special rule brought on statute by 1976 Amendment Act and it is like a "caveat emptor" that the judgment debtor be vigilant and watchful to vindicate pre-sale illegalities or material irregularities. He should not stand by to procrastinate



the execution proceedings. If he does so, Rule 90(3) forewarns him that he pays a penalty for obduracy and contumacy. Equally it is a reminder that the court should be strict to comply with the procedural part under Rule 54(1A) before depriving the judgment debtor of the remedy under Order XXI, Rule 90 of the Code. Hence, where the Court failed to discharge its duty by non complying with the mandatory provisions in Order XXI, Rule 90(3) of Order XXI of the Code does not debar the appellant from raising such infraction.

8. Therefore the contention that in all cases where the judgmental debtor had opportunity to raise objection before conducting sale the bar under sub-rule (3) of Order XXI, Rule 90 of the Code cannot be held good. If there occurred non-compliance of mandatory provisions of Rule 64 of Order XXI, it cannot be said that the failure of the judgment debtor to question the proclamation then and there would disentitle him from raising that question at post sale stage.

9. In **Shalimar Cinema v. Bhasin Film Corporation [(1987) 4 SCC 717]** the Apex Court held that the court has



a duty to see that the requirements of Order XXI, Rule 66 are properly complied with. It is incumbent on the court to be scrupulous in the extreme. No action of the court or its officer should be such as to give rise to the criticism that it was done in a casual way. Therefore, a proclamation of sale drawn casually without compliance of the mandatory requirement and a sale held in furtherance thereof is not a sale in the eye of law.

10. While drawing up the proclamation, it is the obligation of the court as insisted by Rule 64 of Order XXI of the Code to decide whether the whole or what portion of the property of the judgment debtor need be sold. There is nothing on record to show that the landed property as well as the building were separately valued and the price estimated. Without taking into account such necessary aspects in order to ascertain the probable value of the property, the Execution Court proceeded to sell the same. When the building in the scheduled property is not described in the proclamation, the effect is disastrous. A prospective purchaser would not get



exact details of the property being auctioned and that certainly would result in selling the property at a low price. In that view of the matter, the sale of 4.05 Ares of land along with a building thereon for an amount of Rs.7,50,100/- when Rs.20,82,897/- was the decree debt, resulted in substantial injury to the appellant-judgment debtor No.2. Since the irregularities are so glaring the defect of filing affidavit in support of the petition by the counsel, instead of the appellant, shall not be a reason to decline relief, especially when the wife of the appellant, who is competent to give evidence on behalf of the husband under Section 120 of the Evidence Act, 1872, has given evidence in court. Therefore, we find the sale held on 21.05.2019 in E.P.No.51 of 2017 is vitiated by material irregularity and is liable to be set aside.

11. Accordingly, this appeal is allowed. The sale conducted on 21.05.2019 is set aside. E.A.No.844 of 2019 in E.P.No.51 of 2017 in Arbitration Case No.18 of 2015 stands allowed. Respondent-decree holder is free to proceed with



2023/KER/51374

9

F.A.O.No.6 of 2021

E.P.No.51 of 2017 in Arbitration Case No.18 of 2019 before
the III Additional District Judge, Thrissur.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

P.G. AJITHKUMAR, JUDGE

dkr