REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 3090-3092 OF 2008
(Arising out of SLP(C) Nos. 13494-13496/2007)

P.G. SHAJI ... APPELLANT(S)

:VERSUS:

AMBIKA AND ANR. ... RESPONDENT(S)

O R D E R

1. Leave granted.

2. The auction purchaser is before us aggrieved by and dissatisfied with the Orders dated 9.2.2007, 12.2.2007 and 13.3.2007, passed by a learned Single Judge of the High Court of Kerala at Ernakulam in Revision Petition No. 1005/2006. The said orders were passed in the revision application filed by the first respondent herein in Execution Application No. 685/03 filed in Execution Petition No. 77/99.

3. Respondent No.2 filed a suit against the respondent No.1 for specific performance of contract. The said suit was dismissed. On an appeal preferred thereagainst, the Court of II Additional Subordinate Judge, Ernakulam, by its judgment and order dated 20th July, 1998 passed in A.S. No.18/98, set aside the judgment and decree of the trial Court and allowed the plaintiff-appellant to recover a sum of Rs. 50,000/- with interest at the rate of 12% per annum from 26.7.1996 to 19.7.1998, and 6% interest from 20.7.1998 till the date of realisation. It was directed :

> **"The appellant/plaintiff is also allowed to to recover the cost for the lower court proceedings. The appellant/plaintiff is allowed to charge decree amount in the plaint schedule property."**

4. The subject matter of the suit was 5 cents of land. Respondent No.2 – decree-holder filed the aforementioned execution petition. An application for selling the said land in auction was filed. An objection thereto was taken by the respondent No.1 – judgment debtor, contending that for execution of the said decree it was not necessary to sell the entire 5 cents of land. Upholding the said contention, the executing Court directed sale of only 2 cents of land and an off set price was fixed at Rs. 35,000/-.

5. Appellant herein, in the auction conducted pursuant to the said direction of the executing Court, purchased the land in question at the price of Rs. 1,10,000/-. The Judgment Debtor – Respondent No.2 herein, filed an application in terms of Order 21 Rule 90 of the Code of Civil Procedure (CPC), for setting aside the said auction sale. The same was dismissed by an order dated 20.12.2003.

6. It is not in dispute that the appellant deposited 25% of the auction amount in August 2003 and deposited the balance amount on 7th September, 2003.

7. By reason of the first order dated 9th February, 2007, the High Court directed:

"Counsel for the petitioner submits that the petitioner is prepared to deposit the entire amount due to the auction purchaser before 12.4.07 and the sale be set aside on that condition so that on failure so to do the confirmation of sale ordered by the court below can be upheld and the CRP dismissed. It is clearly understood that the amount payable to have the sale set aside will take in the bid amount deposited by the auction purchaser with interest at 10% thereon from the date or dates on which the amount have been deposited till date of actual payment, the sale commission and the value of the stamp paper produced by the auction purchaser to draft the sale deed.

Counsel for the petitioner prays for a day's time to consult his senior and report as to whether an order on the above lines can be agreed to be passed on consent. Delivery in the meanwhile shall stand adjourned to 13.2.07."

8. On the next date fixed, namely, 12.2.2007, the appellant herein expressed his inability to agree to the said suggestions given by the High Court. By the second order dated 12 February, 2007, it was directed:

"It is submitted by the counsel for the second respondent that the second respondent/auction purchaser is not amenable for the sale being set aside on the terms specified in the order dated 9.2.2007.

2. Heard the arguments of both sides.

3. It is seen from the objection filed by the judgment debtor on 18.10.1999 that the contention of the judgment debtor was that the property that is sought to be brought to sale is having value of Rupees one lakh per cent and that the total value of the property is Rupees five

lakhs. Despite the said objection, the sale proclamation, on the basis of which sale was conducted, which is dated 31.5.2003, shows that the estimated price of the property shown by the decree holder for two cents of property, from out of the said five cents, that was brought to sale, is only Rupees seventy thousand, which works out only to Rupees thirty five thousand per cent. When the contention of the judgment debtor is that the property is worth Rupees one lakh per cent, that also should have been shown as the price, which, according to the judgment debtor, will fetch for the property so as to enable the intending purchasers to assesses the value and take part in the auction. That has not been done in the instant case.

4. It is contended by the second respondent / auction purchaser that he bid the property for a total consideration of Rs. 1,10,000/-, viz., at the rate of Rupees fifty five thousand per cent, which is more than the estimated price, shown in the sale proclamation. The very fact that the auction purchaser himself was prepared to bid in auction at Rs. 1,10,000/-, when the estimated cost of the property was shown as Rupees seventy thousand only in the sale proclamation is suggestive that the decree holder has brought the property to sale undervaluing it and that is all the more a reason why the property should not have been brought to auction without showing the price, as contended by the judgment debtor as well in the sale proclamation. The material irregularity that has crept in the matter of auction vitiates the sale conducted."

9. A review application was filed thereagaisnt and by reason of the third order dated 13.3.2007, it was directed:

"Heard counsel for the review petitioner/auction purchaser, the

> counsel for the judgment debtor as also counsel for the decree holder.
>
> 2. Counsel for the judgment debtor and the decree holder submit that there is no objection to the order being reviewed and the request of the petitioner to have the sale set aside on condition specified in the order dated 9.2.2007 being brought into effect."

10. Mr. Deepak, learned counsel appearing on behalf of the appellant would submit that the High Court manifestly committed an error in passing the aforementioned orders in so far as it failed to take into consideration that while setting aside an auction sale, the Court should necessarily arrive at a finding that the material irregularity and/or fraud or illegality had been committed in the matter of holding an auction sale and it was furthermore shown that substantial prejudice was caused to the judgment debtor.

11. It was also contended that in any view of the matter, having regard to the provisions contained in Sub-rule 2 of Rule 89 of Order 21 of the CPC, an application under sub-rule (3) of Rule 90 thereof shall not be maintainable unless and until the application filed under Order 21 Rule 90 thereof is withdrawn. Learned counsel appears to be correct.

12. The first and second impugned orders passed by the High Court did not take into consideration the aforementioned contentions of the auction purchaser.

13. It is now a well settled principle of law that the Courts while setting aside an auction sale, must arrive at a finding that illegality and/or irregularity has been committed in the matter of conduct of auction sale. It must also be held that thereby a substantial injustice has been caused to the judgment debtor.

14. In <u>Saheb Khan</u> vs. <u>Mohd. Yusufuddin and Ors.</u>, [2006 (4) SCC 476] this Court held:

> **"Therefore before the sale can be set aside merely establishing a material irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the court that the material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale. (See Dhirendra Nath Gorai v. Sudhir Chandra Ghosh, (1994 (6) SCR 1001); Jaswantlal Natvarlal Thakkar v. Sushilaben Manilal Dangarwala, (1991 Supp. (2) SCC 691) and Kadiyala Rama Rao v. Gutala Kahna Rao, (2000 (3) SCC 87)."**

15. In <u>Laxmikant Chhotelal Gupta and Ors.</u> vs. <u>State of Maharashtra and Ors.</u> [2007 (5) SCC 713], this Court opined:

> **"Even when an auction takes place under orders of the competent civil court, the procedures laid down in the Code of Civil Procedure are required to be complied with. Objections to the validity of sale at the instance of one party or the other are required to be considered and**

> **determined. Even an appeal lies against such an order in terms of Order 43 Rule 1(u) of the Code of Civil Procedure.”**

16. The executing Court in its order dated 20th December, 2003 opined that the sale of the property effected on 20.8.2003 in favour of the auction purchaser is not liable to be set aside as no fraud or irregularity has been committed in the matter of conduct of auction sale. The revisional Court could interfere in the matter provided the said findings were set aside. By reason of the impugned judgment, the High Court has not arrived at any such finding. As it appears from the order dated 9.2.2007, the High Court proceeded to consider the prayer made by respondent No.1 - the judgment debtor as if it had filed an application in terms of order 21 Rule 89 of the CPC although it had pressed its objections under Order 21 Rule 90 before the executing Court.

17. In the event, however, the High Court intended to grant liberty to the judgment debtor – respondent No.1 to make such an offer, it was obligatory on its part to ensure due compliance of the provisions contained under order 21 Rule 89 of CPC vis-a-vis order 21 Rule 90 of the CPC.

18. The High Court did not set aside the order passed by the Executing Court. The High Court without assigning any reason, whatsoever, failed to take into consideration the condition precedent therefor viz a material irregularity that has crept in in the matter of auction sale, vitiated the sale conducted. It does not appear

that conditions precedent required in terms of the provisions of order 21 Rule 89 of the CPC were taken into consideration.

19. Submissions of the learned counsel had not been noticed. The order is not supported by any reason. No rationality in support thereof is apparent.

20. Appellant sought for review of the order dated 12.2.2007. While setting aside the order dated 9.2.2007, it could not have been brought at naught automatically at the instance of the judgment debtor and decree holder. Appellant herein having deposited the entire amount in terms of the auction sale held on 20.8.2003, was entitled to be heard by the High Court before an order of setting aside the auction sale was passed. We, therefore, are of the opinion that the impugned judgments cannot be sustained and are to be set aside.

21. For the reasons aforementioned, the impugned judgments cannot be sustained, they are set aside accordingly and the matters are remitted to the High Court for consideration of the application(s) filed by the aforesaid appellants afresh.

22. The appeals are disposed of on the above terms. The costs of these appeals shall abide by the costs of debt portion of the appellant.

..........................J
(S.B. SINHA)

..........................J
(LOKESHWAR SINGH PANTA)

NEW DELHI,
APRIL 28, 2008.