

"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 8TH DAY OF JUNE 2022 / 18TH JYAISHTA, 1944

F.A.O.NO. 25 OF 2021

AGAINST THE ORDER DATED 22.01.2021 IN E.A.NO.32 OF 2020

IN E.P.NO.20 OF 2016 IN O.S.NO.6 OF 2015 OF THE SUB

COURT, HOSDRUG

APPELLANT/1ST RESPONDENT/DECREE HOLDER:

SUBAIDA EBRAHIM

AGED 48 YEARS, W/O IBRAHIM,

RESIDING AT THOUFEEQ MAHAL, KUNDACHAKATTA,

KAYYAR VILLAGE & P.O, KASARGOD DISTRICT-671324.

BY ADVS.

SURESH KUMAR KODOTH

SRI.K.P.ANTONY BINU

RESPONDENTS/PETITIONER-3RD PARTY & RESPONDENT 2 TO 4/
JUDGMENT DEBTORS:

- 1 MOOSA C. ,
AGED 81 YEARS, S/O MOHIYUDHEEN,
RESIDING AT FATHIMATH SUHARA MANZIL,
ARWAR AREA, KUNJATHUR P.O,
KASARGOD DISTRICT-671323.
- 2 P.V. THAMBAN,
AGED 62 YEARS, S/O KUNHAMBU,
RESIDING AT ANEESH NIVAS,
PEROLE, P.O NELESHWAR, KASARGOD DISTRICT,
PIN-671314.

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3 V.V.THANKAMANI,
AGED 52 YEARS, W/O P.V. THAMBAN,
RESIDING AT ANNESH NIVAS, PEROLE, P O
NILESHWAR, KASARGOD DISTRICT, PIN-671314.

4 A.V. ANEESH KUMAR,
AGED 34 YEARS, S/O P. V THAMBAN,
RESIDING AT ANEESH NIVAS, PEROLE, P O
NILESHWAR, KASARGOD DISTRICT-671314.

BY ADVS.

SRI.P.BIJIMON

SRI.N.SURESH

SRI.JACOB SAMUEL

SRI.K.T.SEBASTIAN

SMT.PRIYA SREEDHARAN

SMT.P.GEENA BABU

THIS FIRST APPEAL FROM ORDERS HAVING COME UP FOR
FINAL HEARING ON 30.05.2022, THE COURT ON 08.06.2022
DELIVERED THE FOLLOWING:

JUDGMENT

Ajithkumar, J.

This is an appeal filed under Section 104 and Order XLIII, Rule 1(j) of the Code of Civil Procedure, 1908. E.A.No.32 of 2020 in E.P.No.20 of 2016 in O.S.No.6 of 2015 before the Sub Court, Hosdurg, was an application filed by the 1st respondent under Order XXI, Rule 90 of the Code. That E.A. was allowed as per order dated 22.01.2021. Challenging that order, the decree holder-auction purchaser has preferred this appeal.

2. On 23.03.2021, this appeal was admitted to file and notice was ordered to be issued to the respondents. While the 1st respondent entered appearance through his learned counsel, respondents 2 to 4 did not turn up.

3. Heard the learned counsel appearing for the appellant and also the learned counsel appearing for the 1st respondent.

4. The appellant obtained a decree in O.S.No.6 of 2015 for realisation of Rs.10,49,935/- along with interest and

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costs from respondents 2 to 4. The appellant filed E.P.No.20 of 2016 where she brought initially 29 cents of property belonging to respondents 2 to 4 on sale. Respondents 2 to 4 challenged the order of the Execution Court to sell the whole of the property before this court by filing O.P.(C) No.2052 of 2017 contending that the sale of a part of the same would be sufficient to satisfy the decree. As per the direction of this Court, the Execution Court enquired further into the matter and ordered that the sale of 18 cents of land, namely, 11.759 cents and another plot of 7 cents, both comprised in Sy.No.270/2 of Perole Village, was enough to satisfy the decree, and the said property was sold in auction on 05.02.2020.

5. The 1st respondent filed P.L.P.No.2478 of 2017 before the District Legal Services Authority, Kasaragod, claiming that money was due to him from respondents 2 and 4. That matter was settled and an award allowing the 1st respondent to realise an amount of Rs.11 lakhs from the other respondents was passed. The same 29 cents of land belonging

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to respondents 2 to 4 was attached in E.P.No.45 of 2017 filed by the 1st respondent for the realisation of the said amount.

6. The 1st respondent knowing that E.P.No.20 of 2016 was also pending against respondents 2 to 4 and the same property was being proceeded against, filed E.A.No.55 of 2017 requesting the court to initiate steps for the rateable distribution as provided under Section 73 of the Code, once sale of the property is taken place. E.A.No.55 of 2017 was filed in E.P.No.20 of 2016 and after hearing the parties concerned, that application was allowed by the Execution Court as per order dated 03.10.2018. It was thereafter the sale of 18 cents of property has taken place on 05.02.2020. Soon the 1st respondent came with E.A.No.32 of 2020 seeking to set aside the sale, invoking the provisions of Order XXI, Rule 90 of the Code on the ground that the said sale was vitiated by fraud and irregularity. It was contended that when the property was scheduled to be sold after effecting necessary proclamation on 05.02.2020, the appellant approached the Execution Court on 01.02.2020 by filing

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E.A.No.22 of 2020 seeking permission to participate in the auction and also to allow set-off as provided in Order XXI, Rule 72 of the Code. That application was allowed by the Execution Court without giving notice to the 1st respondent. In the auction sale the property was purchased by the appellant for an amount of Rs.18,00,100/- and the entire decree debt due to him, i.e., Rs.15,14,657/- was allowed to be set off against the auction price. It was alleged that the decree-holder did not pay the balance sale consideration also, but that contention was turned out to be incorrect. By contending that despite the order for rateable distribution, permission to bid and set off was granted in favour of the appellant in total negation of the provisions of Order XXI, Rule 72 of the Code, and that amounted to fraud and irregularity, resulting in substantial injury to the 1st respondent, he sought to set aside the sale.

7. The appellant resisted the said application contending that there was absolutely no irregularity or elements of fraud in the process of publication of the

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proclamation or the conduct of the sale, giving rise to a cause of action for an application under Order XXI, Rule 90 of the Code. Only because there was no other bidder, he sought permission of the court to bid the property. It was his right to get the amount due under the decree to set off. Following the order of this Court in O.P.(C) No.2052 of 2017, 11 cents of property along with a residential building of respondents 2 to 4, was excluded from the proclamation schedule and hence the 1st respondent can have no grievance. Order for rateable distribution was passed by the Execution Court at a time when the sale of 29 cents of land was proposed to be sold and when the sale was confined to 18 cents only, the order of rateable distribution lost its significance. The 1st respondent can proceed against the said 11 cents of property and can also appropriate the balance sale price of Rs.2,85,433/-, which was deposited by the appellant, as early on 14.02.2020. Thereby the appellant contended that the alleged irregularity and fraud are quite unreal and there is absolutely no reason to set aside the sale dated 05.02.2020.

8. The Execution Court took the stand that the order of rateable distribution was in vogue despite confining the auction to 18 cents of land alone. Further, it was held that the appellant obtained permission to participate in the auction and to set off the decree debt due to him against the sale price without giving notice to the 1st respondent and that amounted to not only irregularity but also a fraudulent act. On finding further that by happening such a sale, the 1st respondent was denied to have the benefit of the order of rateable distribution, whereby he suffered a substantial injury, the sale was set aside.

9. The learned counsel appearing for the appellant would contend that once the sale was confined to 18 cents of land and the remaining 11 cents was excluded, the order of rateable distribution lost its significance, and therefore, the same cannot be a reason for attributing defect to the process of sale. The sale was conducted after necessary proclamation and such publication itself is enough to have notice to everyone, including the 1st respondent, and therefore, his grievance of lack of notice cannot be reckoned with. After set

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off the decree debt, the balance sale consideration was deposited by the appellant on 14.02.2020 itself. But the Execution Court observed that there was no such deposit, which also was one of the reasons to set aside the sale.

10. The learned counsel for the appellant placing reliance on **Saheb Khan v. Mohd. Yousufuddin and others [(2006) 4 SCC 476]** and **Chilamkurti Bala Subrahmanyam v. Samanthapudi Vijaya Lakshmi and another [(2017) 6 SCC 770]** would contend that the 1st respondent does not have any reason to allege any injury on account of the sale of 18 cents of land, and therefore, sub-rule (2) of Rule 90 of Order XXI of the Code interdicts and the sale cannot be set aside.

11. On the application of the 1st respondent, E.A.No.55 of 2017, the Execution Court allowed rateable distribution as provided under Section 73 of the Code among the appellant and the 1st respondent. Ever thereafter E.P.No.20 of 2016 filed by the appellant and E.P.No.45 of 2017 filed by the 1st respondent were being proceeded with simultaneously. When

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the property of the common judgment debtors was brought on sale, their grievance of selling the entire extent of 29 cents was not ventilated by the Execution Court and that resulted in their filing of O.P.(C) No.2052 of 2017. As per the direction of this Court in the said Original Petition, the Execution Court confined the sale proceedings to 18 cents of land; whereby, 11 cents and the building thereon were excluded. In the wake of that order, the appellant would contend, the order for rateable distribution paled into insignificance.

12. Section 73 of the Code reads,-

“73. Proceeds of execution sale to be rateably distributed among decree-holders.- (1) Where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall be rateably distributed among all such persons :

Provided as follows:-

(a) where any property is sold subject to a mortgage or charge, the mortgage or incumbrancer shall not be entitled to share in any surplus arising from such sale;

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(b) where any property liable to be sold in execution of a decree is subject to a mortgage or charge, the Court may, with the consent of the mortgagee or encumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or encumbrancer the same interest in the proceeds of the sale as he had in the property sold;

(c) where any immovable property is sold in execution of a decree ordering its sale for the discharge of an encumbrance thereon, the proceeds of sale shall be applied—

firstly, in defraying the expenses of the sale;

secondly, in discharging the amount due under the decree;

thirdly, in discharging the interest and principal monies due on subsequent encumbrances (if any); and

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have no obtained satisfaction thereof.

(2) Where all or any of the assets liable to be rateably distributed under this section are paid to a person not entitled to receive the same, any person so entitled may sue such person to compel him to refund the assets.

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(3) Nothing in this section affects any right of the Government." (emphasis supplied)

Order XXI, Rule 72 of the Code reads,-

“72. Decree holder not to bid for or buy property without permission.- (1) No holder of a decree in execution of which property is sold shall, without the express permission of the Court, bid for or purchase the property.

(2) Where decree-holder purchases, amount of decree may be taken as payment- Where a decree holder purchases with such permission, the purchase-money and the amount due on the decree may, subject to the provisions of Section 73, be set off against one another, and the Court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.” (emphasis supplied)

13. The contention of the appellant is two-fold in regard to the substantial question touching the interplay between Section 73 and Order XXI, Rule 72 of the Code. Firstly, in the light of the order of the Execution Court to confine the sale to 18 cents of land, the right of the 1st respondent to claim rateable distribution was lost. Secondly, it was his right to set off the decree debt due to him; since the

sale was confined to a part of the property alone.

14. Going by the provisions of Section 63 of the Code, if the same property is attached in execution of more than one decree for realisation of money, one of the such courts, if there is a difference in grade, the court of the highest grade, has to sell the property. It is in continuation of that the provisions in Section 73 of the Code have to be understood. Section 73 enables different decree holders, who obtained decrees against the same judgment debtor to have a rateable distribution of the assets belonging to the judgment debtor. Once, rateable distribution is ordered, it is the obligation of the Execution Court, which proceeds to sell the property to see that the sale proceeds after defraying the items of expenditure enumerated in provisos (a) to (c) to sub-section (1) of Section 73 of the Code, to rateably distribute the reminder among the sharing decree-holders. In order to have the right of rateable distribution under Section 73 of the Code, the conditions precedent are that the decree holders should have obtained decrees against the common judgment debtor

and initiated execution proceedings before receipt of the assets. In this case, those conditions were satisfied and the 1st respondent obtained an order of rateable distribution with notice to the appellant.

15. It was after passing the order for rateable distribution on 03.10.2018, that the question as to what part of the attached property was to be sold has arisen. When that matter was taken up before this Court, a direction was given to the Execution Court to consider that question before proceeding further with the process of sale for the obvious reason that it is an inexorable obligation of the Court under Order XXI Rule 64 of the Code to ensure that such part of the property as is sufficient to satisfy the decree/s alone is sold. An enquiry was therefore conducted, including calling for a report of the Commissioner. The Execution Court found that the sale of 18 cents of property would be enough. It was in that situation, that the sale took place on 05.02.2020. There is no case for the appellant that ever during that process the order for rateable distribution was meddled with. An order

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lawfully passed by a Court cannot be obliterated or made nugatory on account of subsequent developments, so long as it is not set aside, recalled or annulled in an appropriate proceeding. We are therefore not able to accept the contention of the appellant that the order for rateable distribution would not bind the parties after confining the sale to 18 cents of property.

16. The sale was for Rs.18,00,100/-. Against the said sale price, the appellant, who purchased the property on the basis of the permission granted by the Execution Court as per the order in E.A.No.22 of 2020, got whole of the amount due to her as per the decree set off and deposited the balance amount of Rs.2,85,433/- in court on 14.02.2020. The question immediately arises is whether the appellant could have claimed a set off when there was an order for rateable distribution of the sale proceeds.

17. Sub-rule (2) of Rule 72 of Order XXI of the Code allows the decree holder, who purchases the property with the permission of the court, to set off the money due to him

under the decree against the sale price. But the said right is subject to the provisions of Section 73 of the Code. A conjoint reading of Section 73 and Order XXI Rule 72 of the Code would show that whenever a set off is allowed under the said Rule, the order of rateable distribution, if there is one, shall have to be reckoned with and only after ascertaining the proportionate amount entitled by the decree holder-purchaser, his entitlement to set off can be decided. The provisions do not convey a meaning that in a case where rateable distribution is ordered by the Court, there can be unbridled right to the decree holder-purchaser to set off the entire decree debt due to him. What he is entitled is only to set off the proportionate amount he is entitled on the rateable distribution.

18. As per Order XXI, Rule 84 of the Code, an auction purchaser of an immovable property is bound to deposit 25% of the auction price immediately. The balance sale price has to be deposited before the court closes on the fifteenth day from the date of sale in terms of the provisions of Order

XXI, Rule 85 of the Code. When one of the sharing decree holders is the purchaser and there is order for set off, he is obliged to deposit immediately in the court 25% of the sale consideration after deducting the proportionate amount found to be due to him. After a provisional approximation, if the proportionate sale proceeds, which he is entitled exceeds 25% of the sale only, he can set off that amount and he need not deposit any amount at that stage. While making deposit of the balance sale price, he can deduct the balance amount eligible for set off. If the amount eligible for set off is less than 25%, set off to the extent he is entitled can alone be allowed and he has to deposit the remainder of the 25%, immediately after the sale and the balance within the stipulated time. Violation thereof, undoubtedly, will vitiate the sale and the court is bound to take steps for resale as provided in Order XXI, Rule 87 of the Code.

19. If the sale price is sufficient to cover all the debts, there would not be any question of dividing the sale price proportionately. But when the sale price fetched is less, the

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Execution Court is obliged to find out the proportionate amount entitled by each of the decree holders and the decree holder-purchaser can set off only the amount he is proportionately entitled to. Here, the appellant was allowed to set off the entire decree debt. Taking into account the total amount of sale price of Rs.18,00,100/-, the appellant was not entitled to get set off of the entire decree debt of Rs.15,14,657/-. The order on 02.02.2020 in E.A.No.22 of 2020 allowed the appellant to set off the entire amount due to her under the decree in her favour. Since the leave granted to the appellant was to set off the entire decree debt, the process of conduct of the sale has become irregular being violative of the provisions of subrule (2) of Rule 72 of Order XXI of the Code. That is a reason sufficient to invoke Rule 90 of Order XXI of the Code.

20. Pertaining to the said order another allegation raised is that that order was passed by the Execution Court without giving notice to the 1st respondent. Once rateable distribution among two or more decree holders is ordered, it

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is always desirable to consolidate all the related Execution Petitions and are proceeded jointly. In the sale proclamation being drawn up in such a case, all the debts realisable by the sharing decree-holders shall be stated. Here, there was an order dated 03.10.2018 for rateable distribution. That necessitated giving notice to the 1st respondent before granting such an order for set off. No doubt, the Execution Court is not prohibited from giving permission to one of the decree holders to participate in the auction and to set off. But while doing so, notice shall be given to all the decree holders, and the order shall be in compliance with the provisions of Order XXI Rule 72(2) of the Code. Such a notice was not given to the 1st respondent, in this case. That amounted to an act of fraud, whereof the process of the conduct of the sale became vitiated.

21. The learned Counsel appearing for the appellant in the above context submitted that since the excess sale price of Rs.2,85,433/- is in deposit and 11 cents of land along with a residential building belonging to respondents 2 to 4 is still

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available to be proceeded against, the interest of the 1st respondent is not affected. Therefore there can have no contention by the 1st respondent that he sustained a substantial injury as a consequence of such a sale, without which one cannot claim to set aside a sale. That contention is buttressed by the learned counsel by referring to **Saheb Khan** (supra). In the said decision a three-judge Bench of the Apex Court considered the impact of sub-rule (2) of Rule 90 of Order XXI of the Code. The Apex Court held as follows:

“13. 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 and Suibal Chandra Shaw and others v. Sudhir Chandra Ghosh and others [(1964) 6 SCC 101]; Jaswantlal Natvarlal Thakkar v. Sushilaben

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Manilal Dangarwala & others [(1991) Supp. 2 SCC 691]; Kadiyala Rama Rao v. Gutala Kahna Rao (dead) by & others [(2000) 3 SCC 87]).

22. The Apex Court reiterated that principle in **Chilamkurti Bala Subrahmanyam**(supra) also. In the instant case, by allowing to set off the entire decree debt due to the appellant against the sale price, the right of the 1st respondent to get the proportionate amount from the auction price was lost. That undoubtedly had resulted substantial injury to the 1st respondent. In short, the material irregularity occasioned in the sale dated 5.2.2020 has resulted in substantial injury to the 1st respondent. Under Order XXI, Rule 90 of the Code the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interest are affected by the sale is entitled to apply for setting aside the sale. The 1st respondent, therefore, is a person entitled to apply for setting aside the sale. Hence, going by the principles laid down in the aforesaid decisions also the sale is liable to be set aside.

23. The learned Counsel appearing for the appellant

lastly contended that having obtained a decree in 2015, the appellant shall not be denied to enjoy the fruits of it for the reason attributable to the irregularity in the process of the court. In his view the lapse, even if there is, it is on the part of the court and that cannot be made a reason to set aside the sale thereby putting the appellant at peril. The maxim 'actus curiae neminem gravabit' means that the act of the Court shall prejudice no one is a well-accepted principle. In **Shakuntala Bai v. Narayan Das, 2004 (5) SCC 772** the question considered was whether the legal representatives are entitled to defend further proceedings, like an appeal, after the death of the plaintiff to the estate of whom the benefit under the decree has accrued and, there arises a challenge to that benefit. The Apex Court held in that context,

“In normal circumstances after passing of the decree by the Trial Court, the original landlord would have got possession of the premises. But if he does not and the tenant continues to remain in occupation of the premises it can only be on account of the stay order passed by the appellate court. In such a situation, the well known maxim

'actus curiae neminem gravabit' that 'an act of the court shall prejudice no man' shall come into operation. Therefore, the heirs of the landlord will be fully entitled to defend the appeal preferred by the tenant and claim possession of the premises on the cause of action which had been originally pleaded and on the basis whereof the lower Court had decided the matter and had passed the decree for eviction."

24. In view of that principle, even on taking that there was some flaw on the part of the Court, that shall not prejudice the right of the 1st respondent.

25. In the circumstances, we find no reason to interfere with the order of the Execution Court. The appeal deserves only to be dismissed and the same is dismissed. The Execution Court will proceed with the Execution Petitions in accordance with law.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

P.G. AJITHKUMAR, JUDGE