

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE
&
THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

TUESDAY, THE 6TH DAY OF JUNE 2023 / 16TH JYAISHTA, 1945
MA (EXE.) NO.4 OF 2014
AGAINST THE ORDER DTD.27.01.2014 IN E.A No.165/2013 IN E.P
No.45/2006 IN OP No.990/2005 OF FAMILY COURT,
THIRUVANANTHAPURAM

APPELLANT/DECREE HOLDER/PETITIONER:

THANKAM
VATTAVILA VEEDU,
KALLIYOOR, VELLAYANI . P . O , THIRUVANANTHAPURAM .

BY ADV SRI . LATHEESH SEBASTIAN

RESPONDENTS/CLAIM PETITIONER AND JUDGMENT DEBTOR/RESPONDENT:

1 REMANI
D/O . SARADA , RESIDING AT TC . 27 / 490 , PUNNAPURAM ,
WEST FORT , THIRUVANANTHAPURAM - 695004 .

2 K . VENU
S/O . KUTTAPPAN PANICKER ,
VALIYAVILAKAM , MULLOORKKALA , VELLAYANI . P . O ,
THIRUVANANTHAPURAM - 695522 .

BY ADVS .
SRI . K . L . SHYAM
SRI . K . K . VINOD

THIS MAT APPEAL (EXECUTION) HAVING BEEN FINALLY HEARD ON
06.06.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

"C.R"

**A.MUHAMED MUSTAQUE &
SOPHY THOMAS, JJ.**

Mat.Appeal (Execution) No.4 of 2014

Dated this the 6th day of June, 2023

J U D G M E N T

Sophy Thomas, J.

This appeal has been preferred by the decree holder in E.P No.45 of 2006 in OP No.990 of 2005 on the file of Family Court, Thiruvananthapuram, challenging the order dated 27.01.2014 in E.A No.165 of 2013, which was a claim petition filed by the 1st respondent.

2. The facts necessary for this appeal could be summarised as follows:

The appellant herein filed OP No.990 of 2005 for recovery of patrimony, maintenance etc., against the 2nd respondent herein, who is her husband. That O.P was decreed in her favour, and she filed E.P No.45 of 2006 and proceeded against the attachment schedule property which was six cents of land comprised in survey No.358/14 of Kalliyoor village, for realising the decree debt. That

property was sold in court auction and the appellant purchased that property, in the court auction held on 29.06.2011. Sale was confirmed on 29.08.2011, and sale certificate was issued in her favour on 13.06.2012. While the E.P was posted for delivery, on 18.12.2013 the 1st respondent herein filed a claim petition as E.A No.165 of 2013 contending that, the 2nd respondent is her husband and the auctioned property belonged to her, as it was given to herself and her husband as her share by her father. According to her, she was the absolute owner of that property, though the name of the 2nd respondent/husband was also shown in that document. So, she wanted to exempt her property from the sale proceedings.

3. The appellant/decreed holder objected that petition contending that, there was no marital relationship between respondents 1 and 2, and the property was liable to be proceeded for the dues to be recovered from her husband.

4. The court below allowed the claim petition filed by the 1st respondent and lifted the attachment finding that, there was nothing to prove title of the 2nd respondent/judgment debtor over that property. The order of the Family Court in E.A No.165 of

2013 dated 27.01.2014 is under challenge in this appeal.

5. Though service was complete on respondents 1 and 2, they opted to remain absent.

6. Heard learned counsel appearing for the appellant.

7. We are called upon to answer whether there is any illegality or impropriety in the impugned order warranting our interference. Incidentally, we have to answer whether a claim petition filed after confirmation of the sale is to be entertained in view of the specific bar under proviso (a) to Order 21 Rule 58 (1) of CPC.

8. In the case on hand, the auction of the property was held on 29.06.2011. Sale was confirmed on 29.08.2011. Sale certificate was issued on 13.06.2012. The claim petition was filed by the 1st respondent on 18.12.2013 i.e. after confirmation of the sale and issuance of the sale certificate.

9. Order 21 Rule 58(1) of the CPC reads thus:

"58. Adjudication of claims to, or objections to attachment of, property:

- (1) Where any claims preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim

or objection in accordance with the provisions herein contained:

PROVIDED that no such claim or objection shall be entertained-

- (a) where, before the claim is preferred or objection is made, the property attached has already been sold; or
- (b) where the court considers that the claim or objection was designedly or unnecessarily delayed”.

10. Apparently, a claim petition or objection to the attachment, with regard to the property attached in execution of a decree shall not be entertained, where before the claim is preferred or objection is made, the property attached has already been sold or where the court considers that the claim or objection was designedly or unnecessarily delayed.

11. Now we have to consider when a property under attachment can be said to be 'sold' under proviso (a) to Rule 58(1).

12. Section 65 of the Civil Procedure Code says that '*where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold*

and not from the time when the sale becomes absolute'. So, obviously, only when the sale has become absolute then only the property is deemed to have vested on the purchaser from the date, when the property is sold. So, only when the sale becomes absolute, the vesting of right will relate back to the date of sale. So, till such confirmation of sale, there cannot be any vesting of title on the purchaser. In order to say the sale is complete, the auction sale should have been confirmed. So, till such confirmation, the sale could not be said to be complete. So, a claim petition or objection filed before confirmation of sale will not be hit by proviso (a) to Order 21 Rule 58(1) of CPC.

13. The Apex Court, in **Kancherla Lakshminarayana vs. Mattaparthi Syamala** [2008 (3) KLT 932 (SC)] held as follows:

“Mere holding of the auction does not bar the objections thereto. It is our considered opinion that in this case the sale was not confirmed and that made substantial difference. The word “sold” in Cl. (a) of the proviso to R.58 has to be read meaning thereby a complete sale including the confirmation of the auction. That not having taken place, it cannot be said that the objection by the appellant was ill-founded or untenable. Even if under S.65

C.P.C., the title "after the sale has been made absolute under R.92" relates back to the date of sale, it would still be subject to the earlier rights of the objector and his interest in the suit property. Therefore, in our opinion S.65 would not, by itself, provide any guidance regarding the interpretation of the term "sold" in the said proviso. The attachment cannot be free from the obligations under the contract of sale, then the necessary sequitur must follow that even after the factum of sale the objection would still lie before the sale is made absolute".

14. The High Court of Judicature at Hyderabad for the State of Telangana and Andhra Pradesh had occasion to consider a similar issue in the decision **E.Aruna vs. Vemala Sreenu and Ors.** (MANU/AP/0442/2015). In paragraph 21 of that decision, it was observed as follows:

"21. From the scheme of Order XXI Rule 58 CPC, it is clear that the Rule firstly provides for adjudication of claims at the instance of a third party and the remedies against adjudication to an aggrieved party. The proviso (a) to Sub-Rule 1 of Order XXI Rule 58 prohibits the executing Court from entertaining claim or objection against the property attached has already been sold. The purpose of imposing prohibition to entertain claim petitions in matters which have been processed up to the stage of issuance of sale certificate are easily discernible.

In construing the scope of prohibition to entertain the claim petition under Order XXI Rule 58, sub-rule (1) can be examined by reference to other relevant provision viz., Rules 92 and 94 of Order XXI CPC and read thus:

Rule 92 of Order XXI:

"Sale when to become absolute or be set aside.-

(1) Where no application is made under Rule 89, Rule 90 or Rule 91, or where such application is made and disallowed, the Court shall make an Order confirming the sale, and thereupon the sale shall become absolute:

Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within 1 [sixty days] from the date of sale, or in cases where the amount deposited under Rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an order setting aside the sale:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby:

Provided further that the deposit under this sub-rule may be made within sixty days in all such cases where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

(5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an Order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered."

Rule 94 of Order XXI:

"Certificate of purchaser:-Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute."

15. Paragraphs 24 and 25 of the above decision are also worth quoting which read as follows:

24. Rule 94 enables issuance of sale certificate to the auction purchaser after completing various stages under different rules of execution. Therefore the procedure stipulated in the rules has a forward march with the completion of a particular stage and not intended to reopen the Court concluded actions viz., sale certificate is issued. The important words to attract prohibition, in the proviso to Rule 58(1) CPC are that the property attached has already been sold. The words are simple and convey full meaning in the application of proviso to completed sale transactions. From literal construction of these words it can be held

that once the sale certificate is issued to the property sold in auction held by the Court, the proviso to Rule 58(1) is attracted and no claim petition is maintainable against such property. From a conspectus of the above provisions, it can be held that Order XXI CPC is a stand alone provision comprehensively dealing with execution of decrees and orders. The various stages of the execution provides for objection by respondent/third party to execution and the executing Court decides these objections. With a decision at appropriate stage by the executing Court the next step is followed. Therefore, at the instance of a third party the completed stages are not revisited. Therefore, with the issuance of sale certificate the property is said to be sold by the executing Court and no claim petition under Order XXI Rule 58 CPC is maintainable.

25. The executing Court with the issuance of sale certificate completes the process of auction initiated under Order XXI and thereafter, a further stage in execution proceedings arises. It cannot be the intention of Parliament to go forward and come backward in deciding the execution proceedings with the filing of claim petition. Therefore, prohibition in complete terms is attracted to entertain a claim petition by the proviso when the property is sold by the executing Court.

16. Here, the property was sold in auction, sale was confirmed and sale certificate was issued as early as on 13.06.2012. So, the claim petition filed by the 1st respondent on

18.12.2013 was clearly hit by proviso (a) to Order 21 Rule 58(1) of CPC and it could not have been entertained by the Family Court. So, on that ground alone, the order in E.A No.165 of 2013 is liable to be set aside.

17. Now let us have a look at the order impugned.

Paragraph 6 of that order reads as follows:

"6. Ext.A1 is the copy of a sale deed executed by Venu and his wife to one Ramani on 18.8.1976. The extent of property conveyed is 6 cents in survey No.358/14. It forms part of a larger extent of 91 cents. The property conveyed as per Ext.A1 is 6 cents on the western most extremity in the north-south of southern 45 cents. The description of the property sold is 6 cents on the western most extremity north south of 45 cents. The property sold as per the court sale is identical. As per the encumbrance produced by the decree holder, it is relating to 3 cents in survey 358/14 of Kalliyoor village for the period from 01.1.89 to 14.1 2008. There is no transfer during that period. Ext.A1 sale deed is for the year 1976. Though no evidence is forthcoming as to the alleged marital relationship between the owner that the property proclaimed for sale consist of 6 cents in survey No.358/14. No document to prove the title to the judgment debtor is not forthcoming. Hence the mater now stands, the claim petitioner had no better title over the 6 cents of property now for published auction. Hence the

claim petition is only to be allowed and accordingly allowed”.

18. The schedule property covered by Ext.A1 sale deed was said to be sold by the 2nd respondent and his wife to Smt.Remani, who is the claim petitioner. But, in the cause title of the impugned order, Smt.Remani was shown as the decree holder. Learned Family Court Judge stated that, the property sold as per the court sale is identical to the property covered by Ext.A1 sale deed, when the point for adjudication was whether the property scheduled in the claim petition was the subject matter of auction, and whether it was liable to be auctioned for the dues of the judgment debtor etc. In what manner it was identical or whether it was one and the same property, will not find a place in the order. Further, it is stated that, 'no document to prove the title to the judgment debtor is not forthcoming. Hence the matter now stands, the claim petitioner had no better title over the 6 cents of property now for published auction. Hence the claim petition is only to be allowed and accordingly allowed'. If the claim petitioner had no better title, how the learned Judge could allow the claim petition, is without any explanation. In the impugned

order, learned Judge recorded that 'property is now published for auction' without verifying the fact that the property has been sold already. In fact, that order was passed much after the property was sold, and even after sale confirmation and issuance of the sale certificate to the auction purchaser. So, obviously, learned Family Court Judge was so careless and irresponsible in passing the order in E.A No.165 of 2013 in E.P No.45 of 2006. On going through that order, we fail to understand what was there in the mind of the learned Judge, either to allow the petition or to dismiss the petition. Family Court Judges are to be more careful and sensitive in dealing with human issues coming before them. Without realising the real factual position or the law applicable, they cannot blindly pass orders unmindful of the consequences arising therefrom.

19. The Registry of this Court is directed to serve a copy of this judgment to the learned Judge concerned, wherever he is working now, and the Judicial Academy also has to sensitise Family Court Judges to be more careful, vigilant and sensitive in dealing with the issues coming up before them.

20. With these directions, above Mat.Appeal stands allowed, setting aside the order in E.A No.165 of 2013. If E.P No.45 of 2006 is still pending, the Family Court, Thiruvananthapuram is directed to dispose the same within a period of one month from today.

Before parting with, we make it clear that the 1st respondent/claim petitioner can work out her remedies before a competent civil court, in accordance with law.

Registry to forward a copy of this judgment to the Family Court concerned forthwith.

Sd/-

**A.MUHAMED MUSTAQUE
JUDGE**

Sd/-

**SOPHY THOMAS
JUDGE**

smp