

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 10TH DAY OF DECEMBER 2019

BEFORE

THE HON'BLE MR.JUSTICE S. SUNIL DUTT YADAV

WRIT PETITION No.27470/2015 (GM-CPC)

Smt. K. Gayathri Mallaya

v/s.

The Manager, The Urban Co-operative Bank Ltd.,
Siddapura, UK.

ORDER

The petitioner, who is the judgment debtor No.2 has challenged the order of the lower Court passed on I.A.No.7 filed under Order XXI Rule 90 of C.P.C. whereby the lower Court has dismissed the application filed to set aside the sale.

2. The admitted facts being that the respondent No.4 who is judgment debtor No.1 had obtained loan from the first respondent – Bank and judgment debtor No.2, who is the petitioner herein is the guarantor. The case that is made out by the petitioner is that after obtaining an award under Section 70 of the Karnataka Co-operative Societies Act, 1959 and on obtaining the Recovery Certificate, the proceedings to execute the award was initiated before the Court of Additional Senior Civil & JMFC, Sagar.

3. The petitioner contends that the court sale is liable to be set aside, as the Court at Sagar did not have jurisdiction to execute the decree with respect to the property situated at Shimoga and hence, all the proceedings relating to execution insofar as the property at Shimoga are without jurisdiction and therefore submits that the application under Order XXI Rule 90 of C.P.C. ought to have been allowed.

4. Learned counsel for the petitioner relies on the decisions of Apex Court in the case of Mohit Bhargava v. Bharat Bhushan Bhargava & Others reported in AIR 2007 SC 1717 and also the case of Kiran Singh and Others v. Chaman Paswan and Others reported in AIR 1954 SC 340.

5. The learned counsel appearing for the first respondent Bank Sri S.V.Prakash on the other hand would contend that the question relating to jurisdiction was considered when the court was deciding the application filed for appointment of receiver and the specific contention raised by judgment debtor No.1 that the Executing Court did not have jurisdiction was adverted to while passing the order appointing the

receiver. Copy of the said order is enclosed at Annexure-E.

6. It is the further contention of learned counsel appearing for respondent No.1 that the Executing Court while also considering the application I.A.No.5 filed under Order 21 Rule 58 of C.P.C. seeking raising of the attachment of the property at the instance of judgment debtor No.1 dealing with the similar contention of absence of jurisdiction, has rejected the said contention. Copy of the said order dated 01.07.2014 is enclosed as Annexure-R2 to the petition along with the statement of objections of respondent No.1.

7. It is contended that once the Court has recorded a finding that it has jurisdiction, the question of present petitioner seeking to assail such finding at a later point of time in the same proceedings does not arise. It is also submitted that the period of limitation provided for challenging the sale having lapsed, the application filed beyond the prescribed period does not deserve to be entertained and hence it is contended that the lower Court has rightly rejected the said application.

8. Learned counsel appearing for the auction purchaser whose sale is in question also adopts the submissions of learned counsel appearing for respondent No.1 and points out that a *bona fide* purchaser would be seriously prejudiced, if any order is passed setting aside the order of Court below at this length of time.

9. Learned counsel appearing for respondent No.1 would also contend that except on the grounds provided under Order 21 Rule 90 of C.P.C, the Court has no power to set aside the sale, including on the grounds as raised by the petitioner herein.

10. Heard both the sides. The Court is called upon to consider the manner in which objection to jurisdiction raised under Section 39(4) of C.P.C. is to be dealt with.

11. No doubt, the learned counsel appearing for respondent No.1 would point out that the question with respect to jurisdiction of the Court was also subject matter of consideration while deciding the application filed to appoint the receiver. A perusal of order at Annexure-E would reveal that the Court has recorded a finding that even with respect to the property outside

the jurisdiction of Court, a receiver could be appointed and while doing so has considered judgments relating to power of the Court to appoint a receiver.

12. No finding is recorded in the said order specifically with respect to Section 39(4) of C.P.C. A perusal of the order passed under Order 21 Rule 58 of C.P.C. at the instance of first judgment debtor would also reveal that the Court was called upon to answer the same contention and though does refer to Section 39(4) of C.P.C., a close perusal would reveal that there is no specific finding as regards to the objection raised under Section 39(4) of CPC.

13. As regards the contention that the application filed to set aside court sale was barred by the law of limitation, it is stated that the payment was made by the auction purchaser and subsequently sale was confirmed during the pendency of the present proceedings, in light of the same, the question of limitation being a bar to challenge such a sale prima facie would not arise.

14. The more important question that still remains to be considered is whether the present

proceedings before the lower Court are maintainable in light of Section 39(4) of C.P.C. The Apex Court way back in the celebrated case of Kiran Singh and Others v. Chaman Paswan and Others reported in AIR 1954 SC 340, even before amendment to Section 39 has emphatically held that defect of jurisdiction whether pecuniary or territorial strikes at the very authority of the Court to pass a decree and such a defect cannot be cured by consent of parties. The question of jurisdiction of the Executing Court to exercise jurisdiction relating to person or property outside the jurisdiction of the Executing Court is expressly barred by Section 39(4) of C.P.C.

15. Admittedly, the property bearing Sy.No.206 situated at Hasudi Village, Nidige Hobli is in Shimoga Taluk and falls outside the jurisdiction of the Executing Court at Sagar. This factual position remains uncontroverted. The only case that is sought to be made out by respondent No.1 is that the petitioner is trying to take benefit of some lapse that has occurred in executing the decree and further contends that the petitioner has no *locus standi* in challenging the sale, as he is only a guarantor.

16. The learned counsel for the petitioner submits that he has interest in the property that is brought for auction, as it is a joint family property that had been mortgaged.

17. However, the question is not as to whether the absence of jurisdiction is brought to the notice of Court by any of the parties who is prejudiced or even that the Court at an earlier point of time had recorded a finding that it had jurisdiction as is contended.

When the Court at any stage of the proceedings even at the Appellate or while exercising supervisory jurisdiction under Article 227 of the Constitution of India as in the present case notices that Court which has passed the order had no jurisdiction to pass an order or continue with proceedings, such proceedings are still born and neither any order of the Court passed at an earlier point of time holding to the contrary would estop the Court from taking note of absence of jurisdiction. The absence of jurisdiction cannot be defeated on any equitable consideration or on the ground of prejudice to any of the parties. Once the factum of absence of jurisdiction is brought to the

notice of the Court, it is the duty of the Court to set at naught the proceedings and pass consequential orders. It is clear that the proceedings before the Executing Court in the present case suffer from the vice of '*coram non judice*'.

18. The observations of the Apex Court in the case of Jagmittar Sain Bhagat and Others v. Director, Health Services, Haryana and Others reported (2013) 10 SCC 136 would also throw light as regards to the manner of considering the objection to jurisdiction.

"9. Indisputably, it is a settled legal proposition that conferment of jurisdiction is a legislative function and it can neither be conferred with the consent of the parties nor by a superior court, and if the court passes a decree having no jurisdiction over the matter, it would amount to nullity as the matter goes to the root of the cause. Such an issue can be raised at any stage of the proceedings. The finding of a court or tribunal becomes irrelevant and unenforceable/inexecutable once the forum is found to have no jurisdiction. Similarly, if a court/tribunal inherently lacks jurisdiction, acquiescence of party equally should not be permitted to perpetrate and perpetuate, defeating of the legislative animation. The court cannot derive

jurisdiction apart from the Statute. In such eventuality the doctrine of waiver also does not apply. (Vide: United Commercial Bank Ltd. v. Workmen, AIR 1951 SC 230; Nai Bahu v. Lala Ramnarayan, AIR 1978 SC 22; Natraj Studios (P) Ltd. v. Navrang Studios, AIR (1981) 1 SCC 523 and Kondiba Dagadu Kadam v. Savitribai Sopan Gujar, (1999) 3 SCC 722).

19. The Apex Court in the case of Mohit Bhargava v. Bharat Bhushan Bhargava & Others reported in AIR 2007 SC 1717 has reiterated that in light of Section 39(4) of C.P.C., the Executing Court has no discretion and the decree ought to be transferred to the Court having jurisdiction over the property.

20. In light of the abovesaid facts and discussion made above, the writ petition is allowed and the impugned order is set aside and the application filed under Order 21 Rule 90 of C.P.C. is allowed with a further direction passed in the present factual matrix to the Executing Court to transfer the decree for execution before the jurisdictional Court at Shimoga as regards bringing to sale Sy.No.206 referred to supra, as the first respondent Bank extends to bring to sale the said

property to realise its dues. No doubt, the consequence of the order passed would prejudice the auction purchaser, but in light of absence of jurisdiction, no relief can be granted to the auction purchaser except sympathizing with the plight of the auction purchaser.

21. Taking note that the execution proceedings relate to the award of the year 2004, the Executing Court to which the decree is transferred for execution, to complete the proceedings expeditiously. The lower Court to transfer the decree for execution to the court having jurisdiction under Section 39(4) of C.P.C within a period of two weeks from the date of receipt of certified copy of this order. The Executing Court thereafter on transfer of proceedings at jurisdictional Court at Shimoga shall endeavour to complete the execution proceedings expeditiously, not later than eight months from the date of transfer, subject to all just exceptions.

22. In view of allowing of writ petition, I.A.No.1/2017 is dismissed as having become redundant.