

**Bhagaban Devata and ors. Vs. Mahadev Devata**

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**SooperKanoon Citation :** [sooperkanoon.com/525110](http://sooperkanoon.com/525110)

**Court :** Orissa

**Decided On :** Jul-29-1976

**Reported in :** AIR1977Ori51

**Judge :** S. Acharya, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 47 - Order 21, Rules 89, 90 and 91; [Orissa Prohibition of Alienation of Land Act, 1972](#) - Sections 3, 4 and 5

**Appeal No. :** Misc. Appeal Nos. 15, 16 and 17 of 1976

**Appellant :** Bhagaban Devata and ors.

**Respondent :** Mahadev Devata

**Advocate for Def. :** B.K. Pal, ;N. Prusty and ;Ashok Mohanty, Advs.

**Advocate for Pet/Ap. :** D. Bhuyan and ;B.S. Misra, Advs.

**Disposition :** Appeal dismissed

**Judgement :**

**S. Acharya, J.**

1. The unsuccessful objectors under Section 47, Civil Procedure Code in Execution Case No. 131/69 against the auction sale of certain properties are the appellants in these appeals. All the three appeals arise out of the common

judgment passed on three petitions under Section 47, Civil Procedure Code filed by the appellants in the court below; all the three appeals were heard analogously, one set of argument was advanced by counsel appearing for both the parties; and so all the three appeals are hereby being disposed of by this one judgment.

2. Auction sale in respect of certain properties' was held in the said execution proceeding on 27-6-1974. The appellants claim to be pendente lite purchasers of some of those properties. They did not prefer any petition under Order 21, Rule 90, Civil Procedure Code but filed petitions under Section 47, Civil Procedure Code challenging the validity of the auction sale mostly on the ground that the sale proclamation had not been made, and if made it was not in accordance with the procedure laid down for that purpose under the Civil Procedure Code, and that the said sale was not held on the date when and by the court where it was to be held as allegedly notified earlier.

3. Both the courts have found that the petitioners have not been able to establish that they have sustained substantial injury by reason of the alleged irregularities. Both the courts have also found that proclamation for sale of those properties had been duly made and no material irregularities were committed in holding the auction sale of the properties in question.

4. It is submitted by Mr. Bhuyan, the learned counsel for the appellants in all the three appeals, that there was no sale proclamation for holding the auction sale of the properties in question, and the auction sale was not held on the date on which and by the court in which it was to be held, and so the said sale is absolutely null and void and is liable to be set aside. Mr. Pal, the learned counsel for the respondent, submits that the factual aspects on which the above contention is based are incorrect, and that the appellants are not entitled to any relief in this matter on their petitions under Section 47 C.P.C. especially because they have not filed any petition under Order 21, Rule 90 C.P.C. assailing the said sale. According to Mr. Pal the grounds and allegations on which the auction sale is assailed, even if considered as correct for the sake of argument, would not render the said sale null and void and so the same cannot be questioned by a petition under Section 47, Civil Procedure Code without filing a regular petition under Order 21, Rule 90,

Civil procedure Code.

5. The view that a sale is not a nullity even where there is no service of sale proclamation has been held by this Court in the case reported in (1969) 35 Cut LT 757 (Krishna Chandra v. Upendra Jena). In Dhirendra Nath Gorai's case (AIR 1964 SC 1300) their Lordships have laid down a workable test regarding the distinction between an illegality and an irregularity. Their Lordships in that connection have, with approval, referred to the observation in *Holmes v. Russell*, (1841) 9 Dowl 437, which is as follows:--

'.....,..... the safest rule to determine what is an irregularity and what is a nullity is to see whether the party can waive the objection; if he can waive it. It amounts to any irregularity; if he cannot, it is a nullity.'

Another test, accepted by their Lordships, is the following as stated in 'Craies on Statute Law', 6th Edn.. page 269.

'(But) if it appears that the statutory conditions were inserted by (he legislature simply for the security or benefit of the parties to the action themselves, and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the court.'

In the decision reported in AIR 1967 Ker 163 (Narayanan Namboodripad v. Thomakutty) it has been held that failure to affix the proclamation in any part of the property liable to be sold or to publish the same by beat of drums would not render the court sale illegal or void, but they are only irregularities in the publication and conduct of the sale, rendering the court sale voidable, furnishing only a cause of action for an application under Order 21, Rule 90, Civil Procedure Code. They have also held that only when a sale is void and not merely voidable, Section 47, Civil Procedure Code can be invoked. A Division Bench of the Calcutta High Court in the case reported in AIR 1948 Cal 203 (Jatindra Mohan v. Mahipal Nayak) have held that non-issue of a sale proclamation when the law requires the publication of a fresh sale proclamation stands on the same footing as the non-service or suppression of service of a sale proclamation in the matter of the reversal of a

sale. They would be material irregularities and would not affect the jurisdiction of the executing court to hold the sale, and can only be subject-matter of an application under Order 21, Rule 90 of the Code and cannot be the subject-matter of an objection under Section 47 of the Code. While taking the above view their Lordships have referred to other case laws on the subject.

The Allahabad High Court in the case reported in AIR 1937 All 407 have held that--

'Section 47, Civil Procedure Code, is very wide in its terms and in one sense all questions relating to the execution, discharge or satisfaction of the decree that arise between the decree-holder and the judgment-debtor are within the purview of that section. Nevertheless the section ought to be so interpreted as not to render redundant the other provisions contained in the Code. When the judgment-debtor objects to the validity of an auction-purchase made by the decree-holder in execution of the decree, the question no doubt is one between the parties to the suit and also relates to the execution of the decree. But this by itself is no warrant for holding that all objections by the judgment-debtor to the validity of an auction-purchase made by the decree-holder or his application for setting aside such sales are necessarily within the scope of Section 47, Civil Procedure Code. The Legislature has by Order 21, Rules 89, 90 and 91 made provision for setting aside sale in certain events, and those rules are applicable to applications made by the judgment-debtor or by the decree-holder for setting aside a sale irrespective of the fact whether the decree-holder or a third person is the purchaser. In other words, even though the decree-holder is himself the purchaser the judgment-debtor may under Rules 89 and 90, and the decree-holder may under Rules 90 and 91, apply to set aside the sale, provided the conditions laid down in those rules are fulfilled. To hold that as between the judgment-debtor and the decree-holder all objections to the sale in execution of the decree or all applications to set aside the same come within the purview of Section 47 would, therefore, be to render the provisions of Rules 89, 90 and 91 redundant and this would be contrary to the recognized canons of the interpretation of statutes. It follows that as between the judgment-debtor and the decree-holder only such applications to set aside an auction-purchase made by the decree-holder as do not come within the purview of

Rules 89, 90 and 91 are within the scope of Section 47, Civil Procedure Code.'

On the above view in the matter it is quite clear that if a person feels affected by an execution sale on grounds of material irregularity (which term is to be understood as stated above) causing substantial injury to him, then he has to file an application under Order 21, Rule 90, Civil Procedure Code, and not an application under Section 47, Civil Procedure Code.

6. In the present cases the appellants' allegation that the sale proclamation had not at all been made does not appear to be correct, P. W. 2, one of the appellants in these appeals, who alone has been examined on behalf of all the appellants to support the above allegations, admits in his deposition that he came to know about the proclamation of sale of the properties in question from the daily Samaj. Oral and documentary evidence of proclamation of sale has been adduced by the respondent. There are of course certain discrepancies between the oral and the documentary evidence regarding making the proclamation for sale, but I do not attach much importance to those discrepancies in view of the above-mentioned evidence of P. W. 2 and the absence of any other evidence on record to support the appellants' case to the above effect. On the evidence on record considered along with the aforesaid admission of P. W. 2 it cannot be said that there was no proclamation of sale or that the appellants did not have any notice of the same. The appellants are all pendente lite purchasers of the properties in question, and so they must be keeping watch about the orders passed by the court in respect of the said properties purchased by them. As found above, they had knowledge about the proclamation of sale. That being so, if there was improper service or suppression of service of the sale proclamation that would only amount to material irregularity which could be agitated and assailed by an application under Order 21, Rule 89 or 90 and not under Section 47, Civil Procedure Code.

7. The sale originally was to be held on 17-6-1974. On that date the execution case was ordered to be put up on 27-6-1974 for further orders. It was also ordered that the execution proceeding would be called on that date. So it cannot be said that the execution sale was not to be held on 27-6-1974. On 27-6-1974 the Additional Subordinate Judge, Berhampur, who had received the execution

proceeding on transfer, held the auction sale of the property. It is not alleged that the place where the auction sale was actually held is away from the premises where the sale had originally been notified to be held. It is a well known fact and it is not disputed that the court of the Subordinate Judge and that of the Additional Subordinate Judge at Berhampur are in the same building. However, if the appellants wanted to assail the sale on the ground of absence of fresh sale proclamation from the court of the Additional Subordinate Judge, and/or on the ground of their ignorance of the said sale, they could have agitated those matters by a properly constituted petition under Order 21, Rule 90 and not by a petition under Section 47, Civil Procedure Code, as the said grounds may only amount to material illegalities (sic) (irregularities ?) in conducting the sale and do not render the sale null and void of affect the jurisdiction of the court to hold the sale.

8. Mr. Bhuyan cited a few decisions of other Courts in support of his submission that a sale held under such circumstances was a nullity and such a sale could be assailed on a petition under. Section 47, Civil Procedure Code. But in view of the decision of this Court reported in (1969) 35 Cut LT 757 and the other decisions mentioned above I hold that on the facts and circumstances of these cases the appellants cannot assail the auction sale by their petitions under Section 47, Civil Procedure Code, without filing a regular petition under Order 21, Rule 90, Civil Procedure Code.

9. Mr. Bhuyan submits that the auction sale of the said properties is also illegal and void as they offend the provisions of Section 5 read with Sections 3 and 4 of the Orissa prohibition of Alienation of Land Act, 1972. The facts requiring the application of the provisions of that Act were not established in these cases. Apart from that the said Act was repealed by the President's Act 17 of 1973 which received the assent of the President on the 28th September, 1973 and was published in the Official Gazette on the 29th September, 1973. The said Act 17 of 1973 was of course repealed by Orissa Act 9 of 1974 assented to by the President on the 11th July, 1974. But as the auction sale in question was made in June, 1974, the [Orissa Prohibition of Alienation of Land Act, 1972](#) was not in force at the time of the auction sale as at that time it stood repealed by the President's Act 17 of 1973. Therefore, the sale on this ground also is not a nullity.

10. In course of the hearing of these appeals Mr. Bhuyan on 23-7-1976 filed in this Court one petition in Misc. Appeal No. 15/76 praying for allowing the appellant to make necessary deposits required under the provisions of Order 21, Rule 90, Civil Procedure Code in respect of the properties in question brought under sale in the execution proceeding. Today he has filed two other petitions to the same effect. In the said petitions there is no prayer to treat the said petitions under Section 47, Civil Procedure Code as petitions under Order 21, Rule 90, Civil Procedure Code. In the trial Court the lawyer for the respondent specifically raised the question that on these petitions under Section 47, Civil Procedure Code the matters agitated by the appellants could not be decided and they for that purpose should have filed petitions under Order 21, Rule 90, Civil Procedure Code on depositing the money as provided in the Orissa amendment of the said Rule. The appellants instead of taking steps to convert the said petitions to proper petitions under Order 21, Rule 90, Civil Procedure Code rather persisted to press their said petitions under Section 47, Civil Procedure Code. In the appeals preferred by them against the order of the trial court they did not also take any steps nor did they show any inclination in the above direction. These appeals were filed in this Court on 24-12-1975 and were taken up for hearing in July, 1976. No steps in that direction were taken till the filing of the above-mentioned petitions at this very late stage, wherein also there is no prayer to treat the petitions under Section 47, Civil Procedure Code as petitions under Order 21, Rule 90, Civil Procedure Code, or any indication that the appellants are presently ready with the requisite amount and can readily deposit the same as and when ordered.

Apart from the above considerations, both the courts have arrived at the concurrent finding of fact that the appellants have not sustained any substantial injury due to the alleged irregularities in the auction sale. So on that finding the appellants are not to get any relief even if their petitions under Section 47, Civil Procedure Code are treated as petitions under Order 21, Rule 90, Civil Procedure Code. Moreover, if the above petitions under Section 47, Civil Procedure Code are treated as petitions filed in the executing court under Order 21, Rule 90, Civil Procedure Code, then on the orders passed by the courts below on such petitions no second appeals would lie to this Court, (See AIR 1970 Delhi 56; AIR 1923 Lah 592 and AIR 1934 Pat 627) and these appeals have to be dismissed on that

ground.

On the above considerations the aforesaid petitions filed by the appellants in this Court have to be and are hereby dismissed.

11. It is also to be noted in this connection that both the courts below have concurrently arrived at the finding that the properties in question were sold for proper valuation, and it is not the case of the appellants that those properties were not liable to be sold in this execution proceeding.

12. On the above discussions and considerations I do not find any merit in these appeals and so they are dismissed without costs of this Court.

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