

Philip Vs. Thomas

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Court : Kerala

Decided On : Apr-01-1957

Reported in : AIR1958Ker305

Judge : K.T. Koshi, C.J. and; Vaidialingam, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 67(2) and 90

Appeal No. : Civil Misc. Appeal No. 22 of 1957

Appellant : Philip

Respondent : Thomas

Advocate for Def. : M.M. Mathew, Adv.

Advocate for Pet/Ap. : K.K. Mathew, Adv.

Disposition : Appeal allowed

Judgement :

Vaidialingam, J.

1. This is an appeal filed by the decree-holder-purchaser against the order dated 10th January, 1957, of the learned Subordinate Judge, Meenachil, setting aside the sale held on 21-2-1956, in execution of the decree in O. S. 192 of 1954.

2. The first defendant filed an application under Order 21, Rule 90, C. P. C., to set aside the sale, on the ground of material irregularity and fraud in publishing and conducting the sale. The subject matter of the sale was one half of Oodukkur right in 7 acres 94 cents of land and a building standing thereon. It was alleged by the first defendant that the sale was conducted on 21-2-1956 without proper notice and that the decree-holder himself purchased the property for Rs. 9-158-0-0.

Allegations of fraud and material irregularity in the conduct or publishing of the sale were also made by the first defendant. The first defendant also contended that as the publication of the intended sale was made in 'Kerala Bhooshanam' only on the date of the actual sale, namely 21-2-1956 the sale is illegal and void. The application was contested by the decree-holder-purchaser (the appellant herein) on the ground that there was no material irregularity or fraud in the publishing or conduct of the sale and that in any event no substantial injury has been caused to the first defendant.

3. The first defendant appears to have taken out a commission to assess the value of the properties and the Commissioner has valued the properties both on the basis of yield, as also on the basis of the estimated market value. On the basis of yield, the properties were valued in the sum of Rs. 9879-12-4, and on the latter basis, they were valued at Rs. 11,289-10-8.

The first defendant did not adduce any evidence to challenge the valuation of the Commissioner and, in the absence of any other evidence to the contrary, the valuation arrived at by the Commissioner was rightly accepted by the learned Subordinate Judge. The learned Subordinate Judge has also held that the price fetched at the sale namely Rs. 9,458/- cannot be said to be by any means low or inadequate and that the first defendant cannot be said to have sustained any substantial injury.

4. The main ground of attack on behalf of the first defendant was that the sale itself is illegal and void by reason of the contravention of Order 21, Rule 67 (2), C. P. C., in view of the fact that the newspaper publication 'in 'Kerala Bhooshanam' was only on 21-2-1956, the actual date of sale. The learned Subordinate Judge was impressed by this contention and has held that this amounts to a

contravention of Order 21, Rule 67 (2) of the C. P. C. and . therefore, the sale so held way illegal and in this view the lower Court set aside the sale.

5. Before us, the learned counsel for the appellant has contended that the non-compliance with the provisions of Order 21, Rule 67 :(2), C. P. C., will, at the most, amount only to an irregularity which may give a right to the judgment-debtor to file an application under Order 21, Rule 90, G. P. C., and that the learned Subordinate Judge was wrong in setting aside the sale especially in view of his finding that the judgment-debtor has not sustained substantial injury.

6. Order 21, Rule 67 (l) provides that every proclamation shall be published as nearly as may be, in the manner prescribed by Rule 54, sub-r. (2). It is not the case of the first defendant that the procedure mentioned therein has not been followed. Clause 2 of the said rule further provides that such proclamation shall also be published in the Official Gazette or in a local newspaper or in both in cases where the Court so directs. In this case, by virtue of this provision the Court appears to have directed the publication of the sale proclamation in a local newspaper namely, Kerala Bhooshanam. There is no dispute that the said publication was made only on 21-2-1956.

7. The question that arises for consideration is whether this publication of the sale proclamation in the newspaper only on the date of sale, amounts to a material irregularity enabling the judgement-debtor to maintain an application under Order 21, Rule 90 on the grounds stated therein or whether the sale itself will be a nullity which could be set aside without any further proof of substantial injury by the judgment-debtor,

8. It is also worthwhile noting one other provision namely Order 21, Rule 68 which runs as follows :

'Save in the case of property of the kind described in the proviso to Rule 43, no sale here-under shall, without the consent in writing of the judgment-debtor, take place until after the expiration of at least thirty days in the case of immovable property and of at least 15 days in the case of movable property, calculated from the date on which the copy of the proclamation has been affixed on the Court

house of the Judge ordering the sale.'

9. In *Tasadduk Rasul Khan v. Ahmad Hussain*, ILR 21 Cal 66 (A), the Privy Council had to consider the scope of the old Section 290 (corresponding to Order 21, Rule 68, C. P. C.) and the old Section 311 (corresponding to Order 21, Rule 90, C. P. C.). It was contended before their Lordships that the non-compliance with the interval of 30 days between proclamation and sale, made the sale a nullity. But their Lordships rejected this contention and observed as follows at page 69 :

'The proceeding in this case was brought by the respondent under Section 311 which deals with material irregularity. The non-compliance with the provisions for posting was a material irregularity. Both on principle and authority their Lordships are of opinion that the case must be treated, as the respondents themselves treated it, as one of material irregularity to be redressed pursuant to the provisions of Section 311, and in the application of that section it was incumbent on the respondents to have proved that they sustained substantial injury by reason of such irregularity. They gave no such evidence.'

10. In *Jogendranath v. Nabi Newaj*, AIR 1938 Cal 699 (B), Edgley, J. held that though the provisions of Order 21, Rules 67 and 68 like Rule 69, have been designed for the protection of judgment-debtors and for the purpose of ensuring that properties of such persons shall not be put up to sale-unless due publicity is given to the fact that the sale is to be held, mere failure to comply with those provisions, does not make the Court sale null and void.

The learned Judge has further held that it would be necessary for a person who is aggrieved by the non-compliance with those provisions to treat such non-compliance as material irregularity which he must urge in a properly constituted application under Order 21, Rule 90. The decision in AIR 1938 Gal 699 (B), has been followed by a Bench of the Calcutta High Court (B. K. Mukherjea and Roxburgh, JT.) in *Sm. Ashnlata Bose v. Manindra Nath Bose*, ILR 19-41-2 Gal 570: (AIR 1942 Gal 275) (C).

11. We may also refer to the decision of the Privy Council in *Sharfuddin Hussain v. Radhacharan Das*, ILR 46 Gal 255: (AIR 191 TV PC 217) (D), where their

Lordships had to deal with the provisions for publication of a sale to be conducted under Act 11 of 1859. Section 33 of the said Act which uses similar language found in Order 21, Rule 90, provides that no sale shall be annulled by a Court of justice except upon the ground of its having been made contrary to the provisions of the Act and then only on proof that the plaintiff has sustained substantial injury by reason of the irregularity complained of. The irregularity complained of in that case was the non-publication of the notification of sale in the Uriya Gazette. Their Lordships held that inasmuch as no proof has been offered that any substantial injury arose in consequence of the irregularity complained of, the sale cannot be set aside.

12. The learned counsel for the respondent contends that the non-compliance with the provisions of Order 21, Rule 67 (2) amounts to an illegality, and any sale held in contravention of the said provisions is void. The learned counsel further contends that the sale has to be set aside even in the absence of any proof of substantial injury caused to the defendants.

13. In support of his contentions, the learned counsel relies upon the decisions of the Madras High Court in *Jayarama Ayer v. Vridhagiri Aiyer*, AIR 1921 Mad 583 (E) and *Natesa Pillai v. Venkatarama Aiyer*, AIR 1940 Mad 208 (F). In our opinion these two decisions do not lend any support to the respondent. In AIR 1921 Mad 583 (E), the facts were entirely different. There the sale appears to have been held at a place and by an officer different from that mentioned in the sale proclamation. The following observation of Oldfield, J., at p. 585, makes the position clear.

'It seems to me that if when a proclamation was made any of the usual and effective methods prescribed or permitted by the Court for its publication has been misleading as to details of the matter proclaimed and has been such as not merely not to give information to possible bidders but to divert them to a place where the sale is not to be held, the result must be that the property has never been sold under the Code at all.'

In AIR 1940 Mad 206 (F), a Bench of the Madras High Court (Burn and Stodort, JJ.) held that a sale held on a day on which it has been proclaimed that it shall not take place is invalid and such a sale is vitiated by illegality and it is a nullity. This

decision too does not help the respondent.

14. In view of the decisions of the Privy Council and the Calcutta High Court, referred to above, it follows that the non-compliance with the provisions of Order 21, Rule 67 (2), C. P. C. will, at the most amount only to a material irregularity which could be relied upon by a judgment-debtor for filing an application under Order 21, Rule 90. But the sale so held is not an illegal or a void sale. Such a sale could be set aside only if the judgment-debtor is able to satisfy the Court that he has sustained substantial injury by reason of such irregularity.

On the finding of the lower Court that no substantial injury has been caused in this case the sale should not have been set aside. Having regard to the valuation fixed by the Commissioner in this case, the price fetched in the sale cannot be said to have caused any substantial injury to the 1st defendant much less any consequence of irregularity complained of. The view of the learned Judge that the sale is illegal because it has been held in contravention of Order 21, Rule 67 (2) is not sound.

15. The order of the learned Subordinate Judge is hereby set aside and this Civil Miscellaneous Appeal is allowed and the application filed by the first defendant under Order 21, Rule 90 will stand dismissed. Parties will bear their own costs throughout.

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