

Natesa Pathar Vs. Ganapathi Subba Pathar and ors.

Natesa Pathar Vs. Ganapathi Subba Pathar and ors.

SooperKanoon Citation : sooperkanoon.com/776633

Court : Chennai

Decided On : Oct-19-1926

Reported in : (1927)52MLJ68

Appellant : Natesa Pathar

Respondent : Ganapathi Subba Pathar and ors.

Judgement :

Devadoss, J.

1. The plaintiffs who are the sons of the 4th defendant have brought this suit for partition of their 4|5ths share of the plaint property on the ground that their shares in it were not conveyed to the 1st defendant under the sale in execution of the decree against their father. The District Munsif decreed the plaintiff's suit and the 1st defendant's appeal to the Subordinate Judge's Court was dismissed. He preferred a second appeal to the High Court and it was dismissed by Spencer, J., and he has preferred this Letters Patent Appeal against the decision of that learned Judge. The Lower Courts as well as Spencer, J., have on a consideration of the evidence in the case held that the execution and sale did not convey to the appellant the interest of the plaintiffs in the suit property and that what was bought by him was only the share of the 4th defendant.

2. The contention of Mr. Varadachariar for the appellant is that where the sale papers are unambiguous the Court should give effect to their plain meaning as it

appears on the face of them and should not take evidence in order to ascertain what was intended to be sold by the execution creditor and it is only where the sale papers are ambiguous or capable of more than one meaning that the Court should ascertain what was intended to be and was sold by a reference to 'documents and circumstances connected with the suit, decree, execution proceedings and sale.

3. The prayer in the execution application, Ex. B-4, is

The plaintiff prays that the immoveable property belonging to and enjoyed by the 1st defendant herein described below be attached... on a date to be fixed by the Court, that the property be sold, etc.

4. The sale proclamation B-7 follows the description in the execution application and contains the clause

The immoveable property discribed in the schedule hereto was ordered to be sold in satisfaction of the said decree.

5. The sale certificate, Ex. B-8, certifies that

the plaintiff, Natesa Pathar, has been declared the purchaser at a sale by public auction on the 9th day of January, 1913, of the undermentioned properties for Rs. 75, in execution of the decree in this suit and that the said sale has been duly confirmed by this Court.

6. These documents show that the property as a whole was brought to sale and sold and not the share of the 4th defendant alone. Is it open to the Court to go behind these documents to ascertain what was intended to be sold?

7. The respondent's contention is that in every case where a decree is obtained against a Hindu father and family properties are brought to sale it is a question of fact to be determined by the Court what was the interest that was sold, whether it was the interest of the father alone or the interest of the father as well as of the sons. Where the interest of the father alone is sold or where the interest of the father as well as of the sons is sold the question of what was intended to be sold

would not arise. It is only in cases where family property is sold as belonging to the father without any limitation the question of what was intended to be sold could arise. It is not an invariable rule that in all cases where family property is sold in execution of a decree against the father, in a suit by the sons for partition of their shares or for a declaration that the sale is not binding on their shares, the Court has no option but to enquire into and determine what was intended to be sold after taking such evidence, oral and documentary, as may be brought forward. It is against all rules of construction to enquire into what was intended to be conveyed or transferred under a document when its terms are clear. The capacity or the right of the person to transfer or convey an interest in the property has nothing to do with what he purports to convey. If he has no right to convey or create an interest in property, the transaction can be impeached as not being valid.

8. Where a person without any limitation conveys property which he could validly convey it is not a rule of law that he should be considered to have conveyed only his personal or limited interest in the property and not the whole interest in it which he could lawfully deal with. In every case it is a matter of construction of the document as to what was conveyed by or under it. If a Hindu father sells family property by private treaty without any limitation he conveys the full interest in the property and the Court would not be justified in considering whether he conveyed the whole interest in the property including that of his sons or only his share in it. The sons can impeach the father's sale as not binding on them in certain circumstances, but the fact that they may by showing the presence of certain circumstances impeach the sale of the family property as not affecting their shares is no ground for the Court going behind the plain terms of the document of sale and holding that what was purported to be a sale of the whole property was only a sale of the father's share in it. Considerable confusion has arisen in connection with the Court sales of family property by overlooking the distinction between what was sold and the right of the sons to impeach the sale as not binding on their shares. The existence of a remedy for the sons to release their shares from the father's alienation is not a sufficient ground for them to insist upon the Court to consider in every case where the meaning is clear and there is no ambiguity on the face of the documents evidencing the execution sale that what purported to have been conveyed was not really conveyed.

9. The Court should not lightly overlook the terms of the proclamation, the sale certificate and the execution application. Where a purchaser buys property in a Court auction he buys what the Court purports to sell and when the Court gives him a certificate that the property which he buys is sold to him without any limitation it is not open to the Court in a subsequent proceeding to go behind the sale certificate and say that what purports to have been conveyed was not conveyed. No doubt the auction purchaser buys the property subject to the risk of the sale being set aside on the ground that the judgment-debtor had no saleable interest in the property either wholly or partially but that is no ground for the Court to take evidence to consider whether what purports to be the sale of the whole of the property is not a sale of the whole but only of a fraction of it.

10. In *Ramabhadra Naidu v. Kadiriyasami Naicker* (1921) ILR 44 M 483 (PC) certain lands which were not included in the mortgage were brought to sale owing to a wrong description in the proclamation of sale that all the pannai lands in the possession of the mortgagor were to be sold. After the sale was confirmed a suit was brought by the mortgagor's son alleging that the pannai lands did not belong to the mortgagor, and the sale of them did not convey any title to the vendee. The Subordinate Judge held that the defendant, i.e., the vendee, bought at the sale the pannai lands and that the plaintiff's remedy was only in the execution proceedings under Section 47 of the Civil Procedure Code and not by a separate suit. *Abdur Rahim and Srinivasa Aiyangar, JJ.*, reversed the decree of the Subordinate Judge.

11. *Srinivasa Aiyangar, J.*, who delivered the judgment in the case which was concurred in by *Abdur Rahim, J.*, observed:

I think the sale certificate which' presumably followed the sale proclamation should, if possible, be construed so as to convey the properties which the Court has jurisdiction to sell under the decree. I therefore come to the conclusion that the sale did not include the 226 kulis.

12. On appeal the Privy Council reversed the judgment of the High Court and restored that of the Subordinate Judge. Lord Buckmaster observes at page 488:

It is in their Lordships' opinion impossible to construe this sale certificate as limiting in any way the extent of the pannai lands to which it referred. At the time when it was issued, the whole of the lands in dispute were in fact in the enjoyment of the sons of the mortgagor, who had acquired them as his representatives. The learned Judges of the High Court appear to regard the words set out as capable of explanation and limitation by reference back to the mortgage itself; but their Lordships are unable to accede to this contention. There is no ambiguity in the words of the certificate that are capable of explanation by such means, and the object of the sale certificate would be defeated if it were possible to change its plain meaning by reference to other documents. The rights of the mortgagors, however, need not have been taken away by this fact as they were at liberty to have taken proceedings in the suit in order to raise the contention that they now put forward under Section 47 of the Code of Civil Procedure, 1908, but this they have never done and it is now too late.

13. In that case the sale certificates included the whole of the pannai lands belonging to and enjoyed by the sons of the 1st defendant who acquired them as the legal representatives of the 1st defendant with all its privileges and rights attached to the Zemindari. When the words of the document are clear there should be no question as to what it conveys. Whether it could convey a good title is quite a different question. With regard to the contention that the general words used in the sale certificate must be limited by a reference back to the mortgage the noble Lord observes:

The sale certificate was in their opinion plain, and its meaning was accepted by all parties at the time, showing that even if they misunderstood the operation of the 'mortgage they were under no misapprehension as to that of the certificate. Certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. There is full opportunity for challenge of all proceedings in the execution of mortgage decrees at the time, and except in clear cases a purchaser ought not to be harassed in his possession by disputes arising years after his purchase.

14. In the present case there is no ambiguity in the sale certificate which certifies that the appellant is the purchaser of the undermentioned properties. I think the principle of the decision in *Ramabhadra Naidu v. Kadiriyasami Naicker* (1921) ILR 44 M 483 (PC) applies to the present case.

15. As this question of what is sold in execution of a decree against a Hindu father has been the subject of numerous decisions which are not at all reconcilable I shall refer to a few of the most important of them.

16. In *Nanomi Babuasin v. Modhun Mohun* (1885) ILR 13 C 21 (PC) it was held that the judgment-creditor who obtains a money decree only against the father could bring to sale the whole of the family property and have it sold for the father's debts. The sons could bring a suit for a declaration that the sale is not binding on them and would succeed if they show that the debt was contracted for immoral or illegal purposes; and if they fail to show that, their suit would be dismissed. With reference to the case of *Deendyal v. Jugdeep Narain Singh*.

Their Lordships do not think that the authority of *Deendyal's* case (3) bound the Court to hold that nothing but Girdhari's coparcenary interest passed by the sale. If his debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own.

Their Lordships further observe:

But if the fact be that the purchaser has bargained and paid for the entirety, he may clearly defend his title to it upon any ground which would have justified a sale if the sons had been brought in to oppose the execution, proceedings.

17. The observation of the Privy Council quoted above makes it clear that the Court should consider what was sold and not what could have been sold. If the sale is of the entirety the sons may challenge the sale on the ground that the father's debt was illegal or immoral and the purchaser could defend his title by

showing that the debt was not immoral or illegal.

18. In *Minakshi Naidu v. Immudi Kanaka Ramayya Goundan* there was a sale in execution of a decree against the Zamindar for his debt which purported to comprise the whole of the estate in his Zamindari. The son brought a suit against the purchaser making the father a party defendant to obtain a declaration that the sale did not operate as against him nor affected his interest in the estate. He failed to establish that the debt had been incurred for any immoral or illegal purpose. The Privy Council held that the impeachment of the debt failing, the suit failed; and that no partial interest but the whole estate had passed by the sale, the debt having been one which the son was bound to pay. Their Lordships observe at page 147:

Upon the documents their Lordships have arrived at the conclusion that the Court intended to sell, and that the Court did sell, the whole of the estate and not any partial interest in it.

With reference to *Hardi Narain Sahu v. Ruder Perakash Misser* they observe:

All the documents showed that the Court intended to sell and that it did sell nothing but the father's share, the share and interest that he would take on partition, and nothing beyond it, and this tribunal in that case puts it entirely upon the ground that everything showed that the thing sold was whatever rights and interests the said judgment-debtor had in the property and nothing else.

In *Simbhimath Pande v. Golap Singh* their Lordships observe that

Each case must depend upon its own circumstances. It appears to their Lordships that in all the cases, at least in recent cases, the enquiry has been what the parties contracted about, if there was a conveyance, or what the purchaser had reason to think he was buying if there was no conveyance but only a sale in execution of a money decree.

19. If a Hindu father effects a private conveyance of the family property without any indication that he conveys only his own interest in it can the Court be asked to consider whether the sale conveys only the interest of the father or the interest of the father as well as of the sons? Where the vendor does not limit the interest

which he conveys, it is opposed to all rules of construction to import into the document what it does not contain. The execution sale by a Court does not stand on a different footing. If the Court selling certain property gives a certificate that the property is sold without any limitation then it has the same effect as a conveyance by a Hindu father without any indication of any limitation of the interest in the property which he conveys

In the case of a sale it makes no difference whether it was effected by a conveyance or took place at a Court auction in execution of a decree'.--
Veerabadra Aiyar v. Marudaga Nachiar.

20. Mr. Jayarama Aiyar for the respondent relies upon Avalappa Naicker v. Murugappa Chettiar as authority for the position that the sale certificate is not conclusive as to what was conveyed under it. What is meant by the right, title and interest of the defendant has been the subject of several decisions and the words have been construed to be ambiguous. The learned Judges remark

Much reliance is placed by the learned pleader for the appellant upon the fact that the sale certificate Ex. XVIII mentions that the right, title and interest of the defendant in this suit in the Zamindari is sold as indicating that only his life interest was sold. It has been repeatedly pointed out that such a description is not inconsistent in any way with the sale of all the interest which the doctor had power to dispose of under given circumstances.

21. In Section 213 of Act VIII of 1859 the expression was right, title and interest of the defendant'. In Section 237 of the Code of 1882 the expression was ' the judgment-debtor's share or interest therein '. Practically the same expression is repeated in the present Code in Order 21, Rule 13 (b) which is as follows:

A specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant and so far as he has been able to ascertain the same.

22. The execution creditor is bound to specify the share or the interest of the judgment-debtor. When the judgment-debtor has only a share in the property to be

sold his share has to be specified.

23. If he has some interest in the property less than the full interest that interest has to be mentioned. But where the judgment-creditor brings the property to sale as that of the judgment-debtor without mentioning what his share is or what his interest in it is, though he is bound under the law to state if he is bringing to sale only his interest, can it be reasonably contended that the judgment-creditor did not bring to sale the whole of the property that could be sold for the judgment-debt?

24. In this case the execution application describes the property as inherited and enjoyed by the 1st defendant, i.e., by the father. If the judgment-creditor wanted to sell the 1st defendant's share he would have so mentioned it, for the law does require that he should mention what the share or interest of the judgment-debtor is that he is bringing to sale.

In *Muhammad Husain v. Dip Chand* Sir John Edge, Chief Justice, and Justice Tyrrell laid down that

The specification required by Section 237 of the Civil Procedure Code, of the judgment-debtor's share or interest in immoveable property sought to be attached, should state distinctly whether it was the judgment-debtor's undivided share or the family property in which the judgment debtor had an undivided share which was sought to be attached and should also specify what that family property was.

In that case they observed at page 192

We abide by the view expressed in effect in the recent Full Bench ruling that where there is nothing to show any limitation of the extent of the interest sold, whether the sale took place in execution of a decree on a mortgage or in execution of a simple money-decree obtained against the father, a member of a joint Hindu family; it may be presumed that the family property and not the mere undivided share of the father was sold.

If the specification merely referred to the judgment-debtor's share and interest in what was the family property, we should be prepared to hold unless something to the contrary appeared, that the sale was of that share and interest only and

nothing else.

25. It is clear therefore that where the judgment-creditor is required by law to do something and he purposely omits to do that thing, can it be said that he did not intend to bring to sale the whole of the property which could be sold to satisfy the decree.

26. It is for this reason that we should not go behind the plain meaning of the expression used in the sale papers in order to ascertain what the judgment-creditor could have intended or should have intended in bringing the property to sale.

In *Veerabadra Aiyar v. Marudaga Nachiar* the learned Judges observe at page 206:

The sale certificate is no doubt the most important document as the instrument conferring title but is not conclusive.

27. They go to state what documents and what circumstances should be considered in an enquiry as to what was intended to be sold. The question is not whether the sale certificate is conclusive but whether the plaintiffs in such a case as this could insist upon the Court going behind the clear words of the sale certificate. The above observation of the learned Judges is opposed to the recent decision of the Privy Council in *Ramabhadra Naidu v. Kadiriyasami Ndicker* (1921) ILR 44 M 483 (PC). *Avalappa Ndicker v. Murugappa Chettiar* is not of much help to the respondent. As already observed it only refers to the ambiguous nature of the expression 'right, title and interest of the defendant.'

28. It is unnecessary to discuss at length the cases in *Umbica Prasad Tewary v. Ram Sahay hall* and *Mahabir Pershad v. Moheswar Nath Sdhai*. The expression 'right, title and interest of the judgment-debtor' has, as already observed, given rise to many decisions as to what it meant. Under the present Civil Procedure Code there cannot be that ambiguity for it is the duty of the execution-creditor to specify the share or interest of the judgment-debtor and where he does not specify or limit the right of the judgment-debtor but brings the whole of the property to sale, the

property sold is the whole of the property which the judgment-debtor could convey.

29. After an anxious consideration of the case I have no hesitation in holding that the fact that the sons could impeach the father's sale as not binding on them should not be held to give them a right to insist upon the Court to go behind the clear words of the sale papers and take evidence as to what could have been intended by the judgment-debtor.

30. In this view it is unnecessary to consider whether in this case there are circumstances which could justify the Court in coming to the conclusion that the sons' shares were not sold. If it is necessary to record a finding on that point, I would with due respect to the learned Judge who decided the second appeal differ from the conclusion arrived at by him. The plaintiff who made the minor sons parties to the suit gave them up as he found some difficulty in getting a guardian appointed as the father refused to act as their guardian. The expression 'belonging to and enjoyed by the 1st defendant in Ex. B-4' does not militate against the intention of the judgment-creditor to bring the whole of the family property to sale.

31. It is well settled that a creditor who obtains a money decree against a Hindu father can have the whole of the family property, including the shares of the sons, sold to satisfy his debt and the sons can impeach the sale on the ground that the debt was illegal or immoral. The other circumstances relied upon by the learned Judge are not such as to justify the inference that only the father's share was sold.

32. In the result the Letters Patent Appeal is allowed and the plaintiff's suit is dismissed with costs throughout.

Sundaram Chetti, J.

In this appeal the main question for consideration is whether the 1st defendant (appellant) purchased in the auction sale held in execution of the decree in S.C. No. 1165 of 1908 on the file of the Sub-Court of Kumbakonam the individual interest of the judgment-debtor, or the entire interest of the judgment-debtor and his undivided sons in respect of the properties specified in the sale proclamation

and sale certificate. This is doubtless a mixed question of law and fact. It has been decided against the appellant by the Trial Court as well as by the first and second appellate Courts. All the three' Courts have held that what was sold in Court-auction must be deemed to be the father's individual interest only. This conclusion has been arrived at on a consideration of all the surrounding circumstances coupled with the recitals in the sale certificate, which have all along been taken into consideration in deciding a dispute of this kind as would appear from a series of judicial decisions. *Nanomi Babuasin v. Modhun Mohun*, *Simbhunath Pande v. Golap Singh*, *Mahabir Pershad v. Moheswar Nath Sahai*, *Veerabadra Aiyar v. Marudaga Nachiar* and *Avalappa Naicker v. Murugappa Chettiar*.

The result of the examination of the question from those standpoints has been stated by the learned Judge who decided the second appeal and I cannot do better than to quote his own words:

In the present case, these are the following significant facts. At the trial of the suit, the defendants (song) were exonerated as no guardian was appointed to represent them. The decree directed payment of Rs. 110 by the, 1st defendant alone. In the petition for transmitting the decree for execution it was noted that the defendants 2 to 5 had been exonerated and that no relief was asked against them. In the execution petition, this fact was repeated and the prayer was for attachment of the immoveable property belonging to and enjoyed by the 1st defendant. In the sale proclamation the interest of the judgment-debtor was described as certain survey numbers inherited and enjoyed by the 1st defendant. The sale certificate also contained a note that the defendants 2 to 5 had been exonerated, and the Subordinate Judge also relied on the fact that the property was bought for Rs. 75 which is much below its value even after allowing for the encumbrance.

33. The contention put forward by the learned vakil for the appellant is, that the question should be decided solely on the construction of the sale certificate, which is the document, of title, and unless the words of conveyance therein found are ambiguous so as to create a doubt whether the interest of the father alone or the entire interest of the father and his sons was sold, no evidence furnished by the surrounding circumstances should be considered in determining the question.

34. This contention appears to be correct. It has to be seen whether the sale certificate in this case (Ex. B-8) is so clear and unambiguous as to make the consideration of the surrounding circumstances, unnecessary and improper. The sale certificate gives the suit number, and the number of the execution petition, and describes the plaintiff (auction-purchaser) and mentions the names of the 1st defendant and of his four sons (defendants 2 to 5). It is noted that defendants 2 to 5 having been exonerated, no guardian was appointed for them. Then the certificate proceeds to state the name of the purchaser, the date of the auction-sale, and the price, paid, and also the description of the properties sold, with a footnote that the sale was subject to a mortgage. In construing this sale certificate, are we faced with any sort of doubt or ambiguity? The particulars of the properties sold are given, but nothing else is stated to indicate that only the father's individual share in those properties was sold in Court auction. If the sale certificate should state that the right, title and interest of the 1st defendant (judgment-debtor) in these items of properties was sold, it may be contended there is an ambiguity, and therefore what the extent of that interest was, will have to be ascertained by reference to other documents and circumstances. Under Rule 13 of Order 21, Civil Procedure Code, it is obligatory on the decree-holder to give a description of the properties sought to be attached, by mentioning the survey numbers or boundaries, etc., sufficient to identify the same, and the application should also contain a specification of the judgment-debtor's share or interest in such properties. The sale proclamation embodies the description given in the attachment list, and the sale certificate is based on the sale proclamation. In the present case, it is clear from the sale certificate (Ex. B-8) that certain nanja and punja lands, whose survey numbers and extents are given, have been sold, subject to mortgage. It does not specify what the judgment-debtor's share or interest in these lands is, and such specification must have been made in it, if what was put up for sale and sold was only the 1st defendant's share in these properties and not these properties in their entirety. There are no words in the description of the properties given in the sale certificate to restrict or limit the subject-matter of the auction sale to the undivided share only of the 1st defendant in those items. There being no ambiguity whatever in the sale certificate as to what was actually sold in Court auction, the present case is governed by what their Lordships of the

Privy, Council have laid down in *Ramabhadra Naidu v. Kadiriyasami Naicker*(1921) ILR 44 M 483 (PC).

There is no ambiguity in the words of the certificate that are capable of explanation by such means and the object of the sale certificate would be defeated if it were possible to change its plain meaning by reference to other documents.

35. There is also the further observation that the certificates of sale are documents of title which ought not to be lightly regarded or loosely construed. I have therefore to hold that the plain and unambiguous words of the sale certificate should be given effect to, and the Court cannot embark on an enquiry as to what was intended to be sold or what could have been sold or what must be 'deemed to have been sold by reference to other documents and surrounding circumstances, If such an investigation is permissible in this case, the significant circumstances disclosed in the case would justify the conclusion arrived at by three Courts as to what must be deemed to have been sold. But the question has to be decided on the construction of the sale certificate, which in this case is plain and free from ambiguity.

36. I therefore agree with the order pronounced by my learned brother.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com