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Court : Chennai

Decided On : Dec-05-1975

Reported in : (1977)1MLJ134

Appellant : Sivasangu

Respondent : Chinnaiah

Judgement :

G.J.R. Paul, J.

1. This appeal has been preferred against the order of the learned District Judge of Tiruchirapalli in C.M.A No. 14 of 1973, confirming the order passed by the learned Subordinate Judge of Tiruchirapalli dismissing a petition filed under Order 21, Rule 90 and Section 47 of the Civil Procedure Code, by the appellant for setting aside a Court-sale.

2. The respondent-decree-holder obtained a mortgage decree against the appellant-judgment-debtor and brought the mortgaged properties to sale and subsequently on 21st April, 1971 he purchased the properties in Court-auction for a sum of Rs. 7,000 after obtaining permission from the Court to bid in the Court-auction. The judgment-debtor assailed the sale on the following grounds; (1) the decree-holder managed to see that due publication of the sale proclamation was not made and as a result thereof the prospective purchasers did not get sufficient information and properties worth Rs. 20,000 had been sold for a low amount of Rs.

7,000; (2) no notice was given to him, the judgment-debtor in regard to the petition filed by the decree-holder for permission to bid in the auction; and (3) the executing Court erred in having allowed the decree-holder to bid in the auction even when the properties were brought for sale the second time. All these contentions were negated by the learned Subordinate Judge of Tiruchirapalli.

3. With regard to the first contention that there was no publication of the sale proclamation, it was pointed out on behalf of the judgment-debtor that the sale proclamation was not affixed to any conspicuous part of the suit properties and was not proclaimed by beat of tom-tom, but no evidence was let in support of that contention. The learned Subordinate Judge has referred to the submission, in the application for setting aside the sale, that the time fixed for the sale in the proclamation was 2 P.M., and the sale was conducted at 4 P.M. and hence the persons who had been to the Court to purchase the suit properties left the Court by 3 P.M. and has inferred from those statements that there was due proclamation and a number of purchasers were present at 3 P.M. that day. In any event this objection of the judgment-debtor has not been substantiated by any evidence whatsoever and hence both the Courts below have rightly found that this objection had not been established.

4. The next ground urged was that no notice was given to the judgment-debtor in regard to the application filed by the decree-holder to reduce the upset price and seeking permission to bid at the auction. Order 21, Rule 72, Civil Procedure Code, does not provide for any notice to be given to the judgment-debtor of such a petition. Nevertheless, since in exercising the discretion the Court should consider all the circumstances and exercise the discretion not arbitrarily but on judicial lines it is desirable for the Court to give notice to the judgment-debtor in regard to such petitions so that the Court may be in a position to consider all the circumstances of the matter. In *Venkitammal and Anr. v. Janaki Ammal* : (1971)1MLJ366 it has been held by Ramanujam, J., that the Court, while considering the grant of permission under Order 21, Rule 72 should take into account certain objective matters and the discretion should be exercised on judicial lines and not arbitrarily and though Order 21, Rule 72 does not provide for any notice to the judgment-debtor or any reasoned order being given by the Court, it is desirable for the Court

to give notice to the judgment-debtor to show cause as to why the permission should not be granted and to pass a reasoned order if objections are raised, and though the statute does not provide for any notice, it is well established that the Court exercising judicial functions, should normally give notice to the party who is likely to be affected by that order and cannot pass an order behind the back of the party, offending the principles of natural justice. But then, merely because such a notice was not given it cannot be held that the sale is vitiated. Even if a decree-holder bids and purchase a property in Court-auction without obtaining such permission, such purchase will not be void or a nullity but is only to be avoided on the application of the judgment-debtor.

5- In *B. Susila and Anr. v. Saraswathi Ammal and Ors.* : AIR1970 Mad357 . it was held by this Court that the Court fixing the upset price is not under an obligation to issue notice of fixing that upset price or the alteration thereof to the judgment-debtor and the failure to give such notice does not constitute a material irregularity or fraud within the meaning of Order 21, Rule 90, Civil Procedure Code.

6, In *P. Achamma v. T. Bavanna* : AIR 1969 AP196 . it has been held that the grant of permission under Order 21, Rule 72 is an administrative act and the non-issue of a notice to the judgment-debtor does not vitiate the sale. It was however observed in that decision that the executing Court generally directs notice to the judgment-debtors in an application under Order 21, Rule 72, and that it is a salutary practice to do so. But, actually, in the case now before me on an examination of the records, I find that in E.A. No. 7 of 1971 which was a petition filed by the decree holder for permission to bid and set off notice was served on the defendant through the Court but the defendant was called and was absent and the Court granted the permission. Likewise in E.A. No. 6 of 1971, in the petition filed by the decree-holder to reduce the upset price also notice was given to the judgment-debtor and he was served but was absent and the upset price for lot No. 1 was reduced from Rs. 2,500 to Rs. 2,000 and for lot No. 2 to Rs. 5,000 from Rs. 7,000. No doubt in both those petitions the Court did not give its reasons for granting the permission or for reducing the upset price But nevertheless the Court has relied on the affidavits filed in support of those applications.

7. Ananthanarayanan, C.J., in Mohammed Mustafa Maracayar v. Udaidnachi Ammal : AIR1966 Mad348 . has observed that the order granting permission should specify the grounds on which it is granted, particularly, where the objections thereto have been overRule d.

8. In the case now before me there were no objections raised by the judgment-debtor. Therefore the failure of the learned Subordinate Judge to mention the grounds on which he granted permission would not amount to an irregularity.

9. In Sivathai Ammal v. Arulayee Ammal (1973)T.L.N.J. 38. an argument was raised before Kailasam, J., that permission should be granted only if there were no bidders at two sales and that the upset price was reduced without notice to the judgment-debtor. Kailasam, J., observed it will be seen that Order 21. Rule 72 and Rule 199 of Civil Rule s of Practice, safeguard the interests of the judgment-debtor and the Court itself is bound to consider the facts of the case and grant permission to the decree-holder to bid or purchase the property and in doing so, the Court will have to be satisfied that unless by granting permission to the decree-holder an advantageous sale cannot otherwise be had and though Order 21. Rule 72 and Rule 199 of Civil Rule s of Practice do not provide for notice to the judgment-debtor, it is necessary that the judgment-debtor should be given notice in order to enable the Court to satisfy that an advantageous sale cannot otherwise be had and decide whether permission should be granted to the decree-holder or not and that there is no authority to say that leave to bid should not be granted on the first occasion itself and all that is required in law is that the Court should be extremely cautious in granting permission and that it should be satisfied that an advantageous sale cannot otherwise be had than by granting leave to the decree-holders and that it is a Rule of caution that normally leave should not be granted on the first occasion because the Court will not have art opportunity to know the facts about the nature of the bid, the value of the property etc. which would enable it to decide whether it should grant permission or not. I respectfully agree with these-observations.

10. In support of the third contention-that the Court should not have granted' such a permission even, when the properties were brought to sale for the second time

the decision in Venkitammal v. Janaki Ammal : (1971)1MLJ366 has been cited by the learned Counsel for the appellant. Ramanujam, J., has observed there that the conduct of the decree-holder in obtaining leave to bid even on the first occasion of sale without any ostensible or justifiable reason and purchasing the property amounts to fraud in the conduct of sale. In coming to that conclusion, Ramanujam, J., has referred to a number of decisions. In Sheonath Boss v. Janaki Prasad Singh I.L.R. (1899) Cal. 132. it was observed that leave to bid and set off should be given very cautiously and only when it is found, after proceeding with the sale, that no purchaser at an adequate price can be found, and even then it should be given, only after some enquiry, that the sale proclamation has been, duly published. The words 'after proceeding with the sale, that no purchaser at an adequate price can be found' would necessarily raise the inference that there should be at least, one effort to sell the properties and only after that attempt fails owing to want of purchasers at an adequate price the question of giving permission to the decree-holder to bid and set off should be considered by the Court. In Raghavachariar v. Murugesu Mudali : AIR1923 Mad635 . it has been held that in dealing with the considerations to be taken into account while giving such permission, the main question for the Court to consider is whether it is to the advantage or disadvantage of every one concerned in order to obtaining the highest price that the plaintiff should be allowed to bid or not. In Varadaraja Pillai v. Gandagoi Nanniar : AIR1950 Mad392 . Krishnaswami Nayudu, J., after agreeing with the observations in Ragha-(sic) v. Marugesu Mudali : AIR1923 Mad635 . has observed that 'in this case the application for leave to bid was made for the very first sale and even for the first sale the decree-holder without any material that he could place before the Court, apprehends that the properties may not fetch a good price. Though I am not in entire agreement with the conditions laid down by the learned Judges in the Calcutta case to enable a decree-holder to obtain permission to bid I am however of opinion that the power to grant leave to bid must be cautiously exercised and unless the Court is satisfied from the circumstances shown in the affidavit that otherwise an advantageous sale could not be obtained, no such leave should be granted. In Mohammed Mustafa Maracayar v. Udainachi Ammal (1966) 1 M.L.J. 373 : 79 L.W. 187. Anantanarayanan, C.J., observed that where the permission to bid and set-off is sought by a mortgagee, that discretion

should be exercised with considerable care, that instances of that kind should be scarce and not liberal and that only where attempt to bring the property to sale has become unsuccessful on a prior occasion and the mortgagee has become unable to realise the debt which is very old, leave can be granted in such cases. He has further observed that it is desirable that the order granting permission should specify the grounds on which it is granted, particularly where the objections thereto have been overRule d.

11. Therefore it is clear from the above-said decisions that it would not be proper for the Court to grant such permission even when the properties are brought to sale for the first time. In the case which was before Ramanujan, J., also such permission was given even at the time when the properties were first brought to sale. But then there is no warrant for the proposition that there should be at least two such attempts to bring the properties to sale before permission to bid could be granted to the decree-holder. In the case now before me such permission was granted when the properties were brought to sale for the second time. On the first occasion when the properties were brought to sale there were no bidders,

12. The next objection is that the properties have been sold for a very low price. The respondent had filed two documents Exhibits B-1 and B-2. Under Exhibit B-1, on 2nd June, 1971 the western 82 1/2 cents in S.F. No. 362/5 was sold for Rs. 1,534 and the remaining eastern half of that survey number is the first of the items of properties concerned in these proceedings and it has been sold for Rs. 2,005 in Court auction. Similarly Exhibit B-2 shows that on 23rd July, 1970 an extent of 74 cents in S.F. No. 251/5, 251/6 and 251/7 has been sold for Rs. 3,000 while an extent of 55 cents in S.F. No. 251/5 and 43 cents in S.F. No. 251/6 have been sold in Court-auction for Rs. 5,005. It is therefore clear as found by the learned Subordinate Judge that the Court-auction had practically fetched the same price that was prevalent in the market.

13. The next contention urged is that which was raised for the first time only before the first appellate Court. It is contended that the valuation of the properties according to the judgment-debtor has not been mentioned in the sale proclamation. As observed by the learned District Judge after receiving the first

sale notice under Order 21, Rule 66, Civil Procedure Code, the judgment-debtor appeared before the Court and filed a counter in which he mentioned the value of the properties as Rs. 20,000 but thereafter he did not take part in the execution proceedings at all. On 23rd October, 1970 the presiding officer settled the sale proclamation fixing the upset price for lot No. 1 at Rs. 2,500 and for lot No. 2 at Rs. 7,000 and the presiding officer had noted in the proceedings the valuation given by the judgment-debtor as Rs. 20,000. The sale terms were copied in the draft sale proclamation in which the valuation given by the judgment-debtor, the decree-holder and the Court Amin and the upset price fixed by the Court were all mentioned and the proclamation was made and the properties were put up for sale on 23rd December, 1970 but for want of bidders the properties could not be sold and subsequently E.A. No. 6/71 to reduce the upset price and E.A. No. 7 of 1971 to permit the decree-holder to bid in the Court auction were filed and notices were ordered on both these applications and were served on the judgment-debtor who however remained absent and those applications were allowed on 4th February, 1971 and the fact of reducing the upset price was noted in the docket sheet in the execution proceedings and the Court directed the properties to be proclaimed and sold on 21st April, 1971. But, however, it appears that in that proclamation only the upset prices fixed by the Court was mentioned and the valuation given by the decree-holder and the valuation given by the judgment-debtor were omitted to be mentioned. The question is whether this would vitiate the sale.

14. On behalf of the appellant the decision in *Seetharama Iyengar v. Veeraraghava Pillai and Anr.* : (1970)1MLJ127 has been cited. In that decision Venkataraman, J., has held that on the wording of Order 21, Rule 66 (2) (c), Civil Procedure Code, each sale proclamation should mention the value of the property as stated by the judgment-debtor. But he held that he was unable to find that the judgment-debtor had sustained substantial injury as a result of this irregularity and hence under the third proviso to Order 21, Rule 90, Civil Procedure Code, he was precluded from setting aside the sale on the ground of that irregularity. He further observed that the crux of the matter is that mentioning the judgment-debtor's valuation as Rs. 100 per cent, would not have really improved matters when we find that it was mentioned in the first proclamation and there were no bidders on the prior occasions.

15. On behalf of the appellant the decision in *Esakki Doss v. Chelliah and Anr.* (1974) T.L.N.J. 109. has been cited. There also the substantial ground taken, for setting aside the sale, by the judgment-debtor was that the judgment-debtor's valuation had not been given in the sale proclamation and that had caused substantial prejudice resulting in the property being sold for a low price. It was observed by Gokulakrishnan, j., that the settlement of proclamation must contain all the particular mentioned in Order 21, Rule 66 (2), Civil Procedure Code, and must be settled and written by the Judge and signed by him and that the 'proclamation' has to be taken as settled by the Court and if that proclamation does not contain the necessary particulars, it has to be held that there is defect in the proclamation of sale itself and further, the notes-paper, wherein the District Munsif had stated certain particulars and signed, can be taken as 'proclamation ' settled by the Court and that proclamation settled by the Court admittedly did not contain the judgment-debtor's valuation and therefore there was a clear defect in the proclamation of sale which vitiated the entire sale proceedings and the matter squarely came under Section 47, Civil Procedure Code, and the sale held on such defective proclamation has to be set aside.

16. In the case now before me, on 23rd October, 1970 the learned Subordinate Judge had noted in the notes-paper the upset price fixed by the Court and the judgment-debtor's valuation. But for that sale fixed to take place on 2nd January, 1971 no bidders turned up and the properties were not sold and the petitions to reduce the upset price and for permission to bid were filed and on 4th February, 1971 the learned Subordinate Judge had noted that upset price had been reduced and he ordered proclamation and sale on 21st April, 1971. In that notes-paper he has no doubt not mentioned the judgment-debtor's valuation again; but it should be noted that after the judgment-debtor had first appeared and given his valuation as Rs. 20,000 he did not take any part in the execution proceedings in spite of. notice having been given to him about the petitions for reducing the upset price and for permission to bid.

17. The facts now before me are entirely different from the facts which gave rise to the aforesaid decision of Gokula-krishnan, J., Under the proviso to Rule 90 (1) of Order 21 (Madras Amendment) no sale shall be set aside on the ground of

irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant had sustained injury by reason of such irregularity or fraud. It has been argued on behalf of the appellant that the material irregularity or fraud should be in publishing or conducting it and the settlement of proclamation is antecedent to the publishing or conducting it and as such the matter would come under Section 47 and not under Order 21, Rule 90, Civil Procedure Code, and consequently it is not necessary to prove that the judgment-debtor had sustained substantial injury. Consequently, the learned Counsel for the appellant has pointed out that the observation of Ven kataraman, J., in *Seetharama Iyengar v. Veeraraghava Pillai and Anr.* : (1970)1MLJ127 that the learned Judge was unable to find that the judgment-debtor had sustained substantial injury as a result of that irregularity and hence under the third proviso to Order 21, Rule 90, Civil Procedure Code, he was precluded from setting aside the sale on the ground of that irregularity, would not apply to the facts of the case now before me. In support of that argument he has pointed out the observations of Gokulakrishnan, J., in *Bsakki Doss v. Chelliah and Anr.* (1974) T.N.L.J. 109. where the learned Judge observed that 'the matter squarely comes under Section 47, Civil Procedure Code, and the sale held on such defective proclamation settled by the Court has to be set aside.

18. The learned Counsel for the appellant has also referred to the decision in *Natarajan v. Chandmull Amarchand* : (1971)1MLJ474 . where it has been held that Order 21, Rule 90, Civil Procedure Code, would apply only where a sale is sought to be set aside on the ground of material irregularity or fraud in publishing or conducting it and the want of notice under Order 21, Rule 64 or 66 is a stage anterior to the publication of the proclamation of sale under Rule 67 or conducting the sale and it will not fall under Order 21, Rule 90. The above observations were made when the question came up for consideration as to whether the application to set aside the sale was within time, for if it was one under Order 21, Rule 90, the shorter period of 30 days' limitation prescribed under Article 127 of the Limitation Act would apply; but if it was one under Section 47, Civil Procedure Code, then. Article 137 of the new Limitation Act would apply giving a period of limitation of three years. Of course, Order 21, Rule 66 relates to the drawing up of the proclamation of sale while Rule 67 relates to the publication of the proclamation. But, then in the case now before me, as I have already pointed when the first

proclamation was settled, the judgment-debtor's valuation was noted, but that first sale was adjourned owing to want of bidders and the learned Subordinate Judge on the subsequent settlement of the proclamation did not mention the, judgment-debtor's valuation but only mentioned the upset price. That would be tantamount to his fixing the other terms of the proclamation in accordance with the terms given in the first sale. But unfortunately in publishing it, the other terms noted in the first proclamation were not noted, such he judgment-debtor's valuation.

19. In Krishnaswami Gounder v- Palani Gounder : AIR1975 Mad197 . Maharajan, J., has observed:

It is clear from the language of the Madras Amendment of sub-Rule (2) of Order 21, Rule 66 that the value of the property as stated by the judgment-debtor can be specified by the Court only if the judgment-debtor appears in the execution proceedings and states the value of, the property as per his estimate. If the judgment-debtor fails to appear in an execution petition and fails to state in that execution proceeding his estimate of the value of the property, it is no part of the duty of the Court to make a research relating to any other proceedings between the parties in. order to find out if the judgment-debtor had stated the value of the property.

20. I therefore find that there are no grounds what so ever to set aside the sale in this case. Hence this second appeal is dismissed with costs.

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