

Puttayya and anr. Vs. Varanashi Subraya Hebbar and ors.

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Court : Chennai

Decided On : Jan-29-1953

Reported in : AIR1953Mad988; (1953)2MLJ209

Judge : Govinda Menon and ;Basheer Ahmed Sayeed, JJ.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rules 90, 92 and 92(1) - Order 22, Rule 2

Appeal No. : Second Appeal No. 480 of 1949

Appellant : Puttayya and anr.

Respondent : Varanashi Subraya Hebbar and ors.

Advocate for Def. : S. Ramayya Nayak, Adv.

Advocate for Pet/Ap. : T. Krishna Rao, Adv.

Disposition : Appeal allowed

Judgement :

1. In O.S. No. 431 of 1935 on the file of the Court of the District Munsif of Kundapur, a mortgage decree was passed by which the defendants therein were to pay a sum of money to the plaintiffs within a stipulated period in default of which a final decree had to be passed for sale of the mortgaged property. The defendants were members of a joint Hindu family of which defendant 1 was the

father and manager and defendants 2 and 3 were his two minor sons. The preliminary decree was passed on 30-11-1935 and since no payment was made, a final decree Ex. B-2 was passed on 10-7-1936. In pursuance of that final decree, the hypotheca was sold by public auction on 16-1-1937 and the mortgagee decree-holder himself became the purchaser. Before the sale was confirmed, defendant 1 Manjunatha Hebbar died on 23-1-1937. No steps were taken to declare that defendants 2 and 3 were the legal representatives of defendant 1 and no attempt was made to appoint anybody as guardian-ad-litem of the minor defendants 2 and 3. But the sale was confirmed on 24-2-1937 and the sale certificate, Ex. P-3 dated 15-3-1937 was issued to the auction purchaser who obtained delivery by R. E. A. No. 156 of 1937 on 17-4-1937, Ex. P-4. Thereafter, the decree-holder purchaser leased the property to defendants 1 and 2 in the suit and the last of these leases Ex. P-5 is dated 11-10-1944. Later on, there was a notice of ejectment issued to defendants 1 and 2, sen Ex.. P-6 dated 7-1-1946. To that, the present defendants 1 and 2 replied that by the auction purchase the decree-holder purchaser had not obtained any title but that the title in the property was vested in the present defendant 3 who had purchased the property under Ex. D-3 dated 1-9-1943 from the two minor defendants in O.S. No. 431 of 1935 who had become majors and that they had executed 'chalgeni' lease deeds to defendant 3. In a family partition between the decree-holder and his Brother, the property has been allotted to plaintiff 1 in the present suit. Therefore the present suit was laid by plaintiffs 1 and 2 against the three defendants for recovery of possession with mesne profits.

2. Defendants 1 and 2 in the suit were the lessees and defendant 3 is the purchaser of the rights in the property from the guardian for minor defendants, who claim title adverse to the plaintiffs. The trial court found that the auction sale vested title in the purchaser and therefore defendants 2 and 3 in O.S. No. 431 of 1935 had nothing left in them which could be conveyed to the present defendant 3 and therefore decreed the suit. On appeal, the learned Subordinate Judge found that since at the time the sale took place on 16-1-1937 the minor defendants were not represented by any guardian-ad-litem, the sale was void and as such the decree-holder purchaser did not obtain any title to the property. Disagreeing with the trial Court which held that the non-appointment of a guardian-ad-litem for the

minors before the sale was confirmed was only an irregularity which would not make the sale invalid, the learned Subordinate Judge held that since there was no legal representative for defendant 1 Manjunatha Hebbar and since there was no guardian for the two minor defendants, the confirmation did not take any effect and therefore the purchaser had not obtained any title. Hence the second appeal.

3. Satyanarayana Rao J. before whom this second appeal came on for hearing in the first instance has directed this case to be posted before a Bench as the question raised in this case relating to execution proceedings is practically bare of authority and it would be better if there was a decision of a Bench on the point and that is how this second appeal has come to be posted before us.

4. The first question that arises for consideration is whether the fact that Manjunatha Hebbar's legal representatives, who were already on record, were not declared by Court to be the legal representatives before the sale was confirmed would make the sale invalid- It has to be remembered that the decree was against the joint family as such in which all the members were made parties. Such being the case the death of the managing member would not bring about an abatement of the suit. We are, in this case) governed by Order 22, Rule 2, Civil P. C. which lays down that where there 'are more defendants than one and only one of them dies and where the right to sue survives against the surviving defendants the Court shall cause an entry to that effect to be made on record and the suit shall proceed against the surviving defendants. What has happened in this case is that no entry has been made that defendants 2 and 3 in O.S. No. 431 of 1935 are the legal representatives of defendant 1. Does it invalidate the confirmation of sale is the question.

The decision in -- 'Achutan Nair v. Manavikraman', AIR 1929 Mad 152 (A) definitely lays down that where the legal representatives of a deceased defendant or respondent are already on record, it is not necessary that an application should be made to bring the legal representatives on record within three months. All that is necessary is that at some time or other before the hearing of the suit or appeal, the plaintiff should bring to the notice of the Court the fact of the death of the defendant, and if the Court, as a result of it, gets it noted on the record, then that

would satisfy the obligation under the law. Where a preliminary decree on a mortgage was passed against more than one judgment-debtor and one of them dies before the final decree was passed and the other judgment-debtors happened to be some of his legal representatives, then the omission to bring on record all the legal representatives to represent the estate of the deceased judgment-debtor would not make the final decree a nullity. Vide -- 'Kunhi Kalanda Beari v. Kunhipakki', AIR 1930 Mad 69 (B). In that case, before the decree was passed one of the defendants died and some of his legal representatives were already on record in another capacity but not all. A decree was passed by the Court without any application being made to bring on record the legal representatives of the deceased defendant of whom two were already on record. The final decree was passed without all the legal representatives being before the Court. The Court did not even make a declaration that the existing legal representatives sufficiently represented the estate of the deceased defendant. Even in such a case the learned Judges held that the failure to bring on record all the legal representatives of the deceased defendant would not invalidate the decree. It was further held that even if the Court did not make an entry to the effect that the other defendants were the legal representatives of the deceased defendant, still it cannot be said that the decree passed therein was nullity. It seems to us that there is some resemblance between the facts of that case and what we have to consider here.

Manjunatha Hebbar's legal representatives were defendants 2 and 3 in O.S. No. 431 of 1935 and simply because the Court did not make an entry after the sale took place that the minor defendants 2 and 3 are the legal representatives of Manjunatha Hebbar, no argument can be accepted that the confirmation of the sale, without the other judgment-debtors being declared as the legal representatives of the deceased Manjunatha Hebbar, is void. Even in cases where no legal representative of a deceased judgment-debtor was brought on record after sale but before confirmation, it has been held that the confirmation without a legal representative is only an irregularity which would not invalidate the sale as void. The provisions of Clauses

(2) and

(3) of Order 21, Rule 92, C. P. C. are the governing factors in matters of this kind. Under Clause

(1) of the rule where after a sale takes place no application is made under Rule 89 or Rule 90 or Rule 92 to set aside the sale, or where such application is made and disallowed the Court shall make an order confirming the sale and thereupon the sale shall become absolute. The period of limitation for making applications under Rules 89, 90, and 91 of Order 21, C. P. C. is thirty days as prescribed under Article 165 of the First Schedule of the Limitation Act. Therefore after the lapse of thirty days, if no application is made to set aside the sale or if during that period, an application is made and subsequently that application is disallowed, then it is the bounden duty of the Court to confirm the sale without any fresh application or a request from the decree-holder or the purchaser in court-auction. When once a sale takes place and the decree-holder is not the purchaser, he ceases to have any interest in the property and all the burden which the decree-holder till then had is shifted on the shoulders of the purchaser. There is no provision in the Code of Civil Procedure for a purchaser to apply for bringing on record the legal representative of the deceased judgment-debtor after the sale takes place but before confirmation. There is also no period of limitation prescribed for such bringing on record. The period of ninety days for bringing on record a legal representative in a suit cannot apply to a case where the judgment-debtor dies after sale but before confirmation. The confirmation might be at any time and need not necessarily be within thirty days of the sale. We have also to remember that under Clause

(1) of Rule 92 of Order 21 there is no obligatory duty of issuing any notice of the confirmation to the judgment-debtor unlike what we find in Clause

(2) of that rule. Though the confirmation of sale is a judicial matter and not an administrative act, the Code does not provide for the issuing of any notice to the judgment-debtor whose property has been sold in auction.

Our attention was invited to a decision in --'Kamakhya Dutt Ram v. Lala Shyam Lal'. AIR 1929 Oudh 235 (C). What happened there was that after a sale took place but before the sale was confirmed, the judgment-debtor died and

subsequently without the legal representatives of the judgment-debtor being brought -on record, a confirmation took place. When the validity of the sale was later on questioned by the legal representatives of the deceased judgment-debtor, the learned Judges, Hasan A. C. J. and Misra J. held that as the sale had taken place during the lifetime of the judgment-debtor and there are no provisions in the Code of Civil Procedure which required the legal representative of the judgment-debtor who died after the sale to be brought on record for the purpose of confirmation, the sale was not void. But the learned Judges also differentiated the case where the judgment-debtor dies before the sale takes place and the sale takes place behind the back of his representatives. In such a case they did not express any opinion. A different view was taken by Satyanarayana Rao J. in a recent decision decided after the case was referred to a Bench in -- 'Arunachala Chettiar v. Vadla Koundan', (D). There, the learned Judge, after referring -- 'AIR 1929 Oudh 235' (C), held on similar facts that where in execution of a decree, property belonging to the judgment-debtor was brought to sale and the sale confirmed, but before confirmation the judgment-debtor died, and confirmation takes place in the absence of the legal representative of the judgment-debtor, that the order of confirmation was a nullity because it cannot be made without the presence of parties who are sought to be affected. The reasoning of the learned Judge was that even after a sale takes place the judgment-debtor's interest in the property has not been sufficiently extinguished because according to the decisions it is possible that a Judgment-debtor's 'interest in the property can be attached and sold by other creditors as his interest has not ceased to exist. Such being the case, since the judgment-debtor has still an interest in the property despite the fact that the sale has taken place, the confirmation of the sale without the persons really affected, viz., the judgment-debtor's legal representatives being brought on record, would not pass title to the purchaser in order that the sale shall become absolute. The learned Judge also referred to Clause (3) of Order 21, Rule 92, C. P. C, which says that no suit to set aside an order of confirmation of sale shall be brought by any person against whom such order is made. Since according to this clause, a person against whom an order of confirmation is made is precluded from bringing a suit to set aside the sale, it must be held according to the learned Judge, that the confirmation of sale is an order passed against a person; and if

there is no legal representative on record, no order can be passed against him, On account of the existence of Order 21, Rule 92, Clause (3), C. P. C. the learned Judge was of opinion that though the sale was valid, the confirmation was a nullity. The decision in -- " (D) is therefore directly against the view

expressed by the Lucknow decision; but so far as the present case is concerned it is unnecessary for us to resolve the conflict between these two decisions for in the casa before us, the legal representatives of the deceased Manjunatha Hebbar were already on record and therefore the decision in -- " (D) is not applicable in 'pari materia' to the facts of the present case. Had it been a case where Manjunatha Hebbar was the sole judgment-debtor, and after the sale took place he died and no legal representative was brought on record then the present case would have resembled -- " (D) as well as -- 'AIR 1929 Oudh 235' (C). But here we have a different situation, viz., the legal representatives being already on record but without a guardian. Defendants 2 and 3 in O.S. No. 431 of 1935 were as much judgment-debtors as Manjunatha Hebbar because in fact the suit was against the joint family of which Manjunatha Hebbar and his two sons were the sole members. It is not contended that the sale which took place on 16-1-1937 is in any manner invalid and therefore when once we hold that the sale is valid, any subsequent irregularity, such as the non-recording of the remaining judgment-debtors as the legal representatives of one of the judgment-debtors who died, would not invalidate the sale as it is not necessary that any notice about the confirmation of sale should be sent to anybody for the purpose of confirmation.

5. The next question is whether the fact that no guardian was appointed for the minor defendants would make the sale null and void. On behalf of the respondents Mr. Nambiar contends that the purchaser plaintiff 2 was aware of Manjunatha Hebbar's death and he did not take any steps to appoint a guardian for the minors. That would show the absence of bona fides on the part of the decree-holder purchaser for, if he had taken steps and got a guardian appointed, then such a guardian would have taken steps to file an application either under Rule 89 or Rule 90 of Order 21, Civil P.C. to set aside the sale. Therefore it is contended that the negligence or fraud of the decree-holder cannot entitle him, to gain an advantage by preventing the filing of an application to set aside the sale.

Learned counsel also relies upon the observations of the Privy Council in -- 'Khiarajmal v. Daim', 32 Cal 296 (PC) (E) at pages 309, 310, 311 and 312 as well as in -- 'Mt. Rashid Unnissa v. Muhammad Ismail Khan', 31 All 572 (PC) at pages 581 and 582 (F). Both these well known cases related to instances of non-representation. In both of them, at the time decrees were passed, either the minors were not represented by a guardian or they were represented by persons who, under the law, could not have functioned as guardians. Neither of these cases is authority for the proposition that where there has been a valid sale but before its confirmation one of the judgment-debtors who happened to be a guardian of the other judgment-debtor died then the fact that no fresh guardian was appointed would invalidate the sale. We have carefully considered the various passages in the two Privy Council judgments cited before us and do not find anything that could help the respondents in this argument. If, as has been held in those cases, before the decree was passed, the minor was not represented by a guardian, then the decree is void so far as such minor is concerned. We may also say that if in execution of a valid decree, a minor is not represented before the sale takes place, such a sale also may not be binding on the minor. But these decisions do not help us to resolve the present problem, viz., proper representation at the time of sale but insufficient representation at the time of confirmation.

The two other cases which the learned counsel invited our attention to viz., -- 'Midnaporo Zamindari Co. Ltd. v. Abdul Zalil', AIR 1933 Cal 627 (G) and -- 'Kanchamalai Pathar v. Shahaji Rajasahib', AIR 1936 Mad 205 (FB) (H) also do not touch the present controversy. In the earlier case, after referring to -- '32 Cal. 296' (E) the learned Judges held that a Court has no jurisdiction to sell the property of persons who were not parties to the proceedings or properly represented on the record. As against such persons the decrees and sale purporting to be made would be nullity and might be disregarded without any proceedings to set them aside. Here also the decree was obtained in a suit in which the minor was not represented and a sale of his property in execution of such a decree was held void.

The other case is the well known Full Bench case where it has been held that if after the settlement of a sale proclamation but before the sale was held the

judgment-debtor dies, and no legal representative was brought on record before the sale took place, such a sale was void and not merely voidable. None of these cases really decide the present question. But facts and circumstances somewhat akin to what have arisen now were considered in -- 'Narayana Kothan v. Kalianasundaram Pillai', 19 Mad 219 (I). There the learned Judges had to consider a case where there was valid decree against a particular person but prior to an execution sale taking place in pursuance to that decree, the judgment-debtor had been declared insane and no attempt was made to have a guardian appointed for him before the sale took place. Actually when the sale took place the judgment-debtor, was insane. The question that arose was whether a sale held when there was no guardian to represent the insane judgment-debtor was void or not. Both the learned Judges held that the question about the void or voidable nature of the sale cannot be taken in execution and one of the learned Judges. Subramania Aiyar J. also held that the sale was only irregular and not void. At page 226 of the report, Subramania Aiyar J. observes as follows:

"Though Section 463, C. P. C. is not expressly made applicable to execution proceedings yet, I think the procedure laid down therein ought in reason to be followed in case like the present also, as otherwise serious harm might be done to judgment-debtors under such disability, whose helpless condition entitled them to peculiar protection at the hands of the Court directing the sale of their properties in execution. I am of opinion, therefore, that defendant 1 was bound to see that plaintiff 1 was duly represented in the sale proceedings. And as he omitted to do so the sale must be held to have taken place without due observance of the requirements of law on the point. Is such a sale void or is it only liable to be set aside at the instance of the party affected? We have not been referred to any direct authority on this point. In England it is quite settled that a contract by a person of unsound mind is not void, but only voidable....when such is the case in respect of transactions into which private parties enter directly with insane persons, it is difficult to see how a different rule is to be laid down with reference to public sales held under the authority of a Court of justice, it being of the greatest importance as Sir Edward Sugden observes in the case already referred to that such sales should not be lightly set aside. Against this view it may perhaps be urged that the Indian law as to contracts by persons of unsound mind is different

from the English law and that such contracts according to the proper construction of Section 12, Indian Contract Act are void and not merely voidable. It is not, however, necessary in this case to express any opinion on this point, for assuming for argument's sake that this construction of the section is correct, the ground on which it rests viz., incompetency to enter into a contract, is quite inapplicable to proceedings in execution where property of, judgment-debtors, whether competent to contract or not, is equally liable to be seized and sold. And considering that in such proceedings Courts could and would hold the scales evenly between judgment creditors and purchasers on the one hand and judgment-debtors on the other, the proper course is not to treat sales like the present as entirely null, but to hold that they are liable to be set aside for good cause shown."

An earlier decision of the Calcutta High Court follows the same line of reasoning. See -- '*Netlall Sahoo v. Kareem Bux*', 23 Cal 686 (J). There also among several judgment-debtors there were three judgment-debtors of whom one was a minor and the other was wrongly described as a minor. The adult judgment-debtor was the guardian of the two others. After a mortgage decree was made absolute, proceedings were taken in execution and during the pendency of such execution proceedings, but before sale, the adult judgment-debtor died and although some of the other judgment-debtors were the legal representatives of that judgment-debtor, no one was brought on record as the legal representative and no one was appointed as the guardian-ad-litem for the minor and the alleged minor. The sale took place without the minors being properly represented. Under such circumstances it was held that the omission" to bring the legal representatives of the deceased judgment-debtor did not vitiate the sale and that neither the absence of a guardian-ad-litem for the minor nor the description of the other person as a minor affected the validity of the sale. At page 689 the learned Judges observe as follows:

The absence of a guardian-ad-litem for Jaidia stands upon the Same footing. The order for sale having been made when she was properly represented, it was binding upon her, and if there had been any wish to satisfy the decree on her behalf, she could have applied to do so through a next friend, as in the fact she has preferred the present appeal. Nor are we prepared to say that the description

of Kareem Buksha as a minor in any way affects the validity of the proceedings. This description may indeed be treated as surplusage....."

6. A sale held in execution of a decree after the death of the guardian-ad-litem of a minor judgment-debtor without appointing a fresh guardian is not a nullity. See -- 'Baldeo Prasad v. Kusam Singh', AIR 1927 Nag 198 (K) which followed -- '23 Cal 686' (J) as well as a decision in -- 'Dorasami v. Chidambaram Pillai', AIR 1924 Mad 130 (L), which was subsequently overruled by the Full Bench in -- 'AIR 1936 Mad 205 (FB) (H)'.

7. A review of the decisions which we have just noticed above shows that even in cases where at the time of sale a minor was not properly represented by a guardian but when execution was ordered there was proper and sufficient representation of the minor, then such a sale could at the worst be held only an irregular sale and not a void one. All the more so should we hold that a sale validly held cannot be declared invalid by the mere fact that at the time of confirmation the judgment-debtor minor sons were not represented by guardian. The question which arises in this case is really bereft of direct authority. But the principles deducible from analogous cases is that it is impossible to hold that the confirmation is invalid. It seems to us therefore that the absence of a guardian-ad-litem for the minor judgment-debtors at the time of the confirmation of sale would not make the sale invalid. The second appeal is therefore allowed, the decree of the Subordinate Judge is set aside and that of the District Munsif restored. The appellants are entitled to their costs in this and the lower appellate Court.

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