

Luka Mathai

Vs

Neelakanta Iyer Subramonia Iyer

Civil Appeal No. 542 of 1967

(Sikri JJ)

26.05.1970

JUDGMENT

SIKRI J.

1. This appeal by certificate granted by the High Court of Kerala is directed against its judgment and decree reversing the judgment and decree of the Trial Court and dismissing the suit of the original plaintiff, appellant before us. The relevant facts for determining the points raised before us by Mr. Chagla, learned counsel for the appellant, are as follows.

2. On December 5, 1931, the plaintiff executed a hypothecation bond in favour of the Travancore Government in respect of a loan of Rs. 6,000/-. On December 12, 1931, another bond was executed in respect of a further loan of Rs. 4,400/-. On May 28, 1938, the plaintiff executed another hypothecation bond in favour of the father of Neelakanta Iyer Subramonia Iyer, respondent before us. In the Government Gazettes, dated February 21, 1939, and April 25, 1939, under Paragraph 6 reference is made to the arrears of Rs. 4,193 chs. 19 cs. 9 plus interest under the special loan to be paid by Luka Mathai of Pallithanathu, Kottayam Taluk, and the sale of 97 acres of nilam comprised in survey No. 545/32-11/1 and 14 cents of puravidam comprised in survey No. 532/3.

3. A notice was issued to the plaintiff in March or April, 1939 (27-8-1114 M.E.) that as he had to repay Rs. 4,193 chs. 10 ca. 9 under the special loan plus the execution costs and the interest therein "it is hereby made known that 107 acres 84 cents of properties belonging to your and comprised in survey Nos. 545/32-11/1, 481/3, 481/44, 481/40 etc., of Pulinkunnu Pakuthy and which were attached will be sold in auction on 27th Madam, 114". On May 10, 1939, the revenue auction took place and the respondent purchased the properties in dispute for Rs. 4,510/-. The plaintiff presented a petition (Ext. M) to the Division Peshkar against the revenue sale. In this petition it was stated as follows :

"I received notice stating that the sum will be realised by auctioning the properties comprised in Survey Nos. 545/32-11/1, 481/5, 481/4-A, 481/4-C of Pulinkunnu Pakuthy. Knowing that the aforesaid property in Survey No. 545/32 A-1, which belongs to me and which, I had given as security to Government was going to be sold in auction on 27th Medam last, many persons had come forward to bid the same in auction. But the properties that were sold in auction are the properties comprised in Survey Nos. 545/32-11/2, 481/5, 481/4-A and 481/4-C."

He further stated that "since the auction was conducted in this manner the properties worth about Rs. 30,000/- were sold in this auction for a paltry sum of Rs. 4,500/-

odd".

4. The sale was, however, confirmed by the Division Peshkar. The sale certificate (sanad) was issued to the respondent on November 13, 1929. The sale certificate was executed and issued under Section 34 of Regulation 1 of 1068, in respect of the properties including the properties in dispute, namely, 97 acres of nilam comprised in Survey No. 545/32-A/1 and 14 cents of Puravidam comprised in Survey No. 537/3.

5. On August 5, 1941, partition suit (O.S. No. 102 of 1116) was instituted and judgment was delivered by the Trial Court in this suit on September 29, 1952. Reference is made to this judgment because basing itself on this judgment the plea of res judicata was raised by the defendant in the High Court.

6. The suit out of which the present appeal arises, namely, original Suit No. 492 of 1953, was filed for setting aside the sale and redemption of the mortgage. The Trial Court partly decreed the suit holding that the sale was a nullity. The High Court, as stated earlier, has reversed this judgment and dismissed the suit.

7. The learned counsel for the appellant raised the following points before us : (1) that the revenue sale was a nullity because in effect and substance no proclamation of sale was issued inasmuch as instead of mentioning the proper revenue numbers of the land, namely, Survey No. 545/32-A-1, Survey No. 545/32-II/I was mentioned and in place of mentioning survey No. 527/3, survey No. 532/3 was mentioned; (2) that the property valued at Rs. 1,00,000/- had been sold for a meagre sum of Rs. 4,510/-; (3) that under the Travancore Revenue Recovery Regulation this property could not be brought to sale; and (4) that the Government had no authority to attach and sell plaint A schedule, Items 2 to 5 and B schedule Items 1 and 3 to 8 and C schedule items, which were not given as security under the bonds; and if the Government had no authority then the sale of all the properties is void.

8. Coming to the first point, there is no doubt that wrong revenue numbers were mentioned in the notice, dated May 5, 1939. In the proclamation issued under Section 32 of Regulation 1 of 1068 after mentioning the amount of Rs. 4,193 ch. 19 c. 9 which was due the properties were described in the schedule to the proclamation (Ext. AB). In Column 1 under the heading (name in which the assignment is made : Thandapper and number) is mentioned "1861 Luka Mathai, Pallithanathu Kainedi Kuri, Neelamperur". Survey No. 545/32 is described as Nilam and tenure as Pandaravaka Pattom. The area is 97 acres and taxes are also mentioned. There is a dispute whether against the survey No. 548/32 the latter 'A/1,' existed or '11/1' as in the original proclamation, but there cannot be any dispute that otherwise the description of the property of 97 acres is correct and complete. Regarding survey No. 537/3 again the tenure is described as Pandara Pattom, area 14 cents and the local taxes are also given.

In his evidence the plaintiff stated :

"I was aware that the property mortgaged by me was the property comprised in Survey No. 545/32/AI. It is being called as 97 acres. That which was mortgaged was also 97 acres. In addition to AI, I have no other properties in Survey No. 545/32."

He was asked : "Does any person other than you have nilam which is 97 acres in extent ? " He answered "No. There are no other persons having 97 acres of nilam in

the other numbers also".

9. The High Court referred to some earlier proceedings for recovery of the defaulted amounts, due to the Government, which took place in 1110 M.E. and 1112 M.E. and found that in those cases the correct survey numbers had been given. But as far as the proclamation in question relevant to the present sale are concerned, the High Court found :

"But the proclamations which have been produced as Exts. AB, AD and AE all show some correction by over-writing on the character 'A' in Survey No. 545/32/A/1 and the figure '7' in Survey No. 537/3. The proclamation that was published in the Gazette on 18-9-1114 gives the survey numbers distinctly as 545/32/11/1 and 532/3. Likewise in the sale notice Ext. J. in the copy that is served on the plaintiff the survey number is shown as 545/32/11/1, while in the original it is 545/32/A/1, but one cannot be sure whether A has been corrected or not."

The High Court however came to the conclusion that the description of the property in the relevant records was sufficient to identify the property correctly and to give the requisite information to the intending buyers. The High Court held that Ext. M, the relevant portion of which we have extracted above, shows that the plaintiff had categorically stated that many persons know for certain that Survey No. 545/32/A/1, which had been hypothecated to Government was coming up for auction sale on May 10, 1939, and that the mistakes in the survey sub-division numbers even if they existed at the material time had no misled anybody and everybody concerned know that the property proceeded against was really Survey No. 545/32/A/1 and 537/3. The High Court further observed that it had not been shown in the case that the mis-description of survey numbers has caused any real prejudice to the plaintiff in the revenue sale concerned. The High Court observed :

"There is no case that in the piece of land bearing Survey No. 545/32, the plaintiff had any other plot then that bearing the sub-division No. A/1 or that there is a piece of land bearing the sub-division II-1 therein."

The High court finally concluded :

"An error in the survey number of the property involved in a proclamation of sale cannot be held to be such a vital defect as to compel us to hold the sale to be one 'without a proclamation' at all and to declare the sale void on that score, especially in view of the fact that, even according to the plaintiff, nobody was misled by that error."

10. We agree with this finding of the High Court. We are satisfied that on the material placed before us no other finding could be arrived at.

11. The learned counsel referred to us a number of cases to show that if there is no publication of proclamation then that would vitiate the sale. The learned counsel for the respondent referred us to the decision of this Court in Sheodhyan Singh v. Musamat Kuar ((1962) 2 SCR 753.). Relying on this case the learned counsel says that it was a case of misdescription and not a case of mistaken identity. He further says that the valuation suggested by the learned counsel is highly exaggerated because in his plaint even the plaintiff had only said that the value was Rs. 30,000/-. In that case the final decree for sale in a mortgage suit and in the certificate for sale the number of the property in dispute was give as No. 160 instead of No. 1060, which was the real number but the property was

otherwise fully described so that its identity could be clearly established. This Court held that "as the khata number, the area and the boundaries given in the final decree and in the sale certificate tally with No. 1060, the identity is clearly established and there has only been a misdescription of the plot in the final decree as well as in the sale certificate by the omission of one zero from the plot number". In another passage, referring to the decision of the Privy Council in *Thakur Barmha v. Jihan Ram Marwari* ((1913) LR 41 IA 38.), Wanchoo, J., observed that "the effect of this decision is that where there is no doubt as to the identity and there is only misdescription that could be treated as a mere irregularity".

12. It seems to us that it is clear from the details mentioned in the proclamation, which we have mentioned above, that the bidder, the owner and the auctioneer had no doubt about the identity of the property which was being sold. This was not a case of non-publication of the proclamation and, therefore, the rulings relied on by the learned counsel for the appellant have no application.

13. Under Section 32(2) of the Travancore Revenue Regulation (Regulation 1) of 1068 what is required is that "previous to the sale, the Tehsildar shall issue a notice specifying the name of the defaulter, the position, tenure and extent of land and the buildings therein; the amount of revenue assessed on the land of upon its different sections; the proportions of the Public Revenue due during the remainder of the current Malabar year, and the time, place and conditions of the sale". In our opinion, the proclamation satisfies the requirements of Section 32(2).

14. In view of the above conclusion it is not necessary to rely on the point of *res judicata* made by the High Court.

15. Regarding the second point, there is no material to show that the value of the property was anywhere more than Rs. 30,000/-. In view of the fact that the property had been mortgaged to Government and to private parties, we are not satisfied that the property was sold at a low price. The Trial Court has found that no fraud has been proved.

16. The third and fourth points arise out of the cross-objections filed by the plaintiff-appellant before us. The High Court disposed of the cross-objections in the following words :

"The plaintiff has preferred a cross-objection pleading that the revenue sale ought to have been declared void with regard to the other items of properties included in the plaint schedule also. Admittedly they were the subject-matter of the attachment and proclamation which culminated in the revenue sale. No defect in the proceedings except the error in the survey numbers discussed above, to affect the validity of the revenue sale has been brought to our notice. The cross-objection has no merits and has only to be dismissed."

17. It is not quite clear whether the third ground was specifically taken in the cross-objections though ground No. 5 may perhaps cover it. Be that as it may, as the questions of jurisdiction and law are involved we have to deal with the point. Section 59 of the Travancore Revenue Recovery Regulation (Regulation No. 1 of 1068) reads thus :

"59. All arrears of public revenue due to Government other than land revenue. - All moneys due from any person to Government which under a written agreement executed by such person are recoverable as arrears of public or land revenue, and all specific pecuniary penalties to which such person renders himself liable under such

agreement, and also all sums declared by any other regulation for the time being in force to be recoverable as arrears of public or land revenue, may be recovered under the provisions of this regulation."

18. The learned counsel for the plaintiff contends that there is no written agreement which says that the moneys due under the bond can be recovered as arrears of public or land revenue. The learned counsel for the respondent has not been able to point out any such agreement and the only point he urges is that this point was new and should not be allowed to be taken. No other regulation has been brought to our notice which makes dues under this bond to be recoverable as arrears of public or land revenue. But we are unable to set aside the sale on this ground because if the point had been taken at an early stage the Government may well have relied on the power of sale given under the bond. The fact that the sale took place under the machinery provided by the Revenue Recovery Regulation and not under any ad hoc machinery set up by the Government would not vitiate the sale.

19. But the fourth point raised by the learned counsel for the plaintiff is fatal for the respondent. The bonds do not give power to the Government to sell the properties other than mentioned in the bond. The properties mentioned in plaint A schedule Items 2 to 5, B Schedule Items 1 and 3 to 8 and C schedule items were not given as security under the bond and the Government had no authority to sell them. It is conceded on behalf of the respondent that all the properties were sold in one lot. This, in our opinion, vitiates the whole sale and we have no option but to declare that the sale of all the properties was void.

20. In the result the appeal is allowed and the judgment of the High Court set aside and the decree passed by the Trial Court modified as follows :

"For the reasons stated in this judgment it is hereby declared that the proceedings such as revenue sale, etc., in respect of all the properties mentioned in the plaint schedules A, B and C are void and are accordingly set aside, that the plaintiff has the right to get a release of the properties under the mortgage deed, dated 15th Edavam, 1107 including the said properties; that the plaintiff do recover the said properties from out of the possession of the defendants; and that the plaintiff do realise from the defendants mesne profits as determined by the Trial Court."

21. The parties will bear their own costs throughout.

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