

S. A. Sundararajan

Vs

A. P. V. Rajendran

Civil Appeal No. 124 of 1981

(R. S. Sarkaria, R.S. Pathak JJ)

13.01.1981

JUDGMENT

R. S. PATHAK, J. –

1. This appeal by special leave is directed against the judgment of the Madras High Court maintaining that objection in regard to a sale proclamation in proceedings for execution of a civil decree can be raised under Rule 90 of Order XXI, Code of Civil Procedure.
2. A civil suit by the respondent against the appellant was decreed in 1971. The attachment of the appellant's property before judgment was made absolute on the date of the decree. To execute the decree the respondent filed Execution Petition 222 of 1972 and prayed for sale of the attached property. It was decided to put up the attached property in two lots for sale. Lot 1 was sold on January 28, 1974 for Rs. 40,000 to the respondent. Lot 2 was not sold for want of bidders. The sale of Lot 1 was confirmed by the court on March 2, 1974 and full satisfaction of the decree was recorded. Subsequently, the appellant filed Execution Application 600 of 1974, purporting to be under Section 47 of the Code, for setting aside the sale of Lot 1. He claimed that the proclamation of sale and the conduct of the sale was vitiated by several irregularities. It was alleged that the proclamation was not drawn up in accordance with law, that credit had not been given for a payment of Rs. 6,000 made by the appellant, and that there were other omissions in the sale proclamation inasmuch as it did not mention the date of auction, the tax payable in respect of Lot 1 and the revenue assessment in respect of Lot 2. It was also alleged that the reduction of the upset price from Rs. 80,000 to Rs. 40,000 for Lot 1 was improper and that as the appellant was an agriculturist entitled to the benefit of Act 4 of 1938 he was not liable to pay interest prior to February 1, 1972 and consequently the amount mentioned in the sale proclamation as due from him was incorrect. The application was resisted by the respondent, principally on the ground that it was not maintainable under Section 47.
3. The executing Court found substance in the complaint of the appellant and holding that the sale proclamation was vitiated by material irregularities it set aside the sale. The respondent filed an appeal, CMA No. 386 of 1975, in the High Court against that order. Two other appeals were also filed in the High Court, CMAs 2 and 3 of 1976. They arose out of the dismissal of two applications, one for restoration of an application for possession and the other for removal of obstruction. The two applications had been dismissed as infructuous consequentially to the setting aside of the sale.
4. All the three appeals by the appellant were considered together by the High Court and, in the circumstances, the appeal against the order setting aside the sale was taken as the main appeal. The principal question determined by the respondent was whether the objection to the sale could

properly form the subject of a proceeding under Section 47 or under Rule 90 of Order XXI. After examining a larger number of cases on the point, the High Court held that the application for setting aside the sale lay under Rule 90 of Order XXI and not under Section 47, and therefore remitted the appeals to the executing Court for fresh consideration.

5. It seems to us that the High Court is right. It is plain that the errors complained of by the appellant amount to mere irregularities committed in settling the sale proclamation. They cannot be described as errors which render the sale void. The difference between an error which makes the proceeding void and one which makes it merely irregular has been pointed out by this Court in *Dhirendra Nath Gorai and Subal Chandra Shaw v. Sudhir Chandra Ghosh* ((1964) 6 SCR 1001 : AIR 1964 SC 1300). The requirements which were not complied with in this case when settling the sale proclamation were intended for the benefit of the appellant and could be waived by him. They were not matters which went to the root of the court's jurisdiction and constituted the foundation or authority for the proceeding or where public interest was involved. Clearly, they were mere irregularities. Consequently, they fall within the scope of Rule 90 of Order XXI.

6. It may be pointed out that when Rule 90 of Order XXI employs the expression "in publishing or conducting the sale", it envisages the proceeding commencing after the order for sale made under Rule 64 of Order XXI. The provisions relating to publishing and conducting the sale. Settling the proclamation of sale is part of the proceeding for publishing the sale. Rule 65 of Order XXI declares that every sale in execution of a decree shall be conducted by an officer of the court or a person nominated by the court, and shall be made by public auction in the manner prescribed. How the sale will be published relates to the manner in which the sale is made. Rule 66 of Order XXI is the first step in that behalf. It provides for a proclamation of sale. When drawing up a sale proclamation, sub-rule (2) of Rule 66 requires that the several matters specified therein be taken into account. Other particulars, relating to the sale are prescribed in the succeeding rules of Order XXI. In our view, the settling of the sale proclamation is part of the interest process of publishing the sale, and irregularities committed in the process of settling the sale proclamation are irregularities which fall within the amplitude of Rule 90 of Order XXI. It may be observed that in *Dhirendra Nath Gorai* case ((1964) 6 SCR 1001 : AIR 1964 SC 1300) the question which this Court was called upon to consider was whether non-compliance with Section 35 of the Bengal Money Lenders Act, 1940 when drawing up the sale proclamation was a mere irregularity. Having held that it was, the court then considered it in the light of Rule 90 of Order XXI.

7. Our attention has been invited by the appellant to the Madras amendment made in 1952 in Rule 66 of Order XXI whereby a new sub-rule (2) has been substituted for the original provision. It has not been shown to us, however, that the substituted provision makes any material difference so far as the point under consideration is concerned. It is urged that an opportunity has been provided under the substituted provision to a judgment-debtor to participate in the drawing up of the sale proclamation, and therefore there is no further right to complain against the sale proclamation under Rule 90 of Order XXI. But that right was also available in somewhat similar terms under the original provision. Whether or not a judgment-debtor, to whom notice has been issued under Rule 66 of Order XXI to participate in the proceeding and who does not do so, should be permitted thereafter to challenge the sale under Rule 90 of Order XXI, is a matter to be determined by other considerations. It is sufficient to point out that the application for setting aside the sale on the grounds taken by the appellant is referable to Rule 90 of Order XXI, and, therefore, not to Section 47.

8. Some argument has been addressed before us in regard to the period of limitation but that, in our

opinion, has been properly left by the High Court to the executing Court for determination.

9. The appeal fails and is dismissed, but there is no order as to costs.

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