ANDHRA PRADESH HIGH COURT

Puttaparatti Atchamma

Vs

T. Bayanna

(J Reddi, and V Rao, JJ.)

10.04.1968

ORDER

J Reddi, J.

1. This revision, which is directed against the decree and order in C. M. A. 3/62 on the file of the learned District Judge, Anantapur, has been referred to the Bench by Chandrasekara Sastry, J. as he then was, in view of the conflict between the decisions in *Kondipalli Tatireddy v. Ramachandra Row*[1], and Govindarajulu v. Sivarama Krishnan, on the one hand and *Venkatalingam v. Ranganayakulu*[2], on the other on the question as to " whether a sale can be set aside under Order 21, Rule 72 C. P. C. on the ground that the decree-holder-purchaser had not obtained leave to bid, without the judgment-debtor proving also that he sustained substantial loss or injury."

2. The petitioners obtained a decree against the respondents, in O. S. 43/57 on the file of the District Munsif, Anantapur, on the foot of mortgage. Two houses belonging to the respondents were brought to sale in execution of that decree and were purchased by the petitioners themselves on 20-7-59. The first respondent, Bayanna, moved the executing court in E. A. 405/59 under O. 21, R. 90 and Sections 47 and 151 of the Code of the Civil Procedure for setting aside the said sale alleging (1) that the sale which was fixed for 17-7-1959 was adjourned without notice to the judgment debtors and bidders to 20-7-1959 with the result that it did not fetch a proper price, (2) that the permission granted to the decree-holders to bid at the sale is illegal and void as no notice of that application was given to him and also because the decree-holders managed to obtain the said permission by fraudulent misrepresentation to Court, (3) that he had no notice of the petition filed by the decree-holders for reduction of the upset price either, and (4) that there was misdescription of the property that was put up for sale and that as a result of the aforesaid fraud and irregularities in the publication and conduct of sale, he sustained substantial injury. The decree holders denied, in their counter, that there were any irregularities or fraud in the publication and conduct of the sale. The learned District Munsif held that the respondents had

notice of the petition to reduce the upset price, that no notice was necessary in E. A. No. Nil of 1959 filed by the decree-holder for leave to bid as an earlier application E. A. 820/59 for a similar relief was allowed after notice to the judgment-debtors, that the alleged misdescription of property is of no consequence as the identity thereof was never in doubt having regard to the fact that it was described by boundaries and that the postponement of the sale from 17-7-1959, which happened to be a public holiday, to 20-7-1959, the next working day, is neither irregular nor illegal as all concerned were aware of this postponement. He accordingly dismissed the petition with costs. The learned District Judge, to whom the matter was carried in appeal with the court of first instance that the postponement of the sale from 17-7-59 to 20-7-59 or the wrong description of the property did not vitiate the sale adverting to the other objection based on the absence of notice to the respondents on the application for leave to bid, he concluded that the decree-holders managed to secure the leave by making a false representation to the court, that in their earlier application. E. A. 826/58 filed for the same purpose, notice was issued to the judgment-debtors when in fact this is not the case and that the order D/- 20-7-59, granting permission to the decree-holders to bid at the sale, is consequently illegal besides amounting to a material irregularity entitling the respondents to have the sale set aside without the need to prove that they suffered substantial loss. He accordingly set aside the sale following Raghavachariar v. Murugesa Mudali, AIR 1923 Mad 635 wherein it was held that "the court has inherent power to refuse to allow the sale to be carried out if it is satisfied that the court has been misled either in giving leave to bid or in fixing the reserve price" Hence this petition for revision by the decree holders.

3. Learned counsel for the petitioners assailed at the outset and rightly too, the finding recorded by the court below that the order granting leave to bid is vitiated by fraud besides being illegal as, according to him, this conclusion is the result of certain erroneous and incorrect assumptions of fact. It is common ground that E. A. Nil of 1959 in which leave to bid was granted to the decree holders was filed on the same day on which the sale was held viz, 20-7-1959 and that the judgment-debtors had no notice of this petition. The learned Dist. Munsif observed that no notice was necessary to the judgment-debtors in E. A. Nil of 1959 as he thought that the earlier application, E. A. 826/59 filed for the same purpose by the decree-holders was allowed by the decree-holders was allowed after notice to the judgment-debtors when in fact that petition was dismissed as the sale scheduled to be held on 23-1-1959 was stopped. though the judgment-debtors were served with notice of that petition, as borne out by the certified copy of the order in that petition. While adverting to this mistake committed by the court of first instance, the learned Dist. Judge committed another and a more serious error but for which he would not have held that the order granting leave to bid in E. A. No. Nil of 1959 is vitiated by fraud. The moment he discovered and not allowed as was wrongly assumed by the court of first instance, the learned Dist. Judge jumped to the conclusion that "the decree holder in his affidavit filed along with E. A. Nil/59 dated 20-7-59 made a false statement to the effect that notice had in fact been given to

the judgment- debtors in the previous application and on the strength of that false representation, obtained orders of the court granting him permission to bid at the sale" and that and that the decree-holder has thus played a fraud upon the court and obtained orders granting him permission to bid at the sale" IN the first place, the decree-holder was in no way responsible for the erroneous assumption by the executing court that E. A. 826/58 was allowed as it was clearly stated by him in para 2 of the affidavit filed in support of EA. Nil of 59 for permission to bid that the court dismissed E. A. 826/58 by mistake when it ought to have allowed the same having regard to the fact that the judgment-debtors who were served with notice of it, did not appear and raise any objection for granting permission to bid. Secondly, the interference drawn by the learned Dist. Judge that the judgment-debtors were not served with notice of E. A. 826/58 is not based on any evidence. It can be seen from page 6 of the material papers supplied by the petitioner that both the judgment-debtors were personally served with notices in E. A. 826/58. The certified copy of the order passed in that petition would likewise reveal that the judgment-debtors did not appear in court when called on 23-1-59, the date on which E. A. 826/58 was dismissed on the ground that sale was stopped. The finding of the court below that the decree-holders obtained permission to bid in E. A. Nil/59 by making a false representation that the judgment-debtors were served with notice of the earlier application E. A. 826/58 cannot therefore be sustained.

4. Learned counsel for the respondents however argued on the strength of the decision in Pandurang v. Maruti, that the aforesaid finding, though based on an erroneous assumption that the decree-holders obtained the leave by making a false representation to the court that the judgment-debtors had notice of E. A. 826/58, cannot be interfered with in revision. It is true, as was pointed out by Their Lordships of the Supreme Court in the decision referred to above, that the High Court cannot, while exercising its jurisdiction under Section 115, Civil P.C., correct errors of fact, however gross they may be, or even errors of law, unless those errors have relation to the jurisdiction exercised by the court. But this decision does not help the respondents to contend that the finding in question cannot be interfered with in revision as it was clearly the outcome of the learned Dist. Judge acting in the exercise of his jurisdiction with material irregularity. He would not have chi(sic) on he did but for the fact that contrary to the evidence on record. he erroneously assumed that the decree-holders obtained leave to bid by falsely representing to the court that the judgment-debtors were served with notice of the earlier application E. A. 826/58. When it is thus obvious that the court below would not have decided the question of fraud in the manner it did but for its mistaken assumption of facts, it must be said that it acted in the exercise of its jurisdiction with material irregularity entitling this court to act under S. 115 C. P. C.

5. Another circumstance which appears to have weighed with the learned District Judge in

pronouncing that the sale is vitiated by material irregularity is the alleged illegality of the permission in E. A. No. Nil of 59 without notice to the judgment-debtors. WE are however unable to share this view either. In the first place there is nothing in Order 21 Rule 72 C. P. C. enjoining upon the Court to issue notice to the judgment-debtors before ordering an application for leave to bid. No doubt executing courts generally direct notice to judgment-debtors in applications under Order 21 Rule 72 C. P. C. and it is also true that this is a salutary practice but this would not justify the contention that failure to issue notice in any particular case would render the order granting the leave void as contended for the respondent. If notices are considered imperative in applications under Order 21 Rule 72 C. P. C. the Code would have certainly provided for the same as is done in other cases (vide Order 21 Rules 16, 22, 37, 66 etc.). The absence of any provision for the issuance of notice before granting leave to bid either in Rule 72 C. P. C. or in the Rules of practice relating to execution would therefore make it a matter of discretion to the executing court whether to issue or not to issue a notice before granting leave. This discretion has of course got to be exercised judicially but the fact that a notice was issued to the judgment debtors in the earlier application E. A. 826/58 and that they did not choose to oppose that application despite their having been personally served with notices would make it difficult to countenance any contention that the executing court did not exercise its desecration properly when it granted leave to the decree-holders in E. A. No. Nil of 59 without directing notice thereof to the judgment-debtors.

6. It is well settled that an order giving or refusing to give leave to bid at an execution sale is only a ministerial or administrative order as indicated in *Ulaganatha v. Alagappa*[3]*, and Ko Tha Hnyin I v. Ma Hnyin*[4] Notice before ordering an application for leave to bid cannot therefore be considered essential for this reason also.

7. We are unable to see any substance in the argument urged for the respondents that the order granting permission to hid without notice to the judgment-debtors is null and void and that the sale in favour of the decree-holders is therefore vitiated by material irregularity as the order in question can at best be said to be invalid or illegal even if notice is necessary but not null and void. having regard to the fact that the executing court had an undoubted jurisdiction to make the order in question. The impugned order could be ignored if only the court which passed it was lacking in inherent jurisdiction to grant leave to bid and not otherwise as it is settled law that even an erroneous decision by a court of competent jurisdiction cannot be treated as a nullity unless and until it is avoided by due process of law. If the respondent felt aggrieved with the order granting permission to bid, it was his duty to have taken steps to avoid it by making an application to the executing court itself to set aside or review that order or by challenging it in revision. But he did nothing of the kind and allowed the order to become final. He cannot therefore be permitted to now turn round and question the very existence of that order in this

proceeding, treating it as a nullity. *Navaneethammal v. Ammakannmmal*[5]. is an authority for the position that when a court makes a wrong order the error may be corrected by resort to one or other of the modes known to law, viz .by review. appeal, revision or by suit according to circumstances but that it cannot be ignored treating it as a dead letter and a nullity unless the court making the order is absolutely lacking in jurisdiction over the subject matter and that an erroneous decision by a court of competent jurisdiction is not open to a collateral attack. In that case, a Hindu widow filed a suit in 1939 for partition and recovery of a share of the property left by her husband by virtue of the Hindu Women's Right to property Act and obtained a preliminary decree in the year 1940 declaring her right to a share in all the properties including agricultural lands. No appeal was preferred against this decree. By the time a Commissioner's report submitting a scheme for division of the properties came before the court is 1941. the Federal Court had decided that the Act did not operate to regulate succession to agricultural land in the Governor's provinces. The contesting defendants therefore raised this point in their objections to the Commissioner's report. The subordinate Judge held that though the preliminary decree had become final it was open to him to rectify it in the light of the decision of the Federal Court. On appeal, however, it was held that "it was wrong to think that the preliminary decree was illegal in the sense that it was made without jurisdiction and that it was therefore open to correction. though it had become final. The suit as filed fell within the jurisdiction and that it was therefore open to correction , though it had become final. The suit as filed fell within the jurisdiction of the Court which passed the preliminary decree. Though the preliminary decree was passed on what later on was declared to be an error of judgment, not touching the jurisdiction of the court. which remained as it was, wholly unimpaired by anything contained in the Hindu Women's Right to Property Act. The preliminary decree was sought to be challenged by a collateral attack after the contesting defendants had let go the right and opportunity to challenge its correctness by an appeal, that is to say by a direct attack and as such could not succeed." It must therefore be said that the order without notice in E. A. Nil of 59, which has become final not having been challenged in appropriate proceedings, cannot now be treated as a nullity to justify the contention that the sale is vitiated by material irregularity within the meaning of Order 21 Rule 90, C. P. C.

8. No doubt, the court may, if it thinks fit, set aside an execution sale under O. 21 Rule 72 (3), Civil P.C. on an application by the judgment-debtor or any other person whose interests are affected by the sale in cases where a decree-holder purchases the property by himself or through some one else without obtaining permission to bid as required by sub-rule (I), but the provisions of this rule cannot be availed of by the respondents as it was already seen that the decree-holders did obtain permission to bid, though without notice to the judgment-debtors. The sale cannot therefore be set aside under Order 21, Rule 72(3) C. P. C. either. In this view, it is unnecessary to go into the further question on which there is a conflict between the decisions in AIR 1921 Mad 402 and on the one hand and ILR (1955) Mad 675 on the other viz., the question as whether an

execution sale in favour of the decree-holder can be set aside under Order 21, Rule 72(3) C. P. C. on the ground that he had not obtained leave to bid even in the absence of proof of substantial loss or injury to the judgment-debtor.

9. The order of the court below, setting aside the sale, has to be vacated and the revision allowed in view of what we held in the foregoing paragraphs. But it is contended for respondent that E. A. 59/59 filed by the decree-holder for reducing the upset price from Rs. 6,000 to Rs. 4,750 was allowed even without notice to him and that the sale is liable to be set aside for this reason at least as the ex parte order reducing the upset price enabled the decree-holders to snatch away the property for much less than what it would have otherwise fetched. It was specifically averred in para 2 of the affidavit filed in support of the application for setting aside the sale that no notice was served on the judgment-debtors in the E. A. for reduction of upset price from Rs. 6,000 to Rs. 4,750. The decree-holders appear to have traversed this allegation as the learned Dist. Munsif adverted to this aspect of the case in Para 7 of his order wherein he held that the respondent had sufficient notice of both the petitions viz., the petition for leave to bid and the petition for reducing the upset price. But no finding on this question was recorded by the learned Dist. Judge while disposing of the appeal preferred to him. The parties continue to be at variance on this question as, according to the respondent, no notice at all was served on him E. A. 59/59 while the learned advocate for the petitioners affirms that the upset price was reduced in the presence of the judgment-debtors and after notice to them. Reduction of upset price, during the conduct of the sale, without notice to the judgment-debtor would constitute a material irregularity within the meaning of Order 21, Rule 90 C. P. C. The learned Dist. Judge should have therefore recorded a finding on this question also for a null and effective adjudication of the matter in favour in controversy, It is true that no specific ground based on the alleged absence of notice on the petition for reduction of upset price was raised in the 'Memorandum' of Appeal presented to the learned Dist. Judge but this is no reason to shut out the plea as the averments in ground No. 11 that "the other reasons in support of the judgment are not sound and supported by evidence in the case" would, by necessary implication, mean that the respondent sought to urge before the learned Dist Judge all the grounds which he raised in the court of first instance for avoiding the execution sale. We are, even otherwise, of the opinion that there should be a finding on this question also as the respondent would be entitled to have the sale set aside if he can successfully establish that the upset price was reduced without notice to him and that as a result thereof he sustained substantial loss or injury. The matter has therefore to go back for disposal by the learned Dist. Judge after recording a finding on this question.

10. In the result, therefore, the decree and the order of the learned Dist. Judge, Anantapur, in CMA. 3/62 are set aside and the matter is remanded to him for disposal afresh after recording a finding on the only other question as to whether the respondent had notice of the petition for

reduction of upset price and if not, whether as a result thereof, he sustained substantial loss or injury entitling him to have the sale set aside. The costs of this petition will abide the ultimate result of the appeal and will be provided for by the learned Dist. Judge in his revised order and decree.

11. Order accordingly.

Cases Referred.

1AIR 1921 Mad 402
2ILR (1955) Mad 675
3AIR 1929 Mad 903
4ILR 38 Cal 717
5(1944) 2 Mad LJ 67