BOMBAY HIGH COURT

Sitabai Rambhau Marathe

Vs

Gangadhar Dhanram Marwadi

(Rangnekar and Divatia, JJ.)

18.01.1935

JUDGMENT

Rangnekar, J.

1. The appellant challenges a sale of her property by the Court in execution of a mortgage-decree against her in favour of respondent No. 2, on two grounds, the first ground being, that, pending the execution, the judgment-creditor had no subsisting interest left in him to continue the execution proceedings by reason of his having assigned the decree in favour of one Mr. Deshmukh, his pleader. The second ground, on which the sale is impeached, is, that there was a material irregularity in publishing the sale, that the value of the property was hot fairly and accurately stated in the proclamation issued by the Court, and that it has resulted in a substantial injury to her.

2. A few dates, which are material in this case, may now be stated. The darkhast for sale in the execution of the decree was filed in March, 1931 ; and the judgment-creditor stated therein that the property mortgaged, which consisted of a house having four storeys, situate in a prominent locality in Jalgaon, was worth Rs. 9,000. The judgment-debtor, now the appellant, objected to the valuation ; and, at her instance, the Court directed a panchnama to be made. The panchas valued the property at Rs. 25,000. This was challenged, in turn, by the judgment-creditor; and so the Court, very properly, ordered another panchnama, which resulted in the value being shown at Rs. 15,400. The first panchnama was made on August 9, 1931, and the second on September 7, 1931. As a matter of fact, in regard to this second panchnama, it appears that the panchas differed as between themselves,-one valued at Rs. 21,000 ; the other at 18,000 ; and the third at 13,000 ;- but they agreed that the average should be taken, and that the value of the property should be taken at Rs. 15,400. Between the dates of the panchnama, the decree-holder assigned the decree to Mr. Deshmukh ; and, it is clear from the deed of assignment, that the judgment-creditor reserved to himself the right to execute the decree, which he had assigned, and that the assignee was entitled to the monies realized in the execution proceedings. The assignee also had the

option to continue the execution proceedings then pending. The assignee, however, took no steps to bring himself on record after the assignment, and the judgment-creditor was allowed to continue the proceedings in execution. The record is not clear as to when the proclamation was issued ; nor have the learned advocates been able to satisfy us about the date of the proclamation. But, it is "clear from such materials as we have that one proclamation was issued by the Court, under Order XXI, Rule 66, Civil Procedure Code, between these two dates ; and, either the date of the sale mentioned therein was extended to December 7, 1931, or, what appears to me from exhibit 19, a fresh proclamation was issued on October 31, 1931. In this proclamation, the value of the house was put down at Rs. 9,000. The sale was held on March 31, 1932 ; and, on April 1, 1932, it resulted in a sale for Rs. 9,700, in favour of respondent No. 1. What happened afterwards is really not material to the points arising in this appeal.

3. Upon these facts, the appellant contends, first, that the judgment-creditor was not entitled to continue the darkhast, and the sale, therefore, is void and must be set aside ; and, secondly, that the learned Judge acted arbitrarily in this matter and was not justified in putting, in the proclamation, the value of the property at the figure mentioned by the judgment-creditor, and that this amounts to a material irregularity in publishing the sale, which has caused her substantial injury.

4. As regards the first point, the position seems to me to be clear. In the. first place, Order XXI, Rule 16, Civil Procedure Code, does not compel the assignee to come' forward and have himself substituted on the record in place of the judgment-creditor. It gives him an option to do so; he has a right to bring himself on record if lie wants to see that his rights ^re enforced, but he is not bound to do so. And the darkhast, which is regularly filed by the holder of the decree, cannot come to an end because, pending execution, the judgment-creditor has assigned his interest in favour of another person, It is well established by decisions of this Court, that an assignee does not become a holder of the decree within the meaning of Order XXI, Rule 16, and Section 2 of the Civil Procedure Code, unless he applies to the Court to bring himself on record in place of the judgment-creditor. I need only mention the authorities. They are : *Jasoda Deye v. Kirtibash Das*[1] *Harnand Raiphul Chand v. Rup Chand Chiranji Lal*[2] *Co-operative Town Bank of Padigon v. S.V.K.V. Raman Chettyar*[3] *and Monmotho Nath Mitter v. Rakhal Chandra Ternary*[4]

5. The second contention, however, seems to us to be substantial. Order XXI,. Rule 66, Civil Procedure Code, makes it obligatory on the part of the Court to issue a proclamation. Sub-section (2), clause (e), provides that-

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sale, and specify as fairly and accurately as possible-

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

6. Dealing with this point, their Lordships of the Privy Council in *Saadatmand' Khan v. Phul Kuar*[5] observed as follows (p. 150):-Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of those things 'which the Court considers material for a purchaser to know,' and it is enacted in terms (though express enactment is hardly necessary for such an object) that those things shall be stated as fairly and accurately as possible.

7. Now, it is clear, on the authorities, that, in order to state the value of the property, an enquiry is necessary ; and if an enquiry into the value of the property is necessary, the Court is bound to hold the enquiry. The Court is. not at liberty to take any imaginary figure, or to state the value of the property at any figure which it thinks to be proper. If the value is understated in the proclamation, and the understatement is such as is calculated to mislead bidders and to prevent them from offering an adequate price, and the sale results. in a price altogether inadequate, the sale must be set aside on the ground of material irregularity in publishing the sale within the meaning of Order XXI, Rule 90, Civil Procedure Code.

8. This, then, being the effect of the decisions, the question is, whether the present case comes within them. The facts, which I have indicated, show that the judgment-creditor valued the property at Rs. 9,000. This was not accepted by the judgment-debtor, and the Court ordered a panchnama as regards the valuation of the property. The panchas valued it at Rs. 25,000. This was not accepted by the judgment-creditor, and so the Court ordered another panchnama. This time the panchas ascertained the value to be-Rs. 15,400. What justification, then, was there for the Court to ignore even-the minimum valuation given by the panchas and put down in the proclamation /the figure of Rs. 9,000, which the judgment-creditor had originally mentioned as being the value of the property ? The point made in the judgment, and supported here, is that it was open to the judgment-debtor to prove, by adducing evidence, what the fair value of the property was, and that the judgment-debtor took various adjournments for the purpose of doing so, but failed in adducing evidence for this purpose. This seems to me to be entirely beside the point. The judgment-debtor's case, from the start, had been that the value of the property at Rs. 25,000, as shown by the panchas in the first panchnama, was in itself inadequate, and the judgment-debtor stated that, if proper evidence was taken, the house would be valued at Rs. 40,000. The Court was right in saying that the judgment-debtor failed, in spite of various adjournments given to her, to lead evidence to show that the valuation of Rs. 40,000 was correct; but that, certainly, did not entitle the Court to ignore the materials which the Court had directed, and which the Court had before it.

9. In this view, we think that the sale cannot be upheld and must be set aside ; and the Court must be 'directed to hold another sale of the property, and that, after giving an opportunity to the parties to show the value of the property, and after considering the materials, if any, placed before it, the Court should issue a fresh proclamation, in which the value, which appears to the Court to be adequate and proper, should be stated.

10. This leaves one more point for our decision ; and that is with regard to the order which the Court, after setting aside the sale, has to make under Order XXI, Rule 93, Civil Procedure Code. Mr. Pradhan, on behalf of the purchaser-respondent, asks us to make an order that his client is entitled to the repayment of the purchase-money, which he had paid into the Court, with interest, But we find ourselves unable to make the order ourselves ; and, for this reason, that the record is not clear as to who is the person who has received the money brought in by the purchaser and who really would be liable to pay interest on this purchase-money. We can, therefore, only direct the lower Court to proceed under Rule 93 and order repayment of the purchase-money to the purchaser, with or without interest, as the Court may deem necessary, from either the judgment-creditor or the assignee, as the case may be.

11. Costs of this appeal including the costs of the proceedings before the trial Court will be costs in the execution proceedings.

Divatia, J.

12. I agree.

Cases Referred.

1(1891) I.L.R. 18 Cal 639
2(1933) I.L.R. 14 Lah. 744
3(1926) I.L.R. 4 Rang. 426
4(1909) 10 C. L. J. 396
5(1898) L.R. 25 I.A. 146