(2000) 04 MAD CK 0019

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 1736 of 1999 and CM.P. No. 20138 of 1999

A. Parvatham APPELLANT

Vs

Bank of Baroda and others RESPONDENT

Date of Decision : 07-04-2000

Acts Referred:
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, 47
Stamp Act, 1899 — Section 47A

Citation : (2000) 2 LW(Cri) 952 : (2001) 2 RCR(Civil) 83

Hon'ble Judges : P. Sathasivam, J

Bench : Single Bench

Advocate : V.K. Muthusamy for K. Mohanram, for the Appellant; R. Subramaniam, for No. 1 and R. Sekar, for No. 2, for the Respondent

Final Decision : Dismissed

Judgement

P. Sathasivam, J.—Judgment-debtor in O. S. No. 336 of 1989 on the file of Subordinate Judge, Tiruppur, against the dismissal of her

petition E.A. No. 4 of 1998 filed by her under Order 21, Rule 90 read with Section 47, C.P.C., to set aside the Court auction sale held on 16-7-

1997, has filed the present appeal before this Court.

2. The first respondent herein Bank of Baroda obtained a mortgage decree against the appellant herein in O.S. No. 336/89 on the file of the

Subordinate Judge, Tiruppur and brought the suit properties for Court auction sale in E.P. No. 14/93 and in the Court auction held on 16-7-97.

the 2nd respondent herein has purchased the properties for Rs. 14,79,000/-. According to the appellant herein, the value of the properties is

around Rs. One Crore and even in 1993 the Amin''s value itself was Rs. 60 Lakhs and the property had been sold for a very low value due to incorrect description of the properties in the sale proclamation and for want of proper publicity about the sale and due to material irregularities and

fraud in publishing and conducting the sale, she filed E.A. No. 4/98 to set aside the sale. It was her case that the suit properties consist of three

door numbers and the buildings are of Madras terraced and tiled buildings consisting of ground and first floors in an area of 17 cents in the heart of

Tiruppur Town and the full and correct description of the properties have not been given in the sale proclamation and the real value of the

properties is Rupees One Crore and for want of proper publication and material irregularities in the publication and conduct of the sale substantial

injury has been caused to her and the properties have been sold for a very low price. She also contended that the entire properties need not have

been brought for sale and even if a part of the properties had been brought for sale, the decree could have been satisfied.

3. The respondents herein contested the application by filing separate counter-affidavits. It is stated that there was proper publication for sale and

the properties had been sold for the due and correct price and the petition was filed to protract the execution proceedings.

4. Before the Court below, besides examining the petitioner herself as P.W. 1, an Assistant from Sub-Registrar''s Office, Tiruppur, was examined

as P.W. 2, an approved Chartered Engineer was examined as P.W. 3 and Exs. A-1 to A-5 were marked. On the side of the respondents, one

Balu, purchaser of the suit properties, 2nd respondent herein was examined as R.W. 1. They also marked Exs. B-1 to B-5 is support of their

defence. The Court below, after considering the oral and documentary evidence adduced, rejected all the contentions raised on the side of the

petitioner-appellant herein regarding the value of the properties sold and the irregularities in the publication and conduct of sale and by the

impugned order, dismissed her application. Aggrieved by the said order, she filed the present appeal before this Court.

5. Heard the learned Senior Counsel for the appellant and the learned counsel for the respondents.

6. Mr. V.K. Muthusamy, learned Senior Counsel for the appellant, after taking me through the various objections raised with regard to the auction

sale held on 16-7-1997 as well as the impugned order of the learned Subordinate Judge, has raised the following contentions :-

i) The property sold in the Court auction was not properly described;

ii) No proper notice was issued to the petitioner in the execution proceedings;

iii) Sale proclamation was not properly drawn;

iv) The sale price fetched is inadequate;

v) The auction purchaser/2nd respondent herein is the agent of the decree-holder:

vi) The sale proclamation did not contain the value of the judgment-debtor as contemplated by proviso to Order 21, Rule 66 (2) C.P.C.

vii) The property is an extent of 17 Cents of land with a constructed area of 7400 sq. ft. and situated in the heart of Tiruppur could easily fetch

above Rs. 30,00,000/-and in the light of the oral evidence of P.Ws. 2 and 3 and the documentary evidence of Exs. A-3, A-4 and A-5, the Court

below committed an error in rejecting the claim of the petitioner;

viii) The Court below erred in bringing the entire property for sale when the Execution Petition was levied for Rs. 9.50 lakhs and the Amin''s value

itself was Rs. 60,00,000/- and a part of the property alone should have been brought for sale.

7. On the other hand, learned counsel appearing for the 2nd respondent/auction purchaser would contend that the Court below strictly followed all

the procedures contemplated under the Code, that the judgment-debtor was given adequate notice and opportunity at every stage and that the

main object of the petitioner/judgment-debtor is to delay the proceedings as far as possible. He also contended that the 2nd respondent herein is a

bona fide purchaser for value. He further contended that even though the alleged irregularities were available even at the time of drawing up of sale

proclamation, without filing proper petition at the appropriate time, no application to set aside the sale under Order 21, Rule 90 shall be entertained

after proclamation of sale was drawn up. He also contended that even on the alleged irregularities, the Court below has considered all the materials

and passed orders on merits, holding that those irregularities in drawing up of sale proceedings or in the publication of sale have not been made out

by the petitioner/appellant herein. It is further contended that the evidence produced by the petitioner/appellant herein was considered by the Court

below in detail and it has correctly come to the conclusion that no ground is made out to invoke Order 21, Rule 90, C.P.C. Learned counsel for the first respondent-Bank while reiterating the same contentions, adopted the arguments of the second respondent.

8. I have carefully considered the rival submissions.

9. In order to consider the points raised by both sides, it is better to refer Order 21, Rule 90, C.P.C.. which reads thus :-

Order 21. Rule 90. Application to set aside sale on ground of irregularity or fraud. - (1) Where any immovable property has been sold in execution

of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are

affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied

that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the

date on which the proclamation of sale was drawn up.

Explanation - The mere absence of, or defect in attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this

rule.

It is clear that on the ground of material irregularity or fraud in publishing or conducting the sale the person affected can approach the Court to set

aside the sale. However, as per clause (2) of Rule 90, he has to establish that he sustained substantial injury by reason of such irregularity or fraud.

Likewise, as per clause (3) if such person had occasion to raise objection before the date of proclamation and failed to raise the same, he cannot

be allowed to raise such objection after proclamation of sale was drawn up. I have already noted the objections raised by the petitioner/appellant.

Among those objections, inadequacy of the sale price and certain defects in conducting sale are the main grounds expressed by the petitioner.

Before considering the merits of such objection, I shall refer certain decisions referred to by the learned Senior Counsel for the petitioner/appellant.

In the case of A.U. Natarajan v. Indian Bank, Madras, AIR 1981 Madras 151, the Division Bench of this Court has held thus.

We have already pointed out the difference in meaning between the words ''value'' and ''upset price'' or ''reserve price''. What the proviso in

question lays down is that in a proclamation of sale the estimate of the value of the property as given by either or both the parties, should

necessarily find a place. But, no duty was cast on the Court to enter in the sale proclamation its own estimate of the value of the property. The

reason for the Legislature having worded the proviso in the manner done is not far off to see. The Court making an estimate of the value of the

property and entering it in the proclamation of sale would become necessary only when an upset price has to be fixed for the property. Since the

Legislature has now made it obligatory that the estimate of the value of the property as given by either or both the parties, should necessarily find a

place in the proclamation of sale, the need for the Court to fix an upset price may not arise in all cases........

The Division Bench also held that in order to safeguard the interest of the judgment-debtor, the Court can certainly exercise its discretionary power

under the first limp of the proviso and give its own estimate of the value of the property in the sale proclamation.

10. In Gajadhar Prasad and Others Vs. Babu Bhakta Ratan and Others, , Their Lordships have held that mere mention by the execution Court in

the sale proclamation, of the valuation of the properties (sought to be attached) as staled by the decree-holder, without assigning any reason for the

non-mention of the valuation as put by the judgment-debtor was material irregularity when the judgment-debtor suffered substantial injury by the

sale.

11. In Elumalai Naicker Vs. Kishtambal Ammal, it was held that when the Court gives the upset price, it cannot do so merely on the ipse dixit of

either the judgment-debtor or the decree-holder. What should be the amount to be fixed as the upset price must, therefore, be determined after an

objective consideration of all the relevant facts to which the Court must apply its mind, so as to safeguard the interests of the judgment-debtor.

12. In Manjamma Vs. S.N. Suryanarayana Rao and Others, , a learned single Judge of Karnataka High Court has held that non-publication of sale

proclamation on notice board of Municipal Corporation though property situated within Corporation limits is violation of mandatory provision of

Order 21, Rule 54(2) (Karnataka) read with Order 21, Rule 67.

13. In M/s. Annapurna Industries and another Vs. Syndicate Bank and others, a learned single Judge has held that where the properties involved

were industrial land and buildings with machinery, situated in a small village away from neighbouring important towns which required wide publicity

to the proclamation as there might not have been persons interested in such property in the small village, however, for two years the proclamation

was published on the site in the village by beat of tom-tom and by affixing the sale proclamation to boundary stone in the land, and thereafter,

instead of publishing the same either in the Official Gazette or in the newspaper having wide circulation, it was published in a local newspaper

which attracted no bidders and though in such cases it was imperative for the Court to have taken resort to Order 21, Rule 67 (2), C.P.C. the

Court went on mechanically issuing four more proclamations and after finding a bidder offering 1/3rd of the valuation of the property, accepted the

same as the highest price offered by the bidder, such sale was liable to be annulled.

14. In Palaniappa Gounder v. Nallamuthu Gounder (Vol. (1982) 95 Mad LW (Mad 581 at page 584: (AIR 1983 NOC 61), this Court has held

as follows :-

It is, therefore, quite evident that after the introduction of Tamil Nadu Amendment in Order 21, Rule 66(d)(1) and the amendment effected in R.

196 of the Civil Rules of Practice, it is not open to the Court to reduce the upset price already fixed without notice to the judgment-debtor.

This has been followed in Palaniappa Gounder v. Subramania Gounder, 1993 T.L.N.J. 165.

15. In V. Rajagopal Naidu Vs. Smt. Muthulakshmi Ammal and Others, , it was held that the inclusion of the judgment-debtor''s valuation in the

proclamation is a mandatory requirement.

16. In Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh, the Hon''ble Supreme Court has held that the execution Court has obligation

normally to state the valuation given by both the decree-holder as well as judgment-debtor.

17. Learned counsel appearing for the second respondent has relied on the following decisions in support of the impugned. order. In K.

Krishnaswami Gounder Vs. Palani Gounder, after referring to Order 21, Rule 66 (2) and in the absence of judgment-debtor utilising the notice in

the Court, the learned single Judge of this Court has held as follows (at p. 198 of AIR) :-

It is clear from the language of this rule that the value of the property as stated by the judgment-debtor can be specified by the Court only if the

judgment-debtor appears in the execution proceedings and states the value of the property as per his estimate. Learned counsel for the appellant

says that two years prior to the filing of this execution petition, while E.P. 246 of 1969 was pending, he filed an application to set aside an ex parte

order passed against him and in the course of an affidavit filed in support of that application he had stated that the property that was being brought

to sale was worth Rs. 50,000 and that the Court ought to have looked into the prior records and inserted in the sale proclamation the statement of

the judgment-debtor as regards the value of the property. I am entirely unable to accept this proposition. If the judgment-debtor fails to appear in

an execution petition and fails to state in that execution proceedings his estimate of the value of the property, it is no part of the duty of the Court to

make a research into the prior proceedings to any other proceedings between the parties in order to find out if the judgment-debtor had stated the

value of the property. To say that if the Court fails to perform this impossible duty of conducting a research into the prior proceedings and finding

out if the judgment-debtor has stated his value in those proceedings, it should be held guilty of a material irregularity is, in my view, to make a

mockery of the technicalities of law without any regard for the realities in which the executing Courts are called upon to function. I may also add

that even if it is regarded as a material irregularity, there is proof that as a result thereof the appellant has suffered any injury.

18. In Vaidyalingam Pillai v. Chidambaram Pillai, (1966) I Mad LJ 441, Kailasam, J., (as he then has held that under Order 21, Rule 90 of the

CPC an applicant who seeks to set aside a sale should prove that there has been material irregularity or fraud in the publication or conduct of the

sale. His Lordship has also held that the mere fact that the property was actually worth much more than what it was sold for is no ground to set

aside the sale. His Lordships has further held that where the judgment-debtor had notice at every stage of the execution proceedings and the application for reduction of the upset price, but did not choose to oppose any of them, he cannot be heard to say, after the sale is effected, that the

price fetched is too low. His Lordships has further held that where the proclamation of sale was settled and the judgment-debtor did not raise any

objection to the description of the property therein, and only wanted time to pay the decree amount, but allows the sale to be proceeded with he

cannot at a later stage be allowed to take advantage of any bona fide error in description, to attack the sale.

19. In Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, Their Lordships have held that

objection as to defect in sale proclamation not raised at the time of drawing up of sale proclamation cannot raise under Order 2.1, Rule 90, C.P.C.

20. In R.N. Bhuva v. S.V. Rangaswamy. (1991) 1 Mad LW 575, the Full Bench of this Court has held that participation of the judgment-debtor

in the settlement of proclamation and his not raising any objection for the extent of property brought for sale may be relevant for the purpose of

deciding the application under Order 21, Rule 90, C.P.C., and such conduct on the part of the judgment-debtor may also be viewed as a waiver

of the provisions of the requirements of Order 21. Rule 64 and Order 21, Rule 66(2)(a), C.P.C.

21. In Sathappan v. Andhra Bank Ltd. (1991) 2 Mad LJ 9, Srinivasan, J., (as he then was) has held that objections as to the description of the

sale property in the proclamation of the sale and as to the value of the property fixed could be raised before the proclamation of sale was settled

and they could not be raised under Order 21, Rule 90, against the validity of the sale. His Lordships has also held that under sub-rule (3) of Rule

90 of Order 21, it is provided that no application to set aside the sale shall be entertained upon any ground which the applicant can take on or

before the date on which the proclamation of sale was settled.

22. In Sridevi v. M. Natesan, (1988) 2 Mad LW 234 Ratnam, J., (as he then was) has held that there is no need when the entire property is

described by its four boundaries, to make specific mention about either the electrification or the existence of a well or the availability of a vacant

space within the four boundaries and that all these would be taken in by the boundary description given. His Lordships has further held that the lower appellate Court was, therefore, in error in holding that the omission to specifically refer to those matters would vitiate the sale and that the

view taken by the lower appellate Court that the first respondent had suffered a substantial injury by the sale of the property is erroneous.

23. In P.L.V. Giri v. A. Subramaniam, (1992) 2 Mad LW 237, Janarthanam, J., has concluded that even otherwise, the so-called misdescription

of the property as well as bringing more extent of property, than what is required, for purposes of satisfying the decree, to say, offending

respectively Rules 64 and 66 of Order 21, C.P.C. cannot at all be construed as vitiating or nullifying circumstances rendering the sale itself invalid.

and if at all, such factors can be termed as irregularities, which would be taken into consideration, in an application filed for setting aside the sale

under Order 21, Rule 90, C.P.C.

24. In Arunachellam v. Arunachellam, (1889) ILR 12 Mad 19, the Privy Council has held that a judgment-debtor having allowed the execution

sale of immoveables to be completed without objecting on the ground after wards alleged by him, viz., insufficiency of description within the

requirements of Section 287, he having been throughout aware of what the description was, the sale is not invalid on this ground alone without

more. No evidence having been given in the Court executing the decree of substantial injury having resulted by reason of such irregularity, i.e., the

alleged misdescription.

25. In Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd. and Others, Their Lordships have held that mere inadequacy of price cannot

demolish every Court sale.

26. In V.P. Praseethan Vs. T.P. Sivarama Krishnan and Another, the judgment-debtor was aware of the fact that his property was being sold in

execution of decree obtained against him. He had been making payments and seeking adjournment of sale. There was valid proclamation of sale

and the property was in remote place and there were no bidders and on two occasions the upset price had to be reduced. In such a

circumstances, the Division Bench of Kerala High Court has held that it cannot be said that the sale was for a lesser amount and cannot be lightly

set aside.

27. In the case of G. Loganathan Vs. S. Chenniaya Chettiar, Rengasamy, J., has

held that guideline value cannot be a basis for determination of

market value of the land. According to him, valuation register on the basis of the notification u/s 47-A of the Stamp Act is for collection of Revenue

and it cannot be the basis for determination of the market value of the land.

28. In the light of the various decisions, now I shall consider whether the petitioner has made out any case for interference. It is seen from the

records that the first respondent herein, Bank of Baroda obtained a preliminary decree on mortgage on 29-1-1991 and final decree was passed on

30-12-1991. Pursuant to the said decree, the first respondent filed E.P. No. 14/93 on 19-1-1993 to recover the said amount. The executing

Court issued notice to the appellant as well as other debtors. After paper publication, the appellant herein was called absent and set ex parte. By

order dated 30-4-1993, the Court below passed an order for drawing up of the sale proclamation on 8-6-1993. Admittedly, the appellant herein

did not furnish the value of her properties. Hence the sale proclamation was drawn up based on the decree-holder''s value and the Court''s value.

The first sale was fixed on 21-7-1993. However, on that day, no bidders came forward to purchase the property for the upset price of Rs.

30,00,000/-. Hence, the decree-holder filed an application in E.A. 615/93 to reduce the upset price. It is to be noted that in that application, the

appellant herein appeared through her counsel and filed a counter opposing the reduction of the upset price. In such a circumstance, the Court

below, by an order dated 7-1-1994, directed to conduct the sale once again at the same upset price. It is also seen that the sale for the second

time was directed to be held on the same terms and conditions contained in the sale proclamation drawn on 6-4-1994 for which the appellant

never raised any objection. Even for the sale held on 6-4-1994, there were no bidders and, therefore, the first, respondent filed an application in

E.A. No. 249/94 to reduce the upset price to Rs. 10,00,000/- however, the Court below reduced the upset price to Rs. 25,00.000/-By Order

dated 29-7-1994, the sale was directed to be held on 14-9-1994. Even for the sale held for the third time on 14-9-1994 the appellant failed to

object the terms of the sale proclamation even though she filed counter opposing the reduction of the upset price. In respect of the sale held for

third time i.e., on 14-9-1994, no bidders came forward to purchase the property at Rs. 25,00,000/-. Again on 26-9-1994, in E.A No. 559/94 the

first respondent requested the Court to reduce the upset price. The appellant filed her counter opposing the reduction of the upset price. The Court

below after considering the rival claim, reduced the price to Rs. 20,00,000/- by way of order dated 25-11-1994 in E.A. No. 559/94 and directed

the sale to be held on 18-1-1995 for the fourth time. The sale was adjourned to 18-1-1995 and on that date since there were no bidders, the sale

had not taken place. Once again, the first respondent filed an application in E.A. No. 70/95 to reduce the upset price. After several adjournments,

finally by order dated 9-2-1996, the upset price was fixed at Rs. 15,00,000/- and the sale for the fifth time was directed to be held on27-3-1996.

Even on that date, there were no bidders. Accordingly, the first respondent filed another application in E.A. No. 128/96 to reduce the upset price

from Rs. 15,00,000/- to Rs. 14,75,000/- and directed the sale to be held on 16-7-1997, after proper publication of sale. It is seen from the

records that the paper publication for sale was published in Daily Thandhi on 9-7-1997. In the sale held on 16-7-1997, the second respondent

was the highest bidder along with four others and his offer of Rs. 14,79,000/- was accepted and he was declared to be the successful bidder. It is

further seen that on that date itself, he deposited 1/4th amount, namely, Rs. 3,69,750/- and on 29-7-1997, he deposited another sum of Rs.

12,12,780/-. It is clear that the second respondent had deposited the entire sale price, poundage and stamp duty etc., within time. It is clear that

the appellant herein was put on notice on each and every occasion and as a matter of fact, on many occasions, she participated by filing counter-

statements opposing the reduction of upset price. However, the fact remains that she did not challenge the orders passed by the Court below

reducing the upset price then and there considering the fact that no bidders came forward by way of appeal. It is also clear that though she filed an

objection for reduction of the upset price, she did not raise any objection at the time of drawing up of sale proclamation pointing out the defect. In

such a circumstance, as observed by Their Lordships of the Supreme Court in Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs.

Sudhir Chandra Ghosh and Others, though notice was given to her, she did not attend at the drawing up of the proclamation, accordingly the sale held is not liable to be set aside under Order 21, Rule 90, C.P.C. The same position has been reiterated in the Full Bench decision of this Court

reported in (1991) 1 Mad LW 575 (cited supra).

29. Regarding the misdescription of the property, it is seen from the sale proclamation that the property description given in the sale deed executed

in favour of the appellant is given as description of property in the sale proclamation. The boundaries, door No. extent and other particulars are

same both in the sale deed of the year 1968 and in the sale proclamation. In this regard, it is useful to refer the decision of Ratnam, J., (as he then

was) reported in (1988) 2 Mad LW 234 (cited supra) that when the property is described by its four boundaries, there is no need to mention the

other details such as electrification, existence of well or the availability of vacant space within the four boundaries. As a matter of fact. Janarthanam,

J., in, (1992) 2 Mad LW 237 (cited supra) has gone into the extent of saying that misdescription of the property as well as bringing more extent of

property, than what is required, for purposes of satisfying the decree cannot at all be construed as vitiating or nullifying circumstances rendering the

sale itself invalid. I have already observed that the appellant herein did not raise any objection while drawing up of sale proclamation and she

allowed the sale completed without objection to the property description. In such a circumstance, she cannot contend that the sale is invalid at a

later date. The execution proceedings clearly show that for want of bidders, the sale was postponed on four occasions and only on fifth time, after

reduction of the upset price to Rs. 14,75,000/-, the second respondent came forward to purchase the same for Rs. 14,75,000/- and deposited the

entire amount immediately. I am also satisfied that on each occasion, the Court below ordered notice to the appellant herein and the proposed sale

also was published in the local daily, namely, Thinathandhi. Hence, it cannot be contended that there was no due publicity. As a matter of fact, the

Hon''ble Supreme Court in Kayjay Industries (P) Ltd. Vs. Asnew Drums (P) Ltd. and Others, has held that inadequacy of price is not a ground for

setting aside the sale. Apart from this, the appellant had not established for setting aside the sale in the enquiry. She had not produced any record

to show the value of the property on the date of the sale. I have already referred to the decision of Rengasamy, J., in G. Loganathan Vs. S.

Chenniaya Chettiar, stating that guideline value cannot be a basis for determination of market value of the land.

30. Regarding the other contention that the entire property need not have been brought for sale and even if a part of the properties had been

brought for sale, the decree could have been satisfied, it is seen from the sale proclamation dated 16-7-1997 that the total amount due to the

decree-holder was Rs. 13,60,788/- and the entire suit property was sold for Rs. 14,79,000/-., In such a circumstance, the contention that a part

of the properties alone is sufficient for discharge of the entire decree due is liable to be rejected.

31. Under these circumstances, I am satisfied that the sale proclamation was properly drawn up on each occasion and proper publication was

given in respect of the sales held on various dates. Equally I do not find any irregularity in the publication and conduct of the sale and I hold that the

appellant has not made out any substantial injury in the court auction sales upto the last sale held on 16-7-1997. I do not find any error or infirmity

in the order impugned; accordingly the appeal fails and the same is dismissed. No costs. Consequently C.M.P. No. 20138/99 is also dismissed.

