

(1916) 01 MAD CK 0061
In the Madras High Court

A.K.T.K.M. Narayanan Nambudripad

APPELLANT

Vs

Tawker J. Megaji Seit and Others

RESPONDENT

Date of Decision : 11-01-1916

Acts Referred:

Citation : 32 Ind. Cas. 927

Hon'ble Judges : Srinivasa Aiyangar, J

Bench : Single Bench

Judgement

Srinivasa Aiyangar, J.—This case raises a question of some difficulty on the construction of Section 63 of the Civil Procedure Code.

2. There was a sale of certain Immovable properties under the orders of the Principal Munsif's Court of Calicut in execution of a decree of that Court, in which the properties were purchased by one V. Ahmad. The sale was in September 1912. When the order for sale was made and when the sale took place the properties were also under attachment in execution of a decree of the Subordinate Judge's Court, Calicut. It appears that attachments in execution of decrees in both the Courts were made in March 1912. Prior to the sale in a petition put in by the judgment-debtor opposing an application for permission to bid by the decree-holder, the fact of the attachment by the superior Court and an order by the superior Court directing the sale of the same properties were set out and were thus brought to the notice of the District Munsif's Court which directed the sale. But the sale was, as a matter of fact, held in spite of the objections of the judgment-debtor in contravention of the first clause of Section 63 of the Code. The decree-holder in the Sub-Court suit applied to the District Munsif to set aside the sale under Order XXI, Rule 90, and it was stated in the petition that the properties fetched a low price in consequence of the irregularity in the sale. The first Court dismissed the application on the ground that the second clause of Section 63 rendered the sale valid and that the Court, therefore, cannot set it aside. It further held that no substantial loss by reason of any irregularity was proved in this case. There was an appeal to the District

Court which was dismissed; and this application is to revise that appellate order.

3. If the petitioner was entitled to apply under Order XXI, Rule 90, as in fact he did, then the concurrent finding of both the Courts that no loss had been proved by the petitioner by reason of the irregularity complained of would be conclusive against him, and this petition would be incompetent. But it is difficult to say that the complaint in this case was an irregularity in the conduct of the sale; it is not clear that the irregularity was in the order for sale which was antecedent to the publication or the conduct of the sale; nor is it clear that the petitioner was a person who was entitled to apply under that rule. But as the main question as to the validity of the sale in the circumstances above mentioned has been argued on both sides I prefer to deal with it, more especially as the present petition, though directed against the appellate order, can, if necessary, be amended and treated as an application to revise the original order of the District Munsif.

4. It is quite clear that a sale held in contravention of the first clause of Section 63 is not a nullity. Even prior to the enactment of Clause 2 of Section 63, u/s 285 of the old Code, it was held by this Court and by the Calcutta and Bombay High Courts that such a sale was not a nullity but was only irregular. The enactment of Clause 2 places the matter now beyond all argument. The result, therefore, is that the title of a purchaser in such a sale cannot be impeached collaterally, but that the proceedings irregularly taken can only be set aside either by appeal or by other proceedings prescribed for that purpose. Mr. Ramachandra Aiyar contends that if the Court which ordered the sale had notice of an attachment by a superior Court, as was the case here, the sale is void or at least one which must be set aside by the Court which held it, on an application made to it by a party interested in getting rid of the sale. Mere notice to the Court which ordered the sale cannot oust the jurisdiction, and the sale in this case cannot, therefore, be treated as a nullity. [See Abdul Karim v. Thakordas Tribhovandas 22 B.S 88 per Farran, C.J.] Treating therefore, the sale in this case as being merely irregular, in so far as the purchaser is concerned his title cannot be affected unless he was in fault. As stated in Freeman on Void Judicial Sales, page 87, the general principle is "that the title of a purchaser not himself in fault cannot be impaired at law nor in equity by showing any mere error or irregularity in the proceedings. Errors and irregularities must be corrected by a direct proceeding. If not so corrected they cannot be made available by way of collateral attack on the purchaser's title." Whether mere notice of irregularity to the purchaser makes him a purchaser in fault, is a question which it is unnecessary to decide, as the purchaser in this case has not had such notice. It would have been competent for one of the parties to the suit in the Munsif's Court to have applied to that Court to vacate the order for sale, on the ground that at the time when the order for sale was passed the property directed to be sold was under attachment by order of a superior Court or that after the order for sale, an attachment had been made under such an order; and if the inferior Court does not set it aside the same may be ordered in appeal or in revision, as the case may be. It may be that the decree-holder in the superior Court who may be

affected by the sale, if held, may also apply to set aside the order for sale though it may be difficult to bring his application within any specific provisions of the Code, as I think that Section 47 may not cover a case of that sort. However, that is not the case here as no application was made to set aside the order for sale. After the sale has taken place it can be set aside on an application under Order XXI, Rules 72, 89, 90 or 91 by persons competent to make an application under one or other of these rules and on the conditions set forth in them. The question on which I have felt a difficulty is, whether those provisions are exhaustive or whether the Court had power to set aside a sale held in contravention of the prescribed rules, on a motion made in the proceedings in which the sale was held. Suppose a purchase is made in contravention of Rule 73. Has not the Court power to set aside the sale? I think the Court can and must set it aside. It may be said that the prohibition contained in that rule is one based on public policy (of the similar provision in Section 136, Transfer of Property Act) and a purchase made in contravention of that rule is illegal and void.... The better opinion, however, seems to be that such a sale is not a nullity, at any rate after confirmation. (Freeman, page 113.) Has not the Court then the same power, where the sale is in contravention of another rule? There is, of course, this difference between the two cases that in the one case, the purchaser must be in fault, while in the other, he is not, or at any rate he need not be. All the same if proceedings are taken in contravention of the prescribed rules of procedure, there must be a power in the Court to set aside the irregular proceedings if the appropriate action is taken by the person or persons affected by those proceedings, unless they have waived their right See *Ashutosh Sikdar v. Bihari Lal Kritania* 35 C. A 61; 11 C.W.N. 1011, et seq per Mookerjee, J. The judgment-debtor then in the Munsif-'s Court decree can, I think, apply u/s 47 to set aside the sale, and would be entitled so to have it set aside merely on proving the irregularity without proving any loss. It is clear that the decree-holder in the Subordinate Court may be prejudiced, if, for example, he cannot get any portion of the sale-proceeds u/s 73. Unless the superior Court can get hold of the sale-proceeds (it is suggested in one of the cases that it can be transferred under the order of the District Judge), the decree-holder in the superior Court cannot share in the distribution, while by the sale being set aside, and a fresh sale held by the superior Court, the decree-holder in the inferior Court cannot suffer. The purchaser might, no doubt, lose his bargain, but he has no right to it at least till confirmation. I should, therefore, be inclined to hold that the petitioner was entitled to apply to set aside the sale; and as I do not find any specific provision in the Code enabling him so to apply, he was entitled to invoke the inherent powers of the Court.

5. There are, however, two cases decided u/s 285 of the old Code which are directly in point. One is In the matter of the petition of *Badri Prasad v. Saran Lal* (1882) A.W.N. 69 and the other *Patel Naranji Morarji v. Haridas Navalram* 18 B. 458. In both the above cases an application was made by the decree-holder in the superior Court to set aside a sale held under the order of the inferior Court;

it does not, however, appear whether the applications were made under any specific provision of the Code or under the inherent powers of the Court. There is a reference to Section 311 of the old Code in the case of *In the matter of the petition of Badri Prasad v. Saran Lal* (1882) A.W.N. 69, but the learned Judges point out that that section does not apply. The Allahabad High Court held that the sale was a nullity and set it aside. The Bombay High Court arrived at precisely the opposite conclusion. The view of the Allahabad High Court has not been followed in this Court, which has followed the Bombay and Calcutta High Courts in this matter. It is no doubt true that in the later case of *Abdul Karim v. Thakardas Tribhovandas* 22 B.Z 88 where there was a contest between two rival purchasers the Bombay High Court upheld the title of the later purchaser in the sale by the superior Court, on the ground that the earlier purchaser under the sale by the inferior Court had notice of the attachment by the superior Court. It appears to me that that was a case of collateral impeachment. But, however that may be, the decision in *Patel Naranji Morarji v. Haridas Navalram* 18 B.K 458 was cited with approval in that case and the principle of that decision has been followed in this Court in *Kunhayan v. Ithu Kutti* 9 M.L.J. 1. It was pointed out in this case that the question of notice can arise only between the parties to the proceedings and that third parties are not entitled to impeach the proceedings as being in contravention of Section 285. This decision, if I understand it right, decides, first, that there cannot be a collateral impeachment of such a sale and second, that a direct impeachment is possible only to the parties to the proceedings or persons interested therein, in the manner prescribed by the Code. Clause 22 of the new section was evidently intended as an enactment of this principle. I have, therefore, come to the conclusion, though not without hesitation, that the petitioner is not entitled to apply to set aside the sale merely on the ground that that sale was in contravention of Section 63 of the Code. The petition must be dismissed with costs.