

(1973) 09 AP CK 0008
In the Andhra Pradesh High Court
Case No : A.A.O. No. 330 of 1972

Buddiga Ganganna and Others

APPELLANT

Vs

T. Veerabhadrarao

RESPONDENT

Date of Decision : 04-09-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, Order 21 Rule 66, Order 21 Rule 90, 47

Citation : AIR 1974 AP 216 : (1974) 1 APLJ 151

Hon'ble Judges : A.V. Krishna Rao, J

Bench : Single Bench

Advocate : M. Venkatrayudu, for the Appellant; M. Jagannadha Rao, for the Respondent

Judgement

1. This appeal is against an unnumbered E. A. of 1972 in E. P. No. 8 of 1970 in O. S. No. 63 of 1968 on the file of the Court of the 1st Additional District Judge, East Godavari, at Rajamundry. The judgment-debtors are the appellants and the decree-holder is the respondent.

2. The judgment-debtors filed an application under Order 21. Rule 90, Civil P. C. In the said petition, they prayed that the Court might be pleased to set aside the sale held on 2-2-1972. The application was filed on 2-3-1972, within 30 days from the date of the sale. In the affidavit filed on behalf of the judgment-debtors by the 3rd judgment-debtor in support of this application it was alleged that the decree-holder had brought the property to sale subject to a mortgage in favour of Konavaran Co-operative Land Mortgage Bank and that the property was sold for Rs. 4,200/- subject to the mortgage. It was averred that the mortgage was cleared a long time back (no date was given) and the decree-holder was aware of the same. In suppressing the fact that the mortgage was not subsisting the decree-holder has played fraud on the Court with a view to make wrongful gain to himself. The property was worth Rs. 18,000/- and it was purchased by the decree-holder for Rs. 4,200/- subject to the mortgage. It was also urged that

there was not regular tom-tom in the village, that the proclamation was not properly made and that the sale suffered from material irregularities in a general way, resulting in loss to the judgment-debtor.

3. It may be noted that Sec. 47 Civil P. C. was not mentioned in the application but only Order 21, Rule 90, Civil P. C. was mentioned. The Court, having regard to the Proviso to Order 21, Rule 90, Civil P. C. before admitting the application called upon the judgment-debtors to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or that realised by the sale whichever is less granting seven days' time for the purpose. The unnumbered E. A. was represented by the judgment debtors on 24-3-1972 stating that no security was required to be furnished, as six items of properties belonging to him were under attachment and that only one item was sold that the remaining items would afford sufficient security for the required amount. The Court on 28-3-1972 rejected the above submission of the judgment-debtor and posted the application for hearing the Advocate for the judgment-debtors to 30-3-1972. On 30-3-1972 on behalf of the judgment-debtors 15 days' time was requested for giving the security as directed by the Court. The Court granted the same directed by the Court. The Court granted the same subject to limitation. On 12-4-1972 further time was prayed for by the judgment-debtors for furnishing security and time was finally extended to 19-4-1972 for furnishing security. On 19-4-1972 the E. A. was rejected as security was not furnished. It is against the order of rejection that this C. M. A. is filed by the judgment-debtors.

4. The contention on behalf of the appellants is that the fraud alleged by the judgment-debtors in their application regarding the suppression of the fact that the mortgage in favour of the Co-operative Land Mortgage Bank was no longer subsisting brought the case u/s 47 and not under Order 21, Rule 90, Civil P. C., and that therefore that part of it did not require the furnishing of any security, as the alleged fraud was committed by the decree-holder before the order for sale was made. Though the order irregularities alleged viz., absence of tom-tom in the village and that the proclamation was not properly made, fell within the scope of O. 21, R. 90, Civil P. C. the Court should have rejected the application only in so far as that part of the allegations which fell under Order 21, Rule 90 of the CPC was concerned and that it could not reject the entire petition as part of the allegations fell u/s 47, of the Code of Civil Procedure, Reliance was placed upon a judgment of Ramachandra Iyer, C. J. reported in The Official Receiver Vs. P.R.M. and Co. and Others, . The said judgment lends support to this contention. Where the allegations partly come u/s 47 and partly under Order 21, Rule 90, Civil P. C. the order of the Court directing the furnishing of security must be held to be within its competence. But in such a case the Court cannot reject the application in its entirety where the applicant does not furnish the security. It must admit the application and consider those objections to the sale which fall u/s 47 of the CPC which does not require the furnishing of any security before admitting the application. In the instant case, the order of rejection without admitting the application would be correct only if all the allegations bring the

case within Order 21, Rule 90, Civil P. C. That takes me to the question, whether the allegation of fraud regarding the showing of a non-existent encumbrance as subsistent in the sale proclamation brings the case within the ambit of Section 47, Civil P. C.

5. I shall now consider whether the allegation of fraud alleged on the part of the decree-holder in the matter of suppressing the fact that a discharged mortgage was shown as subsisting takes the case out of Order 21, Rule 90, Civil P. C. and brings the case under Sec. 47, Civil P. C. The learned counsel contended that as the fraud committed was prior to the order for the sale is made, the case comes u/s 47, Civil P. C. and not under Order 21, Rule 90. Civil P. C. as the fraud does not concern publishing or conducting the sale. In order to decide this point, it would be useful to refer to the decision of the Full Bench in *Satyanarayanamurty v. Bhavanarayana*, AIR 1957 Andh Pra 185 . The Full Bench held that a sale cannot be held to commence until an order for sale is made under Rule 64 of Order 21, Civil P. C. While the word "publishing" in Rule 90 refers to the publication mentioned in Rule 67, the word "conducting" refers back to the words "shall be conducted" in Rule 65. There can be no irregularity in the publication or conduct of the sale within the meaning of Rule 90 before an order for sale is made. It was only breaches of the rules that follow Rule 64 that could be characterised as irregularities appertaining to the publication or conduct of the sale. It was also observed that Order 21, Rule 90, Civil P. C. obviously deals with cases where the sale may be said to be violable at the instance of the applicant and not void. If the matters alleged in an application for setting aside a sale are such that would render the sale void, then the application falls under Sec. 47, Civil P. C. If what is alleged is not one that makes the sale void, then the case falls under Sec. 47 Civil P. C. If what is alleged is not one that makes the sale void, then the case falls under Order 21, Rule 90. Civil P. C. and the applicant can succeed only on proof of material violation of Rule 65 etc., followed by proof of consequential substantial injury to the applicant. In the case before the Full Bench, there was no service of notice under O. 21, Rule 66 , Civil P.C. and it was held that it was an irregularity in publishing and conducting the sale.

6. There can be no doubt that in filing the sale papers before an order for sale is made by the Court it is the duty of the decree-holder to file what is called an encumbrance certificate as required by the Civil Rules of practice. Supposing such a thing is not done by the decree-holder and yet an order for sale is made, I should think that the order for sale is not a nullity. O. 21 , R. 66, C.P.C. provides for the proclamation of sale by public auction. After an order for the sale of property is made in execution of a decree under Rule 66 (2) , the proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor. In so drawing up the proclamation in the presence of the judgment-debtor and the decree-holder, the Court among other things mentioned in the Rule under clause (c) is enjoined to mention in the proclamation any encumbrance to which the property is liable. It is not the case of the judgment-debtor in this case that no notice was issued to him. On the

date when the proclamation was drawn up, the judgment-debtor, who had notice of the fact that the proclamation was drawn up, must have known that the mortgage was no longer subsisting and had been discharged by him. It could have been pointed out to the Court that the property was not subject to any encumbrance. Whether the property to be sold was liable to any encumbrance or not is certainly a fact, apart from any encumbrance certificate, which the judgment-debtor must have known. If he without any protest allows the existence of a mortgage to be notified in the proclamation which he knows to have been discharged and he remains quiescent, how can the decree holder be held to be guilty of any fraud when the proclamation was drawn up after due notice to the judgment-debtor? Even if it factually turns out that there was no subsisting encumbrance and the proclamation stated that the property was subject to an encumbrance, the case is one which clearly falls under Order 21, Rule 90, Civil P.C. Rule 66 (4) of Order 21, Civil P.C. reads as follows :

"For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto."

The judgment-debtor, who in this case must have known about the fact whether the encumbrance was discharged or not, even if he did not have the relevant papers with him, which would show this fact, could have sought the assistance of the Court to summon the Co-operative Land Mortgage Bank to produce their records to show the said fact. No such thing was sought to be done. The alleged breach amounts to the proclamation being not properly drawn up. In other words, it was the publication of an improper proclamation of sale. The Full Bench in AIR 1957 AP 185 observed :

"The publication of an irregularly drawn up proclamation of sale, irregular either because of want of notice or on other grounds, may thus be called an irregularity in the publication itself."

The case of the Privy Council reported in AIR 1945 67 (Privy Council) referred to by the Full Bench is of useful application in the present context. In the Privy Council case, the property was sold for a low valuation because the sale proclamation was based on mis-statement by a decree-holder as to the amount due under a prior encumbrance for want of knowledge of the true position. It was held that the case fell under Order 21, Rule 90, C.P.C.

7. Reliance was placed on behalf of the appellants upon the Division Bench case of the Madras High Court reported in Gnanabaranam Pillai Vs. Rathinam Pillai, . In that case it was held that any irregularity or fraud in the settlement of proclamation which precedes its publication or conduct of the sale was not attracted by Rule 90 and in such a case Section 47 was attracted and the failure to furnish the security directed by the Court under the provisions of Order 21, Rule 90, Civil P.C. could not prevail. It is contended that in the instant case,

assuming the case fell under Order 21, Rule 66, Civil P.C. as wrong particulars have been given when the proclamation was settled and as the irregularities in the publication of proclamation are quite different from the irregularities in the settlement of the proclamation, the objection raised by the judgment-debtor regarding the wrong inclusion of a non-existent encumbrance has the effect of taking it out of the purview Order 21, Rule 90, Civil P.C. It will not be open to me to allow myself to be persuaded by this contention based upon the decision of the above Madras Division Bench case, in view of the decision of this Court in AIR 1957 AP 185 (Supra) where the Full Bench categorically observed :

"It is only breaches of rules that follow Order 21, Rule 64, Civil P.C. that can be characterised as irregularities appertaining to the publication or conduct of the sale."

In the opinion of the Full Bench, it is clear that any breach occurring in O. 21, R. 66 Civil P.C. which relates to the settlement of proclamation of sale is one that should be characterised as an irregularity appertaining to the publication or the conduct of sale.

8. In the light of the above discussion, I am of opinion that the allegation made by the judgment-debtor in his application filed under Order 21, Rule 90, Civil P.C. (Section 47, Civil P.C. was not even mentioned in the petition) that the decree-holder committed fraud in bringing the properties to sale by including a non-subsisting mortgage falls only under Order 21, Rule 90 Civil P.C. and not u/s 47, Civil P.C. the allegation being in breach of Order 21, Rule 66 (2) (c) of the Code of Civil Procedure. It must therefore follow that the order directing the furnishing of security made by the Court below is correct and the rejection of the petition for non-compliance with the order is unassailable.

9. I have in the earlier part of the judgment referred to the conduct of the judgment-debtor. When the application was returned the only representation made by the judgment-debtor to the order of the Court requiring him to furnish security before the application was admitted was that the remaining items of property under attachment were sufficient security and hence the petition should be accepted. On 30-3-1972 without any further objection, fifteen days time was requested for giving security and the same was granted by the Court. On 12-4-1972 again time was extended by a week at the request of the judgment-debtor. On 19-4-1972 as security was not furnished, the application was rejected. In such circumstances, whether the judgment debtor could be permitted to raise the objections he did is somewhat doubtful to me. He did not in any way question before the lower Court its order for furnishing security. He gave up his first objection to that order viz., that the other items under attachment were sufficient security and that therefore the furnishing of security directed by the Court may be dispensed with. Time was taken on two occasions, only for furnishing the security, accepting the correctness of the order. Now it has been urged in the appeal that one of the allegations in the affidavit filed in support of the petition brought the case within Section 47, Civil P.C. and not

under Order 21, Rule 90 of the code, and the order of the Court below rejecting the application is erroneous. He accepted the correctness of the order directing the furnishing of security and obtained the indulgence of the Court to furnish security sought extension of time on two occasions which the Court granted. When ultimately the Court rejected the application as, even within the finally extended period the order was not complied with, it would be most improper and inequitable for the judgment-debtor to canvass the correctness of the order in this appeal. He cannot be permitted to approbate and reprobate the same order. However, it is not necessary for me to express any concluded opinion on this aspect.

10. This C.M.A. therefore fails and is dismissed with costs.

11. Appeal dismissed.