
(1955) 09 BOM CK 0010
In the Bombay High Court
Case No : A.F.O. No. 106 of 1954

Budhamal Hajarimal

APPELLANT

Vs

Laxmibai Bhr. Baburao

RESPONDENT

Date of Decision : 13-09-1955

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 66, Order 21 Rule 90
Evidence Act, 1872 — Section 115

Citation : AIR 1956 Bom 147

Hon'ble Judges : Shah, J

Bench : Single Bench

Advocate : V.D. Tulzapurkar, for the Appellant;

Judgement

1. This is an appeal against the order of the Civil Judge, Senior Division, Sholapur, setting aside a court sale under Order 21, Rule 90, C. P. C. The plaintiff filed special suit No. 98 of 1948 in the court of the Civil Judge, S.D. at Sholapur to enforce a mortgage and obtained on 26-9-1951 a decree absolute for sale of the mortgaged property.

Thereafter the plaintiff filed darkhast No. 55 of 1952 to recover Rs. 7130/- odd together with costs and running interest from the judgment-debtors. The properties of the judgment-debtors were put up for sale on 7-11-1952 and were purchased by a partner of the mortgagee firm for Rs. 8000/- with leave of the court. On 5-12-1952, defendant 2 against whom alone, it appears the" decree was passed applied for setting aside of the sale under Order 21, Rule 90, C. P. C.

In that application defendant 2 contended that the sale was vitiated on account of material irregularity and fraud in conducting the sale, and that the purchaser being a stranger should have been called upon to deposit the amount for which the property was sold; that the auction sale was held during the pendency of the application filed by defendant 2 for instalments; that there was material irregularity in issuing the sale proclamation inasmuch as the property was misdescribed therein at the instance of the mortgagee; and that the mortgagor

had made improvements on the property "at considerable expenses which were not brought to the notice of the Court and that the value of the property at the time of the sale was Rs. 27,000/- while it was sold for Rs. 8000/- only to a partner of the mortgagee. .

2. The learned trial Judge directed the parties by his order dated 18-9-1953 to file affidavits in support of their respective cases. Defendant 2 filed two affidavits Exs. 14 and 15 in support of her contention that the property was misdescrib-ed in the sale proclamation and that there had been material irregularity in conducting and publishing the sale, and that she had suffered substantial damages by reason of the sale of the property for Rs. 8000/- to the partner of the mortgagee.

The affidavit of Salbanna Ex. 15 stated that the property had been Improved at a cost of Rs. 8000/-. Saibanna it appears was working as "Mistry" for about 30 years. He stated that about 3 or 3 1/4 years ago he had constructed the Vakhar as a mason and that he had also constructed three rooms and a verandah and a privy of which he estimated the cost at approximately Rs. 4000/-.

He also stated that in plot No. 55742 he had constructed a compound wall and adjoining two rooms in addition to the "Jota" and its foundation. According to Salbanna the amount of Rs. 4000/- must have been spent in making these constructions and a "Houd" or a tank. In the view of this witness the value of the property was about Rs. 25,000/-.

3. The plaintiff auction-purchaser filed his affidavit Ex. 16 formally denying that any additional construction was made by the mortgagor. It was then stated in the affidavit that even assuming that additional constructions were made on the property, they were not of a substantial nature.

4. Defendant 2 produced extracts from the Property Register showing that the mortgaged property had been purchased in the years 1946-47-48 for Rs. 11,000/- It is evident that adding to it the value of improvements made, the property would be worth about Rs. 19,000/-. Even though definite statements were made by defendant 2 and her witness that the value of the mortgaged property was at least Rs. 25,000/- and even though they stated that improvements had been made on the mortgaged property since the date of the mortgage, no attempt was made on behalf of the decree-holder to cross-examine defendant 2 and her witness.

The decree-holder was content to take the affidavits of defendant 2 and her witness at its face value. On 3-4-1954 when the case stood adjourned for further arguments and judgment, the decree-holder filed an application Ex. 19 expressing his willingness to resell the property for the amount for which he had purchased it. The learned Judge rejected that application observing that the application was made more or less for the purpose of record.

He stated that it was handed in at the close of the dictation .of the Judgment on

the application for setting aside the sale. He accordingly directed that Ex. 19 be filed. It is evident from the stage at which Ex. 19 was made, that it was not a bona fide application made with a view to enable defendant 2 to secure purchasers to purchase the property at the value at which the mortgagee had purchased it.

The application (Ex. 19) as the learned Judge points out, appears to have been made with a view to its future use after the Judgment in the application (Ex. 1) was practically concluded. The learned Judge as I have set out earlier granted the application (Ex. 1) and set aside the sale. Against the order setting aside the sale the decree-holder has come to this court in appeal.

5. Mr. Tulzapurkar who appears on behalf of the appellant-decree-holder has contended that there was no reliable evidence on the record from which it could be inferred that the property was sold at a grossly inadequate price. I have already referred to the evidence which consists of the extracts from the Property Register Exs. 6 and 8 showing that the properties mortgaged had been purchased for Rs. 11,000/-.

I have also referred to the affidavit of Saibanna who says that the value of the property was about Rs. 25,000/- in his estimate and that the property had been improved at a costs of Rs. 8000/-. The estimate of defendant 2 as to the value of the property was that it was worth about Rs. 27,000/-. I need not repeat that there was no cross-examination of Saibanna who appears to be an independent witness.

Mr. Tulzapurkar contends that Saibanna is merely a "Mistry" or a mason, and is not an expert in valuing Immovable properties. But if that was the suggestion Intended to be made against the evidence of Saibanna, an attempt should certainly have been made to cross-examine him in. the court below. No such attempt having been made, the evidence of Saibanna must be accepted and the valuation of the mortgaged property must be taken to be not less than Rs. 18,000/- or Rs. 19,000/-.

6. Mr. Tulzapurkar points out that the learned trial Judge himself regarded the value of the property to be Rs. 13,000/-. Even assuming that the estimate of the learned trial Judge is correct, at the date of the sale when it was sold for less than 2/3rd of that value and to a partner of the mortgagee himself it must be held that it was sold at a grossly inadequate price.

7. Mr. Tulzapurkar then contended that before an order for sale may be set aside under Order "21, Rule 90, C. P. C. the applicant has to prove that in publishing or conducting the sale there was material irregularity or fraud, and that as a result of such material irregularity or fraud a substantial injury was caused to the applicant.

Mr. Tulzapurkar submits that there was no material irregularity or fraud in publishing and conducting the sale; and even if there was any such material

irregularity or fraud there was no connection between the said material irregularity or fraud and the injury caused to the applicant by the sale.

8. Now it is clear that after the mortgage was effected, the property was improved by the mortgagor at considerable expense. The mortgagee got the property described in the sale proclamation as it was originally described in the mortgage deed, and did not mention in the sale proclamation the improvements effected on the property. That would normally amount to a "material irregularity" if not fraud, in publishing the sale proclamation. The mortgagee had the conduct of the proceedings.

It was at his instance that the sale proclamation was prepared and published; and if he chose to mislead the court by not bringing to the notice of the Court that since the date on which the property was mortgaged it had been improved at considerable expense, it must be regarded as a material irregularity, in the publication of the sale proclamation.

9. Mr. Tulzapurkar says that there is no evidence to show that the mortgagee did really know that there were improvements made on the property since the date of the mortgage. But that argument is not now open to Mr. Tulzapurkar. It was conceded before me that in the written statement filed by the mortgagee no such plea was raised.

What was pleaded in the written statement by the mortgagee was that no improvements had been made on the property. It was never pleaded that the improvements made on the property at the date when the sale proclamation was prepared at the instance of the mortgagee, the mortgagee had no knowledge.

As pointed out by the learned trial Judge, the mortgagee in his affidavit Ex. 17 made a halfhearted attempt to deny the improvements and apparently tried to gloss over the question of improvements. That shows that the mortgagee was aware of the improvements made and still did not inform the Court that improvements had been made on the property at a considerable expense.

10. Mr. Tulzapurkar then contended that even though improvements had been made on the property it was open to the judgment-debtor to make an application to the court to describe the improvements in the sale proclamation; she having failed to do so, she must be regarded as estopped from raising the contention as to material irregularity or fraud in publishing and conducting the sale in an application under Order 21, Rule 90. C. P. C.

11. Reliance in support of that contention was placed upon -- ;Sakarlal Jamnadas v. Jerbai Sarabji" AIR 1934 Bom 348 (A); and -- Pirmal Goenka and Others Vs. Basanti Das Chatterjee and Others, . In AIR 1934 Bom 348 (A) N. J. Wadia J. observed that since the appellant (judgment-debtor) was aware of the defect in the proclamation and took no steps at the proper time to have the defects remedied, he could not afterwards be allowed to have the sale set aside on the ground of this defect.

It appears however from the report of the case that the purchaser in that case was an outsider. If having knowledge of the defect in the sale proclamation the Judgment-debtor stood by and permitted a third person to purchase the property at the Court auction when there was sufficient description of the property in the sale proclamation, the Judgment-debtor must be regarded as estopped from contending that there was material irregularity in the publication of the sale. But that is not the state of facts in the present case.

In this case it is the mortgagee who got the sale proclamation prepared and he himself has purchased the property at the court auction. I am therefore unable to extend the principle of AIR 1934 Bom 348 (A), to a case where the mortgagee-decree-holder who has full knowledge as to the extent and value of the property chooses to get the property misdescribed and himself purchases the same at the court auction.

It is true that the judgment-debtor in this case was served with the notice under Order 21, Rule 66, C.P.C., and the judgment-debtor applied for correction of the valuation of the property shown in the panchanama and the proclamation and the learned Judge asked the judgment-debtor to deposit Rs. 50/- within the specified time for the Commissioner's fees, and as the judgment-debtor could not deposit the Commissioner's fee within the specified time the application, was rejected by the learned Judge.

But the inability and the consequent failure of the judgment-debtor to deposit Rs. 50/- for the Commissioner's fee within the specified time cannot, lead to the inference that she wanted to stand by and to induce the purchaser to purchase the property at the court auction and thereafter to set up the plea of misdescription of the property.

It appears that the judgment-debtor brought to the notice of the Court that the property had been valued at a very much lower figure than its real value. But the judgment-debtor was not able to pay in time the fee which she was required to pay. Having regard to the fact that it is the mortgagee who has purchased the property, and having regard to the fact that the judgment-debtor had already brought to the notice of the court that the property was put up for sale at a gross under-valuation, it cannot be said that the judgment-debtor is estopped from raising contention on an application under Order 21, Rule 90, C.P.C.

12. Evidently the statement made in the panchanama that the value of the property was Rs. 800/- is not the judgment-debtor's statement, nor is it a statement in the making of which the judgment-debtor has acquiesced. The judgment-debtor protested against the under-valuation of the property, but could not make her protest effective because she was unable to pay in the specified time the amount demanded by the Court.

13. The case in "Piramal v. Basanti Das (B) is true a case in which there was a mortgage decree sought to be executed and ultimately it was the mortgagee who purchased the mortgaged property at the court auction, and a Division Bench of

the Calcutta High Court held, that "if notice under Order 21, Rule 66, C. P. C. has been served on the judgment-debtor or he has come to know of the terms of the sale proclamation before the sale he cannot be allowed to urge after the sale that the properties had been undervalued or described wrongly.

In coming to that conclusion their Lordships of the Calcutta High Court followed the judgment of the Privy Council reported in -- "T. R. Arunachellam Chetti v. V.R.R.M.A.R. Aruna-chiallam Chetti", 15 Ind App 171 (PC) (C). Now the case before their Lordships of the Privy Council was a case in which a third person had been induced to purchase a property at a court auction on "insufficient description" and thereafter the sale was sought to be set aside on the ground of misdescription of property in the sale proclamation. In rejecting that contention, their Lordships observed in the course of their judgment at p. 174 of the report.

"The judgment-debtors knowing, as they must have known, what the description was in the proclamation, allowed the whole matter to proceed until the sale was completed, and then asked to have it set aside on account of this, as they say, misdescription. It appears to come within what was laid down by this Board in -- "Mac-naughten v. Mahabir Pershad Singh", 10 Ind App 25(D), that if there was really a ground of complaint, and the judgment-debtors would have been injured by these proceedings in attaching and selling the whole of the property whilst the interest was such as it was, they ought to have come and complained.

It would be very difficult indeed to conduct proceedings in execution of decrees by attachment and sale of property if the judgment-debtor could lie by and afterwards take advantage of any misdescription of the property attached, and about to be sold, which he knew well, but of which the execution creditor or decree-holder might be perfectly ignorant that they should take no notice of that, allow the sale to proceed, and then come forward and say the whole proceedings were vitiated.

That, in their Lordships' opinion, cannot be allowed, and on that ground the High Court ought not to have given effect to this objection."

14. What was laid down by their Lordships of the Privy Council is the principle that where a person who has means of preventing an injury to a third person, who is innocent, fails to take any steps which are within his competence and thereby causes prejudice to that third person, he cannot be permitted to profit by his own inaction.

15. In the present case, however, the mortgagee purchaser himself knew that improvements had been made on the property and still induced the court to make a statement as to the valuation of the property which was a misleading statement, and he cannot be allowed now to turn round and say that it was open to the judgment-debtor to correct the effect of his statement and the judgment-debtor not having done so, he the mortgagee is entitled to profit by what must be regarded as fraud on his part.

With respect the learned Judges of the Calcutta High Court appear to have thought that the principle of 15 Ind App 171 (PC) (C) would apply to all cases irrespective of the question whether the purchaser at the court auction was the decree-holder himself having full knowledge of misdescription of the property and the mis-description having been caused primarily by reason of his own action.

I am unable to agree that the principle of the case in 15 Ind App 171 (PC) (C), can be extended to all cases in the manner suggested by the Calcutta High Court. It must therefore be held that there has been misdescription of the property in the sale proclamation for which the mortgagee-decree-holder is responsible, and that misdescription is directly traceable to the action of the mortgagee; and the failure on the part of the judgment-debtor to make an effective protest that there has been misdescription of the, property in the sale proclamation cannot be a ground for holding that the judgment-debtor is estopped from raising the contention as to "mis-description of property" in an application under Order 21, Rule 90, C. P. C.

It may be pointed out that the present case is also distinguishable inasmuch as the Judgment-debtor has made an attempt to have the valuation of the property corrected before sale; but the judgment-debtor, it appears due to circumstances beyond her control, failed to have the proclamation corrected.

16. Mr. Tulzapurkar has also referred me to another judgment of the Calcutta High Court in -- Krishna Mohan Kundu Vs. Nripendra Nath Nandi and Others, and he drew my attention to the observations of M. G. Ghose J. :

"Refusal by the judgment-debtors to take back the property sold at the sale price would be a consideration for determining that the sale price was not inadequate."

In that case it appears that during the pendency of the proceedings an offer was made to the judgment-debtors to take back the property at the sale price. The judgment-debtors were willing to consider the offer and obtained time from the Court, but ultimately declined to accept the offer.

Whether on those facts, the circumstances that there was an offer made by the decree-holder to the judgment-debtors to take back the property at the sale price, and that was declined by the judgment-debtors, may be taken into consideration in holding that substantial injury did not result from the conduct of the judgment-debtors, is a question on which I need express no opinion.

As in the present case after the judgment started and the learned trial Judge had practically concluded the Judgment, an application was made by the judgment-creditor offering to sell the property back to the judgment-debtor, it would be reasonable to hold that the offer was not made bona fide, and it would not affect the maintainability of the application by the Judgment-debtor for setting aside the sale on the ground that he has been able to prove before the Court that the property has been sold at a gross undervaluation.

Having regard to all the circumstances of the case, I think that the learned trial Judge was right in setting aside the sale. The appeal there fore fails and is dismissed.

17. Appeal dismissed.