

(1958) 03 KAR CK 0004
In the Karnataka High Court
Case No : Regular Appeal No. 57 of 1953

Doddamane Gurupadappa and Others	APPELLANT
Vs	
Hugulavalli Ranganna Gowda and Others	RESPONDENT

Date of Decision : 20-03-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 90

Citation : AIR 1959 Kar 38 : (1958) 36 MysLJ 469

Hon'ble Judges : S.S. Malimath, J;N. Sreenivasa Rau, J

Bench : Division Bench

Advocate : M. Sadanandaswamy, for the Appellant; V. Krishnamurthy and G.C. Veerappa, for the Respondent

Judgement

S.S. Malimath, J.—This is an appeal by the plaintiffs who had filed O. S. No. 7 of 1947-48 in the Court of the District Judge at Shimoga, claiming possession of certain lands. Plaintiff 1 is the father and plaintiffs 2 to 6 are his sons. The lands in suit were the properties belonging to the joint family of all the plaintiffs. Plaintiff 1 had mortgaged them in favour of defendant 2. The latter obtained a decree in respect of that mortgage in O. S. 20/37-38 in the Court of the Subordinate Judge at Shimoga.

He took out execution proceedings in Exn. 223/42-43 and again in Exn. 162/44-45 On 2-8-45 the properties were sold before Court when defendant 1 purchased them for a sum of Rs. 8,100/-. On 6-9-1945 the judgment-debtor filed a petition under Order XXI, Rule 90, C. P. C. on the ground of material irregularities in the publication and conduct of the sale. The petition was dismissed and the sale confirmed on 22-11-45. Thereafter the present suit was filed on 29-11-47.

2. According to the plaintiffs, the Court sale held on 2-8-45 was without jurisdiction and null and void. It was thus contended that defendant 1 (auction-purchaser) had acquired no title to the suit properties. The plaintiffs, therefore, claimed possession of the same. Defendants 3 and 4 are impleaded inasmuch as

they are vendees from defendant 1.

All the four defendants contested the suit on various grounds. The Court below could not accept any of the contentions for the plaintiffs. Thus the suit came to be dismissed. Being aggrieved by that decree, all the plaintiffs except plaintiff 2, have filed this appeal. Plaintiff 2 has, however, been added as respondent 5.

3. Several contentions were raised in the lower Court by the plaintiffs against the validity of the sale. One of them was that the notice required under Order XXI, Rule 22 of the CPC was not served on the plaintiffs and that, therefore, the Court had no jurisdiction to hold the sale. Another was that the High Court had issued a temporary injunction in C. R. P. 414/44-45 restraining the holding of the sale in question and that, therefore, the sale held in contravention of that order is without jurisdiction and void. These contentions have not been pressed before us.

4. The main contention urged before us is that the sale proclamation was not proclaimed in the village where the suit properties are situate and that a false endorsement and report have been got made in collusion with the Amin to show that it was duly proclaimed and served. It was alleged that there was no proclamation in the village by beat of tom tom.

It is contended by the learned advocate for the appellants that the provisions of Sub-rule (2) of Rule 54 of Order XXI, C. P. C. in respect of the proclamation and beat of drum etc., are mandatory and that if they are not followed, it results not in a mere irregularity but in illegality. In this connection, he relies on the observations of Krishnaswamy J. in Venkateswara Ettu Naicker Vs. Ayyammal and Others, :

"The mode of publishing a sale proclamation is that prescribed by Rule 54(2). Where it is found that a sale proclamation is not made by the mode prescribed by Rule 54(2) the effect is that there is no proclamation at all which is mandatory under Order XXI, Rule 66."

5. Before discussing the law on this point, we think it worth while examining the facts in this case. The sale proclamation in question is produced at Ext. H. There is a shara on it saying

"The sale proclamation is made known through beat of tom tom in Mukthi Hariharpura village by Latchma, son of Tirthahalli Bettiah of Adikarnataka and the copy was affixed to item 1 of the property. As. 4/- was paid to the aforesaid Latchma and the signatures of the panchayatdars present have been obtained. Dated 27-6-45.

As. 4/- has been received.

L. T. M. of the aforesaid Latchma Certified to by Ramachandra Bhatta."

6-7. This has been countersigned by six persons. Below it is the report dated 28-6-45 made by the process server to the same effect as above. Below that is the endorsement of the Process Nazir made on 30-6-45 to the effect that it was

duly published by beat of tom tom in the village and affixed to the Court Notice Board. The learned Advocate for the appellants contends that this is only a technical fulfilment of the requirement of law. According to him, nothing happened as mentioned in this shara. (After discussing the evidence, the judgment proceeded):

In view of these considerations, we reach the conclusion that the sale proclamation was duly published by beat of tom tom at the village and near the land and by affixing a copy of the order on a conspicuous part of the property as required by Order XXI, Rule 54 (2) of the Civil Procedure Code. There is no contention that it was not affixed on a conspicuous part of the Court house or in the office of the Collector of the District. The appellants have thus failed to establish their contention.

8. In view of the above conclusion reached by us on facts, it is not necessary to consider whether the failure to publish the sale proclamation properly was an irregularity or illegality sufficient to vitiate the sale. But, in this case, the question assumes some importance for the reason that the validity has been challenged in a regular suit. It appears that after the sale the plaintiffs filed an application under Order XXI, Rule 90 C. P. C. for setting aside the sale on the ground of material irregularity and fraud in the publication and conduct of the sale, on almost the same or similar grounds.

The said application having been dismissed, the sale was confirmed. Defendant 1 was put in possession of the properties through Court in Mis. Case No. 56/45-46 on the file of the Subordinate Judge, Shimoga. It is after that, that the present suit has been filed. A contention has been raised for the defendants that the suit is barred by Rule 92 (3) of Order XXI C. P. C.

It is to get over this bar that the plaintiffs contend that the sale was void ab initio. As already referred to above, the learned Advocate for the appellants urges that if the sale proclamation is not made according to the mode prescribed by Rule 54 (2) of Order XXI of the Civil Procedure Code, the sale is vitiated, as laid down in Venkateswara Ettu Naicker Vs. Ayyammal and Others, . He further contends that under such circumstances the sale is an illegality and, therefore, it is void ab initio.

For this proposition of law, he relies on the case of Basharatulla v. Uma Churn Dutt ILR 16 Cal 794. In that case, a property was advertised for sale at 12 noon on a particular day. When the party reached the court before that time, he discovered that the sale had been held by the Munsiff at 10-30 a.m. and knocked down in favour of defendant 1. On these facts, the High Court held

"that there had been no sale within the meaning of the Code, the proclamation of the time and place of sale and the holding of the sale at such time and place being conditions precedent to the sale being a sale under the Code."

The learned Advocate points out that this case has been relied upon by the

Madras High Court in Jayarama Aiyar Vs. Vridhagiri Aiyar, . In that case, it was found that the Process Server charged with the duty of making the proclamation of sale in the village had proclaimed that the sale would be held not by the Central Nazir at Cuddalore but by the District Munsiff's Court of Villupurarn. Their Lordships considered that this mistake resulted not in a mere irregularity but that it was an illegality which invalidated the proceedings.

9. The correct principle appears to be that where there is no publication at all or no conduct of the sale as published, it cannot be said to be a mere irregularity. It means that there was no sale held, as required by the provisions of the Civil Procedure Code. In such cases, the sale may be held to be void. But in cases where there has been a publication but there has been some defect in the manner of publication or of conduct of the sale, that will be a mere irregularity. The above cases do not lay down anything beyond this principle.

10. If the irregularity is a material one and if it has further resulted in a substantial injury, the person so aggrieved can get the sale set aside under Order XXI, Rule 90 of the Civil Procedure Code. When such an application for setting aside a sale under Order XXI, Rule 90 C. P. C. is disallowed, the court has to make an order confirming the sale as provided in Sub-rule 1 of Rule 92.

Thereupon the sale becomes absolute. It has so happened in the present case. Such an application was made and it was dismissed and the sale was confirmed. It is not now open to the appellants to file a suit for getting the sale set aside. Such a course is specially barred under the provisions of Sub-rule 3 of Rule 92 of Order XXI of the Civil Procedure Code.

11. There were some more contentions which were urged before the trial court but, in appeal, the points discussed above were alone pressed. The other points have not been argued. Under these circumstances, we come to the conclusion that the appeal should be dismissed with costs. We direct accordingly.

Nittoor Sreenivasa Rau, J.

12. I agree.

13. Appeal dismissed.