

**(1994) 11 KL CK 0017**  
**In the High Court Of Kerala**  
**Case No : C.M.A. 110/92**

Harishankar

APPELLANT

Vs

Syndicate Bank of India and Others

RESPONDENT

**Date of Decision :** 09-11-1994

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54(2), Order 21 Rule 64, Order 21 Rule 66, Order 21 Rule 66(2), Order 21 Rule 67

**Citation :** (1994) 11 KL CK 0017

**Hon'ble Judges :** T.L. Viswanatha Iyer, J;D.J. Jagannadha Raju, J

**Bench :** Division Bench

**Advocate :** O. Ramachandran Nambiar and K.S. Babu, for the Appellant; P.V. Narayanan Nambiar and M.P. Ashok Kumar for 1st Respondent and K. Chandrasekharan and N.N. Sugunapalan for 2nd Respondent and T.A. Ramadasan, for 3rd Respondent, for the Respondent

**Final Decision :** Allowed

## Judgement

D.J. Jagannadha Raju, J.—C.M.A. No. 110 of 1992 is filed by the first judgment debtor, who filed E.A. No. 209 of 1989 under Order XXI. E.F.A. No. 21 of 1992 is filed by the second judgment debtor who was a guarantor, who filed E.A. No. 279 of 1989 to set aside the sale. He filed the application belatedly, but the court excused the delay and entertained the application to set aside the sale. Both the applications were disposed of by a common order dated 30th November, 1991 by the Principal Subordinate Judge, Thalassery. The learned Judge dismissed the applications on the ground that the sale cannot be set aside. The auction sale took place on 9th March 1989 and the properties were actually attached before the judgment on 6th July 1981.

2. Sri K. Chandrasekharan, learned senior counsel who led the arguments in E.F.A. No. 21 of 1992 contends that here is a case where an extremely valuable property has been sold for a paltry sum of Rs. 1,01,000 and the auction was conducted with several material irregularities. The inadequate price fetched by

itself clearly indicates that prejudice has been caused to the judgment debtors. He points out that Order XXI, Rule 66 is not at all complied with. The sale proclamation was not drawn up in accordance with the mandatory provisions of the Code. He also contends that the price obtained is extremely low as is evident from two facts, (1) Long before the sale proclamation was settled in E.A. No. 390 of 1987, when the judgment debtor sought permission to sell the property the court passed an order to the effect that the property shall not be sold for less than Rs. 3,40,000. In spite of the court being aware of this particular fact and its earlier order, the court committed a blunder in fixing the value of the property in the sale proclamation as Rs. 1,00,000. He also contends that Rule 66(2)(e) and the second proviso to that rule are violated in the present case.

3. Sri O. Ramachandran Nambiar appearing for the Appellant in C.M.A. No. 110 of 1992 contends that in this case there is no proper proclamation to save the sale and Form No. 29 of Appendix C is not at all complied with. The judicial officer did not even sign the proclamation and we also do not find any evidence of the same being signed by an authorised officer of the court. He also contends that Order XXI, Rule 64 casts a duty on the court and this duty has not been discharged. Mr. Nambiar relies upon the decisions in *Shalimar Cinema Vs. Bhasin Film Corporation and Another*, and *Ambati Narasayya v. M. Subba Rao* 1989 2 S.C.C. (suppl.) 694

4. On behalf of the decree holder the learned Counsel attacks the court auction sale on the ground that the amount of sale price fetched in the court auction is shockingly low and the various irregularities pointed out by the learned Counsel who led arguments on behalf of the Appellants are present. Here irregularities caused substantial injury to parties concerned.

5. On behalf of the auction purchaser-Respondent it is argued that whatever irregularities are now being canvassed are irregularities which took place prior to the settlement of the proclamation for sale and hence those irregularities cannot be urged in a petition under Order XXI, Rule 90. He places strong reliance upon the decisions in *Antony v. Catholic Syrian Bank* 1994 (2) KLT 341 and *Sreedharan v. Union Bank of India* 1992 (2) KLT 642.

6. The main points that arise for consideration in these appeals are (1) whether the court failed to perform its mandatory duty under Order XXI, Rule 66 and (2) whether the court auction sale is liable to be set aside on the ground that it fetched a low price of Rs. 1,01,000.

7. A perusal of the order of the lower court establishes the following facts. The decree holder contained three decrees against the first judgment debtor, P.V.K. Nambiar. Huge amounts were owing to the bank the decree holder. While execution proceedings were pending in O.S. No. 245 of 1980 the judgment debtor filed a petition seeking permission of the court to sell the property by private negotiation. The court upon the endorsement made by the decree holder granted permission that the property should not be sold for less than Rs.

3,40,000. After the judgment debtor obtained the permission he did not move his little finger and he did not try to sell the property. Accordingly the permission granted to the judgment debtor was cancelled and then execution proceedings continued. But the fact remains that there is a judicial order to the effect that the property should not be sold for a price of less than Rs. 3,40,000. In the strict legal sense it may not amount to the court fixing the price or value of the property. Without adverting to the same, which is a judicial order passed by the court on the basis of the endorsement made by the decree holder's advocate in the execution application. Subsequently action was taken to bring the property to sale perusal of the sale papers and the sale proclamation indicates that in this case grave irregularities were committed by the court in drawing up the proclamation and in publishing the proclamation. The value of the property is indicated approximately as Rs. 1,00,000. The sale proclamation does not indicate the particulars as contemplated under Rule 66 of Order XXI. It is contended by Sri Chandrasekharan, learned senior counsel that Rule 66(2)(e) which contemplates that every other thing which the court considers material for a purchaser to know, in order to judge the nature and value of the property is not at all indicated. Admittedly the property is situated adjoining the municipal limits of the town. It was by the side of a Highway and very near to Central Jail. But none of these facts are mentioned in the sale proclamation. As can be seen from the second proviso to Rule 66(2)(e) it is the bounden duty of the court to include in the proclamation, the estimate if any given by either or both the parties. In this particular case the sale proclamation does not indicate as to what exactly is the value estimated by the judgment debtor or the decree holder. The value as indicated in the sale proclamation is approximately Rs. one lakh. It is true that after the 1976 amendment it is not mandatory for the court to mention in the sale proclamation its own estimate of the value of the property. But it should be remembered in this particular case, the court was aware of the fact that by an earlier order it has directed the judgment debtor to sell the property at a value not less than Rs. 3,40,000. One fails to understand how the value was indicated approximately as Rs. one lakh when the court was aware of the fact that the property was worth more than Rs. 3,40,000. An examination of the sale proclamation also revealed that the publication was done in the Panchayat office, at the site of the property, in the village office and in the court house. But no proclamation or publication was made at the office of the Collector, which has become mandatory after the amendment of Rule 54(2) in the year 1976. Rule 67 of Order XXI stipulates that every proclamation shall be published as nearly as may be in the manner prescribed by Rule 54, Sub-rule (2). In the present case there is a clear violation of Rule 67 because it was not published in the Collector's office.

8. After the court auction sale was conducted on 9th March 1981 the sale stood posted for confirmation to 23rd May 1989. Before that date various applications were filed for setting aside the sale under Order XXI, Rule 90. Stay was granted and only after the E.As. were dismissed on 30th November 1991, the sale was

confirmed. So far till this date delivery of property did not take place. One interesting fact which may have to be noticed in this context is that during the pendency of the application for setting aside the sale a Commission was appointed to value the properties and he submitted his report on 1st March 1991, that is nearly two years after the sale. His report is Ext. C-I. That gives a very high value for the property. Considering the fact that this Ext. C-I Commission report is two years after the conduct of the sale, we are not inclined to attach much value to it because the value of the properties has considerably appreciated during the relevant period. But at the same time we cannot ignore the fact that even as early as in 1987 and 1989 the property was considered by the decree holder as property which can be sold for a price exceeding Rs. 3,40,000. The court recognised this particular fact. In such circumstances the court accepting the bid of the solitary bidder for Rs. 1,01,000 is not proper exercise of judicial function. The court having prior knowledge about the value of the property ought not to have accepted such a ridiculously low amount and it should have stopped the sale for want of proper bids. We are convinced that there is material irregularity in the settlement of the proclamation and in the conduct of the auction and in the publication of the auction sale.

9. We shall now briefly refer to the various decisions relied upon by the learned advocates in support of the respective contentions. Sri Chandrasekharan relied upon the decision in *Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh*, . Paragraphs 9 and 10 may be seen with advantage. These two paragraphs summarise the statutory requirements for conducting an auction in strict accord with the procedure contemplated by Order XXI of the Code of Civil Procedure. The court observed at page 143 as follows:

...When stating the estimated value of the property to be sold, the court should not accept the mere ipse dixit of one side. It is certainly not necessary for it to state its own estimate. If this was required, it may, to be fair, necessitate insertion of something like a summary of a judicially considered order, giving its grounds, in the sale proclamation... Moreover, Rule 62(2)(e) requires the court to state only nature of the property so that the purchaser should be left to judge the value for himself. But, the essential facts which have a bearing on the very material question of value of the property and which could assist the purchaser in forming his own opinion must be stated, i.e. the value of the property that is, after all, the whole object of Order 21, Rule 66(2)(e), Code of Civil Procedure. The court has to decide what are all these material particulars in each case. We think that this is an obligation imposed by Rule 66(2)(e). In discharging it, the court should normally state the valuation given by both the decree holder as well as the judgment debtor where they both have valued the property. It may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised, which could reasonably and usefully be stated succinctly in a sale proclamation.

The decision in *Padiyath Raghavan v. P.K. Krishnan Nambiar* 1992 (2) K.L.J. 519

is more nearer to the facts of the case. The learned Judge dealt with the scope of Rule 66 and observed in paragraph 9 at page 523 as follows:

A judgment debtor who has been struggling to urge that the property worth 2 lakhs rupees was proclaimed as worth Rs. 20,000 without notice to him, should be taken to have urged material irregularity and substantial injury. This should be seen against the background of the fact that the Court blindly accepted the value put by the decree holder although the Report of the Commissioner had valued the land and the house together at Rs. 54,000. The allegation of material irregularity and substantial injury are implicit in the facts pleaded and the evidence led in the case.

The learned Judge further observed in paragraph 10 as follows:

While the judgment debtor is required to prove material irregularity in the proclamation and conduct of sale and the resultant injury, the Court charged with the function of execution of the decree also has a duty to ensure that the property proclaimed fetches fair value and there is no distress sale., This duty is two fold. Firstly in every case it is the duty of the Court to satisfy itself that having regard to the market value of the property the price offered is not unreasonable. Unless the court is satisfied about the adequacy of the price, the act of confirmation of the sale would not be a proper exercise of judicial discretion.

The observations in this judgment aptly apply to our case on all fours.

10. Mr. Nambiar relied upon the decision in Shalimar Cinema Vs. Bhasin Film Corporation and Another, . That is a case where the adjournment of auction sale was not informed to the bidders and the people who participated in the auction, on the first day, namely August 29, were not present and they did not participate in the subsequent auction conducted on September 1, 1977. In that case the court found that in an area where a square yard is selling for Rs. 5,000, the 28/48 share of a cinema house were sold for a ridiculously low price of Rs. 4,37,000 by keeping the auction purchaser in the dark. In such a context the court observed as follows:

Order 21, Rule 66 should be scrupulously followed when the court has a duty to see that the requirements of Order 21, Rule 66 are properly complied with.

The court further observed at page 2083 after going through the materials and the evidence and other outstanding circumstances of the case that "not one of the eight bidders who participated in the auction in August 29, 1977 was present at the auction on September 1, 1977. We are led to the irresistible conclusion that no announcement was made on August 29, 1977 that the auction would be continued on September 1, 1977. We are also satisfied that the price of Rs. 4,37,000 for a 28/48 share of a cinema in New Delhi standing on land of the extent of 5000 square yard can hardly be considered an adequate price. No doubt the auction purchaser stated in his evidence that Shalimar Cinema is

situated in a poor locality, eclipsed by a flyover and was in shambles. Swaranjit Singh who was the highest bidder on September 1 stated that he went prepared to the auction to purchase 28/48 share for Rs. twelve lakhs. We do not have any doubt that even in 1977 when prices were not as high as they are today, the price of Rs. 4,37,000 for 28/48 share of the property in question was totally inadequate. We have therefore no option but to set aside the sale held on September 1, 1977".

11. The other decision, relied on by Mr. Nambiar in *Ambati Narasayya Vs. M. Subba Rao* and another, is not applicable to the facts of our case. Therein ten acres of land were sold in auction for Rs. 17,000 in execution of a decree for Rs. 2,000. In such a background the court felt that sale of the entire property for realising such a low amount is bad. In the present case on hand the total amount due under the decrees is more than Rs. 3,26,000. In such circumstances there is nothing wrong in the entire property of 681/2 cents being brought to sale in the court auction. There are some other observations in this judgment which are to the same effect as we have quoted earlier.

12. The auction purchaser's advocate places strong reliance upon the decision in *Sreedharan v. Union Bank of India* 1992 (2) KLT 642 where Anr. learned Single Judge of this Court observed that a judgment debtor who receive notice and who did not raise any objections to the value of the property is precluded from raising this objection in a petition under Order 21, Rule 90. It should be remembered that in the present case on hand there was a judicial order directing the judgment debtor not to sell the property for a value of less than Rs. 3,40,000. In such circumstances the failure of the judgment debtor to raise objections cannot be given much importance. The court has a bounden duty to see that a reasonable and adequate price is fetched for the property. Another decision relied upon by the auction purchaser's advocate is *Antony v. Catholic Syrian Bank* 1994 (2) KLT 341. That decision is distinguishable on the ground that it deals with the case of mortgage decree and the learned Judge while dealing with the circumstances as a mortgage decree holder purchasing the property equated the same to the case of an ordinary sale of property attached before judgment. We do not wish to go further into the matter as that decision is distinguishable.

13. On the facts we find that there is material irregularity in the settlement of the proclamation and publication of the proclamation for sale. They are defective, and Rule 66 is not fully complied with. We also find that the court acted mechanically in indicating the property as approximate value of Rs. one lakh, while it was fully aware of the fact that the property would fetch a price of more than Rs. 3,40,000 as per its own earlier judicial order. We also find that there is substantial injury caused by conducting this auction and accepting the bid. The court did not exercise its judicial function properly when it accepted the sale price of Rs. 1,01,000 in the above background. Considering all these facts the auction sale held on 9th March 1989 is hereby set aside.

14. E.P. No. 134 of 1987 is remitted back to the Execution Court. The execution

proceedings shall start afresh from the point of filing fresh sale papers. While settling the terms of the sale proclamation the court should indicate not only the judgment debtor's and the decree holder's valuation, but it should also indicate that as per the earlier order of the court the judgment debtor was directed not to sell the property for less than Rs. 3,40,000. It should also indicate that the subsequent Commissioner appointed by the court valued the property at Rs. 4,79,500. It is open to the judgment debtors to pay the money due including interest, and avoid sale.

In the result the appeals are allowed. The auction sale is set aside. The matter is remitted back. Under Rule 93 the auction purchaser would be entitled to repayment of the purchase money with interest at 12 per cent per annum to be paid by the Appellant in E.F.A. No. 21 of 1992. During the course of the arguments the learned Counsel for the Appellant in E.F.A. No. 21 of 1992 undertook to pay interest on the amount. Interest will be 12 per cent per annum from the date of deposit of the amount. Each party shall bear their respective costs.