

(1951) 09 KAR CK 0008

In the Karnataka High Court

Case No : Miscellaneous Appeal No. 55 of 1949-50

K. Chikkiah Setty and Others

APPELLANT

Vs

Aswathanarayana Rao and Others

RESPONDENT

Date of Decision : 21-09-1951

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, 311

Citation : AIR 1952 Kar 63

Hon'ble Judges : Venkata Ramaiya, J; Mallappa, J; Balakrishnaiya, J

Bench : Full Bench

Advocate : T.V. Nathamuni Iyengar, for the Appellant; S.K. Venkataranga Iyengar, for the Respondent

Judgement

Venkata Ramaiya, J.—The question for decision in this case is whether a Judgment-debtor who has conveyed the property by executing a sale-deed in favour of a third person can apply under Order XXI, Rule 90 of the CPC for cancellation of a sale of the same subsequently held in execution of the decree. The answer to this depends on the construction of the words "person whose interests are affected by the sale" in the said Rule which runs thus:

"Where any immovable property has been sold; in execution of a decree, the decree-holder, or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it."

The circumstances under which the question has arisen briefly are that in execution of a mortgage-decree in Execution Case No. 391 of 40-41 on the file of the Munsiff of Doddballapur certain properties were brought to sale and purchased by the 5th Respondent on 31-7-1941 and full satisfaction, of the decree was entered on 30th September 1942. The judgment-debtors, it is alleged, had sold the property to a third party on 29th May 1940. On 23-12-1942 the 5th Judgment-debtor made an application under Order XXI, Rule 90 of the CPC for

cancellation of the sale. The application was dismissed by the learned Munsiff; but on appeal the learned Subordinate Judge set aside the order of dismissal and remanded the case for fresh disposal after inquiry. Against the order of remand the Petitioners, who are decree-holders have applied for revision in this Court contending that the application is not maintainable inasmuch as the 5th Judgment-debtor cannot be deemed to be a "person whose interests are affected by the sale" as he had parted with his interest in the property before the sale. On behalf of the 5th Judgment-debtor it is argued that this is not a correct view of the application of the Rule and that in any case the liability of the 5th Judgment-debtor as a vendor to make good title to the property which he has conveyed to the purchaser is enough to entitle him to attack the Court-sale.

2. No case of this Court in which the point directly arose or was considered in the precise form in which it has been raised in this case has been brought to our notice. But in two cases facts of which are similar and both of which are decisions of the Division Bench, the expression "person whose interests are affected by the sale" is so differently interpreted as to give room for uncertainty about the application of the rule to a case of the present kind. The meaning of the words according to one Division Bench is opposed to that of another, with a view to resolve this conflict the case is placed before the Full Bench. "

3. The two cases in which there is divergence of opinion as regards the meaning to be attached to the words are 29 Mys CCR 174 and 45 Mys HCR 395. In both the cases the petitioner was the person to whom the property subject to the Court-sale did not belong but he was liable under the decree to pay the amount if any which remained due after the sale. In the former case Chandrasekhara Aiyar, C. J., and Subbanna, J., held

"..... he had himself no interest whatever in the property : and hence he was not a person "whose interests are affected by the sale" within the meaning of Rule 90 of Order XXI of the Code. The mere fact that he was interested in the result of the sale to this extent that, if the sale realised a larger sum, his own personal liability for the balance of the decree amount would be reduced pro tanto does not bring him within the expression used in Rule 90. Cf. "SULLE-MANJI IBRAHIMJI v. PRAGJI KALA" 39 Ind.Cas 932 (Sind.)"

"39 Ind.Cas 932 (Sind), is a case of Sind Judicial Commissioner's Court in which the application by some creditors of the judgment-debtor for cancellation of the execution sale was dismissed on the ground that "interests" means interests in the property sold and that:

"creditors who have nothing more than a bare chance of getting a higher dividend out of the debtor's general estate if the sale be set aside, are not persons who have such an interest as is contemplated."

But in "45 Mys HCR 295", Reilly, C. J., and Subramanya Aiyar, J., held :

"that though the applicant was not a person who had any interest in the property

but a judgment-debtor against whom there was personal liability to the extent the price fell short of the decree amount, he could attack the sale under Order XXI, Rule 90, Civil P. C."

In the course of the judgment the learned Chief Justice remarked that:

"the very restricted interpretation put upon the words " "whose interests are affected by the sale" by the learned Judges of this Court In "29 Mys CCR 174", is opposed to the interpretation of similar words in Rule 90 of Order XXI of the CPC of British India adopted by several High Courts in British India." The learned Chief Justice while stating that: "we could not ordinarily refuse to follow the decision of this Court in such a matter unless it were overruled by a Full Bench " expressed that in view of the amendment of Rule 89 of Order XXI, Civil P. C., in 1936 by substituting "whose interests are affected by the sale" for "either owning such property or holding an interest therein by virtue of a title acquired before such sale." "We are not only justified but we are bound to interpret the words "whose interests are affected toy the sale" in Rule 90 in their ordinary literal meaning as similar words in a similar rule have been interpreted by High Courts in British India."

4. It is argued by Sri Nathamuni Iyengar that the cases of other High Courts referred to in support of the interpretation adopted In "45 Mys HCR 295" are distinguishable and the reason given for not following "29 Mys COR 174", is not sound.

Rule 89 provides for the setting aside the sale on deposit of the amount but Rule 90 provides for the same without the deposit. The words in two rules are not identical as in Rule 89 these are "any person owning such property or holding an interest therein by virtue of a title acquired before such sale" and in Rule 90 "the decree-holder or any person entitled to share in a rateable distribution of assets or whose interests are affected toy sale." The amendment relates only to Rule 89. The words in Rule 90 are obviously of wider import than those in Rule 89 in its amended form and since Rule 90 has been the same without any alteration in its words it is rather difficult to see how the change in Rule 89 should necessarily lead to a change in the construction of Rule 90.

5. Apart from this there is hardly any doubt about the correctness of the interpretation placed in "45 MysHCR 295", on the words in the rule. A number of cases of other High Courts show that the words "whose interests are affected by the sale" are meant to denote not only persons who have an interest in the property but also others. Thus B. Narain Pal Singh Vs. Rudra Bhan Singh and Others , it was held that though attachment does not create any title or charge on the property an attaching creditor comes within the meaning of the expression. A Pull Bench of the Madras High Court also held in Ayyappa Naicker Vs. Kasiperumal Nayakar and Others, , that a person who has obtained attachment before judgment of the property can apply under the rule. According to Sitanath Saha and Others Vs. Monoranjn Roy and Others, , the word

"interests" in Rule 90 is not limited to proprietary or possessory interests in the property itself but extends to other kinds of interests "pecuniary or otherwise which are in any way affected by the sale."

6. A view clearly contrary to that in "29 Mys CCR 174", on similar facts is found in *Shiam Lal Vs. Jaswant Singh and Others* and *Bibi Mehdatunnissa Vs. Sheo Devi Singh and Others*. In the former case the decree directed sale of properties "A" and "B" in the first instance and sale of property "C" if the proceeds of the sale were insufficient to discharge the decree. It was held that the mortgagee of property "C" could apply under Order XXI, Rule 90, C.P.C. In the Patna case the judgment-debtor sale of whose property was postponed till the sale of properties of others was deemed to be entitled to apply for cancellation of the sale notwithstanding the fact that the property belonged to others. *Kartick Chandra Chatterji Vs. Nagendra Nath Roy and Others*, cited by Sri Nathamuni Iyengar cannot be taken as supporting the view given in "", as the point raised was whether the auction-purchaser can invoke Rule 90. While holding that he could not apply, it was observed :

"interests affected by the sale mean interests in the property existing before the sale and which have been adversely affected thereby."

The decision on the point must be taken to be overruled by the Full Bench as the opinion of the majority was otherwise. See "*MAHADEO RAM v. MOHAN VIKRAM*", AIR (20) 1933 Pat 435. (*Muhammad*) *Mohideen Maracayar Vs. Ramanadhan Chettiar and Another*, is directly in point as it clearly expresses that a Judgment-debtor will not lose the right to apply under the rule on account of a private sale effected by him.

7. There is thus preponderance of Judicial opinion in favour of giving the rule a wide and liberal interpretation so as to enable even persons who have parted with their rights under private transactions to claim relief. u/s 311 of the Code of 1882 only the decree-holder or any person whose immovable property was sold was entitled to apply for cancellation of the sale. The substitution of "whose interests are affected by the sale" for "whose property was sold" in the new Code would be rendered ineffective if notwithstanding the apparent enlargement of the class of persons allowed to avail themselves of the rule the application is circumscribed to those having an interest of their own in the property. The use of the plural "interests" also denotes that comprehensively persons besides owners and having rights in the property, who are subject, to disadvantage, loss or risk on account of the sale can invoke the benefit of the Rule. It is not disputed that the judgment-debtor can notwithstanding the sale of the property by him, discharge the decree before and after the Court sale on payment of the requisite amount. There can be no reason on principle to deny him the right to attack the sale by which the satisfaction of the decree wholly or in part is sought to be had.

8. The interpretation given in 29 MysCCR 114 is in my opinion not in consonance with the intent and spirit of Rule 90 of Order XXI of the CPC and Volume of

judicial opinion as regards its scope, and the view expressed therein has to be overruled.

Mallappa, J.

9. I entirely agree. The way in which Order XXI Rule 90, is worded leaves no possibility for any other view. Under that rule "any person whose interests are affected by the sale" can file an application to set aside the sale. The rule does not say that the interests of the applicant should be interests in the immovable property sold. There is no reason to read the rule as if the words "in the property sold" are found in the rule after the words "whose interests." Where the Code intends to say that the interests thought of are the interests any person has in the Immovable property sold it says so. Order XXI, Rule 89 for instance as it stands in CPC outside Mysore and as it stood prior to its amendment in Mysore, refers to "any person either owning such property or holding an interest therein." As against this rule which expressly refers to the kind of interest required under it, the absence of any such qualification in the next rule is striking. If the two rules are read together and compared it becomes apparent, that the words "whose interests are affected by the sale" are not confined to interests in the property sold.

10. If interests affected by the sale are only interests in the property sold, they can be interests that existed prior to the sale in the property sold. But the wording of the Rule 90 is of such wide import that it is possible to construe that the interest affected by the sale might be one which was not in existence prior to the sale. See "GOPALKRISHNAYYA v. SANJEEVA REDDY" AIR 1920 Mad 145, Ravi Nandan Prasad Vs. Jagar Nath Sahu and Others . It follows therefore that any person whose interest is affected by the sale whether such interests are interests in the property sold or not can file an application for setting aside the sale on grounds of irregularity or fraud.

(After the opinion of the Full Bench, the appeal came before a Division Bench consisting of Venkata Ramaiya and Mallappa, JJ., who dismissed the appeal.)

11. Appeal dismissed.