

**(1969) 04 AP CK 0003**

**In the Andhra Pradesh High Court**

**Case No : A.A.O. No's. 29, 58, 60, 61, 80 and 81 of 1968**

K. Hanumanthiah Setty and Sons and Another

APPELLANT

Vs

S. Ramalingappa and Another

RESPONDENT

**Date of Decision : 22-04-1969**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 54(2), Order 21 Rule 89, Order 21 Rule 90, 151, 47  
Limitation Act, 1908 — Article 166, 181

**Citation : AIR 1970 AP 286**

**Hon'ble Judges : A.D.V. Reddy, J**

**Bench : Single Bench**

**Advocate : K. Sivaprasada Rao, for the Appellant; K. Ranganadham, K. Ramgopal, E. Subrahmanyam, T.S. Narasingarao and E. Subrahmanyam, for the Respondent**

## **Judgement**

1. These appeals are against the orders of the Subordinate Judge, Adoni in S. S. Nos. 26 and 31 to 34 of 1967 setting aside the orders of the District Munsif, Adoni dismissing E. A. Nos 3, 4, 5, 9, 10 and 18 of 1966 filed u/s 47 and 151 C. P. C., to declare the sale of the petition schedule lands in execution of the decree in O. S. No. 9 of 1962 as not valid as against the petitioners and to restrain the 1st respondent from taking delivery of the properties sold and to restrain the 2nd respondent from drawing the amounts deposited in Court in E. P. No. 219 of 1964.

2. O. S. No. 9 of 1962 on the file of the District Munsif, Adoni was filed by one Hanumanthaiah Setty & Sons, for the recovery of certain monies due on certain dealings. After filing the suit, in I. A. No. 20 of 1962. S. No. 157-B of an extent of Ac. 7-82 cents of land was attached before judgment. After contest, the suit was decreed on 12-3-1962. E. P. No. 219 of 1964 was filed and the attached properties were brought to sale. Ultimately they were sold on 19-2-1966 and the sales were confirmed on 24-3-66. Subsequent to the attachment before judgment certain items of attached properties were sold to a number of persons

by the judgment-debtor on 7-6-1962, 8-6-1965 and 17-7-1965 and E. A. Nos. 3, 4, 5, 9, 10 and 18 of 1966 were filed by these purchasers u/s 47 and 151 C. P. C. to declare that the sale of these properties in Court auction in E. P. NO. 219 of 1964 as not valid and to restrain the decree-holder, auction purchaser from taking delivery of the properties sold in auction and the 2nd respondent (judgment-debtor) from withdrawing the excess amount lying in deposit.

3. It was contended in these petitions that there was no publication in the village be beat of tom-tom, that the copy of the order of attachment was not affixed on a conspicuous part of the property or in the office of the Collector, Kurnool, that as such the attachment is not valid. It was also contended that the first E. P. No. 116 of 1962 having been dismissed, the attachment came to an end and as such the petition schedule land could not have been sold on the same attachment which was not subsisting, and as such the sale has to be declared as not valid.

The Ist respondent (decree-holder-auction-purchaser) in his counter contended that the Court ordered attachment in I. A. No. 20 of 1962 on 4-1-1962 and the attachment was effected with notice to defendant and all formalities relating to attachment were complied with, the attachment was made absolute more than four years prior to the filing of these petitions, that the sale having been held on 19-2-1966 and subsequently confirmed on 24-3-1966, these petitions are barred by time, that the application u/s 47 and 151 C. P. C. are also not maintainable, that in the prior E. P. No. 116 of 1962, some monies were paid and the petition was closed and this does not amount to raising of attachment, that the petitions are therefore liable to be dismissed.

The District Munsif, Adoni held that as in all these petitions the sale is attacked they come under Order 21 Rule 90 C. P. C. and it is old Article 166 (New 127) that applies and have to be filed within 30 days after the sale and these petitions not having been filed within 30 days, are barred by time. He also held that if these are applications coming u/s 47 C. p. C., even then it is old Article 166 (New 127) that applies and these applications being beyond 30 days of the date of sale are barred by time and dismissed the petitions.

On appeals filed by the petitioners, the Subordinate Judge found that these applications have been filed not for setting aside the sale but for a declaration that the sale is not valid and operative in law against the petitioners on the ground that there was no tom-tom in the illegal, that the other formalities envisaged under Order 21 Rule 54 or Order 38 Rule 5 C. P. C. have not been followed therefore these applications do not come within the ambit of Order 21 R. 89, 90 or 91 C. P. C. as those provisions relate to the setting aside of sales, that the petitions have been filed u/s 47 C. P. C. the petitioners being transferees of the property from the Judgment-debtors and hence his representatives and inasmuch as they are asking for a declaration of the sale to be not valid, old Article 166 (New 127) would not apply, that it is old Article 181 (New 137) which provides for 3 years limitation that would apply and the applications will therefore be in time. In this view, he set aside the order of the District Munsif,

dismissing these petitions and directed further enquiry with regard to the irregularities complained of, regarding the attachment and remanded the petitions for disposal in accordance with law after giving both the parties, opportunity to adduce further evidence. hence these appeals.

4. The point to be considered in these appeals is whether the petitions are barred by time. it was subsequent to the attachment before judgment that these properties were purchased by the petitioners (respondents in the appeals). Section 64 C. P. C. interdicts any alienation made subsequent to the attachment. Any subsequent alienation by private transfer or delivery of the property attached or any interest therein, is void as against all claims enforceable under attachment. it is on account of this that these petitioners (respondents) are seeking to attack the attachment as not being in conformity with the provisions of Order 21 Rule 54 C. p. C. For effecting attachment of immovable property before judgment under Order 21 Rule 54 C. p. C. as amended in Andhra Pradesh, there has to be an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. This order has to be proclaimed as provided in sub-rule (2) of Rule 54 C. p. C. by beat of drum or other customary mode at some place or adjacent to such property; a copy of the order must be fixed on a conspicuous part of the property as well as on a conspicuous part of the court house and if the property is land paying revenue to Government a copy of the order should be affixed in the office of the Collector in the District and if situated in a Municipality in the office of the Municipality also. In this case it is the contention of the petitioners that there was no proclamation by beat of tom-tom, that the copy of the order of attachment was not affixed on a conspicuous part of the property or in the Collector's office in Kurnool. It is for these reasons that they seek to attack validity of the attachment, but what they ask for is for declaring the sale on a defective attachment as not valid.

In *K. Swaminatha Iyer and Another Vs. K.G. Krishnaswami Iyer and Others*, it was pointed out that though an attachment is necessary preliminary to a judicial sale, a sale without attachment is not a nullity, that the omission to attach is material irregularity which renders the sale liable to be set aside under Order 21 Rule 90 C. p. C. if substantial enquiry is proved. IN *Vasudeva Kavu Patteri Vs. Mani Naicka and Others*, a Bench of the High Court of Madras which included Rajamannar, C. J. (as he then was) pointed out that the breaches of the rules contained in the CPC relating to execution against Immovable properties commencing from their attachment down to their sale should be dealt with under Order 21, Rule 90 and not otherwise, that the order of confirmation under Order 21, Rule 92 shall give the final quietus to all objections which could be raised under O. 21 Rule 90.

From this it is clear that the petitioners therein, though they may file the petitions u/s 47 as representatives in interest of the judgment-debtor to enable them to dispute the sales, their applications should be under Order 21 Rule 90 C.

P. C. inasmuch as they are wanting in effect to have the sale set aside by reason of the attachment having not been validly made. these petitions therefore amount to petitions under O. 21 Rule 90 C. P. C. to which the provisions of old Art. 166 (New 127) would apply and the petitions should have been filed within 30 days of the sale.

5. In the same execution sale with regard to one of the properties, another petition filed was E. a. No. 6 of 1966 where the petitioner had claimed that her father had purchased these properties under a registered sale deed dated 12-12-1960 i.e., two years before the attachment before judgment and had conveyed the same to her under a gift deed on the same day and that she is therefore entitled to the property and has filed E. A. No. 6 of 1966 for setting aside the sale under Order 21 Rule 58 C. p. C. This petition was allowed by the District Munsif but on revision filed, my learned brother Seshachalpati, J. in C. R. P. No. 390 of 1967 held that the petitioner being a person holding an interest in the property was entitled to file the petition under Order 21 R. 89 C. P. C. for appropriate relief, that the petition under Order 21 Rule 58 C. P. C. is misconceived that the petition to set aside the sale was liable to be dismissed that the petitioner had however other remedies in law. If the present applications are to be considered as application filed under Order 21 Rule 89 C. p. C. by persons holding an interest in the property it is old Article 166 (New 127) that would apply and they having not been filed within 30 days of the sale, they would be out of time. It is not open to them by a trick of pleading to say that what they are asking for is only declaration that the sale is not valid, thereby avoiding the application of old Art. 166 (New 127) and contending that it is residuary old Article 181 (New 137) that would apply. The latter Article would apply if the attachment is void in which case, sales in their favour would not attract the penalty u/s 64 C. P. C. There is no provision for such a declaration in execution. Other remedy by way of suit is no doubt open to them.

In *Vasudeva Kavu Patteri Vs. Mani Naicka and Others*, it was observed that the question whether the failure to observe the provisions of C. P. C. relating to attachment and sale of properties in execution of decrees would render a sale a nullity has, subsequent to the decision in *Basharutulla v. Uma Churn Dutt*. ILR 1889 Cal 794, came up for consideration by the Judicial Committee and by the Courts in India and the trend of these decisions is clearly to establish that breaches of these rules will not render the sales void but that they would only be material irregularities furnishing a ground for taking action under Order 21 Rule 90 C. P. C. Therefore it is not open to the petitioner to plead that the sale is void by reason of a defective attachment. It is not also open to them to ask for a declaration to this effect. When they contend that the sale is vitiated by reason of defective attachment and ask for declaration it amounts not asking for the sale to be set aside in which case they must come under Order 21 Rule 89 or 90 C. p. C. and it is old Article 166 (New 127) that would apply to this application and as they have not been filed within 30 days of the sale, these applications are barred by time. The District Munsif was therefore right in dismissing these application.

The orders of the Subordinate Judge are therefore set aside.

6. In the result, these appeals are allowed with costs throughout. Leave granted.

7. Appeals allowed.