

(1980) 07 MAD CK 0035
In the Madras High Court
Case No : C.M.A. No. 231 of 1980

K. Suresh Babu

APPELLANT

Vs

K. Balasubramaniam and Another

RESPONDENT

Date of Decision : 17-07-1980

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 72, Order 21 Rule 72(1), Order 21 Rule 72(3), Order 21 Rule 90

Citation : AIR 1981 Mad 1 : (1980) 93 LW 714

Hon'ble Judges : Ismail, C.J.;Sathar Sayeed, J;Nainar Sundaram, J

Bench : Full Bench

Advocate : P.R. Varadarajan, for the Appellant; V. Ganapatisubramania Iyer, for the Respondent

Judgement

Ismail, C.J.—This is an appeal against the order of the X Assistant Judge, City Civil Court, Madras dated 14th August, 1978 made in E. A. No. 1435 of 1977 in K P. No. 391 of 1975 in O. S. No. 174 of 1973. E. A. No. 1435 of 1977 was filed for setting aside the sale which was held on 25th January 1977 in execution of a decree obtained in O. S. No. 174 of 1973. The case of the petitioner in the execution application, who was the judgment debtor, was that the purchase at the court auction was a benami purchase by the decree holder and therefore the sale should be set aside. He also put forward the contention that the property was worth Rs. 1,50,000 but it was sold only for an inadequate price of Rs. 30,150, and thereby he sustained a substantial injury. The learned X Assistant Judge, City Civil Court, Madras, recorded a finding that the purchase at the court auction sale was benami one by the decree holder. Having held so, in respect of the question whether the property fetched an adequate price or not, he did not render a definite finding. However, he did say in his order that the judgment-debtor sustained substantial injury by reason of irregularity in the conduct of the sale. On his finding that the purchase was a benami one by the decree-holder and no permission as contemplated by Order 21, Rule 72 (1) of the Schedule to the CPC had been obtained and the judgment debtor sustained substantial injury

he set aside the sale. It is against this order setting aside the sale the present appeal has been filed by the auction purchaser.

2. When the appeal came up for hearing before a Division Bench of this court, the learned counsel for the appellant, having regard to the evidence available, did not challenge the findings that the purchase was benami for the decree holder and no permission contemplated by Order 21, Rule 72 (1) of the CPC was obtained. However, he contended that the learned Judge, not having given a definite finding on the adequacy or inadequacy of the price fetched at the court auction sale, was not justified in giving a finding that the judgment debtor sustained a substantial injury and a finding that the judgment debtor sustained substantial injury as a result of the decree holder not obtaining permission contemplated under Order 21, Rule 72 (1) of the Civil Procedure Code, is necessary for setting aside the sale. In Support of this contention, the learned counsel for the appellant relied on a Bench decision of this court in *GunduVenkataalingam v. Kantheti Venkata Ranganayakulu*, ILR (1955) Mad 675. The said decision certainly supports the contention of the learned counsel for the appellant, namely, that even when a decree holder or his benamidar purchases the property in court auction sale, without obtaining the permission of the court under Or. 21 R. 72 (1) C. P. Code, the sale cannot be set aside unless it is established that the judgment debtor or any person interested in the property sustained a substantial injury. But the Division Bench took the view that having regard to the language of Order 21 Rule 72 (3) C. P. Code, contrasted with the language of Order 21, Rule 90, C. P. Code, the above said Bench decision required reconsideration and. therefore directed the matter to be placed before a Full Bench and that is how the matter is before us now.

3. We have now to Proceed on the basis that there has been a violation of Order 21, Rule 72 (1) C. P. Code, inasmuch as without obtaining the permission of the court the property has been purchased in court auction benami for the benefit of the decree holder and the judgment debtor filed the application to set aside the sale on that ground. The question that requires to be considered is whether the judgment debtor in addition to proving that the purchase at the court auction sale was benami for the decree holder should further prove that as a result of the decree holder not obtaining the permission contemplated by Order 21, Rule 72 (1) C. P. Code, he sustained substantial injury.

4. This question has to be now considered against the background of the relevant provisions contained in the Civil Procedure Code. Order 21, Rule 72 C. P. Code reads as follows-

"Decreeholder not to bid for or buy property without permission- (1) No holder of a decree in execution of which property is sold shall, without the express permission of the court bid for or purchase the property.

Where decree holders Purchase amount of decree may be taken as Payment.

(2) Where a decree holder purchases with such permission, the purchase money

and the amount due on the decree may, subject to the provisions of Section 73, be set-off against one another and the court executing the decree shall enter up satisfaction of the decree in whole or in part accordingly.

(3) Where a decree holder purchases, by himself or through another person, with put such permission, the court may if it thinks fit, on the application of the judgment debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the resale and all expenses attending it shall be Paid by the decree holder."

A reading of this Rule will clearly show that sub-rule (3) does not require that a court can set aside the sale under that rule only if the person who applies for setting aside the sale proves that he has sustained substantial injury by reason of the breach of Order 21, Rule 72 (1) C. P. Code.

5. Now we can contrast the language contained in this rule, usefully with the language contained in Order 21, Rule 90 C. P. C. The rule after its amendment by Central Act 104 of 1976, reads as follows--

"Application to set aside sale on ground of irregularity or fraud- (1) Where any Immovable property has been sold in execution of a decree, the decree holder or the purchaser, or any other 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 material irregularity or fraud in publishing or conducting it;

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud:

(3) No application to set aside a sale under this rule shall be entertained upon any ground, which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation- The mere absence of or defect in, attachment of the property sold shall not, by itself be a ground for setting aside a sale under this rule".

6. As far as the requirement that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud is concerned, there is no change in the language of the relevant provision before its amendment by Central Act 104 of 1976 and after its amendment, by the said Central Act. Consequently, to enable a court to set aside a sale under O. 21, R. 90 C. P. Code, it must be established and the court must be satisfied that the applicant has sustained substantial injury by reason of the irregularity or fraud complained of. In this respect, the language of Order 21, Rule 72 (3) C. P. C. differs basically from the language of Order 21, Rule 90 C. P. C. Notwithstanding this basic difference in the language, the question for consideration is whether

there is anything on principle to import the restriction provided for in Order 21. Rule 90 C, P. Code, into O. 21 Rule 72 (3) C. P. Code. As we pointed out already, the learned counsel for the appellant relied on the decision of a Bench of this Court in *Gundu Venkataalingam, v. Kantheti Venkata Ranganayakulu*, ILR (1955) Mad 675, referred to already. That Bench did not give any independent reason for coming to the conclusion that before setting aside a sale under Or. 21, Rule 72 (3) C. P. C., the court should call upon the applicant to satisfy the court that by reason of the failure on the part of the decree holder to obtain the permission under Order 21, Rule 72 (1) C. P. Code, the applicant had sustained substantial injury. What the court did was to assume that such a principle has been laid down by a decision of the Privy Council in *Rai Radha Krishna v. Bisheshwar Sahay*, (1922) MR I Pat 733: AIR 1922 PC 336 and therefore it has to follow the same. This is what the Bench says at page 677-

"The second objection that as the auction purchasers were benamidars for the decree holders and that as no leave to bid was obtained, the sale was a nullity as it contravened the provisions of Or. XXI Rule 72 C. P. Code, also is without force. It is no doubt true that the rule was contravened. But as pointed out by the Judicial Committee in *Rai Radha Krishna V. Bisheshwar Sahay* ILR 1 Pat 733: AIR 1922 PC 336: 49 Ind. App. 317, the sale is only voidable, as the rule itself requires an application by the judgment debtor to set aside the sale on the ground that no leave to bid was obtained by the decree holder before the sale. It was further held by the Privy Council that the sale was not only voidable but that it could be set aside only if it, were established that the Property had not been realised to the best advantage of the judgment debtor, meaning thereby that Unless substantial injury was established a sale could not be set aside on the ground that it contravened the provisions of Or. XXI Rule 72 C. P. Code."

Since the Bench has simply purported to follow the decision of the Privy Council referred to already, we shall now consider what exactly was the question the Privy Council had to consider in the decision relied on. In: that case, a suit was brought in 1914, by one Rai Mahabir Prasad represented by the appellants before the Privy Council to recover possession of a village alleging that certain execution proceedings in which the village had been sold on 8-4-1899 were illegal, collusive and fraudulent. The first defendant in the suit who was the first respondent before the Privy Council, by his written statement denied the facts alleged and pleaded that the suit was barred by limitation. The Subordinate Judge found that one Hari Narain, the purchaser at the sale, was merely a benamidar for the first respondent, as the plaintiff alleged. He held that the first respondent having purchased after the refusal of an application by him u/s 294 of the Civil Procedure Code, 1882, (corresponding to Or. 21 Rule 72 of the present Civil Procedure Code) for Permission to do so, the sale was void and inoperative. In his view the case was governed by Article 141 and not Art. 12, of Schedule I of the Indian Limitation Act, and the suit was therefore not barred by limitation. The decision of the Subordinate Judge was reversed by the High Court on appeal. It was there after the matter came before the Privy Council. The Privy Council

had to consider two questions, one a question of fact as to whether the court auction purchaser was a benamidar for the decree holder or not and the second a question of limitation as to whether the suit was barred by limitation or not. The Privy Council in its judgment has stated-

"Upon the whole, their Lordships agree with the view of the High Court that it has not been proved that Hari

Narain was benami for Bisheshar. This is sufficient to dispose of the appeal".

Once the Privy Council reached that conclusion normally no further question could possibly arise because the moment it was held that the court auction purchaser was not the benamidar of the decree holder, there was no violation of Order 21. Rule 72 (1) and therefore, there could be no question of filing any application under Or. 21, Rule 72 (3) C. P. Code. Nonetheless the Privy Council went into the question of limitation as that question was considered by the learned Subordinate Judge as well as the High Court. Dealing with that question for the purpose of finding out as to, which was the proper Article of the Schedule to the Indian Limitation Act, that would apply to the suit in question, the Privy Council further extracted the provisions of Section 294 C. P. Code 1882 (corresponding to Or. 21, Rule 72) and proceeded to state-

"Upon the construction of this section it is evident that a purchase by a decree holder who has not obtained permission is not void or a nullity, but is only to be avoided on the application of the judgment debtor or some other person interested. It would be injurious to those interested in the sale if a decreeholder who had been forced up in the bidding to give a large sum of money could escape from fulfilling his contract by getting the sale declared a nullity, and it would make all titles under such sales insecure if at later periods they were liable to be treated as nullities. A sale is to be set aside upon application and upon cause shown. This position is well established and seems to have been accepted by the Subordinate Judge, but in his view, the fact that the decree holder had applied for permission and had been refused made a distinction. Their Lordships, however, cannot see that this makes any difference. He is still a decree holder who has not obtained permission to bid. He is that and nothing more. If indeed an application were made under the last paragraph of the section, his conduct might be one of the points which the court would take into consideration in determining whether it would avoid the sale or not. It is doubtful even then whether it is of any importance. The question would not be whether the decree holder had been contumacious, but whether the property had been really realised to the best advantage. If it had not, the court would set the sale aside: if it had, then it mattered not that the decree holder bought without permission or that he had applied and been refused. If, then, the sale is voidable only and not void, Article 12 in the Limitation Act 1908 applies, and the suit must be brought within one year. Therefore, it was too late".

Article 12 of the First Schedule to the Indian Limitation Act, 1908 which

corresponds to Article 99 of the Schedule to the Limitation Act of 1963 runs as follows--

Description of suit. Period of limitation. Time from which Period begins to run.

12. To set aside any One year. When the sale is of the following sales; confirmed or would (a) sale in execution of a otherwise become decree of a Civil Court. Final and conclusive had no such suit been brought.

7. Article 12 of the First Schedule to the Indian Limitation Act, 1908 dealt with a suit to set aside a sale in execution of a decree of a civil court. In the Privy Council case, there was actually a suit to set aside the execution sale and therefore the Privy Council was considering the question of limitation with reference -thereto. The Privy Council had no occasion to consider what are the requirements that must be fulfilled before a sale can be set aside on an application made by a judgment debtor or any person interested in the property if the decree holder purchases the property without obtaining the permission of the court as contemplated by the law. With reference to the proper Article of the Limitation Act of 1908 that was applicable to the facts of the case before it, the Privy Council had to consider whether the sale held was void or void able and the Privy Council came to the definite conclusion that the sale was not void but void able only Apart from this, the Privy Council had no occasion or necessity to consider any other question. Therefore, we are of the opinion that the Bench of this court while deciding Gundu Venkatalingarn v. Kantheti Venkataranganayakulu, ILR (1955) Mad 675, was wrong in taking the view that the Privy Council has laid down any such rule with regard to the setting aside of a sale an the ground that the decree holder had bid at the auction without obtaining the Permission of the court. As a matter of fact, there is a further error in the said Beach decision. We have already pointed out the language used by the Privy Council is only this:

"The question would not be whether the decree holder had been contumacious, but whether the property had been really realised to the best advantage".

The Privy Council did not use the words "it must be established that the judgment debtor or any person interested in the property should prove that he had suffered a substantial injury by reason of the failure on the Dart of the decree holder to obtain the permission under the law" the Bench of this Court, in the passage which we have extracted already assumed that the above expression of the Privy Council means that unless substantial, injury was established, a sale could not be set aside on the ground that it contravened the provisions of Or. 21 Rule 72 C. P. Code. In our opinion, the meaning to be given to the expression "whether the property had been really realised to the best advantage" is totally different from the meaning that should be given to "the judgment debtor or any person Interested in the property sustaining a substantial injury". The expression "substantial injury" is much stronger than the expression used by the Privy

Council in the judgment and they cannot be equated. Obviously the learned Judges of this Court who decided the case in *Gundu Venkatalingam v. Kantheti Venkataranganayakulu*, ILR (1955) Mad 675 were unconsciously influenced by the circumstances mentioned in Order 21, Rule 90, C. P. Code, and imported the language and requirement of that provision into that case and accordingly come to the conclusion which they did.

8. Now we shall consider the other decisions of this court as well as other courts on this point. As far as the court is concerned the earlier decision is that reported in *Thathu Naick v. Kondu Reddi*. ILR(1909) Mad 242. In that case, the holder of a mortgage decree brought the mortgaged property to sale in execution. He applied to the Court for permission to bid at the sale and the court granted him permission, fixing an amount as the minimum at which he was to bid; The decree-holder purchased the property at sale by court in the name of a third party for a sum far less than the minimum fixed by the court and less than the principal amount secured by the mortgage. The sale was confirmed and possession delivered to the purchaser but actual possession remained with certain parties who had purchased the property from the original mortgagor. In a suit brought by the decree-holder, the auction purchaser, as plaintiff in the court which executed the decree, against the original mortgagor. and the purchasers from him as defendants, the defendants who discovered the fraud of plaintiffs subsequent to the confirmation of sale, contended that the sale to plaintiffs was fraudulent and contrary to the provisions of Section 294 C. P. Code, 1882 (corresponding to Or. 21, Rule 72 of the present C. P. Code) The matter came before a Bench of this court consisting of Miller, J. and Abdul Rahim, J. and both the Judges took the view that the confirmation of the sale was no bar to enforcing the rights of defendants to set aside the sale, the fraud having been discovered only after such confirmation. However, the two learned Judges differed as to the remedy, which was available to the defendants who discovered the fraud. Miller, J. took the view that the defendants were entitled to put forward their case in the written statement itself and have the sale set aside by way of answer to the plaintiffs claim. However. Abdul Rahim. J took the view that the sale cannot be set aside except on an application by defendants under Sections 294 and 244 C. P. Code. 1882, to the court executing the decree. In view of this difference of opinion between the two Judges, the matter was referred to a third Judge, namely, Sankaran Nair, J. who agreed with the view of Miller, J. in this behalf, namely, as to the forum and the mode by which the defendants who discovered the fraud should establish the right and have the sale set aside. With reference to the effect of the failure to obtain permission of the court, the learned Judge observed-

"The next question is whether the sale should now be upheld. Where a decree holder purchases property in contravention of the provisions of Section 294 and the judgment-debtor seeks to set aside the sale, I am of opinion that it unnecessary for the latter to allege fraud or that the property has not been sold for its proper value; it is for the decree holder to satisfy the court that the sale

should be confirmed".

The next decision of this court is that of a Bench of this court in *Tatireddy v. Ramchandra Rao*, AIR 1921 Mad 402: 13 MLW 616. The Bench held: -

"When a sale is set aside under Rule 72 on account of the decree-holder's failure to obtain permission to bid, it is not necessary to find also that the judgment debtor sustained substantial loss by the sale".

9. The next decision of this court is the one in *The Public Prosecutor Vs. G. Sadagopan*, . In that case also, a question arose whether the purchase in court auction without the permission of the court was a nullity or only voidable. A Bench held that it was only voidable and for this purpose it has relied on a passage in *Halsbury's Laws of England*, Volume 28, page 73, paragraph 137 and also the decision of the Privy Council to which we have already drawn attention. Later dealing with the same question, the Bench pointed out-

"Judgment debtors were entitled to apply to set aside the sale and it would have been so set aside even without proof of damage or any loss if an appropriate application had been put in: but that was not done and the sale was confirmed. It is now too late for the judgment debtors to have the sale set aside. The order of confirmation has become final and under the circumstances, as far as the judgment debtors are concerned the first defendant has got an indefeasible title."

Thus, the above three decisions of this court categorically and expressly state that where the decree holder has purchased the property without the permission of the court, the judgment debtor, on an application made by him, can have the sale set aside without the judgment debtor proving that he suffered any damage or loss. Consequently the decision of the Bench in *Gundu Venkatalingam v. Kantheti Venkataranganayakulu*, ILR (1955) Mad 675, is directly opposed to the earlier three decisions referred to above. As we pointed out independently that decision is also not correct in principle. We may also point out in this behalf that the decision of the Bench of this court in *The Public Prosecutor Vs. G. Sadagopan*, , referred to above, actually referred to the decision of the Privy Council on which the Bench in *Gundu Venkatalingam v. Kantheti Venkataranganayakulu*, ILR (1955) Mad 675, relied but for a different purpose, namely, on the question whether the sale was a nullity or only voidable. Thus it is clear that whether the Bench decision in *The Public Prosecutor Vs. G. Sadagopan*, , held that the sale can be set aside without proof of damage or any loss, it did so only after considering the decision of the Privy Council indicating thereby that the Bench did not understand the decision of the Privy Council in the manner in which it was understood by later Bench decision in *Gundu Venkatalingam v. Kantheti Venkataranganayakulu*, ILR, (1955) Mad 675. These are the only decisions of this court which have been brought to our notice.

10. The learned counsel for the appellant brought to our notice the two decisions of the Calcutta High Court, One is in *Mathuradas v. Nathunni Lal Mahta*, ILR(1885) Cal 731. That was a very short judgment which runs as follows--

"Under the terms of the third Para of Section 294 of the Code (Code of 1882) it is discretionary with the court of execution to set aside a sale in which the decree holder has purchased without the permission of the court having been first obtained. In dealing with such a matter, which we regard as an irregularity, in conducting the sale, it should be taken into consideration whether any substantial injury has resulted, that is to say, whether, by reason of the decree holder being the purchaser without permission of the court previously obtained, an inadequate price has been realised at the sale. The judgment debtor, appellant has been unable to show us that the judgment of the lower court, in holding that there was no such substantial injury, is incorrect. There are other irregularities alleged by the appellant in publishing the proclamations; but it is unnecessary to consider them having regard to the finding that no substantial injury has resulted at the sale".

We are of the opinion that this Judgment is not of any assistance to support the contention of the learned counsel for the appellant. Here again, a very reading of the judgment will show that the learned Judges treated an application to set aside a sale under the third para of Sec. 294 C. P. Code, 1882, equivalent to an application to set aside a sale under Or. 21. Rule 90 of the present CPC and that is why they have imported the conception of "substantial injury" into the judgment.

11. The other decision of the Calcutta High Court relied on by the learned counsel is in Jiteswari Dassi Vs. Sudha Krishna Mukherjee, , The relevant passage is as follows-

"The question that next arises is whether the absence of the leave makes the sale void. Now if the decree holder purchases without taking the permission contemplated by the Code, the words of subsection (3), Section 294 of the Code of 1882, and Rule 72, Order 21 of the present Code, themselves show that the sale is not void nor a nullity, but is only to be avoided on the application of the judgment debtor or some other person interested. This is so even if permission was asked for and refused and considering the question whether the sale should be set aside or not, it will have to be seen whether the property has been realised to the best advantage, (see Radhakrishna v. Bisheshar Sahay, ELR I Pat 733: AIR 1922 PC 336."

Apart from merely repeating the language of the Judicial Committee of the Privy Council, the above judgment does not lay down any principle whatever and therefore this also does not support the contention of the learned counsel for the appellant.

12. No other decision was brought, to our notice.

13. As we indicated already, on principle an application to set aside a sale made under Order 21, Rule 72 (3) is an independent application independent in the sense that it is different from the application contemplated under O. 21, Rule 90 C. P. Code. When the two sets of provisions provide for two different applications,

in the absence of any statutory compulsion, there is no justification whatever to equate the two and import into one set of provisions, the restrictions or limitations imposed in the other set of provisions. As we have pointed out already, Order 21, Rule 72 (3) of the Civil P. C. does not refer to the applicant sustaining any substantial injury at all while Order 21, R. 90 C. P. Code does refer to it and makes the proof thereof as a condition precedent for setting aside the sale. In view of this basic difference in the language, it is not possible to hold that the considerations applicable to an application under Order 21, Rule 90 C. P. Code, should be applied to an application under Order 21, Rule 72 (3) of the Code. As a matter of fact, at one stage of the arguments, the learned counsel for the appellant pointed out that even the present application was filed under O. 21 Rule 90 of the Civil Procedure Code. An erroneous statutory provision quoted or cited cannot determine the scope of the rights and liabilities of the parties and the court will have to decide them in accordance with the correct provisions of law applicable to the facts alleged and established.

14. There is one other vital consideration which must be borne in mind. The requirement that a decree holder must obtain the permission of the court before purchasing the property is intended for the benefit of the judgment debtor and in order to prevent any injury being done to the judgment debtor, in view of the stronger position in which the decree-holder is placed. That is why Or. 21, Rule 72 (1) uses the word "shall" and not "may". That means, the obtaining of the permission of the court is mandatory before a decree holder can bid at the auction and purchase the property and if the decree holder without obtaining such permission or in spite of refusal of. Such permission bids at the auction and purchases the property; certainly he contravenes a mandatory provision of law. Further, the statute has deliberately used the word "express" before "Permission" thereby indicating the stringency of the provision it is making. Such a person cannot be allowed to take advantage of his own illegality by calling upon the judgment debtor or any other person interested in the property who applies for setting aside the sale to prove that by reason of his illegality, the applicant has suffered substantial injury.

15. Having regard to all the above circumstances, we are clearly of the opinion that an application filed under O. 21 Rule 72 (3) C. P. Code is an independent application and it has to be dealt with in accordance with the language contained in sub-rule (3) of Rule 72 and that sub-rule does not insist that a sale cannot be set aside if it had taken place contrary to the provisions of that rule unless the applicant establishes that he has sustained substantial injury. In view of this, we overrule the decision of the Bench of this court in *Gundu Venkataalingam. v. Kantheti Venkata Ranganayakulu*, ILR (1955) Mad 675 and confirm the order of the learned Judge setting aside the sale in the present case. The appeal is accordingly dismissed. There will be no order as to costs.

16. Appeal dismissed.