

(1949) 10 MAD CK 0007
In the Madras High Court

Kandaswami Naick

APPELLANT

Vs

Ponnu Naick alias Veerappa Naick and Others

RESPONDENT

Date of Decision : 07-10-1949

Acts Referred:

Madras Estates Land Act, 1908 — Section 112

Citation : (1949) 2 MLJ 839

Hon'ble Judges : Govinda Menon, J

Bench : Division Bench

Judgement

Govinda Menon, J.—The fifth defendant in the trial Court, who was a purchaser of the suit properties from the fourth defendant who, in his

turn was again a purchaser from the third defendant, appeals to this Court aggrieved by the decision of the Subordinate Judge of Ramnad at

Madura in A.S. No. 178 of 1945, on his file. It is seen that the third defendant had purchased the tenancy rights in the properties at a private

auction held by the manager of the Mannarkottai Zamin to which estate the land belonged, for arrears of rent due to the estate. It is alleged that the

plaintiffs who were the occupancy ryots under the Mannarkottai Zamin had defaulted in paying the rent and therefore for the realisation of the

arrears of rent the tenancy rights had to be sold. The rent sale took place on 18th January, 1932. It was confirmed on 11th March, 1932, and a

certificate issued in favour of the Zamindar who bought in the lands, on 30th April, 1933. After the estate purchased the occupancy rights, patta

was sought to be granted to the person who bid for the largest amount at a private auction held on 18th September, 1933. The tenancy rights were

purchased by the third defendant at that auction, and, as has already been mentioned, the title by devolution ended in the fifth defendant, ultimately

becoming the tenant. It is also found by both the lower Courts that the present plaintiff had knowledge of the sale at least as early as 1935, though

he took nearly eight years to file the present suit out of which this second appeal has arisen.

2. The suit by the plaintiffs was for recovery of possession of the properties on the footing that as there were no arrears of rent due from them to

the estate the sale and all the subsequent proceedings were null and void. Paragraph 7 of the plaint recited various negative facts, viz., the absence

of any arrears of rent, the absence of any notice u/s 112 of the Estates Land Act, the absence of a sale u/s 114 of the Act, the absence even of the

fact that the Collector had issued an order directing the sale.

3. The lower Courts have now found at a fact that the notice u/s 112 which should have been served in accordance with the provisions of Section

78(2) of the same Act had not been properly served on the tenant. It is found that the village munsif who went to serve the notice issued by the

Collector u/s 112 could not find the tenant at all. His wife when questioned was not able to give any specific information regarding the whereabouts

and therefore the notice was affixed on the door of the house as well as on the property in dispute. On the basis of this service the landlord applied

to the Collector under section, 114 of this Act for directing the sale of the property. u/s 116 the Collector appointed an officer to conduct the sale

which was held u/s 117 with the result that the third defendant purchased the property.

4. The learned Counsel for the appellant Mr. Bashyam raised various contentions regarding the validity of the sale and urged that the present suit

for recovery of possession on the footing of the sale held on 18th September, 1933, cannot be maintained. It is urged that u/s 114 of the Indian

Evidence Act there is a presumption that judicial and official acts are properly done and in this case when the Collector after receiving an

application u/s 114, appointed an officer u/s 116 of the Estates Land Act to Conduct the sale it must be presumed that there was a proper notice

served upon the defaulter as is statutorily laid down u/s 112. The argument proceeds on the assumption that because the Collector himself was the

authority to issue the notice to the defaulter intimating to him of the intention to sell the property and when later on the self-same Collector as a

result of the issuing of notice has directed the sale it must be deemed that the previous notice on the defaulter had been served on him properly;

otherwise the Collector would not have directed an officer to conduct the sale. There is a singular absence of evidence in this case as to whether in

appointing an officer to conduct the sale the Collector really exercised his individual judgment and found that the notice has been properly served.

In the absence of evidence to that effect I am not justified in presuming that Section 114 of the Evidence Act can be sought in aid by the appellant

for requesting the Court to presume that there has been a proper notice. I do not think that the mere fact of the Collector having appointed an

officer to Conduct the sale would by itself justify the inference by the Court that there has been a proper notice.

5. The next argument of the learned Counsel is that proper steps had been taken to serve the notice upon the defaulter personally and since

personal service was not feasible the service by affixture must be deemed to be sufficient. For this argument reliance is placed upon two decisions

of this Court, Chinna Nagi Reddi v. Venkataramiah and Kamulammal v. Chokkalingam Asari (1924) M.W.N. 224. In the earlier of these cases

Seshagiri Ayyar, J. and Napier, J., have held that when a property was sold for arrears of revenue under the Revenue Recovery Act without notice

to the owner of the property and he came to know about the revenue sale only subsequently when the purchaser tried to get possession and

thereafter brought a suit more than six months after the sale for possession the failure to give notice of the sale did not deprive the Collector of

jurisdiction to effect the sale but was a mere irregularity because the sale was one that ought to have been set aside within six months. The principle

underlying the case is that under the Revenue Recovery Act because there is a provision u/s is for bringing a suit to set aside a revenue sale within

six months of its taking place the fact that such a sale took place without notice to the defaulter would not make it null and void according to the

learned Judges. It seems to me that the principles enunciated by learned Judges cannot be safely applied to the facts of the present case, as I shall

show presently the decisions of this Court have held that the service of notice was an imperative condition precedent to the Collector appointing an

officer to conduct that sale. I do not think that the decision in Chinna Nagi Reddi v. Venkataramiah (1918) M.W.N. 224., can be of any

assistance in favour of the appellant.

6. The other case on which the learned Counsel placed his reliance is Kamulammal v. Chokkalingam Asari (1924) 45 M.L.J. 840. Phillips, J., and

Venkatasubba Rao, J., in their decision were of the view that a suit to set aside a revenue sale under the Madras Estates Land Act one year after

expiration of thirty days after the sale is barred under Article 12 (b) of the Limitation Act. I do not find any observations in this case which can be

availed of in favour of the appellant. The learned Judges have in fact followed the decision in Karuppa Thevan v. Vasudeva Sastri I.L.R.(1883)

Mad. 148, as well as the decision in Bhuvan Mohan Moitra v. Grish Narain Moonshi (1910) 13 C.L.J. 339. I am of opinion that for the principle

sought to be adumbrated in the argument of the learned Counsel these decisions cannot be of any assistance.

7. On behalf of the respondents two decisions of this Court, viz., Kalepalli Rajitagiripathi Vs. Jannavala Pedakotayya and Others, , and a more

recent one of Wads worth, J, in Vattipalli Rameswaramayya Vs. Raja Panuganti Parthasarathy Rayanimvaru, Zamindar of Kalahasti and Others, ,

have been relied upon. It seems to be that the decision in Kalepalli Rajitagiripathi Vs. Jannavala Pedakotayya and Others, , is applicable to the

facts of the present case. There it is held that notice to lawful ryot is such an important condition precedent to the holding of a sale u/s 112 of the

Madras Estates Land Act that the want of it must be regarded as making the sale a nullity. The Bench followed the decision of Ramesam, J., in

Kootoorlingam Pillai and Others Vs. Sennappa Reddiar and Others, . It was further laid down by the learned Judges that where in a sale of a

holding for arrears of rent personal service of notice was neither made nor attempted upon the defaulting ryot, but service by affixture was made,

the statutory requirement as to notice had not been complied with, since the Estates Land Act contemplates service by affixture only when personal

service cannot be effected after due and reasonable diligence.

8. It is unnecessary for me to discuss in any detail the questions that have been considered by the learned Judges, because, in my opinion, the

present case to a very great extent resembles the decision of Curgenven and Sundaram Chetty, JJ, and I respectfully follow the observations of the

learned Judges, The more recent and direct authority is the judgment of

Wadsworth J., in Vattipalli Rameswaramayya Vs. Raja Panuganti

Parthasarathy Rayanimvaru, Zamindar of Kalahasti and Others, . Though the learned Judge did not in terms refer to the earlier decisions, viz-,

Kootoorlingam Pillai and Others Vs. Sennappa Reddiar and Others, , and Kalepalli Rajitagiripathi Vs. Jannavala Pedakotayya and Others, , the

reasoning of the learned Judge is in the same strain and according to him u/s 112 of the Estates Land Act the expression "" if personal service

cannot be effected "" means that personal service cannot be effected when reasonable attempts have been made to effect it. He further holds that to

justify affixture there must be reasonable diligence on the part of the process-server and the mere temporary absence of the person to be served

does not justify the affixture.

9. In the present case except the return of the village munsiff there is nothing to show that reasonable and due diligence have been taken to serve

the defaulter personally. Both the lower Courts have come to the concurrent finding that there has not been such due and reasonable diligence and

I am bound by that finding of fact. Therefore it seems to me that on the facts now found there has been no service as is contemplated u/s 112 of

the Estates Land Act. Wadsworth, J., observes that where a proper notice of sale has not been given even the fact that the defaulter was aware of

the sale at the time when it actually took place will not be sufficient to validate the sale. In the present case there is no evidence to show that prior

to 1935 the defaulter was personally aware of the sale. If that is so the fact that he came to know of the sale about three years later in 1935 will

not make it obligatory upon him to come to Court to set aside the sale. The question is whether a sale held without notice u/s 112 is a nullity or

whether it is a voidable transaction which could be later on set aside by a suit The trend of the decisions of this Court adverted to by me above is

to the effect that under the provisions of the Estates Land Act such a sale is a nullity and if the sale is a nullity there is no duty cast upon the

defaulter to bring a suit to set it aside, for under the law it is impossible to set aside a transaction which is null and void. Therefore, the contention

urged on behalf of the appellant that the respondent waited for nearly eight years before he brought the suit becomes pointless because the

respondent could not bring a suit to set aside the sale but only bring a suit for

possession of the property.

10. It is interesting to notice, as has been pointed out by Mr. Viswanathan for the respondent, that in Kalepalli Rajitagiripathi Vs. Jannavala

Pedakotayya and Others, the sale took place in 1915 and the actual suit out of which the decision there arose was only filed just before the expiry

of twelve years, i.e., 1927. I would therefore hold, agreeing with the lower Courts, that the sale is null and void.

11. Mr. Bashyam then seeks to apply the principles enunciated in the Full Bench decisions in Ramlalsahu v. Mt. Ramia ILR (1947) Pat. 340,

where the learned Judges held that where under Order 21, Rule 22 (1) notice to a legal representative has not been properly served and a sale

held in execution of a decree it would only be a voidable one and not a null transaction. The learned Judges have discussed in great detail the

various decisions of the Patna High Court and have come to the conclusion they did, but in view of the decisions of this Court which hold that the

sale under the Estates Land Act will be null and void if notice has not been properly served on the defaulter, I find it difficult to apply the

observations of the learned Judges of the Patna High Court to the case under consideration.

12. There is one more circumstance which has to be considered and that is that this property has been mortgaged by the tenants to the second

defendant for a sum of nearly Rs. 1,000 and the rights in the same have been sold for an arrear of Rs. 10 and purchased by the estate itself for the

trifling sum of Rs. 9 and odd. As is pointed out by Mr. Viswanathan, if the defaulter knew that a sale was to take place for the sum of Rs. 10 he

would not have allowed it to take place because the property was certainly worth about Rs. 1,000 and the fact that later on before he brought the

suit he rendered a mortgage, is sufficient evidence to show of his absence of knowledge of the sale. This is a material circumstance which if

necessary could be taken into consideration to justify the bona fides of the respondent, but, in the view which I take following the decision of this

Court on the legal aspect, I do not think I should rest my case on the circumstance mentioned by me above. I am therefore of opinion that the

lower Courts were correct in the decision arrived at and the second appeal fails and is dismissed with costs. No leave.