

(1966) 01 OHC CK 0011
In the Orissa High Court
Case No : Civil Revision No. 295 of 1964

Kuntala Bewa

APPELLANT

Vs

Sadhu Charan Mohanti and Others

RESPONDENT

Date of Decision : 17-01-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 66(2), Order 5 Rule 17

Citation : AIR 1966 Ori 166 : (1966) 32 CLT 646

Hon'ble Judges : G.K. Misra, J

Bench : Single Bench

Advocate : K.N. Mohapatra, for the Appellant; L.K. Dasgupta, G.N. Sengupta and B.B. Roy for Opposite Party No. 1, for the Respondent

Final Decision : Dismissed

Judgement

Misra, J.—The disputed land comprising of an area of 7.89 acres admittedly belonged to Kuntala (Judgment-debtor-petitioner). In execution of a decree for rent of Rs. 79.59 paise. it was put to sale on 10-4-58 at the instance of Mahanta Srinivas Ramanuja (decree-holder-opposite party No. 2) Sadhucharan Mohanti (auction-purchaser opp. party No. 1) purchased the property for Rs. 150. The value of the property in dispute in the sale proclamation was given at Rs. 100. On 8-7-58 the petitioner tiled an application u/s 228 (2). Orissa Tenancy Act, for setting aside the sale on the ground of material irregularity or fraud in publishing or conducting the sale. There was an allegation that the applicant had sustained substantial injury by reason of such irregularity or fraud. The petitioner deposited the amount recoverable from her in execution of the decree.

The Rent Execution Officer recorded the following findings :

(i) The notice under Order 21, Rule 22, Code of Civil Procedure, was served on the petitioner by affixture on the outer door in her absence and this was due service of notice.

(ii) Attachment and proclamation of sale were duly served.

(iii) The value of the disputed land would be between Rs. 2,200 to Rs. 2,500. The property was grossly under valued in the sale proclamation.

(iv) The petitioner sustained substantial injury.

On the conclusion that gross under-valuation is itself an indication of fraud, the learned Rent Execution Officer set aside the sale as substantial injury had been sustained. Against this order, the auction-purchaser filed an appeal. The learned Additional District Magistrate (Executive) concurred with the trial Court on all findings of fact, but allowed the appeal on the ground that the sale could not be set aside merely on the ground of under valuation even if substantial injury had been caused as there was no material irregularity or fraud in the publication or conduction of sale. Against the appellate order, the Civil Revision has been filed by the judgment-debtor.

2. Mr. Mohapatra assailed the appellate judgment on the following grounds :--

(i) On the concurrent finding of the Courts below that service of notice was by affixture on the petitioner, when she was absent from her house, there was no proper service and the petitioner had no knowledge of the execution case.

(ii) Writ of attachment and sale proclamation were served on the spot on the identification of the land by one Madhab Naik who has not been examined in this case. The process server and the identifier had no knowledge of the land. In the absence of examination of Madhab Naik, the service of attachment and sale proclamation is not proper and the petitioner had no knowledge of the same.

(iii) Assuming that the sale proclamation was properly served and the petitioner was fixed with the notice that the value mentioned in the sale proclamation was Rs. 100 the objection to under valuation could not have been taken by the petitioner at any stage before the sale and could only be taken in an application u/s 228/2 of the Orissa Tenancy Act,

(iv) The sale of the disputed property, worth Rs. 2,200 to Rs. 2,500 for Rs. 150 is based on a mis-statement of the value of the property in the sale proclamation. Such gross-under-valuation is shocking to the conscience and is by itself a valuable evidence of fraud on the part of the decree-holder and is a material irregularity or fraud in the publication or conduction of the sale.

3. Mr. Dasgupta does not assail the concurrent findings that the value of the disputed property would be Rs. 2,200 to Rs. 2,500 and that by sale of such property for Rs. 150 substantial injury had been sustained. He however, contends that the judgment-debtor had full notice of the execution case and of the attachment and sale proclamation, she is estopped from challenging it now. He also contends that mere under-valuation by itself is not a material irregularity or fraud in publishing or conducting the sale.

4. The following points need consideration

(i) Was there service of notice under Order 21 Rule 22. CPC ?

(ii) Were writ of attachment and sale proclamation duly served ?

(iii) Is there any estoppel and waiver if notice under Order 21 Rule 22, CPC had not been served but writ of attachment and sale proclamation had been served ?

(iv) Is under-valuation of the property in the sale proclamation a material irregularity or fraud in the publication or conduction of the sale ?

5. The concurrent finding of the courts below that though notice under Order 21, Rule 22, C. P. C. was served by affixture when the judgment-debtor was absent from her home, it was a proper service, is contrary to law. Kailash Chandra Singh, the Process server (witness No. 3 for the auction purchaser) deposed--

I did not go inside the house of the judgment-debtor and I called her from outside. I searched for the judgment-debtor and one woman came out from the house and intimated me that she had gone out. I waited for about 15 minutes and as the judgment-debtor did not turn up I affixed the notice on the Sadar door of the house. Order 5 Rule 17, Civil Procedure Code, lays down the procedure when the defendant refuses to accept service or cannot be found. It says:

When the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment or where the serving officer, after using all due and reasonable diligence, cannot find the deftd. and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain

It is well settled that a person cannot be said to be "not found" within the meaning of this Rule, merely by reason of his being temporarily absent from his usual place of residence. The serving officer must use all due and reasonable diligence to find out the defendant. This is not a case of absence of the judgment-debtor for indefinite period. This process server, as his evidence shows and there is no finding to the contrary, made no real and substantial efforts, after proper inquiries, to find out the judgment-debtor. If the judgment-debtor was temporarily absent, the process server should have taken steps to find out as to where the judgment-debtor was. On the finding of the courts below and on application of law the conclusion is irresistible that there was no service of notice on the judgment-debtor under Order 21, Rule 22, Civil Procedure Code. The Courts below exercised their jurisdiction with material irregularity inasmuch as they did not keep in view the provisions of Order 5 Rule 17 C P C in determining whether there was proper service or not.

6. The service of attachment and sale proclamation as a fact is not assailed by Mr. Mohapatra. He contends that the disputed land was not known to the process server or Ratnakar Das, the identifier. Both of them clearly admitted that they did

not know the suit land The land was identified by Madhab Naik who had not been examined in this case. Reliance is placed on *Bhairab Chandra Sinha Vs. Kalidhan Roy Choudhury and Others*, , wherein the following passage occurs.

It is argued that the identifier's deposition shows that he did not know himself the properly sold and that he had to take the help of a man of the locality for the identification of the properties in question. It seems singular that the Sub Judge would in the absence of the most material witnesses who identified the lands should hold that there had been a proper service. The Subordinate Judge failed to realise that when properties were sold for a grossly inadequate price and an application is made to set aside the sale, it is duty of the final court of fact to scrutinise with great care the evidence of service and to require the best evidence of such service. The evidence of the service of the sale and attachment processes on which the Subordinate Judge relied is the evidence of a person who did not know the land on which he was effecting the service and such evidence is indeed absolutely valueless in the absence of the evidence of person on whose identification the identifier acted To base a judgment on such evidence is a material irregularity in the exercise of the Court's appellate jurisdiction and vitiates the judgment on the important question of fact as to whether the services were properly effected.

I am in respectful agreement with the aforesaid view But in this case. Jadumani Sahu (witness 2 for the auction-purchaser) is an attesting witness to the service of attachment and sale proclamation He deposed that he had lands in the neighbourhood and knew the disputed land. The courts below have taken into consideration his evidence. The finding of fact cannot be assailed in Civil Revision.

7. On proper publication of sale proclamation on the spot, the judgment-debtor must be presumed to know that there was a gross under-valuation of the property. The question is whether she would have taken any objection to this gross under-valuation as a material irregularity or fraud in the publication or conduction of sale prior to filing an application u/s 226 (2), Orissa Tenancy Act. Neither the Orissa Tenancy Act nor the CPC makes any such provision, see *Krushna Mohan Mohanty Vs. Govinda Chandra Sahu*, . If the judgment-debtor had no opportunity to challenge the gross under-valuation in the sale proclamation prior to the filing of an application u/s 226 (2) Orissa Tenancy Act, there could be no question of estoppel and waiver. The decisions cited by Mr. Dasgupta are distinguishable on this simple test. He placed reliance on (1912) 15 IA 171 , (1943) 9 CLT 84, AIR 1917 Pat 72 , *New Birbhum Coal Co., Ltd. Vs. Surendra Nath Laik and Others*, , *Ratan Lal Vs. Bank of Bihar, Ltd.*, , *Piramal Goenka and Others Vs. Basanti Das Chatterjee and Others*, . The finding in those cases was that the judgment-debtor did not put in objection to the particular irregularities even though he had notice before drawing up of sale proclamation as provided in Order 21, Rule 66 (2) as it stood before the amendment in Patna and Orissa and stands even now in all other States.

8. The main question for consideration is whether the sale should be set aside.

Section 228 (2). Orissa Tenancy Act, lays down: Where a tenure or holding has been sold for arrears of rent due thereon, the decree-holder, the judgment-debtor or any person whose interests are affected by the sale may, at any time within three months from the date of sale apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting the sale:

Provided as follows

(a) no sale shall be set aside on any such ground unless the Court is satisfied that the applicant has sustained substantial injury by revision of such irregularity or fraud; and

(b) no application made by a judgment-debtor or any person whose interests are affected by the sale under this sub-section shall be allowed unless the applicant either deposits the amount recoverable from him in execution of the decree or satisfies the court for reason to be recorded by it in writing, that no such deposit is necessary The petitioner has deposited the amount recoverable from her in execution of the decree as prescribed in Proviso (b). That the petitioner has sustained substantial injury by the sale of about 8 acres of land worth Rs. 2,200 to Rs. 2,500 for a paltry sum of Rs 150 is not controverted.

9. The material irregularity or fraud in publishing or conducting the sale is alleged to be the under-valuation of the suit land in the sale proclamation. Mr. Dasgputa contends that this is not a material irregularity at all. There is no dispute that by virtue of Section 217 (1), Orissa Tenancy Act, the sale proclamation must satisfy all the requirements prescribed in Order 21, Rule 66 (2), Code of Civil Procedure, as fairly and accurately as possible. Order 21, Rule 66 (2) so far as is relevant before and after the amendment, introduced in 1986, may be quoted :--

Before Amendment :

(2) Such proclamation shall be drawn up after notice to the decree-holder and the judgment-debtor and shall state the time and place of sales and specify as fairly and accurately as possible.

X X X X (e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature and value of the property.

After amendment :

(2) Such proclamation shall state the time and place of sale and specify as fairly and accurately as possible.

X X X X (e) every other thing which the court considers material for a purchaser to know in order to judge of the nature and value of the property.

Provided that no estimate of the value of the property, other than those, if any made by the decree-holder and judgment-debtor respectively together with a

statement that the Court does not vouch for the accuracy of either shall be inserted in the sale proclamation.

On the strength of AIR 1964 Guj 126, Yeshwant Maganlal v. Trust Shah Maganlal, Mr. Dasgupta contends that the estimate of the value of the property is not a material fact to be specified in the sale proclamation. It may be noted that this decision has not taken notice of the proviso as Order 21, Rule 66 (2) has not been amended in Bombay or Gujrat. The answer as to the legal position, prior to amendment of Order 21, Rule 66 (2), is concluded by the decision of the Judicial Committee in (1898) 25 IA 146 (PC) Sadatmand Khan v. Phul Kuer. The Munsif in that case had taken the view that the misrepresentation of the value was not a material irregularity for which a sale could be set aside. His reason was that Section 287 of the old C. P Code (corresponding to Order 21 Rule 66 (2) (a) to (e), CPC 1908) specifically mentioned as to what were material facts to be embodied in the sale proclamation. Value of the property to be sold was not considered such a material fact. Their Lordships rejected it by saying "This is a very mistaken view". Their Lordships' observation on this aspect may be extracted :

Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of those things "which the Court considers material for the purchaser to know", and it is enacted in terms (though express enactment is hardly necessary for such an object) that these things shall be stated as fairly and accurately as possible.

At earlier stage of judgment their Lordships expressed themselves in much stronger terms thus :

. . . . for it is a mis-statement of the value of the property which is so glaring in amount that it can hardly have been made in good faith, and which, however it came to be made, was calculated to mislead possible bidders and to prevent them from offering adequate prices, or from bidding at all. The same view has been taken in Bhairab Chandra Sinha Vs. Kalidhan Roy Choudhury and Others, , Ramizaddin Basar and Others Vs. Naimaddi Basar and Others, , Sitabai Rambhau Marathe Vs. Gangadhar Dhanram Marwadi, , Chandra Bhukhan and Others Vs. Ramdutt Mahto and Others, .

With great respect to the learned Judge in the Gujarat case, I am constrained to say that his Lordship's view attacking the aforesaid Privy Council decision propounding the law as it then stood, is unacceptable. It ploughs the lonely furrow. No other decisions have taken exception to the Privy Council dictum though in the particular facts and circumstances of those cases, different conclusions were reached. It is unnecessary to examine other decisions cited by Mr. Dasgupta in support of the view that mis-statement of valuation is not a material irregularity at all. The true legal position prior to amendment, is that it cannot be said in every case of under-valuation or mis-statement of the value of the property in a sale proclamation that there is a material irregularity which by

itself would be sufficient to set aside the sale. It would depend upon the facts and circumstances of each case.

10. The last point for consideration is whether 25 Ind App 146 (PC) is no longer good law in view of the Proviso. Mr. Dasgupta placed strong reliance on an unreported decision of the Patna High Court in the case of Homeswar Singh v. Maharajadhiraj Sir Kameswar Singh Bahadur A. F. O. O. No. 97 of 1939. D/-1-2-1944 (Pat). Their Lordships observed-

"The effect of this proviso is that the courts are not to estimate the value of the properties to be sold and are prohibited from inserting in the sale proclamation any value other than those, if any, mentioned by the decree-holder and the judgment-debtor and if the value given by the parties is inserted. The Courts must state that they do not vouch for their accuracy. This also shows that the Court now does not consider the value of the property as a material thing which the purchaser ought to know from the sale proclamation and to that extent the case law which set aside sales relying on the provisions in Sub-clause (e) of Sub-rule (2) of Order 21, Rule 66 has no longer any application." This decision is a clear authority for the proposition that Court shall no longer consider the value of the property as a material thing which the purchaser ought to know from the sale proclamation. Their Lordships also laid down in unmistakable terms that the case law which sets aside sales relying on the provisions of Sub-clause (e) of Sub-rule (8) of Rule 66 of Order 21 has no longer any application. To the same effect is the observation in Badri narain Singh Vs. Chander Mauleswar Prasad Narain Singh and Others, though it did not notice the earlier decision. The conclusion of their Lordships seems to be unassailable on an analysis of the Proviso. In the first place, it prohibits the court from inserting in the sale proclamation any value to be determined by itself. Thus the Court has no duty to see to the real value. In the second place, it makes clear that the decree holder or the judgment-debtor or both are not bound to give any value of the property to be inserted in the sale proclamation. Thirdly, if they give any value, the Court would merely insert the same in the sale proclamation with a further declaration that it does not vouch the accuracy of the same. Thus the proviso takes away the effect of the decision of the Privy Council that the value of the property must be inserted as a material fact.

Mr. Mohapatra contended that though it is open to the decree-holder not to give any value to be inserted in the sale-proclamation, it is not open to him to undervalue the price, and that, if he does so, it would constitute either material irregularity or fraud. I find no force in this contention. The purchaser should not look to the sale proclamation as giving an idea of the real value of the property. The object of the Proviso is that value of the property is not to be considered as a material thing. The court sales are thus put on the same footing as private sales. In the case of a private sale, the purchaser makes his own inquiries about the value of the property and settles his bargain. If he purchases a property of a low value at a higher price or vice versa, he cannot make any complaint of material

irregularity or fraud. By the proviso, identical principle has been invoked in the case of court sales. The purchaser is given caution that he should not take the value, mentioned in the sale proclamation, as representing the real value. The law itself makes it clear that whatever be the value inserted in the sale proclamation at the instance of the decree holder or the judgment-debtor, the Court does not vouch the accuracy of the same. It hardly makes any difference whether there is non-mention of the valuation or under-valuation of the property in the sale proclamation. The principle of caveat emptor has been embodied in the proviso.

Mr. Mohapatra then contended that the sale proclamation did not contain any recital that the Court did not vouch the accuracy of the value as prescribed in the Proviso. This omission by itself is not material irregularity. Even if there is absence of such words in the sale proclamation, the purchaser is presumed to know the legal position that the value mentioned in the sale proclamation does not represent the real value and might absolutely have no nexus to the real value.

It was lastly contended by Mr. Mohapatra that as a valuable property has been sold for a paltry sum, the matter may be referred to a Division Bench for examining the correctness of the Patna view. Doubtless this is a hard case; but nothing substantial was urged by Mr. Mohapatra to cast slightest reflection on the correctness of the Patna view so as to justify a reference to a Division Bench. The Rules Committee might, however, examine the desirability of deleting the Orissa Amendment so as to bring the law in conformity with the Privy Council view.

11. In the result, the Civil Revision fails and is dismissed. In the circumstances, parties to bear their own costs throughout.