

(1985) 11 MAD CK 0026
In the Madras High Court

Lakshmi Ammal and Others

APPELLANT

Vs

The Southern India Central Benefit (Private) Ltd. and Another

RESPONDENT

Date of Decision : 08-11-1985

Acts Referred:

Citation : (1986) 99 LW 696 : (1986) 1 MLJ 155

Hon'ble Judges : K.M. Natarajan, J

Bench : Division Bench

Judgement

K.M. Natarajan, J.—The judgment-debtors are the petitioners herein. The facts which are necessary for the disposal of this revision are as follows: The first respondent herein obtained a money decree on 14.10.1978 against the petitioners and in execution of the said money decree, the properties were brought to sale in E.P.No. 80 of 1979 and sold in court auction on 19.10.1980. The second respondent herein is the successful bidder in the auction for Rs. 18,006/-. The sale was confirmed on 10.11.1980. Thereafter the first respondent herein filed an application for issue of a cheque in respect of the decree amount and full satisfaction was also recorded and the execution petition was terminated. The first petitioner is the wife of the second petitioner. The third petitioner is the brother of the second petitioner. They filed R.A.No. 257 of 1981 on 11.3.1981 under Sections 47 and 151 of the CPC for passing an order declaring that the court auction sale held on 10.10.1980 is null and void. According to the petitioners, no notice under Order 21, Rule 66 of the CPC was served on the petitioners before the proclamation was drawn and the sale held without giving such a notice is null and void. It is further contended that they came to know of the court auction sale only on 7.3.1981 when the second respondent approached the first petitioner to hand over possession of the properties. According to the petitioners, originally the upset price was fixed at Rs. 38,000/-and the same was reduced to Rs. 18,000/-without the knowledge of the petitioners, that though the sale was adjourned a number of times for the purpose of reducing the upset price for want of bidders, the petitioners were not served with any notice and that the report of the Amin that the petitioners were not available in the petition

mentioned premises is false and it has been prepared at the instance of the first respondent.

2. The said application was resisted by respondents 1 and 2 and they filed separate counters inter alia contending that the allegations that no notice was taken to the petitioners before proclamation was drawn is false, that the petitioners were fully aware of the proceedings and that it is false to allege that they came to know of the same only on 7.3.1981. It is further contended that since the petitioners were not available in the petition mentioned premises, the Amin has no other go except to serve the notice by affixture. According to them, the value of the property given in the affidavit of the second petitioner is not correct and the property has been sold for a proper price. It is also contended by the first respondent that paper publication was also made prior to the sale on 10.10.1980, besides the substituted service on the petitioners. Lastly it was contended that the application filed under Sections 47 and 151 of the CPC is not maintainable and the petitioners ought to have filed an application under Order 21, Rule 30 of the CPC within the time and the application is hopelessly barred by limitation.

3. In support of the contentions of the petitioners, P.Ws. 1 to 3 were examined and Exs.P-1 to P-31 were marked. On the side of the respondents, R.W.1 (Amin) was examined and no document was exhibited. The learned Principal Sub-Judge, Tirunelveli, enquired into the application and dismissed the same. Aggrieved by the same, this revision is filed.

4. Learned Counsel for the petitioners, Mr. N. Ganapathy, mainly contended that in the instant case no notice was served on the petitioners in the execution at any stage. Even according to the case of the respondents, no notice was served personally, but only affixture service was effected at all the stages. In view of Order 5, Rule 9(2) read with Sub-rule 4(iii) of the Code of Civil Procedure, there is no proper service on the petitioners in respect of the sale and as such the entire proceedings are null and void.

5. Order 5, Rule 9 of the CPC deals with service of summons on the defendant. As per Rule 9(2) of Order 5 of the Code of Civil Procedure, where the summons is returned unserved or the defendant does not appear on the day fixed in the summons, the court may direct the summons, shall be delivered or sent to the proper officer to be served by him or one of his subordinates on the defendant. Sub-rule 4(iii) of Rule 9 of Order 5 of the CPC reads as follows:

Notwithstanding anything contained in Sub-rule (1), where proceedings in Court are taken for:

(i) and (ii)

(iii) bringing to sale any property in execution of a decree or order of Court, notices shall be served only in the manner provided for in Sub-clause (2).

It has to be noted that the said rule was repealed as per S.R.O.C.No. 43/1980

and it was originally substituted in Madras on 27.3.1983. Learned Counsel for the petitioners submitted that in the instant case the decree was passed in 1978 and as such this rule is applicable even though it was repealed in 1980 and that as per the said rule, service of personal notice on the defendant or his subordinate is contemplated and substituted service by affixture is not sufficient compliance. On the other hand, the learned Counsel for the respondents submitted that in the instant case, the Amin who was examined as R.W.I has stated that the petitioners were not available at their usual residence and as such he had no other go except to affix the same at the place of residence. My attention was drawn to the Full Bench decision of this Court reported in Parasurama Odayar Vs. Appadurai Chetty and Others, wherein it was held:

There is no provision in Order 21 as to the manner of service of the notice under Order 21, Rule 36 and hence Order 48, Rule 2 will apply, which means that the provisions of Order 5 relating to the manner of service will apply even to the notice issued under Order 21, Rule 66. Hence, the provisions of Order 5, Rule 19 will apply.

Order 5, Rule 17 of the CPC deals with the procedure when defendant refuses to accept service or cannot be found, the Rule 19 deals with the examination of serving officer by the Court if the return has been verified by the affidavit of the serving officer. In the instant case, the return has been duly sworn in accordance with the procedure contemplated under Order 5, Rule 17. Learned Counsel for the petitioner is a driver employed in the Highways Department at Sankarankoil, 35 miles away, and the third petitioner is a police constable employed at Thalayothu and notices should have been taken to them to the above addresses and the first respondent is fully aware of the same. Further, the first petitioner is residing in the petition-mentioned premises with their children and that the various exhibits filed clearly establish that their children are studying in the same village and that they are residing at the same place and as such the affixture of the notice cannot be accepted. It was also brought to my notice that even though R.W.1 admitted that major womenfolk were there, notices were not served on them and no attempt was made and as such there was no proper notice. Learned Counsel for the petitioner relied on the decision of the Supreme Court reported in C.I.T., Kerala v. T.R. Jervaji Kapasi (1968) 1 S.C.J. 91 and submitted that Order 5, Rule 17 of the CPC prescribes certain conditions on the existence of which alone a summons served by affixing it to 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 may be deemed to be duly served and that those conditions have to be strictly complied with. The proposition of law laid down in the above decision is not disputed. But, the facts in the said case are not applicable to the facts in the present case. In the instant case, in view of the return made by the Amin and his sworn statement and also the evidence of R.W. 1 it cannot be said that there is no valid compliance of the conditions laid down therein.

6. Next we have to consider, even if there is no proper compliance of the conditions and even if there is no proper service of the notice as per Order 5, Rule 9(4) of the Code of Civil Procedure, whether the entire sale is null and void as contended by the learned Counsel for the petitioners. Learned Counsel for the petitioners relied on the decision of this Court reported in Dr. Cherian Vs. P. Ramasami Naidu and Others, wherein Venugopal, J. held:

A sale held in execution of a decree without notice to the judgment-debtor is a nullity and not merely voidable but is void as against the person to whom notice should have been, but was not issued.

On the other hand, the learned Counsel for the respondents drew my attention to the Full Bench decision of this Court reported in A.P.V. Rajendran Vs. S.A. Sundararajan and Others, wherein this Court held:

In view of the said clear pronouncement of the Supreme Court, the earlier decisions of this Court in Ramalingam Pillai Vs. Sankara Iyer (Died) and Others, , Natarajan Vs. Chandmull Amarchand by Power-of-Attorney, K. Milopchand and Another, and Cnanabaranam v. Rathinam (1972) 35 L.W.64 : A.I.R.1973 Mad. 364 in so far as they held that a defect or irregularity in the sale proclamation would not fall under Order 21, Rule 90, CPC as that irregularity precedes the stage of publication and the conduct of the sale cannot be held to be good law. According to the Supreme Court, though the settlement of the sale proclamation precedes the publication and conduct of the sale, in so far as the irregularity in the settlement of sale proclamation relates to the essential steps to be taken by the Court in the matter of publishing and conducting the sale, it has to be taken as an irregularity in the publication itself.

It was finally held:

Though the judgment-debtor had filed the application to set aside the sale u/s 47, it should be treated as an application only under Order 21, Rule 90, Civil Procedure Code, on the facts of the case.

The learned Judges held that the matter has to go back to the executing Court for fresh disposal in the light of the above judgment. The matter was taken to the Supreme Court and their Lordships confirmed the decision of this Court in S.A. Sundararajan Vs. A.P.V. Rajendran, . Their Lordships of the Supreme Court held as follows:

It may be pointed out that when Rule 90 of Order 21, employs the expression "in publishing or conducting the sale", it envisages the proceeding commencing after the order for sale made under Rule 64 of Order 21. The provisions after Rule 64 are provisions relating to publishing and conducting the sale. Settling the proclamation of sale is part of the proceedings for publishing the sale. Rule 65 of Order 21 declares that every sale in execution of a decree shall be conducted by an officer of the Court or a person nominated by the Court, and shall be made by public auction in the manner prescribed. Now the sale will be published relating

to the manner in which the sale is made. Rule 66 of Order 21, is the first step in that behalf. It provides for a proclamation of sale. When drawing up a sale proclamation, Sub-rule (2) of Rule 66 requires that the several matters specified therein be taken into account. Other particulars relating to the sale are prescribed in the succeeding rules of Order 21. In our view, the settling of the sale proclamation is part of the integral process of publishing the sale, and irregularities committed in the process of settling the sale proclamation are irregularities which fall within the amplitude of Rule 90 of Order 21. It may be observed that in *Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others*, the question which this Court was called upon to consider was whether non-compliance with Section 35 of the Bengal Money Lenders Act, 1940 when drawing up the sale proclamation was a mere irregularity. Having held that it was, the Court then considered it in the light of Rule 90 of Order 21.

It is further held:

Whether or not a judgment-debtor, to whom notice had been issued under Rule 66 of Order 21 to participate in the proceeding and who does not do so, should be permitted thereafter to challenge the sale under Rule 90 of Order 21, is a matter to be determined by other considerations. It is sufficient to point out that the application for setting aside the sale on the grounds taken by the appellant is referable to Rule 90 of Order 21, and therefore, not to Section 47.

Prior to the Full Bench, decision of this Court, there were conflicting views about the effect of absence of notice to the judgment-debtor. The decisions which were held to be not good law by the Full Bench are to the effect that want of notice under Order 21, Rule 64 or 66 being a stage anterior to the publication of proclamation of sale or conducting the sale would not fall under Order 21, Rule 99 and therefore the application for setting aside the sale on the ground of material irregularity in the publication and conduct of sale would be made u/s 47 of the Code of Civil Procedure. The above view taken in the three decisions was held to be no longer good law. Applying the ratio laid down in the above Full Bench Decision which was confirmed by the Supreme Court, an application to set aside the sale for want of notice to the judgment-debtor under Order 21, Rule 65(2), would fall only under Order 21, Rule 90 and not u/s 47 of the Code of Civil Procedure, and such an application is not maintainable. Learned Counsel for the petitioners contended that in the above quoted case, the effect of absence of notice did not arise for consideration. On going through the judgment, I find that the Full Bench had an occasion to consider the effect of want of notice under Order 21, Rule 64 or 66 and the earlier decisions of the Division Bench of this Court and made the pronouncements as already stated above.

7. Learned Counsel for the respondents drew my attention to the earlier decision of the Supreme Court reported in *Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others*, which was also relied on in the above quoted Full Bench decision of this Court. In the abovesaid Supreme

Court decision it was held that where there is non-compliance of the provisions of Order 21, Rule 66 the remedy of the judgment-debtor is under Order 21, Rule 90 of the CPC and not u/s 47 of the Code of Civil Procedure. In Babubhai Karirnbhai Jasani and Another Vs. Vora Daudji Amji and Others, the Division Bench consisting of A.D. Desai, J. (as he then was) and Mehta, J. held:

Failure to give notice to the judgment-debtor before settling the terms of the sale proclamation does not render the subsequent proceeding and sale void. It is only a material irregularity in publishing the sale proclamation within the meaning of Rule 90 and the sale could be set aside under that rule only if the judgment-debtor has sustained substantial injury by reason of such irregularity.

Applying the ratio laid down in., the above decisions, it is clear that even if the case of the petitioners that there is no notice under Order 21, Rule 66(2) of the CPC is accepted yet the present application filed under Sections 47 and 151 of the CPC is not sustainable. Further the sale was held on 10.10.1980 and the application to set aside the sale was filed on 11.3.1981, i.e. about five months thereafter, and the application is hopelessly barred by limitation even if it is treated as one under Order 21, Rule 90 of the Code of Civil Procedure. There is absolutely nothing to show that the petitioners sustained any substantial injury also. For all these reasons, I am of the view that the order passed by the courts below is perfectly legal and correct and there is absolutely nothing to show that the said order suffers from any infirmity whatsoever so as to interfere in this revision. Consequently, this revision fails and stands dismissed. There will be no order as to costs.