

(1956) 12 KL CK 0018

In the High Court Of Kerala

Case No : Second Appeal No. 208 of 1955 (E)

Manikka Kunjipennu and Others

APPELLANT

Vs

Narayanan Parameswara Panicker

RESPONDENT

Date of Decision : 12-12-1956

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90
Travancore Civil Courts Act, 1084 — Section 14

Citation : AIR 1957 Ker 74

Hon'ble Judges : N. Varadaraja Iyengar, J

Bench : Single Bench

Advocate : Joseph M. Madathil, for the Appellant; P. Govindan Nair, for the Respondent

Final Decision : Dismissed

Judgement

N. Varadaraja Iyengar, J.

1. This second appeal arises out of an appellate order of the court below refusing to uphold a court sale of immovable property in favour of plaintiff-decree-holder in execution of a small cause decree against the defendants 1 and 2.

2. The Court sale in question took place on 19-4-1122 and concerned a plot of double crop wet land, 34 cents in extent and was for the low sum of Rs. 66 and odd. The 2nd defendant applied on 28-9-1123 u/s 47 and Order 21 Rule 90 C.P.C. for cancellation of the court sale on the ground that the sale was illegal and was attended by fraud and irregularity. The trial court found that the property was worth at least Rs. 340/- and had been grossly under sold; but there was no evidence that the execution proceedings were vitiated by fraud or material irregularity and further that the petition itself was barred as having been filed more than 80 days after the date of the sale. In appeal by the 3rd defendant, in whose favour the rights of the 2nd defendant had devolved in the meanwhile under a Dhananischayam, the lower appellate court held that the sale was attended by fraud and material irregularity and besides the petitioner 2nd

defendant had been kept out of knowledge of his right to apply in time by the fraud of the decree-holder. And in the light of the Munsiff's finding, which it accepted that there was proof of substantial injury, the court below set aside the sale. Hence this second appeal by the plaintiff's legal representatives.

3. Learned counsel for the appellants urges firstly that there is absolutely no legal evidence in support of the case of fraud or material irregularity, whether under Order 21, Rule 90 C.P.C. or u/s 18 of the Limitation Act as set up by the debtor. According to learned counsel, all the notices in execution addressed to defendants 1 and 2 were refused by them and necessarily had to be served by affixture. The process servers who had served the various notices had also not been examined. The 1st defendant was not even a party to the application to set aside the sale. Nor did the 2nd defendant, who applied, examine himself while it was possible. But it is not as if these aspects were omitted to be considered by the court below. They were considered and found to be of no significance in view to other outstanding circumstances. For one thing there was obvious inconsistency in the description of the various houses to which the notices were affixed on ground of alleged refusal. Secondly the upset price mentioned in the proclamation schedule was lower even than that fetched at the auction and therefore very grossly low as contrasted with the value of the property as found by the Munsiff.

4. There was also one matter which the lower appellate court took fresh notice of viz., the defective procedure attendant on the proclamation and sale of immovable property in execution of a small cause decree. Section 14(d) of the Civil Courts Act II of 1084 requires that the court must, before issuing process against immovable property, be satisfied that the judgment-debtor under a small cause decree had no personal property which can be proceeded against. The court shall in all such cases record in its own handwriting its reasons for doing so and in no case shall such execution be allowed unless the decree-holder supports his application by a verified statement as is provided for in the case of plaintiffs under the Code of Civil Procedure. The ruling in *Sivanu Chettiar v. Puthiya Pulavar* 27 TLJ. 657(A), would show that the matter is one of jurisdiction for the executing court. It may be that an affidavit of the decree-holder may be enough and a verified petition might not be essential. It may further be that a specific order of court granting sanction to attach may not be necessary. But it is essential that the court should be satisfied that the judgment-debtor has no sufficient personal property to satisfy the decree. What happened in this case was that the decree-holder in his application for attachment of immovable property only mentioned that if the attachment was not levied immediately, it would be difficult for him to realise the decree-amount. There was no affidavit or verified petition as to non-availability of personal property as required nor was there anything to show that the court bestowed its judicial attention in the matter and gave sanction for the process against immovable property. The court below acted properly in accepting this ground also in aid of its order.

5. On the whole, there is no merit in the second appeal and it is dismissed with costs.