

(1994) 04 MAD CK 0032
In the Madras High Court
Case No : C.R.P. No. 4447 of 1985

M.S. Sundaram and Another	Vs	APPELLANT
Madurai Solaibadra Iyer and Others		RESPONDENT

Date of Decision : 28-04-1994

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, Order 21 Rule 64, Order 21 Rule 66, Order 21 Rule 90, Order 5 Rule 17

Citation : AIR 1995 Mad 125

Hon'ble Judges : Pratap Singh, J

Bench : Single Bench

Advocate : S.S. Sundar for M/s. T.R. Rajagopalan and T.R. Rajaraman, for the Appellant; T.V. Sivakumar, O.V. Baluswami, for Manick K. Ramalingam, for the Respondent

Judgement

1. This civil revision petition is directed against the order passed in E.A. No. 761 of 1983 in E.P. No. 199 of 1978 in O.S. No. 48 of 1973 on the file of Subordinate Judge, Madurai.

2. Short facts are : The petitioners who are defendants 3 and 4 in the suit had filed E.A. 761 of 1983 under Sections 47 and Order 21 Rules 66

and 90 of the Code of Civil Procedure, praying for setting aside the court auction sale held on 10-9-1979 on the following grounds :

The property belongs to joint family of the petitioners and their mother deceased, first defendant. The deceased first defendant was an illiterate lady

and she was living in the property along with respondents 3 and 4. The petitioners used to come to Madurai to see their mother occasionally. The

first petitioner was in Tea Board Service and was serving in the northern towns of India for more than two decades. The second petitioner was at

Madras for more than two decades. The second respondent and her major sons started a transport business in 1971 and obtained the signature of the first defendant, without disclosing the true nature of the document, as if she had deposited title deed as security for the amount of Rs. 20,000/- alleged to have been borrowed under the pronote, signed by the second respondent herein. On that promissory note, suit was laid and decreed ex parte on 16-10-1972. All these things were not known to the first defendant. Later on, the first defendant died in November 1976. Without the knowledge of the petitioners, final decree was passed and in execution proceedings, sale was held on 10-9-1979, in which the property was sold for paltry sum of Rs. 32,000/-. No notice was served upon these petitioners at any point of time. The property was brought to sale with many material irregularities and fraud in publishing and conducting the sale. The petitioners came to know of the above, only a week ago. Hence the petition.

3. Respondents 2 and 4 have tiled objections. The allegations in it are briefly as follows :--

The second defendant in the suit has set up the petitioners to file this petition. The allegations with regard to the suit, passing of preliminary and final decrees are all not true. The allegation that petitioners have succeeded to the estate of the first defendant, as Legal Representatives, is not correct.

The petitioners have no interest whatsoever in the property and their claim to the property is illegal. Their claim that they have no knowledge of the court proceedings all these years is ridiculous. The petition is not maintainable.

4. The 6th respondent/court auction purchaser has filed a statement of objections.

5. After enquiry, learned Subordinate Judge, had dismissed the petition. Aggrieved by the same, this revision petition is filed.

6. Mr. Sundar, learned Counsel appearing for the revision petitioners would submit that the petitioners are living at Madras and that no notice whatsoever was served on the petitioners at any stage of the proceedings and hence the court auction sale is void and liable to be set aside,

7. I have heard of Mr. O. V. Baluswami, for Mr. Manick K. Ramalingam and Mr. T. V. Sivakumar, learned Counsels appearing for the respondents on the above aspects.

8. I have carefully considered the submissions made by the rival Counsel. The petitioners are the sons of deceased first defendant The first

defendant died in February 1976. Thereafter, the petitioners were impleaded as her Legal Representatives and the proceedings continued.

Ultimately, the property was sold in court auction sale on 10-9-1979. The question that falls for consideration is whether the petitioners were

served with the notice, at any stage of the execution proceedings and if not served, what would be the sanctity or legality of the court auction sale

held on 10-9-1979.

9. I shall first examine the evidence, relating to the service of notice of the petitioners. Before proceeding further in this regard. I would like to make

it clear that whatever might be the position prior to the death of the first defendant, after the death of the first defendant, the petitioners who are her

sons, have got a share in the suit property. This would be the position, even assuming that what the petitioners have claimed with regard to their

title to the suit property, prior to the death of the first defendant, is not proved Now, reverting back to the evidence, I shall first consider the

evidence of the first petitioner, who figured as P. W. 1, He has stated that he is living at Madras for more than 18 years and prior to that, he was

serving in Northern India. He would also state that the second petitioner is living at Madras for 25 to 30 years. He would also claim that they were

not served with the notice in the petition filed to implead them, as Legal Representatives of the deceased first defendant and that he came to know

of the sale of the suit property in court auction sale, only in 1983. In cross-examination, he has stated that he came to know of the court auction

sale through his brother-in-law Veeraragavan, who told him so in July 1983. The Accountant of the third respondent figured as R.W. 1. It was

elicited from him in cross-examination that he does not know whether notices were served on the Legal Representatives of Kamalammal. He did

not enquire whether the petitioners were living in the addresses mentioned in the affidavit, filed in support of the application in E. A. No. 327 of

1977. He would also state that he does not remember, whether sale notice was served to the petitioners, in the execution petition; that he verified

the court records and found that the notices were not served on the petitioners. It was also elicited from him that Exes. C1 to C3 are the returned

covers and that he does not know whether he took any further step in this regard. He would admit that in Ex.C4, the court summon was returned

with an endorsement that respondents 3 to 5 in that application were living at Madras and in the Execution Petition summon was not sent to

respondents 3 to 5 to their Madras address. On a scrutiny of Exes. C1 to C3, I find that they were returned with an endorsement ""not known"".

Ex.C4 consists of the returned notices meant for defendants 3 and 4 in the suit viz. petitioners 1 and 2 herein. In it, the return was that they are

living at Madras. Despite this endorsement, notice was not taken to Madras address. So far as Exs. C2 and C3 are concerned those returned

covers show that notice was taken to M. S. Sundaram and Seetharaman, petitioners herein to Venkatachala Mudali Street. Triplicane. Madras.

No door No, was given. There is nothing to show that they were living in Venkatachala Mudali Street, Triplicane, Madras. As I have already

indicated, the endorsement in the postal cover is ""not known"". The above documents and the evidence tendered by P.W. 1 and R.W. 1 would

clearly go to show that there was no service on the petitioners in the execution proceedings.

10. In the typed set, a copy of the execution petition and the endorsement of learned Subordinate Judge on various dates on which the case was

posted is filed. That would show that address of the petitioners is given, as if they are living at Madurai. Notice was not served on them. So

substituted service was ordered by publication in one issue of MALAI MURASU. Substituted service is provided in Order 5, Rule 20 of the

Code of Civil Procedure. As per the said provision, where the court is satisfied that there is reason to believe that the defendant is keeping out of

the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way. the Court shall order

the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house..... Under Order 5. R.20(1)(a) where the court

acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in

which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain. In the instant case,

there is no evidence to show that the petitioners herein were living in the locality in which MALAI MURASU was circulated. There is neither any

material to show that the court was satisfied that there was reason to believe that the petitioners were keeping out of the way for the purpose of

avoiding service or for any other reason summons could not be served in the ordinary way. The notice on 1-8-1977 by the learned Judge reads as

follows:--

S. S. petition returned S. S. petition represented today. S. S. by publication in one issue of Malaimurasu 22-8-77"".

There is absolutely no indication to show that any of the pre-requisite which is necessary for ordering substituted service was available in this case.

Thus the resultant position is that there was no personal service neither there is any substituted service, as per the provisions of Order 5, Rule 20 of

the Code of Civil Procedure, on the petitioners, at any time during the execution proceedings which ultimately culminated in the sale of the suit

property, in the court auction sale.

11. I shall now proceed to consider the legality of the court auction sale held on 10-9-1979, on the above facts. In Natarajan Vs. Chandmull

Amarchand by Power-of-Attorney, K. Milopchand and Another, , a Division Bench of this Court had held in paragraph 10 as follows :

Now, though in Rule 64 before the amendment in 1963 the words ""after notice to the decree-holder and the judgment-debtor"" were not there, it

is clear from first principles that such a notice was necessary, particularly in a case where no previous notice under Order 21, Rule 22 was

necessary in view of the fact that the execution petition was filed within two years of the order against the judgment-debtor on the previous

execution petition. It is very important that the judgment-debtor should show that his property is going to be sold, and, if his property is ordered to

be sold without notice to him, it would be most unjust and unfair to him, and it could, indeed, be said that the sale without such notice is a nullity.

Though there were no words specifically prescribing notice to the judgment-debtor in Rule 64 as it stood before the amendment of 10th April,

1963, it is a necessary implication from first principles that, before ordering that any property attached shall be sold, notice should go to the

judgment-debtor, particularly in a case where notice had not already gone to him under Order 21. Rule 22, because of the proviso to that rule. The

necessity for such a notice is no doubt made clear by the amendment of 10th

April. 1963, but that was necessarily implicit even in the rule as it originally stood.

12. In *Dr. Cherian Vs. P. Ramasami Naidu and Others*, Venugopal J. has held that 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.

Learned Judge had referred to the judgment of the Full Bench in C.M.A. Nos. 386/75. 2 and 3.76 which held as follows :--

From the judgment of the Full Bench cited supra, it can be seen that if a sale is sought to be set aside on the ground of material irregularity in

publishing and conducting the sale, or on the ground that there is defect or irregularity in the sale proclamation, the petition would fall within the

purview of Order 21, Rule 90. But if the sale is claimed to be void for want of notice under Order 21. Rule 22 or 64 or 66, then Section 47 has to

be invoked. In the present case, the first respondent has alleged that no notice of sale proceedings had been served on him. As the sale is claimed

to be void for want of proper service of notice under Order 21, Rules 64 and 66, the present petition, E.A. No. 614 of 1972 falls u/s 47, Civil

Procedure Code.

This ruling applies squarely to the facts of this case, before me.

13. In *Lakshmi Ammal v. The Southern India Central Benefits (P) Ltd.* (1986) 99 Mad LW 696, on facts learned Judge had held that there was a

proper compliance of the provisions of Order 5, Rule 17, C.P.C. and so there was service of summons on the judgment-debtor. Learned Judge

had held that the application to set aside the sale for want of notice to the judgment-debtor under Order 21, Rule 66(2) would fall only under

Order 21, Rule 90 and not u/s 47, C.P.C.

14. In that case, an application was filed under Sections 47 and 151, C.P.C. and so it was held not maintainable. The facts of the case before me

are totally different and hence this ruling would not apply to the facts of this case before me.

15. The court below had held in its order that the petitioners must have knowledge of the execution proceedings because they were coming to

Madurai often and they would not have failed to know it. This is only an assumption and not based on any material evidence. On the side of the

petitioners, Exs. A1 to A21 were filed to show that they are living at Madras. The address of M. S. Sundaram, viz. the first petitioner is No. 15.

Venkatachala Chetty Street, Madras-5. The address given in Ex. C2 is M. S. Sundaram, Venkatachala Mudali Street, Triplieane, Madras, The

name of the street is wrong and no door No. is given in Ex. C2. So it is no wonder that the notices sent by post were retruned with an endowment

not known"". As such F.X3. A1 to A21 would go to fortify the petitioners" cast that they were living at Madras, during the relevant time. On the

face of these materials, the finding of the court below that petitioner must have got knowledge of the execution of the decree is erroneous and

cannot be sustained.

16. The resultant position is that the petitioners were not served with any notice of the execution proceedings at any time. There is no acceptable

evidence to show that they have got knowledge of the execution proceedings. Without any notice to the judgment-debtor, if the property is sold in

court auction, it is a nullity and it is liable to be set aside. Hence the petition filed in the court below deserves to be allowed. In the result, this civil

revision petition is allowed and the order of the court below in E.A.761 of 1983 in E.P. 199 of 1978 in O.S. 48 of 1973 on the file of Sub Court,

Madurai, is set aside and it shall stand allowed. No costs.

17. Revision allowed.