
(1914) 04 MAD CK 0061
In the Madras High Court

Pasumarti Payidanna

APPELLANT

Vs

Ganti Lakshminarasamma and Others

RESPONDENT

Date of Decision : 17-04-1914

Acts Referred:

Citation : (1915) ILR (Mad) 1076 : (1915) 28 MLJ 525

Hon'ble Judges : Wallis, J;Sadasiva Aiyar, J

Bench : Full Bench

Judgement

Wallis, J.—This is a Second Appeal from the decree of the Lower Courts declaring that the sale in execution of the decree in O.S. No. 559 of 1903 on the file of the District Munsif of Vizagapatam was not binding on the plaintiff. The present plaint was presented as a petition in that suit, but was registered as a plaint in a separate suit under the new provision in Section 47, Civil Procedure Code.

2. The facts may be briefly stated. The present 1st defendant had obtained decrees against plaintiff's husband in two suits 555 and 559 of 1903, and after his death his two widows, the plaintiff and the 2nd defendant, were brought on as his legal representatives by the Court of the District Munsif of Rajam to which the decrees had been transferred for execution. One of the grounds taken by the plaintiff is that the Court to which the decrees had been transferred for execution was not the proper Court to bring on legal representatives of a deceased party, as decided by the Full Bench in Swaminatha Ayyar v. Vaidyanatha Sastri ILR (1905) M. 466 and that the order was a nullity. It is, however, unnecessary to consider this point, as the sale has been held not to be binding on another ground. The main objection to the sale is that, as found by the Lower Courts, at the time when the plaintiff and the 2nd defendant, the co-widow were brought on the record and at the date of the sale on 19-10-06 the plaintiff was a minor only attaining her majority in July 1907, while the other widow, the 2nd defendant had ceased to have any interest in the estate of her deceased husband. The plaintiff was admittedly impleaded as a major though, according to the findings, the 1st defendant decree-holder and the 3rd defendant, the auction

purchaser both knew she was a minor. The attached properties which were subject to mortgages were first put up for sale by the 1st defendant in execution of his decree in O.S. No. 555 of 1903 on the 15th October 1906. The properties were put up at Rs. 600 and the sale list Exhibit H shows that there were no bidders on the 15th, 16th, and 17th and that on the 18th the present 3rd defendant bid 601. This sale was stopped at the instance, it is said, of the 3rd defendant because certain other decree-holders had applied for rateable distribution in the suit, a matter which was no business of his; and on the following day, the 19th, the 1st defendant applied orally to the District Munsif in the other suit 559 of 1903, and, on the plea that there were no bidders, got the reserve price reduced to Rs. 200, without telling the District Munsif of the sale in O.S. No. 555 of 1903 and the bid of 601 by the 3rd defendant. The properties were then put up to sale in O.S. No. 559 of 1903 and knocked down to the 3rd defendant for Rs. 201.

3. The Subordinate Judge has found, in my opinion rightly, that this was a fraud upon the plaintiff. The properties should have been sold in execution of the decree in O.S. No. 555 of 1903 in which they were first put up for sale, then the 1st defendant, as decree-holder in O.S. No. 559 could if so minded have applied for rateable distribution of the sale proceeds; and the conduct of the 1st defendant and the 3rd defendant in proceeding with the sale in the second suit and getting the reserve price reduced by suppressing from the court what had happened at the first sale amounted to a fraud upon the plaintiff. This fraud is not without some bearing on the main issue in the case, because, in view of what had happened in the absence of any proper representation of the judgment-debtor, it cannot be said that the plaintiff was not prejudiced by the omission to bring her properly on the record.

4. The respondent relies on two decisions of the Privy Council in *Khairajmal v. Daim* ILR (1904) C. 315 and *Rashidun Nisa v. Muhammad Ismail Khan* (1909) ILR 31 A. 572. (P.C.) to show that the sales are wholly void against the plaintiff because she was not properly represented, while the appellant relies on the decision of the Privy Council in *Malkarjun v. Narhari* (1900) ILR 25 B. 337 (P.C.) and on certain observations in *Kadir Mohideen Marakkayar v. Muthukrishna Ayyar* ILR (1902) M. 230. In my opinion the decision in *Malkarjun v. Narhari* (1900) ILR 25 B. 337 (P.C.) has no bearing on the present case. In that case a party who was brought on as legal representative objected that he was not the legal representative but the Court decided that he was; and their Lordships held that, in view of this decision which was within the jurisdiction of the Court the sale could not be treated as a nullity even against the real representatives of the deceased who afterwards came forward. Their Lordships also held that, if the suit could be regarded as one to set aside the sale, it was barred by Article 12 of the Limitation Act.

5. On the other hand in *Khairajmal v. Daim* ILR (1904) C. 296 one Amirbaksh, a minor, the legal representative of one Naurez, was sued by his guardian one

Alahnawaz, who was not his guardian in fact, and had not been appointed his guardian ad litem, and the Court held that Court sales in execution of the decrees obtained in these suits were not binding on the estate of the deceased Naurez or the minor, but were without jurisdiction and null and void. In the course of the judgment, their Lordships no doubt say that the absence from the record of one of the legal representatives of a deceased judgment-debtor is not always sufficient reason for disturbing judicial sales which otherwise have been properly conducted. " The Indian Courts " their Lordships say " have properly exercised a wide discretion in allowing the estate of a deceased debtor to be represented by one member of the family, and in refusing to disturb judicial sales on the mere ground that some members of the family, who were minors were not made parties to the proceedings, if it appears that there was a debt justly due from the deceased, and no prejudice is shown to the absent minors."--But these observations do not cover such a case as the present in which according to the findings, the other widow who was brought on the record had ceased to have any interest in her husband's estate, and the sale itself was a fraudulent one. An endeavour has been made, to distinguish that case from the present on the ground that the decrees themselves were nullities owing to the minor defendant not having been properly represented, whereas in the present case the decrees were duly obtained against the deceased judgment-debtor. The still more recent decision of their Lordships in *Rashidun Nisa v. Muhammad Ismail Khan* ILR (1909) A. 572 shows that there is no substance in this distinction. In that case, as in the present, the suit was brought to declare the nullity as against the plaintiff of certain sales in execution of decrees against a deceased person in which the minor plaintiff had been brought on as legal representative of the deceased judgment-debtor.

6. In two instances she had been represented by a woman who, as such, was not qualified to act as guardian ad litem, and in the third by another person on whose interests were adverse.

7. Their Lordships held that the plaintiff had never been a party to any of these suits in the proper sense of the term. They further held that a minor brought on in this defective manner was not a party to the suit within the meaning of Section 244--now Section 47 C.P.C. and did not come within the operation of that section.

8. It follows from this decision that the minor here, who had no guardian ad litem at all, was not a party to the suit in which the sale was made, and that she was entitled to bring the present suit to declare it not binding without regard to the provisions of Section 47 C.P.C. It follows also from the two decisions last mentioned that the plaintiff, not having been a party to that suit and not having been sufficiently represented by any one who was a party seeing that the other widow had ceased to have any interest in the estate, the sale was not binding on her, and does not require to be set aside. What has been already said disposes of the question of limitation as the new article 166 and article 12 are alike

inapplicable, and the suit which was instituted within three years of the plaintiff's attainment of majority is not barred. The appeal is dismissed with costs.

Sadasiva Aiyar, J.

9. The 3rd defendant is the appellant. The plaintiff is the principal respondent. The material facts might be shortly stated thus :

10. The plaintiff is the 2nd widow of the judgment-debtor in O.S. No. 559 of 1903. The decree in that suit was transferred from Vizianagaram District Munsif's Court to the Rajam District Munsif's Court for execution. The Rajam District Munsif's Court on the application of the decree-holder (the present 1st defendant) allowed execution against the plaintiff (junior widow) and the 2nd defendant (senior widow). u/s 234 of the old Code (Section 50, Clause 1 of the present Code) it was the Court which passed the decree to which the application by the decree-holder to execute the decree against the widows of the judgment-debtor ought to have been made and it is that Court which ought to have passed the order allowing execution. However the Rajam District Munsif's Court somehow passed the order.

11. Another defect in that order was that, while the two widows jointly represented the estate of the deceased judgment-debtor (each of them representing half the said interest) the decree-holder admitting this fact and knowing that the plaintiff (junior widow) was a minor, represented to the Rajam District Munsif's Court that she was a major, brought her on record as a major, and conducted execution proceedings against her and brought to sale, the plaintiff's properties including her moiety of the interest therein as if she was a major. The 3rd defendant purchased the two moieties of the two widows in the Court auction sale he also knowing that she (the plaintiff) was a minor. The purchaser (3rd defendant) and the decree-holder (the 1st defendant) was also guilty of some other fraudulent acts (as found by the lower appellate Court) in connection with this Court auction sale.

12. The sale took place on 19-10-1906 and it was confirmed on the 23rd January 1907. The present suit was brought on the 13th March 1909 praying for the following reliefs: (a) that the Court auction sale of 19-10-1906 may be set aside (b) that it may be declared invalid (c) that such further or other reliefs might be granted (d) that costs might be awarded.

13. The Lower Courts have granted the reliefs prayed for by the plaintiff. I ought to have mentioned that the plaintiff asked for the above reliefs, not by a plaint in a regular suit but by an application put in u/s 47 of the Civil Procedure Code, which application was converted into a suit by the District Munsif's Court of Rajam.

14. So far as the merits are concerned, I need only say that on the findings of the lower Appellate Court the plaintiff was entitled to a decree as the Court auction sale was brought about by the fraud of the decree-holder and the Court

auction purchaser (a fraud having two branches, one directed against the plaintiff, the junior widow of the judgment-debtor, the other directed against the executing Court which was wilfully kept in ignorance of the fact of the plaintiff's minority and of the offer of the Court auction purchaser in another suit (the decree in which was simultaneously executed) of three times the purchase-money for which it was ultimately knocked down. The plaintiff also relied on the contention that the District Munsif's Court of Rajam had no jurisdiction to allow execution against her as the legal representative of her husband as that Court was not the Court which passed the decree. Having regard, however, to the decision of Benson and Miller JJ., in *Thamboo Pillai v. Sriramulu Naidu* (1907) 17 M.L.J. 300 to the effect that an order of the executing Court allowing execution against the legal representatives of the judgment-debtor is not void in other words, that the defect of jurisdiction in the executing Court is not such a defect as makes its "order wholly ineffectual, and I do not think that the plaintiff is entitled to succeed on that technical ground alone.

15. Another ground on which the plaintiff (respondent) asks us to uphold the decision of the lower Court is that as the plaintiff was not represented by a guardian in the execution proceedings she was no party at all to the proceedings and the sale thereunder, that it is only a person who was a party to the execution proceedings that is obliged to set them aside and that a person in the position of a stranger to the proceedings need only obtain a declaration that the proceedings have not affected her rights. Though the plaintiff also prayed in her plaint for setting aside the sale, that prayer may be treated as a surplusage and the suit may be treated as a mere suit for a declaration of the invalidity of the sale as against the plaintiff's rights in her husband's properties.

16. In answer to this contention of the plaintiff, the appellant urged that according to the decision of the Privy Council in *Malkarjun v. Narhari* ILR (1900) B. 337 the legal representative of a deceased judgment-debtor ought to have the execution sale set aside by proper proceedings even though he was not made a party to the execution proceedings and even though a wrong party has been joined as such legal representative; that on similar reasoning, a minor who was brought in as legal representative, but for whom a guardian was not appointed must also have the sale set aside by proper proceedings and should not be allowed to treat it as invalid as against her without a positive cancellation of the sale and that this rule of law applies a fortiori in a case like the present where a co-widow, one of the legal representatives was a major and was on the record. The rejoinder of plaintiff to this contention of appellant is that though in the absence of fraud or collusion, where a Court and a decree-holder treat a person who is not the legal representative of the deceased judgment-debtor as such legal representative or treat one of several legal representatives and conduct execution proceedings, such execution proceedings ought first to be set aside by the true legal--representative or by those legal representatives who had not been added as such by proper proceedings, that that rule does not apply to a case where the decree-holder and the Court did purport to bring in the proper legal

representative (or one of the proper legal representatives) who was a minor as representing respectively the whole (or a portion, of the estate of the deceased judgment-debtor, but had not put him or her properly on the record by appointing a guardian to act for him or her in the execution proceedings and that this non-applicability of the rule laid down in *Malkarjun v. Narhari* ILR (1900) B. 337 to such a case becomes more pronounced as in this case, it was through the decree-holder's fraud and not through his mere ignorance that the minor legal representative was not represented by a guardian. I think that this contention of the plaintiff in rejoinder ought to be accepted. In the Privy Council case in *Rashid-un-nisa v. Muhammad Ismail Khan* ILR (1909) A. 572 36 I.A 168 not only the decrees obtained against a minor without a proper guardian having been appointed for her but even Court auction sales held the interests belonging to a minor legal representative (among the several legal representatives of a deceased judgment-debtor) were treated and declared invalid in the suit brought by the said legal representative. Mr. V. Ramesam who partly argued the appellant's case with acuteness and persistence contended that that case in *Rashid-un-nisa v. Muhammad Ismail Khan* ILR (1909) A. 572 : 36 I.A 168 did not decide that even such a minor legal representative need not have the sale set aside by proper legal proceedings and need only sue for the declaration of the invalidity of the Court auction sales as against her interests, I have carefully read through that judgment. In the Court of first instance in that case, the suit seems to have been brought (see the report at page 572) for a declaration that the decrees and sales were invalid and also for the relief that they should be set aside so far as the plaintiff was concerned. Thus, as in the present case, there seem to have been prayers for a declaration of invalidity and also for setting aside. It is not, of course, surprising that plaintiffs in such cases are not clear in their own minds as to whether there is a necessity for a positive cancellation through court of such sales and decrees or whether mere declaration will do when learned gentlemen of the bar are able to put forward plausible arguments for both views. In the present case the plaintiff has been careful to add also a prayer for "further and proper reliefs which the court may deem fit." In that Privy Council case in *Rashid-un-nisa v. Muhammad Ismail Khan* ILR (1909) A. 572 the Subordinate Judge seems to have given both the reliefs (see page 575) which reliefs are however spoken of by the reporter as "the relief she" (the plaintiff) "claimed." Their Lordships of the Privy Council do not make any definite pronouncement on the question whether the sales were void as against the plaintiff and need not therefore be set aside and whether therefore a mere declaration of the invalidity will do or whether they were only voidable by the plaintiff as regards her interests and whether therefore she should ask in the suit for a relief as to their cancellation at page 583, their Lordships simply restore the decree of the Subordinate Judge.

17. While in the case in *Malkarjan v. Narhari* ILR (1900) B. 337 the estate of the deceased judgment-debtor could be treated (owing to the wrong order of the court which had jurisdiction to pass that order) as sufficiently represented in

execution proceedings by the wrong legal representative and hence that the tight legal representative should have the sale set aside by taking proper proceedings and could not treat such a sale as completely void, a legal representative who was a minor not represented by a guardian and who could therefore not act at all in the proceedings for the protection of the interests of the estate should be treated as no party at all to the proceedings, that the interest in the estate represented by her should also be treated as not put in a position to be legally dealt with by the proceedings in the executing Court and that such a minor legal representative need not bring a suit to have execution proceedings set aside and might properly content herself with a prayer for declaration of the invalidity of the execution proceedings as against her and as against the interests she possessed in the deceased judgment-debtor's estate.

18. I have to deal finally with the contention that the plaintiff's only remedy was by an application under Order 21, Rule 90 (old Section 311) of the CPC to have the execution sale set aside and that that application is barred by limitation as not having been brought within the 30 days allowed for that purpose by article 166 of the Limitation Act. As I have remarked before in this case an application was put in by the plaintiff u/s 47 of the CPC and this suit arose out of the transformation of that application into a plaint. Before Section 311 of the CPC was amended and re-enacted as Order 21, Rule 90 of the Civil Procedure Code, applications to set aside execution sales for fraud were treated as coming u/s 244 and not u/s 311. By the amended provisions in Order 21, Rule 93, an application to set aside an execution sale for fraud was put on the same footing as an application to set aside an execution sale on the ground of material irregularity. It seems no doubt hard upon a judgment-debtor whose properties have been sold for a song by the fraud of the decree-holder that he should be compelled to come in within 30 days though he might not have known of the fraud till after the 30 days had expired. Section 18 of the Limitation Act would not help him in getting an extension of the 30 days unless, after the date of the fraudulent sale the decree-holder and the purchaser kept him by fraud from the knowledge of his right to make an application, especially, where the Court auction purchaser has joined the decree-holder in bringing about a fraudulent sale does not seem a denial of justice to hold that the judgment-debtor should apply within 30 days of the sale to have it set aside. But I do not see my way to get over the plain words of article 166 of the Limitation Act and I feel myself constrained to hold that if this suit is treated as an application to set aside the sale as distinguished from a suit for a declaration of the invalidity of the sale as against the plaintiff's rights it must be treated as barred by limitation. So far as the suit is for the declaration of the invalidity of the sale, it is of course not barred by limitation. The decretal portion of the judgment of the District Munsif (see page 15 of the printed pleadings) and the decree of the District Munsif (See page 38) merely give such a declaration and there is no decree directing the sale to be set aside and hence the decree seems to me to be quite correct. As regards those hard cases which I just now referred to, if the fraud was only on the part of

the decree-holder and not of the Court auction purchaser, I think the Legislature intended that a bona fide court auction purchaser should be protected after 30 days, and that an application to set aside the sale should be brought within 30 days of the sale even though the judgment-debtor was ignorant of the sale and of the decree-holder's fraud which brought about the sale. The judgment-debtor in such a case ought to be left to his remedy for damages caused to him by the decree-holder's fraud.

19. The case where both the decree-holder and the Court auction purchaser have been guilty of fraud raises a question of greater difficulty and nicety. Is it reasonable to hold that even in such a case the judgment-debtor should only sue them for damages for the fraud after the expiry of the 30 days and cannot get back his property which had been sold in the Court auction through the fraud of both the decree-holder and the purchaser?--After anxious consideration and with great diffidence, I am inclined to hold that the judgment-debtor even in such a case cannot apply under Order 21, Rule 90 after the expiry of the 30 days for setting aside that sale. As regards the relief for the setting aside of the sale, the procedure pointed out by the legislature, is only by an application under Order 21, Rule 90. It may be that other appropriate reliefs which in justice are due to the judgment-debtor to get rid of the effects of the fraud practised by the Court auction purchaser, may be open to him by instituting a suit praying for such other reliefs. I do not wish to hold that the courts are powerless to imagine, invent, and grant other appropriate reliefs in such cases. It may be that the Court without setting aside the sale can give an injunction to the Court auction purchaser to reconvey the property to the judgment-debtor. Such injunction would have an effect similar to the effect of a decree for specific performance of a contract to sell. The hands of courts of justice are not tied in these matters simply because, to support the grant of a particular appropriate relief, no exact precedent could be quoted. As regards a suit for such other appropriate reliefs that suit would be governed by Article 95 of the Limitation Act which gives three years from when the fraud becomes known to the party wronged. In the result I would also dismiss the appeal with costs.