

(1960) 05 KL CK 0004
In the High Court Of Kerala
Case No : A.S. No. 264 of 1956 (E)

Paulose Varghese and Others

APPELLANT

Vs

Balagangadara Thilak and Others
 Balagangadara
Thilak and Others Vs Paulose Varghese and Others

RESPONDENT

Date of Decision : 27-05-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 22, Order 21 Rule 90, Order 32
Rule 4

Citation : AIR 1961 Ker 172

Hon'ble Judges : T.K. Joseph, J;M.S. Menon, J

Bench : Division Bench

Advocate : M.T. Paikaday, T.N. Subramonia Iyer, S. Subramonia Iyer, V. Sankara Menon, for the Appellant;

Final Decision : Partly Allowed

Judgement

Joseph, J.—The suit in which this appeal has been brought was one for a declaration that the sale in execution of the decree in O. S. No. 919 of 1111 of the District Munsiff's Court of Irinjalakuda was void and for recovery of possession of the property on payment of the mortgage money, for the realisation of which the said decree was obtained. The Immovable property which forms the subject-matter of the suit belonged to one Velayudhan Nail who executed a simple mortgage for Rs. 1000 In favour of the first defendant.

The latter sued in O. S. No. 919 of 1111 for recovery of the mortgage money and obtained a decree. Velayudhan Nair applied for scaling down the debt under the Cochin Agriculturists Relief Act and the application was allowed. The decree-holder preferred an appeal and while the same was pending in the District Court, Velayudhan Nair died. His wife Karthiayini Amma and his children (Plaintiffs 1 to 4 and deceased Radha-krishnan) were impleaded as his legal representatives.

After the decision of the appeal the first defendant applied for execution in 1117 and the property was sold on 11-4-1118. The second defendant purchased the

property in court-sale and by successive transfers the same became vested in the third defendant. The fifth plaintiff in this suit is a child born to Karthiayini Amma after her husband's death and according to the plaintiffs, the fifth plaintiff was born on 3-12-1115. Karthiayini Amma became insane later and she died after the date of the court-sale.

The main grounds on which the plaintiffs seek relief are that Karthiayini Amma and her minor children were not properly represented in execution proceedings, that the fifth plaintiff was not brought on the array of parties, that Radhakrishnan, one of the sons of Velayudhan Nair died in Medom 1117 and his legal representatives were not brought on record, that the property was sold for a grossly inadequate price and that the sale was void. On these allegations the plaintiffs sought a declaration that the sale was inoperative. They also prayed for recovery of possession of the property with mesne profits on payment of the mortgage money.

2. The third defendant contended that the fifth plaintiff was an illegitimate child of Karthiayini Amma and was not entitled to any interest in the property, that Karthiayini Amma and the minor children were properly represented in the execution proceedings, that Radhakrishnan did not die in 1117 and that the sale was properly conducted. The third defendant died during the pendency of the suit in the lower court and his legal representatives were impleaded as defendants 4 to 7 and 8 to 12. The fourth defendant filed a written statement adopting the contentions of the third defendant and further contending that he was the sole heir of the third defendant.

3. The Court below held that Karthiayini Amma and her minor children were properly represented in execution proceedings, that the fifth plaintiff was the daughter of Velayudhan Nair born on 3-12-1115, that the omission to implead her in execution rendered the sale void, that Radhakrishnan died in Medom 1117, that his heirs were not impleaded and that the property was sold for a grossly inadequate price.

The sale in respect of the entire property was therefore declared to be void and inoperative and the plaintiffs were given a decree for recovery of possession of the property with mesne profits on payment of the mortgage money and interest as well as value of improvements effected by the third defendant. Defendants 4 to 12 have therefore preferred this appeal and the plaintiffs have filed a memorandum of cross objection objecting to the finding against them and claiming that the decree should be drafted in accordance with the judgment.

4. The question regarding the representation of Karthiayini Amma and her minor children in execution proceedings in the earlier suit may be considered first. The legal representatives of Velayudhan Nair were brought on record and a guardian appointed for them in the appeal relating to scaling down of the debt. The decree-holder at first applied that one Narayana Pillai, a brother of Karthiayini Amma, be appointed as guardian.

He could not be served, and the decree-holder applied for the appointment of an officer of the Court as guardian. The Nazir of the Court was accordingly appointed as guardian. We do not see any ground invalidating the appointment of the Nazir as guardian and there is no evidence to show that he was guilty of fraud, collusion or negligence. We confirm the finding of the lower Court that Karthiayini Amma and plaintiffs 1 to 4 were properly represented in the execution proceedings.

5. There is satisfactory evidence to show that the fifth plaintiff was born on 3-12-1115 and the Court below has rightly rejected the defence case that Velayudhan Nair was not the father of the child. The evidence adduced by the plaintiffs on this point consists of the testimony of persons who are competent to speak on the point while the defence evidence is of a vague nature.

6. As regards the death of Radhakrishnan also the defence had no specific case on the point. Except for a vague allegation that he died in 1117, the defence had no case as to when he died. We do not see any reason to reject the evidence adduced by the plaintiffs on this point and we accept the finding that he died in Medom 1117.

7. The validity of the sale has to be considered in the light of the above findings. It was conceded that if the fifth plaintiff was born on 3-12-1115 the Court had no jurisdiction to sell her share in the property without impleading her in execution. The position contended for by the appellants is that the omission to implead the fifth plaintiff would not render the sale of the whole property void and the lack of jurisdiction, if at all, is only in respect of her share. *Khierajmal v. Daim* ILR 32 Cal 296 (PC) is authority for the position that in such a case the sale would be without jurisdiction only in respect of the share of the person who was not a party to the proceedings. Lord Davey observed:-

"The question, therefore, is whether the equity of redemption not only purported to be, but was in fact sold under the decrees. Their Lordships agree that the sales cannot be treated as void or now be avoided on the grounds of any mere irregularities of procedure in obtaining the decrees or in the execution of them. But on the other hand the Court had no jurisdiction, to sell the property of persons who were not parties to the proceedings or properly represented on the record as against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for these elementary propositions it may be found in the judgment of Sir Barnes Peacock in *Kishen Chunder Ghose v. Ashoorun* (1863) 1 MLJ 647."

This view was adopted by the Calcutta High Court in a later case, *Manindra Chandra Nandi Vs. Rahatannessa Bibi and Others*, We therefore hold that the sale of the fifth plaintiff's 1/7th share was without jurisdiction.

8. Another point which arises for consideration is the effect of the omission to issue a notice under Rule 22 of Order 21 on the death of Radhakrishnan before

the date of sale in execution. It is contended on behalf of the plaintiffs respondents that such notice was necessary even though Radhakrishnan's legal representatives were his mother, brothers and sisters who were already on record. Order 21, Rule 22 provides that where an application for execution is made against the legal representative of a party to a decree, the Court executing the decree should issue a notice to the person against whom execution is applied for, requiring him to show cause why the decree should not be executed against him.

Though there was doubt at one time whether the omission to issue such a notice affected the jurisdiction of the Court to sell the property which devolved on the legal representatives of a deceased judgment-debtor it has been consistently held after the Privy Council decision in *Raghunath Das v. Simdar Das* ILR 42 Cal 72 : (AIR 1914 SC 129) that the Court acquires jurisdiction to sell, only after issuing such a notice. It has to be considered what the position is, on the basis of this principle.

9. The party to the decree who died before realisation of the amount decreed was Velayudhan Nair. He died during the pendency of the appeal relating to the scaling down of the debt and his widow and children other than the fifth plaintiff were impleaded in appeal. The decree-holder applied for execution on 18-4-1117 and notice under Order 21 Rule 22 was issued to the legal representatives brought on record.

It is seen from Ext. XXVII that the notice to the minor children of Velayudhan Nair including Radhakrishnan was served on their guardian, the Nazir of the Court on 25-4-1117. No objection was raised and notice to settle the proclamation was thereafter issued. Radhakrishnan died only in Medom 1117, long after the service of notice under Order 21, Rule 22. His share devolved on his mother, brothers and sisters who had already been served with the notice under Order 21, Rule 22. It is true that another notice under the same rule was not issued to them after Radhakrishnan's death, but it cannot be contended that the Court had no jurisdiction to sell the property, as the decree which was being executed was one against Velayudhan Nair whose legal representatives on record had already received such a notice.

So far as the legal representatives of Velayudhan Nair who were parties to the execution proceedings are concerned there was no lack of jurisdiction to sell the property in execution of the decree against Velayudhan Nair. Learned counsel for the respondents was not able to show us any decision which has gone to the extent of holding that when a legal representative of a party to the decree who has been served with notice under Order 21, Rule 22 dies and the legal representatives of such deceased legal representative are parties to the execution proceedings but have (not ?) received notice under Order 21, Rule 22 the subsequent sale of the original judgment-debtor's property would be without jurisdiction. There are observations in the judgment of Madhavan Nair, J., in *M.L.M. Ramanathan Chettiar Vs. Ramanathan Chettiar and Others*, which support

the position that a further notice under Order 21, Rule 22 is unnecessary when such a legal representative dies during the pendency of the execution.

10. The object of the notice sent to the legal representatives of Velayudhan Nair was to show cause why his property which devolved on them on his death should not be sold in execution of the decree against him. Such notice having been issued and accepted, a further notice was unnecessary on the death of Radhakrishnan. The matter may be viewed in another way also. The proclamation was to sell the property which belonged to the widow and children and it cannot be disputed that on the day of the sale the property belonged to them as well as the fifth plaintiff in this suit. The sale must therefore be held valid and operative so far as the shares of the widow and children who were made parties to the execution.

11. This conclusion will not affect the share of the fifth plaintiff who was neither made a party to the execution proceedings nor served with notice under Order 21, Rule 22. On the death of Velayudhan Nair the fifth plaintiff got 1/7th share and on Radhakrishnan's death this became augmented by a 1/6th of Radhakrishnan's 1/7th share. Thus, on the date of sale the fifth plaintiff had 7/42 (or 1/6th) share in the property. The sale of this share was without jurisdiction and must be held to be inoperative.

12. It follows from what has been stated above that the sale must be held valid in respect of 5/6th share in the property and is inoperative only in respect of the fifth plaintiff's 1/6th share.

13. It remains to be considered whether the sale of the shares of the widow and children other than the fifth plaintiff is liable to be set aside on the ground of inadequacy of price. Mere inadequacy of price without proof of material irregularity in publishing and conducting the sale is no ground for setting aside the sale and even when both exist, the proper remedy is to be sought by an application under Order 21, Rule 90, C. P. C.

There is some evidence in this case that the property was sold for about half the price it should have fetched, but it should not be ignored that this was a sale through Court with all the attendant risks of further litigation. There was no application for setting aside the sale within 30 days by the guardian and it is too late now to rely on inadequacy of price, if any, as a ground for avoiding the sale. We therefore hold that the sale is not liable to be set aside on this ground.

14. The Court below has allowed the plaintiffs to recover a sum of Rs. 260/- per annum as mesne profits from the date of deposit of the mortgage money and interest as well as value of improvements. As the sale is upheld in respect of 5/6th share, the only plaintiff who is entitled to claim mesne profits is the fifth plaintiff and her claim must be limited to 1/6th of Rs. 260/-, i.e., Rs. 43.33, per annum. Before she becomes entitled to claim mesne profits she must deposit 1/6th of the mortgage money, i. e., Rs. 236.88 (1/6th of Rs. 1421-4-2), and her share of the value of improvements.

15. The plaintiffs-respondents have raised a ground in the memorandum of cross-objections that the mesne profits decreed should have been allowed to be set off against the mortgage money and value of improvements. Mesne profits have been allowed only from the date of deposit of the amount due to the appellants and there is no ground in the memorandum of cross-objections that the sale should have been allowed from the date of dispossession; hence no question of set off arises at this stage.

16. As the suit is to be decreed only in respect of 1/6th of the property, the proper order would be to direct the parties to a suit for partition. However this suit has been pending for five years and in order to avoid multiplicity of suits we consider it proper to effect a division of the property in this suit itself. Therefore, in modification of the decree of the Court below we pass a preliminary decree in the following terms:

(i) The fifth plaintiff is given a declaration that the sale in execution of the decree in O. S. No. 919 of 1111 of the District Munsiffs Court of Irinjalakuda is inoperative in respect of her share of the property.

(ii) The fifth plaintiff is allowed to recover 1/6th of the property and this decree will be treated as a preliminary decree in the suit.

(iii) The Court below will pass a final decree dividing the property by metes" and bounds and allowing the fifth plaintiff to recover 1/6th share. In effecting such division the Court below will see that as far as possible the building is allotted to the share of the appellants, compensating the fifth plaintiff for her share of the same.

(iv) The value of improvements in the plot allotted to the fifth plaintiff will be determined in the final decree and on payment of such value as well as the fifth plaintiffs share of the mortgage money, namely, Rs. 239.88, the fifth plaintiff will be allowed to recover possession of the property allotted to her by the final decree as well as mesne profits at the rate of Rs. 43.33 per annum from the appellants.

16. The appeal is allowed and the decree of the Court below is modified as stated above. The memorandum of cross-objections is dismissed. The costs hitherto incurred will be borne by the respective parties and further costs will be provided for in the final decree.