

(2011) 01 MAD CK 0177

In the Madras High Court

Case No : C.R.P. (PD) No. 4024 of 2009 and M.P. No. 1 of 2009

Ramaiyan, Dhanapal and Geetha

APPELLANT

Vs

Krishnan (died), Muniyammal, Dhanalakshmi and Govindhan

RESPONDENT

Date of Decision : 07-01-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2, Order 21 Rule 54, Order 21 Rule 66, Order 21 Rule 67, Order 21 Rule 69
Constitution of India, 1950 — Article 227

Citation : (2011) 6 CTC 386

Hon'ble Judges : R.S. Ramanathan, J

Bench : Single Bench

Advocate : R. Margabandhu, for the Appellant; K.B. Arul, for the Respondent

Final Decision : Dismissed

Judgement

R.S. Ramanathan, J.—The judgment debtors in O.S. No. 86 of 1998 on the file of the Sub Court, Vellore are the revision petitioners.

2. The revision is filed to set aside the order of sale held in pursuance of E.P. No. 130 of 2000 on the ground that provision under Order XXI,

Rule 67 were not complied with and therefore, the sale is a nullity.

3. It is submitted by Mr. Margabandhu, the learned Counsel for the Petitioners that the property was brought to sale at the instance of the decree

holder/Respondents herein on 16.11.2005, sale proclamation was settled and thereafter, the sale was adjourned to various dates and finally, the

sale was conducted on 7.9.2009 and while conducting the sale on 7.9.2009, there was violation of provisions of Order XXI Rule 67 of the CPC

and therefore, the sale is a nullity and therefore, it must be set aside.

4. The learned Counsel Mr. Margabandhu further submitted that after the

settlement of proclamation on 16.11.2005, the sale was not held immediately. As per Order XXI, Rule 69(2) of the Code of Civil Procedure, when a sale is adjourned for a longer period than thirty days, a fresh proclamation under Order XXI, Rule 67 shall be made unless the judgment debtor consents to waive it. In this case, admittedly, the sale proclamation was made on 16.11.2005 and the sale was held on 7.9.2009 and therefore, it is beyond the period of thirty days as per Order XXI, Rule 69 of the CPC and without issuing a fresh proclamation under Rule 67, the court below ought not have ordered sale and therefore, there is a clear violation of the principles of law and therefore, the sale is a nullity. In support of his contention, he relied upon the decisions in *N. Nataraja Nadar v. Noor Ahmed and Anr.* AIR 1989 Madras 274 and *Mahakal Automobiles and Another Vs. Kishan Swaroop Sharma*, .

5. On the other hand, learned Counsel for the Respondents submitted that the present revision is not maintainable and sale was conducted on 7.9.2009 and on 9.9.2009, it was recorded by the court and confirmed by the court on 8.12.2009. The learned Counsel further submitted that there is no violation of Order XXI, Rule 69 of the CPC and even assuming that there is a violation, unless the judgment debtor is able to prove that the violation amounts to material irregularity and substantial injury by reason of the material irregularity, the sale cannot be set aside. Further, Even in that event, he has to file application under Order XXI Rule 90 of the CPC for setting aside the sale and in the absence of any such application, it is not open to the judgment debtor to set aside the sale by filing revision under Article 227 of the Constitution of India. He further submitted that the judgment debtors filed E.A. No. 184 of 2009 under Order XXI Rule 90 of the CPC to set aside the sale and that was also dismissed as withdrawn on 8.12.2009 and only thereafter the sale was confirmed and hence, the revision is not maintainable.

6. To appreciate the contention of the parties, we will have to see the provisions of Order XXI, Rule 69 and Rule 90. Order XXI Rule 69 reads as follows:

69. Adjournment or stoppage of sale

(1) The Court may, in its discretion, adjourn any sale hereunder to a specified day and hour, and the officer conducting any such sale may in his

discretion adjourn the sale, recording his reasons for such adjournment: Provided that, where the sale is made in, or within the precincts of the

Court-house, no such adjournment shall be made without the leave of the Court.

(2) Where a sale is adjourned under sub-rule (1) for a longer period than thirty days, a fresh proclamation under Rule 67 shall be made, unless the

judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer

conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

7. Though under sub Clause 2 it is specified that where a sale is adjourned for a longer period than thirty days a fresh proclamation under Rule 67

shall be made, there is an amendment by our High Court to sub Rule 2 and as per the amendment of our High Court, the sub Rule 2 reads as follows:

Where a sale is adjourned under Sub-rule (1) for a longer period than thirty days, there shall be fresh publication of the proclamation in the manner

prescribed by Rule 67, unless the judgment-debtor consents to waive it, or the Court otherwise orders.

8. Therefore, it is seen from the said amendment that when the sale is adjourned for a longer period than thirty days, there shall be fresh publication

of proclamation in the manner prescribed by Rule 67 unless the judgment debtor consents to waive it or the court otherwise orders. Therefore,

there is no need for fresh proclamation and as per the amended Rule, there is no need to have a fresh proclamation in the manner prescribed by the

Rule.

9. As per Order XXI Rule 90 of the Code of Civil Procedure, any person, whose interest is affected by the sale, may apply to the court to set

aside the same on the ground of material irregularity or fraud in publishing or conducting it and as per Order XXI, Rule 90(2), no sale shall be set

aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has

sustained substantial injury by reason of such irregularity or fraud.

10. Therefore, a combined reading of Order XXI, Rule 69 as amended by our High Court and Order XXI, Rule 90, even though there is violation

of Rule 67 in the matter of proclamation of sale, it cannot be challenged under

Order XXI, Rule 90 unless the irregularity in publishing or conducting resulted in substantial injury to the person, who challenges the same. In this case, as stated supra, the proclamation was originally made on 16.11.2005 and thereafter, the sale was held on 7.9.2009 and therefore, apparently, the sale was held after the expiry of thirty days. As per the amended Order XXI, Rule 69(2), it is clear case of violation of Order XXI, Rule 69(2) as there was no publication of proclamation. Now, the question is whether the failure to publish the proclamation under Order XXI, Rule 69(2) will amount to material irregularity resulting substantial injury to the Petitioner.

11. The learned Counsel for the revision Petitioners relied upon the judgment in Mahakal Automobiles and Another Vs. Kishan Swaroop Sharma, and submitted that when there is violation of Order XXI, Rule 54 and Rule 66, the sale is a nullity.

12. It is seen from the above judgment that the Honorable Supreme Court held in that judgment as follows:

Each stage of the sale is governed by the provisions of the Code. For the purposes of the present case, the relevant provisions are Order 21

Rule 54 and Order 21 Rule 66. At each stage of the execution of the decree, when a property is sold, it is mandatory that notice shall be served

upon the person whose property is being sold in execution of the decree, and any property which is sold, without notice to the person whose

property is being sold is a nullity, and all actions pursuant thereto are liable to be struck down/quashed.

13. Therefore, what the Honorable Supreme Court held in that case was that when the judgment debtor was not given notice about the sale, the

said sale is a nullity and all actions pursuance thereof are liable to be struck down. In this case, the revision Petitioners/judgment debtors are parties

to the proceedings and they took part in each stage of the proceedings and they were aware about the adjournments, settlement of proclamation,

the date fixed for sale by the court. Therefore, it cannot be stated that they were not given notice about the conduct of the sale. Even assuming that

there was no publication of the proclamation as per Order XXI Rule 69(2) (as amended by our High Court), having regard to the reason stated

hereunder, it is not a material irregularity causing substantial injury to the

Petitioner.

14. I had an occasion to delay with Order XXI, Rules 54 and 66 in the judgment rendered in C.R.P.(MD) No. 1638 of 2009 dated 20.8.2010 in

Sengan v. V. Ramesh and Anr. Rwherein, after relying upon the decisions of our High Court and the Honorable Supreme Court, I held that the

judgment debtors are not entitled to challenge the sale on the ground of violation of Order XXI, Rule 66 without following the provisions under

Order XXI, Rule 90 to set aside the sale. Further, the Honorable Supreme Court in the judgment in Saheb Khan Vs. Mohd. Yusufuddin and

Others, , held as follows:

In view of Rule 90(2) of Order 21 of the Code of Civil Procedure, foresting aside the sale merely establishing a material irregularity or fraud will

not do. The applicant must go further and establish to the satisfaction of the court that the material irregularity or fraud had resulted in substantial

injury to the applicant. Conversely even if the applicant had suffered substantial injury by reason of the sale, that would not be sufficient to set aside the

sale unless substantial injury had been occasioned by a material irregularity or fraud in publishing or conducting the sale.

15. Further, under Order XXI, Rule 90(2), no sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless,

upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. In this case, no

ground is made out by the revision Petitioners that by reason of the irregularity in not publishing the proclamation of sale under Order XXI, Rule

69(2), they have sustained substantial injury.

16. Further, in the case reported in Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others, , the

Honorable Supreme Court has dealt with the irregularity of the sale and the nullity. The aforesaid judgment is the authority to determine what is an

irregularity and what is a nullity. If one can waive it, it amounts to irregularity and if one cannot, it is a nullity. As per Order XXI, Rule 69, where a

sale is adjourned for a longer period than thirty days, there shall be fresh publication of proclamation in the manner prescribed by Rule 67 unless

the judgment debtor consents to waive it. Therefore, when the judgment debtor consents to waive the publication, there is no question of violation

of Rule 69(2). Therefore, as per the Supreme Court judgment referred to above reported in Dhirendra Nath Gorai and Subal Chandra Shaw and

Others Vs. Sudhir Chandra Ghosh and Others, , when it is possible for a person to waive the objection, it amounts to an irregularity and it is not a

nullity. In other words, the rule provides for the waiving of such objection and therefore, the violation of Rule 69(2) will not amount to nullity and it

is only irregularity and as per Order XXI Rule 90, the irregularity must be a material irregularity and resulted in substantial injury.

17. In this case, it has not been pleaded that substantial injury was caused to the Petitioner even assuming that violation of Order XXI, Rule 69(2)

is material irregularity. Further, in the judgment relied upon by the learned Counsel for the revision Petitioners reported in AIR 1989 MAD 274,

the judgment debtors challenged the sale by filing application under Order XXI Rule 90 and in this case, as stated supra, though an application was

filed under Order XXI, Rule 90 i.e. No. 184 of 2009, that was allowed to be dismissed as withdrawn and therefore, in the absence of any such

application, it is not open to the revision Petitioners to challenge the sale on the ground that there is violation of provisions under Order XXI, Rule

69(2) of the Code of Civil Procedure. Hence, I do not find any reason to interfere with the order of the court below.

In the result, the civil revision petition is dismissed. No costs. The connected miscellaneous petitions also dismissed.