
(1994) 09 MAD CK 0002
In the Madras High Court

Ramaswamy Gounder and Others

APPELLANT

Vs

T.S. Ramaswamy Gounder and Others

RESPONDENT

Date of Decision : 20-09-1994

Acts Referred:

Citation : (1995) 2 MLJ 413

Judgement

1. The common question that arises for consideration in these C.R. Ps. is as to whether the proviso inserted by the High Court of Madras

Amendment in Rule 90, Order 21 of the CPC immediately after Sub-rule (1) thereof is inconsistent with the provisions contained in Rule 90, Order

21 of the CPC as amended, by Central Act 104 of 1976 (hereinafter referred to as the Amending Act). The proviso inserted by the High Court of

Madras Amendment is as follows:

Provided that the Court may after giving notice to the appellant call upon him before admitting the application either to furnish security to the

satisfaction of the Court, for an amount equal to that mentioned in the sale warrant or to that realised by the sale, whichever is less, or to deposit

such amount in Court.

In view of the contrary opinions expressed in the decisions of this Court rendered by the learned single Judges, these cases have been referred to a

Division Bench. In V. Kannan v. Haji Abdul Rawoof Sahib 1982 T.L.N.J. 502. and Janakirama Iyer, K. V. v. Radhakrishna Chettiar (1988)¹

L.W. 6, it has been held that the proviso inserted by the High Court of Madras Amendment in Rule 90, Order 21 of the CPC is inconsistent with

the provisions contained in Rule 90, Order 21 of the CPC as amended by the Amending Act, whereas in Shanmugham v. Lakshmi Naidu

100 L.W. 99 and Karuppanna Gounder v. Velappa Naicker (1988) 1 L. W. 18, it has been held that the proviso is not inconsistent with the

provisions contained in Order 21, Rule 90 of the CPC as amended by the Amending Act. Therefore, the learned single Judge has referred these

cases to a Division Bench.

2. Rule 90, Order 21 of the CPC as amended by Amending Act 104 of 1976 reads thus:

90. Application to set aside, sale on ground of irregularity or fraud: (1) Where any immovable property has been sold in execution of a decree, the

decree-holder or the purchaser or any other person entitled to share in a rateable distribution of assets or whose interests are affected by the sale,

may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(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.

(3) No application to set aside sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date

on which the proclamation of sale was drawn up.

Explanation: The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this

rule.

The very Rule as it stood prior to coming into force of the Amending Act with the proviso inserted by the High Court of Madras was as follows:

Rule 90. Application to set aside sale on ground of irregularity or fraud: (1) Where any immovable property has been sold in execution of a decree,

the decree-holder or any person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the

Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it:

(1) Provided further that the Court may after giving notice to the applicant, call upon him before admitting the application, either to furnish security

to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or to that realised by the sale, whichever is less, or to

deposit such amount in court:

Provided also that the security furnished for the deposit made as aforesaid shall be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale).

Provided (1) (further) that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(1) The Bracketed portions were inserted by the High Court of Madras Amendment before 1.2.1977.

At the outset itself, we must make it clear that the validity of the proviso relating to the security furnished or the deposit made and the adjustment of the same is not the subject-matter of reference. As such, we are not required to consider the same.

3. In *V. Kannan v. Haji Abdul Rawoof Sahib* 1982 T.L.N.J. 502. and *Janakirama Iyer, K. V. v. Radhakrishna Chettiar* (1988) 1 L.W. 6, it has

been held that as no provision is contained in Rule 90, Order 21, of the Code of Civil Procedure, as amended by Amending Act 104 of 1976,

regarding furnishing of security as ordered by the Court before taking up the application to set aside the sale, the proviso which casts additional

burden or restriction on the right to have the sale set aside, is inconsistent with the provisions contained in Rule 90, Order 21 as amended by

Amending Act 104 of 1976. Therefore, having regard to the provisions contained in Section 97(1) of Act 104 of 1976, the proviso being

inconsistent with the amended Rule 90, Order 21 of the CPC it must be held to have been repealed.

4. On the contrary, in the other two decisions, viz., *Shanmugham v. Lakshmipathy Naidu* 100 L.W. 99 and *Karuppanna Gounder v. Velappa*

Naicker (1988) 1 L. W. 18, it has been held that the said proviso is not inconsistent with the amended Rule 90, Order 21 of the Code of Civil

Procedure, as such, it cannot be held to have been repealed.

5. The scope of Section 97(1) of the Amending Act came up for consideration before the Supreme Court in *Ganpat Giri v. IInd Additional District*

Judge 99 L.W. 481. The Supreme Court was called upon to consider the effect of Section 97 of the Amending Act on any amendment made or

any provisions inserted in the Code of Civil Procedure, 1908 by a State

Legislature or a High Court prior to commencement of the Amending Act

i.e., prior to February 1, 1977, in the different local areas in India, where the Code is in force if they be inconsistent with the provisions of the

Code as amended by the Amending Act. In Ganpat Giri's case, the High Court of Allahabad took a view that since the Amending Act had not

made amendment of any kind in so far as Rule 72 of Order 21 of the CPC was concerned, the amendment made by the High Court of Allahabad

to Rule 72 of Order 21 prior to the commencement of the Amending Act remained intact. This view was not approved by the Supreme Court.

This is clear from paragraphs 5 to 12 of the judgment which are reproduced hereunder:

5. There are three sub-sections in Section 97 of the Amending Act: A reading of Section 97 of the Amending Act shows that it deals with the

effect of the Amending Act on the entire Code both the main part of the Code consisting of sections and the first Schedule to the Code which

contains Orders and Rules. Section 97(1) of the amending Act takes note of the several local amendments made by a State Legislature and by a

High Court before the commencement of the Amending Act and states that any such amendment shall except in so far as such amendment or

provision is consistent with the provisions of the Code as amended by the Amending Act stands repealed. It means that any local amendment of

the Code which is inconsistent with the Code as amended by the Amending Act would cease to be operative on the commencement of the

Amending Act, i.e., on 1st February, 1977. The repealing provision in Section 97(1) is not confined in its Operation to provisions of the Code

including the orders and Rules in the First Schedule which are actually amended by the Amending Act. The object of Section 97 of the Amending

Act appears to be that on and after February 1, 1977 throughout India wherever the Code was in force there should be same procedural law in

operation in all the civil courts subject of course to any future local amendment that may be made either by the State Legislature or by the High

Court, as the case may be, in accordance with law. Until such amendment is made the Code as amended by the Amending Act alone should

govern the procedure in civil courts which are governed by the Code. We are emphasising this in view of the decision of the Allahabad High Court

which is now under appeal before us.

12. Now reverting to Section 97(1) of the Amending Act, the High Court was in error in holding that because no amendment had been made to

Rs. 72 by the Amending Act. Section 97(1) had no effect on the Rule as it was in force in the State of Uttar Pradesh before the commencement of

the Amending Act. As observed earlier, the effect of Section 97(1) is that all local amendments made to any of the provisions of the Code either

by a High Court which were inconsistent with the Code as amended by the Amending Act stood repealed irrespective of the fact whether the

corresponding provision in the Code had been amended or modified by the Amending Act and that was subject only to what was found in Sub-

section (2) of Section 97. Sub-section (3) of Section 97 provides that save as otherwise provided in Sub-section (2) the provisions of the Code as

amended by the Amending Act shall apply to every suit, proceeding, appeal or application pending at the commencement of the Amending Act or

instituted or filed after such commencement notwithstanding the fact that the right or cause of action in pursuance of which such suit, proceeding,

appeal or application is instituted or filed had been acquired or had accrued before such commencement. Sub-section (3) of Section 97 sets at rest

doubts, if any, by making the Code as amended by the Amending Act applicable to all proceedings referred to therein subject to Sub-section (2)

of Section 97.

6. Therefore, what we are required to see as to whether the proviso in question is inconsistent with Rule 90, Order 21, the CPC as substituted by

the Amending Act. Of course in *Shanmugham v. Lakshmipathy Naidu* 100 L. W. 99 and *Karupattna Gounder v. VelappaNaicker* (1988) 1 L.W.

18, it has been held that there is no amendment to Order 21, Rule 90 by the Amending Act. Such an assumption is not correct, because the Rule

has been amended. The words ""any person"" either owning such property or holding an interest thereon by virtue of title acquired before such law

occurring in Sub-rule (1) of Rule 90, Order 21, have been substituted and the substituted rule now reads that where any immovable property has

been sold in execution of a decree, the decree-holder or the purchaser or any other person entitled to share in a rateable distribution of assets or

whose interests are affected by the sale, may apply to the Court to set aside the

sale on the ground of material irregularity or fraud in publishing or conducting it. Further, an explanation also has been added, which was not there in the original Rule to the effect that the mere absence of, or defect in, attachment of the property sold, shall not, by itself, be a ground for setting aside a sale under this rule. Therefore, the assumption made in *Shanmugham v. Lakshmipathy Naidu* 100 L.W. 99 and *Karuppanna Gounder v. Velappa Naicker* (1988) 1 L. W. 18, that there is no

amendment, is not correct. Similarly the view taken in those decisions that the Amending Act 104 of 1976 did not touch the provisions contained in

Rule 90, Order 21, Code of Civil Procedure, is not correct.

7. In addition to this, as already pointed out, the Supreme Court in *Ganpat Giri's* case 99 L. W. 481, has held that the repealing provision in

Section 97(1) of Act 104 of 1976 is not confined in its operation to the provisions of the Code, includes the Orders and Rules in the First

Schedule, which are actually amended by the Amending Act. It has also been further held that the object of Section 97 of the Amending Act is that

on or after 1.2.1977, throughout India, wherever the Code was in force, there should be same procedural law in operation in all the Civil Courts

subject, of course, to any future local amendments that may be made either by the State Legislature or by the High Court, as the case may be, in

accordance with law. The aforesaid two decisions cannot therefore be held to have proceeded on correct lines and the reasoning contained therein

is quite contrary to the aforesaid decisions of the Supreme Court in *Ganpat Giri's* case 99 L. W. 481.

8. Therefore, now, we shall examine whether the proviso is in any way inconsistent with Rule 90, Order 21, Code of Civil Procedure. It may be

pointed out here that the proviso does not in any way alter the conditions laid down in Sub-rules (1), (2) and (3) and the explanation thereto of

Rule 90, Order 21, Code of Civil Procedure, as substituted by Amending Act 104 of 1976. The proviso only provides that the Court may, after

notice to the applicant seeking to set aside the sale, call upon him before admitting the application either to furnish security to the satisfaction of the

Court for an amount equal to that mentioned in the sale warrant or to that realised by the sale whichever is less or to deposit such amount in court.

This proviso only enables the Court at the initial stage after hearing the applicant

to find out whether there is a prima facie case for setting aside the sale or not and if that be so, whether in the facts and circumstances, there is a case for directing any security. The proviso does not lay down that in every case, it is incumbent upon the Court to insist upon furnishing of security to the satisfaction of the Court or depositing of the amount as stated therein, nor does it make it as a condition precedent for filing an application for setting aside the sale, that security should be furnished. The proviso contains a very salutary rule. It is intended to prevent frivolous applications to delay the execution. It is well known that the real trouble of the decree-holder commences only after he obtains the decree and puts into execution. It is also well known that the execution proceedings are the paradise for the members of the Bar. It is also well known that there are very few decree-holders, who are fortunate to execute a realise the decree during their lifetime. Such is the law governing the execution proceedings and if that be so, there is no doubt that there would be number of frivolous applications filed for setting aside the sale and it is to prevent such applications and to enable the Court at the initial stage to apply its mind to find out whether there is a prima facie case for setting aside the sale and if that be so, whether in the facts and circumstances of the case, it is necessary to order security. Such a rule cannot be held to be inconsistent with the provisions contained in Rule 90, Order 21, CPC as substituted by Act 104 of 1976. The grounds prescribed for, setting aside the sale and the procedure to be followed for setting aside the sale are not in any manner affected by the proviso. Therefore, we are of the view that looked at from any point of view, the proviso cannot be held to be inconsistent with Rule 90, Order 21, Code of Civil Procedure, as substituted by Act 104 of 1976. Consequently, we find it difficult to agree with the decisions in *V. Kannan v. Haji Abdul Rawoof Sahib* 1982 T.L.N.J. 502 and *Janakirama Iyer v. Radhakrishna Chettiar* (1988) 1 L. W. 6.

9. We also consider it necessary to lay down that it is the established judicial discipline that when a learned single Judge finds it difficult to agree with the view of another learned single Judge, in the absence of a decision on the point by a larger Bench of the same court, the same should be referred to a larger Bench. This should have been followed in the cases reported in *Shanmugham v. Lakshmipathy Naidu* 100 L. W. 99 and

Karuppanna Gounder v. Velappa Naicker (1988) 1 L. W. 18. The decisions of the Supreme Court on this point are many in number, but,

however, we only refer to two of them, viz., Dhanki Mahajan Vs. Rana Chandubha Wakhatsing and Others, and Guranditta v. Amar Dass AIR

1965 S.C. 1966. We accordingly overrule the decision in V. Kannan v. Haji Abdul Rawoof Sahib 1982 T.L.N.J. 502 and Janakirama Iyer v.

Radhakrishna Chettiar (1988) 1 L.W. 6 and approve the view taken in Shanmugham v. Lakshmipathy Naidu 100 L. W. 99 and Karuppanna

Gounder v. Velappa Naicker (1988) 1 L.W. 18.

10. We shall now advert to the merits of each one of these revision petitions. In C.R.P. No. 1947 of 1994, the application for setting aside the sale

has not been considered on merits. It is dismissed on the ground that no security is furnished. The case is also not considered in terms of the

proviso referred to above. Therefore, the C.R.P. is required to be allowed and the matter has to be remitted to the lower Court for considering it

afresh and in accordance with law and in the light of this decision.

11. C.R.P. No. 2516 of 1986 is directed against the order rejecting the application to dispense with the furnishing of security. It has not been

considered on merits and it is rejected only on the ground that as per the proviso, it is not maintainable. C.R.P. No. 2517 of 1986 is connected

with C.R.P. No. 2516 of 1986 as the same is preferred against the order rejecting the application for setting aside the sale on the ground that no

security is furnished. Therefore, both the C.R.Ps. are entitled to be allowed and the matters have to be remitted to the court-below to consider the

same afresh in accordance with law and in the light of this decision.

12. C.R.P. No. 2577 of 1987 is preferred against the order rejecting the application filed by the petitioner to dispense with the furnishing of

security. The application has been rejected only the ground that the prayer is not permissible in terms of the proviso. Therefore, it has to be set

aside and the case has to be remitted to the lower Court to consider the same afresh in accordance with law and in the light of this decision.

13. C.R.P. No. 1040 of 1988 is preferred against the order rejecting the application filed for setting aside the sale at the initial stage on the ground

that no security is furnished. A memo is filed today by the learned Counsel appearing for respondents 1 and 2 stating that the auction purchaser

died as long back as in the year 1989. No step is taken to bring the legal representatives of the auction purchaser on record. In the absence of the legal representatives of the deceased auction purchaser, the validity of the sale cannot be gone into. Therefore, we place the memo on record and dismiss C.R.P. No. 104 of 1988 as abated.

14. As far as C.R.P. No. 3438 of 1988 is concerned, the original Court rejected the application for setting aside the sale on merits. In the appeal preferred by the appellant before the District Court, it has been allowed and the sale has been set aside. The finding recorded by the District Court that the sale is vitiated by reason of material irregularity apart from being a finding of fact, it has not been shown before us that such a finding of fact is vitiated in any manner. Therefore, C.R.P. No. 3438 of 1988 has to be dismissed.

15. C.R.P. Nos. 1976 and 1977 of 1987 are also required to be allowed, because the same are not considered in the light of the interpretation placed by us on the proviso.

16. For the reasons stated above, C.R.P. Nos. 1947 of 1994, 2516 and 2517 of 1986, 2577 of 1987, 1976 and 1977 of 1987 are allowed. The orders are set aside. The cases are remitted to the courts below with a direction to take up these cases on file and deal with them afresh in accordance with law and in the light of the observations made in this order. C.R.P. No. 1040 of 1988 is dismissed as abated. C.R.P. No. 3438 of 1988 is dismissed. In the facts and circumstances, there will be no order as to costs.

17. As these matters relate to decree obtained several years back, we direct the parties to appear before the respective courts on the 17th October, 1994. The courts below shall decide all these cases within three months from 17.10.1994, or three months from the date of receipt of the records, whichever is later.