
(1944) 08 CAL CK 0008
In the Calcutta High Court

Shila Pal and Others

APPELLANT

Vs

Comilla Banking Corporation Ltd. and Others

RESPONDENT

Date of Decision : 10-08-1944

Acts Referred:

Citation : AIR 1945 Cal 434

Hon'ble Judges : Sharpe, J;B.K. Mukherjea, J

Bench : Full Bench

Judgement

B.K. Mukherjea, J.—This appeal is on behalf of some of the judgment-debtors, and it is directed against an order of the Sub-Judge 3rd Court, Comilla, dated 21st November 1941, dismissing an application made by the appellants, for setting aside an execution sale under Order 21, Rule 90, Civil P.C. The material facts lie within a short compass and may be stated as follows: The respondent Bank advanced a sum of Rs. 57,000 to Babu Saroda Sundar Pal the father of the appellants on a pronote dated 7th August 1933. On the borrower failing to pay the money, a suit was instituted by the Bank on the basis of the pronote, in August 1936. Pending the hearing of this suit, Saroda died and his six sons were brought on the record, as his heirs and successors-in-law. A decree was passed on 29th September 1939, against these six sons, for a sum of Rs. 69,904 which was to be recovered from the assets of their late father in their hands. The decree was put into execution on 29th September 1939, and 38 items of property alleged to belong to Saroda Sundar were attached by the decree-holder. The widow of Saroda preferred a claim which was allowed and a number of the attached properties were released from attachment. Eventually 15 items of property were put up to sale in separate lots on 29th June 1940, and with the exception of lot No. 35, all the rest were purchased by the decree-holder for an aggregate price of Rs. 5975. On 29th July 1940, the present proceeding was started by two of the six sons of Saroda, who were judgment-debtors 3 and 6 and they prayed for setting aside the sale of 14 lots of properties on grounds of material irregularity and consequent inadequacy of price, under Order 21, Rule 90, Civil P.C. The Sub-Judge dismissed the application and the two judgment-

debtors have come up on appeal to this Court.

2. The two questions that require consideration in this appeal are: (1) whether there was any material irregularity in publishing and conducting the sale? and (2) whether by reason of these irregularities if any the judgment-debtors sustained substantial injury? Mr. Sanyal appearing on behalf of the appellants has attempted to show that the material irregularities in connexion with the sale are of a threefold character. In the first place, there has been no proper publication of sale proclamation so far as the village properties are concerned. In the second place, the prices of some of the properties have been grossly understated in the sale proclamation; and thirdly no hour of sale was fixed by the Court on the adjourned date as is necessary under Order 21, Rule 69, Civil P.C. The entire evidence bearing on these points has been placed before us by the learned advocates on both sides. It is conceded by Mr. Sanyal" that there is no irregularity in the publication of the sale proclamation as regards lot No. 5, which is a plot of land measuring 1 kani and situated in the town of Comilla itself, nor with regard to lots 36 and 37, which are shares in certain joint stock companies held by Saroda Sundar Pal. Regarding the other 11 items of property which are situated in certain villages at a considerable distance from the Comilla town it seems to us that the evidence of publication of sale proclamation is unsatisfactory. The serving peon has no personal knowledge of the details of service. It appears that the actual report of service of sale proclamation which was verified by the peon, was through mistake or otherwise, not made an exhibit in this case. What has been marked as Ex. D, consists of certain statements made by the peon on the back of the several sheets of the sale proclamation, and these statements are neither complete nor verified. Mr. Sanyal has drawn our attention to various discrepancies between these statements and those which occur in the verified return of service. Unfortunately however these things were not brought to the notice of the Court below and the peon was not asked to state as to why he had prepared two reports at all, and what was his explanation regarding the discrepancies between the two. It is conceded on both sides that the witnesses were all examined and cross-examined on the basis of the verified report, and we must assume therefore that that is the proper return of service and that the exhibit-mark was put on a wrong paper inadvertently. The serving peon served the processes on the identification of one Mohim Ali who is an employee of the bank, and who was sent by the latter to act as identifier. He himself had no knowledge of the locality and says that he identified the different properties by making enquiries from villagers. The sale proclamation described the properties primarily with reference to Khatians of the C.S. records and did not state their boundaries. These were for the most part tenanted lands, and the settlement Khatians could show the names of the tenants who were in actual occupation of the same. The identifier says that he did not carry any settlement map or paper with him, and it is extremely doubtful, whether by making enquiries from villagers it was possible for him to identify the various properties even though their names or mudafats were mentioned in the sale proclamation.

None of the Mokabila witnesses have been examined by the decree-holder. One Taijuddi whose name appears as a witness in the verified report of the peon in connexion with service of sale proclamation on 25th April 1940 has been examined by the judgment-debtor, and he states On oath that he never witnessed the service of sale proclamation in his village. Many of the witnesses, whose names appear in the peon's report, are not inhabitants of the particular village where the sale proclamation purports to have been served. In these circumstances we are of opinion that there has not been proper publication of sale proclamation so far as the village properties are concerned.

3. It cannot be disputed that the price of some of the properties was grossly understated in the sale proclamation. Thus lot No. 5 was valued at Rs. 200 in the sale proclamation though the decree-holder purchased it for Rs. 3000. We agree however with the Subordinate Judge that it is not open to the appellants to make this a ground for attacking the sale under Order 21, Rule 90, Civil P.C. It appears from the records, that both the appellants were served with notices under Order 21, Rule 66, Civil P.C., prior to the drawing up of the sale proclamation. Appellant 1 himself took the notice on signing the acknowledgment, and though appellant 2 now says that he was at Batanagore on that date, the peon's report shows that he was present at the house at the time, when the peon went there, and as he refused to sign the acknowledgment, the notice was hung up on the outer door of the premises where he lived. As the appellants in spite of having received notice under Order 21, Rule 66, Civil P.C., did not attend at the drawing up of the sale proclamation nor preferred any objection to the same, the sale cannot be set aside on the ground of any defect in the sale proclamation.

4. The other irregularity complained of by the appellants is that in adjourning the date of sale from 6th to 29th June 1941, the Court did not fix the hour at which the sale would be held on the 29th. The order was that the sale would be held, after a miscellaneous case started by the judgment-debtor was disposed of. This is a material irregularity for it is incumbent upon the Court to specify both the day and the hour under Order 21, Rule 69, Civil P. C: vide *Surnomoyee v. Dakhina Ranjan* 24 Cal. 291. Moreover, as there was no knowing as to when the miscellaneous case would be disposed of, and whether or not it would be decided in favour of the decree-holder, there was a considerable amount of uncertainty involved in the order, which could not but adversely affect the intending bidders. It is admitted that no other bidder except the decree-holder was present at the time of the sale.

5. Let us now consider how far the judgment-debtors have suffered injury by reason of these irregularities. As we have said already, out of the 15 items of properties that were put up to sale, eleven were situated in villages far off from the town; only one viz., lot No. 5, which was a piece of land measuring one Kani, was situated in the Comilla town itself, while the remaining three consisted of shares in Joint Stock Companies. No evidence has been adduced by the judgment-debtors as regards the value of the last four items. Item 35 which has

been purchased by a stranger is not the subject-matter of the present proceeding. Regarding the price of lot No. 5, Mr. Sanyal relies upon certain statements made by two of the witnesses examined on behalf of the decree-holder. One of them who is witness 5 has said in cross-examination that town lands are valuable and each Kani of land sells for Rs. 5000. The other witness who is witness 6 stated that "a Kani of land is worth Rs. 10,000. Nal lands sell for less than Rs. 1000." The statement of witness 6 is of little assistance to the appellants for the figure Rs. 10,000 is obviously a mistake for Rs. 1000, as the sentence following it clearly indicates. As regards witness 5 all that can be said is that it is a perfectly general statement. Town lands can certainly sell for Rs. 5000 a Kani, but there must be various kinds of land in the town, and the price would undoubtedly depend upon the nature of the land. It cannot be said that Rs. 5000 is the fixed price for all varieties of land in the town. We are inclined to hold that lot No. 5 is actually situated in the Comilla town as the sale proclamation shows. That it is a valuable property is apparent from, the fact that decree-holder himself offered Rs. 3000 for it, although the price given in the sale proclamation was only Rs. 200 and there was no other bidder present at the sale. We have absolutely no materials, however, to hold that the price of Rs. 3000 paid by the decree-holder is inadequate. Girish Chandra Das, the officer of the bank, says in his deposition that this land is partly used for agricultural purposes and is partly covered by a doba. There is no evidence on the side of the judgment-debtor to show what it really consists of. In this state of evidence, it is not possible for us to say that this property has been purchased by the decree-holder at an inadequate price.

6. Mr. Sanyal does not complain that there is any inadequacy of price as regards items 36 and 37. As regards the eleven lots of village properties, there was this omission on the part of the judgment-debtors that they did not produce their collection papers, which would have shown the rents that they were realising from the tenants in possession of the lands. To prove the valuation of these properties they have examined a man of the village named Sahibuddin Sarkar who has given his own estimate of the valuation of the different lots. The figures given by him are not entirely reliable except where he has disclosed the basis of his calculation. We have got the areas of these lands given in the sale proclamation, and the rents payable by the tenants in some cases at least can be ascertained from the evidence of Sahibuddin. It appears that lot No. 8 has an area of 3 acres and the rent paid by tenant is Rs. 9 a year. The price it has fetched is Rs. 125 and this seems to be much below the market rate. Lot No. 9 has an area of 72 acres, and it fetches an annual rent of Rs. 64. This has been sold for Rs. 500 only, which appears to be an inadequate price. Lot No. 10 measures 6 acres, and it was sold for Rs. 75. As regards lots Nos. 22 and 24, the judgment-debtors have produced a sale deed Ex. 1(a) which shows that -half share in both these properties was purchased by Saroda from his own brother for an aggregate price of Rs. 2500 in the year 1921. It may be that Saroda being the owner of the other half, and the vendor being his own brother, he paid a

much heavier price than otherwise he would, but at the same time it must be noted that both these properties in their entire 16 annas share have been purchased by the decree-holder for a sum of Rs. 300 only. As regards the other lots the prices fetched seem to be altogether disproportionate to the areas. On the whole our conclusion is that the eleven items of village property were sold at an inadequate price resulting in substantial loss to the judgment-debtors, and as has been said already the sale of these properties was not properly advertised.

7. The question now is whether we should set aside the sale of all the fourteen lots, or of these eleven lots only. There is no evidence as we have said above to prove that the judgment-debtors suffered loss by sale of lots Nos. 5, 36 and 37. Now, Order 21, Rule 90 speaks of setting aside a sale in its entirety, if it is proved that it is bad on the ground of material irregularities or fraud. A sale which is affected by such defects cannot be set aside in part, and it is immaterial that the person who applies to set it aside, is interested only in a fractional share of the property sold: *Ramesh Chandra Patranabis Vs. Birajasundari Gupta and Others*, . When however properties are sold separately in separate lots, it must be held that the sale of each lot is a separate sale. In such cases the sale may be upheld with regard to some of the lots and set aside as regards the rest. In *Chhaterbijai Singh and Others Vs. Damodar Das and Others*, , it was held by the Patna High Court that where properties are sold in several lots, the Court can set aside the sale in respect of some only of the lots, provided that the irregularity and the injury can be satisfactorily allotted to the sale of those lots only. Where however the irregularity extends to all the lots, it is not justifiable to retain the efficacy of the sale with respect to some of the lots only in which the sale price obtained cannot be shown to be inadequate. We cannot agree with this decision in its entirety. If sales of properties in separate lots are to be regarded as separate sales, it is immaterial, we think, that the irregularity extends to all the lots. If the sale of one particular lot has not resulted in any injury to the judgment-debtor, that sale cannot be set aside under the proviso to Order 21, Rule 90, Civil P.C., even if there is material irregularity in relation to it. We think that the correct view has been taken by the Madras High Court in *Karumoori Narasimhamurthy Vs. Official Receiver and Others*, and as no injury has resulted to the judgment-debtors by sale of lots Nos. 5, 36 and 37, we hold that the sale of these lots would stand, even though there was a material irregularity with regard to them as well by non-mention of the hour of sale in the order of the Court dated 6th June 1940. The result is that the appeal is allowed in part. The sale is set aside as regards lots Nos. 7, 8, 9, 10, 22, 24, 26, 27, 28, 33 and 38. Each party to bear costs in this Court as well as in the Court below.

Sharpe, J.

8. I agree.