

(2017) 02 KAR CK 0208
In the Karnataka High Court
Case No : 1968 of 2016 (CPC)

SRI. L. NANJUNDA MURTHY, S/O MR. K. LINGAIAH, & ANR.	APPELLANT
Vs	
SRI. S. SURESH REDDY, S/O. A. SRINIVASA REDDY, & ORS.	RESPONDENT

Date of Decision : 10-02-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Section 151](#), [Order 21 Rule 90](#), [Order 21 Rule 66](#), [Order 21 Rule 66\(2\)](#)

Citation : (2017) 02 KAR CK 0208

Hon'ble Judges : K.N. Phaneendra

Bench : SINGLE BENCH

Advocate : T. SESHAGIRI RAO, I. GOPALA KRISHNA, L. S. CHIKKANAGOUDAR

Final Decision : Dismissed

Judgement

1. The appellants have called in question the order dated 21.1.2016 passed in Execution No.3242/2014 on IA No.IV filed under Order XXI Rule 90 read with Section 151 of CPC passed by XXXI Addl. City Civil & Sessions Judge (CCH-14), Bengaluru City, and consequently to set aside the sale held on 11.09.2015 at the spot and the Court sale dated 28.9.2015.

2. The brief factual matrix of the case are that: The plaintiff (respondent No.1 herein) has filed a suit in OS No.6181/2011 for recovery of a sum of Rs.93,82,742-76. The plaintiff - decree holder sued out execution for recovery of the said amount in Execution No.3242/2014. The said Execution Petition was contested by the judgment debtor. After following some procedure, the Court has ordered for auction sale of the Schedule property for recovery of the above said amount. The judgment debtor after the sale has been effected by the Court on 28.9.2015 has filed an application under Order 21 Rule 90 read with Section 151 of CPC, seeking for setting aside the said sale which was executed in favour of the highest bidder the second respondent herein Sri K. Ganesh son of K.V.

Keshava Murthy. On various grounds, the said application was contested by the decree holder and after hearing, the executing Court has come to the conclusion that the said application is devoid of merit and the same has been dismissed.

3. The learned counsel for the appellants in support of the grounds urged in the Memorandum of Appeal contended before this Court that the second respondent is no other than the brother-in-law of the decree holder and there is a collusion for the purpose of participating in the auction sale on the spot and before the Court. Therefore, the said order is liable to be set aside. Further, it is contended that the sale proclamation which was issued on 26.8.2015, is not in accordance with law and the same is in violation of order 21 Rule 66(2) of CPC and it is not in conformity with Form No.29 as contained in CPC. Mandate of the statute has not been followed by the executing Court, and the court has not even looked into the Karnataka amendment to the said provision. Therefore, the sale on this ground is liable to be set aside. It is further contended that there is no semblance of material in the order sheet of the trial Court that the Court has called upon the parties to furnish the estimated value of the property before putting the property into public auction. It is further contended that in the auction sale one Mr. T.N. Harish Kumar was the highest bidder, bid the property for a sum of Rs.1,40,000/- that shows that the value of the property is much more than the amount for which it was sold by the Court. The Court would not have accepted an amount of Rs.1,10,00,000/- offered by the second respondent in the Court sale, it ought to have set aside the proceedings and re-auctioned the property. Lastly, it is contended that the property is worth more than Rs.1,75,00,000/- and there is no fixation of any amount by the Court as the minimum bid amount. However, the bailiff on the spot quoted the minimum bid amount at Rupees 75 lakhs which is also not based on any statutory empowerment. Therefore, for all these reasons, the learned counsel sought for setting aside the sale.

4. Per contra, the learned counsel appearing for the respondents has seriously contended that though there is some irregularity in filling up Form-29 and also some procedure has not been followed by the Court under Order 21 Rule 66 of CPC, but no substantive injury caused to the appellant as the said provision only says, that the parties can also provide the estimated value of the property.

5. It is contended that no such ground was taken up before the trial Court with regard to irregularity alleged to have been committed by the trial Court. This stand was not urged either at the time of filing the application under Order 21 Rule 90 of CPC or at the time of submitting the arguments. The proceedings disclose that the trial Court has followed all the procedures and provided opportunity to the parties in this regard. Having participated at the time of bid proceedings, the appellants have not taken up any such contention at the earliest point of time. Therefore, he is not entitled to contend the auction sale done by the Court particularly at the spot and before the Court as illegal. The appellants have not produced any material to show that any fraud has been played by any

of the parties to the proceedings and he has not furnished the actual value of the property by means of any supporting documents. It is contended that even considering that there is some Statutory violation in following the procedure, under Order 21 Rule 66, unless, the judgment and decree shows that appellant has been prejudiced by the proceedings and any substantial or irreparable injury caused to him, normally, the Court should not set aside the same. He also further contended that though the highest bidder had participated on the spot, but he did not participate in the Court. Therefore, the Court has accepted the bid of the second respondent who is the highest bidder before the Court. No irregularity or illegality committed by the trial Court. In the above said circumstances, he pleaded for dismissal of the appeal.

6. Of course, it is evident from the order of the trial Court that this particular ground i.e., with reference to the irregularity in following the procedure under Order 21 Rule 66(2) of CPC, was not raised before the trial Court at all and no finding has been given by the trial Court. The trial Court has come to the conclusion that the Court has followed all the procedure and there is no irregularity and further the auction purchaser has fairly participated before the Court. Though the bid amount was Rs.1,03,00,000/- at the spot, he raised the same to Rs.1,10,00,000/- and therefore, he remained as the highest bidder before the Court. The appellant has not established any collusion between the decree holder and the second respondent. Therefore, the very relationship even if it is accepted between the decree holder and the respondent is not sufficient to set aside the sale. Hence, the Court has rejected the said application.

7. In view of the above said facts and circumstances of the case and submissions made and after going through the order of the trial Court, the question remains for consideration of this Court is:

"Whether the appellants herein have made out any reasonable or substantial ground to interfere with the order impugned under the appeal."

8. In order to set aside the sale, certain important aspects have to be established and proved by the person who seeks for setting aside the sale. For easy understanding of the provision, Order 21 Rule 90 of CPC is extracted below:

"Order 21 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 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 a 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."

9. It is evident that the sale can be set aside on the ground of material irregularity or fraud in putting or conducting the sale, whenever any application is made, by a person whose interest is affected by such a sale. However under sub clause (2) and (3) of Order 21 Rule 90, there are two riders, as to under what circumstances, the Court shall not set aside the sale. Sub clause (2) of Order 21 Rule 90 of CPC clarifies that, the sale shall not be set aside merely on the ground of irregularity or fraud in putting or conducting it, unless upon the facts it is proved to the satisfaction of the Court that, the applicant has sustained substantial injury by the reason of such irregularity or fraud. Under sub clause (3) of the said provision says that the sale shall not be set aside under this rule, on any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn. The explanation to the provision further clarifies that mere absence or defect in attachment of the property sold shall not by itself a ground for setting aside the sale under this Rule.

10. On meaningful reading of the above said provision, it is clear that though there is a fraud or a Material irregularity or defect, if the said irregularity or fraud alleged, are not proved, the sale cannot be set aside. Even if it is proved, the Court has to look into whether any substantial injury has been occurred to the applicant and he had absolutely no opportunity to question the defects in the sale proclamation before the date on which proclamation was drawn. In this background, the Court has to examine first as to whether there is any Material irregularity or fraud has been alleged and proved to the satisfaction of the Court and thereafter, test the said two aspects with reference to sub rule (2) and (3) of order 21 Rule 90.

11. First let me consider with reference to the Material irregularity alleged in this case.

12. It is seriously argued that Order 21 Rule 66 (2)(e) of CPC (Karnataka amendment) and as well Form No.29, with regard to the proclamation of sale has not been properly followed by the trial Court. It is the main contention that strict rule of law if it is not followed that itself amounts to Material irregularity so as to set aside the same. In this background, let me first consider what exactly the mandate of order 21 Rule 66 of CPC and a correlative Form No.29. The relevant provision, Order 21 Rule 66 of CPC reads thus:

"66 - PROCLAMATION OF SALES BY PUBLIC AUCTION.-

(1) Where any property is ordered to be sold by public auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court.

(2) Such proclamation shall be drawn up after notice to the decree-holder and

the judgment - debtor and shall state the time and place of sale, and specify as fairly and accurately as possible-

(a) the property to be sold, (or, where a part of the property would be sufficient to satisfy the decree, such part);

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government;

(c) any incumbrance to which the property is liable;

(d) the amount for the recovery of which the sale is ordered and

(e) every other thing which the Court considers material for a purchaser to know in order to judge the nature and value of the property:

[Karnataka High Court amendment - The word "and" at the end of Clause (d) omitted, existing clause (e) renumbered as clause (f) and clause (e) inserted by Notification No.ROC No.2526/1959, dated 9.2.1967 (w.e.f.30.3.1967).

(e) the value of the property as stated by the decree holder and the value of the property as stated by the judgment debtor; and]

provided that where notice of the date for settling the terms of the proclamation has been given to the judgment-debtor by means of an order under rule 54, it shall not be necessary to give notice under this rule to the judgment-debtor unless the Court otherwise directs:

Provided further that nothing in this rule shall be construed as requiring the Court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties.]

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the manner hereinbefore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation.

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any document in his possession or power relating thereto."

It is very clear from this provision that in Rule 66, sub-rule (2)(e) and (f) as amended by Karnataka High Court that -

"(e) The Value of the property as stated by the decree Holder and the value of the property as stated by the Judgment debtor to be mentioned in the Sale proclamation as amended by Karnataka High Court.

(f) Every other thing which the Court considers material for a purchaser to know in order to judge the nature and value of the property."

The proviso further says that the Court is not required to enter proclamation of sale, its own estimation of the value of the property but the proclamation shall include the estimate value if any given by either of the parties. Therefore, the above said provision clears the doubt that the estimate value if any given by the party shall be entered in the sale proclamation. Strictly speaking, this provision does not in fact create any mandate on the Court to call upon the parties to furnish the value. However, as an abundant caution, the Court shall make it known to the parties the provision though they themselves can provide the estimated value of the property in order to include the same in the proclamation. If that is not done definitely as argued by the learned counsel, it amounts to a Material irregularity, which vitiates the sale.

13. Now, coming to Form No.29 (Civil), the relevant portion is extracted as under:

"No. 29

PROCLAMATION OF SALE

(O. XXI, r. 66)

(1) xxxxx

Conditions of sale 1 to 8. xxxxxxxx

Given under my hand and the sale of the Court, this
day of 19..... /20..... .

Judge

Schedule of Property

Number of lot Description of Property to be sold with the name of each owner where there are more judgment-debtors than one The revenue assessed upon the estate or part of the estate, if the property to be sold is an interest in an estate or a part of an estate paying revenue to Govern-

ment

Detail of any encumb -rances to which the property is liable

Claims if any, which have been put forward to the property and any other known particulars bearing on its nature and value [The value of the property as stated by the decree-holder The value of the property as stated by the judgement decoder.]

The said format mandates the Court that apart from mentioning the conditions of sale in the format while giving Schedule of the property, there are two columns at the end of the said Schedule of property with reference to "the value of the property as stated by the decree holder" and "the value of the property as stated

by the judgment debtor". Therefore, while issuing Form No.29, the proclamation of sale, it is the duty of the Court to mention by filling up the above said two aspects with reference to the value of the property stated by the decree holder and the judgment debtor.

14. The Karnataka High Court has inserted sub clause (e) to order 21 Rule 66(2) of CPC by way of amendment in the year 1977. It is stated that the value of the property as stated by the decree holder and the value of the property as stated by the judgment debtor by virtue of the insertion of the above said sub clause (e), the Court has to mention the value of the property as stated by the decree holder and the value of the property as stated by the judgment debtor in the proclamation of sale. Earlier to this amendment, Form No.29 did not contain these two columns. Therefore, it is the duty of the Court to make it known to the parties their obligation to furnish the value of the property and thereafter to fill up the relevant columns. Otherwise, it amounts to a material irregularity.

15. Now, coming back to the records of the trial Court, it discloses that the Court has not made known to the parties at any stage and called upon them to furnish the value of the property nor the case is posted for furnishing the estimated value of the property. Therefore, as rightly argued by the learned counsel, the non mentioning of the value of the property in Form No.29 in the sale proclamation amounts to a material irregularity which is a very good ground for setting aside the sale.

16. Before scanning Order 21 Rule 90 of CPC to ascertain whether there was any opportunity to the parties to explain and furnish the value of the property, I would like to refer whether any fraud is alleged by the judgment debtor and it has been proved in this particular case.

17. The fraud alleged by the judgment debtor in the affidavit filed in support of his application under Order 21 Rule 90 of CPC, depicted at paragraph (6) is that -

"The purchaser Mr. Ganesh is none other than the brother-in-law of the decree holder and both of them played fraud on the judgment debtors and also successfully held up the highest bidder from appearing before the Court"

And at paragraph 7, it is stated that :

"The value of the schedule property is more than 1.75 crores and the decree holder and his brother-in-law Mr. Ganesh the purchaser before this Court have hatched a conspiracy and played fraud and thereby trying to knock off the property for a meagre amount."

Except the above, nothing has been stated as to how the fraud has been played. How, the decree holder has prevented the other highest bidder from appearing before the Court. There are no details of facts stated in the affidavit with regard to the playing of the fraud by the decree holder. It appears no evidence has been led by the Judgment debtors in this regard. However, written argument has been filed by the judgment debtor reiterating the above said paragraphs in the written

arguments also.

18. In order to establish fraud, the party must distinctly raise the same in the pleadings with sufficient pleadings and it has to be proved to the satisfaction of the Court with cogent and convincing evidence. Mere pleading in the affidavit which is specifically and categorically denied by the other side does not amount to proof of the alleged fraud. Fraud is both a civil wrong and a Criminal act which leads to severe consequences. The word fraud cannot be equated to material irregularity, but it stands on the higher footing than the material irregularity. Therefore, it should be established beyond doubt to show that the fraud has been played and resulted in substantial injury to the judgment debtor.

19. In this background, if the records are seen, except stating in the affidavit nothing has been elucidated by way of evidence or examining the person who was the highest bidder in the spot was prevented from appearing and participating in the Court Sale before the Court. He is the proper person to say that in any manner he was prevented from appearing before the Court to participate in the Court sale. In the absence of such materials, mere pleading is not sufficient to prove the fraud. The fraud alleged in this particular case cannot said to have been proved by the Judgment debtor.

20. The other argument raised by the learned counsel that the bailiff has fixed the amount of Rs. 75 lakhs as the minimum initial bid value of the property, where there is no empowerment for him to fix up the said amount. In that line also, the sale is vitiated.

21. Looking to the above said facts and circumstances, when, the fraud alleged has not been established, this Court has to consider whether the judgment debtor has established under Order 21 Rule 90 of CPC that the applicant has sustained substantial injury due to the material irregularity in the conduct of Sale, and the applicant could have taken that ground on or before the date on which the proclamation was ordered.

22. As I have already narrated that mere existence of material irregularity, not by itself a ground for setting aside the sale under the said provision. Therefore, it is clear from the above said provisions that mere irregularity or fraud by themselves are not grounds for setting aside the same. Though irregularity or fraud is established, there must be a substantial injury occasioned by the irregularity or fraud. It depends however upon several relevant facts. There must be an express plea as to substantial injury suffered by the judgment debtor, however, it can also be ascertained if it is implicit in the allegations made in the application. It is the bounden duty of the Court to ascertain even otherwise on the basis of the over all facts and materials on record whether any substantial injury has been occurred due to the material irregularity or any fraud played in conducting the sale. If the Court is of the opinion that there is no substantial injury, even if it is established the existence of material irregularity or fraud, the Court cannot interfere with the sale proceeding.

23. Though there is no specific plea taken up by the judgment debtor before the trial Court with regard to the above said alleged material irregularity and the Court has not adverted to the said aspect, nevertheless this Court can definitely consider them as it is a violation of a statute under Order 21 Rule 66 of CPC. Therefore, this Court has ventured upon to do the same.

24. Having come to the conclusion regarding existence of a material irregularity, but not the fraud as alleged in this case, it is just and necessary to look into the factual matrix of this case, in order to ascertain whether there was an opportunity to the judgment debtor to question the above said irregularity before the sale proclamation or whether any substantial injury has been caused to him.

25. So far as the substantial injury is concerned, it is the contention of the appellant in the affidavit filed in support of the application under Order 21 Rule 90 of CPC is concerned, that the value of the Schedule property is more than 1.75 crores, but the same has been sold for a meager amount of Rs.1.10 crores. Therefore, the appellant has suffered substantial injury due to that. It is seen from the records that no where earlier to the present application, the appellant has stated about the value of the property as Rs.1.75 crores. It is also seen from the records that at one stage, the appellant says that the property worth Rs.1.50 crores and in another breath he says that the property worth more than Rs.1.75 crores. In order to establish that the property worth more than Rs.1.75 crores except his affidavit it appears nothing has been placed before the Court. As no evidence has been adduced, the Court is not expected to investigate this particular aspect suo moto and estimate the value. Even in the memorandum of arguments submitted before the trial Court, the said aspect is conspicuously absent as to how the appellant has evaluated the said property, as worth Rs.1.75 crores.

26. It is worth to refer the order sheet of the trial Court which depict that, on 25.4.2015, the advocate for the judgment debtor submitted that he would make the payment of the decretal amount on the same day at 3.00 p.m., but in the afternoon he further prayed time and the same was rejected and sale notice was issued on 4.6.2015. The Court observed that sale notice was duly served and thereafter, the judgment debtor on 6.6.2015 submitted that he himself would sell the property and he would make the payment, but he has not done so. Thereafter, an amount of Rs.20 lakhs has been paid by the judgment debtor on 22.6.2015 received by the decree holder. For further payment, he sought time and it is quantified that judgment debtor still has to pay Rs.73 lakhs, the Court has rejected his prayer on 3.8.2015 and issued sale proclamation and sale warrant on 3.8.2015 fixing the date of sale on 26.8.2015 on spot, and 11.9.2015 before the Court. The said sale proclamation returned on the ground that there was no 15 days time to conduct the bid on the spot. The trial Court on 21.8.2015 re-issued the sale proclamation and warrant fixing the sale on 11.09.2015 on the spot and on 28.9.2015 before the Court. On 10.9.2015, the judgment debtor has changed his advocate and he filed an application IA No.2 praying time to pay the

decreetal amount and to recall the order dated 3.8.2015. The Court posted the said application for objections on 11.9.2015 again, the counsel for the judgment debtor has insisted for recalling of the sale warrant. As the decree holder and counsel were absent, the sale warrant was not recalled.

27. Looking to the above said factual aspects as noted in the order sheet, from 3.8.2015 upto 11.09.2015, the judgment debtor had sufficient opportunity to submit before the Court the exact value of the property, or bring it to the notice of the Court about the alleged material defect in the Sale proclamation. Both decree holder and judgment debtor had opportunity to furnish the estimated value of the property so as to mention the same in the sale proclamation in the Schedule. Therefore, Order 21 Rule 90 CPC cannot be invoked to set aside the sale, as the Judgment debtor had sufficient opportunity to take up such contention before the Court at the earliest point of time, if he does not take, then he is precluded from taking such objections later.

28. Be that as it may, on 11.9.2015, the sale warrant was executed by the concerned bailiff discloses that, the sale proceedings on the spot on 11.9.2015 in the afternoon at 3.00 p.m., was held on the spot fixing the value of the property at Rs.75 lakhs. The said document which is referred to as "Sthirasthi Haraju patti" (immovable property auction list) shows that on that day, at that particular point of time, this judgment debtor, (the appellant) was very much present and signed the said document. The said document discloses that as many as eight persons have participated in the auction and highest bidder was Sri T.N. Harish Kumar who bid in the auction for a sum of Rs.1.40 crores. The another next highest bidder was Sri K. Ganesh who bid for a sum of Rs.1,02,00,000/-. Other six bidders have in fact bid for the lesser amount. Therefore, the bailiff has informed the said Ganesh, Harishkumar and others, that the Court sale would be held on 28.9.2015 and requested them to appear and participate before the Court. These documents have been signed by the panchayathdars and the bidders. Particularly, Sri T.N. Harishkumar has also signed this document. He never informed or complained at any point of time that he was prevented from appearing before the Court to participate in the Court sale proceedings.

29. It is also pertinent to note here that even at the time of execution of the warrant of sale, the judgment debtor had opportunity to tell the bailiff with regard to the actual value of the property as Rs.1.75 crores. It is also not mentioned in the application filed under Order 21 Rule 90 of CPC and the affidavit that, he has intimated the said bailiff about the actual value of the property, and in spite of that bailiff has not considered the same. It is further pertinent to note that, the order sheet at 20.09.2015 discloses that the judgment debtor and the decree holder were present before the Court. The Court conducted the Court sale. As the highest bidder Harish Kumar was absent, the next highest bidder was ready to purchase the property for Rs.1.02 crores, before the Court and it appears after bargain he further agreed to purchase the property for Rs.1.10 crores. The Court in the presence of the decree holder and

the judgment debtor accepted the said bid and directed the said person to deposit 25% of the bid amount and allowed him to deposit the remaining 75% within 15 days. On that day also though the judgment debtor was very much present, he never made any representation or filed any objection stating that the bid amount was at a throw away price as the property worth more than Rs.1.75 crores. But on 14.10.2015, after lapse of more than 15 days, he filed the application under Order 21 Rule 90 of CPC.

30. What emerges from the above said facts and circumstances and sequence of events taken place before the trial Court is, if at all the property was auctioned for a throw away price or Court sale was held at throw away price, nothing prevented the judgment debtor from filing one such application on the date of Court sale with reference to the market value of the property at Rs.1.75 crores. That clearly establishes that though the judgment debtor had sufficient opportunity, he has not made use of the same and not furnished any details with regard to the market value of the property as on that date. Therefore, the judgment debtor is not entitled to file an application under Order 21 Rule 90 of CPC on that particular ground in view of the proviso to the said provision.

31. As I have already discussed that no material is placed either before the trial Court or before this Court what is the basis for evaluating the schedule property for a sum of Rs.1.75 crores as the market value as on the date of the auction. In the absence of such materials, it cannot be said that the judgment debtor has established that he has suffered any substantial injury due to the auction sale of the property.

32. In the absence of such materials, the Court cannot imagine that the appellant has suffered any substantial injury. Therefore, the question of setting aside the said sale does not arise and as such, the trial Court has properly considered the materials on record and dismissed the application rightly.

33. Though this Court is of the opinion that there is a material irregularity in conducting the sale but as there is no substantial injury established by the appellant, the order impugned under the appeal is not liable to be interfered and the sale cannot be set aside.

In the above said facts and circumstances of the case, the appeal is liable to be dismissed. Accordingly, the appeal is dismissed as devoid of merit on cost throughout.