
(1970) 06 MAD CK 0012
In the Madras High Court

S.S. Sundaram Chettiar

APPELLANT

Vs

Mangai Achi through Power Agent M.PR. Chockalingam
Chettiar

RESPONDENT

Date of Decision : 26-06-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, 151

Citation : (1973) 86 LW 112 : (1973) 1 MLJ 160

Hon'ble Judges : T. Ramaprasada Rao, J

Bench : Division Bench

Judgement

T. Ramaprasada Rao, J.—The appellant is the judgment-debtor. The respondent obtained a mortgage decree against the appellant in the year 1962 in O.S. No. 72 of 1961 on the file of the Subordinate Judge's Court, Ramanathapuram. The hypotheca is the cinema theatre in Rajapalayam. Admittedly this was valued by the Commissioner appointed by Court at Rs. 2,91,320. In or about 1968 when the theatre was brought to sale pursuant to the mortgage decree the amount due under the decree was about Rs. 2,38,695. On the basis of the value as fixed by the Court, the upset price was also fixed but was reduced from, lime to time as there were no bidders at such auctions purported to be held in execution of the decree. Ultimately, on 12th August, 1969, the upset price was reduced to Rs. 2,25,000 and the property was also sold for Rs. 2,25,000. On an earlier occasion this Court had to consider whether a sale of this very hypotheca in execution of the above decree for a sum of Rs. 2,100 subject to encumbrances was proper. In (K. Ramachandran v. S.S. Somasundaram Chettiar and Ors.) L.P.A. No. 98 of 1964 Anantanarayanan, C. J., and Natesan, J., by their order dated 7th March, 1967, set aside the sale and found that there were certain suspicious circumstances which warranted the forced sale being set aside. The proceedings that followed thereafter and which culminated in the impugned sale are the subject-matter of the appeal before us.

2. The appellant contended that the property was worth very much more than

the decree amount and that in the sale held on 12th August, 1969, it was knocked off for a ridiculously low price, In those circumstances he filed an application u/s 151, Civil Procedure Code, along with his application for setting aside the sale under Order 21, Rule 90 for an order that the application may be accepted without calling for any security as required under the rule. This was opposed by the respondent on the ground that under Order 21, Rule 90 it is imperative that such 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, has to be called for or in the alternative a direction to deposit such amount in Court be made. The respondent in his counter referred to various activities of the appellant, characterised by him as unlawful, and ultimately he would state that the sale having been concluded after several adjournments no further indulgence should be given and if at all the application under Order 21, Rule 90 filed by the appellant has to be entertained, it should be done after calling for security or after a direction to the appellant to _ deposit the amount as required under the rules. The learned Subordinate Judge, Sivaganga, who enquired into the matter, finds that the property was valued by the Commissioner at Rs. 2,91,320 but without advertng to any further facts or material but following the imperative mandate under Order 21, Rule 90, Civil Procedure Code, was of the view that there was no reason to dispense with the security as required therein. He ultimately dismissed the application with a direction to the appellant to furnish security for a sum of Rs. 2,25,000. It is as against this the present appeal has been filed.

3. Learned Counsel for appellant contends that it is not incumbent on the Court at all times to demand additional security without considering the merits of the case and the material on record. His case is that the circumstances of the instant case cannot prompt the Court to call for fresh security end in any event as the value of the hypotheca. is far in excess of the decree amount, the lower Court ought not to have summarily rejected the application for dispensing with the security on the basis of the antecedent history of the appellant and without advertng to the relevant material on record. Learned Counsel for the respondent would urge that the call for security is well founded and the Court has no jurisdiction to pass any other order as the statutory prescription in Order 21, Rule 90, enjoins upon the Court to do so.

4. As already stated, the application, in the instant case is made u/s 151, CPC also. Order 21, Rule 90. reads as follows:

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.

Provided that the Court may, before admitting the application, call upon the applicant either to furnish security to the satisfaction of the Court for an amount

equal to that mentioned in the sale warrant or that realised by the sale whichever is less, or to deposit such amount in Court:

Provided also that the security furnished or 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 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".

5-6. The first proviso vests in the Court discretion to call upon the applicant either to furnish security or to deposit the amount as mentioned there in Court. The second proviso has certainly an impact on the first proviso. It provides as it were a key for interpreting the first proviso. It is normal to expect that in cases where applications to set aside sales on grounds of irregularity or fraud are filed and if the Court is inclined to hear them, it would call for such security as prescribed, but having regard to the spirit of the rule such security as would be essential in the circumstances to avert avoidable loss to the decree-holder should only "be demanded. No doubt, it is the decree-holder who is likely to be involved in another proceeding in case the sale is set aside with all risks attendant upon it. It is in this view that the second proviso indicates as to how the security called for under the first proviso should ultimately be dealt with. The Code however is silent as to what the Court has to do in certain circumstances when it would be extremely harsh and unreasonable to call for security or deposit as prescribed. Whatever may be said of ordinary money decrees with which we are not concerned in this appeal, it appears to us to be chimerical if the Court at all times and irrespective of the expediency of the case before it should insist upon security or deposit for the entire amount mentioned in the sale warrant. No doubt, it is well accepted that in so far as matters are dealt with and provided by the Code the provisions therein are exhaustive; but at the same time the principle that every procedure has to be understood as permissible until expressly interdicted or prohibited by law has also to be borne in mind. In a matter like the one under consideration and particularly in the case of execution of mortgage decree, it is difficult to hold the view whether the Court while exercising its jurisdiction under the first proviso to Order 21, rule 90, should invariably and in all cases call for the security or deposit for the totality of the amount in the sale warrant as the effect of the second proviso considerably whittles down such an inelastic interpretation. On a fair reading of Order 21, Rule 90, it can fairly be presumed that the Code has not provided at least for certain contingencies.

7. One such contingency is this. When the value of the hypotheca as ascertained by the Court or its officers is sufficiently high and the price secured in the public sale in Court is considerably low, then is the Court in exercise of its discretion precluded to relax the rigidity of the call for security or deposit for the entire amount shown in the sale warrant or that realised by the sale? The scope for the

exercise of such discretion *ex debito justitiae* is not ruled out because of the saving element provided in the second proviso. The language of the second proviso is to the effect that the security furnished or the deposit made shall be liable to be proceeded against only to the extent of the deficit on a re-sale have some significance and they have to be given effect to without being totally and lightly brushed aside. If effect has to be given to these words, it appears to us that, in the case of a mortgage decree in any event, the Court has to construe the limbs of Order 21, Rule 90, in a liberal way and see that justice is not denied because of technicalities. In a given case the Court can easily find out the extent, of the anticipated deficit and if it so finds on enquiry the limits of such a deficit it could quantify the same and call upon the judgment-debtor in a mortgage decree to furnish security for that amount or deposit the same to cover up the apprehended loss. Certainly this would involve an enquiry and an investigation and the Courts are bound to act wisely and cautiously in quantifying the deficiency so that the decree-holder may not be prejudiced later. If the intendment of the rule of procedure in Order 21, Rule 90, is to be understood as inelastic and rigid, then the second proviso which is intertwined with the first appears to be otiose. Security is asked for only to recompense the decree-holder in case he suffers loss on a re-sale. The second proviso to Order 21, Rule 90, throws abundant light on this aspect. It cannot be said that the text and intendment of the second proviso was only to make an obvious position more clear. It is in this context that the impact of the second proviso over the first becomes important and lends support to the view that the Court while exercising the discretion under the first proviso can not only dispense with power in an authority which can easily be comprehended and spelt. If an authority can dispense with the furnishing of security in a given transaction, it has undoubtedly the lesser power to dispense with such security, in part. So also where the Court is satisfied that the value of the hypotheca is high and the justice of the case requires that the security or deposit need not be called for, then it would be in order to dispense with the same either entirely or after enquiry quantify the anticipated loss and call for security for such a reckoned amount. It is not as if the Court is bereft of such a jurisdiction. In fact, the application in the present case was filed u/s 151, Civil Procedure Code, and the Court has inherent powers to so exercise and mould its discretion in appropriate cases.

8. Our attention has been drawn to a decision of Ismail, J., in *Saradambal Vs. A.M.P. Arunachalam*, There the learned Judge was not in fact concerned with the manner of exercise of discretion of Courts while dealing with an application under Order 21, Rule 90. The learned Judge after observing that Order 21, Rule 90, applies to every case where an immovable property has been sold--whether it is in execution of a mortgage decree or any other decree, stated as follows:

In the case of a mortgage decree a proper exercise of discretion on the part of the execution Court will be to direct furnishing of security only if it comes to the definite conclusion that the value of the property will not be sufficient to cover the liability on the property, including the amount for which the property was

sold. So long as the lower Court has not come to a positive conclusion on this aspect, it will not be exercising its discretion properly or legally if it directs the applicant to furnish security.

In so far as money decrees are concerned, we respectfully, agree with the ratio of a Division Bench of this Court reported in *G.F.F. Foulkes, administrator of estate of Robert Foulkes by agent a. Kailasam Pillai Vs. A.S. Suppan Chettiar and Another*, , In the course of the discussion King, J... while dealing with the second proviso or the third paragraph of Order 21, Rule 90, expressed as follows at page 207:

It will be obvious from a consideration of the third sub-section that it, can come into operation only in very extraordinary circumstances, namely, when the Court has demanded security and then has proceeded to consider the merits of the petition and has come to the conclusion that the grounds urged in the petition justified the setting aside of the sale, in other words, when the property sold has owing to certain irregularities fetched a sum far less than it ought to have done. It is obvious in these circumstances that if the Court's decision is right the result of a re-sale is almost certain to result in a much larger sum being realised, so that there will be no opportunity in the ordinary course for the enforcement of the security against the person who has furnished it. The third sub-section of Rule 90 therefore can come into operation only in the extraordinary circumstances of the Court being first satisfied that there are good grounds for setting aside the sale and then finding, no doubt to its extreme surprise, that the result of the re-sale is even less satisfactory in the matter of the sale proceeds than the result of the sale which it has set aside.

The above quotation, to a certain extent, supports our view that there may be extraordinary circumstances where the calling for security for the entire amount as prescribed might cause not only considerable hardship but on certain occasions it may negative a just right in the judgment-debtor to approach Courts for relief or make it impossible for him to do so. In any event we are of the view that the ratio in *G.F.F. Foulkes, administrator of estate of Robert Foulkes by agent a. Kailasam Pillai Vs. A.S. Suppan Chettiar and Another*, , has to be restricted to sales of immovable properties in execution of decrees other than mortgage decrees.

9. A Division Bench of this Court consisting of Ramachandra Iyer, C.J. and Anantanarayanan, J., had occasion to consider the scope of the provisos to Rule 90 of Order 21. In *Santhia Servai and Anr. v. M. Ar. Rm. V. Solqyappa Chettiar* C.M.A. No. 86 and 92 of 1959, the learned Judges observed as follows:

In our opinion, the terms of the proviso to Order 21, Rule 90, Civil Procedure Code, which requires security to be furnished either in respect of the amount mentioned in the sale proclamation, or in respect of the sale amount would be inappropriate in the case of a mortgage decree, as there is already a subsisting security for the decree amount. It may be that in certain - cases on account of

the delaying tactics adopted by the judgment-debtor, the existing security might depreciate and, in such event, it might be considered equitable there should be a power in Court to demand security for the deficiency, viz., between the amount realised at the sale and the present value of the property. But there is no provision in Order 21, Rule 90, Civil Procedure Code, to cover a case of such deficiency in security. In the case of mortgage decree it will be apparent from the above discussion that a Court can be said to be exercising its jurisdiction wisely, if it does not demand security under the proviso to Order 21, Rule 90, Civil Procedure Code.

Again, Anantanarayanan, C.J. and Natesan, J., in *Brackath v. The Trivandrum Permanent Bank Ltd.* L.P.A. No. 91 of 1964, observed:

It is submitted that it is a case of mortgage decree and in the case of a mortgage decree, security need not be demanded. But it is not an inflexible rule that no security should be demanded on an application under Order 21, Rule 90, Civil Procedure Code, in the case of a mortgage decree. Cases may differ and require security even in the case of mortgage decrees.

We find however that the observation in *Santhia Servai and Anr. v. M. Ar.Rm. V. Solayappa Chettiar* C.M.A. No. 86 and 92 of 1959, lend support to the view that the Court has got the power in appropriate cases to demand security only for the deficiency notwithstanding the fact that there is no provision in Order 21, Rule 90, Civil Procedure Code, to cover a case of such deficiency in security. If really hardship would result in literally applying the first proviso to the rule, then Courts are not totally bereft of their power and in our view, they could, after due enquiry, fix the deficiency and call for security for such deficiency or for a deposit in specie of such deficiency.

10. Having thus set the principles which have to be borne in mind in exercising discretion vested in Courts under Order 21, Rule 90, we are not satisfied that in the instant case the learned subordinate Judge was right in calling for security without advertent to the value of the hypotheca and without giving a positive finding that the value of the mortgaged property will not be sufficient to cover the liability on the property including the amount for which the property was sold. We agree with the observations cited above from the judgment of Ismail, J., that as long as there is no definite finding or conclusion on the above aspect the Court cannot be said to have exercised its discretion properly or legally if it directed the judgment-debtor to furnish security. This is what the lower Court did. As already stated, the value as fixed by the Commissioner is sufficiently high and we are therefore of the opinion that security should not have been demanded as the respondent has not even attempted to prove that in case of re-sale there is bound to be deficiency. There is therefore no imminent need for security and we are of the view that the Court below has wrongly exercised its discretion in calling for such security. The Civil Miscellaneous Appeal is therefore allowed and the application for setting aside the sale will be numbered by the lower Court and the same disposed of in accordance with law expeditiously.

There will be no order as to costs.