
(1971) 11 AP CK 0006
In the Andhra Pradesh High Court
Case No : A.A.O. No. 419 of 1968

Tamma Venkata Pardhasaradhi	Vs	APPELLANT
Tamma Ramachandra Rao and Others		RESPONDENT

Date of Decision : 11-11-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 41 Rule 33, 47

Citation : AIR 1972 AP 223

Hon'ble Judges : Sambasiva Rao, J; Ramachandra Raju, J

Bench : Division Bench

Advocate : Hanumantha Rao, for the Appellant; G. Venkatarama Sastry, C. Sitaramaiah and M. Chandra Sekhara Rao, for the Respondent

Judgement

Sambasiva Rao, J.—The appellant filed before the lower Court a petition under Order 21, Rule 90, C. P. c. and Section 47, C. P. C. for setting aside a sale. The husband of the fourth respondent and father of respondent 5 to 15 obtained a decree on the foot of a mortgage in O. S. No. 32 of 1964 on the file of the Subordinate Judge's Court Guntur. The father of the appellant is judgment-debtor No. 1. The appellant is judgment-debtor No. 2 and his brother is judgment-debtor No. 3. The father and brother are respondents 1 and 2 in the appeal. There was a sale of the mortgaged property on 17-7-1968. Alleging that the sale was vitiated by several illegalities and irregularities like absence of notice, fraud, etc., and that the sale caused substantial loss to him the appellant filed the petition for setting aside the sale.

2. The petition was filed on 14-8-1968. The Court's office took an objection that neither security was furnished nor the decretal amount was deposited and the decretal amount was deposited and accepting the office note the Court directed the appellant on 22-8-1968 to furnish security or deposit the amount within seven days. This was obviously done without giving notice to the appellant and out giving notice to the appellant and calling upon him to show cause why he should not be directed to furnish security or make a deposit. The appellant

represented the petition on 29-8-1968 stating that it was an application not only under that it was an application not only under Order 21, Rule 90 but also under Sec. 47, C. P. C. that in any case the security or deposit Rule 90 is only discretionary and neither furnishing security nor making a deposit was necessary; and that notice of the objection might be sent to the respondent. This view of the appellant was not accepted by the Court. When the petition came up before the Court on 12-9-1968 the decree-holder's counsel appeared on his own accord without Court's notice and sought an opportunity of making his representation before the petition was numbered. Thereupon the petition was posted to 20th of September, 1968. The decree-holders appeared through a counsel and the petition was adjourned to 11-10-1968 for objections were filed on behalf of the decree-holders. The petition was still unnumbered and arguments were heard thereon on 26th and 28th of November, 1968 and ultimately the Court rejected the unnumbered petition on 30th of November, 1968. The present appeal is directed against the said order or rejection.

3. Two principle questions appear to have been raised by the appellant before the lower Court. Firstly, once the Court had heard the advocates of the respondents and their objections it was tantamount that the court had taken cognizance of the petition and registered it and when that is done the court had no more jurisdiction to require the appellant either to furnish security or to make a deposit under Order 21, Rule 90, C. P. C. Secondly, the petition filed for setting aside the sale not so much under Order 21, Rule 90 but was one u/s 47 which does not require any security or deposit. In the light of the aforesaid two objections it was argued that the insistence on furnishing security or making a deposit was not proper. These contentions, as we have said, did not find favour at the hands of the lower Court. They have been reiterated before us by the learned counsel for the appellant. He has, in addition, argued that the direction of the Court dated 22nd of August, 1968 to the appellant either to furnish security or to deposit money within seven days without notice to the appellant is contrary to law. It has also been submitted that since this is a mortgage decree no further security is, in fact, necessary in this case.

4. We will first take up for consideration the contention that once the Court has heard the advocates of the respondents and their objections it was tantamount that the petition for setting aside the sale was registered and taken judicial cognizance of and that the Court had lost the power to call upon the appellant to furnish security or make a deposit. This argument is sought to be founded on the language of the first proviso to Rule 90 of Order 21 introduced by Andhra Pradesh and Madras. Sub-rule (1), which is common, enables certain persons to apply to the Court to set aside sale on the ground of material irregularity or fraud in publishing or conducting it. The proviso thereto, which is common to all the States, however, lays down that no sale shall be set aside on the ground of irregularity or fraud, unless the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud. The amendment of Andhra Pradesh and Madras has inserted two provisos between sub-rule (1) and

the provisio. They read as follows:-----

"Provided 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 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 resale of the property already brought to sale."

5. The newly inserted first provisio is material in this context. It enables the court to call for security or deposit only before admitting the application for setting aside the sale. Then the question would be what is "admitting the application. Whether admitting the application is a judicial act or an administrative act is not material for the purposes of the present discussion. What is important is the act of admitting the application." It is undoubtedly the act of the Court and not merely caused by the appearance of parties or filing of objections on their behalf. In order to find out whether an application is admitted or not, the decision and intention of the Court should be found out. The only criterion in such determination is the intention of the Court to receive the application on file for the purpose of adjudicating on it. The physical act of merely receiving the papers and the application cannot by any stretch of imagination be considered as admitting the application. For, the Court's office generally receives all papers filed into it, whether tenable or untenable and whether in accordance with law or not. It is only when the papers are scrutinized and found to be correct and in accordance with law, then they are admitted for decision.

In some cases it may happen that the opposite party may have scented about the filing of the papers into Court and appear before the Court and object to the filing of the papers even without any notice from the Court. Generally speaking the issuance of notice by the Court on an application or suit is an indication that the Court has received such application or suit for adjudication. In the absence of such a notice by Court, it is difficult to infer the intention of the Court to admit the application or suit. It cannot be said from the mere fact of the appearance of the opposite side that the Court has admitted the application or suit. As we have said it is the intention of the Court that matters and not the appearance of parties. it is patent that whether an application or suit has been admitted or not has to be gathered from the circumstances of the case.

6. Decided cases also support the same view. Panduranga Rao, J., in Chidambaram Pandaram Vs. Lakshminarayana Chettiar, observed that usually and rightly the issue of a notice to the other side is regarded as a step showing that the petition has been admitted. The learned Judge also emphasised upon finding out the intention of the Court to ascertain whether a petition has been admitted or not. Once notice is issued and the other side was actually heard, the

learned Judge held, it was tantamount to admitting the petition. The decision of King and Happell, JJ., in *R.D.K. Venkatalingama Nayanam Bahadur Varu Vs. Raja Inuganti Rajagopala Venkata Narasimha Nayanam Garu*, is more apposite. There the Court ordered that security should be furnished and in pursuance thereof the applicant filed a draft security bond. Without passing any orders in regard to the adequacy of the security tendered or even to the necessity for furnishing any security, the Court issued notice to the opposite side. The opposite side appeared and objected to the adequacy of the security offered. The result of the enquiry was that the Court found that the offered security was inadequate and thereupon it dismissed the application without considering it on its merits.

The learned Judges held that the Court by giving notice did not intend to deprive itself on the power of deciding whether the security to be eventually furnished by the applicant was adequate or not. This decision affords an illustration that even issuance of notice to the other side does not clinch the matter and it was the circumstances of the matter as a whole and the intention of the Court that are important. In *N.V. Vaidyanatha Ayyar and Another Vs. Indian Bank Ltd., Tiruchirapalli and Others*, , Balakrishna Ayyar, J., speaking for the Court observed that whether a petition has been admitted or not would depend upon the circumstances of each case. Stating the processes through which an application filed into Court passes, the learned Judge observed that when notice is ordered to go, it normally means that the Court has applied its mind to the petition and decided to hear the petitioner and the opposite side. Normally, that would be cogent evidence that the petition has been admitted. But there may be cases where notwithstanding the fact that notice has been ordered to issue, it is clear that such a result was not intended.

This is clear enunciation of the law. The case in *C.D. Sarojini Ammal Vs. The Egmore Benefit Society 3rd Branch Ltd.*, offers an analogous illustration to the circumstances of the present case. When the applicant was ordered to furnish security, the decree-holder voluntarily took notice and desired to file counter-statement. The permission was accordingly granted by the Court. In these circumstances, as observed by Ananthanarayana, J. (as he then was) was not tantamount to admitting the application and did not absolve the applicant from the duty of furnishing security in accordance with the Court's order. Ismail, J. in *Saradambal Vs. A.M.P. Arunachalam*, following the decision in *R.D.K. Venkatalingama Nayanam Bahadur Varu Vs. Raja Inuganti Rajagopala Venkata Narasimha Nayanam Garu*, (which we have already referred to) expressed the same view. It is, therefore, undoubted that the factum of admitting the petition and the Court's intention to do so should be gathered from the circumstances of each case.

7. Now what are the circumstances of the present case. To briefly recall them, when the appellant had filed his application, the Court directed him, acting on the office note, to furnish security or deposit the amount within seven days. On 29th of August, 1968 the appellant represented the petition saying that security

or deposit was not necessary. When the matter came up before the court on 12-9-1968, the decree-holder's counsel appeared of his own accord without Court's notice and sought an opportunity of making his representation on the unnumbered petition. According to his request, the Court gave him time obviously for the purpose of finding out whether the application should be admitted and numbered without any security or deposit. Both parties addressed their arguments on this aspect of the matter on 26th and 28th November, 1968 and the Court was persuaded to accept the arguments of the decree-holder. Then it rejected the unnumbered petition. The significant fact is that till the end the application was unnumbered. The decree holder's counsel appeared on his own initiative without being invited by the Court. Further, his representation was essentially in regard to the need for security or deposit. From these circumstances, it is impossible to gather any intention of the Court to admit the application. It is manifest that it was only considering throughout these proceedings whether it should grant the request of the judgment-debtor and admit the petition without security or deposit. It cannot, therefore, be said in the present case that the Court had admitted the application or that the hearing of the objections of the respondent's counsel was tantamount to such admission. The objection of the judgment-debtor therefore fails.

8. It was next argued for the Judgment-debtor that the application was really u/s 47, C. P. C., which does not require any security or deposit. It was contended before the Lower Court and the same contention has been repeated before us that the matter would directly come u/s 47, C. P. C., because there was no notice as required by O. XXI, R. 22 C. P. C. Therefore, the material irregularity is not in publishing and conducting the sale, but actually occurred in filing the execution petition itself. But this objection in fact is not correct. E. P. No. 28/1967 in which the execution is being taken was filed on 20th of December, the final decree. That was found by the lower Court and the learned Counsel is not able to show that it is wrong. It is thus patent that there is no irregularity in starting the execution proceedings as such. Infact the sale set aside petition rests mainly on the alleged illegalities and irregularities in the sale. It was alleged that there was no proper proclamation of the sale as per the rules: that there was no publication of the sale; and the 16th respondent had maneuvered the sale in his favour in collusion with respondents 4 to 15; and that the property was valued for a lesser amount.

All these allegations concern only with the illegalities and irregularities in publishing and conducting the sale. Thus the application comes directly within the scope of Rule 90 of the Order XXI, C. P. C. It is true that all questions between the parties to the suit relating to the execution, discharge or satisfaction of the decree are generally covered by Section 47, C. P. C. But that is only a generally provision. However, the code makes a specific provision and lays out a definite procedure for setting aside sales of Immovable properties on grounds of irregularity or fraud in publishing or conducting them. When there is a specific provision in the law, it is that provision that should be invoked and applied and

not the general provision. This rule is well established. In fact that appellant himself had invoked Order XXI, Rule 90, C. P. C., also as the provision under which he was making his application. The circumstances of his case are clearly therefore, logical to test his application from the perspective of the specific provision of Rule 90 and not from that of the general provision of Section 47, C. P. C. Otherwise Rules 89 and 90 of Order XXI, C. P. C., would be rendered nugatory and otiose. That could never be the intention of the makers of the code.

9. When a person, feeling aggrieved by a sale impugns it on grounds stated in Rule 90, he is bound by the requirements and implications of that Rule. For the purpose of finding out whether a particular application comes under Rule 90 or Section 47, C. P. C., the substance of the application must be considered. And if that substance is that there were irregularities or illegalities in publishing or conducting the sale, then the application must be treated as one under Rule 90. If, on the other hand, the grounds alleged are either anterior or subsequent to the publishing or conducting the sale, it is outside the purview of Rule 90 and will come within the ambit of Section 47, C. P. C. This distinction between two provisions has also been pointed out by the Madras High Court in *Seshagiri Aiyar Vs. Valambal Ammal and Others*, and this Court in *Satyanarayanamurthy v. Bhavanarayana* AIR 1957 AP 185 (FB). Since the appellant's petition alleges irregularities and illegalities in publishing and conducting the sale, it is one coming within the scope of Order XXI, Rule 90, C. P. C., and must, therefore, satisfy all its requirements.

10. All the same, we find great force in the contention of the learned counsel for the judgment-debtor that the lower court acted quite contrary to law in requiring the judgment-debtor to furnish security or make a deposit and that too without notice to him. The Court below, after coming to the conclusion that the petition is governed by Order XXII, Rule 90, C. P. C., thought that either security or deposit is a condition precedent before a petition thereunder is numbered. This supposition on the part of the lower court is wholly unwarranted by the rule. The word used in the first proviso inserted by the Andhra Pradesh and Madras amendment is "may" and not "shall". The said proviso merely enables the Court to call upon the applicant before admitting the application, either to furnish security or to make a deposit. Had the legislature intended that such security or deposit is a condition precedent, it would have used necessary language to bring out that meaning. Had it been its intention to do so, it would have used the word "shall" and not "may". The language of the proviso does not at all support the contention that it was obligatory on the part of the Court to direct the applicant to furnish security or make a deposit.

Further, if security or deposit were at condition precedent the framers of the Code would not have left it to the Court require them. On the other hand, they would have shown them as a condition precedent for making an application by an aggrieved person. Moreover, it is conceivable that in some cases, like a mortgage decree, where furnishing of security or making a deposit might be found to be

unnecessary. Therefore discretion is given to the Court whether or not to require security or deposit. We have no hesitation, therefore, that the lower Court is wrong in thinking that security or deposit is a condition precedent for an application under Order XXI, Rule 90, C. P. C. The learned counsel for the decree-holder has, however, referred to an unreported decision of Krishna Rao and Madhava Reddy, JJ., dated 19-11-1970 in Civil Misc. Appeals Nos. 179 and 121 of 1969 (Andh Pra), in an endeavour to support this view of the lower Court. The decision of the Division Bench does not, render any support to this view. The Civil Misc. Appeals were filed against the orders refusing to accept security and to redeliver property pursuant to the sale that was confirmed. The learned judges held that since the Civil Revision Petition filed against the order directing security was dismissed and became final, the Civil Misc. Appeal was ineffective without getting the sale set aside. That is all the decision in this case. It is quite clear that the learned Judges did not express any opinion on this matter.

11. Then the main grievance of the judgment-debtor remains that the order directing the judgment-debtor to furnish security has been made without notice. But the learned counsel for the decree-holder has raised an objection to this contention showing that there was no appeal against the order directing the judgment-debtor to furnish security or make a deposit, and that the present appeal is directed only against rejecting his sale set aside petition. It has been argued that in this appeal the order directing security or deposit cannot be interfered with. But this objection ignores the power of the appellate Court, while disposing of an appeal against a final order, to correct the interlocutory orders. The application of the judgment-debtor has been rejected by the lower Court on the ground that the judgment-debtor had not deposited the amount or furnished security as ordered by the Court. This Court has ample power to correct the earlier order while disposing of the present appeal directed against the final order on the petition rejecting it. This power of the appellate Court is well established and is not in doubt. (Vide *Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, and *Satyanarayana v. Ramamurti* (1960) 2 AWR 430.

12. The fact remains that the lower Court had directed the judgment-debtor to furnish security or make a deposit without giving him any notice or affording him an opportunity to show cause against it. A direction to furnish security or make a deposit is prejudicial to him and principles of natural justice, apart from the positive rules of law, require that such an order causing prejudice to a person cannot be passed without hearing him. Even before the amendment of *Gunturu Seeta Ramanjaneyulu, minor by mother and guardian Seetamma Vs. Vishnubhotla Ramayya and Others*, . But now the Andhra Pradesh and Madras amendment places the position beyond any doubt whatever. In specific terms, it provides that the Court may call upon the applicant to furnish security or make a deposit "after giving notice to the applicant." Thus giving notice to the applicant has been made compulsory before a direction to furnish security or make a deposit is given. Moreover such notice is also essential in the interests of justice. For instance, if it is a mortgage decree and the property has already been

attached, then the affected party pay point out these circumstances to the Court and satisfy it that to security or deposit is necessary.

Therefore giving notice to the concerned person before a direction to furnish security or make a deposit is given is a mandatory requirement. Admittedly in this case the Court did not afford such an opportunity to the judgment-debtor and in failing to do so failed to discharge the requirements of the Rule. Its order should, therefore, be set aside which we have no hesitation to do.

13. Before parting with the case another contention put forward on behalf of the decree-holder must be taken notice of. It has been said that since the Official Receiver has taken possession of the properties, the appellant had no locus standi to file the application. Reference in this behalf was made to *Manmatha Nath Mukherjee Vs. Jiaul Huq and Others*, . But the fact remains that the appellant is not the insolvent and his share of the properties has vested in the Official Receiver appointed for the estate of his father only for the appellant is obviously affected and is very much interest, in impugning the same. It cannot be said, therefore, that he has n locus standi to file the petition.

14. The learned counsel for the judgment-debtor has submitted that in this particular case no security or deposit would be necessary because it is a mortgage decree. It is for the Court below to satisfy itself whether security or deposit is necessary, because it cannot be said that in all mortgage decrees no security or deposit need be necessary. That depends upon the value of the mortgaged property and other circumstances of the case. The Court will have to consider all the circumstances of the case including the value of the security that is available.

15. In the result, the decision of the lower Court rejecting the petition of the petitioner is set aside and the matter is remitted back to the lower Court which is hereby directive (directed?) to restore the petition and to decide, after giving notice to the judgment-debtor, whether he should be directed to furnish security or make a deposit as per the Andhra Pradesh and Madras amendment to Order XXI, Rule 90, C. P. C., and to dispose of the sale set aside petition in accordance with the law and the observations made above. The appellant will have his costs of the appeal from the respondents.

16. Case remanded.