

(1972) 03 KAR CK 0013

In the Karnataka High Court

Case No : Ex. First Appeal No. 25 of 1970 with Cross Objections at
Miscellaneous First Appeal No. 8 of 1971

The Karnataka Bank Ltd.

APPELLANT

Vs

K. Shamanna and Others

RESPONDENT

Date of Decision : 27-03-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 34 Rule 14, 151, 47, 96

Citation : AIR 1972 Kar 321 : (1972) 2 MysLJ 20

Hon'ble Judges : M.S. Nesargi, J;E.S. Venkataramiah, J

Bench : Division Bench

Advocate : B.P. Holla, for the Appellant; P. Rangaswamy, for the Respondent

Final Decision : Allowed

Judgement

Venkataramiah, J.—The above appeals are filed against the orders passed on I. As. 10 and 11 in Execution No. 7/ 1966 on the file of the Civil Judge. Bangalore City, setting aside the sale of a house belonging to judgment debtor No. 2. The sale was held on 22-11-1966.

2. In the said execution proceedings the decree-holder sought to execute a money decree passed in O. S. 79/62 on the file of the District Judge. Bangalore. Under the decree the judgment-debtors, K. Shamanna and Lakshamma, were jointly and severally liable to pay the amount due under the decree. It may be mentioned here that the said decree was consent decree. Under the decree the defendants were permitted to pay the decretal amount in four equal instalments with a default clause stating that in the event of any two instalments being in default, the entire amount would become due. The judgment debtors did not pay the decretal amount in accordance with the decree. The decree-holder therefore sued out execution to realise the amount

3. The execution application was filed on 30-4-1966. Notices were issued to judgment debtors 1 and 2. The Judgment-debtors filed objections to the

execution on 1-6-1966. The case was posted for evidence to 3-6-1966. On that day, the judgment debtors and their counsel were absent. The executing court held that there was no substance in the objections and overruled the same. It therefore, issued sale notice for selling the property belonging to judgment-debtor No. 2. On 8-7-1966, I. A. 1. was filed u/s 151, Civil P. C. for setting aside the order dated 3-6-1966 by which the court overruled the objections. The court ordered that the ex parte order would be set aside and the judgment debtors would be heard provided a sum of Rs. 25/- was paid by way of costs to the decree-holder. The judgment debtors did not pay the costs and therefore on 29-7-1966 the contentions of the judgment-debtors were again overruled. On 26-9-1966 the decree-holder filed I. A. 2 for selling the property at the spot and it was allowed. On 17-11-1966, I. A. 5 was filed on behalf of the judgment debtors requesting the court not to publish the notification of sale regarding the sale of the property in a regional newspaper. This application was allowed. On the same day, another application i.e. I. A. 6 on behalf of the judgment debtors was filed requesting the court to notify in the sale proclamation that the property was worth Rupees 1,25,000/- for the reasons mentioned in the affidavit accompanying I. A. 6. but the same was rejected. The date of sale of the property was fixed as 22-11-1966. On 21-11-1966, the day before the date fixed for the sale, I. A. 7 was filed on behalf of the judgment debtors requesting the court to postpone the sale. On the same day, I. A. 8 and I. A. 9 were filed by the judgment debtors. Under I. A. 8, the judgment debtors requested the court to set aside the order dated 28-7-1966 overruling their objections and to again hear their objections to the execution petition. I. A. 9 was filed to hear the objections of the judgment debtors on the same day. The court did not pass any orders on these applications on that day. The sale was held on 22-11-1966 at the spot. It was submitted on behalf of the judgment debtors on 25-11-1966 that they would not press I. A. 7. It was accordingly dismissed. On 9-12-1968 I. A. 10 was filed by the judgment debtors under Order 21, Rule 90, Civil P. C. for setting aside the sale. During the pendency of the said petition, the second judgment debtor died. After her death the legal representatives of the second defendant was brought on record. They filed I. A. 11 raising certain objections with regard to executability of the decree. These two applications i.e. I. As. 10 and 11; were taken up together. The lower court allowed I. As. 10 and 11 and set aside the sale held on 22-11-1966. Ag-grieved by the order of the lower court on I. As. 10 and 11, the decree holder has filed the above appeals. Since some of the objections raised fall outside Order 21, Rule 90, Civil P. C., the decree holder has chosen to file Ex. First Appeal u/s 47 read with Section 96, Civil P. C. The Misc. First Appeal is filed against that Part of the order falling under Order 21, Rule 90, Civil P. C. by the decree holder.

4. Sri B. P. Holla, learned counsel appearing on behalf of the decree holder, submitted that the court below was wrong in setting aside the sale on the grounds mentioned in its orders. It may be mentioned at this stage that the court below has held that the allegations of fraud made by the judgment debtors

in the conduct of the sale had not been made out. No arguments were addressed 031 this question on behalf of the judgment debtors. We, therefore, proceed on the basis that the sale is not vitiated on the ground of fraud. The four grounds on which the court below was of the opinion that the sale was liable to be set aside are these:--

(1) that the sale of the property ordered without an attachment of the same was a serious irregularity and the sale was therefore a nullity;

(2) that non-publication of the sale proclamation in the local paper vitiated the sale.

(3) that the property which was worth as least 70 to 80 thousand rupees was knocked down for a sum of Rupees 55,182/- by the decree holder and therefore the judgment debtors were prejudiced; and

(4) that in the absence of a final decree, it must be deemed that the decree-holder had waived his right to proceed against the property of the judgment debtors for realising the decretal amount.

The first contention urged by Sri B. P. Holla before us is that the view of the court below that the sale was vitiated on account of the absence of the attachment is erroneous. In support of his submission he relied on Section 51. Civil P. C. Clause (b) of Section 51, Civil P. C. authorises the realisation of the decretal amount by attachment and sale or by sale without attachment of any property belonging to the judgment debtor. We feel that there is great force in what the learned counsel for the decree holder has urged. Nowhere do we find in the CPC any provision which says that a property belonging to a judgment debtor cannot be sold in the execution of a money decree without attaching it before ordering its sale. The said question whether the attachment is necessary for conferring jurisdiction on the court to order the sale of the property or not is no longer in doubt. We are of the opinion that the attachment of the property is neither necessary nor is an essential step in the process of realisation of the decretal amount by sale of the property belonging to the judgment debtor. The object of attaching the property is to secure the interest of the decree holder and the auction purchaser. If the property is not attached before it is sold, it would be open to the judgment debtor to transfer his right, title and interest in the same or to encumber it in favour of a third party before the date of sale and if he does so the decree holder may not be able to realise the decretal amount in view of such anterior transaction or encumbrances effected by the judgment-debtor. Similarly, the auction purchaser would also be exposed to the danger of purchasing a property in which the judgment debtor may not have any interest at all or may be having an interest less than what he had on the date of issue of the sale proclamation. The order of attachment is not certainly intended for the benefit of the judgment debtor. On going through the provisions governing the sale of the property, we are not able to find out how a judgment debtor is prejudiced in the absence of attachment of property before it is sold. This view of

ours in supported by decisions in the following cases:

(1) Duggappa Gowda v. K. Subba Rao (1963) 2 Mys LJ 352; (2) Vepa- Vepa Satyanarayanaimivlhy Vs. Chekka Bhavanarayana and Others (3) P. E. R. Kishtiah v Manne Pochiah,.

5. There is one other reason which persuades us to hold that the absence of an attachment of the property put up for sale cannot be urged as a ground under Order 21. Rule 90 of the Code for setting aside a court sale. The objections that may be raised under Order 21. Rule 90 of the Code are only those which relate to material irregularity or fraud in publishing and conducting a sale. We are of the opinion that only those irregularities or illegalities which have been committed after the stage of Rule 64 of Order 21 that can be urged as a ground under Order 21, Rule 90 of the Code for setting aside a court sale. The stage of attaching the property is anterior to the stage dealt with by Order 21, Rule 64 of the Code. We, therefore, hold that the view of the court below that the court sale held in this case was a nullity on the ground that there was no attachment of the property before the sale was held, is unsustainable.

6. The next ground on which the court below hold that the sale was invalid, was one based on the non-publication of the date of sale in the local newspaper. It may be mentioned here that the judgment debtors themselves requested the court through I. A. V. that the proposed sale should not be advertised in the local newspapers. Having prevented the court by the said application from publishing the date of sale in the newspaper, the judgment debtors cannot be allowed after the sale is held, to question the sale on the ground that there was no proper publication of sale in the local newspapers. The judgment debtors are estopped from contending to the contrary. It is unfortunate that the Court below did not refer to the order passed on I. A. V. while disposing of the application under Order 21, Rule 90 of the Code. If it had looked into that order, it would not have committed the above error. The court below was wrong in thinking that the sale was liable to be set aside on the above ground.

7. The lower court further erred in holding that the sale was bad on the ground that the value of the property was about Rs. 70,000/- to Rs. 80,000/- on the date of sale and that the property had been purchased by the decree holder for Rs. 55,182-00. The 1st Judgment debtor in his examination-in-chief stated that the property in question was worth Rs. 1,25,000/-. In his cross examination he admitted that the property could fetch rent at the rate of Rs. 200/- to Rs. 250/- per month. Even granting that the property could fetch Rs. 250/- per month, the net annual income from the said property would be Rs. 2,500/- only setting apart two months' rent for purposes of taxes and repair. By capitalising the net annual income by applying the rule of twenty years' purchase, we hold that the property was worth approximately Rs. 50,000/-. The sale in this case is for Rs. 55,182.00. The view of the Court below that the property must be worth Rs. 70,000 to Rs. 80,000 on the basis that it had been mortgaged for Rupees 35,000/- in favour of the Bank, borders on mere conjecture. The Court below

was wrong in over-looking the evidence that was before it on the above question. Further, mere proof of inadequacy of price realised at a Court sale would not be sufficient in the eye of law to set aside a sale. What has to be established is that there was not only inadequacy of the price, but that inadequacy was caused by reason of the material irregularity or fraud. A connection has thus to be established between the inadequacy of the price and the material irregularity. In this case, the lower Court was of the opinion that the sale proclamation had been duly published and that no fraud had been committed. The judgment debtors have not examined any persons who were in the position of intending bidders. They have also not made out their case that some bidders who wanted to offer their bids were driven away by the agent of the decree-holder or the amin. The lower Court has disbelieved that part of the story. Hence, even granting that there has been inadequacy of price fetched at the sale, there is no ground for setting aside the same under Order 21, Rule 90 of the Code.

8. Sri B. P. Holla has made an application before us in E. F. A. No. 25 of 1970 to treat a certified copy of a sale-deed executed by the 2nd judgment-debtor subsequent to the date of sale carrying the very same property for a sum of Rs. 38,000/-, as additional evidence to demonstrate that the contention of the judgment debtors regarding the valuation of the property is wrong. Sri P. Rangaswamy the learned counsel for the judgment-debtors opposes the said application. In view of the finding that we have already arrived at on the above question earlier, it is unnecessary to consider this additional evidence in order to dispose of these cases.

9. The next ground on which the Court below came to the conclusion that the Court sale was bad, was that there was no final decree passed in this case. The basis for the said observation of the Court below is as follows:

10. The plaintiff filed a suit for recovery of the amount due from the judgment-debtors, on the basis of a mortgage said to have been executed by the judgment-debtors in favour of the Bank. In the plaint they prayed for a decree for sale against the property. But, when the case was taken up for trial, the plaintiff and the defendants agreed that a money decree be passed. Accordingly, a money decree was passed in this case, and thereby, the decree-holder relinquished its mortgage claim against the property in question. So, after the decree was passed, there was only a money decree. The lower Court however felt that in view of the prayer made in the plaint, there should have been a preliminary decree followed by a final decree, and that in the absence of a final decree, the property could not be sold.

11. It is unfortunate that the Court below misconceived the whole case. It is open to a plaintiff who has filed a suit on the basis of a mortgage, to give up his right to the security and to have only a money decree if he so chooses. In this case, as already stated, there was only a money decree. We do not find any impediment in the way of a holder of a decree for money only to realise the decretal amount by bringing any property belonging to a judgment-debtor to

sale. Sri P. Rangaswamy, the learned counsel for the judgment-debtors, however, contended that by waiving the right to have a decree for sale of the property in the suit, the decree-holder abandoned its rights to recover the decretal amount by the sale of the property of the judgment debtors. We find it difficult to accede to this submission. The relationship between the parties in this case after the decree was passed, was that of a holder of a money decree and the judgment-debtors, against whom a money decree had been passed. The provisions of Order 34. Rule 14 of the Code, over which some reliance was placed at some stage by Sri P. Rangaswamy, would not be of any avail in this case. Rule 14 of Order 34 imposes a duty on the mortgagee, who holds a decree in respect of a claim arising out of a mortgage, to institute a suit for the realisation of the mortgage amount before bringing the mortgaged property for sale for realising the decretal amount in the earlier suit. This is not a case to which Order 34, Rule 14 is attracted. In this case, the Court below was wrong in holding that in the absence of a final decree, the decree could not be executed.

12. With regard to the observation of the Court below that in the sale proclamation Rs. 1,25,000/- should have been shown as the value of the property, we have to observe that what we have stated already with regard to inadequacy of the price fetched, would negative this contention also. It is relevant to observe at this stage that when the proclamation was settled under Order 21, Rule 66 of the Code no objections were filed by the judgment-debtors even though they had notice of the same earlier.

13. There is no evidence in this case to come to the conclusion that the judgment-debtors have suffered any injury or prejudice. 14. Sri P. Rangaswamy, the learned counsel for the judgment-debtors, contended before us that the procedure prescribed under Rule 41 of Order 21 having not been followed, the sale was liable to be set aside under Order 21. Rule 90 of the Code. We have already held that it is only that irregularity that is to be found at stages subsequent to Rule 64 of Order 21 that can be considered as a ground under Order 21. Rule 90 of the Code. Rule 41 of Order 21 requires the Court to examine the judgment-debtor if necessary to find out what debts he is entitled to recover from others or what property he possesses so that the Court could attach that property. We do not understand how in this case the Judgment-debtors can complain that they have been prejudiced by not following the procedure prescribed under Order 21, Rule 41 of the Code which reads as follows: "Where a decree is for the payment of money the decree-holder may apply to the Court for an order that-- (a) that the judgment-debtor, or (b) (c) be orally examined as to whether any or what debts are owing to the judgment-debtor and whether the judgment-debtor has any and what other property or means of satisfying the decree; and the Court may make an order for the attendance and examination of such judgment-debtor, or officer or other person, and for the production of any books or documents". We do not find any substance in the submission of Sri P. Rangaswamy that on account of the violation of the above Rule, the judgment-debtors have suffered any prejudice, 15. It was lastly urged

by Sri P. Rangaswamy that when a money decree is passed with the consent of parties then in order to realise the amount from the judgment-debtor by sale of his or her property, the decree-holder must file a suit once again. We fail to understand the logic or reason behind this argument. 16. We have gone through the Judgment of the Court below carefully and we find that the lower Court has committed a serious error in this case in setting aside the sale that had been duly held, on grounds which were wholly untenable. No other ground is made out on behalf of the judgment-debtors. 17. In the result, we allow both the appeals with costs and set aside the order passed on I. As. X and XI by the Court below and confirm the sale held on 22-11-1966.

18. The Court below is directed to proceed with disposal of the execution case in accordance with law.

27-3-1972.

19. In view of our decision on the above appeals, cross-objections filed in Ex. F. A. No. 25 of 1970 by respondents are dismissed No costs in the cross-objections.