
(1978) 12 MAD CK 0033
In the Madras High Court

The Official Receiver, Salem

APPELLANT

Vs

C.B. Samanthagam Ammal and Others

RESPONDENT

Date of Decision : 22-12-1978

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 85
Partition Act, 1893 — Section 3

Citation : (1979) 2 MLJ 115

Hon'ble Judges : T. Sathiadev, J

Bench : Division Bench

Judgement

T. Sathiadev, J.—C.R.P. No. 2687 of 1978 is filed against an order made in I.A. No. 1495 of 1974 which was filed for grant of extension of time for depositing the sum of Rs. 20,000 into Court as ordered in I.A. No. 214 of 1971 dated 5th March, 1974.

2. C.R.P. No. 2724 of 1978 is filed against the order in I.A. No. 1407 of 1974 which was filed by the Official Receiver for directing the plaintiff in the suit to execute a sale of his half share in the suit properties on receiving a sum of Rs. 20,000. Apart from this, I.A. No. 1494 of 1974 was also filed for excusing the delay in filing I.A. No. 1495 of 1974. All these three interlocutory applications were heard and disposed of by the Court below by a common order dated 19th June, 1976.

3. In O.S. No. 652 of 1971, the plaintiff, having a half share in the properties, applied for sale of the shares of the defendants by invoking Section 3 of the Partition Act and in I.A. No. 214 of 1971 dated 5th March, 1974, the Court directed him to deposit a sum of Rs. 20,000 within a period of three months from the date of that order. The period expired on 5th June, 1974. By that date, he could not deposit the amount as he was undergoing treatment in the hospital at Pondicherry from 10th April, 1974 to 21st May, 1974, and it is thereafter he came to know about the order of the Court and deposited the sum of Rs. 20,000 in the current account of his Advocate in the Lakshmi Vilas Bank Limited, Salem,

and has produced the bank receipt to that effect, and it showed that the deposit was made on 5th October, 1974 (Exhibit A-1 and Exhibit A-2). Therefore he has come forward with an application for extension of time and for excusing the delay in complying with the orders of Court. In the meanwhile, Official Receiver had taken out I.A. No. 1407 of 1974 stating that the creditors, in insolvency proceedings entitled for the other half share, are prepared to deposit Rs. 60,000 and therefore a public sale will be advantageous to the creditors, and that the plaintiff not deposited the amount by 5th June, 1974 cannot ask for extension of time. The Court below held that a delay of about four months in depositing the amount is excusable under the facts and circumstances stated by the plaintiff, and hence granted time for making the deposit. Aggrieved by this order, these two revision petitions have been filed by the Official Receiver, Salem.

4. Mr. O. V. Balasami, appearing for the petitioners contended that a sale under the Partition Act is also governed by the provisions contained in Order 21, Rule 85, Civil Procedure Code, and the time prescribed under the said Rule being mandatory, the non-deposit of the amount within the time provided under the said Rule, will result in the sale itself being declared as a nullity, and that being so, there can be question of the Court below granting extension of time. The other contention raised by him is that the sale having been already directed under Sections 2 and 3 of the Partition Act, Sections 6 and 7 of the Act contemplated only a public sale, and therefore when the value of the property had appreciated, the application taken out by the Official Receiver for a public-auction will be in the interests of not only the creditors but also of the other sharer of the property, and hence the Court below ought to have directed a public sale of the properties.

5. On the first point, about the scope of the sale to be effected under the Partition Act and about the applicability of Order 21, Rule 85, Civil Procedure Code, he refers me to the decision of the Supreme Court in Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another, and also to the provisions of the Partition Act. Section 2 of the Partition Act, 1893, deals with the power of Court to order sale instead for division, in partition suits. If it is made out to the Court that a sale of the property and distribution of the proceeds would be more beneficial to all the shareholders, then the Court may, on the request of any of the shareholders individually or collectively, to the extent of one moiety or upwards, direct a sale of the property and thereafter the distribution of the sale proceeds. Under this section, the Court has the jurisdiction to direct a sale by public auction, only on the request of the shareholders. When a request is made u/s 2, then Section 3 of the Act comes into play, which enables a sharer of the property to ask for the valuation of the share or shares and ask for the sale of the shares at a price ascertained by Court which may give all necessary and proper directions in that behalf. Hence, u/s 3 of the Act, what can be sold, will be only the share or shares of such of those persons, whose share require to be sold, and it is not a sale in public-auction because the right to purchase the shares, is acquired by other sharers of the

property. Section 4 of the Act will be applicable when dwelling houses are sold and a third party had purchased the shares of any of the shareholders therein and ask for partition. In this case, the property involved is a dwelling house. But Section 4 of the Act will not be applicable, because there was no question of any third party having purchased the shares of any of the shareholders. Section 6 of the Act refers to a sale being directed to be held u/s 2 of the Act. Clause 2 of Section 6 states as follows: "On any such sale, any of the shareholders shall be at liberty to bid at the sale on such terms as to non-payment of deposit or as to setting off or accounting for the purchase money or any part thereof instead of paying the same as to the Court may seem reasonable". Section 7 of the Act deals with the procedure to be followed in case of sales. It is provided therein that save as otherwise provided under the Act, any property when it is directed to be sold under the Act, the procedure shall as far as practicable, be adopted, and Clause (b) states that such sales be held according to such procedure as the High Court may, from time to time, by Rules prescribe and until such Rules are made, the procedure prescribed in the CPC in respect of sales in execution of decrees be applicable.

6. Mr. O. V. Balasami, learned Counsel contends that this is a case where Section 2 of the Partition Act has been invoked and therefore u/s 6 of the said Act, the sale has to be by public-auction and the procedure that is prescribed u/s 7 of the Act shall be followed. The Madras High Court has framed Rules as provided u/s 7(b) of the Act and the Rules are found in Chapter III of Part II of the Civil Rules of Practice. Rule 9 therein provides that if, under the Partition Act, 1893, or otherwise, the sale of any property is ordered, an order for sale shall be made and the subsequent proceedings shall be conducted in manner prescribed by Rules 193 to 205 of Chapter IX, Part I, as far as the same are applicable, provided Rule 199 shall not apply to the said sale and the Court may, grant leave to any party, to bid for and purchase the property, or any part thereof, on such terms as the Court thinks fit. Chapter IX, Part I, deals with general Rules about sale of property under orders of Court. Rule 193 contemplates that the sale of a property in public shall be conducted in the manner prescribed, thereafter under Rules 194 to 205. Rule 200 deals with the manner in which the sale has to be conducted. It states that it shall be done in the manner prescribed by the Code for sale of attached property. Hence, he contends that since the High Court has framed Rules adopting the procedure to be followed under the Civil Procedure Code, Order 21, Rule 85 comes into play and the Supreme Court held that when the amount is not deposited within time as provided under Rule 85, the sale itself will be a nullity. *Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamad and Another*, The time provided therein is 15 days from the date of the sale of the property.

7. A reference is also made to the decision reported in *Subbammal Vs. P. Gurusamy Thevar and Others*, which has followed the decision of the Supreme Court. The counsel for the respondents would contend that this is a case where only Section 4 of the Partition Act, will be applicable, because the property

involved is a dwelling house, and secondly, what was sold was only a share of the defendants and not a question of the property itself being sold and when alone the question of public-auction will arise u/s 6 of Partition Act. He refers to the decisions reported in *Debendranath v. Haridas* 15 C.W.N. 552 and *Hart Charan v. Fakir Chandre* 40 C.W.N. 955 to show that when it is a sale u/s 3 of the Act, it is only the shares of the co-sharers which can be sold, and there is no question of a public sale, because such a sale can take place only if Section 6 of the Act can be applied. To substantiate this contention he refers to the decision in *Ragi Durgamba and Another Vs. Sri Lakshminarasimhaswamy Rice Factory and Others*, .

8. The other decision referred to by him is *R. Ramamurthi Iyer v. Raja V. Rajeswara Rao* (1972) 2 S.C.C. 72 for the purpose of showing that the purpose underlying Section 2 of the Partition Act undoubtedly is to prevent the property falling into the hands of the third parties, if that can be done in a reasonable manner. What is required to be considered when a sale is to be held u/s 3 of the Act is to find whether the property is capable of division, and it is not necessary for the Court to give a positive finding that it is incapable of division by metes and bounds. It should only "appear" that it is not so capable of division.

9. In this case, at present there can be no dispute about the order that was made by the Court in I.A. No. 214 of 1971 dated 5th March, 1974 enabling the plaintiff to purchase the other half share of the property by depositing Rs. 20,000. Hence, the concept of public sale does not arise. This is a case where Sections 2 and 3 of the Act have become applicable, and the Court has already decided that the half-share belonging to the defendants, can be purchased by the plaintiff. Therefore, unless it be made out that the Court had no power to extend the time which was granted in I.A. No. 214 of 1971, plaintiff, by showing sufficient cause to the Court, can get the delay excused in depositing the amount.

10. Therefore the first point taken by Mr. O. V Balasami, learned Counsel for the petitioners that Order 21, Rule 85, Civil Procedure Code, will be applicable to the order made in I.A. No. 214 of 1971 has to be considered. Section 7 of the Partition Act, deals with the procedure to be followed in cases of sales. This Section itself starts by saying that "save as hereinbefore provided, the property can be sold under the Act". The Act itself contemplates two types of sales. Sections 2, 3 and 4 of the Act initially enables the sharers of the property to buy the shares of other sharers for a price to be fixed by Court, which would mean an internal sale within the co-sharers, and no question of public participation arises. The other type of sale is the one where the property is to be sold in public-auction, when Section 6 of the Act will become applicable, and the members of the public can bid in the court-auction sale. Even in Section 6 of the Act, Clause (2) itself provides for the Court to stipulate about "the non-payment of deposit or as to setting off or accounting, for the purchase-money or any part thereof instead of paying the same into Court". Hence, even the Partition Act, itself has contemplated stipulation of certain special terms and conditions, when sales are

effected under the Act, and therefore it cannot be contended that only the provisions made under Order 21, Rules 84, 85 and 86, Civil Procedure Code, will alone be applicable to all types of sales under the Partition Act. Section 7 of Partition Act, also is to the same effect by stating that "except as otherwise provided under the Act," properties can be sold under the Act following the procedure as far as practicable, which would mean that certain types of sales under the Act will come under a special category and they cannot be governed by the sales that may be effected under the Code of Civil Procedure. Section 7(b) of the Act empowers the High Court to frame Rules and the Madras High Court has framed Rules which had been already referred to. Rule 9 in Chapter III also states that the Rules prescribed in Chapter IX, Part I supra "as far as the same are applicable", shall be followed. Rule 200 found as part of Part I, Chapter IX (VII) states that the sale of property be conducted in the manner prescribed by the Code for the sale of the attached property. The provisions made under Sections 6 and 7 of the Partition Act and the Rules framed by the High Court, all go to show that all types of sales effected under the Partition Act cannot be governed by the provisions of the Code of Civil Procedure. But the Act itself contemplates a different mode of sale of shares in properties, and the Court has the power to decide about the terms as to non-payment of deposit or setting of or accounting for the purchase money or part thereof instead of paying the same into Court. In this case, the Court itself has granted three months time for depositing the amount, being fully aware of the provisions made under Order 21, Rule 85, Civil Procedure Code, because that would not be applicable to the facts and circumstances of the case and the sale held under Sections 2 and 3 of the Partition Act. Order 21, Rules 84, 85 and 86 of the CPC can be applied only for public sale of property. But when Sections 2 and 3 of the Partition Act, are invoked even u/s 6(2) of the Act, the Court is enabled to make such provisions about deposit, and in this case, the Court has chosen to fix a period of three months, and hence it has the inherent jurisdiction to extend the time granted by it without being inhibited by Order 21, Rule 85, Civil Procedure Code. Hence, the order made by the Court below cannot be held as one made against the provisions of Order 21, Rule 85, Civil Procedure Code.

11. The Court below had accepted the reasons given by the plaintiff about his undergoing treatment in hospital and also about the deposit made by 5th October, 1974 and there are no materials to show that, what is claimed by the plaintiff is not true. Hence, these revision petitions are dismissed. No costs.