

(1927) 08 MAD CK 0005
In the Madras High Court

T.S. Ramaswami Ayyangar, Official Receiver of Ramnad and
Another

APPELLANT

Vs

M.L.M. Rama Nathan Chettiar

RESPONDENT

Date of Decision : 15-08-1927

Acts Referred:

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

Citation : 107 Ind. Cas. 295

Hon'ble Judges : Ramesam, J;Cornish, J

Bench : Division Bench

Judgement

Ramesam, J.—This is an appeal arising out of an application to set aside a sale in execution of the mortgage decree in O.S. No. 11 of 1917,

under Order XXI, Rule 90, Civil Procedure Code. The mortgage itself being subsequent to a prior mortgage, the decree directed the sale subject

to the prior mortgage. The Subordinate Judge dismissed the petition without enquiring into the petitioner's allegations. There was an appeal to the

High Court and the case was sent back for further enquiry by Spencer and Venkatasubba Rao, JJ. The matter has been fully enquired into by the

present Subordinate Judge of Dindigul and the petition has been again dismissed. The petitioner appeals.

2. The sale is sought to be set aside on account of the following material irregularities in making the proclamation and effecting the sale:

1. the property consists of various parcels of land situated in six villages and it was directed to be sold in one lot instead of being sold separately

thus reducing the number of possible bidders, and as the whole property is certainly worth about three lakhs a number of purchasers were deterred

from joining in the sale and bidding;.

2. the proclamation was not properly published in all the six villages; and.

3. the market value fixed in the proclamation was too low.

3. It is said that these irregularities have led to substantial injury to the petitioner as the properties were sold for a gross undervalue. The appellants

have also taken another question which, it is alleged, is a question of jurisdiction and makes the sale null and void. It is said that the property that

was advertised for sale was only the equity of redemption of the first mortgage, where as what was sold was the whole property free of all

encumbrances and it is contended that this irregularity is so gross as to make the sale a nullity.

4. On the first point it is now contended that the properties ought to have been sold in separate parcels. The execution petition was filed in April,

1919. On 29th April, the 1st defendant was declared insolvent and the properties were vested in the Official Receiver. In August, the Official

Receiver applied for the adjournment for four months on the ground that a private sale at the spot would be more advantageous than the Court

sale. Though the petition was not granted, practically the petitioner had the four months' time he sought, for the sale ultimately took place only in

January, 1920. Anyhow, in this petition no request was made to sell the property by separate parcels. Notice was ordered, but none of the

judgment-debtors appeared, nor did the Official Receiver appear. On 3rd December, 1919, it was ordered that all the properties should be sold in

one lot subject to the first encumbrance the principal of which was Rs. 1,10,000 and the market value of the equity of redemption was estimated to

be Rs. 40,000. The reason for directing the sale of all properties together is that they were all subject to one prior mortgage and if parcels were

sold separately and purchased by different purchasers there will be numberless suits for contribution among the purchasers if the amount of the

prior mortgage is recovered from some of them only, a course open to the prior mortgagee. These considerations might deter purchasers and,

therefore, all were directed to be sold together. On the other hand, it is now urged that there is a way of selling separately without the

inconvenience of giving rise to numerous suits for contribution. It is suggested that all the parcels should be sold free of encumbrances and that a

reservation should be made in the proclamation that the bids will be accepted

only if the total price realised on all the parcels exceeded the amount due on the first mortgage. In this way the inconvenience resulting from the sale of several parcels subject to one common mortgage is avoided and the payment of the first mortgage is ensured while the purchasers secure an unencumbered title. The suggestion is, no doubt, good and in this particular case would have probably worked out well, but this suggestion requires the consent of the first mortgagee. He might have given the consent or not. The suggestion has been made for the first time only before us now and it cannot be said that the course followed by the Subordinate Judge constituted a gross irregularity merely because there is a better way of carrying out the sale. This first objection, therefore, fails.

5. The second objection is that the proclamation was not properly published in various villages. There were six villages, three of them lying in one group and the other three lying in a different region.

6. [His Lordship referred to the evidence and proceeded:].

7. From the above documents and oral evidence it is not only likely that the proclamation was properly made and, at any rate, was known to many likely purchasers, but no complaint was made about it at any time.

8. It is next suggested by the petitioner that the lands were sold for an undervalue, and this is the result of non-proclamation and also of the low

market value mentioned in it. A large amount of evidence was referred to to show the value of the lands. Two kinds of evidence were brought to

our notice: (1) the sale-deeds of adjacent lands, and (2) the income of the lands. Here again it is unnecessary to refer to the evidence in great detail

because the petitioner has not produced his best evidence. The 1st defendant is P.W. No. 46. He says in his evidence, ""He (the Official Receiver)

took possession of the villages. I Was in possession till Fasli 1327. My elder brother Adaikappa Chettiar has got the accounts of these lands for

Fasli 1326. He would help me in the conduct of this case in appeal. I have not filed those accounts now."" If the income of the lands is to be relied

upon for estimating the market value, the accounts which the 1st defendant and his brother have must be produced. It is futile to rely upon oral

evidence. It is easy to work out arithmetically that the lands are Worth 4 or 5 lakhs. A small variation in the method pursued will produce a large

amount of difference. For instance, Mr. Sastri was always trying to capitalise the

value of land at 25 times the annual income. It is not very clear that it ought to be 25 times and not 20 times. Making allowance for the revenue of the land and capitalising the value at 20 times the annual income, it seems to me that the lands cannot be worth more than Rs. 3,60,000 and it cannot be said that the market value mentioned in the proclamation is such a gross Under-estimate as to vitiate the sale. [See Saadatmant Khan v. Phul Kuar 20 A. 412 : 2 C.W.N. 550 : 25 I.A. 146 : 7 Sir. P.C.J. 380 : 9 Ind. Dec. 624 where the estimate given in the proclamation was 1/10th of the real value]. In the present case it must be remembered that, though the principal of the first mortgage was Rs. 1,10,000 its actual amount at the time of the sale was Rs. 1,93,000 so that the market value as given in the proclamation works out at the figure Rs. 2,35,000 for the value of the land free of any encumbrance. Thus, whatever the truth about the proclamation may be, it is not possible to infer that what was realised is substantially less than the real market Value and such inadequacy of price, if any, was the result of irregularity, if any.

9. It is next suggested that the sale itself was void for want of jurisdiction. This portion of the case was argued by Mr. Krishnaswami Iyer and he relied on Raja Thakur Barmha Vs. Jiban Ram Marwari, and Mahomad Kala Mea v. Harperink 1 Ind. Cas. 122 : 36 C. 323 : 13 C.W.N. 249 : 6 A.L.J. 34 : 5 M.L.T. 126 : 9 Cri.L.J. 165 : 11 Bom. L.R. 227 : 19 M.L.J. 115 : 36 I.A. 32 (P.C.). The facts necessary for this portion of the case are these. The Subordinate Judge gave the decree-holder permission to bid on 10th January. In his order he refers to the fact that, in a prior execution at the instance of a money decree-holder against the same properties subject to both the mortgages the bid went up only to Rs. 10,000 and the two mortgages then amounted to Rs. 3,10,000. He then said, ""Having regard to the bid in the previous sale I think it safe to give permission to the decree-holder to bid over Rs. 3,20,000 which will be the upset price so far as he is concerned."" This order does not say that the property should be sold free of encumbrance in variation of the proclamation. It merely says, that the total price which the decree-holder should pay for the lands should not be less than Rs. 3,20,000. This was for the protection of the judgment-debtor. Though other bidders may bid for any sum, however low they like, the decree-holder cannot do so. He can only bid for

such a sum which if added to the first mortgage amount will come up to Rs. 3,20,000. This is the clear meaning of the order of the 10th January. What happened on the actual date of sale was this. On 19th January the only bid outstanding was that of P.S.P.L. Palaniappa Chettiar for Rs. 45,000. It is said for the petitioner that this Palaniappa Chettiar was merely a creature of the decree-holder; but whatever it may be, there was no other bid. Then the figure for the decree-holder was Rs. 3,20,500, free of all encumbrances. Then there is a note to this effect: ""The other bidder T.S.P.L.P. Palaniappa Chettiar is not prepared to bid for over this amount. This sale will, therefore, be concluded in favour of the decree-holder for Rs. 3,20,500...free of the first encumbrance which is in pursuance of the effect of my order on 10th January 1920."" It seems to me that what the Subordinate Judge meant in his order is that Palaniappa Chettiar is not prepared to bid for the equity of redemption by offering an amount larger than Rs. 45,000 and also larger than what the decree-holder's bid comes to for the equity of redemption. No complaint seems to have been made by Palaniappa Chettiar that the property was being sold free of encumbrances and, if so, he finds it difficult to bid though he might be able to bid for a higher amount if only the equity of redemption is to be put up for sale. In these circumstances it is not clear that the decision in Raja Thakur Barmha Vs. Jiban Ram Marwari, has any application to this case. In that case the facts are that the judgment-debtor's property consisted of two parts a 10-annas share subject to encumbrance and a 6 annas share not so subject. The decree-holder's petition attached the 6-annas share subject to encumbrances and a 6-annas share not so subject. The decree-holder's petition attached the 6 annas share subject to encumbrances. It was afterwards suggested that there was a slip in the petition and that what was meant to be attached was the 6-annas share not subject to encumbrances. This suggestion was accepted by the High Court, but the Privy Council held that, whatever might have been meant, the attachment made was only of 6-annas share subject to encumbrances and as this is less than 10 annas share which was subject to encumbrances, the petition on its face, referred only to a 6-annas share subject to encumbrances and it must be taken that what was sold was only a 6-annas share subject to encumbrances and if it is attempted, at a later stage to change this into

a 6-annas share not subject to encumbrances it will amount to a case of changing the identity of the property sold and not a case of mere slip in

description. In the present case, there is nothing to show that anybody understood that what was finally knocked off was property which was only

the equity of redemption. On the other hand, no such objection was taken in the present petition, nor was it taken in the grounds of appeal to the

High Court on the former occasion. Mr. Krishnaswami Iyer informs us that he mentioned it at the time of argument and also when the judgment

was delivered by our brothers Spencer and Venkatasubba Rao, JJ., but they made no reference to this point Their order merely says that the case

should go back and the Subordinate Judge should take further evidence on all the objections raised by petitioner in his petition and affidavit. Nor is

the objection taken in the present grounds of appeal. For these reasons we do not think that there is any substance in the objection that the sale

was a nullity. This argument is merely to take advantage of the looseness of the language employed by the decree holder's Vakil and by the

Subordinate Judge in the final order accepting the bids. It is not suggested that the prior mortgagee ever consented to sell free of encumbrances

and it seems that nobody could have contemplated such a sale.

10. The appeal fails and is, therefore, dismissed with costs. Pleader's fee Rs. 500.

Cornish, J.

11. I agree.