
(1960) 11 MAD CK 0021
In the Madras High Court
Case No : A.A.O. No. 75 of 1960

V.D. Kothandapani Mudaliar	Vs	APPELLANT
V.D. Shetharama Mudaliar and Others		RESPONDENT

Date of Decision : 17-11-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 21, Order 21 Rule 89, Order 21 Rule 91

Citation : (1960) 11 MAD CK 0021

Hon'ble Judges : Ramachandra Iyer, J

Bench : Single Bench

Advocate : K.S. Naidu and R. Vijayam, for the Appellant; V. Seshadri and G. Viswanathan, for the Respondent

Judgement

Ramachandra Iyer, J.—In O. S. No. 16 of 1946 on the file of the Sub Court of Chingleput, Dhanagopala Mudaliar claimed partition of the

joint family properties which he held in common with his three sons, who are the appellant and respondents 1 and 2 to this appeal. Most of the

properties were by consent divided and taken possession by the respective parties to the suit. One of the items which was comprised in the suit,

namely, 24, Arunachala Mudali St., Madras, was left undivided, evidently for the reason that it was incapable of partition by metes and bounds.

The property itself was subject to a mortgage. Dhanagopala Mudaliar died in 1951, and in his place his widow the third respondent was brought

on record. In I. A. No. 815 of 1953 the lower Court directed that No. 24, Arunachala Mudali Street, should be sold under the provisions of the

Partition Act and the proceeds divided. The order was substantially confirmed by this Court in C. M. A. No. 254 of 1956. Under the directions

given by this Court the parties were allowed to bid at the auction. The judgment further stated:

In the case of strangers bidding at the auction they will have to pay the price according to the rules of the Civil Procedure Code. But in the case of

the claimants the payment will be postponed only after the adjudication is made with regard to the exact proportion in which they are entitled to the

property. After such adjudication they will be entitled to set off to the extent of their shares in the property and will be called upon to pay the

balance of the sale proceeds.

In pursuance of the order Messrs. Murray and Co. were appointed as auctioneers to sell the property. In due course the auctioneers advertised

the property for sale to be held on 28th February, 1957. It is admitted that the conditions of the sale stated that the property was ""sold pursuant to

the order of the Court,"" and the highest bid would be subject to acceptance by Court.

2. At the auction held on the 28th February, 1957, the appellant was the highest bidder. His bid was Rs. 6750 subject to the mortgage that was

subsisting on the property. The second defendant who was present at the auction and who is the main contesting respondent to this appeal signed

the bid list. That would show that there was no irregularity in the conduct of the sale. The price for which the property was bid was however not

paid by the appellant as the order of this Court permitted such a course, namely, that the successful bidder if he happens to be a sharer need not

pay the price then and there but adjust it in the final accounts at the time of the passing of the final decree. This was for the reason that subsequent

to the passing of the preliminary decree, Dhanagopal Mudaliar had died and the parties were entitled to increased shares in the property on his

death and his widow also had become a party.

3. The appellant who was functioning as a Receiver in the partition suit was already in possession of the property. It is said that after the sale was

knocked down in his favour he effected repairs to the property to the extent of R. 2000. A statement to this effect is contained in his affidavit filed

in support of the application for stay filed along with this appeal (C. M. P. No. 1918 of 1960). In the counter affidavit filed by the second

respondent the factum of repair has not been controverted though the extent of

amount spent for the repairs is denied.

4. The sale was stated to be subject to the acceptance of the bid by the Court; but nothing appears to have been done for a considerable time.

None of the parties challenged the propriety of the sale for a period of nearly 2 1/2 years. No formal application for either setting aside the sale or

for not accepting the highest bid of the appellant was made to the Court. The matter however came up before Court on 16th December 1959. On

that day there appears to have been some controversy as to whether the sale should be confirmed or whether a fresh sale should be had. The

learned Subordinate Judge passed a somewhat curious order in I. A. No. 815 of 1953. It will be convenient to refer to the order itself at this stage:

The learned Counsel for defendants 2 and 3 contend that there is now good prospect of the sale going for price above upset price fixed for Rs.

7500. This is denied by the first defendant's Counsel. It is also urged on behalf of the first defendant that if the sale goes ultimately for a sum below

Rs. 6750, for which the first defendant had bid the loss is to be borne by defendants 2 and 3 at whose instance the sale is to be held again. I

consider the contention of defendants 2 and 3 to be reasonable in the event of the sale ultimately going for any sum less than for Rs. 6750.

Defendants 2 and 3 would be made liable for the deficiency Hence sale would be held by Murray and Co., after due publication and as per the

order of the High Court in A. A. O. No. 254 of 1956.

5. It will be noticed that the learned Subordinate Judge did not consider whether the sale conducted by Messrs, Murray and Co., on 28th

February 1957 should be accepted or not. A reference is made to the upset price having been fixed at Rs. 7500. But the learned Counsel

appearing before me are not able to show whether at all any upset price was fixed in the case, and if so, at what amount. The first defendant has

appealed.

6. When the appeal came up before me for hearing, learned Counsel appearing for respondents 2 and 3 raised a preliminary objection that the

appeal was not maintainable as the appellant had impliedly agreed to a resale. I thereupon called for affidavits to be filed as to the circumstances

under which the order appealed against was passed by the learned Subordinate Judge. The affidavits filed in pursuance of my order were not

however such as could be acted upon. I therefore called for a report from the lower Court as to whether the order of the lower Court was one on

the basis of a consent or on contest. The lower Court has submitted a report that it decided the case on contest and not on the basis of any

consent by the parties. There is therefore no substance in the preliminary objection urged on behalf of the appellant which I overrule.

7. Mr. K. S. Naidu, on behalf of the appellant, contended that the lower Court had no jurisdiction to refuse to accept the highest bid of the

appellant after the sale was held and in the informal way in which it did. I am of opinion that there is considerable force in the contention of the

learned Counsel for the appellant. As I pointed out earlier the learned Subordinate Judge did not even consider the circumstances under which the

previous sale was held. He does not say anything about the irregularity of the sale or why the highest bid made on that occasion should not be

accepted. He has proceeded to pass an order for re-sale without giving any finding whatsoever as to the validity or otherwise of the sale held on

27th February 1957. It is however clear that the main reason which influenced him not to confirm the sale held in 1957 was the possibility of

obtaining a higher price for the property.

8. Mr. K. S. Naidu contends that a sale under the Partition Act is a sale by Court and the provisions of O. 21, C.P.C., will apply to it and that in

the absence of an application to set aside a sale and in the absence of proof of the relevant facts requisite for setting aside a sale as contained in Rr.

89 to 91 of O.21, there would be no power in the Court to ignore the previous sale and direct a re-sale. I cannot however accept the argument as

entirely correct. Sales under the Partition Act are governed by rules framed under that Act. R. 9 of the rules framed under the Partition Act states

thus:

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 Rr. 193 to 205 of Ch. IX, Part 1, supra of the Civil Rules of Practice and Circular Orders, Vol. I, as

far as the same are applicable--...

9. Rule 201 of Ch. IX is the relevant rule. That relates only to sales held under O. 21, Rr. 89 to 91, C.P.C., and cannot govern a case like the

present one. The validity of a sale held under the Partition Act would be governed by the terms of the order directing the sale and the conditions

subject to which the property is sold. In the present case the highest bid at the sale was subject to confirmation by Court. A confirmation is not a

mere formality. The Court will have to examine whether the sale held was fair and just. In considering whether a sale should be confirmed or not

the Court will not be hampered by the limitations and conditions contained in O. 21, Rr. 89 to 91. But at the same time it would not be entitled to

refuse to accept the bid for purely speculative or insufficient reasons.

10. In *S. Soundararajan and Others Vs. Khaka Mahomed Ismail Saheb of Messrs. Roshan and Co.*, a Bench of this Court held:

The fact that the sale is subject to the confirmation of the Court does not mean that the Court shall refuse to accept the highest bid because at a

later stage some one else is willing to pay more. The condition is only a safeguard against irregularity or fraud in connection with the sale and

against property being sold at an inadequate price and an auction purchaser making an adequate bid and complying with all the requirements of the

Court and there being no irregularity or fraud is entitled to have the sale confirmed even though at a later stage, some other person is willing to pay

more.

11. This question was again considered by my Lord the Chief Justice sitting with Venkatarama Ayyar, J., in *Subbarama v. Sundararajan* ILR 1952

Mad. 502 507 = 64 L.W. 821. The learned Judges observed:

It will therefore be not only proper but necessary that the Court, in exercising the discretion, which it undoubtedly has, of accepting or refusing to

accept the highest bid at the auction in pursuance of its orders, should see that the price fetched at the auction is an adequate price.

12. What the Court therefore has to see is whether the highest bid made at the sale was adequate and proper. For coming to a decision as to

whether that price is proper or not it can certainly take into account offers made before it and if there were infirmities attending the notice,

proclamation or publication of the sale it can legitimately infer that if the sale had been properly advertised higher offers would have come. But it is

not in every case where a higher offer is made in Court that it would be entitled to ignore the sale. To accept any such principle would destroy the

utility of auction sales and would really be subversive of sound practice; persons will not come forward to bid at auction sales if there were no

guarantee that the highest bid would not be ultimately accepted and that sales conducted in public auction would be liable to be set aside merely

because some other person offers more at the time when the matter comes up for the order of the Court. That will be neither fair nor just to the

purchaser. No hard and fast rule can be laid for such cases; the Court has to decide in each case whether in the circumstances of the case the price

was not a proper one.

13. In the present case there is no evidence that the property was worth more at the time when it was put up for auction. No doubt 2 1/2 years

after the sale the other parties might have thought either by reason of the repairs effected to the property by the appellant or by reason of the

general rise in the value of the house property in Madras that the property was worth more. That surely is not a circumstance which should

influence a Court which has got to judge the validity of the sale as on the date it was held. The learned Subordinate Judge had no tangible evidence

before him to show that the price for which the property was bid in 1957 was inadequate or was in any way less than the market price; it was

nobody's case that there was any fraud or irregularity in the conduct of the sale. The learned Subordinate Judge has in effect proceeded to direct a

re-sale on a mere possibility of getting a higher price. I say "possibility" because the parties themselves appear to have thought that the price that

might be obtained at the fresh auction might not even go up the price that was offered by the appellant on the former occasion, and provided

safeguards for respondents 2 and 3 bearing the loss in case there was a deficiency. It is undesirable that the Court should refuse to accept the

highest bid in an auction sale held under its orders merely in the hope that some better price might be obtained if the property were to be sold

afresh. It is equally undesirable that sales held under orders of Court should be nullified years afterwards without there being any material to show

that the previous sale was in any way objectionable. I am of opinion that the order of the learned Subordinate Judge cannot be supported. The

order is set aside. The sale in favour of the first defendant held on 27th February 1957 will stand confirmed. The appellant will be entitled to his

costs from the respondents.