(1916) 02 MAD CK 0033

In the Madras High Court

V.G. Anantharama Iyer APPELLANT

Vs

Vettath Kuttimalu Kovilamma alias Nangachi Kovilamma and Another RESPONDENT

Date of Decision : 27-02-1916

Acts Referred:

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

Citation : 34 Ind. Cas. 829 : (1916) 3 LW 504 : (1916) 30 MLJ 611

Judgement

1. One Abdul Kadir was adjudged an insolvent on the 17th August 1911. In execution of a decree obtained against Abdul Kadir on the 21st

January 1911, certain properties were attached. The Receiver of the Insolvent''s estate applied to the Subordinate Judge of Calicut on the 2nd

March 1912 to stay the sale on the ground that Abdul Kadir had been declared an insolvent. A fresh sale proclamation was issued and the sale

was adjourned to the 15th April 1912 on which date the property was sold subject to a mortgage of Rs. 6,119-3-0 in favour of one Ummar Sahib

and purchased by the 2nd respondent. On the 19th April 1912 the Receiver applied to the Court under Order 21 Rule 90 of the CPC to set aside

the sale. The Subordinate Judge dismissed the application on the ground, inter alia, that the insolvency proceedings in the District Court related to

the insolvency of a firm of which the judgment-debtor was a member and that the property sold was not the property of the firm but the exclusive

property of Abdul Kadir, that the auction purchaser was a purchaser in good faith, and that neither Section 47, nor Order 21 Rule 90 of the CPC

had any application. An appeal to the district Court was dismissed, the District Judge holding that Order 21 Rule 90 of the CPC did not apply as

there was no irregularity in publishing or conducting the sale. The District Judge further observed that no application such as is contemplated by

Section 35 of the Provincial Insolvency Act had been made by the Receiver.

2. Mr. Narasimha Rao takes the preliminary objection that no appeal lies even if Order 21 Rule 90 of the CPC under which the application to set

aside the sale was made, is applicable : We think that the petition may be taken as having been presented u/s 47 of the CPC also, though that

section was not quoted.

3. Proceedings to set aside sales on the ground of material irregularity or fraud in publishing or conducting the sale involve questions relating to the

execution, discharge or satisfaction of a decree and hence fall under both Section 47 and Order 21 Rule 90 of the Code of Civil Procedure.

Proceedings to set aside auction sales on any other tenable ground also involve questions relating to execution etc. and hence fall u/s 47 of the

CPC though they may not also fall under Order 21 Rule 90 of the Code of Civil Procedure. We agree with the opinion of Oldfield, J. In Muthiah

Chettiar and Another Vs. Bava Sahib and Others, that an executing court is entitled to set aside a sale on an application u/s 47 of the CPC and

that no separate suit will lie. See also Manasarm v. Nagendra Nath (1912) 16 C.L.J. 557 and Amirchand v. Bakshi Harihar Prosad Singh (1915)

30 M.L.J. 238. It is only where Order 21 Rule 90 applies also (besides Section 47) to the petition to set aside the auction sale that no second

appeal lies u/s 100, Civil Procedure Code. But when Section 47 of the CPC alone is applicable to the petition, the order passed thereon is a

decree and a second appeal lies.

4. Moreover, the appellant has also filed a civil revision petition and there can be no doubt that; we have the power to interfere in revision, if it is

shown that the Lower Courts have acted with material irregularity in the exercise of their jurisdiction.

5. Mr. Rosario contends (1) that after adjudication no creditor is entitled to proceed against the person or property of the insolvent, and that when

it was brought to the notice of the court by the Receiver that the judgment-debtor had been adjudged an insolvent court ought not to have

proceeded with the sale; (2) that as a matter of procedure the Receiver in whom the insolvent''s estate vested on the making of the adjudication

order ought to have been made a party to the execution proceedings, and that the sale is bad. Mr. Rosario has referred us by way of analogy to

certain cases, Ramasawmi v. Bagirathi ILR (1883) M. 180, which was followed in Krlshnayya v. Unissa Begum ILR (1891) M. 399 and

Samandan Karkat Edathil Rayarappan Nambiar Vs. Malikandi Aketh Mayan, where it was held that a sale held without bringing on record the

legal representatives of the deceased judgment-debtor is void or a nullity as against the representative of the judgment debtors. We think that the

sale was altogether irregular and that the court in holding the sale after it had been brought to its notice that the judgment-debtor had been

adjudged an insolvent, acted, if not without jurisdiction, at any rate with material irregularity in the exercise of the jurisdiction of the Court. Section

34(1) of the Provincial Insolvency Act provides that ""where execution of a decree has issued against the property of a debtor, no person shall be

entitled to the benefit of the execution against the receiver except in respect of assets realised in the course of the execution by sale or otherwise

before the date of-the order of adjudication."" The terms of the section are quite clear and must, we think, be giveneffect to. In this case both the

sale and the realisation of the assets took place after the adjudication order was made. We are also of opinion that the judgment-debtor had at the

time of the sale no right, title or interest which could be sold or vested in a purchaser and that, consequently the 2nd respondent acquired no title as

to the property which had passed to the Receiver on the adjudication order being made. See Raghunath Das v. Sundar Das ILR (1914) Cal. 72

6. Mr. Narasimha Rao for the 2nd Respondent relies on Sub-clause 3 of Section 34 of the Provincial Insolvency Act which provides that ""a

person who in good faith purchases the property of a debtor-under a sale in execution shall, in all cases acquire a good title to it against the

Receiver.

7. It appears to us that a purchaser in good faith means a person who did not know at the time of the sale that the judgment-debtor was an

insolvent, and could not by the exercise of due diligence have discovered that an adjudication order had been made. The sale in this case was

stayed at the instance of the Receiver and adjourned for a month and a fresh sale proclamation was issued. It is difficult to believe that the auction

purchaser could have been unaware of the fact that the judgment-debtor whose property was sold had been declared an insolvent. The insolvency

of Abdul Kadir must have been a matter of notoriety in Calicut where the property was sold and the purchaser must have been aware of it.

Further, it is only the purchaser of the property of the ""debtor"", who is protected but when the property had vested in the Receiver before the sale

it ceased in law to be the property of the debtor and hence Section 34 has no application. Section 35 of the Provincial Insolvency Act to which the

District Judge refers must be read with Section 34. Section 35 of the Provincial Insolvency Act relates to the dates of a court executing a decree as

to property taken in execution, when notice has been given to the court before the sale that an adjudication order has been made. The omission on

the part of the Official Receiver to give such notice does not, we think, affect the case. The sale must accordingly be set aside and the appeal

allowed with costs. No. separate order in Civil Revision Petition No. 879 of 1914 is necessary.