

**(1959) 07 KL CK 0048**

**High Court Of Kerala**

**Case No:** C. M. A. No's. 32 and 39 of 1959

Kurian

APPELLANT

Vs

Barbary Mary Lopez and Another

RESPONDENT

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**Date of Decision:** July 23, 1959

**Acts Referred:**

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

**Citation:** (1959) KLJ 994

**Hon'ble Judges:** K. Sankaran, C.J; Anna Chandy, J

**Bench:** Division Bench

**Advocate:** P. Govindan Nair, G. Balagangadharan Nair, P.K. Kurien, K. Sukumaran in C. M. A. 32/59, K.K. Mathew and George Vadakkal in C. M. A. 39/59, for the Appellant; K. Raman Nair, G. Rajasekhara Menon in C. M. A. 32/59 and T.S. Krishnamurthy Iyer in C. M. A. 32/59 and C. M. A. 39/59, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

Sankaran, C.J.

These two appeals are directed against a common order passed by the lower court dismissing the applications filed by the defendant-judgment debtor in O. S. No. 128 of 1951 on the file of the Kottayam District Court. In execution of the decree in that case five items of immovable properties belonging to the defendant were sold in court auction. These items were bid by the decree-holder for a sum of Rs. 31,000/-. The defendant filed an application under Order 21 rule 90 C. P. C. to have the sale set aside on grounds of material irregularity and fraud committed by the decree-holder and which have brought about substantial injury to the defendant-debtor. While the enquiry into these allegations was in progress, the judgment-debtor was adjudicated an insolvent and his properties became vested in the Official Receiver. The Receiver who got himself impleaded in the enquiry started by the defendant, was allowed to continue the proceedings from the stage at which he was impleaded. The judgment-debtor also filed an application under Act XXXI of

1958 to have the court sale set aside under clause 3 of Section 22 of that Act. Finally both the applications were dismissed. Against that common order of dismissal, defendant has filed C. M. Appeal 32 of 1959 and the Official Receiver has filed C. M. Appeal 39 of 1959. The main point urged on behalf of the appellants in both these appeals is that the lower court ought to have found that the court sale was vitiated by material irregularity and fraud and that the defendant has sustained substantial injury as a result of such a sale. On going through the records in the case, we are satisfied that there is not much force or substance in this contention. No material defect is pointed out in the proclamation schedule. Notice of the proclamation was accepted by the defendant and even though he applied for time to file objections, he is seen to have given up that idea subsequently. In fact he did not file any objection. The probable price of the properties proclaimed for sale was shown at only Rs. 19,000. The defendant had no case at that stage that this was an under-valuation. He got the sale adjourned on a few occasions to enable him to deposit the decree amount. It was because he could not deposit the amount that the properties were finally sold. It is also seen that other decree-holders who had to get amounts from this defendant had also intervened and had applied for rateable distribution. Among these decree-holders there were banks also. In such a situation it cannot be said that the decree-holder-auction-purchaser would have been able to knock off the properties for a low price. The other creditors would have been on the alert to see that the best price was obtained at the auction. In view of the application for rateable distribution, the auction purchaser had to deposit the sale price in court. These facts and circumstances are sufficient to show that the allegation of fraud and material irregularity in respect of the court sale is baseless.

2. Another point urged on behalf of the appellants is that the lower court erred in dismissing the defendant's application to take out a commission to report about the value of the properties covered by the court sale. It is stated that a commission report would have shown that the properties were really worth much more than the price fetched at the auction. At the outset, it has to be pointed out that the defendant's application for the issue of a commission was a belated one. All the same, the court directed the defendant to file the title deeds relating to the properties sold so that the court may be satisfied by prima facie evidence that the allegation of under-sale is well-founded. The defendant simply ignored the order of the court and did not care to produce any document. This attitude of his showed the lack of bona fides on his part. The lower court was therefore right in dismissing the belated application for the issue of a commission.

3. The other items of evidence adduced by the defendant have been fully considered by the lower court and it has been found that the defendant's case of gross under-valuation is not made out by such evidence. Out of the five items sold in court auction, items 3 to 5 are paddy lands and there is no reliable evidence about the value of these items at the time of the sale. The other two items are garden lands. It has come out in evidence that there were about 400 rubber trees in these items and

they were all cut and removed by the defendant and this conduct shows that he was only anxious to appropriate as much as is possible out of these properties. The oral evidence given by P. W. 2 about the value of the properties was rightly rejected by the lower court in view of the fact that it was amply demonstrated in his cross-examination that he has no definite idea about the real value of the properties. The sale deed Ext. P. 1 in favour of P. W. 3 cannot also be accepted as a safe guide. A small bit of property was purchased under it and naturally therefore a fancy price must have been paid for it. Ext. P 2 also stands more or less in the same position. In the absence of evidence regarding all the relevant data, the compensation awarded (Ext. P. 3) cannot also be accepted as proper basis for fixing the value of the properties covered by the court sale. It has also to be remembered that in a court sale which is subject to certain risks, a reasonable margin has to be allowed in the price fetched at the auction. Such a sale can be avoided only if there is reliable and acceptable evidence to show that the sale was for a grossly inadequate price resulting in substantial injury to the debtor and that the sale is vitiated by fraud and material irregularity. As already stated, no such defects have been made out in respect of the court sale in this case. On the other hand the circumstances under which the auction was conducted, go to show that a proper and reasonable price was fetched at the auction and that it cannot be set aside for any of the grounds contemplated by order 21 rule 90 C. P. C.

4. Then there is the other ground urged on behalf of the defendant, who is the appellant in C. M. A. 32 of 1959, that he is an agriculturist and as such, is entitled to have the court sale set aside under clause 3 of Section 22 of Act XXXI of 1958. Even assuming that he is one who could claim the benefits of this Act, he could get the sale avoided only if he has satisfied the essential condition of the deposit of the first installment as provided for in Sections 4 and 5 of the Act, within the time prescribed. The last date for deposit of first installment was 14-1-1959. Admittedly no deposit was made on or before that date. The deposit made several days later cannot be accepted as a proper and valid deposit. The defendant could get an extension of the time for depositing the installment amount, only if he had applied under clause 4 of Section 12 of the Act. It is clear from that clause that the application for extension of time has to be filed before, the expiry of the six months prescribed as the normal period for making the deposit. Within that period, no application for extension of time was filed and hence the lower court was right in refusing to grant an extension of time. The deposit made beyond the prescribed time limit was also rightly held to be not a proper and valid deposit. On this ground alone the defendant's application under clause 3 of Section 22 of the Act had to be dismissed. In this view of the matter, the other points urged against the sustainability of the defendant's application under that section do not arise for consideration. In the result, C. M. A. 32 of 1959 and C. M. A. 39 of 1959 are both dismissed with costs.