

(2005) 12 KL CK 0060

High Court Of Kerala

Case No: FAD No. 89 of 2003

P.L.S. Kannan

APPELLANT

Vs

K. Vijayan

RESPONDENT

Date of Decision: Dec. 5, 2005**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 22, Order 21 Rule 54, Order 21 Rule 54(2), Order 21 Rule 58, Order 21 Rule 66

Citation: (2008) 1 KLJ 426**Hon'ble Judges:** R. Bhaskaran, J; M. Sasidharan Nambiar, J**Bench:** Division Bench**Advocate:** O. Ramachandrann Nambiar and Geen T. Mathew, for the Appellant; Varghese C. Kuriakose and Jacob Sebastian, for the Respondent**Final Decision:** Allowed

Judgement

M. Sasidharan Nambiar, J.

The judgment debtor in E.P. 272/98 in O.S. No. 48/98 on the file of the Sub Court, Trichur is challenging the dismissal of this petition to set aside the sale filed under Rule 90 of Order XXI of the Code of Civil Procedure, hereinafter referred to as the Code) as per order in E.A. 654/01 dated 11-12-2002. Appellant filed the petition to set aside the Sale contending that the property was sold for Rs. 5,01,000/- on 4-9-2001 and purchased by the decree holder and the sale is vitiated by material irregularities and fraud in publishing and conducting the sale and sale is liable to be set aside. It was contended that appellant had only 1/2 right in a plot of land measuring sixteen cents in R.S. No. 91/16 as per settlement deed No. 562/67 of S.R.O. Nenmara and the remaining extent belongs to his brother Sivakumar and the property was sold without disclosing this fact and it is a material irregularity. It was also contended that the property sold is worth Rs. 25 lakhs and the inspection by a Commissioner would disclose that the price quoted by the decree holder is blatant fraud and sale of a portion of the property would have been sufficient to satisfy the

decree. It was also contended that there was no proper publication or publicity about the sale in the locality and there was no affixture of the notice in the Village Officer or any where in the locality and no publication was made to enable the public to know about the sale and it is another material irregularity. It was further contended that respondent bid the property without fixing a reserved price as provided under Rule 72A of Order XXI of the Code and it has to be taken that the decree holder bid the property for the full and final settlement of the entire decree. Appellant also contended that there has been no compliance of the provisions of Order XXI Rule 54 and there was no beating of the drum and there was no notice of the sale and therefore the sale is to be set aside under Rule 90 of Order XXI of the Code.

2. Respondent filed an objection denying all the allegations and contending that appellant deliberately evaded service of Rule 22 notice in the E.R and even the Commissioner has reported that the value of the property is only Rs. 9,50,000/- which is less than the value of the property shown in the sale proclamation and the brother of the appellant filed E.A. 412/01 claiming 1/2 share in the property and when the right of the claimant was disclosed respondent conceded the right and as directed by the court, sale paper was amended showing that appellant has got only 1/2 right in the property. According to first respondent appellant obtained permission of the court and bid in auction and Rule 72A of Order XXI is not applicable to the facts of the case and all the formalities were complied and appellant had challenged the order of the executing court earlier before the High Court and the order was confirmed and the total amount due under the decree exceed Rs. 17 lakhs and the attempt is only to drag on the proceedings and there is no fraud or material irregularity in the publication or conducting of the sale and therefore the petition is only to be dismissed.

3. The learned Sub Judge as per order dated 11-12-02 dismissed the petition holding that there is 11-12-02 dismissed the petition holding that there is no material irregularity or any other legal injury caused and therefore the sale cannot be set aside. Appellant is challenging that order in the appeal contending that court below should have stayed the proceedings till the disposal of the three petitions pending before the Sub Court, Palakkad to set aside the ex parte decree passed against the appellant. It was contended that the respondent has not amended the sale papers in accordance with the order of the court in E.A. 412/02 and it has resulted in injustice and the extent of the property sold is 27 3/4 cents and appellant has right over only 16 cents of land. It was also contended that the mandate of Rule 58 was not complied and there was no proper sale proclamation and there was no proper conducting of the sale and the sale conducted on 4-9-01 is invalid. It was also contended that though respondent was permitted to bid in auction, no reserve price was fixed and the upset price fixed for sale was Rs. 10 lakhs and decree holder should have bid the property for Rs. 10 lakhs and the sale for Rs. 5,01,000/- is illegal and it is a material irregularity. It was also contended that the non publication of the

date of sale in the newspaper is a fraud on the court as well as the judgment debtor and it is a material irregularity and as a result irreparable injury was caused. It was also contended that the Amin did not affix the sale notice at the office the Collector of the District where the property is situate and persons could not participate for want of information of the auction sale and hence proper purchasers could not participate in the sale and it is a material irregularity and the sale is to be set aside.

4. We heard Advocate Sri. O. Ramachandran Nambiar appearing for the appellant and Advocate Sri. Jacob Sebastian for the respondent.

The argument of learned Counsel Sri. Ramachandran Nambiar was that the court sale is vitiated by material irregularity and fraud. It was argued that under Sub-rule (2) of Rule 67 of the Code proclamation for sale shall be published in the Official Gazette or in a local newspaper or in both where the court so directs and as per Order dated 23-6-00 executing court had directed proclamation and sale after publication in Mathrubhoomi Daily and showing the amount given by the Commissioner, decree holder and judgment debtor in the sale proclamation and that order was confirmed by this court in C.R.R No. 1801/00, still the sale was conducted without publication and therefore it is a material irregularity. The learned Counsel argued that if there was paper publication more purchasers would have bid in the auction and the property would have been sold for better price and due to the failure to publish in the newspaper, decree holder respondent snatched the property for Rs. 5,01,000/- and it has caused loss and injury to the appellant judgment debtor and it is a material irregularity sufficient argued that when the second proviso to Sub-rule (2) of Rule 66 of Order XXI of the Code mandates that the value of the property in the sale proclamation shall include the estimate given by the judgment debtor and when appellant had contended that the value of the property is Rs. 25 lakhs and the court has directed that the said price has to be shown in the sale proclamation, the property was sold without complying with the directions and it is a material irregularity. Learned Counsel also argued that under Rule 72 of Order XXI a reserve price should have been fixed by the court below when the decree holder had shown the value of the property at Rs. 10 lakhs and when he was permitted to bid the auction, the bid amount shall not be less than Rs. 10 lakhs and as the sale was for Rs. 5,01,000/- it is a material irregularity. The learned Counsel further argued that as per Sub-rule (1) of the Rule 67 the proclamation has to be published as provided under Sub-rule (2) of Rule 54 and Sub-rule (2) of Rule 54 provides that proclamation has to be published in the office of the Collector in which the land is situated and as it was not done, the sale is vitiated. The learned Counsel also argued that these grounds are sufficient enough to set aside the sale as provided under Rule 90 of Order XXI C.P.C.

5. The learned Counsel for the respondent argued that the property was sold as per the order of the Court dated 21-6-01 and there was no direction to publish the proclamation in any newspaper and therefore the failure to publish the

proclamation in a news paper is not a material irregularity. The learned Counsel also argued that consequent to the claim petition filed by the brother of the appellant claiming 1/2 share in the property, respondent was permitted to amend the sale papers and the sale papers were amended and the sale was proclaimed and property was sold complying with all the mandatory conditions provided in the Rules and there is no material irregularity in publishing or conducting the sale and there was no fraud and there is no reason to interfere with the order of the Court below.

6. The question is whether the court sale is vitiated by any material irregularity and if so whether appellant sustained any substantial injury by such irregularity. Rule 90, Order XXI of C.P.C. reads:

Rule 90- Application to set aside sale on ground of irregularity or fraud- (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up. Explanation-The mere absence of or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule.

Under Sub-rule (2) a sale cannot be set aside on the ground of irregularity or fraud in publishing or conducting the sale it unless it is proved to the satisfaction of the court that the applicant has sustained substantial injury by reason of such irregularity or fraud. So also under Sub-rule (3) no application to set aside the sale under Rule 90 could be entertained on any ground which the appellant could have taken on or before the date on which the proclamation of sale was drawn up.

7. The decree was originally passed by Sub Court, Thrissur. The decree was transferred for execution, at the instance of the respondent, to Sub Court, Palakkad. Rule 22 notice was issued and appellant appeared before the executing court on 24-7-98. He filed an objection dated 21-1 -99 to the sale paper contending that the upset price of Rs. 10 lakhs shown is very low and the property is having 27 3/4 cents with a house worth Rs. 25 lakhs and the properties are having road frontage on two sides. At the instance of the appellant, a Commissioner was appointed and the Commissioner submitted a report showing the value of the property including the building at Rs. 9,71,000/-. The executing court thereafter passed the following order

on 23-6-2000.

Proclaim and sell after publication in Mathrubhoomi and showing the amounts shown by the Commissioner, decree holder and judgment debtor 18-8-00.

Appellant challenged that order before this court in C.R.P. No. 1801/00. That was dismissed by this court as per order dated 24-1-01. As is clear from the order of this court, what was contended by the appellant before this court was that the property sought to be sold is having 27.75 cents with a residential building and to realise the decree debt only a portion of the property need be sold and the property could be sold in two plots namely the plot 12.5 cents with residential building and the balance of 15 cents as a separate plot and there is no need to sell the whole property. This court rejected the contention holding that it is not possible to sell the property in two plots and there are no grounds to interfere with that order. Thereafter the brother of the appellant filed E.A. 412/01, a petition under Order XXI Rule 58 of the Code before the executing court. The contention of the claim petitioner was that he has 1/2 share in sixteen cents of the property sought to be sold by the respondent and he was unaware of the proceedings and therefore his claim for half share in the property is to be protected by excluding the same from sale. The property shown in the schedule to the claim petition was 16 cents. When the claim petitioner produced the title deed, respondent conceded the right of the claim petitioner. Executing court allowed E.A. 412/01 declaring that the claim petitioner has 1/2 right over the property as per document No. 562/67 which was sought to be sold in the E.P. consequently appellant was directed to amend the sale proclamation. The executing court directed to proclaim and sell the property on 4-9-01. Consequent to that order respondent filed E.A. 459/01 seeking permission to amend the sale proclamation. The executing court permitted respondent to amend the sale paper showing that what is being sold is the half right of the appellant over the property. The value of the share of the property was reduced to Rs. 5 lakhs. The original value of the full right over the property shown was Rs. 10 lakhs. Court auction was conducted on 4-9-01. There was no bidders except respondent. Respondent decree holder purchased it for Rs. 5,01,000/-.

8. Eventhough as per the earlier order dated 23-6-00 the executing court directed to sell after publication in Mathrubhoomi, there was no such specific direction when the executing court directed to sell the property on 4-9-01. The records showing the proclamation and sale conducted by the court below establish that the sale paper did not show either the value of the property as estimated by the Commissioner or the value of the property claimed by the judgment debtor, which were directed to be shown as per the order dated 23-6-00. The records also show that the sale proclamation was affixed in the court notice Board, in the Village Office and the Panchayat Office and also in the property proclaimed for sale. But np notice was affixed in the Collectorate. The argument of the learned Counsel appearing for the appellant is that these are material irregularities.

9. Sub-rule (2) of Rule 54 of Order XXI of the Code mandates that sale proclamation has to be affixed on a conspicuous part of the property to be sold and a conspicuous part of the court-house, office of the Collector of the District in which the land is situated and in the Village Office as well as the Office of Gram Panchayat. The question whether the failure to affix sale notice in the office of the Collector of the District is a material irregularity or not was considered by a Division Bench of this Court in *Harishankar v. Syndicate Bank of India* ILR 1996 Ker 756. On the materials this court found that no proclamation or publication was made at the office of the Collector which has become mandatory after the amendment; of Rule 54(2) of Order XXI of the Code in the year 1976. Before the amendment the Rule 54(2) by the Amending Act 104 of 1976, as per the Kerala Amendment publication in the office of the Collector was not necessary. The Division Bench found that as per the amended Rule 54(2) proclamation has to be published at the office of the collector also and Rule 67 stipulates that every proclamation shall be published by Rule 54(2). As it was not published in the Collector's office this court held that there is a clear violation of the mandatory provisions. On the facts, this court found that it was a material irregularity in the sale proclamation and publication. The sale was set aside. Learned Counsel also relied on the decision of the Apex Court in [Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh](#), and argued that an obligation is imposed on the court while directing sale of the property as provided under Rule 66 and though it is not mandatory under Sub-rule (2) of Rule 67 that sale proclamation is to be published in a newspaper, when the court has already exercised the discretion and directed the decree holder to publish the sale proclamation in Mathrubhoomi Daily as per order dated 23-6-90, the sale conducted without publication of the proclamation in the newspaper is in violation of the mandatory provisions of Rule 67 and therefore sale is vitiated.

10. The Apex Court in *Desh Bandh*'s case has elaborately considered the various provisions of execution under Order XXI of the Code. Holding that proclamation for sale is an important part of the proceedings and the details should be ascertained in the case which will remove the basis for many a belated objections to the sale at a later stage, the Apex Court held:

Moreover Rule 66(2)(e) requires the court to state only nature of the property so that the purchaser should be left to judge the value for himself. But the essential facts which have a bearing on the very material question of value of the property and which could assist the purchaser in forming his own opinion must be stated i.e. the value of the property, that is after all, the whole object of Order 21 Rule 66(2)(e) CPC. The court has only to decide what are all these material particulars in each case. We think that this is an obligation imposed by Rule 66(2)(e). In discharging it, the court should normally state the valuation given by both the decree holder as well as the judgment debtor where they both have valued the property, and it does not appear fantastic. It may usefully state other material facts, such as the area of land, nature of rights in it, municipal assessment, actual rents realised, which could reasonably

and usefully be stated succinctly in a sale proclamation has to be determined on the facts of each particular case. Inflexible rule are not desirable on such a question.

11. The compulsory sale of immovable property under Order XXI divests the right, title and interest of the judgment-debtor and confers those rights, in favour of the purchaser. The proceeding thereby deals with the rights and disabilities either of the judgment debtor or the decree holder. It is therefore mandatory that the executing court has to apply its mind and follow the mandatory provisions. From the records, it is clear that the executing court mechanically passed the order for proclamation and sale on 21 -6-2001 without verifying the previous orders. If it had verified the previous orders in the E.P., it would have seen that as per order dated 23-6-00, it was specifically directed that the sale is to be conducted after publication in Mathrubhoomi Daily and that order was affirmed by this court in the C.R.R.

12. On going through the records, we find that there are material irregularities in the proclamation and conducting of sale. As stated earlier, it is clear that there was no publication of the proclamation in the Collectorate as is mandated under Sub-rule (2) of Rule 54 and Rule 67 of Order XXI of the Code. When the court has already exercised the discretion as provided under Sub-rule (2) of Rule 67 and that order was confirmed by this Court in a revision filed by the judgment debtor, executing court could have sold the property only after publication in Mathrubhoomi as directed in the order dated 23-6-90. There is nothing in the order dated 21-6-01 to show that the direction to conduct the sale after publication in Mathrubhoomi Daily was dispensed with or altered. If so, the sale could have been conducted only as provided under the Order dated 23-6-00. It is true that publication of the sale proclamation in a news paper is not at all mandatory. Sub-rule (2) of Rule 67 only provides that proclamation is to be published in the official gazette or local newspaper or both only if the court so directs. But once that discretion was exercised and court directed publication in a newspaper, the sale can be conducted only after such publication. The exercise of the said discretion cannot be obliterated by another order for sale and that too without any specific direction that the previous order to conduct the sale after publication in a news paper was reviewed or altered. If so, the subsequent sale without publication of sale proclamation in a news paper is definitely a material irregularity.

13. Eventhough after the amended code it is not for the court to fix the upset price, it is any given by the judgment debtor in the sale proclamation. Proviso to Sub-rule (1) of Rule 66 of CPC reads:

Provided further that nothing in this rule shall be construed as requiring the court to enter in the proclamation of sale its own estimate of the value of the property, but the proclamation shall include the estimate, if any, given by either or both of the parties.

As per order dated 23-6-90 the executing court has directed that the value of the property shown by the decree holder and the judgment debtor shall be included in the sale proclamation. The proclamation of the sale conducted on 4-9-01, which is available in the court records establish that the sale proclamation did not show the value of Rs. 25 lakhs as claimed by the judgment debtor. What was shown in the sale proclamation was the value of half share of the appellant over the properties viz. Rs. 5 lakhs. This is in violation of the mandatory provisions of Rule 66(2) and also the order of the executing court dated 23-6-01. It is also a material irregularity in publishing; and conducting the sale.

14. We find no merit in the case of the appellant that the property available for sale was only sixteen cents and not 27 3/4 cents. This is a plea which was available to the appellant; when he filed objection to Rule 66 notice. Hence this plea which was not taken earlier cannot be entertained in a petition under Rule 90 because of the bar provided under Sub-rule (3) of Rule 90. Moreover what was contended by the appellant before the executing court and before this court in the earlier C.R.P. was that the property is having 27 3/4 cents and is having a value of Rs.25 lakhs. But there is substance in the argument of the learned Counsel for the appellant that the statement in the amended sale proclamation that appellant has only half share in the 27 3/4 cents is not correct. As per E.A. 412/99 the claim petitioner, the brother of the appellant, had claimed only 1/2 right over 16 cents of the property proclaimed for sale. He did not claim any right over the remaining property. The case of the respondent was that appellant has right over the entire 27 3/4 cents shown in the sale proclamation. In the objection filed by the appellant to Rule 66 notice also it was admitted that the property is having 27 3/4 cents. When the claim petitioner had claimed only 1/2 right over 16 cents of the property what was available for sale and to be proclaimed for sale is the right of the appellant over the entire 27 3/4 cents of property. But what has been shown in the sale proclamation was that appellant has only 1/2 right over the 27 3/4 cents of property. Brother of appellant, the claim petitioner had only half share in sixteen cents. Appellant has absolute right over the remaining extent. We find that there is merit in the submission of learned Counsel for appellant that properly would have fetched more value than what has been sold for if the sale proclamation had shown that appellant had half right over 16 cents and full right over the remaining extent. Though it was contended that the sale is vitiated as the decree holder purchased the property without an order from the executing court fixing reserve price, we find no merit in the contention. Reserve price as provided under Rule 72A of Order XXI of the Code is to be fixed only in a sale for mortgage decree and not in a sale for money decree as in this case. Respondent had obtained permission of the executing court to bid in the auction. It is therefore clear from the records that there were material irregularities in the publication and conducting of the sale. The crucial question is whether appellant established that he sustained substantial injury by reason of such irregularity.

15. The learned Counsel appearing for the respondent relying; on the decision of the court in *Praseethan v. Sivarama Krishnan* (1996) (1) KLT 1 SN and in *Antony v. Catholic Syrian Bank* 1994 (2) KLT 341 argued that even non mentioning of time of sale is not a material irregularity resulting a substantial injury and no substantial injury was caused and hence sale cannot be set aside. Learned Counsel appearing for appellant relied on the decision of High Court of Bombay in [Jaikisandas Balchand Pamnani and another Vs. Municipal Corporation of Greater Bombay and others](#), and High Court of Andhra Pradesh in [M. Veeranjaneeyulu Vs. M. Saraswathamma](#), and argued that substantial injury was caused as property was purchased by decree holder for a lesser value.

16. Rule 90(3) of Order XXI mandates that on the ground of irregularity or fraud, no sale shall be set aside, unless court is satisfied that applicant sustained substantial injury by reason of such irregularity or fraud. The property sold was 27 3/4 cents. What was sold was half share in that property. Even according to the decree holder the value of the property with building was Rs. 10 lakhs. Respondent contended that the value is more than 25 lakhs. The claim petition was for only half share out of 16 cents of the property. If so there is force in the submission of the appellant that if the proclamation was published as mandated under Rule 54(2) and Rule 67(2) of Order XXI of the Code, the property would have known that what was sold was half right over 16 cents of the 27 3/4 cents and full right over the remaining extent, it is possible that there would have been intending purchasers for the sale. If there was paper publication of the sale, the court sale would have attracted more purchasers and it would have resulted in realising more value for the property. If so judged it has to be found that respondent sustained substantial injuries due to the material irregularities in publishing and conducting of the sale. If so it is definitely a material irregularity which has resulted in substantial injury to the appellant. The sale conducted on 4-9-01 is vitiated by material irregularity and appellant judgment debtor sustained substantial injury by reason of the said material irregularities. It is liable to be set aside under Rule 90 of Order XXI of the Code.

17. The appeal is allowed. The order of the court below in E.A. 634/01 in E.P. 272/98 is set aside. E.A is restored to file and the sale conducted on 4-9-01 is set aside. The executing court is directed to sell the property afresh after fresh proclamation and that too after effecting publication as directed in the order of the executing court dated 23-6-90, It is also made clear that the sale proclamation has to be amended showing the value of the property shown by the decree holder as well as the judgment debtor in the sale proclamation and also showing that the property; sold is 1/2 right of the appellant over 16 cents of the property and full right over the remaining 11 3/4 cents of the property.