

**(2005) 08 CAL CK 0006**

**Calcutta High Court**

**Case No:** G.A. No. 1222 of 2005

Kamala Bala Mustaphy

APPELLANT

Vs

Debabrata Ghosh and Another

RESPONDENT

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**Date of Decision:** Aug. 11, 2005

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 60, Order 21 Rule 66, Order 21 Rule 90, Order 21 Rule 90(3)

**Citation:** AIR 2006 Cal 82

**Hon'ble Judges:** Kalyan Jyoti Sengupta, J

**Bench:** Single Bench

**Final Decision:** Dismissed

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### **Judgement**

@JUDGMENTTAG-ORDER

Kalyan Jyoti Sengupta, J.

The above application has been taken out for delay, if any, be condoned, and recalling of an order dated 28th February, 2005 passed by me on G.A. No. 1374 of 2000 arising out of Suit No. 222 of 1958. By my above order I with detailed reasons and judgment confirmed sale in favour of purchaser at price of Rs. nearly 12 lacs. The offer of the purchaser was accepted by the Court on earlier occasion at a sum of Rs. 9 lacs. The earlier application was heard in presence of the parties. The present applicant on 25th of February, 2005 appeared before this Court and made submission and the matter was again fixed on 28th of February for further hearing. On 28th of February, 2005 the applicant did not appear and the impugned order was passed by me considering the submission of the learned Counsel of all the parties. The present application has been taken out on two grounds, firstly the applicant was incapacitated from coming to Court for illness on 28th of February, 2005 to make submission and second ground is that the property has been sold and confirmation thereof has been made at a throwaway price of Rs. 12,71,431/-.

2. Mr. Sarkar learned Senior Advocate appearing in support of this application has drawn my attention to the various documents namely Doctor's certificate dated 11th March, 2005 and prescription that the applicant was unwell. It appears from the certificate that the Doctor advised him to take complete bed rest since 25th February, 2005. He also annexes prescription of the Doctor concerned in support of the certificate. According to Mr. Sarkar the aforesaid ground is sufficient cause for which the petitioner was prevented from appearing in this matter on 28th of February, 2005, so on that ground alone my earlier order should be recalled and the matter be heard afresh.

3. On merit he has made submission showing that the sale was not conducted in accordance with the provisions of Order 21, Rule 66 of the CPC (CPC) and also it has been sold at grossly undervalued price. According to him even after confirmation of the sale this Court is empowered to set aside the same if it is found the sale is vitiated with fraud and with material irregularities. It is the duty of the Court to examine that valuation of the property is done properly. In support of his submission he has relied on the following decisions.

[Pandurangan and Another Vs. Dasu Reddy, Gajadhar Prasad and Others Vs. Babu Bhakta Ratan and Others, Shalimar Cinema Vs. Bhasin Film Corporation and Another, Union Bank of India Vs. Official Liquidator H.C. of Calcutta and Others, .](#)

4. He says that his client has been able to procure a purchaser at the price of Rs. 20 lacs and as a matter of fact in Court the demand drafts covering the above amount were produced.

5. Mr. Dipak Som learned Senior Advocate submits that under the law it is difficult to set aside the sale, as this property did not belong to either of the parties but the same belongs to the deity. The sale took place pursuant to the order of the Court and Court itself has adopted its own procedure. The sale order was passed by the Hon'ble Mr. Justice Hazari (as His Lordship then was) holding the property, being debutter one, as far back as on 25th August, 1993. Pursuant to this advertisement various offers were received. This order was challenged in an appeal and the Appeal Court by a judgment and order dated 26th July, 2000 has dismissed the action and directed to hold sale in terms of the order of the learned trial Judge. This order of the Division Bench was challenged before the Hon'ble Supreme Court by filing a SLP but it was withdrawn. Thereafter a review application was filed and the same was also dismissed.

6. To implement the aforesaid order of sale this Court ultimately passed order. He contends in principle if better price fetches then it may be sold again. He contends further that provision of Order 21, Rule 60 or for that matter Order 21, Rule 90 of CPC do not apply in this case.

7. Mr. Malay Ghosh, Id. counsel, appearing for the purchaser namely Pashupati Mullick has adopted the legal submission of Mr. Som and contends that pursuant to

the order of this Court entire money has been deposited with the Official Receiver, however, conveyance has not been executed as yet. He further submits that actually his client was obliged to pay Rs. 9 lacs only as that is the actual balance price. The property was agreed to be sold by the Court. However, this Court considering the delay occurred in effecting the sale, has also taken into consideration the escalation of the price. Upon advertisement and extensive public notice the property was sold and object of achieving best price has been fulfilled. There cannot be any question of fraud or material irregularity to warrant to interfere with the order passed by this Court. Moreover, the applicant himself appeared in this matter and made submission and on his request the matter was adjourned on the following Monday. The certificate produced did not suggest that he was unwell on 25th of February, 2005. It is his habit to resist all actions unsuccessfully every time, any time and everywhere.

8. I have carefully considered the contention of the learned Counsel and examined all the materials. The first point is whether the applicant has been able to make out sufficient cause for which he was prevented from appearing at the time when the impugned order was passed. This is an admitted position that the petitioner-in-person himself appeared on 25th of February, 2005 and made submission. He prayed for adjournment till 28th of February, 2005 on that date he was not found. Then this Court had no option but to dispose of the matter with reasons considering his submission made on 25th of February, 2005, as on that date he was not found. Now it has to be seen whether the petitioner has been able to bring a case of his non-appearance on 28th of February, 2005 or not. He has annexed a Doctor's certificate dated 11th March, 2005 which advised him to take complete bed rest since 25th of February, 2005. He has also annexed a prescription dated 25th of February, 2005. In my view the certificate given by the Doctor is factually incorrect as I found in Court he was absolutely fit to make submission physically on 25th of February, 2005 itself. On this given situation how a doctor could certify his inability to move on 25th February, 2005. I am not making further comment. It may so happen either he has flouted the Doctor's advice or the certificate itself is a false being a product of afterthought. There has been no certificate that on 28th of February, 2005 he was unwell or for that matter there is no record to show that his condition on 28th of February, 2005 deteriorated so much so to unable him to come to Court. Therefore, I outright reject this certificate and disbelieve the same. I therefore, hold that no sufficient ground or reasons has been made out wherefrom it can be said that the petitioner was prevented from appearing on 28th of February, 2005. In real sense it cannot be said that the matter was heard or order was passed ex parte. As a matter of fact the order was passed in his absence, but he was heard. On that ground I do not think it fit to recall my earlier order. The argument on other points namely the sale was not conducted in accordance with the provisions of Order 21, Rule 66 is wholly inappropriate in this case as the Court in its wisdom has adopted the method of procedure of sale. This

order was passed upon hearing the petitioner by Justice Hazari as quoted above. This order was appealed against and Appeal Court affirmed the order of the learned single Judge by giving specific direction to the Official Receiver to take all steps in terms of the order of the learned trial Judge for effecting sale of the property. These points are in my view cannot be reopened or re-adjudged as the same is hit by the principle of constructive res judicata if not expressed one. When the Appeal Court has directed to sell the property in terms of the order of the learned trial Judge with the method adopted therein this Court while sitting singly cannot pass any order affecting or touching the order of the Division Bench. Justice Hazari has adopted the methodology for advertisement in the newspaper. Upon advertisement the highest price had been offered and indeed paid by the purchaser. The method adopted by Hon"ble Mr. Justice Hazari is not by way of private sale but by public auction. As such this contention is overruled. The decisions cited by Mr. Sarkar on this point are not applicable at all. As far as the decision of Madras High Court reported in [Pandurangan and Another Vs. Dasu Reddy,](#) is concerned the said decision was rendered on the question that the sale was held with irregularity as such the same was set aside. The Court therein proceeded on the basis of Order 21, Rule 90 of the CPC. This provision in this case is in my view absolutely inapplicable and particularly in view of the provisions of Order 21, Rule 90. Sub-rule (3), of the Code of Civil Procedure, which is quoted hereunder :

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.

9. The petitioner herein, therefore, could have taken up this point even before the Appeal Court or at the earliest possible opportunity. As such this point has no merit on the facts and circumstances of this case. The higher price at this stage is of no relevance, as offer of Rs. 20 lacs as on today after five years is not better or higher in real sense, in comparison to offer of 10 lacs five years ago, as if the property is sold after five years then price may come unsurprisingly at Rs. 40 lacs. It is natural that more is the delay more is increase in price in real property in metropolitan city. Accordingly I do not find any merit on this application. The same is dismissed. However, without any order as to costs.