

Manindra Chandra Nandi Vs Rahatannessa Bibi and Others

Court: Calcutta High Court

Date of Decision: Feb. 28, 1930

Acts Referred: Civil Procedure Code, 1908 (CPC) â€” Order 21 Rule 90, 47

Citation: AIR 1931 Cal 555

Hon'ble Judges: Mitter, J

Bench: Division Bench

Judgement

1. This is an appeal by a decree-holder auction-purchaser, from an order setting aside an auction sale held in execution of a mortgage decree for

sale. One of the judgment-debtors applied to set aside the sale under Order 21 Rule 90, Civil P.C., and Section 47, Civil P.C. So far as the

application was under Order 21, Rule 90, Civil P.C., is concerned it has been held that the complaints of the applicant had no substance. As

regards her application u/s 47, Civil P.C., it has been held that the notice under Order 21, Rule 22, Civil P.C., had not been served on her, and on

that ground the sale has been set aside in its entirety. She is one of the heirs of one of the mortgagors, and it is said that her share in the properties

is less than 5 pies and that of her father the mortgagor was 2 annas 9 pies.

2. The question which arises is whether the entire sale should be set aside or it should be held that the sale so held was invalid to the extent of

applicant's share. This question has not, as far as we can see, been considered in any decision of this Court.

3. The Judicial Committee in the case of Raghunath Das v. Sunder Das Khetri AIR 1914 P.C. 129 dealing with Section 248 of the Code of 1882

which corresponded to Order 22, Rule 1, Sub-rule (1) of the present Code, held, approving the decision of this Court in the case of Gopal

Chandra Chatterji v. Gunodamani Dasi [1893] 20 Cal. 370 that

a notice u/s 248 of the "Code is necessary in order that the Court should obtain jurisdiction to sell property by way of execution as against the legal

representatives of a deceased judgment-debtor.

4. This interpretation of "the law has been applied to Order 21, Rule 22, Sub-rule (1), Civil P.C., since the Code of 1908 came into being, and it

is perhaps too late to contend that in view of the insertion of Sub-rule (2), nothing corresponding to which there was in Section 248 of the Code of

1882, what was under the Code of 1882 regarded as want of jurisdiction should now only be regarded as an irregularity the effect of which would

depend upon the circumstances of each particular case. In any event no Court will perhaps have the courage to say so until the Judicial Committee

have another opportunity of considering the matter in the light of this subrule and of pronouncing an opinion in favour of this view. But I find that

whenever any Judge has expressed such a view it has been firmly negatived: see *Kasivisvanathan Chetty Vs. A.S.P.L.S. Somasundaram Chetty*

and *Others*, and *Doraswami v. Chidambaram Pillai* AIR 1924 Mad. 130 which were overruled by *Rajagopalan v, Ramanuja Chariar* AIR 1924

Mad. 431. I have ventured to refer to this view merely because I find it very difficult to reconcile the view as to absolute want of jurisdiction with

what the subrule says that subrule leaves it entirely to the Court in a case, in which in the exercise of its discretion it considers that the issue of such

notice would cause unreasonable delay or defeat the ends of justice, not to issue that notice. Of course the Court has to record its reasons for

dispensing with the notice, and that is obligatory; but it has been held that though the Court should record its reasons, *Monmatha Nath Ghose Vs.*

Mt. Luchmi Debi and Others, , omission in that respect is a mere irregularity. *Rajagopala Aiyar by guardian Ramachandra Aiyar Vs.*

Ramanujachariar and Another, .

5. Be that as it may, the question in the present case is whether the entire sale should be set aside. There is no decision of this Court in which the

question has been expressly considered and answered in the affirmative. On the other hand the Madras High Court in a Full Bench decision in the

case of *Rajagopalan v. Ramanuja Chariar* AIR 1924 Mad. 431 has held that the sale is void only as against the person to whom the notice was not

given. The Judicial Committee in the case of *Raghunath Das v. Sundar Das* and this Court in the case of *Gopal Chunder v. Gunodamani* have held

that the Court would have no

jurisdiction to sell the property by way of execution as against the legal representatives of the deceased judgment-debtors

on whom the notices were not issued. Moreover, a decree holder should not find himself in a worse position by reason of his omission in this

respect than what he would be in if he omits to make the particular legal representative a party to the execution. In the latter case the sale, on the

authority of the decision of the Judicial Committee in the case of *Khairajmal v. Daim* [1905] 32 Cal. 296 would not bind the share of that particular

legal representative and would be void to the extent of that share. It would therefore be more in consonance with their Lordships' decision in the

case cited to hold that the sale in the case before us is not void in its entirety but only that it does not bind the share of the applicant.

6. A question arose whether such an effect can legally be given to a mortgage sale, but having regard to the decisions in which it has been held that

even when a person having a share in the equity of redemption has been left out of a mortgage suit, a decree may be had proportionate to the

shares of those who have been impleaded: see *Kherodamoyi Dasi Vs. Habib Shaha*, in which the cases are cited, no difficulty in this respect will

arise.

7. The result is that the appeal is allowed. The Court below will in lieu of the order it has made, proceed to confirm the sale except as regards the

share of the petitioner in the properties sold, and to the extent of that share the sale shall stand void.

8. There will be no order for costs.

Mitter, J.

9. I agree.