Pamidimarri Gnamma and anr. Vs. Kettireddi Krishna Reddi and ors.

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Court : Chennai

Decided On : Mar-15-1923

Reported in : 75Ind.Cas.369

Judge : Francis Oldfield and ;Devadoss, JJ.

Appellant : Pamidimarri Gnamma and anr.

Respondent : Kettireddi Krishna Reddi and ors.

Judgement :

Oldfield, J.

1. This is an appeal by the petitioners, judgment-debtors, against an order dismissing their petition under Order XXI, Rule 90, Civil Procedure Code.

2. The majority of the grounds, on which the publication and conduct of the sale were impugned, were rightly held unsustainable by the lower Court because they either had been or might have been taken in the proceedings for framing proclamation, of which the petitioners had notice, and, so far as they were taken, were either not established or were not material. We, therefore, can confine ourselves to two points, (1) the lower Court's failure to enquire into the allegation that the sale was not proclaimed in the village, (2) its conclusion, adopted from a previous order, that no publication at the Collector's Office was required, because the property was not raiyatwari land.

3. That previous order is in fact material on both points, because as regards publicat on in the village also the conclusion in it was adopted, no further enquiry being held. It was passed on a previous petition by the present petitioners, Execution Application No. 71 dated 2nd April 1921 in which publication in two newspapers was asked for and also a postponement of the sale until 9th July 1921, apparently after the vacation. The sale had been fixed for 4th April 1921 and the petitioners object to gain time was sufficiently clear. In spite, however, of the decree-holder's opposition, referrred to in the diary in the record, to a postponement and his presumable readiness to support the sale in case of proceedings under Order XXI, Rule 90, the lower Court took the exceptional course of allowing the sale to continue, but at the same time holding an enquiry into the validity of the proclamations, concluding the sale only when that enquiry had ended in the decree-holder's favour. That enquiry included the taking of evidence as to the publication in the village, which had been denied in the affidavit accompanying the. petition; and the decision that the proclamation was duly published has been adopted in the order before us.

4. One ground, on which this adoption has been supported, is that the lower Court

merely utilized the evidence already taken, as though the previous proceeding during the sale had not been completed and based its present finding on it. But that does not correspond with the facts, that the previous proceeding was completed by the refusal to adjourn the sale and that the lower Court does not now profess to have applied its mind to the evidence or to have done more than adopt the previous decision.

5. It is then necessary to consider whether, as is further argued, that previous decision concludes the parties as res judicata. Certainly, the evidence for and against publication was taken fully and the order of 7th May 1921 refusing adjournment, or postponement, discussed fully; and, certainly, the judgment-debtor had invited the Court to decide and the decree-holders acquiesced in its deciding the question, the latter producing their evidence. It may, moreover, be said that if there had been no proper publication, the sale would clearly have been ineffective, since on application it would have had to be set aside. But those considerations do not entail that the Court had jurisdiction to reach, or the judgment-debtors the right to ask it to reach, a conclusion on the point at that stage, or that in doing so it acted otherwise than officiously. The Code does not provide for any enquiry into the validity of the publication of proclamation until alter the sale has been held. If the Court holds one, it must be regarded as doing so for its own satisfaction. Whether, in case it is not satisfied that there has been proper publication, it would be entitled to refuse to proceed and to call upon the decree-holder to pay for a fresh publication, in spite of his readiness to take the risk of failure in proceedings under Order XXI, Rule 90, need not in the present case be considered. What is material is that, when the enquiry is not prescribed by law, but is, as here, undertaken only to decide on the necessity for a postponement there can be no security for the Court's application of the standard of proof appropriate to a judicial proceeding, or, shortly, for its having acted judicially and for its decision being a judgment. There is naturally no authority applicable to an exceptional incident of this description. But it is material that in Sivagami Achi v. Subrahmania Aiyyar 27 M. 250 : 14 M.L.J. 57 the policy of this part of the law was regarded as being to avoid the difficulties and delays, which even now occur in obtaining the execution of decrees and to postpone consideration of objections to the publication and conduct of sales, until after they have been held, when the essential issue whether loss has been caused can also be tried. In the circumstances, it is not possible to hold that the proper publication of the sale proclamation was res judicata or that the lower Court was justified in refusing to take evidence and adjudicate on it.

6. The lower Court further did not take evidence as to the publication at the Collector's Office because it adopted the previous conclusion that such publication was requisite under Order XXI, Rule 67, read with Rule 54(2), only in the case of raiyatwari land and not in the case of enfranchised shrotriem villages, such as are in question according to petitioner's affidavit dated 2nd April 1921 and the sale proclamation and the admission made before us. For this construction of Rule 54(2) we have been shown no authority and in ordinary parlence, the quit rent payable to the Government would be as clearly revenue as any other money payable to it for use in the ordinary course of administration. Revenue, however, has not been, so far as we have been shown, defined, except in Section 1, Madras Act VI of 1867. True, according to that provis on, revenue means: 'Assessment, quit-rent, ground rent or other charge upon the land payable to Government' and in the Revenue Recovery Act (II of 1864) the machinery for the collection of revenue is, by Sections 1 and 3, explicitly applied to shrotriemdars. The argument on the other side is, however, that a distinction, is recognised in other Statutes, for instance, by the reference to 'Lakhiraj lands and ail other lands paying favourable quit-rents' in sect on 4 Regulation XXV of

1802 and in the reference to 'land charged with any fixed payment in lieu of revenue' in Section 7(v)(e) of the Court-Fees Act, (VII of 1870) between revenue and such payments as a shrotriemdar has to make and that this distinction should be applied before the shrotriem villages in the proclamation before us are treated as land paying revenue to Government. But as regards the Regulation it is material that 'lands paying favourab'e quit rents' are one of a number of 'articles of revenue' enumerated in the section and that it is not clear, the result for the purpose of Court-fee being the same, whether shrotriem lands would not fall under the description in sect on 7(v)(e) of the Court-Fees Act as 'land partially exempt from the payment of the revenue.' In any case, the foregoing reference to the two Madras Acts shows that no decisive result can be reached by recourse to other Statutes. The real answer to the decree-holder, moreover, is that recourse to other Statutes is not legitimate when, like those here relied on, they are not in pari materia with the Statute under interpretat on and that it is unnecessary, when, as in this case, the prima facie interpretation of the word used is consistent with the circumstances and the object of the provision. For it is easy to understand the division of land in private ownership under two heads that for which directly or indirectly payments are made to Government and that for which there are none, land available for cultivation falling under the first and land not so available, for instance, house sites backyards, and other urban or village sites under the other; and it is easy to understand the necessity for advertisement of the sale of the former at the public office concerned with two important incidents of ownership, the liability and the right to recognition of liability for public dues, the lower Court's conclusion that publication at the Collector's Office was unnecessary cannot, in these circumstances, be sustained.

7. The result is that the appeal must be allowed, the lower Court's decision being set aside and the petition remanded for re-hearing after enquiry on the issues (i) whether the proclamation was published in the village, (2) whether it was affixed in the Collector's Office, (3) whether, if the finding on either or both of these points is in the negative, the applicant in consequence sustained substantial loss. Costs to date here and in the lower Court will be costs in the cause and be provided for in the order to be passed.

Devadoss, J.

8. This appeal is against the order of the District Judge of Nellore de clining to set aside an auction sale held on 7th May 1921. The petitioners are the 2nd and 3rd defendants, and respondents Nos. 1 to 4 are the plaintiffs, in Original Suit No. 5 of 1917. The 6th respondent is the auction-purchaser. The plaintiffs obtained a mortgage-decree against the first defendant (the husband of the 2nd defendant) and the 3rd defendant, her son. The properties were brought to sale and were purchased for a sum, which the petitioners allege to be considerably below the value of the properties. They applied to have the sale set aside on the ground of irregularity and fraud on the part of the plaintiffs and the auction-purchaser. The learned District Judge declined to take evidence as regards the irregularities complained of as, in his opinion, they had already been found against the petitioners in a previous enquiry and held that there were no grounds for setting aside the sale.

9. In this appeal several contentions were put forward. The first is that the amount of income derived from the properties was not mentioned in the sale proclamation and that no particulars were given for ascertaining the value of the properties. The petitioners were served with notices to be present at the time when the sate

proclamation was settled and they did not chose to be present. They cannot, therefore, reasonably complain that a certain piece of information, which, according to them, would have given data to the purchaser as regards the value, have been omitted There is nothing, therefore, in this contention.

10. It is next urged that the properties were grossly undervalued in the sale proclamation. It is in evidence that the two properties were valued at Rs. 7,000 each and there is no reliable evidence to show that the value of the propeties was anything more than that mentioned in the sale proclamation. As a matter of fact, we find that the upset price had to be reduced as there were no bidders to bid up to the amount mentioned in the sale proclamation. This objection also fails.

11. The contention that there was a combination among the bidders and that they conspired not to raise the bid is not seriously pressed. It is not illegal for a number of intending bidders to arrange among themselves not to bid above a certain figure. The other allegations in the petition are not seriously pressed.

12. The contention that needs consdieration is was the learned Judge justified in refusing to take evidence as regards the allegations made in the petition? In his judgment, in paragraph 5, he says: 'Paragraph 4 refers to four circumstances in connect on with the publication of the proclamation. 1, 2 and 3 were dealt within the order of the Court on the previous petition and were found against the petitioners,' and in paragraph 8, he observes:' For the foregoing reasons I am of opinion that it is unnecessary to take evidence for disposing of the petition.' The enquiry referred to was held by the District Judge on a petition presented by the present petitioners on 2nd April 1921 in which they prayed for orders ' (1) for publishing the proclamation in the case duly in the Andhra Patrika and the Hindu papers, (2) for stopping the sale in this case till 9th July 1921, and (3) with such other reliefs as the Court may deem fit according to circumstances. The sale was advertised to be held on 4th April 1921. The pelition was opposed by the plaintiffs and the learned Judge passed the following order on 16th April 1921: 'The sale will continue from day to day till 30th April. Petitioner to pay batta. His witnesses must be ready that day. Adjourned to 30th April for evidence.' The petitoners stated in paragraph 9 of the affidavit filed in support of the petition that, 'the proclamation was not published by tom-tom beat of the drum even in the two villages. Therefore, the proclamation is not proper and maintainable.' Evidence was taken on both sides and the Judges passed an order on the 7th May 1921 that, 'There are no grounds, therefore, to suppose that there was no proper proclamation;' with regard to the allegation that notice was not affixed in the Collector's Office, he remarked, 'the properties being shrotriem lands, it was not necessary to affix a copy of the notice of sale in the Collector's Office' and he concluded his order by saying, 'I see no grounds to hold that there has been no proper publication of the sale. I, therefore, dismiss the petition with costs. '

13. It is contended on behalf of the respondent that that order is binding on the parties and that it was not, therefore, necessary for the Judge to enquire again into that matter after the sale had been held. This application is made under Order XXI. Rule 90. That rule can only apply to cases where there has been a sale and where the petitioners seek to set aside the sale. No doubt the Executing Court has power to satisfy itself whether a proclamation of sale was duly published or not, when an allegation is made by a party that it was not duly published. It is urged that, inasmuch as the petitioners invited the learned Judge to hold an enquiry they are bound by the result of that enquiry whether the learned Judge had power or not to hold such an

enquiry. The question is, whether the parties are bound by the result of an enquiry which could not be held before the sale. The mere fact that the petitioners adduced evidence or consented to the enquiry and even asked the Judge to hold an enquiry would not be a sufficient compliance with the provisions of Rule 90 of Order XXI, whereby a party has got a right to go before the Executing Court and ask that Court to hold an enquiry and set aside a sale on the ground of material irregularity or fraud in publishing or conducting it. No authority is shown for the contention that the finding of the learned Judge is either res judicata between the parties or that that decision is a sufficient answer to an application under Rule 90. In this case the petition was mainly intended to get a sale adjourned and to have the proclamation of sale published in some of the well-known papers, so that well-to-do people, or people who wanted to invest in land, might bid at the sale. There is no prayer in the petition of 2nd April 1921 for an enquiry as regards the irregularity or the absence of publication by beat of tom-tom in the village. It cannot be contended that, by making an application for adjournment of a sale and by consenting to have evidence adduced as regards one of the allegations in the petition, the petitioners either abandoned their right to have the sale set aside under Rule 90 of Order XXI, Civil Procedure Code, or under any other provision of law open to them. The object with which the learned Judge held the enquiry on the petition of April 1921 was only for the purpose of satisfying himself as regards the truth or otherwise of the allegations made in that petition in order to consider whether the sale should be adjourned or not. In these circumstances, the lower Court erred in not taking evidence and disposing of this petition on the merits.

14. In this connection, it is necessary to notice the content on that it is not necessary to affix the notice of sale in the Collector's Office. It is difficult to say with what materials the learned Judge had for saying in his order of the 7th May 1921, that the properties being shrotriem lauds, it was not necessary to affix a copy of the notice of sale in the Collector's Office. Under Order XXI, Rule 54 'a copy of the order shall be affixed on a conspicuous part of the property and then upon a conspicuous part of the Court-house and also, where the property is a land paying revenue to Government in the Office of the Collector of the District in which the land is situate.' It is argued for the respondent that, inasmuch as the properties brought to sale are shrotriem villages, it was not necessary to affix the notice in the Office of the Collector of the District, for shrotriem villages pay only quit rent or jodi and what is paid is not revenue and, therefore, Order XXI, Rule 54, Clause (2), does not apply to them. Mr. Krishnaswamy Aiyar, in support of his argument, refers to the Court-Pees Act, Section 7, Clause (v)(e), and contends that 'revenue' there means revenue which is collected from raiyatwari lands or from permanently settled estates and where a certain amount is paid as quit rent it is not revenue but it is in lieu of it and. therefore, Rule 54 does not apply to a case like this. It has to be remembered that a Civil Procedure Code is an enactment of the Imperial Leg slature and we have to see whether the Legislature intended to use the expression 'land paying revenue to Government' in the sense in which it is ordinarily understood or in any particular sense.

15. From the earliest days of the East India Company, the Revenue Administration of the territory ceded to it formed an important portion of its activities. The word 'revenue' meant the share of the produce of the land which the Government, either the East India Company or its predecessor, took from the raiyat or the cultivator. There is no definit on of the word 'revenue' in the Civil Procedure Code or in the General Clauses Act, but in the Madras Revenue Recovery Act of 1864 'public revenue' is said to include, for the purpose of the Act, cesses or other dies payable to

Government on account of water supplied for irrigation. It is admitted that shrotriem villages are liable to pay road-cess. The short answer to the respondent's contention is that shrotriem villages pay road-cess and, therefore, they are lands paying revenue to Government but the discussion need not end here as the word 'revenue' in the Madras Regulations as well as in Bengal and Bombay Regulations always meant the assessment which the Government levied from the occupier for the occupation of the land. In the Madras Regulation XXV of 1802, known as the Permanent Settlement Regulation, the words 'land revenue' are used to denote the amount payable by the zemindars to the Government. It is, therefore, clear that what a Zemindar pays to Government is revenue. Whether land held in inam or on other favourable tenures could be sad to be land paying revenue to Government is a question which is not free from difficulty. In Bengal Law Reports, Supplementary Volume, page 75 at p. 87, there is a case, Peezeerooddeen v. Modhoosoodun Paul Chowahty B.L.R. Sup. 75: 2 W.R. 15 in which the question was whether a zemindar could grant a piece of land rent-free out of his zemindari. In the course of the judgment, Mr. Justice Shamboonath Pandit, one of the Judges who formed the Full Bench,observes: 'In India that portion of the produce of lands which goes to the ruling power as its share is called revenue, and the produce (in money or kind) received from the cultivators by (he persons entitled to collect, as well as the collections made (in kind or money) by other intermediate holders of different grade from those who are above those persons that collect, from tenants of the lowest grade up to those who pay the revenue directly to Government, is called rent.' In another case, Mahomed Akil v. Assadun-nissa Bibee B.L.R. Sup. 774 : 9 W.R.(sic) (F.B.), Sir Barnes Peacock, C.J., observes at page 831: ' If the construction which I put upon the words of Section 10 is correct, the word 'revenue' will be read' in its ordinary and natural sense. The provisions of the section are natural and consistent with justice, and force and effect will be given to every word of the section.' The word 'revenue,' therefore, means ordinarily the share which the Government gets from the occupier as its claim upon what the Indian Raja and Government gets from the tollers of the soil. Considerable light is thrown upon this in the Filth Report on the East India Affairs, at page 34 of the second volune of this report, there is this passage: 'To form a correct judgment of the weight of the assessment upon the country generally, we ought to possess the following data. First, a knowledge of the rent actually pa d by the raiyats compared with the produce of their labour. Secondly, accurate accounts of what the zemindars and farmers collect and their payments to Government. Thirdly, detailed accounts of the alienated lands showing the quantity of them, the person to whom they were granted, the dates of the grants and those by whom they are now held.

16. As I have said above, from the earliest days of the East India Company a good port on of its activities was directed towards the Revenue Settlement of the territory ceded to it by the Native Princes or, acquired by it under treaties, or other' wise, and, in all the correspondence and earliest documents and papers, the word 'revenue' is used to denote what the East India Company or the Government expected to get from the lands as its share of the produce. In the third volume of the Fifth Report, at page 252, there is an extract from the proceedings of the Board of Revenue at Fort St. George of the 8th September 1806. It is addressed to the Subordinate Collector of Tanjore. It begins thus: 'You will be pleased to commence in the settlements of the revenues on your respective divisions without delay and on the following grounds:-- Para Nanja. You first take the produce of each village in Fasli 1210-1211 and 1212 and ascertain therefrom the average produce per veli. This average you wil consider as the medium standard produce of the village,' and various directions are given as to how the Government's share was to be ascertained.

17. It is contended that certain cesses are not revenue; no doubt they are not land revenue but anything which is made payable by reason of possession of land or that which is levied upon land may be taken to be revenue. In other words, whatever is payable to Government either by way of cess or by way of dues by a holder of land as such would be revenue.

18. The policy of Order XXI, Rule 54 is patent. It is for the purpose of informing the Collector of the District as to the change of ownership of land so that he may proceed, in case of default of payment of revenue, against the person who is the owner of the land. Though land is primarily responsible for the payment of the revenue yet it is necessary for the Revenue Department to know who is the owner so that it may have its remedies against him. That being so, it is not possible to accept the content on that a shrotriem village is not land paying revenue to Government simply because it does not pay the revenue which an ordinary raiyatwari holding pays or which a zemindari pays. The learned Judge has erred in thinking that the shrotriem in question is not land paying revenue to Government and that, therefore, notice of sale need not be affixed to the Collector's Office.

19. The appeal is allowed and the learned Judge is asked to take evidence and dispose of the petition as directed by my learned brother.