

CASE NO.:
Appeal (civil) 2079 of 2006

PETITIONER:
Saheb Khan

RESPONDENT:
Mohd. Yousufuddin & Ors

DATE OF JUDGMENT: 17/04/2006

BENCH:
Ruma Pal, Dalveer Bhandari & Markandey Katju

JUDGMENT:
J U D G M E N T
(Arising out of SLP (Civil) No.8491 of 2004)

RUMA PAL, J.

Leave granted.

The appellant had purchased certain property in a Court sale. The High Court has set aside the sale. The decision of the High Court has been impugned in this appeal. The disputed property was the subject matter of a suit for partition between the respondents or their predecessors-in-interest. The property was not partible. The Trial Court accordingly directed sale of the suit property. An Advocate Commissioner was appointed to sell the suit property. The order directing sale required the Advocate Commissioner "to sell the suit property in auction between the parties to the suit or in public auction, if the parties are not coming forward after following the due procedure like giving wide publicity".

The Advocate Commissioner issued notice to the parties to the suit through their respective advocates on 25th June, 2002. The notice said that the warrant of commission would be executed by the sale of the property on 30th June, 2002 by auction and that the parties were at liberty to participate in the auction if they desired to. The Commissioner also pasted notices on the wall of the suit property and distributed pamphlets advertising the sale in the locality. On 30th June, 2002, four of the parties were present and, according to the report of the Commissioner about "20-30 general public offers were made as against the fixed upset price of Rs. 10 lakhs". The highest bid was given by the appellant of Rs. 12 lakhs. He deposited three lakhs being 1/4th of the bid amount. A report was submitted to Court by the Advocate Commissioner enclosing inter alia a copy of the minutes of the proceedings held by the Commissioner signed by the parties as well as a list of the bidders and their names and addresses.

On 12th August, 2002, the respondent No.1, herein (who was the defendant No.4 in the suit) filed an application under Order XXI Rule 90 read with Section 151 of the Code of Civil Procedure praying that the auction should be set aside and that the sale should be made in favour of one Azhar Quyum Sidhique for 18 lakhs. The application was accompanied by an affidavit affirmed by the said Sidhique in which he said that he was ready to purchase the suit premises and would deposit Rs. one lakh within two days and pay the balance "within any period at the time of registration".

Although by this time, the appellant had deposited the offered price of Rs. 12 lakhs, the District Judge gave an

opportunity to the respondent No.1 to bring the said Sidhique to court to deposit the sum of Rs.18 lakhs. The respondent No.1, however failed to produce the alleged purchaser. Three such opportunities were given by the District Judge. On all three occasions, the said Sidhique did not present himself in Court.

The District Judge then passed an order holding that adequate notice had been given by the Advocate Commissioner for publishing the sale. The Respondent No.1's contention that the sale should have been published in the newspaper was rejected on the ground that no such direction had been given by the Court. The Trial Court also noted that the Respondent No.1 was not interested to purchase the property himself and had failed to substantiate his claim that he had found a purchaser of the property for Rs. 18 Lakhs despite repeated opportunities. The Trial Court held that the legally prescribed procedure had been followed by the Advocate Commissioner to sell the property and the sale did not suffer from any irregularities or fraud. The sale was accordingly confirmed in favour of the appellant.

Impugning the decision of the District Judge, the respondent No.1 preferred an appeal before the High Court. The High Court set aside the sale holding that no notice was given to the respondent No.1 to purchase the property in terms of Sections 2 and 3 of the Partition Act, 1893 before selling the property by public auction. It was also held that it was unclear whether notice was served on the respondent No.1 as the signatures on the notice were not legible. In any event, the Court was of the view that the provisions of Order XXI Rules 66 and 67 of the Code of Civil Procedure had been violated by not giving adequate publicity to the sale. It was also noted that the respondent No.1 had brought to the notice of the Court the offer of the said Sidhique for Rs. 18 lakhs. The High Court said that there was no valid or legal reason for not accepting or acting upon the offer so brought forward by the respondent No.1. In the circumstances, the appeal was allowed and the sale was set aside.

Before us the appellant has contended that the High Court did not construe the provisions of Order XXI Rule 54(2) read with Rule 67 (1) correctly. Although wide publicity had been directed to be given by the Trial Court, there was no direction to publish the advertisement in any newspaper. It was further said that there was no material irregularity in the conduct of the sale which could justify the High Court in setting it aside. It was further contended that the alleged offer brought forward by the respondent No.1 was not followed up by any actual deposit and could not form the basis of the High Court coming to the conclusion that the property has been sold for at an undervalue to the appellant.

According to the learned counsel appearing on behalf of the respondent No.1, by using the word "wide publicity", the Trial Court had intended that the sale should be advertised in the newspaper. It was also submitted that no notice was given to the respondent No.1 at any stage. The Advocate Commissioner's notice of sale had been addressed to a lawyer, who did not in fact represent the respondent No.1. It was further submitted that the sale had been held in collusion between the other parties and the purchaser and that the sale had been made at an undervalue.

We are unable to sustain the reasoning of the High Court. Order XXI Rule 90 of the Code of Civil Procedure allows inter-alia any person whose interests are affected by the sale to apply to the Court to set aside a sale of immovable property sold in execution of a decree on the ground of "a material irregularity or fraud in publishing or conducting" the

sale. Sub-section (2) of Order XXI Rule 90 however places a further condition on the setting aside of a Court sale in the following language:

"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.

Therefore before the sale can be set aside merely establishing a material irregularity or fraud will not do. The applicant must go further and establish to the satisfaction of the Court that the material irregularity or fraud has resulted in substantial injury to the applicant. Conversely even if the applicant has suffered substantial injury by reason of the sale, this would not be sufficient to set the sale aside unless substantial injury has been occasioned by a material irregularity or fraud in publishing or conducting the sale. (See: Dhirendra Nath Gorai and Suibal Chandra Shaw and Ors. Vs. Sudhir Chandra Ghosh and Ors. (1964) 6 SCC 101; Jaswantlal Natvarlal Thakkar Vs. Sushilaben Manilal Dangarwala & Ors. (1991) Supp. 2 SCC 691; Kadiyala Rama Rao Vs. Gutala Kahna Rao (dead) by & Ors. (2000) 3 SCC 87).

A charge of fraud or material irregularity under Order XXI Rule 90 must be specifically made with sufficient particulars. Bald allegations would not do. The facts must be established which could reasonably sustain such a charge. In the case before us, no such particulars have been given by the respondent of the alleged collusion between the other respondents and the auction purchaser. There is also no material irregularity in publishing or conducting the sale. There was sufficient compliance with the orders of Order XXI Rule 67(1) read with Order XXI Rule 54(2). No doubt, the Trial Court has said that the sale should be given wide publicity but that does not necessarily mean by publication in the newspapers. The provisions of Order XXI Rule 67 clearly provide if the sale is to be advertised in the local newspaper, there must be specific direction of Court to that effect. In the absence of such direction, the proclamation of sale has to be made under Order XXI Rule 67(1) "as nearly as may be in the manner prescribed by Rule 54, sub-rule(2)". Rule 54 sub-rule (2) provides for the method of publication of notice and reads as follows:-

"(2) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and 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 land paying revenue to the Government, in the office of the Collector of the district in which the land is situate (and, where the property is land situate in a village, also in the office of the Gram Panchayat, if any, having jurisdiction over that village)".

The proclamation of the sale by beat of drum was not mandatory, so long as the sale notice was proclaimed at or

adjacent to the property. Admittedly, the Advocate Commissioner distributed the pamphlets advertising the sale in the locality several days prior to holding of the sale and also affixed a copy of the sale notice on the property itself. In any event the respondent No. 1 has been unable to establish that he had suffered substantial injury by reason of any irregularity or fraud. The lack of notice under the Partition Act, 1893 to the respondent No.1 was immaterial as it was not the appellant's case that he would have purchased the property. No such intention has ever been expressed. The respondent No.1's only grievance is that the property could have fetched a higher value. Apart from the alleged affidavit of the said Sidhique, no other material has been produced by him in support of the such submission. On the other hand in fixing the upset price, the Advocate Commissioner had taken into account the certificate of market value in respect of the property issued by the Sub-Registrar Golkunda dated 13th May, 2005 at Rs. 10 lakhs. The respondent No.1 has never complained that the upset price had been wrongly fixed. The appellant's offer was above the market value. Additionally, the respondent No.1 was given several opportunities to produce the purchaser, who was allegedly willing to pay a higher price. The purchaser was never produced. As against this, the appellant has duly deposited the entire amount of Rs. 12 lakhs in Court. The District Judge, was in the circumstances correct in rejecting the so called offer of the said Sidhique.

In the circumstances, the High Court erred in setting aside the sale in favour of the appellant. The decision of the High Court is unsustainable both in fact and in law. It is accordingly set aside and the appeal is allowed with costs.