

RANJANIE DE SOYSA
v.
EDWARD COORAY AND OTHERS

COURT OF APPEAL
ISMAIL J.,
C.A. (REVISION) APPLICATION NO. 886/95
D.C. COLOMBO NO. 2913/M
MARCH 11 AND 26, 1997.

Civil Procedure – S. 282 – Sale in execution – Material irregularity

No irregularity which is not a material irregularity in publishing or conducting a sale is a ground for setting aside the sale. It is evident that ample publicity to the sale had been given and there is no material to support the contention that there was material irregularity.

Cases referred to:

1. *Challappa v. Selvadurai* 15 NLR 139.
2. *Kandavanam v. Hoole* 14 NLR 314.

APPLICATION in revision of order of the District Court of Colombo.

S. Kangasingham for defendant-petitioner-petitioner.

W. P. Gunatilake with *M. Nanayakkara* for 6th respondent-respondent.

Vidura Gunaratne for 7th respondent-respondent.

Cur. adv. vult.

April 30, 1997.

ISMAIL, J.

The petitioner above-named filed this application for revision dated 13.12.95 and sought by way of relief an order as follows:

- (a) setting aside the order made by the learned District Judge of Panadura on 5.12.95 disallowing the application of the petitioner made in case No. 2913/M in the District Court of Panadura to set aside the sale of the property described in the schedule to the plaint in that case which is the subject matter of this action.
- (b) setting aside the order made on 31.10.1995 disallowing the petitioner's application to lead oral evidence to prove the allegations of –
 - I) lack of publicity to the purported sale by public auction,
 - II) irregularities in the conduct of the said sale.
- (c) directing the learned District Judge of Panadura to hold a proper inquiry into her allegations about the said sale by public auction of the property which is the subject matter of the action No. 2913/M conducted on 22.5.1995 by allowing her to lead oral evidence to prove her allegations.
- (d) to grant and issue an order staying all proceedings until final determination of this application."

When this application was supported on 4.1.96 this court heard the submissions of the counsel for the petitioner and upon a perusal of the order of the District Judge dated 5.12.95 ordered notice to be issued on the respondents and made order staying all proceedings

until the final determination of this application. The 6th and 7th respondents have thereafter filed their statements of objections and the petitioner has filed a counter affidavit in reply.

The plaintiffs-respondents filed action No. 2913/M in the District Court, Panadura, against the defendant-petitioner to recover certain sums of money due to them as assignees on a mortgage bond. The matter was settled between the parties on 14.9.94. The defendant-petitioner agreed to pay the money due to the plaintiffs-respondents in instalments and undertook to pay the first instalment of Rs. 150,000 on or before 31.3.95. The defendant-petitioner failed to pay this sum of money on the stipulated date and an order was made for the sale of the property. On her application the sale of the property which was fixed for 26.5.95 was postponed for 28.7.95 on condition that she pays a sum of Rs. 900,000 to the plaintiffs-respondents in full and final settlement of their claim. The defendant-petitioner failed to pay this sum of money as agreed and the property which was the subject matter of the mortgage bond was sold by public auction on 22.9.95.

Thereafter the defendant-petitioner filed an application dated 5.10.95 supported by an affidavit moving to have the sale set aside chiefly on the ground that there was no publicity given to the sale by the display of banners and posters. The defendant-petitioner also alleged impropriety on the part of the auctioneer in conducting the sale. This application to set aside the sale in terms of section 282 (2) of the Civil Procedure Code was also supported by an affidavit of the brother of the defendant-petitioner. An amended application was later filed together with the amended affidavits of the petitioner and her brother.

This matter was taken up for inquiry on 31.10.95 and counsel for the defendant-petitioner moved for permission to lead oral evidence. This application was objected to by counsel for the plaintiffs-respondents and the other respondents. The court having considered the submissions of counsel refused the application of the defendant-petitioner to lead oral evidence as two affidavits had already been filed in support of the application to set aside the sale.

The defendant-petitioner was permitted to file written submissions and the other respondents also filed written submissions in reply. The District Judge has in his order made on 5.12.95 refused the application of the defendant-petitioner to set aside the sale on the material placed

before him. The District Judge had before him in addition to the affidavits, the report of the auctioneer who had previously obtained confirmation of the conditions of the sale from court.

The defendant-petitioner did not immediately seek to challenge the order made on 31.10.95 refusing her application to lead oral evidence. Instead an application was made to tender written submissions in support of the application to have the sale set aside. The present application in revision has been filed after the court made its order on 5.12.95 refusing the application to have the sale set aside. The defendant-petitioner now seeks to have the order previously made on 31.10.95 and the order made on 5.12.95 set aside. It was submitted that she should have been permitted to lead oral evidence to show the irregularities committed by the fiscal. She relied on the judgment in *Chellappa v. Selvadurai*,⁽¹⁾ in which it was also held that:

"A person seeking to set aside a fiscal's sale on the ground of material irregularity must lead direct evidence to prove that the sale of the property at an undervalue was due to an irregularity; the mere allegation of inadequacy on the ground on which the sale is impeached is not sufficient evidence of substantial damage caused by such irregularity".

The defendant-petitioner has suffered no prejudice as she had already sought to substantiate her allegation of material irregularities in her affidavit and that of her brother and they could not have added anything further by giving oral evidence. The decision in the case referred to above does not support the contention of the defendant-petitioner that an opportunity to give oral evidence should have been provided to her. It is to be noted that the respondents have in their written submissions tendered to the District Court drawn its attention to the decision in *Kandavanam v. Hoole*,⁽²⁾ in which it was held that section 282, so far as irregularity is concerned, is exhaustive; no irregularity which is not a material irregularity in publishing or conducting a sale is a ground for setting aside the sale.

The 7th respondent who has been a licensed auctioneer and a court commissioner from 1962 and who claims to have conducted over 1,000 court sales has filed an affidavit together with his statement of objections. He has stated that in addition to inserting paper

advertisements regarding the auction sale that he has put up banners and posters at the place of the sale and in the nearby towns. He has produced a copy of a poster, a handbill and a receipt from the printing press which printed them. The petitioner and her brother were present at the sale at which bids were made by the 6th respondent and another. He has also set out in detail the manner in which he conducted the sale and as to how he set out from Panadura to the site taking along with him tom-tom beaters, his clerk and police officers from the Ragama Police station.

The 6th respondent who purchased the property at the sale has in his affidavit stated that he became aware of the sale from an advertisement in the Divaina newspaper of 7th September '95. He also saw posters affixed indicating that the sale of the said property by public auction would take place on 22.9.95 at 3.30 pm. He attended the auction taking with him cash in a sum of Rs. 200,000 and he made bids upto Rs. 1,014,000 which was accepted by the auctioneer. He made a deposit of Rs. 140,731 being 10% of the value and then on 20.10.95 he deposited the balance sum of Rs. 912,600 at the National Savings Bank at Panadura to the credit of this case. The auctioneer's conveyance No. 4828 attested by Oliver Perera NP was executed on 5.12.95. The plaintiffs in the said case have withdrawn the entirety of the sum of Rs. 1,014,000 on an order made by court on 8.12.95.

Although the learned District Judge has not set out the reasons in detail in his order made on 5.12.95, dealing with every allegation of irregularity made by the defendant-petitioner, it is clear that he has considered the affidavits tendered and the report of the sale made by the 7th respondent. He has also dealt with every step taken by the parties previously in the course of the trial. I see no reason to interfere with his order refusing to set aside the sale. It is evident from the material available that ample publicity to the sale has been given. The contention on behalf of the defendant-petitioner that there was material irregularity in publishing and conducting the sale as referred to in section 282 (2) of the Civil Procedure Code cannot be accepted.

For these reasons this application is dismissed. The 6th and 7th respondent would each be entitled to costs fixed at Rs. 750.

Application dismissed.