APPELLATE CIVIL.

Before Mr. Justice Burn and Mr. Justice Stodart.

1939, August 31.

RUKMANI AMMAL (FIRST DEFENDANT), APPELLANT,

v.

SUBRAMANIA SASTRIGAL AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Code of Civil Procedure (Act V of 1908), O. XLI, r. 6 (2)—Application for stay of sale under—Grant of—Obligatory on Court, if—Stay refused—Sale held—If illegal or irregular only—O. XXI, r. 90—Material irregularity—Sale of lands in small lots rather than in large lots—Propriety of—Question as to—Failure to consider—Material irregularity, if—O. XXI, r. 64—Effect of—O. XXI, r. 66 (2) (c)—Misdescriptions of property sold calculated to mislead purchaser as to its real value—Material irregularity, if and when—Topes containing large number of mango and coconut trees and close to house sites—Description of, as punja land—Effect of.

The sale in execution of the final decree in a suit was fixed for 21st November 1934. On that day the judgment-debtor put in an application under Order XLI, rule 6, sub-rule 2 of the Code of Civil Procedure, praying that the sale might be stayed for two months on the ground that appeals were pending against the final decree and from an order of the Court on the application to set aside the preliminary decree in the suit. The Court dismissed that petition on 28th November 1934 and the sale was held on the same day.

Held that the sale was illegal.

Under Order XLI, rule 6, sub-rule 2, the Court has no option but to grant stay of sale on such terms as to giving security or otherwise as the Court thinks fit.

Harnarain v. *Govind Rai*(1) disapproved.

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*Appeal Against Order No. 6 of 1938.

(1) A.I.R. 1932 All. 561.

When the Code says that an executing Court shall not sell in certain circumstances and the Court nevertheless proceeds to sell, the Court has committed what is more than an irregularity. It amounts clearly to an illegality.

Sixty-seven acres of land in one village and twenty-nine acres of land in another village were directed to be sold in execution of a decree. The judgment debtor contended from the beginning of the execution proceedings that the sale ought to be in small parcels. The executing Court, however, failed to consider the question whether it would not be better to sell the lands in small lots rather than in large lots. The whole of the sixty-seven acres was sold as one lot and the whole of the twenty-nine acres was sold in another lot. There was good reason to believe that the sale in two lots instead of a large number of lots caused the prices realized to be considerably less than they otherwise would have been.

Held that the failure of the executing Court to consider the question whether it would not be better to sell the lands in small lots rather than in large lots constituted a material irregularity.

Two items of land sold in execution of a decree were, notwithstanding the objection of the judgment-debtor, described in the proclamation of sale as punja, while as a matter of fact they consisted of topes containing a large number of mango and coconut trees, and alleged to be close to house sites and to be capable of being sold as building sites for a great deal more than their value as mere dry lands.

Held that the said misdescriptions were irregularities which would be very likely to affect the prices realized.

APPEAL against the order of the Court of the Subordinate Judge of Trichinopoly, dated 16th December 1937 and made in Execution Application No. 8 of 1935 in Execution Petition No. 350 of 1933 in Original Suit No. 6 of 1927.

B. Sitarama Rao and *R. Gopalaswami* for appellant.

T. M. Krishnaswami Ayyar and *A. Balasubramania Ayyar* for respondents.

The JUDGMENT of the Court was delivered by BURN J.—This appeal is from an order of the learned

BURN J.

RUKMANI v. SUBRAMANIA

BURN J.

Subordinate Judge of Trichinopoly in Execution Application No. 8 of 1935 dismissing the appellant's application under Order XXI, rule 90, and section 47, of the Code of Civil Procedure to set aside a sale held in execution of the decree in Original Suit No. 6 of 1927. The final decree in the suit was passed on 23rd February 1933 and the sale was held on 28th November 1934. Several irregularities were alleged on behalf of the judgment-debtor. The learned Subordinate Judge held that no irregularities had been made out and also held that the lands had been sold for reasonable prices and that therefore no substantial loss had been caused. He therefore dismissed the petition.

In appeal Mr. Sitarama Rao for the appellant has pressed before us strongly the contention that the sale was illegal. The sale was fixed for 21st November 1934. On 21st November 1934 the judgment-debtor put in an application under Order XLI, rule 6, sub-rule 2, praying that the sale might be stayed for two months on the ground that appeals were pending against the final decree and from an order of the Court on the application to set aside the preliminary decree in the suit. The learned Subordinate Judge dismissed this petition on 28th November 1934 and the sale was held on the same day. Mr. Sitarama Rao referring to the wording of Order XLI, rule 6, sub-rule 2, contends that the Court has no option but to grant stay of sale on such terms as to giving security or otherwise as the Court thinks fit. We think that this contention is well-founded. Mr. Krishnaswami Ayyar for the respondent has referred us to a decision reported as *Harnarain* v. *Govind Rai*(1). In that case KENDALL J. expressed the opinion that sub-rule 2 of rule 6

(1) A.I.R. 1932 All. 551.

does not impose on the Court which ordered the sale an obligation to stay the same merely because the property which is to be sold is immovable property. With all respect to the learned Judge we are unable to agree. Sub-rule 2 of rule 6 is quite clear that when an order has been made for the sale of immovable property in execution of a decree and an appeal is pending from such decree, the sale, shall, on the application of the judgment-debtor to the Court which made the order, be stayed on such terms as to giving security or otherwise as the Court thinks fit until the appeal is disposed of. We can see no justification for supposing that this rule means anything else than what it says. Mr. Krishnaswami Ayyar points out the danger that the judgment-debtor will be in a position to paralyse the executing Court, that he will be able to lie by until the last moment, then come up just when the sale is going to take place and get it stopped. We think there is sufficient answer to this in the provision that the Court may impose such terms as to giving security or otherwise as it thinks fit. If the Court thinks that the application has been designedly delayed, the Court can deal with it by prescribing conditions. If the judgment-debtor appears only on the morning to which the sale is posted, the Court has a discretion to say, for example, that the sale will be stayed if the judgment-debtor produces the amount for which the sale is going to be held within half an hour or one hour. There is no limit to the discretion of the Court in imposing terms and that the Court is not without power to deal with a vexatious judgment-debtor in this way, if the Court is obliged to stay a sale when such an application is made, is quite clear from the terms of Order XLI, rule 6, sub-rule 2. The learned

RUKMANI v. SUBRAMANIA.

BURN J.

Judge was therefore wrong when on 28th November 1934 he thought he had discretion to stay or refuse to stay the sale. When the Code says the executing Court shall not sell in certain circumstances and the Court nevertheless proceeds to sell, the Court has committed, in our opinion, what is more than an irregularity. It amounts clearly to an illegality. The learned Subordinate Judge ought to have imposed whatever terms he thought fit and if those terms were not complied with he could then have directed the sale to proceed. On this ground alone we think that this appeal must succeed. Moreover, we are of opinion that the learned Subordinate Judge acted unreasonably in declining any postponement of the sale. It was shown that the judgment-debtor had been appealing against earlier orders passed by the executing Court and had been applying to this Court to stay the sale and that her last application for stay had been dismissed on 20th November 1934. In those circumstances it appears to us that the learned Subordinate Judge ought to have realized that there was no chance of selling this property to the best advantage since there must have been considerable uncertainty as to whether the sale would or would not be held at all. It would have been quite easy for the learned Subordinate Judge to prescribe conditions which would have been satisfactory to the decree-holder. It was shown that after the decree was passed the decree-holder realized Rs. 14,000 towards the amount of the decree by consenting to sales by the judgment-debtor to third parties. The learned Subordinate Judge might, for example, have prescribed that the judgment-debtor should pay, say Rs. 20,000 within a month and there seems to be no reason to believe that the judgment-debtor would not have been able to comply

with some such condition as that. The learned Subordinate Judge was not, we think, justified in holding that the application to stay the sale was devoid of *bona fides* and was designed merely to cause delay.

Another irregularity which undoubtedly occurred in the proclamation of the sale was that the proclamation for the sale of lands in Athikudi was affixed to Survey No. 131-1 which was not an item of land proposed to be sold. In the circumstances of this case we do not consider that it was a material irregularity since there was another sub-division of the same survey number that was intended to be sold and we do not think that any intending bidder could have been misled by the mere affixing of the proclamation to a pole planted in Survey No. 131-1.

A more serious objection that Mr. Sitarama Rao has pressed before us is that the lower Court failed to consider the question whether it would not be better to sell the lands in small lots rather than in large lots. The extent sold was sixty-seven acres in the village of Peruvalanallur (53·12 acres of nanja and 13·93 acres of punja) and twenty-nine acres in Athikudi (21·95 acres of nanja and 7·26 acres of punja). The whole of the land in Peruvalanallur was sold as one lot and realized Rs. 60,000. The whole of the land in Athikudi was sold in another lot and realized Rs. 30,600. The judgment-debtor was contending from the beginning of the execution proceedings that the sale ought to be in small parcels and it appears that in April 1934 the learned Subordinate Judge directed the decree-holder to put in an estimate of the value of each item of the lands to be sold "in case the properties have to be sold in various lots." But when the proclamation came on to be settled in September 1934 the learned Subordinate Judge has recorded that the only point

RUKMANI v. SUBRAMANIA. BURN J.

for determination was whether the prices given by the decree-holder should be accepted. This, of course, was incorrect because he had also to determine the other point which was still pressed by the first defendant that the properties ought to be sold in small parcels. e think this is a matter of importance because it is obvious that there are not many persons likely to bid for sixty-seven acres of land at a time or for twenty-nine acres. There must be a much larger number of persons who are in a position to bid for parcels consisting of 1, 2, 3, 4 or 5 acres. Mr. Krishnaswami Ayyar for the respondent has endeavoured to persuade us that the learned Subordinate Judge had considered this point but we think it is quite clear from the terms of the order on 18th September 1934 that he did not consider it at all. If he had considered it, it would be difficult to say that the sale in two lots instead of a large number of lots by itself constituted an irregularity. But we think there is good reason to believe that the sale in two lots has caused the prices realized to be less, considerably less, than they otherwise would have been. It is no doubt the case that the value of land was declining between 1929 and 1934. But we do not see reason to believe that it declined by so much as fifty per cent. There was very good evidence to show that nanja lands of similar situation and quality to those sold fetched over Rs. 2,000 per acre in 1929. There was some evidence about the sales of nanja lands both in Peruvalanallur and Athikudi even up to 1933 in which prices of nearly Rs. 2,000 per acre were realized. The prices actually fetched at the sale are approximately Rs. 1,000 per acre. It seems probable that if sold in small lots better prices could have been obtained.

Another objection taken by Mr. Sitarama Rao for the appellant was with regard to the misdescription of certain items of dry lands. For example, Survey No. 140-1 in Athikudi was described as punja but as a matter of fact it consisted of a tope containing a large number of mango and coconut trees. Survey No. 249-27 was a similar tope. It was alleged that both these topes were close to house-sites and could have been sold as building sites for a great deal more than their value as mere dry lands. Survey No. 22-3, it was shown, contained a large number of clusters of bamboos. The attention of the executing Court was invited to these matters in April 1934 and in September when the terms of the proclamation were being drawn up the judgment-debtor reiterated the contentions raised by her in April. It has often been pointed out that the duty of drawing up the proclamation is the duty of the Court. Therefore it is no answer to these objections to say that the decree-holder is free from blame or has acted *bona fide*. These misdescriptions are clearly irregularities which would be very likely to affect the prices realized. They come within Order XXI, rule 66 (2) (*e*), being matters which the Court should bring to the notice of possible purchasers in order to enable them to judge the probable value of the property.

For these reasons we think this appeal must be allowed and the sale must be set aside. The appellant will recover her costs from the respondent.

In reselling the property we desire to invite the attention of the executing Court in particular to Order XXI, rule 64, from which it is clear that no more of the judgment-debtor's property ought to be sold than is sufficient to realize the amount due under

RUKMANI v. SUBBAMANIA.

the decree. This has a bearing upon the desirability of selling the property in small parcels, a subject we have already dealt with.

N.S.

APPELLATE CRIMINAL.

Before Mr. Justice Burn and Mr. Justice Stodart.

1939, October 17.

IN RE NAINAMUTHU, SON of KANNAPPAN (ACCUSED), APPELLANT.*

Code of Criminal Procedure (Act V of 1898), sec. 164—Statement by accused, after committing the offence, to Magistrate that he killed the deceased and describing the circumstances of the crime—Admissibility—Killing with consent of the deceased—Offence, if murder—Indian Penal Code (Act XLV of 1860) sec. 300, exception 5.

The appellant, after killing his concubine, appeared before a Joint Magistrate and made a statement to him that he (appellant) had killed the deceased and describing the circumstances of the crime. The Magistrate took down the statement in writing and that statement was admitted in evidence at the trial of the appellant for the murder of his concubine. On objection taken to the admission of the statement in evidence on the ground that it was a statement made under section 164, Criminal Procedure Code, and that it had not been recorded after observing the formalities prescribed by that section,

held that the objection was unsustainable.

The Magistrate was not investigating the case or any of the facts connected with the case. On the contrary the information given by the appellant was itself the first information of the crime.

Held further that as the appellant had killed the deceased at her request and with her own consent, the offence committed by him was not murder but was only culpable homicide not amounting to murder.

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*Referred Trial No. 107 of 1939 and Criminal Appeal No. 439 of 1939.