

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.R.P.No.3173 of 2013

ORDER:

Heard Sri N.Aswartha Narayana, learned counsel for the petitioners and Sri L.J.Veera Reddy, learned counsel for the respondent.

2. This Revision Petition is filed challenging the order dt.19-12-2012 in E.A.No.04 of 2012 in E.P.No.25 of 2005 in O.S.No.215 of 1999 of the Junior Civil Judge, Dharmavaram.
3. Petitioners herein are J.Drs. in the said suit which had been filed for recovery of money by the respondents against them and it has been decreed on 28-11-2002. Thereafter, E.P.No.25 of 2005 was filed for attachment of sale of a house property belonging to the petitioners. The sale was held on 03-05-2011 and the respondent/D.Hr himself became the auction purchaser.
4. On 20-06-2011, E.A.No.176 of 2011 was filed by petitioners under Order 21 Rule 89 CPC. Along with the said E.A., the E.P. amount along with poundage was deposited by the petitioners, but they did not deposit 5% of purchase money which is required to be deposited under clause (a) of sub Rule (1) of Order 21 Rule 89 CPC.
5. Counter affidavit was filed by the respondent pointing out the fact that the petitioners have not deposited the 5% of the purchase money as mandated by clause (a) of sub Rule (1) of Order 21 Rule 89 CPC.
6. This was upheld by the Court below by order dt.20-12-2012 and the Court below dismissed E.A.No.176 of

2011 on the ground of non-compliance with the above provision of law.

7. While this was pending, E.A.No.4 of 2012 had been filed by the petitioners on 01-12-2011 to allow him to deposit 5% of the purchase amount as required by Order 21 Rule 89 (1) (a) CPC. They pointed out that it was a clerical mistake on account of which they did not deposit this amount. It was also pointed out that on 20-10-2011, a memo was filed by them to the effect that they are ready and willing to pay the deposit amount and that it was returned.
8. Counter was filed by the respondent opposing the said application on the ground that the deposit of 5% of purchase money should also be within the time prescribed by law and petitioners cannot be permitted to deposit beyond the time prescribed by law.
9. By order dt.19-12-2012, the Court below dismissed E.A.No.4 of 2012. It held that since the petitioners have not complied with the condition under Order 21 Rule 89 (1) (a) CPC within the time prescribed by law, they cannot be permitted to deposit 5% of the purchase money even beyond the time prescribed by law.
10. Challenging the same, this Revision Petition is filed.
11. Order XXI Rule 89 CPC states:

“Order XXI Rule 89 - Application to set aside sale on deposit:

(1) Where immovable property has been sold in execution of a decree, ¹[any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person,] may apply to have the sale set aside on his depositing in Court,--

(a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.”

12. Order XXI Rule 92 (2) CPC states:

“Order XXI Rule 92 - Sale when to become absolute or be set aside:

(1)

(2) Where such application is made and allowed, and where, in the case of an application under rule 89, the deposit required by that rule is made within ²[sixty days] from the date of sale, ³[or in cases where the amount deposited under rule 89 is found to be deficient owing to any clerical or arithmetical mistake on the part of the depositor and such deficiency has been made good within such time as may be fixed by the Court, the Court shall make an order setting aside the sale]:

Provided that no order shall be made unless notice of the application has been given to all persons affected thereby.

⁴[Provided further that the deposit under this sub-rule may be made within sixty days in all such cases where the period of thirty days, within which the deposit had to be made, has not expired before the commencement of the Code of Civil Procedure (Amendment) Act, 2002.]”

13. There was some controversy earlier as to the time prescribed for filing an application to set aside sale of immovable property as provided in Article 127 of the Limitation Act, 1963 and as to whether it will apply even for making for deposit under

Order 21 Rule 92 (2) CPC.

14. This controversy was resolved by a Five Judge Bench of the Supreme Court in **Dadi Jagannadham Vs. Jammulu Ramulu and others**, wherein the Supreme Court held that Order 21 Rule 92 (2) CPC did not prescribe any period of limitation in which the deposit has to be made and in spite of that, there are no different periods of limitation for making deposits and for filing an application for setting aside the sale. It held that not only a deposit should be made within a period of 60 days from the date of sale as prescribed by Order 21 Rule 89, but application for setting aside sale should also be made within 60 days from the date of the sale. It held that Order 21 Rule 92 (2) provides that if deposit is made within 30 days from the date of sale and application to set aside the sale is filed, then the Court would have no discretion but set aside the sale. But this does not mean that if the deposit is made after 30 days, the Court cannot entertain the application. It held that if the deposit is made beyond 30 days from the date of sale but within a period of 60 days, then it will be within the discretion of the Court whether or not to grant the application.

15. After this decision was rendered, there was an amendment to Order 21 Rule 92 (2) CPC by the C.P.C. (Amendment) Act, 2002 w.e.f. 01-07-2002 and the period of making deposit was also increased to 60 days in the place of the earlier 30 day period so as to avoid any controversy. Therefore only if the amount prescribed by Order 21 Rule 89 (1) (a) and (b) is deposited within the period of 60 days from the date of sale and an application to set aside the sale is made within a period, the Court can set aside the sale.

16. No doubt under Order 21 Rule 92 (2) CPC, if there is any clerical or arithmetical mistake in calculation of the amount deposited under Rule 89 and there is some deficiency, the Court has got the power to extend the time. But such extension can only be if it is sought within a reasonably short period.
17. In the present case E.A.No.4 of 2012 seeking permission to deposit 5% purchase money was made almost 7 months from the date of sale and more than five months after E.A.No.176 of 2011 was filed.
18. It is unfortunate that the learned counsel for the petitioners in the Court below had not noticed clause (a) of sub Rule (1) of Rule 89 of Order 21 CPC and on account of his carelessness, the petitioners have found themselves in this predicament. But it cannot be said that the Court below had committed any error in not permitting the petitioners to pay 5% of the purchase money, having regard to the fact that application filed by the petitioners was highly belated.
19. Learned counsel for the petitioners relied on the judgment in **M.Swarna and another Vs. State Bank of India, Warangal Branch and others** stating that the executing Court was conferred with the power to grant time if there is deficiency in making the deposit of the amount prescribed in clause (a) sub Rule (1) of Order 21 Rule 89 CPC. Although the existence of the power is not in doubt, in that case, since the executing Court had not raised any objection when the appellants tendered the amount covered by Rule 89 (1) (b) through a demand draft, the appellants therein were not aware of the deficiency. So this

Court therefore observed that on account of mistake of the Court in not returning the application even though the deposit made by the appellants therein was defective, the party cannot be allowed to suffer. That is not the situation here. Therefore, the said decision is clearly distinguishable.

20. Therefore I do not find any error of jurisdiction in the order passed by the Court below warranting interference by this Court under Section 115 CPC.

21. Accordingly, the Civil Revision Petition is dismissed. No costs.

22. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 29-10-2015

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