

HONOURABLE SRI JUSTICE S.RAVI KUMAR
CIVIL REVISION PETITION No.1122 OF 2008

Dated 19-1-2015

Between:

Jonnavithula Mallikarjuna Prasad.

..Petitioner.

And:

Boosi Jayaraju.

..Respondent.

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HONOURABLE SRI JUSTICE S.RAVI KUMAR
CIVIL REVISION PETITION No.1122 OF 2008

ORDER:

This revision is against the orders dated
24-12-2007 in C.M.A.No.69 of
2006 on the file of I Additional
District Judge, Krishna at Machilipatnam whereunder
order dated 17-11-2006 in E.A.No.306 of 2006 in
E.P.No.149 of 2005 in O.S.No.396 of 2002 on the file
of Junior Civil Judge, Bantumilli, is reversed.

Brief facts leading to this revision are as follows:

Revision petitioner is Decree Holder in
O.S.No.396 of 2002 for money decree and he brought
the house property situated at Malleswaram, Bantumilli
for attachment before judgment for sale in E.P.No.149
of 2005 for realizing the decretal amount and the court
conducted auction on 17-7-2006 and Decree Holder
also participated in the auction with the permission of
the court and he became the highest bidder for
Rs.62,500/- and accordingly, he deposited the
requisite amount as per the terms of the auction and
when the matter is coming for confirmation of sale,
J.Dr. filed E.A.No.306 of 2006 under Order 21 Rule 90
C.P.C. and the trial court after due enquiry dismissed

the said application, aggrieved by which, J.Dr. preferred appeal to the District Court and First Additional District Judge, Machilipatnam, allowed the appeal and allowed the application filed by J.Dr. and set aside the sale conducted on 17-7-2006 and consequently, dismissed the E.P. Aggrieved by the same, present revision is preferred.

Heard both sides.

Advocate for revision petitioner i.e., D.Hr. submitted that lower appellate court committed material irregularity in exercising its jurisdiction. He further submitted that appellate court failed to observe crucial aspect in the case and this resulted in miscarriage of justice. He also submitted that the scope of enquiry under Order 21 Rule 90 C.P.C. is to see whether there is any irregularity or fraud in publishing or conducting the sale and except that no other ground is available to set aside the sale under this provision but the appellate authority without examining this, travelled beyond the scope of the powers and considered the ground of saleable interest and ground of exemption under Section 60 C.P.C. which cannot be entertained in a petition under Order 21 Rule 90 C.P.C.

He submitted that the property was attached before judgment and the J.Dr. has not raised any objection. He submitted when property was attached, he has not taken any steps to see that the attachment is raised. He submitted even after the decree and during execution proceedings also, he has not taken any objection till the property is sold and thereby, he has waived his right and appellate court committed wrong in entertaining these objections.

On the other hand, advocate for respondent/J.Dr. supported the order of the appellate

court.

Now the point that would arise for my consideration in this revision is whether the appellate court has committed any material irregularity in exercising jurisdiction beyond the scope of enquiry under Order 21 Rule 90 C.P.C.?

POINT:

Revision petitioner who is D.Hr. filed O.S.No.396 of 2002 before Junior Civil Judge, Bantumilli and in the said suit, he obtained attachment before judgment against house property which is the subject matter in the sale proceedings. Admittedly, the attachment before judgment ordered in I.A.No.1068 of 2002 in O.S.No.396 of 2002 was made absolute on 13-6-2003 and thereafter, the suit was decreed on contest in February, 2005. After the decree has become final, D.Hr. filed a petition to transfer the decree to Junior Civil Judge, Bantumilli as the property in question was within the territorial jurisdiction of Bantumilli Court. While the execution proceedings were pending, the J.Dr. i.e., respondent herein filed E.A.No.258 of 2006 invoking order under 21 Rule 89 C.P.C. to stop the sale on the ground that the property brought under the sale belongs to Government and that there is no saleable interest. D.Hr. filed counter in that application but the J.Dr. has not pursued that application and the trial court after dismissing that application proceeded with sale and conducted the same on 17-7-2006. After D.Hr. deposited the bid amount, J.Dr. filed E.A.No.306 of 2006 invoking Order 21 Rule 90 C.P.C. which was dismissed by the trial court after due enquiry. But the appellate court reversed findings of the trial court and allowed the appeal on the ground that the J.Dr. falls within the category of landless poor and agricultural coolly and exempted under Section 60 (C) C.P.C.

Now the main objection of the D.Hr. is that this objection cannot be entertained in the petition filed under Order 21 Rule 90 C.P.C. as the scope under this provision is very limited.

It may be necessary to examine Order 21 Rule 90 C.P.C. in order to appreciate the contentions and rival contentions of both parties.

This provision reads as follows:

(1) “Where any immovable property has been sold in execution of a decree, the decree holder, or the purchaser, or any other person entitled to share in a retable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity for 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.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.”

In KADIYALA RAMA RAO Versus GUTALA KAHNA RAO (DEAD) BY L.Rs. AND OTHERS^[1], Honourable Supreme Court held that “The provision of Order 21 Rule 90 thus categorically envisage, material irregularity and fraud alone would confer jurisdiction on the executing court to set aside the sale. The question of saleable interest does not come within the ambit of

Order 21 Rule 90 and as such the Judgment Debtor had no locus standi to apply to the court for setting aside the sale.”

The Honourable Supreme Court also observed that “On a plain reading of Order 21 Rule 90 CPC three factors emerge and which ought to be taken note of in the matter of setting aside the sale of an immovable property, viz:

- (i) material irregularity and fraud in publishing or conducting the sale;
- (ii) the court dealing with such an application is satisfied that the applicant has sustained substantial injury by reason of such an irregularity or fraud; and
- (iii) no application would be entertained upon a ground which the applicant could have taken on or before the date of drawing up of the proclamation of sale.

The third requirement deserves special mention by reason of the factum of incorporation of the principles analogous to the doctrine of constructive res judicata as envisaged under Section 11 C.P.C. The legislative intent is clear and categorical in both the provisions: that in the event of an intentional relinquishment of a known right, question of proceeding further would not arise.”

In *TANARAPU SURYARAO v. REDDY MAHALAXMI* (^[2]), this court observed that “A perusal of Section 60(c) CPC would make it clear that residential house of an agriculturist which is in his occupation is only exempted from attachment and sale. There is no evidence on record to show that the petitioner-judgment debtor is in possession of such

house as an agriculturist. In the absence of the same, the trial Court rightly rejected the claim of the petitioner.”

_____ In *JALA GANDHI v. ELURI VIJAYA LAXMI* (^[3]), this court observed “In the absence of any evidence before the executing Court and in the absence of raising objection at the stage of attachment in the year 2005, it does not lie in the mouth of J.Dr., now to contend that he is an agricultural labour and agriculturist in order to claim exemption under proviso (c) for sale of his house property.”

_____ In *RAM MAURYA Versus KAILASH NATH AND OTHERS* (^[4]), the Honourable Supreme Court held that “In the absence of such pleading, it was not open to the executing court to set aside the auction.”

_____ Referring to above judgment, advocate for revision petitioner contended that the respondent/J.Dr. has not pleaded any fraud or material irregularity in conducting sale and he has also not produced any evidence to show that the trial court committed material irregularity in conducting the sale. He further submitted that simply contending that J.Dr. is an agricultural coolie and entitled for benefit of Section 60 (c) C.P.C. is not sufficient without establishing that his principal source of livelihood is only from agricultural labour. He further submitted that J.Dr. has not placed any material attracting the grounds contemplated under Order 21 Rule 90 C.P.C. for setting aside the sale and the appellate court is simply carried away with the contention of respondent/J.Dr. and gave the exemption under Section 60 (c) C.P.C. without looking into the jurisdiction that can be exercised under Order 21 Rule 90 C.P.C.

_____ On a perusal of the material papers, it is clear

that nowhere in the affidavit filed in support of petition filed under Order 21 Rule 90 C.P.C., any fraud or material irregularity is pleaded. From a plain reading of Order 21 Rule 90 C.P.C. it is incumbent on the person invoking this provision to establish that there was material irregularity or fraud in publishing or conducting sale. The only ground urged in the petition under Order 21 Rule 90 C.P.C. is that he is an agricultural coolie and as per Section 60 (c) C.P.C., Court has no right to sell the property belonging to agricultural coolie. Admittedly, this property was attached in the suit under Order 38 Rule 5 C.P.C. i.e., attachment before judgment and the same was made absolute on 13-6-2003. Though attachment was made absolute on 13-6-2003, respondent J.Dr. has not taken any legal recourse challenging the same. He has not raised any objection invoking Section 60 (C) C.P.C. during pendency of suit. Ultimately, the suit was decreed on 14-2-2005 and thereafter, execution proceedings were launched. Though J.Dr. filed separate E.A. No.258 of 2006 in the execution proceedings under Order 21 Rule 26 and 59 C.P.C., he has not pursued that application and allowed it to be dismissed and made the executing court to proceed with the sale. When the J.Dr. has not raised objection at the time of attachment or at the time of making the attachment absolute, or at the initial stage of execution proceedings, as rightly pointed out by advocate for revision petitioner, J.Dr. is estopped from taking such objection after sale of the property. Further when the ground of saleable interest is not available under Order 21 Rule 90 C.P.C. entertainment of such ground is definitely beyond the powers and jurisdiction vested in the appellate court. In fact, executing court i.e., trial court rightly dismissed the

application but the appellate court without looking into the scope under Order 21 Rule 90 C.P.C. and without looking into the grounds available under this provision for setting aside sale traversed beyond the scope of the provision and entertained the ground that was not available under Order 21 Rule 90 C.P.C. and interfered with the findings of the trial court which was in accordance with the provisions of Order 21 Rule 90 C.P.C.

On a scrutiny of material, I am of the considered view that the appellate court committed grave material irregularity and exercised jurisdiction that was not vested in it under Order 21 Rule 90 C.P.C. and as such, orders of appellate court are liable to be set aside by restoring back the orders of the trial court i.e., executing court.

For these reasons, this Civil Revision Petition is allowed and the impugned order dated 24-12-2007 in C.M.A.No.69 of 2006 on the file of I Additional District Judge, Krishna at Machilipatnam is set aside and the orders of the executing court dated 17-11-2006 in E.A.No.306 of 2006 in E.P.No.149 of 2005 in O.S.No.396 of 2002 on the file of Junior Civil Judge, Bantumilli, are restored back. No costs.

As a sequel to the disposal of this revision, the Miscellaneous Petitions, if any, pending, shall stand dismissed.

JUSTICE

S.RAVI KUMAR

Dated 19-1-2015.

Dvs.

HONOURABLE SRI JUSTICE S.RAVI KUMAR

CIVIL REVISION PETITION No.1122 OF 2008
Dated 19-1-2015

- [1] (2000) 3 SCC 87
- [2] 2014 (1) ALD 487
- [3] 2013 (4) ALD 261
- [4] (1999) 9 SCC 276