

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

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CIVIL REVISION PETITION No.3466 of 2011

Between:

Kamireddy Sumathi and another.

....Petitioners

and

C.Mallikarjuna Reddy and others.

....Respondents

JUDGMENT PRONOUNCED ON : 28.12.2015

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO :

1. Whether Reporters of Local newspapers : Yes
may be allowed to see the Judgments?
2. Whether the copies of judgment may be : Yes
Marked to Law Reporters/Journals?
3. Whether Their Ladyship/Lordship wish to : Yes
see the fair copy of the Judgment?

* THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

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+ CIVIL REVISION PETITION No.3466 of 2011

% 28.12.2015

Kamireddy Sumathi and another.

...Petitioners

vs.

\$ C.Mallikarjuna Reddy and others.

... Respondents

!Counsel for the Petitioner : Sri V.Sudhakar Reddy

^Counsel for the Respondents : Sri V.M.M.Chary
Sri C.Subodh

<Gist :

>Head Note :

? Cases referred

1. (1994) 1 SCC 131
2. (2005) 10 SCC 235
3. (2006) 3 SCC 49
4. (2007) 13 SCC 576
5. 2011 (3) ALD 581
6. 2014 (2) ALD 319
7. (1994) 4 SCC 177
8. (2014) 6 SCC 397
9. (2012) 13 SCC 568
10. (2001) 7 SCC 71
11. (2008) 17 SCC 491
12. (1977) 3 SCC 337
13. (1997) 4 SCC 451
14. 2009 (10) Laws (Mad) 532
15. AIR 2003 AP 45

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

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CIVIL REVISION PETITION No.3466 of 2011

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ORDER:

Two unfortunate unmarried women filed the present Civil Revision Petition seeking to protect their ancestral property. Their attempt is strongly opposed by the auction purchaser, who is the third respondent herein. Their father, who is the second respondent is unrepresented. The decree holder – first respondent remains silent.

The brief facts leading to the present case are that the second respondent executed a promissory note for Rs.25,000/- in favour of the first respondent on 01.03.1998. Though he paid an amount of Rs.4,000/-

subsequently, he committed default in paying the balance amount. The first respondent filed O.S.No.190 of 2003 on the file of the learned Junior Civil Judge, Sullurpet, for recovery of an amount of Rs.52,500/- on 12.06.2003. It was decreed for Rs.52,500/- with subsequent interest at 6% per annum on the principal amount of Rs.21,000/- on 13.10.2004. The first respondent filed E.P.No.85 of 2005 before the learned Junior Civil Judge, Sullurpet, and the property of the second respondent was attached on 22.08.2005. A proclamation of sale of the property was issued on 25.10.2007 declaring the date of auction as 12.11.2007. On the said date, the auction was conducted and the third respondent herein became the successful bidder. He purchased the property for a sum of Rs.2,25,000/-. He paid 1/4th of the auction amount on that day. The petitioners herein filed E.A.No.348 of 2007 seeking stay of further proceedings and E.A.No.349 of 2007 making claim over the property. On 21.11.2007, the third respondent paid the balance of auction amount. On 26.06.2008 both the applications filed by the petitioners were dismissed for default. The applications in E.A.Nos.278 and 279 of 2008 to restore those applications are pending. Thereafter, the petitioners filed E.A.No.338 of 2008 seeking permission of the Court for depositing the decretal amount and the same was dismissed on 20.07.2011. Challenging the same, the present Civil Revision Petition is filed.

This Court, while issuing notice before admission, directed the petitioners to deposit the entire E.P amount within a period of four weeks in order to show their bonafides. The petitioners complied with the said order of this Court by depositing the entire E.P amount on 10.10.2011. The stay granted earlier has been continuing till today. The above facts are not in dispute.

As stated above, the present Civil Revision Petition is filed against the order in E.A.No.338 of 2008 seeking permission of the Court to pay the decretal amount and other expenses to the decree holder towards full satisfaction of the decree in O.S.No.190 of 2003 on its file, to raise attachment and to set aside the sale conducted in the E.P. The application

was filed stating as follows:

"I submit that the E.P. schedule property is our ancestral property. It is clearly mentioned in the title deed and pattadar pass book. But, my father i.e., J.Dr is addicted to bad vices and he is not looking after our welfare. As such, we both are living by doing tailoring and embroidery and residing with our relatives. Recently we came to know that our ancestral property was attached and brought for sale. We both were not yet married and the only E.P. schedule property is alone is there for our livelihood and for our marriage expenses and other things. As such, if the E.P schedule property is sold it is very difficulty to celebrate our marriages. As such, we filed a claim petition in this case and it is pending for disposal."

Neither the decree holder nor the judgment debtor filed any counter. But, the auction purchaser filed a counter affidavit stating that the judgment debtor is the absolute owner of the property, he borrowed the amount for the family necessities and hence the petitioners are liable to pay the decretal amount. He also stated that he became a successful bidder for an amount of Rs.2,56,250/-, initially he deposited 1/4th of the bid amount and thereafter paid the balance amount within fifteen days as contemplated under the provisions of the Civil Procedure Code. Thus, he is a bonafide purchaser for value and he cannot be deprived of his right over the E.P schedule property. The petitioners are residents of Nelaballi Village and the property was also situated in the same Village. The attachment and proclamation was made by tom tom in the Village. In spite of having knowledge about the sale of the property, no steps were taken at the earliest point of time either for payment of decretal amount or for challenging the proceedings.

The Executing Court dismissed E.A.No.338 of 2008 stating that the auction was conducted on 12.11.2007 and after paying 1/4th of the amount, when proceedings are pending, the petitioners filed two applications seeking stay and raising a claim over the property and those applications were dismissed for default on 26.06.2008. They filed E.A.Nos.278 and 279 of 2008 to restore the claim petition and stay petition without depositing any amount. In view of filing of claim petition and stay petition within seven days from the date of conduct of sale on 19.11.2007, the petitioners cannot

plead ignorance about the attachment of the schedule property. They did not take any steps to file a petition to set aside the sale. The present petition was not filed within time by complying with the provisions under Order 21 Rules 89 and 92 of CPC and, accordingly, the petition was dismissed by order dated 20.07.2011.

This Court by order dated 05.09.2011 directed the petitioners to deposit the entire E.P amount within four weeks and they have complied with the same by depositing the amount on 10.10.2011. The sale is not yet confirmed.

Learned Counsel for the petitioners submitted that the property worth more than four times of the auction value was put in auction when the decretal amount was only Rs.52,500/-. The auction by the lower Court without looking into the provisions contained in Order 21 Rule 64 of CPC would make the auction invalid. He relied on **Desh Bandhu Gupta v. N.L.Anand & Rajinder Singh**^[1], **S.Mariyappa v. Siddappa**^[2], **Balakrishnan v. Malaiyandi Konar**^[3], **Sai Enterprises v. Bhimreddy Laxmaiah**^[4] and **Akula Veerraju v. Karumuru Rukmabai**^[5].

Learned Counsel for the third respondent – auction purchaser, tried to support the auction by submitting that the petitioners made several attempts for stalling the sale proceedings without depositing any amount and now it is not open to them to raise the contention based on Order 21 Rule 64 of CPC.

He further submitted that the application filed, which resulted in the impugned order, is beyond the period of limitation prescribed under Order 21 Rule 89 of CPC read with Article 127 of the Limitation Act. He submitted that the present application is filed under 151 of CPC without mentioning the correct provision of law so as to conveniently take a different stand at different points of time. He, thus submits that the application filed under Order 21 Rule 89 of CPC is not maintainable, as it was filed beyond the prescribed period of limitation, the application under

Order 21 Rule 58 of CPC is not maintainable after sale of the property and the last ground that is pleaded by the learned Counsel on the basis of Order 21 Rule 64 of CPC is also not maintainable as the same was never pleaded before the trial Court. Learned Counsel relied on **Penugonda Varalakshmi v. Nallamala Lakshymi Tayaru**^[6], **Mohan Lal v. Hari Prasad Yadav**^[7], **Annapurna v. Mallikarjun**^[8], **Ram Karan Gupta v. J.S.Exim Limited**^[9], **Dadi Jagannadham v. Jammulu Ramulu**^[10] and **Bachhaj Nahar v. Nilima Mandal**^[11].

In the light of the above facts, the points that arise for consideration are as follows:

- 1) Whether a petition filed for seeking permission to deposit the amount is maintainable?
- 2) Whether it is open to the petitioners to raise the ground of invalidity of sale under Order 21 Rule 64 of CPC, for the first time in the present Civil Revision Petition, without raising such a plea before the lower Court?

The facts in this case are undisputed. The decree was passed on 13.10.2004 in O.S.No.190 of 2003 for an amount of Rs.52,500/- with subsequent interest at 6% per annum on the principal amount of Rs.21,000/- from the date of the suit till the date of realization. The second respondent was also directed to pay a sum of Rs.5,803/- as costs of the suit. The property was attached in E.P.No.85 of 2005 on 22.08.2005. The proclamation of sale of the property was issued on 25.10.2007 fixing the date of auction as 12.11.2007. Auction was conducted on the said date. The third respondent herein purchased the property for a sum of Rs.2,25,000/- and paid 1/4th of the auction amount on that day. After conducting auction, the petitioners herein filed E.A.No.348 of 2007 seeking stay of further proceedings and E.A.No.349 of 2007 claiming right over the property. On 21.11.2007, the third respondent paid the balance of auction

amount. On 26.06.2008 both the applications of the petitioners were dismissed for default. They filed E.A.Nos.278 and 279 of 2008 to restore the claim petition and stay petition without depositing any amount and they are pending. Thereafter, the petitioners filed E.A.No.338 of 2008 for seeking permission of the Court to pay the decretal amount and other expenses to the decree holder and when the same was dismissed on 20.07.2011, the present Civil Revision Petition is filed.

The relevant provisions of CPC and Article 127 of the Limitation Act are as follows:

“Order XXI

64. Power to order property attached to be sold and proceeds to be paid to person entitled - Any Court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled under the decree to receive the same.

89. Application to set aside sale on deposit— (1) Where immovable property has been sold in execution of a decree, 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.

92. Sale when to become absolute or be set aside:-

(1) Where no application is made under rule 89, rule 90 or rule 91, or where such application is made and disallowed, the

Court shall make an order confirming the sale, and thereupon the sale shall become absolute :

Provided that, where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property, the Court shall not confirm such sale until the final disposal of such claim or objection.

(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 sixty days from the date of sale, 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.

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.

(3) No suit to set aside an order made under this rule shall be brought by any person against whom such order is made.

(4) Where a third party challenges the judgment-debtor's title by filing a suit against the auction-purchaser, the decree-holder and the judgment-debtor shall be necessary parties to the suit.

(5) If the suit referred to in sub-rule (4) is decreed, the Court shall direct the decree-holder to refund the money to the auction-purchaser, and where such an order is passed the execution proceeding in which the sale had been held shall, unless the Court otherwise directs, be revived at the stage at which the sale was ordered.

Article 127 of the Limitation Act:

Article	Description of the suit	Period of Limitation	Time from which period begins to run
127	To set aside a sale in execution of a decree including any such application by a judgment-debtor.	Sixty days	The date of the sale.”

Now I consider the decisions cited by the learned Counsel for the third respondent – auction purchaser.

The Supreme Court, in **Mohan Lal's** case (supra) held that the executing Court had no jurisdiction to entertain an application filed under Order 21 Rule 89 of CPC after the period of limitation prescribed by Article 127 of the Limitation Act.

The decision of the Supreme Court in **Dadi Jagannadham's** case (supra) is also to the same effect. The Constitution Bench held as follows:

“18. Having given our careful consideration to the question, we are of the opinion that there is no anomaly and that there are no different periods of limitation for making deposits and/or filing an application for setting aside the sale. It is by virtue of Order 21 Rule 89 CPC that an application for setting aside a sale and a deposit can be made. Order 21 Rule 89 CPC does not prescribe any period within which the application is to be made or deposit is to be made. All that Order 21 Rule 92(2) provides is that if the deposit is made within 30 days from the date of sale and an application is filed then the Court would have no discretion but to set aside the sale. That does not mean that if the deposit is made after 30 days the Court could not entertain the application. If the deposit is made beyond the period of 30 days, but within the period of 60 days, then it will be within the discretion of the Court whether or not to grant the application. Thus, an application can be made within the period prescribed under [Article 127, Limitation Act](#). As an application can be made within 60 days and, as stated above, no period for making a deposit is prescribed under Order 21 Rule 92(2) the deposit can also be made within 60 days. In our view, therefore, the view expressed in **P.K.Unni v. Nirmala Industries** ((1990) 2 SCC 378) that Order 21 Rule 92(2) CPC prescribes a period of limitation for making a deposit is not correct.”

In **Ram Karan Gupta's** case (supra), the Supreme Court held that the provision of Order 21 Rule 89 is in the nature of a concession and held as follows:

“...Clause (a) of Sub- rule (1) of Rule 89 of Order 21 requires the applicant to deposit in Court 5% of the purchase money for payment to the auction purchaser. Deposit of the requisite amount in the Court is a condition precedent or a sine qua non to an application for setting aside the execution of sale and such a amount must be paid within a period specified in the rule and if the deposit is made after the time limit, the application must be dismissed. The deposit made under Rule 89 of Order 21 CPC should be unconditional and unqualified and the decree-

holder or the auction purchaser should be able to get the amount at once.

We have already indicated that the rule is in the nature of a concession shown to the judgment debtor, so he has to strictly comply with the requirements thereof and a sale will not be set aside unless the entire amount specified in sub-rule (1) is deposited within 60 days from the date of the sale and, if it is beyond 60 days, the Court cannot allow the application. We have already found that the appellant-judgment debtor did not pay the amount within the stipulated time and he only made an application on 1-12-2010 without depositing the amount and hence the Court cannot entertain such an application and bound to confirm the sale which, in this case, the Court did on 23-10-2010.”

This Court also held on the same lines in **Penugonda Varalakshmi's** case (supra).

In **Annapurna's** case (supra) the Supreme Court held that the deposit of the requisite amount in the Court is a condition precedent or a sine qua non to an application for setting aside sale in execution of decree.

In the facts of the present case, the sale was held on 12.11.2007 and no amount was deposited along with the application filed under Order 21 Rule 89 of CPC.

Now we have to consider the right of the petitioners to deposit the amount by raising the ground of invalidity of sale.

In **Takkaseela Pedda Subba Reddi v. Pujari Padmavathamma**^[12], the decree holder obtained decrees in two suits. He filed Execution Petition in respect of one decree for selling the properties belonging to the judgment debtor and he also applied for permission to bid at the auction sale. The sale was held in respect of the lands situated in two Villages. The sale was set aside as there was some delay in payment of the sale price. A second sale took place. In the second sale, the decree holder purchased the lands in one Village, whereas the auction purchaser purchased the lands in another Village. But, the sale price in respect of the lands in one Village where the decree holder became the successful bidder was sufficient to satisfy the decree. In spite of the same, when the sale of

lands in another Village was held and the auction purchaser became the highest bidder, the judgment debtor objected to the sale of lands in another Village. But, the objection of the judgment debtor was rejected. However, the High Court upheld the contention of the judgment debtor based on the provisions of Order 21 Rule 64 of CPC. That is how the matter went to the Supreme Court. The Supreme Court observed that the absence of objection by the judgment debtor before the Executing Court is not sufficient to put him out of Court because the matter went to the very root of the jurisdiction of the Executing Court to sell the properties and non-compliance with the provisions of Order 21 Rule 64 of the Code was sufficient to vitiate the sale.

In **S.S.Dayananda v. K.S.Nagesh Rao**^[13] the Supreme Court upheld the order of the High Court setting aside the sale for non-compliance with the procedural requirements of Order 21 Rule 64 of CPC.

Thus it is clear that the Executing Court has a duty to comply with the procedural requirements of Order 21 Rule 64 of CPC and the record does not disclose whether such compliance was made in this case. No doubt it is true that the present application is filed under Section 151 of CPC without quoting proper provision of law but that should not deter this Court from directing the Executing Court to comply with the mandatory provision of Order 21 Rule 64 of CPC. The learned Counsel for the third respondent relied on a decision of Madras High Court in **Saminathan v. Manager, State Bank of India**^[14]. The High Court of Madras relied on a decision of this Court in **Vummethala Somamma v. Thameeru Balanagamma**^[15] and held that when the Executing Court was not asked to act under Order 21 Rule 64 of CPC by exercising its discretion to sell only part of the property attached, it is not open to the petitioner/judgment debtor to raise that point in the Civil Revision Petition. But that case arose after confirmation of sale and in the present case, the confirmation of sale did not take place.

In **Desh Bandhu Gupta's** case (supra) also, the Supreme Court held that the auction-purchaser gets a right only on confirmation of sale and till then his right is nebulous and has only right to consideration for confirmation of sale.

This Court in **Akula Veerraju's** case (supra), after considering the entire case law, held as follows:

“...The question as to whether the petitioners (judgment debtors) raised any objection as to the value arrived at and selling the entire petition schedule land is not much relevant. It is obligatory on the part of the executing court to find out as to what extent of the petition schedule land is enough to satisfy the amount due under the decree. But, in the instant case, it does not appear that any such exercise has been done by the executing court. Since this is a case wherein the court did not at all examine the issue as to what extent of the property is required to be sold for satisfying the decree and sold the property for a sum of Rs.1,10,000/- where the decretal amount is only an amount of Rs.27,211/-. The auction sale conducted by the court is totally vitiated and is liable to be set aside. The laches on the part of the petitioners/judgment debtors is inconsequential because the executing court failed to observe its statutory duty...”

The petitioners, while filing the earlier petition under Order 21 Rule 89 did not deposit any amount. In view of the settled law, such applications are not maintainable. But that does not debar the petitioners from filing the instant application seeking permission of the Court to deposit the amount dehors the provisions of Order 21 Rule 89 or 92. In such an application, the petitioners can raise the invalidity of sale and it is the duty of the Court to examine that issue under Order 21 Rule 64. That right is available to the petitioners as the sale was not confirmed in favour of the auction purchaser and the right of the auction purchaser to take back his amount is protected. Hence the points considered have to be answered in favour of the petitioners.

In view of the same, the impugned order in E.A.338 of 2008 dated 20.07.2011 is set aside and the said application is remanded to the lower Court to consider the issue relating to Order 21 Rule 64 of CPC within three months from the date of receipt of a copy of this order after giving due

opportunity to all the parties and pass appropriate orders in accordance with law within the said period. Further proceedings in execution petition would abide by the result of such order.

The Civil Revision Petition is, accordingly, allowed. The miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

(A.RAMALINGESWARA RAO, J)

28.12.2015

VS

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- [\[1\]](#) (1994) 1 SCC 131
 - [\[2\]](#) (2005) 10 SCC 235
 - [\[3\]](#) (2006) 3 SCC 49
 - [\[4\]](#) (2007) 13 SCC 576
 - [\[5\]](#) 2011 (3) ALD 581
 - [\[6\]](#) 2014 (2) ALD 319
 - [\[7\]](#) (1994) 4 SCC 177
 - [\[8\]](#) (2014) 6 SCC 397
 - [\[9\]](#) (2012) 13 SCC 568
 - [\[10\]](#) (2001) 7 SCC 71
 - [\[11\]](#) (2008) 17 SCC 491
 - [\[12\]](#) (1977) 3 SCC 337
 - [\[13\]](#) (1997) 4 SCC 451
 - [\[14\]](#) 2009 (10) Laws (Mad) 532
 - [\[15\]](#) AIR 2003 AP 45