IN THE HIGH COURT OF JUDICATURE AT HYDERABAD

FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

CIVIL REVISION PETITION Nos.4580 of 2014 and 871 of 2015

Between:

M.Srividya Chowdary and another.

....Petitioners

and

M.Sreenivasulu and others.

....Respondents

JUDGMENT PRONOUNCED ON : 04.12.2015

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 His Lordship wishes to : Yes
see the fair copy of the Judgment?

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

CIVIL REVISION PETITION Nos.4580 of 2014 and

871 of 2015

% 04.12.2015

M.Srividya Chowdary and another.

…Petitioners

vs.

$ M.Sreenivasulu and others.

… Respondents

!Counsel for the Petitioners : Sri M.P.Chandramouli

Sri T.C.Krishna

^Counsel for the Respondents : Sri P.Jagadish Chandra Prasad

<Gist :

>Head Note :

? Cases referred

1. AIR 1981 AP 238
2. 2012 (2) ALT 311
3. 2011 (3) ALT 591
4. AIR 1967 SC 608 (1)
5. AIR 1968 SC 86
6. AIR 2000 SC 1148 : (2000) 3 SCC 664

THE HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

CIVIL REVISION PETITION Nos.4580 of 2014 and 871 of 2015

COMMON ORDER:

These two Civil Revision Petitions are being disposed of by this common order in view of the common cause of action.

C.R.P.No.4580 of 2014 is filed against the order in E.A.No.260 of 2014 in E.P.No.64 of 2009 in O.S.No.9 of 2005 by the petitioners in E.A.No.260 of 2014 seeking to set aside the sale held on 21.08.2009 in favour of the first respondent – decree holder. C.R.P.No.871 of 2015 is filed by the second judgment debtor against the order in E.A.No.402 of 2014 filed by him Order 34 Rule 5 of CPC seeking permission of the Court to deposit the entire Execution Petition amount.

The parties as arrayed in C.R.P.No.871 of 2015 are taken into consideration for the narration of facts in disposing of these cases.

The petitioner's father purchased Plot No.10 under registered sale deed dated 06.08.1983 and after his death, the petitioner and the third judgment debtor succeeded to the said property. His mother also purchased another plot bearing No.11 under registered sale deed dated 06.08.1983 and during her lifetime she executed a Will dated 15.01.1993 in favour of her daughter-in-law. The third respondent was in need of money for getting a job and for the purpose of taking the loan, the property consisting of plot Nos.10 and 11 was mortgaged by the petitioner and his father without noticing that the Will was executed in respect of the property covered by Plot No.11 by the mother in favour of her daughter-in-law. Both the parents are no more. The third respondent was not cooperating and in view of the said circumstances, the petitioner undertook to pay the entire amount payable along with the poundage amount as well as a sum equal to 5% of purchase money and other costs and filed E.A.No.6 of 2010 under Order 21 Rule 90 of CPC and the same was dismissed by the Executing Court on 07.07.2014. In view of the Will executed by the mother of the petitioner, his wife filed E.A.No.8 of 2009 and the same was dismissed on 06.03.2014.

Before the petitioner filed the above petition, his daughter and minor son filed E.A.No.260 of 2014 claiming to have been in possession and enjoyment of the schedule property and resisting execution. They further stated that fraud was played in conducting the sale and they came to know of the same only on 07.09.2014. In their petition they stated that their father and his brother played fraud against them and made deliberate concealment of facts. Their mother also filed a separate claim petition without revealing the correct facts and, accordingly, they sought setting aside the sale dated 21.08.2009. When the said application was dismissed on 20.11.2014, C.R.P.No.4580 of 2014 was filed.

The suit schedule property is a house bearing No.5-143, situated in Survey Nos.1146 and 1147 admeasuring an extent of Acs.2.98 cents in Old Dasarapalle Village, Pakala Mandal in Chittoor District. The first respondent herein filed O.S.No.9 of 2005 seeking recovery of amount on the basis of a promissory note secured by mortgage of the said property and the suit was decreed on 21.08.2006. The wife of the petitioner herein filed E.A.No.8 of 2009 and when the same was dismissed on 06.03.2014, A.S.No.15 of 2014 was filed before the learned I Additional District Judge, Chittoor, and the same was also dismissed by judgment and decree dated 06.06.2014 confirming the order passed by the learned Principal Senior Civil Judge, Chittoor. The petitioner filed E.A.No.6 of 2010 under Order 21 Rule 90 of CPC to set aside the sale of property held on 21.08.2009 and the same was dismissed on 07.07.2014. Thereafter, the children filed a petition for setting aside the sale in E.A.No.260 of 2014, as aforesaid, and the same was also dismissed on 20.11.2014, against which C.R.P.No.4580 of 2014 was filed as aforesaid. As a last attempt, the petitioner filed E.A.No.402 of 2014 seeking permission to deposit the money before confirmation of sale. The sale certificate was issued on 19.01.2015 and the application in E.A.No.402 of 2014 was dismissed on the same day, by closing the petition as infructuous. But, it was made subject to result of C.R.P.No.4580 of 2014.

The calculation memo filed along with E.A.No.402 of 2014 by the petitioner shows an amount of Rs.8,39,064/- and there is a dispute with regard to that amount by Rs.2000/-.

E.A.No.260 of 2014 filed by the children of the petitioner was dismissed on the ground that the sale was held on 21.08.2009 and no amount was deposited by them either before 30 days or at least before 60 days. It was also noted that their mother earlier filed claim petition and the same was dismissed. Their father also filed a petition under Order 21 Rule 90 of CPC in E.A.No.6 of 2010 and the same was also dismissed on 07.07.2014. In view of the same, the ignorance of the execution proceedings pleading by them was held to be not genuine and the petition was barred by limitation. The lower Court followed the decisions of this Court in **T.Venugopal Naidu v. N.Tirumala Naidu** and **Pallepu Poleswari v. Tammisetti Nageswara Rao** and dismissed the application of the children of the petitioner by order dated 20.11.2014. I am in agreement with the said order and C.R.P.No.4580 of 2014 is liable to be dismissed.

C.R.P.No.4580 of 2014 is, therefore, dismissed.

In so far as C.R.P.No.871 of 2015 is concerned, the petitioner herein filed E.A.No.402 of 2014 seeking permission to deposit the entire E.P. amount with interest thereon, poundage amount, 5% equal to purchase money and other costs into court for annulment of sale of the E.P. schedule property. That application was filed on 24.12.2014 for an amount of Rs.8,39,064/-. In view of the nature of the said relief sought for in the said petition, that petition should have been considered first and issuance of sale certificate should have been considered later. But, both E.A.No.402 of 2014 and E.P.No.64 of 2009 were posted to 19-01-2015 and an order was passed in the execution petition for issuance of sale certificate and in E.A.No.402 of 2014 the following order was passed:

> "In view of order for issuance of Sale Certificate as per order dated 19-01-2015 in Main Execution Petition, present petition is closed as infructuous. But, it is subject to result of CRP.4580/2014 on the file of Hon'ble High Court of Judicature at Hyderabad for the State of Andhra Pradesh."

This procedure is clearly irregular.

The learned counsel for the petitioner submits that in view of irregular procedure followed by the trial Court, great prejudice was caused to the case of the petitioner and the order in E.A.No.402 of 2014 is liable to be set aside. He relied on **Patnam Subbalakshmamma v. Sunkugari Sreenivasa Reddy.**

Learned counsel for the first respondent, on the other hand, submitted that though a decree was obtained way back on 21.08.2006, the fruits of the decree could not be enjoyed by the Decree holder due to dilatory tactics adopted by the petitioner, his wife and his children. He further submitted that there are no bonafides in the petition filed by him and he did not deposit the entire amount in the lodgment schedule and hence, the order passed by the Executing Court was proper. He relied on **Janak Raj v. Gurdial Singh** and **Hukumchand v. Bansilal.**

Order XXXIV Rule 5 of the CPC reads as follows:

> "**Final decree in suit for sale.-** (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into court of all amounts due from him under sub-rule (1) of rule 4, the court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order—
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> (a) ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary—
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> (b) ordering him to transfer the mortgaged property as directed in the said decree, and also if necessary,
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> (c) ordering him to put the defendant in possession of the property.
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> (2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the court shall not pass an Order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in court for payment to the purchaser a sum equal to five per cent of the amount of the purchase money paid into court by the purchaser.
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> Where such deposit has been made, the purchaser shall be entitled to an Order for repayment of the amount of the purchase money paid into court by him, together with a sun equal to five per cent thereof.
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> (3) Where payment in accordance with sub-rule (1) has not been made, the court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt within the manner provided in sub-rule (1) of rule 4."

A reading of the above provision makes it clear that before confirmation of sale in pursuance of the final decree, if the defendant makes payment into Court of the amount due, the Court shall pass a final decree ordering the plaintiff to deliver up the documents referred to in the preliminary decree and if necessary, ordering him to transfer the mortgaged property as directed in the said decree and also if necessary, ordering him to put the defendant in possession of the property. The purchaser was given a right to take back the money together with the sum equal to five percent thereof. In case of failure to deposit the money, then only the property shall be sold.

A learned single Judge of this Court in **Patnam Subbalakshmamma**'s case (supra) considered the point of the mortgagee's entitlement for the benefit under Rule 5 of Order 34. The learned Single Judge, while relying on a decision in **Kharaiti Lal v. Raminder Kaur**, held that the judgment debtor in a suit for mortgage would have a facility to seek annulment of the sale, which is more liberal in nature, when compared to the one available to a decree-holder in other suits, under Rule 89 of Order 21 CPC.

Janak Raj's case (supra) relied on by the learned counsel for the first respondent, was a case dealing with the point relating to setting aside the sale of immovable property in execution of an *ex parte* money decree, put into execution, which was set aside subsequently. In the said case, after sale has become final, an application for setting aside the ex parte decree was made. The facts of the case as culled out in the above decision read as follows:

> "…….The facts are simple. One Swaran Singh obtained an ex parte decree on February 27, 1961 against Gurdial Singh for Rs. 519/-. On an application to execute the decree, a warrant for the attachment of a house belonging to the judgment-debtor was issued on May 10, 1961. At the sale 'which took place, the appellant before us be,came the highest bidder for Rs. 5,100/- on December 16, 1961. On the 2nd of January 1962, the judgment-debtor made an application to have the ex parte decree set aside. On January 20, 1962 he filed an objection petition against the sale of the house on the ground that the house which was valued at Rs. 25,000/- had been auctioned for Rs. 5,000/- only and that the sale had not been conducted in a proper manner inasmuch as there was no- due publication of it and the sale too was not held at the proper hour. By an order dated April 19, 1962, the executing court stayed the execution of the decree till the disposal of the application for setting aside the ex parte decree. On October 26, 1962 the ex parte decree against the defendant-judgment-debtor was set aside. On November 3, 1962 the auction purchaser made an application for revival of the execution proceedings and for confirmation of the :sale under O.XXI, r. 92 of the Code of Civil Procedure. On November 7, 1962 the judgment-debtor filed an objection thereto contending that the application for revival of execution proceedings was not maintainable after setting aside the ex parte decree and that the auction purchaser was in conspiracy and collusion with the decree-holder and as such not entitled to have the sale confirmed. It is to be noted here that the case of collusion was not :substantiated. On August 31, 1963 the executing

> court over-ruled the objection of the judgment-debtor and made an order under O.XXI, r. 92 confirming the sale. This was affirmed by the first ,appellate court. On second appeal to a single Judge of the Punjab High Court, the auction purchaser lost the day. An appeal under cl. 10 of the Letters Patent in the Punjab High Court met the same fate. Hence this appeal….."

In the said case, obviously, no application was made by the Judgment Debtor for setting aside the sale and in those circumstances, the Supreme Court confirmed the order of the Executing Court by setting aside the orders of the High Court.

Here, in this case, the judgment debtor wanted to take the benefit of Order 34 Rule 5 CPC.

In **Hukumchand**'s case (supra), the Supreme Court dealt with a case of default of the judgment debtor in depositing the money within the time specified under Order 21 Rule 90 CPC. In those circumstances, the order of sale was confirmed. Hence, the decisions cited by the learned counsel for the first respondent are distinguishable on facts.

In **Kharaiti Lal**'s case (supra) it was held that in an appeal pending against the order refusing to set aside the sale, the confirmation of sale as also the issuance of Sale Certificate would be in a nebulous state and, consequently, it would be open to the judgment debtor to invoke the provisions of Order 34 Rule 5 CPC. The relevant observations of the Supreme Court are as follows:

> "10. The entire case-law was reviewed by this Court in a recent decision in **U.Nilan v. Kannayyan** ((1999) 8 SCC 511) in which also the Court had formulated the following question :-
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> > "21.What is the meaning of the phrase "before the cofirmation of sale" may now be considered in the light of other relevant provisions of the Code of Civil Procedure."
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> 11. The above question is identical to the question framed by the

> Division Bench of the High Court in this case. This Court, on a consideration of a number of decisions, including the decision of this Court in **Hukumchand'**s case (supra) laid down that if an appeal was pending against an order refusing to set aside the sale, the confirmation of sale as also the issuance of Sale Certificate would be in a nebulous state and, consequently, it would be open to the judgment debtor to invoke the provisions of Order 34 Rule 5 C.P.C. and make the necessary deposits to save his property from being transferred to a third person or, may be, to the decree-holder, in execution of the decree passed in the mortgage suit. It may be mentioned that in **U.Nilan'**s case (supra), reliance was also placed upon the decision of this Court in **Maganlal v. Jaiswal Industries** ((1989) 4 SCC 344), in which it was held that the sale does not become absolute or irrevocable merely on passing an order confirming the sale under Order 21 Rule 92, but it would attain finality on the disposal of the appeal, if any, filed against an order refusing to set aside the sale."

Though this is not a case of appeal against the confirmation of sale, since the order passed by the Executing Court in dismissing the application for depositing the money was challenged, the benefit of the said ratio laid down by the Supreme Court can be extended to this case also. The Courts would be jealous of protecting the interest of the mortgagor who would be willing to deposit the amount of mortgage money. No doubt the petitioner made several attempts to defeat the sale without depositing any amount in the past. But when the petitioner came forward now to deposit the sale amount, he should not be deprived of his right to retain the property.

In view of the failure of the Court to follow the procedure provided in Rule 5 of Order 34, the order passed by the Executing Court on 19.01.2015 in E.A.No.402 of 2014 is set aside and the application is remanded to the Executing Court for passing an order in accordance with law within a period of 60 days from the date of receipt of a copy of the order. In view of setting aside the above order passed by the Executing Court on 19.01.2015, the order passed in E.P. on the same day shall also be required to be set aside even though there was no separate challenge to the said order. The Executing Court shall first decide E.A.No.402 of 2014 and as a consequence thereof should pass orders in E.P.No.64 of 2009.

C.R.P.No.871 of 2015 is, accordingly, allowed.

In the result, C.R.P.No.4580 of 2014 is dismissed and C.R.P.No.871 of 2015 is allowed. The miscellaneous petitions pending, if any, shall stand closed. There shall be no order as to costs.

(A.RAMALINGESWARA RAO, J)

04.12.2015

vs/ksn

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