HON'BLE SRI JUSTICE S.V.BHATT

CIVIL REVISION PETITION No.1291 OF 2015

ORDER:

Auction purchaser in the pending proceedings in E.P.No.99 of 2009 in O.S.No.389 of 2006 in the Court of Principal Junior Civil Judge, Kavali, is the revision petitioner. The C.R.P. is directed against the order in E.A. No.252 of 2014 dated 19.12.2014.

The 1st respondent in the C.R.P. filed E.A.No.252 of 2014 in E.A. No.96 of 2013 under Order XXI Rule 59 of Civil Procedure Code (for short 'CPC') for stay or to stop the delivery proceedings pending in E.A. No.96 of 2013 in E.P.No.99 of 2009. The executing Court through docket order dated 19.12.2014 ordered thus:

> "To avoid the un-necessary complications in the interest of justice, the delivery proceedings in E.A.96/2013 in E.P.99/2009 in O.S.389/2006 is hereby stayed, call on 31.12.2014, meanwhile issue notice to Respondents 1 to 3."

The revision petitioner being aggrieved by the grant of stay of delivery of E.P. schedule property pending in E.A.No.96 of 2013 filed the present C.R.P.

The circumstances necessary for disposing of instant revision are as follows:

The 2nd respondent in the revision filed O.S.No.389 of 2006 in the Court of Principal Junior Civil Judge, Kavali to recover a sum of Rs.43,000/- and odd from 3rd respondent herein. On 05.09.2006, the trial Court ordered attachment before judgment of the following property:

> "Sri P.S.R.Nellore District Registration- Kavali Sub Registration- Jaladanki Mandal- Chamadala Village an extent of Ac.1.30 cents in S.No.522/8 and an extent of Ac.0.20 cents in S.No.522/9 in total Ac.1.50 cents of land out of Ac.1.53 cents within the following boundaries.

EAST	:	Road
SOUTH	:	Land of Devalla Chenchaiah and

others

WEST	:	Vagu
NORTH	:	Land of Pallapu Ankaiah as per the instant E.P.schedule, as per the petitioner Pallapu Anjaiah"

O.S.No.389 of 2006 was decreed on 02.07.2009. The 2nd respondent is executing the Decree in E.P.No.99 of 2009 by putting to sale the attached property. On 06.11.2012, the property was sold and the revision petitioner purchased the E.P. Schedule in the auction conducted by the Court. On 31.01.2013, sale certificate was issued in favour of revision petitioner. On account of resistance, in one form or the other, for actual delivery of E.P. schedule property the E.P. is pending. The revision petitioner filed E.A.No.96 of 2013 for appropriate orders from the executing Court. While the matters stood thus, the 1st respondent filed E.A.Nos.251and 252 of 2014 under Order XXI Rules 58 and 59 CPC respectively. The case of 1st respondent is that on 07.06.2006, agreement of sale was entered into between the 1st and 3rd respondents in the revision petition and a regular sale deed was executed on 01.04.2011 between them. The 1st respondent is unaware or ignorant of either the attachment order dated 05.09.2006 in O.S. No.389 of 2006 or knows anything about the pending execution proceedings. The 1st respondent with the above contentions filed claim and stay petitions in E.A. Nos. 251 and 252 of 2014 as stated above.

Sri N.Vijay, learned counsel for the revision petitioner contends that the executing Court committed serious illegality by ordering stay of delivery under Order XXI Rule 59 CPC in E.A.No.252 of 2014. According to the learned counsel, the executing Court can certainly entertain an application filed under Rule 59 of Order XXI CPC provided the petition filed under Order XXI *Rule 58 CPC in* E.A.No.251 of 2014 is maintainable. The learned counsel relies upon the proviso to Order XXI Rule 58 CPC and submits that once the E.P. schedule property is not only sold, but sale certificate is issued in favour of revision petitioner herein, prohibition in law for entertaining the claim petition at the instance of any one much less the 1st respondent who claims to be a purchaser of suit schedule property when the attachment is in force is attracted.

The learned counsel places strong reliance upon the decisions reported in **P.M.Doraswamy Reddy v. T.M.Gowri Sanker**[1], **M.Jayamma v. J.Nadamuni Reddy (died) per LRs**[2], **Gangineni Damodar Naidu v. Kurapati Kondaiah Naidu**[3], **Singirikonda Surekha v. G.V.Sharma**[4] and **Kancherla Lakshminarayana v. Mattaparthi Shyamala**[5].

The learned counsel while challenging the docket order dated 19.12.2014 contends that having regard to the facts and circumstances of the present case, the prayer in E.A.No.252 of 2014 is not maintainable and consequently no order under Rule 59 can be granted. In other words, the objection raised by the petitioner goes to the maintainability of applications in E.A.Nos.251 and 252 of 2014 and the jurisdiction of the Court to grant stay of delivery of sold property.

On the other hand, Sri A.V.V.S.N. Murthy submits that the 1st respondent on 07.06.2006 entered into agreement of sale with judgment debtor and a registered sale deed was executed by judgment debtor on 01.04.2011. The 1st respondent is not aware of the attachment order dated 05.09.2006, or sale of the property in E.P.No.99 of 2009. Alternatively he submits that as a regular sale deed is obtained by the 1st respondent, the 1st respondent is a person having interest in the E.P. schedule property and the claim petition under Rule 58 of Order XXI CPC is maintainable. The learned counsel when confronted with stark fact of auction held on 06.11.2012 and issue of sale certificate dated 31.01.2013 replies by placing reliance upon the decision in **M/s Magunta Mining Co. v. M.Kondaramireddy**[6] that a claim petition even after sale is completed can be maintained in law and the instant applications are accordingly maintainable. The learned counsel alternatively submits that the executing Court can certainly consider the maintainability of E.A. Nos. 251 and 252 of 2014 and no ground is made out by the revision petitioner for interference at this stage in E.P.No.99 of 2009.

Perused the material available on record and noted the rival submissions of learned counsel appearing for the parties.

Now the point for consideration is whether the executing Court is competent to pass the order dated 19.12.2014 in E.A.No.252 of 2014?

At the outset, it is noted that C.R.P. is directed against the order dated 19.12.2014 in E.A.No.252 of 2014. Consideration of legality or otherwise of the prayer in E.A.No.252 of 2014 and/or the order dated 19.12.2014 is depending upon consideration of the primary objections raised by the revision petitioner under Order XXI Rule 58 CPC against the very maintainability of E.A. No.251 of 2014.

Order XXI Rule 58 Sub Rule (1) reads thus:

> "Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim, or objection in accordance with the provisions herein contained:
>
> Provided that no such claim or objection shall be entertained-
>
> (a) Where, before the claim is preferred or objection is made, the **property attached has already been sold**; or (emphasis added)
>
> (b) where the Court considers that the claim or objection was designedly or unnecessarily delayed."

The above Rule provides for adjudication of claims or objections on attached property in E.P. The Rule enables maintaining a claim or objection to the attachment of a property in execution of a decree by contending that the property so attached is not liable for attachment or further proceedings against the property covered by attachment cannot be proceeded with in pending E.P. The claim is decided under Sub Rules 2 to 5 or Order XXI Rule 58. Proviso (a) to Order XXI Rule 58 Sub-Rule 1 CPC reads thus:

> "No such claim or objection shall be entertained where, before the claim is preferred or objection is made, " the property attached has already been sold". (emphasis added).

In other words, by operation of proviso (a), the executing Court cannot entertain a claim petition if the execution proceedings have culminated in sale of attached property and a sale certificate is issued by the executing Court. The learned counsel appearing for the 1st respondent places reliance upon **M/s Magunta Mining Co**'s case (6 supra) stating that a claim petition is maintainable even after the property is sold and issuance of sale certificate by the executing Court. The learned counsel relies upon the following paragraph in **M/s.Magunta Mining Co**'s case (6 supra).

> "Whenever a claim is preferred under O.21, R.58 against attachment of immovable properties, the fact that the properties are sold or the sale confirmed will not deprive the Court of its jurisdiction to adjudicate on the claim. The inquiry into the claim can be proceeded with by the trial Court of the appellate Court (under the Amended Code) and in the event of the claim being allowed, the sale and the confirmation of sale shall to that extent be treated as a nullity and of no effect."

M/s. Magunta Mining Co.'s case (6 supra) was decided by a Division Bench of this Court. The ratio of **M/s.Mangunta Minding Co**'s case has been the subject matter of the decisions in **P.M.Doraswamy Reddy** (1 supra) and **Singirikonda Surekha** (4 supra). I consider it appropriate to refer to the observations in these two decisions to ascertain the ratio laid in **M/s.Magunta Mining Co'** s case (6 supra)**.**

The distinguishing feature in **M/s.Magunta Mining Co**'s case (6 supra) and **P.M.Doraswamy Reddy** (1 supra) and **Singirikonda Surekha** (4 supra) cases is that in **M/s.Magunta Mining Co'**s case, the claim petition was filed before auction was held and during the pendency of the appeal filed against rejection of claim petition, the property was sold. The distinguishing fact situation of **M/s. Magunta Mining Co'**s case (6 supra) is considered in **P.M.Doraswamy Reddy'**s case (1 supra) and **Singirikonda Surekha'**s case (4 supra). Relevant Paras read as follows:

P.M.Doraswamy Reddy's case (1 supra):

"The Division Bench is concerned with a situation whether appeal

is maintainable and in the context of considering this aspect two aspects namely the sale after interim order was passed and the stay of confirmation of sale were adverted to. Whatever be the effect of sale subsequent to grant of interim stay the stay of confirmation of sale is not a bar to the maintainability of appeal in view of second limb of clause (B) of Order 21 Rule 59 CPC. It is obvious that the conclusion is based upon this crucial aspect as evident from the categorical observation, "But it is clear that so long as the sale is not confirmed the *status quo ante can be restored in case the claim is allowed."* After adverting to the legal position hereinbefore with reference to the facts in the case the Court adverted to the legal effect of allowing the claim petition and in the context of considering this aspect made general observations in para 15. For the purpose of considering the contention of maintainability of the petition founded upon the operation of proviso to Order 21 Rule 58 the impact of Order 21 Rule 59 has already been considered with reference to facts in the case and as such the general observations in Para 15 are not intended to cover the situation when the sale is held before filing the claim petition. It is obvious that these observations echoed the prevalent enunciation of legal position that the sale of the attached property is null in the event of allowing the claim petition and these observations are sought to be unduly stretched to the maintainability of claim petition, notwithstanding the anterior sale.
It may be reiterated that the non-maintainability of the claim petition under proviso to Rule 58 can be impugned by recourse to remedy by way of suit under clause 5 of Rule 58 and this route of questing the maintainability of the claim petition is not concerned with the issue of adjudication of claim petition in event of sale before filing the petition. Therefore, the conclusion of the lower court that the application under Order 21 Rule 58 CPC is maintainable even when the sale is held before filing the claim petition is in teeth of proviso to Order 21 Rule 58 CPC and the decision referred to is not applicable to the situation in the instant case."

Singirikonda Surekha's case (4 supra)

"M/s.Magunta Mining Co.(1 supra), relied on by the learned counsel for the revision petitioner, has no application to the facts of this case. In that case claim petition, in respect of the properties attached in March,1980, was filed on 25.04.1980. After enquiry that petition was dismissed on merits. Appeal against that order of dismissal was filed in this Court on 18.05.1980 and interim stay was granted on 22.08.1980. But, even before the order of stay was communicated to it, the Executing Court held the auction. Therefore, a contention was raised during the course of hearing of the appeal that the appeal is liable to be dismissed inasmuch as the sale was already held. Therefore, one of the points for consideration framed was whether the appeal can be proceeded with even though the property was sold during the pendency of the appeal. Holding that the appeal can be heard on merits, the Bench held in para 15 of its judgment as under:

"Whenever a claim is preferred under Order 21 Rule 58 C.P.C,. against attachment of immovable properties, the fact that the properties are sold or the sale confirmed will not deprive the Court of its jurisdiction to adjudicate on the claim. The inquiry into the claim can be proceeded with by the trial Court or the appellate Court (under the amendment Code) and in the event of the claim being allowed, the sale and the confirmation of sale shall to that extent be treated as a nullity and of no effect, as the judgment-debtor had no title which could pay to the Court auction-purchaser.

Therefore, the ratio in that decision is that if sale was held during the pendency of the "appeal" against the order of dismissal of a petition filed under Rule 58 of Order 21 C.P.C., the appeal does not become infructuous. The Bench was not deciding the question as to whether a claim petition can be filed after the sale was held. So, the said decision has no application to the facts of this case."

In **Kancherla Lakshminarayana**'s case (5 supra), the Apex Court considered the meaning of the word "sold" in proviso (a) to Sub Rule I of Rule 58 of Order XXI and held as follows:

"Mere holding of auction sale does not bar the raising of objection to attachment of property. The word "sold" in Clause (a) of the proviso to Rule 58 has to be read meaning thereby a complete sale including the confirmation of the auction. In considering the "time factor" of challenging the sale, the "locus standi factor" on account of any prior interest of the objector in the suit property has also to be considered. The attachment cannot be free from the prior obligations. The necessary sequatur is that even after the facturm of sale the objection would still lie before the sale is made absolute."

This Court in the instant C.R.P. is concerned with proviso (a) to Sub Rule 1 of Rule 58 of Order XXI CPC and maintainability of claim petition after the property is sold and a sale certificate is issued. To complete the narration the consideration on this aspect, the following paragraph in **Gangineni Damodar Naidu**'s case (3 supra) is excerpted.

"Rule 58 of Order XXI directs that all claims, or objections to, attachment of any property, in execution of a decree, must be preferred before the Executing Court itself. This provision is mainly intended to deal with the claims, or objections of third parties. The reason is that, a judgment-debtor cannot object for proceeding against an item of property, if he has right and title in it, and he should not bother himself much, if he does not hold title, upon it. Apart from enabling third parties, to put forward their claims in the execution proceedings, Rule 58 prohibits filing of separate suits. However, the rule draws a dead line, in the matter of presentation of the claims. No claim can be entertained, after the attached property is brought to sale."

The facts and circumstances are not in dispute and the outcome of C.R.P. depends on maintainability of claim petition after the property is sold and a sale certificate is issued by the executing Court. The 1st respondent places strong reliance upon **M/s.Magunta Mining Co**'s case (6 supra), as already noticed **M/s.Magunta Mining Co**'s case is distinguished by **P.M.Doraswamy Reddy** (1 supra) and **Singirikonda Surekha** (4 supra) cases and the contention basing upon **M/s.Magunta Mining Co'**s case (6 supra) has to be negatived and accordingly rejected. Now, I proceed to examine effect of proviso (a) to Order XXI Rule 58 (1)CPC.

From the scheme of Order XX1 Rule 58 CPC, it is clear that the Rule firstly provides for adjudication of claims at the instance of a third party and the remedies against adjudication to an aggrieved party. The proviso (a) to Sub- Rule 1 of Order XXI Rule 58 prohibits the executing Court from entertaining claim or objection against the property attached has already been sold. The purpose of imposing prohibition to entertain claim petitions in matters which have been processed up to the stage of issuance of sale certificate are easily discernable. In construing the scope of prohibition to entertain the claim petition under Order XXI Rule 58, sub-rule (1) can be examined by reference to other relevant provision viz., Rules 92 and 94 of Order XXI CPC and read thus:

<u>Rule 92 of Order XXI</u>:

"**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 1 [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."

Rule 94 of Order XXI:

"**Certificate of purchaser**:-Where a sale of immovable property has become absolute, the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser. Such certificate shall bear date the day on which the sale became absolute."

Proviso to Rule 92 sub-rule (1) of Order XXI CPC refers to a situation where the sale is held and a claim is made by a third party, the executing Court is directed not to confirm the sale till the disposal of such claim by the executing Court.

Sub-rules (4) and (5) deal with a situation where a third party is compelled to challenge by way of a suit, the judgment-debtor's title to the property sold in execution proceedings and who are the necessary parties and what is the jurisdiction of Court to grant comprehensive reliefs in the suit filed by a third party.

Rule 94 enables issuance of sale certificate to the auction purchaser after completing various stages under different rules of execution. Therefore the procedure stipulated in the rules has forward march with the completion of a particular stage and not intended to reopen the Court concluded actions viz., sale certificate is issued. The important words to attract prohibition, in the proviso to Rule 58(1) CPC are that the property attached has already been sold. The words are simple and convey full meaning in the application of proviso to completed sale transactions. From literal construction of these words it can be held that once the sale certificate is issued to the property sold in auction held by the Court, the proviso to Rule 58(1) is attracted and no claim petition is maintainable against such property. From a conspectus of the above provisions, it can be held that Order XXI CPC is a stand alone provision comprehensively dealing with execution of decrees and orders. The various stages of the execution provides for objection by respondent/third party to execution and the executing Court decides these objections. With a decision at appropriate stage by the executing Court the next step is followed. Therefore, at the instance of a third party the completed stages are not revisited. Therefore, with the issuance of sale certificate the property is said to be sold by the executing Court and no claim petition under Order XXI Rule 58 CPC is maintainable.

The executing Court with the issuance of sale certificate completes the process of auction initiated under Order XXI and thereafter, a further stage in execution proceedings arises. It cannot be the intention of Parliament to go forwards and come backwards in deciding the execution proceedings with the filing of claim petition. Therefore, prohibition in complete terms is attracted to entertain a claim petition by the proviso when the property is sold by the executing Court. Therefore, in my considered opinion the prayer in E.A.No.251 of 2014 is not maintainable.

Having regard to the findings recorded on the maintainability of E.A.No.251 of 2014, I have to consider the legality of docket order dated 19.12.2014. The executing Court *prima facie* has committed an illegality in entertaining E.A.No.251 of 2014 and that E.A.No.96 of 2013 is pending for delivery of possession. The order impugned is erroneous and unsustainable. Once the claim petition is not maintainable in law, the question of granting stay of delivery of possession does not arise. Hence, the order impugned is set aside and C.R.P. allowed. The revision petitioner is given liberty to bring to the notice of executing Court the observations on the maintainability of E.A.No.251 of 2014 and obtain appropriate orders.

It is made clear that the E.As filed by the 1st respondent are considered from the limited perspective of maintainability and not on merits. The dismissal or rejection of E.A. Nos.251 of 2014 or 252 of 2014 shall not be treated as foreclosing the remedies, if any, available to the 1st respondent.

With the above observation, the C.R.P. is allowed. No order as to costs.

Miscellaneous petitions pending, if any, shall stand closed.

S.V.BHATT,J

Date:17.07.2015
Note:
L.R. copy to be marked.
B/o.
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[1] 1987 (1) ALT 583
[2] 2002 (1) An.W.R.374 (A.P.)

[3] 2007 (1) ALD 106

[4] 2003 (1) An.WR 401 (A.P.)

[5] AIR 2008 SC 2069

[6] AIR 1983 A.P. 335