

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.5312 of 2013

ORDER:

The unsuccessful appellant-petitioner-JDr filed this revision petition under Section 115 of the Code of Civil Procedure, 1908, assailing the judgment and decree dated 30.08.2012 of the learned Principal District Judge, Visakhapatnam, passed in CMA.no.40 of 2010 whereby the learned District Judge while dismissing the said appeal confirmed the order and decretal order dated 27.10.2009 of the learned I Additional Junior Civil Judge, Visakhapatnam, passed in EA.no.164 of 2009 in EP.no.179 of 2005 in OS.no.2667 of 1999 filed under Order XXI Rule 90 read with Section 151 of the Code to set aside the auction sale conducted on 16.03.2009 and order fresh sale of the EP schedule property.

2. I have heard the submissions of Sri G. Rama Gopal, learned counsel appearing for the revision petitioner and of Sri E. Venkata Reddy, learned counsel appearing for the respondent. I have perused the material record.

3. The parties in this revision shall hereinafter be referred to as the petitioner-JDr, the 1st respondent-DHr and the 2nd respondent-auction purchaser.

4. The facts, which led to the filing of this revision petition by the JDr may be stated, in brief, as follows:

The DHr having obtained a decree for recovery of money filed the Execution Petition for attachment and sale of the EP schedule property. The JDr having received the notices in the Execution Petition from time to time, participated in the execution proceedings and contested the EP. Eventually the EP schedule property was sold in a Court auction held on 16.03.2009 and the auction purchaser, who is no other than the husband of the DHr, having

participated in the auction proceedings purchased the same in the Court auction and the sale was knocked down in his favour for a consideration of Rs.4,01,000/- he being the highest bidder. Later the sale was confirmed and a sale certificate was issued in his favour. While so, the JDr filed the subject application requesting to set aside the sale. The said application was resisted by the DHr. On merits and by order dated 27.10.2009, the executing Court dismissed the petition. The CMA preferred by the JDr was dismissed by the judgment impugned in this revision.

5. The case of the JDr in support of her request for setting aside the Court auction sale held on 16.03.2009, in brief, is as follows:

The EP schedule property was put to auction and was sold in the Court auction sale on 16.03.2009. The auction purchaser, who is no other than the husband of the DHr, purchased the EP schedule property for an amount of Rs.4,01,000/-. He himself arranged the bidders for participation in the auction sale. All the bidders and the DHr colluded together and eventually the husband of the DHr purchased the property for a low price of Rs.4,01,000/-. The DHr and the auction purchaser, who are residents of a place situate near to the plaint schedule property, know very well about the real value and cost of the EP schedule property. The cost of the EP schedule property as per the Government Market Value register was Rs.8,50,000/-. The open market value was Rs.12,00,000/-. However, to grab the EP schedule property at a low price, the DHr, her husband, who is the auction purchaser, and the other bidders who participated in the auction colluded and ultimately the property was sold in the Court auction for a low price. There are also irregularities in the sale process. Hence, the Court auction sale may be set aside and fresh auction may be held.

6. The case of the DHr, in brief, is this:

The allegations made by the JDr are all false. The petition is not maintainable as the JDr while filing this petition, has not followed the pre-

requisite condition with regard to depositing 5% of the auction sale amount. The auction purchaser paid the entire amount. The petition is filed only to drag on the proceedings. The petition may be dismissed with exemplary costs.

7. At the hearing, it is brought to the notice of the Court that the EP schedule property is a house bearing door no.19-28-2 at Rangireeju veedi, Visakhapatnam. It is also stated on behalf of the auction purchaser that despite delivery of the property to the auction purchaser on 19.12.2011 by a Field Assistant of the Court, the families of Rajeti Chitti Babu and others are not allowing the auction purchaser to enjoy the property and therefore a police complaint was lodged against the said Chitti Babu and four others and that a case in Crime No.123 of 2012 was registered under Section 452, 427, 506(ii) read with Sec.34 of IPC against them by the Station House Officer, I Town Police Station, Visakhapatnam, and that subsequently after investigation a charge sheet was filed and a calendar case was taken on file and that the present application is one of the attempts of the JDr and her henchmen to harass the DHr and the auction purchaser.

8. The only contention of the JDr is that the auction purchaser is the husband of the DHr and that the other bidders, who participated in the Court auction sale, were arranged by him and that they all colluded together and that the property was ultimately sold for a low price of Rs.4,01,000/- even though the value of the property as per the Government Market Value Register was Rs.8,50,000/- and in open Court market was Rs.12,00,000/-. During the course of enquiry before the trial Court neither the copy of the market value certificate obtained from the Sub-Registrar's Office concerned was produced nor any other authentic document showing the value of the property was filed and exhibited. No oral evidence was adduced either by examining the JDr or any other competent witness like a neighbour, to substantiate the contentions of the JDr. Merely because the DHr is related to the auction purchaser and that

they are wife and husband and on mere assertions of the JDr that there is collusion, no safe conclusion can be reached in favour of the JDr more particularly for the reason that the JDr failed to substantiate her contentions by adducing any evidence. The JDr has alleged baldly that there is irregularity in the sale process. She did not even allege in her affidavit as to what are such irregularities and failed to furnish any details of the same in her affidavit.

9. The Court below in its judgement referred to the provision of Rule 90 of Order XXI which reads as under:

90. Application to set aside sale on ground of irregularity or fraud.- (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 rateable 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 or 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.

Explanation : The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule.

A plain reading of the provision of law would show that even in a case where irregularity or fraud with regard to publishing or conducting the sale are established the sale will not be set aside by reason of such irregularity or fraud unless the JDr further establishes that the JDr sustained substantial injury by reason of such irregularity or fraud. Further, no application to set aside the sale under Rule 90 shall be entertained on any grounds which the JDr could have taken on or before the date on which the proclamation of a sale was drawn up. In case on hand, the JDr has admittedly participated in the execution proceedings from time to time is not in dispute. She did not raise any objections and allowed the sale to be conducted in a Court auction sale though she is aware that the husband of the DHr is one of the bidders at the auction. The executing Court ultimately conducted the Court auction sale and

the Dhr's husband became the successful bidder. After confirmation of sale, a sale certificate was also issued to him and the property was also delivered.

10. The court below also referred to the decision of this Court in Suresh Kumar Bhandari v. Ramesh Kumar Bhandari and another [2003(3) ALT 240] wherein the facts are as follows:- 'In a suit for partition, in an application for passing a final decree, an advocate commissioner was appointed to sell the suit schedule property. He having issued the sale proclamation and followed the procedure, conducted auction on 08.12.1999; and in the said auction the 2nd respondent therein was declared as highest bidder. The petitioner and others were aware of the auction proceedings. However, in the auction sale proceedings before the Advocate Commissioner, he accepted the highest bid on behalf of Nani Devi.' In the stated factual background, this Court while holding on the facts of the case that no fraud was played had also considered the question whether the highest bid amount is inadequate sale consideration. While answering the said question, this Court, while holding that the sale consideration is not inadequate, further held that mere inadequacy of price is not a ground for setting aside the sale.

11. Further a Division Bench of this court in V.V. Narayan chetty v. Nenla Dhanamma and others¹ held as follows:

"It is now well settled that the sale cannot be set aside under O. 21, R. 90 C. P. C., on the mere ground of low price for which the property was sold in the court-auction, unless it is proved that the property fetched low price as a result of fraud being playing by the decree-holder in getting the low price published for the purpose of getting the bidders only for such a low price and consequently the judgment-debtor has suffered substantial injury."

12. Further a Bench of three Hon'ble Judges of the Supreme Court in the decision in M/s.Kayjay Industries (P) Ltd., v. M/s.Asnew Drums (P) Ltd., and others² considered the principal issue as to whether the inadequacy of price is

¹ AIR 1984 AP 159

² AIR 1974 SC 1331

sufficient for setting aside the sale. The Supreme Court also considered the question – ‘whether there was any material irregularity in the conduct of the sale and did it cause substantial injury to the judgment debtor? While answering the said question, the Supreme Court laid down the legal position as follows:

“Be it by a receiver, commissioner, liquidator or court this principle must govern. This proposition has been propounded in many rulings cited before us and summed up by the High Courts. The expressions 'material irregularity in the conduct of the sale' must be benignantly construed to cover the climax act of the court accepting the highest bid. indeed under the Civil Procedure Code it is the court which conducts the sale and its duty to apply its mind to the material factors bearing on the reasonableness of the price offered is part of the process of obtaining a proper price in the course of the sale. Therefore failure to apply its mind to this aspect of the conduct of the sale may amount to material irregularity. Here substantial injury without material irregularity is not enough even as material irregularity not linked directly to inadequacy of the price is insufficient. And where a court mechanically conducts the sale or routinely signs assent to. the sale papers not bothering to see if the offer is too low and a better price could have been obtained and in fact the price is substantially inadequate there is the presence of both the elements of irregularity and injury. But it is not as if the court should go on adjourning the sale till a good price is got it being a notorious fact that court sales. and market prices are distant neighbours. Otherwise decree holders can never get the property of the debtor sold. Nor is it right to judge the unfairness of the price by hindsight wisdom. May be subsequent events not within the ken of the executing court when holding. the sale may prove that had the sale been adjourned a better price could have been had. What is expected of the judge is not to be a prophet but a pragmatist and merely to make a realistic appraisal of the factors and if satisfied that in the given circumstances the bid is acceptable conclude the sale. The court may consider the fair value of the property, the general economic trends the large sum required to be produced by the bidder, the formation of a syndicate, the futility of postponements and the possibility of litigation, and several other factors, dependent on the facts of each case. Once that is done, the matter ends there. No speaking order is called for and no meticulous post mortem is proper. If the court has fairly, even if silently applied its mind to the relevant considerations before him while accepting the final bid no probe in retrospect is permissible. Otherwise, a new threat to certainty of court sales will be introduced.”

13. A reading of the ratio would indicate that material irregularity not linked directly to inadequacy of price is insufficient to set aside the sale. If the Court has fairly accepted the final bid by applying its mind, even if silently, no probe in retrospect is permissible according to the precedential guidance of the Supreme Court. Only bald averments were made in the affidavit filed in support of the petition. And, no oral and documentary evidence was adduced to substantiate any of the averments pleaded in the affidavit of the JDr. It is well settled that pleading is not proof. Thus, in the absence of the factual basis in the pleadings and any evidence about any irregularity in the sale process and when it is not her case that any fraud has been played on the Court and when any kind of fraud is not established, and when no evidence is produced to show that the consideration obtained in Court auction sale is inadequate, this Court finds that the petition of the JDr is devoid of merit, in the facts and circumstances of the case.

14. On the above analysis this Court finds that the order of the executing Court and the Court below are justified and, therefore, do not call for any interference.

15. In the result, the Civil Revision Petition is dismissed.

Miscellaneous petitions pending, if any, in this civil revision petition shall stand closed. There shall be no order as to costs.

23rd December, 2016
Vjl

M. SEETHARAMA MURTI, J