

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.1970 of 2016

ORDER:

The unsuccessful judgment debtor filed this revision under Section 115 of the Code of Civil Procedure, 1908, assailing the order, dated 22.03.2016, of the learned Principal Junior Civil Judge, Avanigadda, Krishna District, passed in E.A.No.31 of 2016 in E.A.No.217 of 2014 in E.P.No.60 of 2012 in O.S.No.57 of 2012 filed by the judgment debtor requesting to condone the delay of (173) days in re-presenting the petition filed by him for setting aside the dismissal order for default passed, on 30.06.2015, in E.A.No.217 of 2014.

2. I have heard the submissions of *Sri Venkateswarlu Chakkilam*, learned counsel for the revision petitioner and *Sri V.V.L.N.Sarma*, learned counsel for the respondents 1 and 2.

3. The case of the judgment debtor, in brief, is this:

The Decree Holder filed E.P.No.60 of 2012 against him. In the said execution petition, the judgment debtor filed E.A.No.217 of 2014 under Order XXI Rules 89 and 90 read with Section 151 of the Code of Civil Procedure, 1908, ('the Code') requesting for permission of the Court to deposit the sale warrant amount, poundage amount, commission and other expenses and praying to set aside the sale, which was held on 11.04.2014. The said E.A.No.217 of 2014 was posted for enquiry to 30.06.2015 on condition that on that day, the judgment debtor shall adduce his evidence, without fail. On 12.06.2015, the judgment debtor's counsel informed him of the same. However, the judgment debtor could not attend the Court on 30.06.2015 as he suffered from fever and Diarrhoea. On account of his non-appearance and his failure to adduce evidence, the executing Court dismissed E.A.No.217 of 2014 for default. There are no wilful laches on his part in not attending the Court on 30.06.2015. He was under the impression that his counsel was looking after his affairs including

the proceedings in the said EA. Therefore, he did not meet his counsel thereafter. When he approached his counsel on 24.07.2015, he was informed that his E.A.No.217 of 2014 was dismissed for default. He has a strong case to succeed in that petition. Therefore, he filed a petition to set aside the order of dismissal for default dated 30.06.2015 and restore the said E.A.No.217 of 2014 to file. That application in G.L.No.2893 filed on 24.07.2015 was returned on the same day with objections raised by the office of the executing Court and a time of seven days was given to comply with the objections and re-present the said unnumbered application. However, the said application in G.L.No.2893 was not re-presented within the said time of seven days. It was re-presented on 20.01.2016. As there was a delay of 173 days in re-presenting the said petition in G.L.No.2893, the subject application in E.A.No.31 of 2016 was filed for condonation of the said delay in re-presentation of the said petition in G.L.No.2893. The petitioner suffered jaundice from July 2015 onwards and was bed ridden. Hence, the delay had occasioned. Two days after his recovery from Jaundice, he filed the subject petition for condonation of delay of 173 days in re-presenting the application in G.L.No.2893. In fact, his counsel returned his record by expressing inability to appear for him. Hence, he engaged another counsel and filed the subject petition for condonation of delay in re-presenting G.L.No.2893. The delay has not occasioned either due to wilful or wanton reasons. If the delay is not condoned, the judgment debtor suffers irreparable loss.

4. The Decree Holder, who had purchased the decree schedule property with the permission of the Court in a Court auction filed a counter and resisted the application. In the counter, the Decree Holder-cum-auction purchaser while stating the history of the case and various events from time to time *inter alia* contended as follows:

After the Court auction sale, the entire auction sale amount was deposited by the auction purchaser along with poundage amount before the

executing Court. E.A.No.217 of 2014 is only filed for permission to deposit the sale warrant amount, poundage amount, commission and other expenses. The said application was filed on 10.07.2014 though the sale was held on 11.04.2014. Along with the said petition, no amount was deposited as required under law. That petition was filed without any *bona fides* on the part of the judgment debtor. Therefore, the said petition in E.A.No.217 of 2014 ought not to have been numbered by the executing Court. When the said application was coming for enquiry, the trial Court posted the said application [E.A.No.217 of 2014] on condition that the judgment debtor shall adduce his evidence without fail. On that day, the judgment debtor was absent. The said petition was hence dismissed for default. Even thereafter, he did not contact his counsel. But, belatedly, the unnumbered application in G.L.No.2893 was filed for setting aside the order of dismissal for default made in E.A.No.217 of 2014. When that application was returned with office objections, it was not re-presented within the time allowed by the Court. Thereafter, the subject application was filed for condonation of the long delay of 173 Days in re-presenting the said un-numbered petition by creating a story and by falsely alleging that he suffered jaundice and was bed ridden. The newly engaged advocate did not file a fresh vakalat on behalf of the judgment debtor. The said advocate signed on the vakalat already filed into the Court by the former counsel. This act of manipulation is itself sufficient to dismiss all the applications of the judgment debtor and his henchmen. No valid reasons are assigned for condonation of delay in re-presenting the petition in G.L.No.2893. Hence, the petition is liable for dismissal.

5. At the hearing, the learned counsel for both the sides advanced arguments in line with the contentions of the parties, which are stated supra, in detail.

6. I have given detailed and thoughtful consideration to the facts and submissions.

7. The Decree Holder filed execution petition and sought attachment and sale of immovable property. The Decree Holder having obtained permission of the Court participated in the Court auction sale and purchased the EP schedule property in the court auction held on 11.04.2014. Subsequently, the sale was confirmed and a sale certificate was also issued to the Decree Holder-cum-auction purchaser. However, as a claim petition was filed by a third party, the property could not be delivered to the Decree Holder-cum-auction purchaser. E.A.No.217 of 2014 was filed by the judgment debtor on 10.07.2014 before the executing Court for permission to deposit the sale warrant amount, poundage amount, commission and other expenses and also with a request to set aside the sale held on 11.04.2014. Along with the said application, the judgment debtor did not deposit the sale warrant amount and other amounts, but only simply sought permission to deposit the said amount. It is apt to now note the provision of Order XXI Rule 89 of the Code which read as under:

“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.

8. Under the above said provision, the judgment debtor who makes an application to have the sale set aside shall deposit the amounts furnished in the proclamation of sale besides 5% of the purchase money. Without depositing the

said money within the time allowed under law, the judgment debtor is not entitled to file a petition for setting aside the sale. Be that as it may, despite not fulfilling the said requirement, that E.A.No.217 of 2014 was taken up by the executing Court for enquiry and was finally adjourned to 30.06.2015 for adduction of the evidence of the judgment debtor. On that day, the judgment debtor failed to attend before the executing Court and therefore, the said petition was dismissed for default. The judgment debtor alleged that he suffered from fever and Diarrhoea on that day and further stated that for the said reasons he could not attend before the executing Court. Even thereafter, he did not contact his counsel and failed to file an application to set aside the order of dismissal for default and to restore E.A.No.217 of 2014 to file. He blithely states that he was under the impression that his advocate will take care of the matter. At his leisure, he met his counsel on 24.07.2015 and filed an application in G.L.R.No.2893 dated 24.07.2015 for setting aside the order of dismissal for default dated 30.06.2015 made in E.A.No.217 of 2014 by alleging that he suffered jaundice from July 2015 onwards and that he recovered two days prior to the filing of the said petition in G.L.No.2893. Even that petition that was filed, was defective and was not in order. That petition was therefore returned by the office of the executing Court with objections. The judgment debtor was required to re-present the said petition within seven days time granted by the executing Court. He did not do so. The said application in G.L.No.2893 was re-presented with a delay of 173 days. Therefore, the subject application was filed for condonation of the said delay. The narration of events would show that after the sale was conducted on 11.04.2014, E.A.No.217 of 2014 was belatedly filed on 10.07.2014 seeking only permission to deposit the sale warrant amount etcetera without depositing the said amount along with the application as required under law. Even thereafter, when that application was posted for enquiry, the judgment debtor did not get ready and allowed the said application to be dismissed for default. Even after

that application was dismissed for default on 30.06.2015, he did not promptly file an application for restoration of the said application. He leisurely filed G.L.2893 on 24.07.2015 for restoration of the aforesaid application requesting to set aside the order of dismissal for default made on 30.06.2015. Even that application in G.L.No.2893 was defective and therefore, the executing Court returned it with office objections giving seven days time for re-presenting the same after complying with the said objections. Even that application was not re-presented within a reasonable time if not within the time of seven days allowed by the Court below. There was a delay of 173 days in representing the said petition. It is simply alleged that he suffered jaundice from July 2015 onwards; and the said allegation is not substantiated. The executing Court also noted that the judgment debtor colluded with others and got filed several petitions in the execution proceedings and that the present petition is also intended to drag on the proceedings and accordingly, dismissed the petition as the decree holder/ auction purchaser had already purchased the property with the permission of the Court in the Court auction sale and also applied for delivery of the property long time back.

9. In that view of the matter and on the analysis of all the events and facts, this Court finds that the executing Court is justified in dismissing the petition and that there are no merits in the revision.

10. The revision petition which is devoid of merit is accordingly dismissed.

There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

19th December, 2016
RAR