

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA PRADESH**

CIVIL REVISION PETITION No.2707 of 2014

Between:

Bangaru Krishnarjuna and 3 others

.....Petitioners

and

Dasari Atchutamba and another

.....Respondents

Date of Judgment pronounced on : 29-09-2016

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

1. Whether Reporters of Local newspapers : Yes/No
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : Yes/No
to Law Reporters/Journals:
3. Whether The Lordship wishes to see the fair copy : Yes/No
Of the Judgment?

*** HON'BLE DR. JUSTICE B. SIVA SANKARA RAO****+ CIVIL REVISION PETITION No.2707 of 2014**

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< GIST:**> HEAD NOTE:**

! Counsel for the petitioners : Sri Ch. Srinivas

^ Counsel for the respondents : Ms. Madhavi Priya

? Cases referred

1. 2013 (2) ALT 520
2. AIR 1973 Madras 107
3. AIR 1977 SC 1789
4. 1989 Supp (2) SCC 693
5. (1977) 4 SCC 451
6. 1994 (1) SCC 131
7. (1997) 4 SCC 356
8. (2005) 10 SCC 235
9. (2006) 3 SCC 49
10. 2007 (13) SCC 576
11. 2016 (5) ALT 76
12. 2014 (1) SCC 584
13. 2004 (1) SCC 453
14. AIR 1968 SC 998
15. AIR 1990 SC 2221
16. AIR 1997 SC 856
17. AIR 1995 SC 358
18. AIR 1996 SC 2050
19. AIR 1998 SC 1827
20. AIR 1998 SC 1754
21. 2000 (10) SCC 405
22. AIR 2002 SC 251
23. AIR 2004 SC 511
24. 2006 (4) SCC 412

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**CIVIL REVISION PETITION No.2707 of 2014****ORDER:**

The revision petitioners are third parties to the suit O.S.No.176 of 2002 filed by the plaintiff against the defendant for recovery of money. The suit was decreed in favour of the plaintiff on 25.02.2009. Thereafter, the plaintiff filed E.P.No.109 of 2009 for sale of the petition schedule property for realisation of the decree amount and the property was sold on 23.04.2013 in the public auction. Questioning the public auction dated 23.04.2013, the petitioners/third parties to the suit but for claiming as vendees from judgment debtor (for short J.Dr.) filed E.A.SR.No.1688 of 2014 in E.A.No.95 of 2014 under Order XXI Rule 90 CPC to set aside the auction on the grounds of irregularity in conducting the sale for the entire property, instead of sufficient portion therein and said petition since rejected holding not maintainable, the present revision is filed impugning the same.

2. It is the contention of the learned counsel for the petitioners that the lower Court gravely erred in rejecting the petition and failed to consider the principles of law that while conducting auction sale in execution of a decree, the Court is under a duty to follow the mandatory requirements contained under Order XXI Rules 64 and 66 CPC. It is also the contention that the executing Court cannot sell more than such extent of property which is enough to satisfy the decree. The lower Court also went wrong in rejecting the petition on the ground that the earlier petition filed by the petitioners under Order XXI Rule 58 CPC was dismissed for default and the expression in **Malempati**

Harinarayana Vs. Vankayalapati Subba Rao¹ not considered and sought for setting aside the order of the lower Court and to allow the revision petition as prayed for.

3. Whereas it is the contention of the learned counsel for the revision respondents that order of the lower Court holds good and for this Court while sitting against the revision there is nothing to interfere and sought for dismissal of the revision.

4. Heard and perused the material on record.

5. The petitioners claim that the first petitioner purchased an extent of Ac.1.08 cents in survey No.315/3C under registered sale deed dated 28.07.2005 and the 2nd petitioner purchased an extent of Ac.1-22 cents in S.No.315/4C by registered sale deed dated 27.07.2005. It is also their claim that petitioner Nos.3 and 4 purchased an extent of Ac.1-00 cents out of Ac.1-22 cents supra under an unregistered sale agreement from the 2nd respondent/ J.Dr. K.V. Ramana in claiming independent rights over the property. The sale warrant amount of EP.No.109 of 2009 shows Rs.1,84,100/- and the properties were sold on 23.04.2013 in the public auction. That was shown knocked in favour of the auction purchaser, no other than the decree holder for Rs.5,50,000/- the property shown sold, and the J.Dr. having alienated the property did not make an objection. It is one of the contentions in their claim petition affidavit in support of the petition dated 31.05.2014 that for realization of Rs.1,84,100/- sale warrant amount of the decree debt due, the sale of the entire property is illegal and unsustainable, but for to bring only sufficient extent to meet the

¹ 2013 (2) ALT 520

decree debt at best and it is out come of fraud on Court by the decree holder, even apart from the same causes irreparable injury and such recourse adopted by court also unsustainable.

6. A perusal of the E.P. schedule shows the total extent of survey No.315/B-Ac.1-11 cents, S.No.315/A-Ac.0-15 cents and S.No.315/C is Ac.1-50 cents totally comprise of Ac.2-76 cents and with common boundaries given in the E.P. Schedule for the entire Ac.2-76 cents. A perusal of the order of the lower court in dismissing the application is mainly on two counts viz., auction was held on 23.04.2013 and the application filed is by mentioning order XXI rule 90 CPC to set aside the sale and the decision placed reliance in **Pandurangan and Another Vs. Dasu Reddy**² indicates the application can be filed to set aside the sale even after sale has been confirmed and sale certificate is issued. But when Order XXI Rule 90 clause (3) speaks no such application 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 and thereby the application is not maintainable. It is the observation that among the four claim petitioners, petitioner Nos.1 and 2 already filed E.A.No.245/2010 under Order XXI Rule 58 CPC to raise attachment under execution of the property effected that was dismissed for default though same is no bar, it shows they got knowledge about the sale proclamation.

7. In fact the Order XXI Rule 64 CPC mandates as a duty of the Court that only such portion of the property that would satisfy the decree alone to be sold and not the entire property. The

² AIR 1973 Madras 107

wording is the following “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 to the decree to receive the same.”

8. The Apex Court in **Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma**³ categorically held that the party can apply for non compliance of the mandatory provision of Order XXI Rule 64 CPC by the Court, in seeking to set aside the sale. There also the D.Hr. was the auction purchaser. It was observed that it is manifest where amount specified in proclamation of sale for recovery of which the sale was ordered is realized by sale of certain items, further items to be stopped. Non compliance with the provision went to the very root of the jurisdiction of the executing Court and was sufficient to vitiate the sale. Even absence of objection by the Judgment Debtor before executing Court is not a ground as the very executing court derives jurisdiction to sell the properties attached, only to the point at which the decree is fully satisfied and thereby non-compliance of the procedure by the executing Court, which is duty bound is suffice to set aside the very sale. The words necessary to satisfy the decree used in Rule 64 clearly indicate that, no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. Thus, non-compliance with the mandatory provision is sufficient to vitiate the sale.

³ AIR 1977 SC 1789

9. The other expression in this regard reiterated the same of the Apex Court is **Ambati Narasayya Vs. M.Subba Rao**⁴, where it is held that if the property is allowed to sale for decree to be satisfied is a small, the Court should allow only such portion of the property attached to be sold which would be sufficient to satisfy the claim of the decree holder. It is immaterial where the property is one and indivisible. Even if the property is one and indivisible, where a part thereof can be sold without violating any provision of law, then only such portion of property should be sold. This is not a just discretion, but an obligation imposed on the executing court and the sale held without examining this aspect and not in conformity with the mandatory requirement is per se illegal and without jurisdiction.

10. The other expressions of the apex court in this regard are **S.S. Dayananda Vs. K.S. Nagesh Rao**⁵, **Desh Bandhu Gupta Vs. N.L. Anand**⁶, **Lal Chand Vs. VIII ADJ**⁷, **S.Mariyappa Vs. Siddappa**⁸ and **Balakrishnan Vs. Malaiyandi Konar**⁹ and **Sai Enterprises Vs. Bhimreddy Laxmaiah**¹⁰ and the recent expression of this Court (another bench) in **Kamireddy Sumathi Vs. C.M. Reddy**¹¹.

11. This scope of seeking to set aside the sale under Order XXI Rules 89 to 93 CPC, are different though Rule 90 also covers to some extent to this scope of Order XXI Rule 64 CPC. What Rule 89 provides even to any person interested in the property sold may

⁴ 1989 Supp (2) SCC 693

⁵ (1977) 4 SCC 451

⁶ 1994 (1) SCC 131

⁷ (1997) 4 SCC 356

⁸ (2005) 10 SCC 235

⁹ (2006) 3 SCC 49

¹⁰ 2007 (13) SCC 576

¹¹ 2016 (5) ALT 76

apply to have the sale set aside on his depositing within 60 days to the date of sale, for payment to auction purchaser a sum equal to 5% of purchase money and payment to Decree Holder, the amount specified in the proclamation of sale, less any amount since date of proclamation paid to the Decree Holder and with further liability to costs and interest not covered by the sale proclamation, to protect the constitutional right to property as held in **Sukumar De Vs. Bimala Auddy**¹², **Challamava Huchha Gowda Vs. M.R. Tirumala**¹³, **Tribhovandas Purshottamdas Thekkar Vs. Ratilal Motilal Patel**¹⁴ and **Hindi Pracharak Prakashan Vs. M/s. G.K. Brothers**¹⁵. Rule 64 supra, however, when mandates, the very sale conducted ignoring the mandatory provisions and duty of the executing Court, is per se illegal and unsustainable on its face and tantamounts to sale without jurisdiction. For that, leave about the bar of limitation to file application after two months under Order XXI Rule 90 is not applicable, if at all it is required to decide on consideration of the provision with Rule 90 clause (3) to decide whether applies or not, that was not even properly adverted to by the executing court in dismissing the application.

12. The mere fact that a claim petition was filed impugning the attachment and same was dismissed for default, when rightly observed by the lower Court is of no bar to the impugning of the subsequent sale, the lower Court should have been considered that Rule 90 clause (3) should not have been strictly applied to the petitioners who are even third parties to the execution proceedings, though they are persons claiming through the J.Dr. within the

¹² 2014 (1) SCC 584

¹³ 2004 (1) SCC 453

¹⁴ AIR 1968 SC 998

¹⁵ AIR 1990 SC 2221

meaning of Section 146 CPC and Order XXII Rule 10 CPC, for what they claim is purchased bona fide prior to the attachment, at least most of the property covered under the E.P. schedule, that could have also been considered, apart from the very sale on its face of the entire property for a sum of Rs.5,50,000/- though the decree debt is only up to Rs.1,85,000/- when showing contrary to the mandatory provision under Rule 64 of Order XXI CPC that was required to follow and undisputedly not followed, the sale is thereby vitiated, the trial Court should have enquired into the matter rather than dismissing on its threshold as if not maintainable per se.

13. The right of auction purchaser arises only on confirmation of sale and till then his right is nebulous and has only a right to consider for confirmation of sale as held in *Desh Bandu Gupta* supra by the Apex Court. In this case the auction purchaser is no other than the decree holder and not even a third party purchaser.

14. Thereby the order impugned in the revision is unsustainable and the revision is accordingly liable to be allowed to remit back the matter to the lower Court for fresh disposal on merits by treating the application only under Order XXI Rule 64 and Order XXI Rule 97 CPC as per the decisions supra and also of the other expressions of the Apex Court in **Porahmdeo Chowdary Vs. Rishikesh Prasad Jaiswal**¹⁶ on the principle that right of third party to decree can be even before dispossession to raise claims for adjudication from which a decree to be passed and same is appellable by referring to the earlier expressions in **Banwar Lal Vs.**

¹⁶ AIR 1997 SC 856

Satyanarayanan¹⁷ and Babulal Vs. Raj Kumar¹⁸ and same referred and relied in the later expressions viz., **Sreenath Vs. Rajesh¹⁹; Silver Line Forum Private Limited Vs. Rajiv Trust²⁰** in **Anwarbee Vs. Pramod DA Joshi²¹; NSS Narayana Sarma Vs. M/s. Gold Stove Exports²²; Ashan Devi Vs. Phulwasi Devi²³** and **S.Rajeswari Vs. Kulasekaran²⁴.**

15. Accordingly and in the result, the revision petition is allowed by setting aside the impugned order of lower Court and by remanding back the same to the lower Court for fresh disposal on merits under Order XXI Rule 64 & 97 CPC.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

JUSTICE Dr. B.SIVA SANKARA RAO

Date: 29.09.2016
Note: L.R. copy to be marked
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¹⁷ AIR 1995 SC 358

¹⁸ AIR 1996 SC 2050

¹⁹ AIR 1998 SC 1827

²⁰ AIR 1998 SC 1754

²¹ 2000 (10) SCC 405

²² AIR 2002 SC 251

²³ AIR 2004 SC 511

²⁴ 2006 (4) SCC 412