

*HONOURABLE Dr. JUSTICE B. SIVA SANKARA RAO

+ Civil Revision Petition Nos.1232, 1234, 1236 and 1293 of 2015

% Dated 15.11.2016

Between:

E.Suryanarayana, died by his Legal representatives ... Petitioners

and

\$ Koripalli Adinarayana Murthy ... Respondent

! Counsel for the petitioners : Sri E.V.V.S Ravi Kumar,

^ Counsel for respondent : S.Sridhar

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? Cases referred: :

1. AIR 1952 Madras 871(1)
2. AIR 1929 Oudh 235
3. AIR 1953 Madras 988
4. AIR 1927 Nag 198
5. AIR 1979 Bombay 67
6. ILR 1890 12 All 440
7. AIR 1958 Madras 396
8. AIR1936 at page 205
9. (2003)1 SCC 476
10. AIR 2005 SC 1500
11. (1996) 5 SCC 48
12. (2000) 6 SCC 259



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and

1. Whether Reporter of Local newspapers May be allowed to see the Judgments?	Yes/ No
2. Whether the copies of judgment may Be marked to Law Reporters/ Journals?	Yes/ No
3. Whether Their Ladyship/ Lordship wish To see the fair copy of the Judgment?	Yes/ No

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Civil Revision Petition Nos.1232, 1234, 1236 and 1293 of 2015

COMMON ORDER:

One Koripalli Adinarayana Murthy filed suit in O.S.No.163 of 2004 on the file of I Additional Senior Civil Judge, Kakinada against one Eedala Suryanarayana for recovery of money and obtained decree, dated 27.01.2006. Pursuant to which, the Decree Holder(for short, 'the DHr') filed E.P.132 of 2010 before the said Court for recovery of Rs.3,54,230/- with interest and costs and the Execution Petition was ended in dismissal on 12-08-2011. Subsequently, the DHr filed EP.No.91 of 2011 on 23.08.2011 for attachment and sale of immovable property viz; site of 335/ 13 sq.yards with tiled house No.14-2-26(new) 14-2-22 of Surepallivari street, Samarlakota Municipality of J.Dr. supra to recover the E.P. amount. Attachment of the property was ordered. Pursuant to the attachment made absolute and from settlement of terms on 13-04-2012, by order for proclamation and sale there was Court auction sale conducted on 01-03-2013 ultimately, and the bid was knocked in favour of one Koripalli Venkatarao none other than the G.P.A. holder of DHr for Rs.12,20,000/-.

2. The sale held on 01.03.2013 was later confirmed on 03-06-2013 and sale certificate was also issued in favour of the auction purchaser on even date. The J.Dr. meantime died on 18-04-2013. There was no intimation to the DHr or auction purchaser about the death of J.Dr., after the Court auction sale held on dated 01-03-2013 and before confirmation of the sale on 03.06.2013, on expiry of (60) days mandatorily contemplated by O.XXI Rule 92 CPC, which says where there was no any application made by the J.Dr. or person claiming through the J.Dr. or person having interest in the property meantime (within the 60

days statutory period of limitation to the date of sale), to set aside the sale either under Order XXI Rule 89 or Rule 90 or 91 CPC, as the case may be, among order XXI Rule 89 to 93 CPC supra, which is no doubt subject to auction purchaser being the highest bidder after deposit of 1/4th amount immediate to the auction pays 3/4th of balance with poundage amount within the stipulated time of (15) days from the date of auction, else to conduct fresh auction to recover any loss from the auction purchaser for any default, as the case may be, as per the procedure contemplated under Order XXI Rules 84 to 88 C.P.C.

3. In the case on hand, not only the death of the J.Dr., after auction sale and before confirmation of sale not reported to the executing Court but also no application to set aside the sale filed by any of the legal representatives or assignees or other persons having any interest over the property by coming on record which resulted in confirmation of the auction sale under Rule 92 CPC and issuance of sale certificate under Rule 94 CPC.

4. It is important to note that Order XXII Rule 12 C.P.C. specifically says Order XXII Rules 3, 4 to 8 have no application for execution proceedings. It is to say in case of execution proceedings to proceed against estate of deceased/ J.Dr. in the hands of legal representatives of the deceased-J.Dr., section 50 and 52 C.P.C. that applies to enable the Dhr to recover the decree debt against the estate of the deceased in the hands of the legal representatives as contemplated. Here it is not the case that even as the property already brought to sale after notice and enquiry during the life time of J.Dr. on 01-03-2013 and the J.Dr. died one month 17 days later to it on 18-04-2013.

5. Thus, what is remained from the auction purchaser complied with payment of the balance amount with poundage within 15 days as contemplated by Order XXI Rules 84 to 88 C.P.C. is only confirmation of sale for which the Court is duty bound, for no application made by the J.Dr. during his life time within that one month 17 days and no person claiming through him or having any interest in the property even filed much less later within that two months period from the date of sale on 01-03-2013.

6. The only thing now to consider is, whether the sale confirmed after death of the J.Dr. as part of the duty of Court under Order XXI Rules 92 and 93 CPC, is liable to be set aside and if so upto what stage? Is it only confirming and issuing of sale certificate and delivery of property if not, to any stage of the proceedings prior to that taken place during life time of J.Dr. even.

7. It is in the legal background supra with reference to the facts supra, the revision petitions arose outcome of respective orders of the lower Court, which are being detailed herein.

8. CRP.No.1232, 1234 and 1236 are filed respectively against the orders dated 18.03-2015 passed in E.A.Nos.128, 127 and 115 of 2015 in E.A.No.283 of 2014 in EP.No.91 of 2011 in the O.S.No.163 of 2004 on the file of I Additional Senior Civil Judge, Kakinada filed under Section 151 CPC to direct the S.H.O. Samalkota, to grant male and female Police Aid to the Amin at the time of execution of delivery warrant from the obstruction causing in execution, with power of general arrest and break open locks for the same were allowed.

9. In all these Execution applications, the D.Hr. pleaded that the lower Court ordered delivery of E.P. schedule property and appointed

Amin to deliver the same to the D.Hr. but when the Amin went to the EP schedule property for delivery, the J.Drs. are obstructing him by proclaiming that they lock the doors and cause obstruction to the proceedings for delivery by one way or other. As per Amin report, in order to take delivery of the EP schedule property, it is necessary to grant male and female police aid for execution of the delivery warrant and also prayed to order break open locks of doors and general arrest of obstructers at the time of execution of the warrant. Accordingly, the said petitions were ordered.

10. CRP.No.1293 of 2015 is filed against the order dt.03-06-2015 in EP.No.91 of 2011 in O.S.No.163 of 2004 on the file of I Additional Senior Civil Judge, Kakinada under Order XXI CPC and the same was allowed issuing sale certificate in favour of auction purchaser confirming the sale by the public auction held on 01-03-2013 in execution of the decree.

11. Impugning the above orders, the present revision petitions are filed mainly on the grounds that Executing Court should not have issued the sale certificate without bringing the legal representatives of the deceased-sole J.Dr. on record when he died before confirmation of sale and as such said sale certificate is not valid under law. It is also urged that the Executing Court without issuing notice to the legal heirs of deceased-J.Dr. ordered the petitions filed for police aid and general arrest of obstructers at the time of execution of warrant. Basing on said sale certificate, the GPA holder of the D.Hr., who is the auction purchaser, is trying to take possession of the property. As such, the sale certificate is not binding on the petitioners, as they are not parties to the same.

12. All the four revisions supra are taken up for common hearing and disposal. Heard and perused the entire material on record.

13. No doubt, this Court while admitting the four revisions, vide order dated 31.03.2015, in mentioning for C.R.P.No.1293 wrongly as 422 by typographical mistake, passed orders saying unfortunately in the instant case, the J.Dr. expired within 60 days period, after the sale was conducted and the sale certificate issued subsequently appears to be erroneous, in ordering notice before admission and in granting stay of all further proceedings, including delivery of possession to the auction purchaser.

14. Now to decide the legality and correctness of the impugned order, in *Arunachala Chettiar Vs. Vadla Koundan*¹ a single Judge of the Madras High Court referring to the expression of the Oudh Court in *Kamakshya Dutt Ram Vs. Shyam Lal*² held that where the sale of the property held on 09.11.1942 and confirmation taken place on 12.12.1942, attacked on the ground of J.Dr. died before confirmation on 14.11.1942, for the confirmation order passed without impleading the legal representatives of the J.Dr., despite obligation to give notice to the J.Dr. before confirmation of sale and as such same cannot be validated.

15. In fact, in *Kamakshya Dutt Ram* supra, the J.Dr. died within 30 days of date of sale and there was held no provision requiring legal representatives of the J.Drs. who died after sale to bring on record for the purpose of confirmation and as such there is no need to bring his legal representatives on record and the confirmation after death of the

¹ AIR 1952 Madras 871(1)

² AIR 1929 Oudh 235

J.Dr. without bringing legal representatives of him on record even was valid.

16. No doubt confirmation under Order XXI Rule 92 CPC in the absence of applications under Order XXI Rules 89 or 90 or 91, is automatic to say confirmation of the sale shall follow as a matter of course. In Arunachala Chettiar supra, it was held that it does not mean order of sale confirmation can be made without presence of parties who are sought to be affected. If the J.Dr. or his legal representatives are parties to the proceedings, they would undoubtedly be aware of the sale and within the period of limitation provided by law, would be in position to take steps to have the sale set aside either by deposit of money or if sale was vitiated by irregularities by application under Rule 90 C.P.C. The position of others who are also entitled under Rule 89 or 91 CPC, to apply for the relief would be different because it may be that they are not aware of the sale. The decision of Oudh Court overlooked the language of Rule 92(3) CPC, which says, a suit to set aside an order made under this rule, shall not be questioned in a suit by any person against whom such an order is made. The object of that rule is to prevent the J.Dr., and in case he dies his legal representatives, from agitating the question of finality of the sale in a later proceedings and to compel them to take proceedings under Rule 89 or 90 CPC, by deposit of money or other requirements being satisfied. Before confirmation, the J.Dr.'s interest in the property could be attached and sold even by another creditor and until confirmation of sale, auction purchaser's right not vested. The confirmation order got double operation of divesting the J.Dr. of his title in the property and vesting in the auction purchaser retrospectively from the date of sale.

17. In the expression of the Madras High Court in Puttayya Vs. Varanashi Subraya Hebbar³ the expressions of the Oudh Court in Kamakshya Dutt Ram supra and of the earlier single judge expression of Madras High Court in Arunachal Chettiyar supra among several other expressions were referred in holding that in execution of mortgage final decree for sale against joint family of a father and minor sons of the hypothecation sold but before confirmation of sale father died and sale confirmed without any entry being made Under Order XXII Rule 2 of C.P.C., if the right to sue survives from the death of 1st J.Dr. father to the other J.Dr's minor sons and without even any fresh appointment of guardian for the two minor sons, the sale would not be vitiated by distinguishing the two expressions of Kamakshya Dutt Ram supra and Arunachala Chettiar supra and observed that as held by Nagapur High Court in Baldio Prasad Vs. Kusam Singh⁴ the absence of a *guardian-ad-litem* for the minor J.Drs. at the time of confirmation of sale, would not make the sale invalid.

18. It was observed by the Madras High Court referring to the earlier expression in the later expression in Puttayya supra that there is no provision in the CPC for an auction purchaser to apply for bringing on record the legal representatives of deceased J.Drs. after sale taken place and before its confirmation. There is also no period of limitation prescribed for such bringin on record. The period of 90 days for bringing on record legal representatives in a suit cannot apply in execution where the J.Dr. died after sale but before confirmation of the sale. The confirmation might be at any time and need not necessarily within the 30 days (60 days as per amended CPC) of the sale.

³ AIR 1953 Madras 988

⁴ AIR 1927 Nag 198

19. In fact, in that decision of Puttayya supra, the minor J.Drs. on record and after 1st J.Dr-cum-guardian of other among them died after auction sale and before confirmation and even lack of representing the minor J.Drs. by guardian for the minor on record as legal representatives late 1st J.Dr. also, from anything regarding of that fact is an irregularity which will not vitiate the sale, for no obligation to the Court even to issue notice to J.Drs. before confirmation of sale.

20. In fact reading of Order XXI Rule 92 CPC, sub rule (1) in particular, it is clear that where no application is made under Rules 89, 90 or 91 CPC, or where such application is made and disallowed, the Court shall make order confirming the sale, and thereupon the sale shall become absolute. Thus, when there is no provision to say notice to the J.Drs. or hearing of the J.Drs. for confirmation of sale, it is practically an administrative act like recording delivery.

21. The remedy of filing application once left open and in the case on hand, the J.Dr. as on the date of sale was alive for one month 25 days after sale, no doubt before expiry of 60 days waiting under the Rules 89 to 91 CPC supra. Even he died, once after expiry of 60 days, it shall be duty of the Court to confirm the sale to make the sale absolute, dates back to the date of sale, even confirmation done was later.

22. Now to consider correctness of what is observed in Arunachal Chettiar supra, in case where the J.Dr. or his legal representatives are parties to the proceedings they would be aware of the sale, then be in a position to take steps to have the sale set aside if at all. As referred supra even from that observation, the J.Dr. having alive for about one month 25 days after date of sale to his knowledge and did not point his little finger to the sale meantime before his death, when the and the

legal representatives of the J.Dr. cannot be in a better position to the J.Dr. much less to have any independent right than that of J.Dr., they shall not get any special concession or privilege.

23. Now coming to another expression of the Division Bench of the Bombay High Court in *Motilal Harachand Marwadi Vs. Sadabai*⁵, it is also held that the sale was held during the J.Dr's lifetime, however before confirmation of the sale, from death of the J.Dr. and legal representatives not brought on record while confirming the same after death of the J.Dr., the sale was held not vitiated and dissented the expression of the Madras High Court in *Arunachal Chettiar supra* and by placed reliance upon *Kamakshya Datt Ram supra*.

24. The observations in *Motilal Herachand Marwadi supra* by the Bombay High Court referring to several expressions of other High Courts including the Full Bench expression of the Allahabad High Court in *Sheo Prasad Vs. Hiralal*⁶, is held that '*after sale is validly conducted, it is for the J.Dr. or his legal representatives to decide whether provisions of Rule 89 or 90 of Order XX1 Civil Procedure Code, should be availed of or not, and if they are not availed of and if the Court confirms the sale, the validity thereof will not be affected, even though the legal representatives of the J.Dr., who died after the sale but before confirmation thereof are not brought on record before confirmation of sale, as the jurisdiction of the Court is not affected thereby*'. The Bombay High Court in this regard referring to Section 50 of CPC, which says only where the J.Dr. dies before decree has been fully satisfied, the holder of decree may apply to the Court which passed it to execute the same against the legal representatives of the deceased to say it enables

⁵ AIR 1979 Bombay 67

⁶ (1890) ILR 12 All 440

merely the D.Hr. to apply the Court which passed the decree to bring legal representatives of J.Dr. on record, if he dies before the decree is satisfied fully so to pray for execution against the legal representatives for continuation of the same execution proceedings even.

25. In *Motilal Supra* the Bombay High Court further observed that the Rule 92 of Order XXI CPC, in fact after statutory waiting imposes a statutory duty on the Court to confirm the sale held in execution proceedings, if no application to set aside the sale meanwhile filed or if filed and disallowed and Mulla CPC having observed so at pages 193 to 263. It was observed further that confirmation of sale under Rule 92 of CPC does not require any application by auction purchaser to the Court as it is the statutory duty on the part of the Court and if an application is filed it is not subject to any limitation even. In Mulla CPC for that conclusion quoted with approval not only the expression in *Kamakshya Datt Ram supra* of Oudh Court, but also same relied by the Madras High Court differing to *Arunachal Chettiar supra* in the later expression in *Lakshmi Ammal vs Thangaraju Padayachi*⁷.

26. It is also quoted with approval in *Motilal supra* by the Bombay High Court of what was held by the Oudh Court that once sale was taken place in the lifetime of J.Dr. for there is no provision requires to bring on record the legal representatives of deceased J.Dr., who died after sale but before confirmation, for the purpose of confirmation for not a case of sale conducted after death of J.Dr. and behind the back of legal representatives. Thereby auction purchaser gets his title because of the auction sale itself and not because of confirmation, though sale confirmation is from the date of auction sale in passing title to the auction purchaser, which is in a sense contingent becomes absolute on

⁷ AIR 1958 Madras 396

confirmation and that does not mean gets title because of confirmation or only from date of confirmation as same relates back to date of auction sale itself. That is the reason why once the auction sale held validly and compliance made by auction purchaser, he need not even apply for confirmation of sale but for duty of the Court. The Rules 89 or 90 of Order XXI CPC, give an opportunity at best to the J.Dr. to seek for setting aside the sale or to challenge the validity of the sale if he desires to do so. That does not mean if he died before confirmation after sale affected there is necessity of bringing legal representatives of J.Dr. for confirmation of sale.

27. The observations in Arunachal Chettiar supra reasoning is held by the Bombay High Court in Motilal supra as not agreeable even from the very language of Rule 92, it is for the reason said Rule 92 (3) does not indicate that because of confirmation of sale, it precludes the J.Dr's right to challenge the same, if otherwise entitled. It is to say in confirming the Court auction sale, executing Court does not pass any further judicial orders adversely affecting the J.Drs. interest who discharges statutory duty lying on it and records the legal consequences that flow from Rule 92 and Rule 92(3) merely mentions the legal position arising of confirmation of Court of sale. It is not urged of legal representatives of deceased J.Dr. may not aware of auction sale against the J.Dr. Even when that would not give any additional right to legal representatives, much less higher rights than that of deceased J.Dr. It is in fact for the J.Dr. or his legal representatives if at all to exercise the above right under Rules 89 or 90 within the statutory time provided and on failure to exercise, that right of confirmation must fallow as a matter of course, and it is immaterial for such confirmation death of J.Dr. after sale and before confirmation, and as to his legal representatives are

brought on record or not. Representation of deceased J.Dr. for mere confirmation of sale is unnecessary for legal consequences, automatically follow statutorily, for the Court to discharge its duty. Mere factum of legal representatives of the J.Dr. not aware of the sale conducted in the lifetime of J.Dr. and confirmation after death of J.Dr. in their absence, makes no difference for no way affects the legal position.

28. The Bombay High Court in *Motilal supra* further observed that the Full Bench of Allahabad High Court in *Sheo Prasad supra* held, as quoted in Mulla CPC under Section 50 of C.P.C. commentary, which was a case where after attachment, the J.Dr. dies before conducting auction sale and correctness of that need not even be gone into. Once the J.Dr. was alive and got knowledge of the sale conducted by the Court in public auction, his subsequent death makes no difference.

29. What the Full Bench of Madras High Court in *Kanchammalai Pathar Vs. Shahaji Rajah Sahib*⁸ held was that, it was after death of the J.Dr. without bringing legal representatives on record under Section 50 of C.P.C. proclamation of sale and settlement of terms of sale ordered and sale conducted thereby after death of J.Drs. is an execution against a dead person.

30. Here once the sale is conducted in the lifetime of J.Dr. for there is lot of difference from his subsequent death; when once the J.Dr. was alive at the time of sale, subsequent death of him before confirmation and omission to bring legal representatives of him for confirmation does not affect validity of confirmation of sale from the

⁸ AIR1936 at page 205

date of sale much less validity of sale was the ultimate conclusion of the Bombay High Court in Motilal supra.

31. In one of the decisions placed reliance of the Apex Court three Judge Bench in Zahirul Islam Vs. Mohd. Usman⁹, which was a case where an ex parte decree under Order IX Rule 13 CPC sought for setting aside and pending the same there was death of the defendant-petitioner, from what Order XXII Rule 4 CPC speaks of death of one of several defendants or sole defendant, Court may exempt the plaintiff from necessity of substituting legal representatives of such defendant, who failed to file written statement or even filed failed to appear and contest and judgment may be pronounced against him notwithstanding his death with same force as pronounced before death took place.

32. In fact that arises in a post ex parte decree stage in the pending petition to set aside the ex parte decree and thus said proposition or the provision have no application in execution proceedings from what Order XXII Rule 12 CPC specifically says is, Rules 3,4 and 8 of Order XXII have no application at all to execution proceedings. Thus if at all Section 146 CPC and further at best Order XXII Rule 10 CPC, that can be invoked at that stage.

33. Coming to the other expression of the Apex Court in Ratan Bapu Patil (Dead) by Lr s. v. Dodhu¹⁰ (two Judge Bench) relying upon the earlier expression in Pattam Khader Khan vs Pattam Sardar Khan¹¹, where it was held that once the Court auction sale was confirmed and sale certificate was issued, confirmation of sale relates back to date of sale and title passes to auction purchaser thereby from the date of sale and no doubt for taking of possession by auction purchaser under Rule 95

⁹ 2003(1) SCC 476

¹⁰ AIR 2005 SC 1500

¹¹ 1996 5 SCC 48

of C.P.C., limitation of one year under Article 134 of Limitation Act, is only from date of confirmation of sale in issuance of sale certificate.

34. The law is very clear thereby that, the confirmation of sale done and sale certificate even issued later dates back retrospectively from the date of sale. The law is very clear from the very wording of Rule 92 CPC that, if no application by the J.Dr. or any person claiming through him or any person having interest over the property otherwise even within the statutory time after the Court auction sale to say 60 days, it is the automatic duty of the Court to confirm and for that no application of auction purchaser even required and once from the sale affected the D.Hr.'s amount is satisfied, there is also no obligation to the D.Hr. of decree satisfied to bring legal representatives of J.Dr. even the J.Dr. died before confirmation of sale and after the Court Auction sale for when no need of auction purchaser to apply, there is practically no need to bring any legal representatives by the auction purchaser, much less even any duty of the Court to confirm the sale in the absence of D.Hr. or the J.Dr. or any of their legal representatives.

35. Further it is also necessary to mention in this context that where two interpretations are capable to give the one which assists the D.Hr. to have the fruits of the decree alone should be preferred, as the purposes of execution proceedings is to enable the D.Hr. to obtain fruits of the decree. It is no doubt in the context of interpretation of the decree and the same analogy can also be extended for any other interpretation even for any provision to lean in favour of the D.Hr. From said proposition laid down in Deep chand Vs. Mohanlal¹² saying out of two interpretations even possible, one to lean in favor of the D.Hr. to reap the fruits of decree is the sound principle of just interpretation.

¹² (2000) 6 SCC 259

36. Having regard to the above, there is nothing to set aside the Court auction sale confirmation and issuance of sale certificate much less to nullify. The taking of delivery of possession by the auction purchaser from the J.Dr. or persons claiming through the J.Dr. within statutory time of one year from the date of confirmation of sale and issuance of sale certificate from death of the J.Dr. is no doubt by array of legal representatives of the late J.Dr.

37. No doubt in the case on hand as pointed out by learned counsel for revision petitioners claiming through late J.Dr. clearly shows the sale was knocked in favour of the D.Hr represented by his GPA holder by participation and it is with Rule 72 CPC permission or not is also not clear from the submissions, for the matter to be considered is whether the GPA Holder of D.Hr. participated either as GPA Holder on behalf of the D.Hr. representing him or independently that is left open to raise before the executing Court afresh for consideration on merits.

38. Coming to the other submission in this regard of though sale of property is only to the extent what is required to satisfy the decree debt with interest and costs etc. and nothing beyond and it is the duty of the executing Court as per Rule 64 of Order XXI CPC and despite it, more property than required was sold is a nullity so to annul or nullify and for that there is no limitation.

39. Here, there is no such application by the legal representatives of the J.Dr. who are the revision petitioners and there is no such plea raised even to consider that aspect further but for any such remedy is left open if at all sustainable to raise before the executing Court to enquire and to decide on own merits.

40. Accordingly and in the result, subject to the above observations, all the four revisions are dismissed. No order as to costs.

41. Pending miscellaneous petitions in all the revisions, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 15.11.2016

Note: L.R. copy to be marked.

B/ o. Vvr.

