

THE HON'BLE SRI JUSTICE A.V. SESA SAI

CIVIL REVISION PETITION No.4383 of 2015

ORDER:

Judgment debtor in E.P.No.180 of 2010 in O.S.No.35 of 2010 on the file of the Court of Prl. Senior Civil Judge, Ongole is the petitioner in the present revision filed under

Section 115 of the Code of Civil Procedure. This revision challenges the order, dated 16-09-2015 passed by the said Court rejecting the application filed by the petitioner vide E.A.C.F.R.No.8383 of 2015.

Heard Sri J. Seshagiri Rao, learned counsel for the petitioner, Sri V. Naga Praveen, learned counsel for the respondent No.2 and despite service of notice none appears for the 1st respondent.

The facts and circumstances leading to filing of the present revision are as infra:

First respondent herein instituted O.S.No.35 of 2010 for recovery of a sum of Rs.2,48,760/- along with interest against the petitioner herein on the foot of a promissory-note. On 27-07-2010, the said suit was decreed *ex-parte*. Subsequently, the decree holder/1st respondent herein filed E.P.No.180 of 2010 for recovery of the decretal amount by way of the sale of E.P. schedule property. The said E.P. was contested by the judgment debtor and the said E.P. was allowed on 08-08-2010, directing sale of the property.

Against the said order, the petitioner herein filed C.R.P.No.4420 of 2012 before this Court. By way of an order, dated 11-09-2012 this Court disposed of the said revision, granting four (4) months times to the judgment debtor/petitioner herein to discharge the decree debt in lump-sum while ordering postponement of the auction of the schedule property till then. As the petitioner did not comply with the said condition and failed to deposit the amount as directed by this Court the executing Court conducted auction on 02-04-2013, wherein the 2nd respondent herein emerged as the highest bidder. Subsequently, an application vide E.A.No.340 of 2015 was filed, praying for delivery of property in favour of the auction purchaser/2nd respondent herein

and on 22-06-2015 said application was ordered, directing delivery of property.

Pending E.A.No.340 of 2015, one Mr.G. Mallikarjun Rao filed E.A.No.554 of 2015 under Order 21 Rules 97, 98 and 101 of the Code of Civil Procedure, claiming a part of the E.P. schedule property to the extent of vacant land and the said E.A.No.554 of 2015 was allowed on 13-07-2015. Subsequently, for the remaining house property of the E.P. schedule property the Court below issued warrant and in view of the resistance of the judgment debtor it was returned un-executed. At that point of time the judgment debtor filed the present E.A.C.F.R.No.8383 of 2015 on 31-07-2015 under the provisions of Order 21 Rules 90 and 97 and Section 47 and Section 151 of Code of Civil Procedure, praying to revise the entire E.P. proceedings and to set aside the sale on the ground of alleged irregularity and fraud.

The learned Principal Senior Civil Judge, Ongole by virtue of the impugned order dated 16-09-2015 rejected the said application.

Calling in question the validity and the legal sustainability of the said order passed by the Court below the present revision has been filed under Section 115 of the Code of Civil Procedure.

It is contended by learned counsel for the petitioner that the order under challenge is erroneous, contrary to law and opposed to the very spirit and object of the provisions of Order 21 and Rules 90 and 97 of the Code of Civil Procedure. It is further submitted that the petitioner herein was not properly guided. It is further submitted by learned counsel that since the petitioner herein already deposited the entire sale amount, there is absolutely no justification on the part of the Court below in rejecting the present application without even numbering it. It is further submitted that had the contents of the affidavit filed in support of the petition been considered from proper perspective, the order impugned in the revision would not have emanated.

Per contra, it is argued by the learned counsel for the 2nd respondent/auction purchaser that there is no illegality nor there exists any infirmity in the impugned order and the present application is only an attempt to drag on the proceedings to the extent possible. It is further submitted by learned counsel that the application filed by the petitioner herein is not

maintainable in view of the provisions of Order 21 Rules 89, 90 and 92 of Code of Civil Procedure. It is also submitted that since the sale was already held and certificate was already issued in favour of the auction purchaser, the petitioner herein is not entitled for any interference under Section 151 of Code of Civil Procedure in absence of any perversity in the order.

In support of his submissions and contentions learned counsel for the 2nd respondent/auction purchaser places reliance on the judgment in case of ***Annapurna v. Mallikarjun and another.***

In the above backdrop, now the issues that emerge for consideration of this Court are:

1. *Whether the order under challenge is in accordance with law?*
2. *Whether the petitioner is entitled for any relief under Section 115 of the Code of Civil Procedure?*

The material available before this Court manifestly discloses that the decree, dated 27-07-2010 passed by the learned Principal Senior Civil Judge attained finality and the Executing Court allowed E.P.No.180 of 2010 on 08-08-2010, directing sale of property. Felt aggrieved by the said order passed by the Executing Court the judgment debtor carried the matter to this Court in C.R.P.No.4420 of 2012. A copy of the order passed by this Court in said C.R.P. is filed before this Court along with the revision as a material paper. It would be very much clear from a reading of the said order that this Court while disposing of the said revision granted four (4) months time to the petitioner to discharge the decree debt and postponed the auction till then. At paragraph No.4 of the said order this Court also categorically and clearly observed that the counter-affidavit filed by the petitioner did not disclose any tenable grounds to stall further proceedings in the E.P. Despite time of four (4) months granted by this Court, the judgment debtor/petitioner herein failed to pay the amount within the said time. He deposited the amount on

12-08-2013. It is also clear from the material on record that in view of the failure on the part of the petitioner herein to deposit the amount as directed by this Court the Court below proceeded with the auction on 02-04-2013 wherein

the 2nd respondent herein emerged as the highest bidder and the record further discloses that on 20-06-2014 the Court below confirmed the sale in favour of the 2nd respondent and issued the sale certificate also.

It is pointed out by the learned counsel for the 2nd respondent that the deposit made by the judgment debtor is of no consequence nor it has any significance for deciding the present issue as the said deposit was obviously made without being accompanied by any application.

In this context it may be appropriate to refer the provisions of Order 21 Rule 89 and 92 of the Code of Civil Procedure, which read as under:

“89. Application to set aside sale on deposit

*(1) Where immovable property has been sold in execution of a decree,
¹[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 deposition 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.

92. Sale when to become absolute or be set aside.

(1) When 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:

¹*[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 ²[sixty days] from the date of sale, ³[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.

⁴*[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.

⁵*[(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 directs, be revived at the stage at which the sale was ordered.]

While dealing with the above provisions of law the Hon'ble Apex Court in case 1st cited above at paragraph No.8 held as under:

"8. In view of the settled law on the issue as noted above, in this case it must be held that the High court committed grave error of law in not noticing the relevant provisions of CPC and the Limitation Act and in allowing the Writ Petition for re-consideration of the petition under Order XXI Rule 89, CPC. In absence of required deposit made by the judgment-debtor within the time mandated by law, such an exercise would be only an exercise in futility because the Executing Court does not have any option but to reject the petition. In such a situation, the judgment under appeal is set aside and the Appeal is allowed with a cost of Rs.10,000/- (Rupees Ten Thousand) payable by Respondent No.1 to the Appellant."

In the instant case also the petitioner herein did not make any endeavour to deposit the amount by making necessary application within the time stipulated

under the above provisions of law.

Having regard to the facts and circumstances of the case and in view of the law laid down by the Hon'ble Apex Court and keeping in view the above referred provisions of law this Court has absolutely no scintilla of hesitation nor any traces of doubt to hold that the petitioner herein has failed in making out any case, warranting any interference of this Court under Section 115 of Code of Civil Procedure.

For the aforesaid reasons, the Civil Revision Petition is dismissed. There shall be no order as to costs. The Miscellaneous Petitions, if any, pending in this Civil Revision Petition shall stand closed.

A.V. SESA SAI, J

January 29, 2016

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THE HON'BLE SRI JUSTICE A.V. SESA SAI

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January 29, 2016

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