HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

CIVIL MISCELLANEOUS APPEAL No.950 of 2017

JUDGMENT :

The appellant in the civil miscellaneous appeal is the defendant/judgment-debtor in O.S.No.1684 of 2004 on the file of the Principal Senior Civil Judge at L.B.Nagar of Ranga Reddy District. Undisputedly, against the decree and judgment of the trial Court in O.S.No.1684 of 2004, dated 12.03.2008, in the suit for recovery of money, the judgment-debtor filed appeal A.S.No.189 of 2009 on the file of this Court and there is interim stay of execution of the trial Court's decree as per orders in A.S.M.P.No.2565 of 2008, dated 27.11.2008, at the un-numbered stage of the appeal with delay condonation, subject to condition of depositing 50% of the decree amount within six weeks from the date of receipt of a copy of the order and on application in A.S.M.P.No.100 of 2009, dated 01.05.2009, there is further extension of two months for compliance and it is stated fully not complied with and the stay therefrom ceased its effect despite some amount paid i.e., on 17.09.2009 Rs.1,00,000/- to the credit of the suit and later Rs.1,00,000/- to the credit of the suit and again Rs.50,000/- to the credit of the suit on respective dates 07.07.2009, 03.09.2010 or so. The said Rs.1,00,000/- deposited was withdrawn by filing a petition in the pending appeal seeking permission with accrued interest Rs.1,07,855/- on 13.03.2013 and the remaining amount if at all deposited is lying to the credit of the suit before the trial Court. The withdrawal of the amount covered by the cheque petition appears, the cheque was issued not for Rs.1,07,855/-, but for Rs.1,07,344/-, if not to show otherwise from the lower Court record, there are two cheques covered by the two amounts withdrawn by the decree-holder for not the case of anybody in the course of hearing of present appeal. Leave it as it is, it is from the consequences of appeal, stay not fully complied with, the decree-holder in the said execution petition of the decree of the trial Court brought for sale of the property of the judgment-debtor for recovery of the amount and the sale was effected. It is seeking to set aside, the sale an application was filed under Order XXI Rule 89 C.P.C. No doubt, the Division Bench of the Apex Court in **Challamane Huchha Gowda v. M.R.Tirumala and another**[1] observed that from combined reading of Order XXI Rule 89 read with 92(2) C.P.C., the application for setting aside the sale concerned, the Rule does not provide filing of application in a particular form and thus even a memo with a prayer for setting aside the sale is sufficient for compliance with the Rule and even wrong mention or non-mention of a provision not even a ground for rejection of such application of the judgment-debtor. It is further observed that the so-called object of the rule is to provide a last opportunity to the judgment-debtor to put an end to the dispute before the sale is confirmed by the Court and also to save his property from his dispossession. Once the two conditions contemplated by Rule 92 sub rule 2 of Order XXI C.P.C. on an application made, there will be

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[1] (2004) 1 SCC 453

compliance with the Court's order or decree that is sought to be executed. It is on satisfaction of the compliance with the conditions provided under Rule 89, it is mandatory upon the Court to set aside the sale under Rule 92 after giving notice under Rule 92(2) to all affected persons. In fact, in filing the application in E.A.No.91 of 2015 to set aside the sale effected on 06.04.2015 in the said E.P. proceedings, the averments of the judgment-debtor for the said prayer in respect of it is in the pending appeal impugning the trial Court's judgment in the course of conditional stay in operation Rs.1,00,000/- deposited on 17.09.2009 and from extension of time another Rs.1,00,000/- and Rs.50,000/- respectively on 07.07.2009 and 03.09.2010 deposited and decree-holder withdrewing the said amount by filing petition on 07.07.2011 and the said amount deposited in the Court comes to Rs.3,05,000/- in total including another Rs.55,000/- deposited by the judgment-debtor and these facts could not be brought to the notice of the Court due to lack of knowledge and legal proceedings, however the property was sold by the Executing Court in the auction on 06.04.2015 for Rs.43,50,000/- and he deposited Rs.6,12,528/- by bankers cheque besides 5% purchase amount of Rs.2,17,500/- by bankers cheque and thereby the sale is to be set aside.

2. The contention of the decree-holder in opposing the petition is that the petitioner as an appellant did not avail the opportunity of interim stay granted pending appeal and he deposited only

Rs.1,00,000/- on 17.09.2009, Rs.50,000/- on 03.09.2010 and thereby the stay is not in force for non-compliance fully and later in proceeding with the execution by the Executing Court ordered for proclamation after attachment of the property for sale, fixing the date on 31.10.2014 and later on 17.11.2014.

3. The contention of the auction purchaser in opposing the petition is that the sale conducted on 06.04.2015 and he became highest bidder for the said amount of Rs.43,50,000/- and the judgment-debtor did not deposit any amount and he is a bonafide auction purchaser and at the time of entire amount within the prescribed time and at the time of confirmation of sale the judgment-debtor filed a petition alleging that he deposited the amount, which is not at all correct, as he failed to deposit amount in time, he cannot take the plea he was misguided by the advocate, apart from ignoring of law is not excusable. It is from that by the impugned order of the trial Court, dated 21.01.2016, the E.A.No.91 of 2015 was dismissed with the observations particularly from para 10 onwards that out of the deposited amount, judgment-debtor deposited Rs.1,07,000/- and the same was withdrawn by decree-holder by cheque petition and even 50% of the decretal amount comes to Rs.3,05,000/-, pursuant to the stay of this Court and balance did not deposited and Rs.1,00,000/- kept in ICICI Bank, Dilsukhanagar Branch, that was not encashed even as per the evidence of PW.2 and even from the docket proceedings of E.P.No.145 of 2008, dated 03.09.2012, a memo filed of Rs.50,000/- deposited by

bankers cheque, but no cheque was placed in the Court's account section and except that no such mention about deposit of remaining Rs.2,05,000/- out of 50% of the decretal amount. With reference to the evidence of petitioner/judgment-debtor as PW.1 and Exs.P.1 to P.7 to the Assistant Manager of SBI, Gaddiannaram Branch, was examined and Ex.P.3-letter summoned the Deputy Manager, ICICI Bank, Dilsukhnagar Branch, proved the deposit of amount. PW.2 deposed that by way of bankers cheque, petitioner deposited Rs.1,00,000/- on 07.07.2009 and the same is available with ICICI Bank and so far as the amount deposited with SBI, Gaddiannaram Branch, it was received by the decree-holder and the amount lying with ICICI Bank, Dilsukhnagar Branch, is not cleared and on the verification of suit record and E.P. record with reference to cheque register and accounts register, there is no such mention about placing of original cheque before the Court and if such version of the judgment-debtor true, he should have been submitted compliance report before the High Court without seeking further extension 17.07.2009 and that extension petition dismissed thereby later there is no extension of staying of execution. The petitioner deposited Rs.6,12,528/- and 5% of sale amount Rs.2,17,500/- as can be seen from the record of E.P.No.145 of 2008 and the E.P. amount itself shown of Rs.6,12,528/- as on the date of proclamation, total due amount under decree is Rs.8,45,288/- and even what the amount decree-holder withdrawn of Rs.1,07,000/- considered, total amount to satisfy the sale not deposited for, still there is a balance payable to satisfy the decree of Rs.1,25,516/-. Thus, mere deposit of part of decretal amount is not sufficient to comply with the mandatory requirement of Order XXI Rule 89 C.P.C., same is now impugned.

4. The contentions in the grounds of appeal are that the trial Court has not properly adverted to the facts born by record and the order is out come of misleading of the facts and material besides deposit of Rs.6,12,528/- and 5% of sale Rs.2,17,500/- of the amount other than that even considering what is shown of Rs.8,45,288/- as per the decree due, there is still, as per the evidence of PW.3, Rs.55,000/- available with ICICI Bank in suit account and thereby the full decree amount due was deposited and the sale should have been set aside and the dismissal of the application is unsustainable.

5. Whereas, it is the contention of the learned counsel for the decree-holder and auction purchaser respectively are that the impugned order of the lower Court no way requires interference, it is with reference to the record supported by reasons and thereby the appeal is liable to be dismissed.

6. Heard both sides and perused the material on record.

7. Among Exs.P.1 to P.7 and Ex.X.1 with reference to evidence of PWs.1 to 3 recorded by the trial Court before passing the impugned order, dated 21.01.2016, shows that Rs.1,00,000/- amount was deposited by three bankers cheques of Rs.34,000/-, Rs.33,000/- and Rs.33,000/-, all on 17.01.2009, and besides the said Rs.1,00,000/- of

SBH, L.B.Nagar, there is another amount of Rs.1,00,000/- bankers cheque, dated 07.07.2009, issued by ICICI Bank Limited to pay to the Principal Senior Civil Judge, Ranga Reddy District at L.B.Nagar, to the credit of O.S.No.1684 of 2004. Thus, by 07.07.2009 Rs.1,00,000/- (three bankers cheque of Rs.1,00,000/-), another bankers cheque of Rs.1,00,000/- to the credit of the suit obtained and but for the first Rs.1,00,000/- covered by three bankers cheques, the second one drawn on ICICI Bank was it appears not adjusted to the amounts of the civil suit from the order of the lower Court. Further, the Assistant Manager of SBI, Gaddiannaram Branch, (PW.3) recorded about the bankers cheque No.345725, dated 03.09.2010, for Rs.50,000/- in favour of Principal Senior Civil Judge, L.B.Nagar, to the credit of O.S.No.1684 of 2004 and it was shown cleared from the confirmation letter of the SBI, Gaddiannaram, dated 17.04.2015, of the same was cleared on 17.09.2010. It is to show there from, the deposited amount of Rs.2,50,000/-, but for if at all the banker cheque of ICICI Bank of Rs.1,00,000/- not adjusted to the Civil Court deposits. If that is taken into consideration of said Rs.2,50,000/-, out of which Rs.1,07,000/- representing Rs.1,00,000/- deposit adjusted to civil Courts was withdrawn admittedly and there is for the amount due even from the lower Court order of Rs.8,45,288/-, there is nothing to show the said Rs.1,07,000/- part satisfaction is recorded in the execution petition and after that still that amount is due and after adjustment only the remaining amount due and once such is the case, there is further amount of Rs.1,00,000/- and Rs.50,000/- and what the lower Court observed at para 15 of the order is by considering only Rs.1,00,000/- encashed of Rs.1,07,000/- mentioned of still balance of Rs.1,25,516/-, however Rs.50,000/- adjusted to the banker as per the SBI, Gaddiannaram branch, letter of the said adjustment to the credit of the suit on 03.09.2010 and Rs.1,00,000/- of ICICI Bank that reflects entire amount deposited as on the date of brining the property to sale. Once such is the case, the conclusion arrived by the lower Court of total amount not deposited and still there is a balance of Rs.1,25,516/- in dismissing the application to set aside the said is unsustainable. Thereby, the impugned order of the lower Court is liable to be set aside.

8. Accordingly and in the result, the civil revision petition is allowed by setting aside the impugned order of the lower Court, and by virtue of this order the lower Court shall hear afresh and pass orders with reference to the above, if necessary by permitting to adduce further evidence of both parties in deciding the same.

Miscellaneous petitions pending, if any, shall stand dismissed. No order as to costs.

Dr. B. SIVA SANKARA RAO, J

17th November 2017.

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