

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 4984 of 2016

ORDER:

1) Assailing the docket order, dated 28.06.2016, wherein an application filed by the petitioner under Order XXI Rule 89 of C.P.C. seeking to set aside the sale of E.P. Schedule property, dated 20.06.2016 and permit the petitioner to deposit the decretal amount and costs to the decree holder was returned for deposit of E.P. amount, poundage and 5% of the sale proceeds, the present Civil Revision Petition is filed under Article 227 of the Constitution of India.

2) For the sake of convenience the parties hereinafter be referred to as arrayed in E.P.

3) The facts in issue are as under:

The decree holder filed O.S.No.417 of 2011 for recovery of an amount of Rs.2,08,000/- with interest basing on the promissory note. After contest the suit was decreed vide its judgment and decree dated 14.06.2012. The said judgment and decree has become final as no appeal was preferred against the said judgment. On 16.07.2012 the decree holder filed O.E.P.No.113 of 2012 on the file of the Principal Senior Civil Judge, Tirupati for realization of the decretal amount, under Order XXI Rule 54 of C.P.C., seeking attachment of the E.P. schedule properties and then to issue sale notice to the Judgment Debtor under Order XXI

Rule 64 of C.P.C. After service of notice, the judgment debtor entered his appearance and filed counter. After conducting an enquiry, the Executing Court passed an order of attachment. Accordingly, the E.P. schedule properties were attached which attained finality since no revision or appeal has been filed. Thereafter, on 08.07.2013 the Executing Court issued sale notice. After receipt of the same, the wife and son of the judgment debtor filed E.A.No.237 of 2013. In the said E.A. the judgment debtor remained exparte and ultimately it was dismissed for non-prosecution. As per the procedure envisaged, the sale of E.P. schedule property came to be published in local news paper and consequently publication was effected to 05.02.2015. It is to be noted that after dismissal of E.A.No.237 of 2013, for non-prosecution, the judgment debtor through his son got filed E.A.No.35 of 2015 under Order XXI Rule 58 of C.P.C. Having regard to the above, the E.P. was kept aside and subsequently it was adjourned, in view of the pendency of the said E.A. However, after contest the said E.A.No.35 of 2015 came to be dismissed on merits by its judgment and decree dated 11.03.2016 and accordingly the E.P. was posted to 11.04.2016 for settlement of terms. As the decree holder filed proclamation and sale batta in time, the same was published intimating the public at large about the properties being put to auction on 06.06.2016. On 06.06.2016, the decree holder filed Sub-Registrar Valuation Report, wherein the property was valued at Rs.37.00 lakhs. However, the matter was adjourned on the ground that the value

of E.P.schedule property is morethan Rs.40.00 lakhs. Subsequently on 20.06.2016 the Executing Court took into consideration the documents filed and conducted the sale in which the second respondent herein, who is the highest bidder purchased the E.P. schedule property for a sum of Rs.40,30,000/ -. As per the procedure, the auction purchaser deposited ¼ of the sale amount on 20.06.2016 itself and the E.P. was then posted to 04.07.2016. On the said date the auction purchaser deposited the balance sale consideration and thereafter, the E.P. was posted to 06.09.2016 for confirmation of sale.

4) The counter filed by the decree holder show that on 07.09.2016 the judgment debtor and son-in-law of auction purchaser were present and at their instance the executing Court granted 20 days time for settlement and posted the E.P. to 26.09.2016. On that day sale was confirmed and sale certificate came to be issued. In the meanwhile, the judgment debtor filed an application under Order XXI Rule 89 of C.P.C. to set-aside the sale. The said application was returned on 28.06.2016 directing the judgment debtor to deposit E.P. amount, poundage and 5%of the sale proceeds. Seven days time was granted to him to comply with the same. Challenging the same, the present revision came to be filed.

5) Relying upon the judgment of this Court in *Kamireddy Sumathi and another v. C.Mallikarjuna Reddy and others*¹

¹ (2016) 3 ALD 311

learned counsel for the petitioner would contend that the order of the Executing Court in conducting auction for the property valued at Rs.40.00 lakhs for recovery of an amount of Rs.2,35,000/- is illegal and improper. He submits that the petitioner is ready and willing to pay the entire decretal amount if an opportunity is given to him. The same is opposed by the learned counsel appearing for the decree holder as well as the auction purchaser. According to them, this Revision under Article 227 of the Constitution of India itself is not maintainable for the reason that the deposit of E.P. amount is a condition precedent for entertaining an application under Order XXI Rule 89 of C.P.C. It is further urged that even if it is to be treated as an order under Order XXI Rule 89 of C.P.C. only an appeal would lie and not a revision before this Court. In any event it is urged that since the sale is confirmed, the question of giving opportunity to the petitioner to deposit the E.P. amount now would not arise. It is further urged that the judgment of this Court relied upon by the learned counsel for the petitioner would not apply to the case on hand.

6) In order to appreciate rival contentions it would be useful to refer to Order XXI Rule 89 of C.P.C. which reads as under:

“Order XXI Rule 89 of C.P.C.: 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 percent 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 relive the judgment debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale.

7) A reading of Order XXI Rule 89 of C.P.C. makes it clear that the deposit required under Rule 89 (1) (a) and (b) has to be made by the applicant within 60 days from the date of sale. In *Harijana Mukeeranna v. B.Thimmothi and others*² a learned Single Judge of this Court held as under:

“In case the claimant was not able to deposit the total amount as per Rule 89(1) (a) (b), there is no provision or power for the executing Court to extend time for deposit of the said amount which was not deposited by the applicant for reasons other than clerical or arithmetical mistake. This Court is of the opinion that order of the executing Court extending time to the 1st respondent-claimant for deposit of major part of the amount to be

² (2013) 5 ALT 179

deposited as per Rule 89 (1) (a) (b) upto 15-06-2009 is without jurisdiction and erroneous.”

8) In *Patnam Subbalakshamma v. Sunkugari Sreenivasa Reddy and another*³ a learned Single Judge of this Court held that “whenever the property of a judgment debtor, in suit for money decree was brought to sale, he has a right under Rule 89 of Order XXI of C.P.C. to seek annulment of the sale, by making deposit of the decretal amount mentioned in the sale proclamation and a sum equal to 5% of the purchase money, payable to the auction purchaser.

9) In view of the judgments referred to above, it is clear that the petitioner/judgment debtor shall make an application for setting aside the sale within a period of 60 days and deposit the amount as contemplated under the said provision. It is well established principles of law that to entertain an application under Order XXI Rule 89 of C.P.C. deposit of amount is a condition precedent. In the instant case, the petitioner though made an application under Order XXII Rule 89 of C.P.C. within time, from the date of sale but failed to deposit any amount. Since the petitioner failed to pay any amount along with the application, the Court returned the said application. Therefore, the Court below rightly returned the application as no amount was deposited along with the application. Infact, the Court gave reasonable time to the petitioner to comply with the conditions. Without doing so, the present revision is filed.

³ (2011) 3 ALT 591

10) The judgment of this Court in *Kamireddy Sumathi and another v. C.Mallikarjuna Reddy and others* (1 *supra*) relied upon by the learned counsel for the petitioner would not apply to the case on hand. In the said case, this Court has categorically held that without depositing the amount an application under Order XXI Rule 89 of C.P.C. cannot be maintainable. However, it was a case where an application seeking permission of the Court to deposit the amount was made, *de hors* the provisions of Order XXI Rule 89 or 92 of C.P.C. The Court held that in such application, the petitioners can raise the invalidity of sale and it is the duty of the Court to examine the issue under Order XXI Rule 64 of C.P.C. The case on hand stands on different footing. As observed earlier the present revision came to be filed directly against the return endorsement made by the trial Court, directing the petitioner to comply with the objection. In view of the above, I see no illegality or irregularity in the order passed by this Court under the said Count.

11) The second ground urged by the learned counsel for the respondent is that even if it is to be treated as an order under Order XXI Rule 89 of C.P.C. only an appeal would lie and not a revision. This issue is no more *res integra* in view of the judgments of this Court in *Sheikh Masthan v. Gubba Atchayya and others*⁴, in *Vummenthala Somamma v. Thameeru Balanagamma*⁵ and in *N.Devamma v. M.Akkamma and others*⁶.

⁴ AIR 1959 AP 667

⁵ AIR 2003 AP 45

⁶ 2005 (4) ALT 73

12) For the aforesaid reasons, there are no merits in the revision and the same is liable to be dismissed. However, the petitioner is at liberty to avail the remedies, if any, available under law.

13) Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs. Miscellaneous petitions, if any, pending shall stand closed.

JUSTICE C. PRAVEEN KUMAR

07.02.2017
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