

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

C.R.P.No.3833 of 2012

ORDER:

The petitioner herein is the judgment debtor in E.P.No.259 of 2001 on the file of the Court of II Additional Senior Civil Judge, Kakinada, East Godavari district.

2. This revision filed under Section 115 of Code of Civil Procedure challenges the order dated 11.6.2012 passed by the said Court in E.A.No.207 of 2012 in E.P.No.259 of 2001 in O.S.No.225 of 1999.

3. One Guthula Sanyasi Rao instituted O.S.No.225 of 1999 for recovery of amount on the foot of a mortgage. The said suit was decreed on 13.2.2001. Thereafter, the decree holder filed E.P.No.259 of 2001 for realisation of the amount by way of sale of the mortgaged property. Pursuant to a paper publication made on 22.2.2003, auction was held on 25.8.2005 and in the said auction, with the leave of the Court under the provisions of Order XXI Rule 72 of CPC, participated in the said auction and emerged as a successful bidder. The said E.P.No.259 of 2001 stood for confirmation of sale on 24.1.2006. Meanwhile, on 8.1.2006, the decree holder died and the 2nd respondent herein filed E.A.No.62 of 2008, requesting the Court below to recognise him as legal representative of decree holder on the basis of a will said to have been executed by the decree holder. Pending E.A.No.62 of 2008, the petitioner herein filed E.A.No.440 of 2008 under the provisions of Order XXI Rule 90 of CPC, praying the Court below to set aside the sale. Thereafter, the petitioner herein also filed E.A (SR) No.1052 of 2012 on 5.3.2012 under the provisions of Order XXI Rule 90 of CPC. Subsequently, petitioner filed E.A.No.207 of 2012 on 26.3.2012, praying the Court below to

permit her to withdraw E.A.No.440 of 2008, so as to proceed her to prosecute E.A. (SR) No.1052 of 2012 dated 5.3.2012. The said application was resisted and the learned Senior Civil Judge passed an order on 11.6.2012, dismissing the said application. This revision assails the validity and legal sustainability of the said order.

4. Heard the learned counsel for the petitioner and the learned counsel for Respondents and perused the material available on record.

5. It is contended by the learned counsel for the petitioner that the order passed by the Court below is erroneous and contrary to law and is opposed to the very spirit and object of Order 23 Rule 1(2) of CPC. It is the further submission of the learned counsel that the Court below did not properly consider the contents of the application and had the contents of the affidavit taken into consideration from proper perspective, the order impugned would not have emanated. It is also the submission of the learned counsel that as the petitioner herein could not put-forth all the contentions in E.A.No.440 of 2008, the present application was filed. Learned counsel further submitted that the Court below ought to have allowed the application for giving a quietus to the entire litigation. It is further submitted by the learned counsel that the first application i.e. E.A.No.440 of 2008 was not filed in a proper form and was filed only by one Judgement Debtor, as such, the office of the Court below should have returned the same; that at the instance of the decree holder, the sale was adjourned for more than 2½ years on applications filed by the decree holder; that the comprehensive application was filed pleading fraud in E.A (SR) No.1052 of 2012 under Section 47 and Order 21 Rule 90 read with Section 151 of Code of Civil Procedure and in the event of same being allowed, the same would date back to the date of filing

of E.A.No.440 of 2008; that the petitioner filed Memo vide S.R.No.1881 of 2012 dated 25.4.2012, enclosing copies of the judgments in Pillakathuku Subbarathnam and Anr. vs. Executive Officer, Polathala Malleswaraswamy Temple and Ors.¹, Madappa vs. Lingappa and Anr.² and Kasarapu Sujatha and Anr. vs. Veera Velli Veera Somaiah³, but the Court below did not consider the same. It is further contended that the petitioner herein filed E.A.No.402 of 2012 in E.A.No.440 of 2008 to permit to deposit the sale amount with poundage and on 1.7.2012, the same was allowed and the petitioner deposited the same and the same would show the bonafides of the petitioner and that no prejudice would be caused to the Respondents in the event of present application being allowed.

6. On the contrary, it is contended by the learned counsel for Respondents that there is absolutely no illegality nor there exists any infirmity in the impugned order and in the absence of the same, the order impugned is not amenable for any correction by this Court under Section 115 of CPC. It is the further submission of the learned counsel that the Court below rightly rejected the application by assigning cogent and valid grounds. It is further contended that the present Execution Application is not maintainable under Order 23 Rule 1 of CPC in view of bar under Order 23 Rule 4 of CPC. It is further submitted that the sale was held on 25.8.2005 and the application to set aside the said sale had to be filed within a period of (60) days from the said date and the application is also barred under the provisions of Section 127 of Limitation Act. It is further submitted that E.A (SR) No.1052 of 2012 would not date back to the date of filing of E.A.No.440 of 2008 and there is no such provision for the said stand.

¹ 2005(4) ALT 423

² AIR 1987 Kar 60

³ 2008(3) ALD 525

7. In the above background, now the issue that emerges for consideration of this Court is whether the impugned order passed by the Court below is sustainable and tenable or whether the same warrants any interference by this Court under Section 115 of CPC?

8. The first and foremost contention which needs to be considered in the present revision is whether E.A.No.207 of 2012 filed by the petitioner under the provisions of Order 23 Rule 1 of CPC is maintainable. In order to resolve the said controversy, it would be appropriate to refer to the provisions of Order 23 Rules 1 to 4 of CPC, which reads as under:

“Order XXIII Rule 1 - Withdrawal of suit or abandonment of part of claim

1[1. Withdrawal of suit or abandonment of part of claim

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,--

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or pan of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff--

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.]

2. Limitation law not affected by first suit

In any fresh suit instituted on permission granted under the last preceding rule, the plaintiff shall be bound by the law of limitation in the same manner as if the first suit had not been instituted.

3. Compromise of suit

Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise 1[in writing and signed by the parties], or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith 2[so far as it relates to the parties to the suit, whether or not the subject-matter of the agreement, compromise or satisfaction is the same as the subject-matter of the suit]:

1[Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall

decide the question; but no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.]

1[Explanation.--An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule.]

4. Proceedings in execution of decrees not affected

Nothing in this Order shall apply to any proceedings in execution of a decree or order.”

It is very much evident from a reading of Rule 4 of Order 23 that the application of the present nature is expressly barred in execution proceedings. Therefore, on the said ground alone, the present application is liable to be rejected.

9. Another aspect which needs mention in this context is that as per provisions of Order 21 Rule 90 of Section 127 of the Limitation Act, the period of limitation of filing an application to set aside the sale is (60) days. Admittedly, the present application is sought to be pressed into service beyond the said period of limitation. No provision of law could be brought to the notice of this court according to which the event of application being allowed, the application would date back to the date of filing of earlier application. On this ground also, the present application, in the considered opinion of this court, cannot be maintained.

10. According to the learned counsel for the petitioner, though the petitioner filed copy of the judgments-, on which he wanted to place reliance vide Memo (SR) No.1818 of 2012 dated 2.4.2012, the same was not considered by the Court below. After going through the above said

judgments, this Court is of the opinion that the principles laid down therein would not also come to the rescue of the petitioner herein. According to the learned counsel for the petitioner, since the petitioner herein filed the present application under the provisions of Section 47 also, the application would fall within the period of limitation Act. Admittedly, in the present case, the sale was conducted by the Court below on 25.8.2005 and the petitioner herein filed E.A (SR) No.1052 of 2012 only in the year 2012, therefore, even as per Section 137, the application needs to be filed within a period of three years, which the petitioner failed to do. On this ground also, petitioner herein is not entitled for any indulgence of this Court.

11. In the affidavit filed in support of present E.A.No.207 of 2012, the petitioner herein stated that she is an illiterate woman having acquaintance to signature only and suffering from old age ailments and has no male support. In the said affidavit, it is also averred that her previous Advocate left the bundle to her citing reasons to which she has no comprehension and with the aid of people in the vicinity of schedule property, she has engaged the present counsel and that the previous application filed through earlier counsel did not meet or represent her case in terms of law.

12. A perusal of the order under challenge shows that while dealing with the reasons assigned by the petitioner, Court below categorically recorded a finding that the said reasons assigned would not provide a valid ground for withdrawal of E.A.No.440 of 2008. The learned Senior Civil Judge also took note of the fact that E.A.No.440 of 2008 was filed four years back and the evidence on behalf of petitioner already came to end. Eventually, after elaborately considering various aspects and while assigning valid reasons, the Court below dismissed the said application. This Court also does not find any

patent error in the said order, warranting interference of this Court under Section 115 of CPC. Further, this Court finds no merit in the revision.

13. Accordingly, the Civil Revision Petition is dismissed. However, this order will not preclude the petitioner herein from urging legal pleas at the time of hearing of E.A.No.440 of 2008. As a sequel, the miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

A.V.SESHA SAI, J

Date: 8.12.2017
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THE HON'BLE SRI JUSTICE A.V.SESHA SAI



8.12.2017

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