

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.5241 of 2016

ORDER:

This DHrs' revision, under Section 115 of the Code of Civil Procedure, 1908, ('the Code', for short), is directed against the order and decretal order, dated 22.09.2016, of the learned IX Additional District Judge, Wanaparthy, passed in CMA.no.7 of 2015 whereby the learned Additional District Judge while allowing the appeal had set aside the order, dated 19.01.2015, of the learned Senior Civil Judge, Nagarkurnool, passed in EA.no.46 of 2005 in EP.no.21 of 1999 filed by the JDr, under Order XXI Rule 90 of the Code, requesting to set aside the auction sale of the EP schedule land, held by the executing Court, on 29.03.2001, in the said EP.

2. I have heard the submissions of Sri M. Damodar Reddy, learned counsel appearing for the revision petitioners and of Sri V. Hanumantha Rao, learned counsel appearing for the respondent. I have perused the material record.

3. The parties in this revision shall hereinafter be referred to as the Decree Holders (DHrs) and the Judgment Debtor (JDr) as arraigned in the proceedings before the executing Court.

4. The facts, which are necessary to be stated as a prelude to this order, in brief, are as follows:

The sole decree holder (since died), who is the husband of the 1st revision petitioner obtained a preliminary decree against the JDr in OS.no.31 of 1997, which is a suit for recovery of money on the foot of a registered mortgage deed, dated 01.01.1996. Later the DHrs filed the afore-said EP for sale of the mortgaged property/ decree schedule property and eventually, with the permission of the executing Court, the DHrs purchased the EP schedule property in the Court auction held on 29.03.2001. A certificate of sale was also

issued to the JDr on 28.06.2001. While so, the JDr filed the subject execution application under Order XXI Rule 90 of the Code, in April, 2005, requesting to set aside the sale mainly urging two grounds, namely, (1) the sale is vitiated for irregularities in the conduct of sale; and (2) the sale is void as the property mortgaged and sold in Court auction is an assigned land and is not alienable or transferable in view of the provisions of Act 9 of 1977, that is, A.P. Assigned Lands (Prohibition & Transfers) Act, 1977. The DHrs resisted the said application. The executing Court dismissed the said petition. However, the Court below allowed the CMA and consequently set aside the sale by the order impugned in this revision. Therefore, the DHrs are before this Court.

5. Learned counsel for the DHrs would submit as follows:

The auction sale was held on 29.03.2001. The said sale has become final and a sale certificate was also issued to the DHrs/ auction purchasers. Long after such sale, the JDr filed Execution Application under Order XXI Rule 90 of the Code for setting aside the sale. The period of limitation for filing such an application under Article 127 of the Indian Limitation Act is 60 days. The Execution Application filed by the JDr admittedly after the said period of 60 days is hopelessly barred by law of limitation. For applications like the one filed by the JDr for setting aside the sale, the provision of Section 5 of the Limitation Act does not apply as per settled legal position. Therefore, the Court below ought not to have allowed the appeal and ought not to have set aside the Court auction sale without considering the fact that the application of the JDr is barred by law of limitation. The Court below ought to have seen that it has no power or jurisdiction to grant a relief in a proceeding, which is barred by law of limitation. Further, the JDr contended that the property mortgaged and sold in Court auction is an assigned land and that it was assigned in the year 1971 and hence, the court auction sale is void and is liable to be set aside. However, the JDr filed only copies of pahanies and a

certificate issued by the MRO, which is having no probative value. The patta, if any, is not filed to show that the subject property is an assigned property. Further, Order XXI Rule 90 of the Code would apply if only there is an irregularity or fraud in conducting the sale. The JDr, at no point of time, till the property was sold raised any objection for the sale of the property on any ground and allowed the property to be sold and later raised a belated plea that the property is assigned land and cannot be sold in a court auction sale. Since the application is filed by the JDr and not a third party and as there is no irregularity or fraud alleged and established and as the property was sold for recovery of the amount due under a decree granted in mortgage suit and as no substantial injury is caused to the JDr by reason of the Court auction sale, the court below ought not to have set aside the sale on the mere assertions that the property is an assigned land without any proof in respect thereof.

6. Per contra, learned counsel for the JDr having supported the orders of the Court below contended as follows: "The subject property is an assigned property. It was assigned to the JDr in the year 1971. The JDr produced not only copies of pahanies but also the certificate issued by the Tahasildar, as he was not in a position to produce the original patta. Since the property is an assigned land and as it cannot be sold even in a court auction sale as per the settled law, the said fact itself makes it manifest that there is irregularity in court sale and that, therefore, the sale is liable to be set aside. Hence, the order of the Court below is justified in the facts and circumstances of the case. The plea based on the law of limitation was raised for the first time before this court. When the sale itself is *ab initio* void and when no title passed by virtue of the court sale to the purchaser, the court below rightly held that the matter goes to the root of the matter and hence, the application of the JDr is entertainable and rightly entertained the petition and set aside the sale. There is no merit in the revision and the revision is liable to be dismissed."

7. I have bestowed my attention to the facts and submissions.

8. As rightly stated by the learned counsel for both the sides, the plea of bar of limitation was not raised before the Court below particularly the lower appellate court, which allowed the appeal and the application of the JDr. However, the learned counsel for the DHrs would submit that in view of the provision of section 3 of the Indian Limitation Act, 1963, the Court below is required to consider the plea of bar of limitation although limitation has not been set up as a defence. Further, it is brought to the notice of the Court by the learned counsel for the JDr that though the JDr who was earlier not in a position to produce the patta is now in a position to produce the original patta, having now traced it out. He would also submit that the same shows that the property mortgaged and sold in Court auction sale is an assigned land.

9. In view of the fact that the crucial document, which is the patta, which according to the JDr reflects that the subject property which is sold in Court auction sale is an assigned land is not produced and marked in the proceedings and as the plea of limitation, which is a mixed question of fact and law, is raised for the first time before this Court and the issue as to whether the sale of assigned land can be raised even beyond the period of limitation has also to be considered by the court below, this court is of the considered view that the matter requires consideration afresh by the court below and hence, the matter requires to be remitted to the court below after setting aside the order impugned in this revision.

10. Resultantly, the Civil Revision Petition is allowed and the order, dated 22.09.2016, of the learned IX Additional District Judge, Wanaparthi, passed in CMA.no.7 of 2015 is hereby set aside and the said CMA is remitted to the said Court for fresh disposal in accordance with the procedure established by law. The parties are at liberty to raise before the Court below all the contentions,

which the law permits. It is made clear that the JDr is at liberty to file the original patta, if he so chooses to do, by making an appropriate application before the court below for receiving additional evidence for consideration in the appeal. It is needless to state that the Court below before deciding the matter afresh on merits shall give an opportunity to both the sides to adduce further evidence, if the parties choose so to do.

Miscellaneous petitions pending, if any, in this civil revision petition shall stand closed. There shall be no order as to costs.

27.02.2017
Vjl



M. SEETHARAMA MURTI, J