HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

CIVIL MISCELLANEOUS APPEAL No.1067 of 2017

JUDGMENT:

The revision petitioner is judgment-debtor No.4. Respondent No.4 herein is plaintiff, who filed O.S.No.766 of 2011 and the said suit was decreed in his favour. Thereafter, the plaintiff filed E.P.No.68 of 2012 for sale of the petition schedule property for realisation of the decree debt and the property was sold on 18.01.2016 in the public auction. Questioning the said public auction, dated 18.01.2016, judgment-debtor No.4 filed E.A.No.189 of 2016 under Order XXI Rule 90 C.P.C. to set aside the sale of the E.P. schedule property on the grounds of irregularity in conducting the sale and as the said petition was dismissed, the present revision is filed impugning the same.

2. It is the contention of the learned counsel for the petitioner that the lower Court gravely erred in dismissing the petition and failed to consider the principles of law that while conducting auction sale in execution of a decree, the Court is under a duty to follow the mandatory requirements contained under Order XXI Rules 64 and 66 CPC. It is also the contention that the petition schedule property in question is grossly under valued in the sale proclamation and it is an RCC building of recent construction with plinth area of above 2000 sq. feet in 260 sq.yards site situated in a commercial locality of in and around school and hospital and the value of the property is more than

Rs.30,00,000/-. As there was no proper and sufficient description of property sold and house number is also not mentioned and the boundaries mentioned are also incorrect, the bidders have no idea of the actual property advertised for sale and the bidders are relatives of the decree-holder. There was no proper publication or proclamation of sale by beat of tom tom and the publication made in Praja Shakthi Newspaper has no wide circulation and the sale took place in a concealed and secret manner without due publicity. It is further contended that the lower Court should have considered only six members have participated, who are close relatives to the decree-holder. It is also the contention that the executing Court cannot sell more than such extent of property which is enough to satisfy the decree. The lower Court also went wrong in dismissing the petition on the ground that the earlier petition filed by the petitioners under Order XXI Rule 58 CPC was dismissed for default. The expression in **Malempati Harinarayana Vs. Vankayalapati Subba Rao**[1] was not even considered by the lower Court and sought for setting aside the sale set aside petition dismissal order of the lower Court and to allow the appeal as prayed for by setting aside the sale.

3. Whereas it is the contention of the learned counsel for the decree-holder that order of the lower Court holds good and for this Court while sitting against the appeal, there is nothing to interfere and sought for dismissal.

---

[1] 2013 (2) ALT 520

4. Heard and perused the material on record.

5. The claim of the petitioner is that there are irregularities in conducting the sale of the petition schedule property. In fact, Order XXI Rule 64 CPC mandates as a duty of the Court that only such portion of the property that would satisfy the decree alone to be sold and not the entire property. The wording is the following "Any court executing a decree may order that any property attached by it and liable to sale, or such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient portion thereof, shall be paid to the party entitled to the decree to receive the same."

6. The Apex Court in **Takkaseela Pedda Subba Reddi Vs. Pujari Padmavathamma**[2] categorically held that the party can apply for non compliance of the mandatory provision of Order XXI Rule 64 CPC by the Court, in seeking to set aside the sale. There the D.Hr. was the auction purchaser. It was observed that it is manifest where amount specified in proclamation of sale for recovery of which the sale was ordered is realized by sale of certain items, further items to be stopped. Non compliance with the provision went to the very root of the jurisdiction of the executing Court and was sufficient to vitiate the sale. Even absence of objection by the Judgment Debtor before executing Court is not a ground as the very executing court derives jurisdiction to sell the properties attached, only to the point at which

[2] AIR 1977 SC 1789

the decree is fully satisfied and thereby non-compliance of the procedure by the executing Court, which is duty bound is suffice to set aside the very sale. The words necessary to satisfy the decree used in Rule 64 clearly indicate that, no sale can be allowed beyond the decretal amount mentioned in the sale proclamation. Thus, non-compliance with the mandatory provision is sufficient to vitiate the sale.

7. The other expression in this regard reiterated the same of the Apex Court is **Ambati Narasayya Vs. M.Subba Rao**[3], where it is held that the Court has to first decide whether it is necessary to bring the entire property to sale or such portion thereof as may be necessary to satisfy the decree. If the property is allowed to sale for decree to be satisfied is a small, the Court should allow only such portion of the property attached to be sold which would be sufficient to satisfy the claim of the decree holder. It is immaterial where the property is one and indivisible. Even if the property is one and indivisible, where a part thereof can be sold without violating any provision of law, then only such portion of property should be sold. This is not a just discretion, but an obligation imposed on the executing court and the sale held without examining this aspect and not in conformity with the mandatory requirement is per se illegal and without jurisdiction.

---

[3] 1989 Supp (2) SCC 693

8. The other expressions of the apex court in this regard are **S.S. Dayananda Vs. K.S. Nagesh Rao**[4], **Desh Bandhu Gupta Vs. N.L. Anand**[5], **Lal Chand Vs. VIII ADJ**[6], **S.Mariyappa Vs. Siddappa**[7] and **Balakrishnan Vs. Malaiyandi Konar**[8] **and Sai Enterprises Vs. Bhimreddy Laxmaiah**[9] and the recent expression of this Court (another bench) in **Kamireddy Sumathi Vs. C.M. Reddy**[10].

9. This scope of seeking to set aside the sale under Order XXI Rules 89 to 93 CPC, are different though Rule 90 also covers to some extent to this scope of Order XXI Rule 64 CPC. What Rule 89 provides even to any person interested in the property sold may apply to have the sale set aside on his depositing within 60 days to the date of sale, for payment to auction purchaser a sum equal to 5% of purchase money and payment to Decree Holder, the amount specified in the proclamation of sale, less any amount since date of proclamation paid to the Decree Holder and with further liability to costs and interest not covered by the sale proclamation, to protect the constitutional right to property as held in **Sukumar De Vs. Bimala Auddy**[11], **Challamava Huchha Gowda Vs. M.R. Tirumala**[12], **Tribhovandas Purshottamdas Thekkar Vs. Ratilal Motilal Patel**[13]

---

[4] (1977) 4 SCC 451
[5] 1994 (1) SCC 131
[6] (1997) 4 SCC 356
[7] (2005) 10 SCC 235
[8] (2006) 3 SCC 49
[9] 2007 (13) SCC 576
[10] 2016 (5) ALT 76
[11] 2014 (1) SCC 584
[12] 2004 (1) SCC 453
[13] AIR 1968 SC 998

and **Hindi Pracharak Prakashan Vs. M/s. G.K. Brothers**[14]. Rule 64 supra, however, when mandates, the very sale conducted ignoring the mandatory provisions and duty of the executing Court, is per se illegal and unsustainable on its face and tantamounts to sale without jurisdiction. For that, leave about the bar of limitation to file application after two months under Order XXI Rule 90 is not applicable, if at all it is required to decide on consideration of the provision with Rule 90 clause (3) to decide whether applies or not, that was not even properly adverted to by the executing court in dismissing the application.

10. Further, the mere fact that earlier the judgment-debtor or somebody to the attachment of the property raised objection and that petition was dismissed for default is not a bar to impugn the sale.

11. The right of auction purchaser (be it decree-holder/auction purchaser or third party auction purchaser) arises only on confirmation of sale and till then, his right is nebulous and has only a right to consider for confirmation of sale as held by the Apex Court in Desh Bandu Gupta (supra). This court in Malempati (supra) at para 22 rejected the contention of petitioner not having challenged the sale by filing application under Order XXI Rule 89 or 90 C.P.C. cannot be permitted to file revision, where on facts initially two items sold and later one more item in saying contrary to Rul 64 supra by distinguishing earlier expression in **Vummenthala Somamma v.**

[14] AIR 1990 SC 2221

Thameeru Balanagamma[15], wherein it was held the judgment-debtor cannot file revision without availing remedies under Order XXI Rule 89 or 90 C.P.C. with contention of non-service of sale notice.

12. From the above, coming to Rule 90 of Order XXI C.P.C., which deals with application to set aside sale on ground of irregularity or fraud, reads as follows:

> (1) Where any immoveable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.
>
> (2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.
>
> (3) No application to set aside a sale under the rule shall be entertained upon any ground whichthe applicant could have taken on or before the date on which the proclamation of sale was drawn up.

13. So far as invoking of the provision supra concerned, there must be plea and proof as to the injury suffered by objectors to the auction sale (be it judgment-debtor or any person claiming through or otherwise) in showing said sale arising out of alleged material irregularity or fraud, as the case may be, as held by the Apex Court in **Ram Maurya v. Kailashnath**[16].

14. No doubt, keeping the judgment-debtor totally ignorant of execution proceedings vitiates the sale as held by the Apex Court in

---

15 AIR 2003 AP 45
16 AIR 2000 SC 3402

Satya Narain Pachauriya v. Ram Narain Dibrewal[17]**.** Aapart from a sale for paltry price in not considering whether sale of a part of property is sufficient vitiates the sale as held in Desh Bandhu Gupta, Takkeseela Pedda Subba Reddi supra and Ambati Narasayya. However, here as can be seen from the record at the time of attachment for sale, judgment-debtor raised an objection by filing a petition that was ended in dismissal is borne by record. He did not show what is the actual price of the property by giving his value. What he complains of his, the so-called proclamation in Praja Shakthi Newspaper is not in wide circulation. In fact, the same cannot be given credence as an isolated factor, when it is not his case of no notice even served at the stage of proclamation of pre-sale, but for his value and raise his objections, if any. If from his own saying about six participants attended the bid, though the auction purchaser is the highest bidder. The decree amount shown is Rs.5,42,400/- with costs of Rs.25,226/- apart from subsequent interest after 08.08.20012 at 6% (the warrant amount is on the date of sale is Rs.6,41,185/-) on the amount covered by the decree. The execution petition filed was for sale of the property of 242 sq. yards with Door No.3-33/1 of Aryavatam Village of Kajuluru Mandal, Tallrevu Sub-Registry, East Godavari District. The Sub-Registrar's market value certificate of March 2016 for the sale by auction held in January 2016 herein shows value at Door No.3-26/1 of Aryavatam Village is for the land Rs.1,500/- per sq. yard and for the construction area Rs.720/- per sq.

---

17 AIR 1994 SC 1583

feet. The property of sale covered by Door No.3-33 to say to some extent. As per the Sub-Registrar's value certificate, for the 242 sq. yards, it comes to Rs.3,63,000/- and for the built up area of the RCC building mentioned in the new construction is Rs.720/- per sq. feet. Whereas, it is an old one and Rs.14,40,000/- if taken, half value out of it comes to Rs.7,20,000/- and in addition to that Rs.3,63,000/- that can be the value of the house property approximately and the sale was knocked. Where as the decree-holder mentioned the value of the property at Rs.4,00,000/-, the Amin mentioned the value after inspection at Rs.8,00,000/- and the Sub-Registrar mentioned the value referred supra and judgment-debtor did not give his value and the sale is knocked in favour of the highest bidder-T.Srinivas Rao for Rs.6,00,000/-. The Court, no doubt, should have fixed the upset price by considering the Sub-Registrar's value or Amin value. It is not shown even part of the property if chosen to bring to sale could be sufficient to satisfy the decree debt. Even from the above and even in the application under Order 90 C.P.C. supra, it is not even mentioned what is the age of the building after construction to take the building value for the land value is only Rs.3,63,000/-. Ever distress sale cannot be considered as fraudulent, much less to attribute anything of fraud and collusion between the decree-holder and the auction purchaser in the absence of showing anything by the judgment-debtor. In view of these facts, though Court got a duty under Rule 64 C.P.C. and if it is a fraudulent, knocking of the sale behind the back of the judgment-debtor, it can be set aside for the factual background lacks support to any of these. There is nothing to interfere while sitting in appeal against the dismissal order of the lower Court of the application to set aside the sale filed under Order XXI Rule 90 C.P.C. by the judgment-debtor in E.A.No.189 of 2016.

15. Hence, the civil miscellaneous appeal is dismissed.

Miscellaneous petitions pending, if any, shall stand closed. No costs.

Dr. B. SIVA SANKARA RAO, J

12th December 2017.

mar