

HON'BLE SRI JUSTICE A.RAMALINGESWARA RAO

C.M.A.No.1389 of 2008

ORDER

This Civil Miscellaneous Appeal is directed against the order dated 20.10.2008 passed in E.A.No.261 of 2008 in E.A.No.15 of 2006 in OEP No.81 of 2005 in O.S.No.177 of 2002 by the Junior Civil Judge, Pakala.

Heard learned counsel for the appellant and the 1st respondent-claimant.

The 2nd respondent is the decree holder. It is stated that the 2nd respondent died during pendency of the present appeal. In view of the nature of the order passed by the trial Court, the presence of the 2nd respondent is not necessary.

The 2nd respondent obtained a decree in O.S.No.177 of 2002 in respect of the mortgaged property, which was under attachment during pendency of the trial. After obtaining the decree on 19.04.2004, a final decree petition was filed on 6.6.2005 and the said petition is still pending for disposal. The property was brought to sale and the sale was held on 23.1.2006 and balance sale price was paid on 6.2.2006. At that stage, the 1st respondent herein filed E.A.No.15 of 2006 under Order 21 Rule 58, wherein the appellant herein was set ex parte on

28.02.2006 due to his non-appearance even after receiving notice.

When the claim petition was posted for arguments, the appellant-J.Dr filed a petition seeking to set aside the *ex parte* order. When the application was dismissed vide order dated 20.10.2008, the present appeal is filed.

The relevant portion of the order passed by the trial Court reads as under:

“Heard both sides. As seen from the record, D.Hr filed this E.P. for sale of E.P. schedule mentioned properties for realisation of decretal amount, in which the petitioner herein/J.Dr was set *ex parte* and sale was conducted on 23.01.2006 and balance of sale price paid on 6.2.2006, on the date the claim petitioner filed E.A. u/Or.21 R.58 in which the petitioner/J.Dr was set *ex parte* on 28.02.2006 on his failure to appear on receiving of notices.

When the claim petition is posted for arguments the J.Dr came with this petition to set aside the *ex parte* order dt.28.2.2006 claiming that I came to know about the order on 14.08.2008, and the mortgage deed dt.26.11.2002 is a nominal one.

The petitioner/J.Dr is not disputed the attachment and sale of E.P. schedule properties and mortgage deed executed by him in favour of claim petitioner, he is claimed that it is a collusive one. Even if the petitioner is brought on record he is not permitted to question the same in EA 15/06. Further it is not the case of petitioner/J.Dr that no notice is not served on him in EA 15/06. He received notice and having knowledge before the date of hearing, but called absent and he was set *ex parte*, the reasons stated for his absence, is not believable.

The provision U/Or.21 R.106(3) can be invoked, when the notice is not on the respondent and was set *ex parte*. In the instant case respondent/petitioner received notice and was set *ex parte* and filed this petition after 2 ½ years of the

orders. Therefore, I found no *bona fides* to allow the petition. Hence, the petition is dismissed.”

Now, the proceedings before the trial Court are at the instance of the 1st respondent herein, who filed a claim petition under Order 21 Rule 58. Even after receipt of notices in the said proceedings, the appellant did not appear and after 2 ½ years, he filed the present application when the property was already brought to sale. The claim petition of the 1st respondent herein has to be decided. This Court sees no *bona fides* in filing the present application.

In view of the same, the order passed by the trial Court is proper and does not warrant any interference.

Accordingly, the Civil Miscellaneous Appeal is dismissed.

Miscellaneous petitions, if any, pending, shall stand closed.

JUSTICE A.RAMALINGESWARA RAO

4th August, 2017
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