

THE HON'BLE SRI JUSTICE M. SEETHARAMA MURTI

CIVIL REVISION PETITION No. 3991 of 2017

ORDER:

This Civil Revision Petition, under Section 115 of the Code of Civil Procedure, 1908, by the petitioners/judgment debtors, is directed against the orders, dated 12.07.2017, of the learned I Additional Chief Judge, City Civil Court, at Secunderabad, passed in E.P.No.49 of 2016 in O.S.No.34 of 2001.

2. I have heard the submissions of *Sri T.Natraj*, learned counsel appearing for the petitioners/judgment debtors (hereinafter, 'JDrs'), and of *Sri Syam S.Agarwal*, learned counsel appearing for the respondent/Decree Holder (hereinafter, 'DHR'). I have perused the material record.

3. The order impugned reads verbatim as under:

"Memo filed to order for fresh proclamation basing on the orders of the Hon'ble High Court. Hence issue fresh proclamation for sale on payment of process by way of public auction. Process paid. Issue proclamation in Eenadu Telugu daily and Hindu paper by 29-8-2017. For further hearing call on 7-9-2017."

4. Learned counsel appearing for the JDrs would submit that the notice of sale proclamation, dated 12.7.2017, in Form No.29 was affixed to the property of the JDrs keeping blank, the date of proposed auction sale in it and that, therefore, it is a defective notice of proclamation and that non mention of the date of auction sale in the said notice resulted in a procedural irregularity and illegality and that pursuant to such defective notice of proclamation, if the sale is held, the sale gets vitiated. In support of the said submission, he placed reliance on a decision in *L. Nanjunda Murthy and Ors. vs. S. Suresh Reddy and Ors.*¹. He would further submit that the property of the JDrs, which is

¹ AIR 2017 KARNATAKA 50

worth six crores is being put to auction to satisfy a decree of a value of about thirty five lakhs and that the property being brought to sale is divisible and therefore, the Court of execution is under an obligation to bring to sale only a portion of the property that would be sufficient to satisfy the decree and that despite the failure of the JDrs to raise any objections in that regard the Court executing the decree has a statutory obligation as the said statutory provision is mandatory and that the executing the Court cannot sell more extent of the property than the property, which is enough to satisfy the decree. In support of the said contentions, he placed reliance on the decisions in *Akula Veeraju v. Karumuru Rukmabai*²; *Ambati Narasayya v. M.Subba Rao*³. Having urged accordingly, he prays to set aside the impugned order and direct the executing Court to first decide the question as to whether the property is divisible or not and then initiate steps in accordance with law for sale of the required extent/part of the property that would be sufficient to satisfy the decree, in case, the property is divisible.

5. Per contra, learned counsel for the Dhr would submit that the suit is of the year 2001 and the execution petition is of the year 2016 and that the JDrs from time to time are putting spokes for execution of the decree and dragging on the matter and that despite having capacity to pay the entire decree debt, they are not paying the money only with a view to avail as much time as possible to satisfy the decree and that the objections now raised belatedly by the JDrs are unsustainable.

6. I have given earnest consideration to the facts and submissions and I have perused the material record.

7. Be it noted that when a similar issue was raised by the JDrs before this Court contending *inter alia* that the proclamation affixed at a conspicuous

² CMSA Nos.23 & 39 of 2001, dated 15.09.2010 (APHC)

³ AIR 1990 SC 119

place of Court Hall is full of blanks and that the sale proclamation is defective and that non mention of the values furnished by the DHr and the JDrs in the same is a material irregularity, which vitiates the sale, this Court by orders, dated 09.06.2017, directed the Court of execution to issue fresh sale proclamation and comply with the necessary formalities under Order XXI Rule 64 CPC in Form No. 29. Now by the order impugned in this revision, the executing Court once again ordered for issuance of fresh proclamation for sale and ordered for publications to be made in Telugu and English daily news papers, by 29.08.2017 and posted the matter for further hearing to 07.09.2017. Yet again as contended by the JDrs the notice is not in conformity with Order XXI Rule 64 of the Code and the date of sale is kept blank in the said notice, dated 12.07.2017, in Form No.29.

8. Though the learned counsel for the DHr placed reliance on the Division Bench decision of the High Court of Patna in *Bijali Bala Das v. Charu Bala Ash*⁴ in support of the contention that when the JDrs fail to raise objection at the earliest opportunity after service of notice, the rule enshrined in the doctrine of constructive *res judicata* would apply and that the JDrs are precluded from raising any such objections at a later point of time, a plain perusal of the cited decision would show that it deals with saleability of the property and not with the present issue involved in the present *lis*.

9. Learned counsel for the JDrs would further contend as follows: 'The property being brought to sale is worth rupees six crores and that the decree debt is about rupees thirty five lakhs. The property being brought to sale is divisible. It is obligatory on the part of the executing Court to find out as to sale of what extent or portion of the schedule property would be enough to satisfy the amount due under the decree. In the instant case, the executing Court has not first decided whether the property is divisible and whether it is

⁴ 1967 Law Suit (Pat) 57

necessary to bring the entire property of the JDrs to sale or only a portion thereof as may be necessary to satisfy the decree. The executing Court failed to discharge its statutory duty. As such, the matter requires examination afresh by the executing Court on the said aspects before the property or part thereof is brought to sale. However, in reply, the learned counsel for the DHr contended that this contention is being raised for the first time at a belated stage and that the JDrs have not raised any such objection earlier and that the property is not divisible and that a part of it cannot be brought to sale. The learned counsel for the DHr also placed reliance on a decision of this Court in Jagati Thimmaraju v. Uppuluri Brahmanna⁵ and contended that as per the mandate of provision of Order XXI Rule 66(2), the JDrs are obliged to take objection with regard to extent of property to be sold for satisfying the decree and that on failure of the JDrs to do so, the JDrs are not entitled to raise the said objection at a later point of time, that is, at the stage of sale proclamation and auction sale.

10. Now it is necessary to refer to *infra* Order XXI Rule 64 of the Code:

Power to order property attached to be sold and proceeds to be paid to persons entitled:- 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 under the decree to receive the same.

11. Further, in the decision Akula Veeraju v. Karumuru Rukmabai (2nd supra) this Court having referred to Order XXI Rule 64 and Rule 66 (2) of the Code and following the decision of the Supreme Court in Takkeaseela Pedda Subba Reddi v. Pujari Padmavathamma and others (1977 (3) SCC 337) held as follows:

⁵ 1998 Law Suit (AP) 176

'The question as to whether the Petitioners (judgment debtors) raised any objection as to the value arrived at and selling the entire petition schedule land is not much relevant. It is obligatory on the part of the execution court to find out as to what extent of the petition schedule land is enough to satisfy the amount due under the decree. But, in the instant case, it does not appear that any such exercise has been done by the execution Court. Since this is a case wherein the court did not at all examine the issue as to what extent of the property is required to be sold for satisfying the decree and sold the property for a sum of Rs. 1,10,000/- where the decretal amount is only an amount of Rs. 27,211/-. The auction sale conducted by the court is totally vitiated and is liable to be set aside. The laches on the part of the Petitioners/ judgment debtors is inconsequential because the execution Court failed to observe its statutory duty.

It is trite to note that in *Ambati Narasayya v. M.Subba Rao* (3rd supra) relied upon by the learned counsel for the JDrs, the Supreme Court held as follows:

It is of importance to note from this provision that in all execution proceedings, the Court has to first decide whether it is necessary to bring the entire attached property to sale or such portion thereof as may seem necessary to satisfy the decree. If the property is large and the decree to be satisfied is small, the Court must bring only such portion of the property, the proceeds of which would be sufficient to satisfy the claim of the decree holder. It is immaterial whether the property is one or several. Even if the property is one, if a separate portion could be sold without violating any provision of law only such portion of the property should be sold. This, in our opinion, is not just a discretion, but an obligation imposed on the Court. Care must be taken to put only such portion of the property to sale the consideration of which is sufficient to meet the claim in the execution petition. The sale held without examining this aspect and not in conformity with this requirement would be illegal and without jurisdiction.

12. In view of the above precedential guidance, this Court finds that the contention of the JDrs that there is statutory obligation on the executing Court to bring to sale only that much portion of the property as would be sufficient to

satisfy the decree, merits consideration. Further, as the sale proclamation notice under Form No. 29 is defective and such defect materially affects the sale to be held, this Court is of the considered view that the revision petition deserves to be allowed on that ground also.

13. Further, learned counsel for the JDrs fairly conceded that the JDrs are prepared to deposit 50% of the decretal amount as mentioned in the sale publication and sought a time of four weeks for making the deposit of the said portion of the decretal amount from the date of receipt of a copy of this order.

14. On the above analysis, this Court finds that the impugned order is liable to be set aside.

15. In the result, the Civil Revision Petition is allowed. As a sequel, the impugned order, dated 12.07.2017, of the learned I Additional Chief Judge, City Civil Court, at Secunderabad, passed in E.P.No.49 of 2016 in O.S.No.34 of 2001, is set aside with a direction to the trial Court to first examine the divisibility or otherwise of the subject EP schedule property and thereafter, bring to sale either the whole of the property, if it is not divisible or a part or portion thereof, which would be sufficient to satisfy the decree, in the event it is divisible. The JDrs are directed to deposit 50% of the decretal amount as mentioned in the sale publication within four weeks from the date of receipt of a copy of this order. On such deposit of the amount by the JDrs, the DHr is permitted to withdraw the same by following the procedure established by law. Considering the nature of the matter, the executing Court is directed to endeavour to complete the afore-stated exercise as per procedure established by law, however, as expeditiously as possible and preferably within one month from the date of receipt of a copy of this order.

There shall be no order as to costs.

Miscellaneous petitions pending, if any, in this revision shall stand closed.

M. SEETHARAMA MURTI, J

21.08.2017

Note : Issue CC by 28-08-2017
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