

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.4015 of 2015

ORDER:

This revision is filed, under Article 227 of the Constitution of India, against the orders, dated 29.09.2012, of the learned V Additional District Judge (Judge, II Fast Track Court), Warangal, passed in C.M.A.No.100 of 2010, whereby, the learned Additional District Judge confirmed the orders dated, 04.08.2009, of the learned II Additional Senior Civil Judge, Warangal, (hereinafter, 'executing Court') passed in E.A.No.95 of 2008 filed by the judgment debtor under Order XXI Rule 90 read with Section 151 of the Code of Civil Procedure, 1908, (hereinafter, 'the Code') requesting to set aside the sale held on 01.08.2008.

2. I have heard the submissions of *Sri A. Prabhakar Rao*, learned counsel for the JDr/ petitioner (hereinafter, 'JDr') and of *Sri K. Subba Rao*, learned counsel appearing for the decree holder/ 1st respondent (hereinafter, 'Dhr') and the auction purchaser/ 2nd respondent (hereinafter, 'auction purchaser').

3. Before proceeding further, it is necessary to refer to the pleadings of the parties.

3.1 The case of the JDr, in brief, is this:

The Dhr having obtained a decree for money against the JDr filed the EP for the realization of the decree debt by sale of the EP schedule house property. No notice in the execution petition was served on the JDr at any point of time. It is mandatory to serve notice under Order XXI Rule 54 and also under Order XXI Rule 66(2) of the Code, before proclamation of sale. Since no notices are served as required under the above provisions and as no notice was ever served at any point of time on the JDr, and as the sale notice did not disclose the value of the property ordered to be sold in Court auction and as the Dhr filed the valuation certificate just before the sale, on 01.08.2008, and as the Dhr failed to comply with the mandatory procedural and legal

requirements and as the value of the property to be sold was kept blank in the valuation certificate filed prior to the proclamation of sale and as the Field Assistant/ Bailiff of the Court has not furnished the valuation of the property before sale, the sale held is irregular and is vitiated and is liable to be set aside. The DHr mislead the executing Court and played fraud on it. Therefore, the sale conducted on 01.08.2008 is irregular and is liable to be set aside.

3.2 Per contra, the case of the DHr and the auction purchaser, in brief, is this:

After the EP was filed, a notice by registered post was duly served on the JDr; and the JDr having received the notice, remained *ex parte* on 08.09.2005. Again, sale notice was served on the JDr by registered post. He, having received the said notice, remained *ex parte* on 02.08.2006. The approximate value of the property was mentioned in the affidavit of the DHr filed on 01.09.2008. The JDr filed EA 40 of 2007 to stay the sale of the property till the disposal of his application in I.A.No.204 of 2007 filed on the original side for setting aside the *ex parte* decree. The said petition was dismissed. The JDr filed EA 57 of 2008 and EA No.58 of 2008. Both the said petitions were dismissed. There is no irregularity or fraud as alleged by the DHr. Valuation certificate was filed and the procedure was duly followed for conducting the Court auction sale. The petition of the JDr is filed with false allegations.

4. At the hearing, the learned counsel for the JDr and the learned counsel for the DHr and the auction purchaser reiterated the respective contentions of the parties.

4.1. The learned counsel for the JDr would submit as follows: 'When no notice was ever served in the execution proceedings and when the mandatory notices as required under Rule 54 and 66(2) of Order XXI of the Code are not served on the JDr and when the valuation of the property was not mentioned by the Filed Assistant of the Court and also in the sale notice and as the

valuation of the property was furnished just before the sale, on the date of the sale, and as the sale was got conducted by playing fraud on the Court and by making misrepresentations, the sale is liable to be set aside being irregular. Though the property was worth Rs.30 lakhs it was sold for Rs.10,60,000/- . Therefore, the irregularities resulted in failure of justice. Hence, the executing Court ought to have set aside the sale on the ground of irregularity. However, the executing Court erroneously dismissed the petition of the JDr and the learned Additional District Judge erroneously confirmed the orders of the executing Court.

4.2 Though it is not urged in the grounds of revision and in the affidavit filed in support of the petition before the executing Court, it is further contended on behalf of the JDr that the property was mortgaged to LIC for obtaining Housing Loan. The learned counsel for the petitioner/JDr, having filed the copy of the copy application filed before the executing Court, submitted that when the JDr made attempts to obtain certified copies of the notices and postal acknowledgements, the copy application was not granted and was returned by the executing Court with an endorsement that the documents are not available in the Court record and that the said fact would indicate that no notices were ever served on the JDr and hence, the Court auction sale is irregular and is vitiated.

4.3 *Per contra*, the learned counsel for the DHr and the auction purchaser while supporting the orders of the Courts below and the concurrent findings in the said orders of the Courts below, contended as follows: “The JDr made false allegations that no notices were served though, in fact, notices are duly served. There is neither fraud nor misrepresentation. The notices sent by registered post are duly served on the JDr; and the JDr having received notices in the execution petition from time to time had intentionally remained *ex parte*. There is no irregularity much less material irregularity. In any event, no substantial injury was caused to the JDr. In view of the provision of

Order XXI Rule 90 of the Code, there are no grounds for setting aside the sale.

The revision is devoid of merit and is liable to be dismissed.”

4.4 Learned counsel for the Dhr and auction purchaser would also point out that in the affidavit of the JDr filed in support of the petition, no averment was made that the property was worth Rs.30 lakhs and was sold for a low price and that it is also not averred in the affidavit of the JDr that the property was mortgaged to LIC for obtaining a Housing Loan. It is further submitted that the auction purchaser is prepared to take the property subject to the mortgage and undertakes to discharge the mortgage debt to the LIC without making any claim from the JDr.

5. I have given detailed and thoughtful consideration to the facts and the submissions. I have gone through the material papers including the copy of the proceeding sheet/docket sheet maintained by the executing Court in the execution petition.

6. To begin with, it is to be noted that the Dhr obtained a decree for money against the JDr and filed E.P.No.152 of 2005 for realization of the decree debt by sale of the immovable house property (RCC building) of the judgment debtor, i.e., EP schedule property, which was already attached before judgment, i.e., during the pendency of the suit. E.A.No.40 of 2007, E.A.57 of 2008 and E.A 58 of 2008 filed by the JDr were dismissed on 31.07.2008 and eventually, the sale was held on 01.08.2008 and was knocked down in favour of the 2nd respondent/ auction purchaser. The auction purchaser deposited the required amounts and the sale was confirmed on 05.09.2008 and a sale certificate was duly prepared and was issued to the auction purchaser on 12.09.2008. While so, the daughters of the JDr filed E.A.No.212 of 2010 under Order XXI Rule 97 read with Section 151 of the Code *inter alia* claiming that they are having a 6/ 5th share in the RCC building, i.e., the EP schedule property. However, by orders, dated 10.04.2015, the executing Court dismissed the said E.A.No.212 of 2010 *inter alia* holding that

the certified copy of the registered sale deed exhibited as R1 reflects that the JDr was allotted Plot No.20 being the member of Teachers' Cooperative Housing Society and that the 1st petitioner-PW1 therein stated in her evidence that she has no proof to show that her grandfather invested joint family funds for purchasing the Plot and that on the other hand, she further stated that the LIC housing loan amount was discharged by her father/ JDr and that she does not have any proof to show that the EP schedule property is joint family property. Aggrieved thereby, the petitioners therein/the claim petitioners, who are the daughters of the JDr, filed an unregistered appeal assailing the aforestated orders of the executing Court passed in E.A.No.212 of 2010. However, as a delay of (64) days had occasioned, the daughters of the JDr filed I.A.No.1391 of 2015 for condonation of the said delay in filing the said unregistered appeal. The application for condonation of delay was dismissed by the learned Principal District Judge, Warangal. Aggrieved thereby, the daughters of the JDr preferred C.R.P.No.1269 of 2016 before this Court. Further, the JDr filed E.A.No.106 of 2015 for setting aside the orders, dated 10.06.2015, passed by the executing Court in E.A.No.133 of 2009 filed by the auction purchaser for delivery of the EP schedule property. That petition was dismissed by the executing Court on 19.01.2016. The JDr preferred another C.R.P.No.979 of 2016 before this Court. The said two revision petitions, viz., C.R.P.No.1269 of 2016, filed by the daughters of the JDr, and C.R.P.No.979 of 2016, filed by the JDr, are coming along with the present CRP. Today, this Court by separate orders dismissed both the said CRPs.

7. In this setting of facts and chronology of events, it is to be restated that the subject E.A.No.95 of 2008 filed by the JDr under Order XXI Rule 90 read with Section 151 of the Code for setting aside the sale held on 01.08.2008 was dismissed by the executing Court. The CMA 100 of 2010 preferred by the JDr was dismissed by the learned Additional District Judge. Therefore, the JDr preferred the present revision. A plain perusal of the copy of the proceeding sheet/docket sheet maintained in the execution petition by the executing

Court and other material papers would show that the property was attached before judgment and that the JDr was duly served with notice by registered post and after holding that the service was held 'sufficient', he was set *ex parte* in the EP on 08.09.2005. The copy of the proceeding sheet also reflects that a sale notice was first ordered on 18.11.2005 and that fresh notices by registered post were ordered on 06.01.2006 and 24.03.2006 and that when the notices were returned with endorsement that the JDr was not residing in the given address, the executing Court again directed on 27.06.2006 to serve fresh notice and that notice was duly served and that therefore, the executing Court set the JDr *ex parte* on 02.08.2006 after recording that 'service was held sufficient'. On that day, the EP was posted for filing sale papers and encumbrance certificate. Be it noted that the JDr also filed E.A.No.40 of 2007 to stay the sale proceedings on the ground that he filed I.A.No.204 of 2007 on the original side for setting aside the *ex parte* decree and that he also filed EA No.57 of 2008 and EA 58 of 2008 and that all the said EAs were dismissed by the executing Court and the said orders have become final. The executing Court noted in its orders that the JDr was served with notices from time to time and that he participated in the execution proceedings by filing execution applications, which were dismissed, and that before conducting sale, an upset price was fixed and that there are no irregularities in conducting the sale. The said findings were confirmed by the Additional District Judge in her orders passed in the CMA No.100 of 2010. The Court below also held that the JDr having remained absent did not raise any objections for the sale of the property, which is attached before judgment, and that as the JDr failed to take any objections at an earlier point of time or at the time of sale proclamation, he is not entitled to raise any objections after the sale is duly held on 01.08.2008 and was confirmed on 05.09.2008. Thus, the executing Court and the Additional District Court concurrently held that there are no irregularities in conducting the sale on 01.08.2008. It is an undisputed fact that the sale was confirmed on 05.09.2008 and that later, a

sale certificate was also issued to the auction purchaser and that the JDr filed the application to set aside the sale on the ground of irregularity after the sale was confirmed on 05.09.2008. It is pertinent to note that the JDr did not adduce any oral and documentary evidence to substantiate his pleaded case. Further, the JDr did not plead in his affidavit filed in the subject EA 95 of 2008 that the property was worth Rs.30 lakhs though such a contention was raised in the grounds of revision. The JDr did not produce and mark as an exhibit the market value certificate of the property and also failed to adduce any oral evidence. The JDr raised a contention before this Court that the EP schedule property was mortgaged to LIC for obtaining a Housing Loan. However, the JDr did not state the outstanding amount of debt due and payable towards the housing loan. However, when the JDr raised the said contention that the property was mortgaged to LIC for obtaining Housing Loan, it was fairly stated on behalf of the auction purchaser that the auction purchaser is bound to discharge the mortgage debt due to the LIC, having purchased the property in a Court auction, and that, therefore, the auction purchaser is prepared to discharge the said debt without reference to the JDr. Thus, the auction purchaser has undertaken before this Court to discharge the housing loan, if any, due and payable to the LIC without reference to the JDr. As noted earlier, all the applications of the JDr, viz., EA 40 of 2007, EA 57 of 2008 and EA 58 of 2008 were dismissed on merits by the executing Court and the said orders have become final. Further, this Court dismissed, today, vide separate orders, the CRP 1269 of 2016 filed by the claim petitioners, the daughters of the JDr. The JDr having failed to adduce any evidence before the executing Court failed to establish any irregularities much less the alleged irregularities in conducting the sale. The law is well settled that pleading is no proof. Further, the JDr also failed to take the available pleas before the date on which the proclamation of sale was drawn up and therefore, he is not entitled to urge any grounds, which he could have taken on or before the date on which the sale proclamation was drawn up. Order XXI Rule 90 postulates that no sale

shall be set aside on the ground of irregularity or fraud in publishing or conducting it, unless upon facts proved, the Court is satisfied that the JDr has sustained substantial injury by such irregularity or fraud. The JDr in this case has not established that he had sustained substantial injury on the ground of alleged irregularities or fraud. Having gone through the material record and the orders of the Courts below, this Court finds no reason calling for interference with the well considered concurrent findings in the orders of the Courts below. On a careful consideration of facts and the legal position, this Court finds that there is no illegality or irregularity or impropriety in the orders of the Court below calling for interference.

8. Before parting, it is to noted that the learned counsel for the revision petitioner/JDr relied upon the following decisions: (i) M/s. Mahakal Automobiles v. Kishan Swaroop Sharma¹: This decision was relied upon in support of the contention that at each stage of the execution proceedings, when a property is sold, it is mandatory that notices shall be served upon the judgment debtor and that if any property is sold without notice to the judgment debtor, the sale would be a nullity and that the further actions pursuant to such sale are liable to be struck down. (ii) Desh Bandhu Gupta v. N.L.Anand²: This cited decision, was relied upon in support of the proposition that services of notices on judgment debtor in regard to the proposed sale of his property is mandatory and that on omission to serve notices under Order XXI Rule 54 and Rule 66(2) the sale becomes a nullity. In the case on hand, on facts, it was found by both the Courts below that notices are duly served on the JDr from time to time in the execution proceedings. (iii) Manduva Sreeramamurthy v. Manager, Andhra Bank, Ongole, Prakasam District³: This decision is relied upon in support of the contention that when the judgment debtor was not given an opportunity to furnish the value of the property and when the executing Court failed to ascertain the value of the property from

¹ AIR 2008 SUPREME COURT 2061

² 1993 AIR SCW 3458

³ 20112 (2) ALD 418

the office of the Sub Registrar, the sale of the suit property becomes void. In the present case, even as per the version of the JDr, the valuation certificate was furnished to the Court on the date of the sale. Further, in the affidavit of the DHr filed along with the sale papers, the value of the property was mentioned and a copy of the encumbrance certificate was also filed with the sale papers. The executing Court fixed upset price having regard to the facts and circumstances of the case and the nature of the property and the JDr has failed to produce and exhibit any valuation certificate in his evidence to substantiate his plea. (iv) *Gajadhar Prasad v. Babu Bhakta Ratan*⁴: This decision was relied upon in support of the contention that the non-mention of the valuation as put up by the judgment debtor in the sale proclamation is a material irregularity and that when the judgment debtor suffered substantial injury by the sale, the sale is liable to be set aside. (v) *M.Veeranjaneyulu v. M.Saraswathamma*⁵: This decision was relied upon in support of the proposition that the Court below shall indicate in the sale proclamation the values of the DHr as well as the JDr and that it is not desirable for the executing Court to arrive at a valuation figure on its own, particularly as quoted by the DHr, which is a figure on the much lower side than the figure quoted by the JDr. In the case on hand, the JDr did not produce and exhibit any valuation certificate and also failed to establish that on account of the alleged irregularities, he had suffered substantial injury. In the light of the facts peculiar to the case on hand and for all the reasons aforesaid, the decisions are not helpful to advance the case of the JDr, any further.

9. Viewed thus, this Court finds that there is no merit in the revision and that the revision is liable to be dismissed.

10. In the result, the civil revision petition is dismissed. No costs.

⁴ AIR 1973 SUPREME COURT 2593

⁵ AIR 2004 ANDHRA PRADESH 27

Pending miscellaneous petitions, if any, shall stand closed.

07th February 2017
RAR

M. SEETHARAMA MURTI, J

