

HON'BLE SRI JUSTICE D.V.S.S. SOMAYAJULU

C.R.P.No.378 of 2017

ORDER:

This Civil Revision Petition is filed by the judgment debtor against the order dated 03.12.2016 in E.A.No.280 of 2016 in E.P.No.11 of 2013 in O.S.No.92 of 2005 passed by the I Additional Senior Civil Judge, Guntur.

The judgment debtor is the revision petitioner. His property was brought to sale by the decree holder. Hence, he filed an application in EA No.280 of 2016 in EP No.11 of 2013 to set aside the sale and to stay of all further proceedings in the case. The said application was filed under Order XXI Rule 89 of CPC and a counter was filed by the respondent-decree holder opposing the said application and also taking a plea that the auction purchaser is not added as a party and that the application should be returned for non-joinder of the necessary party. After considering the submissions made, the lower Court by its order allowed the application on condition that the auction amount along with the poundage, interest should be deposited on or before 14.12.2016. It is this order which is assailed in the present revision.

This Court has heard Sri B. Narasimha Sarma, learned counsel for the revision petitioner/judgment debtor and Sri A. Rajendra Babu, learned counsel for the respondent/decree holder and M. Chalapati Rao, learned counsel for the auction purchaser.

The essential contention that is urged by the learned counsel for revision petitioner/judgment debtor is that the lower Court committed a grave error in directing the deposit of auction amount/proclamation amount and that it should have directed the deposit of EP amount, costs and interest only. The learned counsel also argued that his clients *bonafides* were overlooked and he pointed out that earlier itself the judgment debtor has filed an application to set aside the *ex parte* decree and also an application to condone the delay in filing the application to set aside the *ex parte* decree. He also pointed out that before the present application is filed, his client was travelling abroad. He also made a genuine attempt by filing an application sent through an e-mail and scan and the same is filed along with the additional material papers. The learned counsel argued that the bonafides of his client should have been seen by the Court and that his client made a genuine attempt to make the requisite application since the beginning.

Coming to the present application, the learned counsel for the revision petitioner argues that the condition imposed by the lower Court to deposit the entire auction amount is onerous. It is his submission that EP is filed only for recovery of Rs.6,36,250/-. Therefore, he contends that it is this amount which should have been directed to be deposited along with poundage and interest. He argues that the judgment debtor is an aged person and that the property that

is the subject matter of EP is his only the residence and he has no other property. Therefore, he prays an order allowing the revision and directing the deposit of EP amount with pondage, interest etc.

The learned counsel for the revision petitioner also relied upon two judgments reported in ***K. Lakshmiddevamma v. Canara Bank***¹ and ***Kamireddy Sumathi and another v. C. Mallikarjuna Reddy***². He argues that a learned single Judge of this Court in ***K. Lakshmiddevamma***'s case (1 supra) held that if an application or appeal is pending, any confirmation of sale or a sale certificate will not be conclusive and that the judgment debtor still has a remedy upon to get the sale set aside. He also pointed out that in ***K. Lakshmiddevamma***'s case the learned single Judge set aside the order of sale confirmation and delivery also. The second decision relied upon was under Order XXI Rule 89 CPC itself wherein the learned single Judge after considering the law on this subject remanded the matter to examine the issues raised particularly under Order XXI Rule 64 CPC, about the sale of a part of the property being sufficient to cover the decree. Therefore, he argues that the matter can be allowed at this stage or it can be remanded.

In reply thereto, the learned counsel for the decree holder pointed out that the suit was filed in 2005, a decree was obtained in 2009 and execution was taken out 2013.

¹ 2016 (6) ALT 386

² 2016 (3) ALD 311

The sale was conducted on 03.01.2017. According to him, the sale was also confirmed. He argues that the judgment debtor did not show any bonafides earlier either by tendering amount or by paying the decretal amount. He also pointed out that even after the impugned order was passed, the present judgment debtor moved another application in EA No.16 of 2017 for stay of the impugned order for a period of two months to enable the judgment debtor to approach this Court and secure an order. The said order was passed on 03.01.2017 and is a part of the material papers. The lower Court rejected this application stating that the further stay cannot be granted when the EP is closed after the sale certificate is prepared.

The learned counsel for the decree holder also argues that the language used in Order XXI rule 89 CPC is crystal clear and it clearly states that an application under Order XXI Rule 89 CPC cannot be entertained, unless and until the applicant deposits 5% of the purchase money and the amount mentioned in the proclamation itself. The learned counsel relies upon the plain language of Order XXI Rule 89 CPC and states that the lower Court committed a manifest error in entertaining the application without allowing the plain language of Order XXI Rule 89 CPC. However, he states that later the lower Court rectified its mistake by directing the deposit of amount as prescribed under Order XXI Rule 89 CPC. The learned counsel also pointed out that in **Kamireddy**

Sumathi's case (2 supra) itself, the learned single Judge noticed the Hon'ble Supreme Court judgment on the subject that the deposit of the amount under Order XXI Rule 89 CPC is mandatory and that unless the entire amount is deposited within 60 days from the date of the sale, the application cannot be entertained. This deposit is a condition precedent as per the learned counsel for the decree holder. In addition, the judgment of the Hon'ble Supreme Court in **Ram Karan Gupta v. J.S. Exam Ltd.**³ was also cited. In para-19 of this judgment, the Supreme Court reiterated that the deposit of 5% of the purchase money and the requisite amount for payment to the auction purchaser is a condition precedent or *sine qua non* to the application for setting aside of the execution of the sale. This deposit is thus an absolute necessity or an essential condition as stated by the Hon'ble Supreme Court. The period for this deposit is 60 days as per Article 127 of the Limitation Act, 1963.

Having heard both the learned counsel for the judgment debtor and decree holder, this Court feels that the order of the lower Court is correct for the reason that the language under Order XXI Rule 89 CPC is mandatory. It does not admit of any exceptions. No latitude or sympathy is permissible or possible. The Hon'ble Supreme Court has also held that the deposit of money as per Order XXI Rule 89 CPC and within the 60 day period specified is a "pre-condition" for

³ AIR 2013 SC 24

entertaining the application itself. The deposit is to be made unconditionally and as the language suggests for payment to the decree holder.

This Court observes that without the deposit, the application should not have been entertained. However, this Court holds that the lower Court followed the language stipulated in Order XXI Rule 89 CPC and ultimately held that the application is allowed subject to the deposit of the amount specified in the proclamation of sale along with the poundage, interest etc. It is not an onerous condition at all in the opinion of this Court.

This Court however holds that the lower Court committed an error in failing to notice the absence of the auction purchaser. The auction purchaser was a necessary party and an objection was specifically raised in the counter filed in IA No.280 of 2016 that the auction purchaser is a necessary party. The affidavit filed clearly shows that the judgment debtor was aware of the purchase of the property by R.Venkata Rao, but he did not add the said R. Venkat Rao as a party. The said auction purchaser is a necessary party, since the deposit contemplated under Order XXI Rule 89 CPC includes the payment of 5% of the purchase money also. In addition, any order effecting the rights of a party can only be passed in his presence. Therefore, the application under Order XXI Rule 89 CPC filed in this case without the presence of the auction purchaser was not correct. The auction

purchaser should have been impleaded as a party as any order passed about the EP schedule property should be passed in his presence only. He is a “necessary” party to this application. Order XXI Rule 92 (2) has a proviso which says that no order shall be passed until notice is given to all persons affected thereby. Nevertheless as this Court is confirming the order passed for other reasons, the same is not very germane now.

In addition, an argument was advanced that the property worth a few crores has been sold for a paltry sum. Additional documents were also filed as material papers before this Court. This is an issue which should have been raised in the opinion of this Court under Order XXI Rule 64 CPC. Admittedly in this case, no application was filed under Order XXI Rule 64 CPC as contemplated under law. If such an application was filed and the same was not considered, this issue could have been examined by this Court. Merely because it is mentioned in the affidavit that the property is valuable, the Court cannot embark on an enquiry into that issue in this revision petition.

This Court also noticed the following facts:

The suit was filed in 2005. The decree was obtained in 2009 and EP was filed in 2013 and it is only in 2017 the decree holder was able to realize the fruits of the decree. Granting further indulgence to the judgment debtor would be actually causing injustice to the decree holder and to the

auction purchaser. As was noticed by the lower Court in the application filed to grant stay of the impugned order, the Courts should be careful to see through the plans of judgment debtors, to deny the decree holders the fruits of the decree. Para 15 of ***Gayatri Devi and Ors. V. Shashi Pal Singh***⁴ case is relevant here.

For all the above reasons, this Court finds that there are no merits in the revision and the same is accordingly dismissed. In the circumstances of the case, there shall be no order as to costs. As a sequel, miscellaneous Petitions, if any, pending in this appeal shall stand closed.

Date: 29.03.2018
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D.V.S.S. SOMAYAJULU, J

⁴ AIR 2005 SC 2342