**THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY**

**C.M.S.A.No.54 of 2015**

**JUDGMENT:**

1 This appeal is filed under Section 100 CPC challenging the order dated 26.09.2015 passed in CMA No.21 of 2015 on the file of the Court of the II Additional District Judge, Visakhapatnam wherein and whereby the order dated 30.05.2015 passed in E.A.No.499 of 2011 in E.P.No.151 of 2009 in O.S.No.1676 of 2005 on the file of the Court of the II Additional Senior Civil Judge, Visakhapatnam, dismissing the petition filed by the petitioner under Order XXI Rule 90 r/w Section 47 CPC, was confirmed.

2 Heard Sri P.Raja Sekhar the learned counsel for the petitioner, Sri G. Rama Gopal the learned counsel for the first respondent and Sri A. Krishnam Raju the learned counsel for the second respondent.

3 Parties to this appeal will hereinafter be referred to as they were arrayed before the executing court.

4 A perusal of the record reveals that the first respondent filed O.S.No.1676 of 2005 on the file of the Court of the II Additional Senior Civil Judge, Visakhapatnam against the petitioner for recovery of suit amount with interest. During the pendency of the suit, the first respondent filed I.A.No.1047 of 2005 under Order 38 Rule 5 CPC for attachment of the property and the same was allowed. The attachment order was in force till disposal of the suit. After full fledged trial, the trial Court decreed the suit on 14.7.2009. Feeling aggrieved by the judgment and decree passed in O.S.No.1676 of 2005, the petitioner preferred A.S.No.215 of 2009 on the file of the Court of the Principal District Judge, Visakhapatnam. The learned District Judge, after reappraising the oral, documentary evidence and other

material available on record, dismissed the appeal on 18.3.2011. Challenging the judgment and decree passed in A.S.No.215 of 2009, the petitioner preferred S.A.No.1126 of 2011 on the file of this Court and the same was dismissed at the admission stage on 18.10.2011.

5 In order to realize the decretal amount, the first respondent filed E.P.No.151 of 2009 in O.S.No.1676 on the file of the Court of the II Additional Senior Civil Judge, Visakhapatnam. The executing Court conducted auction on 12.10.2011 to sell the suit schedule property. Out of 12 prospective bidders, the second respondent became highest bidder. The bid was knocked in favour of the second respondent for Rs.12,25,000/-.

6 On 10.10.2011 the petitioner filed E.A.No.499 of 2011 in E.P.No.151 of 2009 under Order XXI rule 90 CPC, *inter alia*, contending that the executing court has not followed the due procedure as contemplated under Order XXI CPC, the first respondent filed counter opposing the claim of the petitioner. Before the executing court on behalf of the petitioner P.Ws.1 to 3 were examined, but no documents were marked. On behalf of the first respondent no oral or documentary evidence was adduced. Basing on the oral, documentary evidence and other material available on record, the executing court arrived at a conclusion that the petitioner failed to prove the basic ingredients of Order XXI Rule 90 CPC and dismissed the petition.

7 Feeling aggrieved by the order dated 30.05.2015 passed in E.A.No.499 of 2011 in E.P.No.151 of 2009 in O.S.No.1676 of 2005, on the file of the Court of the II Additional Senior Civil Judge, Visakhapatnam, the petitioner preferred CMA No.21 of 2015 on the

file of the Court of the II Additional District Judge, Visakhapatnam. The learned II Additional District Judge, after reappraising the material available on record, arrived at a conclusion that the sale was conducted by following due procedure and consequently dismissed the appeal. Hence the present Civil Miscellaneous Second Appeal.

8 The auction purchaser was impleaded as second respondent during pendency of the present appeal vide order of this Court dated 27.7.2018 in I.A.No.3 of 2017 in CMSA No.54 of 2015.

9 The predominant contention of the learned counsel for the petitioner is that the executing court has not given notice to the petitioner as contemplated under Order XXI Rule 54 (1) (a) CPC before conducting sale of the property. He further submitted that no notice was served on the petitioner even at the time of settlement of the terms and conditions of the sale.

10 *Per contra*, the learned counsel for the first respondent submitted that the trial Court, after following the due procedure as contemplated under Order XXI CPC, conducted the sale. He further submitted that the J.Dr filed the E.A. with an ulterior motive to drag on the proceedings thereby to deprive the first respondent to enjoy the fruits of the decree.

11 On the other hand, the learned counsel for the second respondent submitted that the E.A. filed by the Petitioner/J.Dr is not maintainable for non-impleading of the auction purchaser. He further submitted that the executing court strictly adhered to the procedure and conducted the auction and hence it is not a fit case to allow the appeal.

12 Now the point that arises for consideration in this appeal is whether there are any valid grounds to interfere with the impugned order?

13 The petitioner filed first appeal and second appeal challenging the decree and judgment of the trial Court, but lost the battle before both the courts. It is not in dispute that during the pendency of the suit, the first respondent filed I.A.No.1047 of 2005 under Order 38 Rule 5 CPC for attachment of the property. The trial Court allowed that petition. For one reason or the other, the petitioner did not challenge the order passed in I.A.No.1047 of 2005. Therefore, the order passed in I.A.No.1047 of 2005 became final in view of non-challenging of the order by the petitioner.

14 The crucial question that falls for consideration is whether the executing court has issued notice to the petitioner as contemplated under Order XXI Rule 54 (1) (a) CPC or under Order XXI Rule 66 CPC before settlement of terms and conditions.

15 In order to appreciate the contention of the learned counsel for the petitioner, this court carefully perused the record of the executing Court. Immediately after filing of the E.P.No.151 of 2009 by the first respondent, the executing court ordered notice to the petitioner. The notice sent to the petitioner was returned with an endorsement 'he vacated the house'. Thereafter the first respondent furnished the correct address of the petitioner. Then the executing court issued notice to the correct address of the petitioner. A perusal of the docket sheet of the executing Court reveals that the notice was duly served on the petitioner. On 27.02.2010 the counsel for the petitioner made appearance before the executing court. Thereafter, the matter was

posted for filing of sale papers and encumbrance certificate. On 28.7.2011 after filing of the sale papers, the executing court posted the matter to 05.08.2011 on which date the first respondent filed certificate issued by the Sub-Registrar showing the value of the property for sale as Rs.6.00 lakhs. The Court Amin valued the property as Rs.10.00 lakhs. For one reason or the other, the petitioner did not choose to file any document showing the value of the property. The executing court, having no other alternative, fixed the upset price basing on the valuation certificate submitted by the first respondent and the Amin. The executing court, after following due procedure, conducted auction on 12.10.2011 and the bid was knocked in favour of the second respondent for Rs.12,25,000/-.

16 A perusal of the record reveals that the petitioner participated in the proceedings right from 27.02.2010 till completion of the auction. The auction was conducted in the presence of the counsel for the petitioner. But the petitioner did not choose to file any objections at the time of settlement of the terms and conditions of the sale or at the time of conducting of auction.

17 As seen from the testimony of P.W.2, who is the Process Server, he affixed the sale notice on the doors of the house where the petitioner resides. His testimony further reveals that the village servant made beat of tom tom in the village duly intimating the proposed sale of property in the court auction. His testimony further reveals that the son of the petitioner was present at the time of affixing the sale notice on the doors of the house of the petitioner. As seen from the testimony of P.W.3 he conducted an enquiry in the village and estimated the value of the property as Rs.10,00,000/- A perusal of the record reveals that the first respondent filed the

valuation certificate received from the office of the Sub-Registrar. In the cross examination the petitioner being P.W.1, in unequivocal terms, deposed that the counsel engaged by him has been informing the stage of the proceedings. No explanation was put forth by the petitioner for non-filing of his valuation certificate, in spite of giving reasonable time and opportunity to him by the executing court. I have carefully perused the docket sheet of the executing court. The executing court meticulously followed the procedure as contemplated under Order XXI CPC from the date of appearance of the petitioner till the date of conducting of the auction.

18 It is needless to say that burden of proof lies on the person who files an application under Order XXI Rule 90 CPC to establish the irregularity or fraud, if any, in conducting the auction. There is no mention in the testimony of P.W.1 about the alleged irregularities in conducting the auction by the executing court. A person who pleads fraud has to establish the same by preponderance of probabilities. The testimony of P.W.1 is no way helpful to establish that the first respondent played fraud. On the other hand, the first respondent / D.Hr produced the valuation certificate given by the Sub-Registrar. The executing court also fixed the upset price basing on the valuation certificate produced by the first respondent / D.Hr and the Court Amin. The executing court has not committed any irregularity while fixing the upset price. The material placed before the Court is not sufficient to hold that the D.Hr played fraud. The petitioner failed to prove the basic ingredients of Order XXI Rule 90 CPC. The executing court, basing on the material available on record, arrived at a conclusion that the petitioner failed to prove the basic ingredients of Order XXI Rule 90 CPC. The appellate court, after re-appreciating the

entire material available on record afresh, arrived at a conclusion that the petitioner failed to prove the ingredients of Order XXI Rule 90 CPC and consequently dismissed the petition. I am fully endorsing with the findings recorded by the courts below.

19 The learned counsel for the second respondent submitted that the E.A. is not maintainable without impleading the auction purchaser. To substantiate the argument, he has drawn the attention of this court to the judgment in ***S. Sarojamma vs. Sri Ram Chits Funds Ltd, Hindupur, Anantapur District***[1] wherein this court held at para No.11 as follows:

> "Apart from all these findings, which was also reached by the executing Court, the fundamental defect of non-joinder of necessary party namely auction purchaser in EA No.498 of 2002, to my mind does not get cured merely by impleading the auction purchaser in the present C.M.A. By not impleading the said auction purchaser, any orders passed in EA No.498 of 2002 would not bind the said auction purchaser and as such the relief of setting aside the sale sought for by the petitioner without impleading the auction purchaser is too fundamental defect, which is incurable."

20 As per the principle enunciated in the case cited supra, the auction purchaser is a necessary and proper party to the petition filed under Order XXI Rule 90 CPC or Rule 66 CPC.

21 Refuting the submission made by the learned counsel for the second respondent, the learned counsel for the petitioner submitted that the auction purchaser is not a necessary and property party. To substantiate the argument, he has drawn the attention of the court to the judgment in ***Desh Bandhu Gutpa vs. N.L.Anand & Rajinder Singh***[2] wherein the Hon'ble apex Court held at para No.5 as follows:

> "The further contention of Shri Madhava Reddy that the objection petiton and the appeal are not maintainable as the wife of Rajinder Singh, joint purchaser was not impleaded eo nominee as respondent, too is devoid of force. The application to set aside the execution sale is primarily against the decree-holder since he is a person at whose instance and benefit the execution proceedings were initiated and the sale was held to discharge his

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[1] 2013 (1) ALD 91
[2] (1994) 1 SCC 131

> decree debt. Therefore, primarily he is the person entitled to be heard and since he is in-charge of publishing the notices and to conduct the sale it is he that lays before the court the steps taken or the procedure followed in serve of notice or conducting the sale and to establish that they have been done properly, regularly and in accordance with the law. The auction-purchaser, gets a right only on confirmation of sale and till then his right is nebulous and has only right to consideration for confirmation of sale. If the sale is set aside, apart from the auction-purchaser, the decree-holder is affected since the realisation of his decree debt is put off and he would be obligated to initiate execution proceedings afresh to recover the decree debt. Therefore, in the proceedings under Section 47 or Order 21 Rule 90, the decree-holder is impleaded *eo nomine* as respondent as the property was purchased jointly at the court sale, it is enough that one among them had been impleaded as a party. It is not necessary to implead all the joint purchasers."

22 In the above case two persons have purchased the property jointly in an auction. One of the auction purchaser is shown as respondent in the petition filed under Order XXI CPC. The Hon'ble apex Court held that one of the joint purchasers need be impleaded as respondent.

23 In the instant case, for the reasons best known to the petitioner/J.Dr, he did not implead the auction purchaser as one of the party respondents in E.A.No.499 of 2011 before the executing court. In the appeal also, the petitioner has not impleaded the auction purchaser as one of the respondents. As observed earlier, during the pendency of the appeal, the second respondent filed a petition under Order I Rule 10 CPC and the same was allowed. Non-impleading of the auction purchaser is also one of the valid grounds for dismissal of the E.A. A perusal of the record reveals that the trial Court has not confirmed the auction in favour of the second respondent in view of the stay granted by this court.

24 Having regard to the facts and circumstances of the case and also the principle enunciated in the cases cited supra, I am of the considered view that there is no question of law much less substantial question of law in this appeal warranting interference of this court

while exercising jurisdiction under Section 100 CPC. The present CMSA lacks merits and bonafides.

25 Accordingly, the CMSA is dismissed. No order as to costs. As a sequel, miscellaneous petitions, if any, pending in this CMSA shall stand dismissed.

**T.SUNIL CHOWDARY, J**

Date: August 10, 2018
***Kvsn***