

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

C.R.P.No.952 OF 2017

Between:

1. K.Venkateswaramma @ Hema Laltha Kumari
2. K.Lakshmi Devamma

Petitioners

And

1. Y.Ravindranath Reddy
2. K.Rangaswami

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 01.02.2018

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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|--|----------|
| 1. Whether Reporters of Local Newspapers may be allowed to see the judgment? | Yes / No |
| 2. Whether the copies of judgment may be marked to Law Reporters / Journals? | Yes / No |
| 3. Whether Their Lordship wish to see the fair copy of the Judgment? | Yes / No |



*** THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY**

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! Counsel for Petitioner : Sri K. Rathangapani Reddy

^ Counsel for Respondents : Sri O.Manohar Reddy

< Gist:

> Head Note:

? Cases referred:



THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.R.P.No.952 OF 2017

ORDER:

This revision petition is filed under Section 115 C.P.C. questioning the order dated 30.11.2015 in C.M.A.No.6 of 2013 passed by the IV Additional District Judge, Kurnool, dismissing the appeal filed by the petitioner against the order dated 13.12.2011 in E.A.No.264 of 2010 in E.P.No.330 of 2007 in O.S.No.214 of 1992 passed by the II Additional Junior Civil Judge, Kurnool, dismissing the application filed under Order 21 Rule 90 C.P.C.

2. The petitioners filed affidavit raising only one contention i.e. posting the matter for filing sale papers for test and sale of E.P. schedule property without attachment, but raised different contentions during hearing before the executing Court. In view of the various contentions raised during hearing, it is appropriate to extract the allegations made in the affidavit for better appreciation:

“I am the petitioner No.2 herein and the J.Dr.No.2 in the above said E.P. The respondent No.1 filed the above E.P. against me and one K.Lakshmi Devamma to sale the E.P., schedule property for realization of E.P. amount of Rs.3,30,000/-. The respondent No.1 herein brought the E.P. schedule property for sale. The D.Hr has not attached the E.P. schedule property and directly posted the matter for test and sale the E.P. schedule property under Order 21 Rule 66 C.P.C. On 16.08.2010 the Hon'ble Court conducted sale and sale knocked down in favour of respondent No.2 for Rs.11,20,000/- and the matter is posted to 01.11.2010 for conformation of sale.”

3. Before the executing Court, the respondents filed counter denying the material allegations *inter alia* contending that in terms of the decree for payment of Rs.1,25,000/- a charge was created against the property and thereby the property need not be attached under Order 21 Rule 54 C.P.C. and thus, failure to attach the property following the procedure under Order 21 Rule 54 C.P.C. is not illegal or irregular and thereby the sale is not vitiated by any material irregularity or illegality and prayed to dismiss the petition.

4. Before the executing Court, the 2nd petitioner was examined as PW.1 and the 1st respondent was examined as RW.1. No documents were marked.

5. Upon hearing argument of both counsel, the executing Court not only recorded a finding on the ground urged in the petition i.e about proceeding to sell the property without attachment in compliance of Order 21 Rule 54, but also the other grounds raised with regard to the non service of notice under Order XXI Rule 66 C.P.C. and sale of entire property for realization of Rs.3,30,000/- and dismissed the petition.

6. Aggrieved by the same, the petitioner preferred C.M.A, before the IV Additional District Judge, Kurnool, which was ended in dismissal confirming the order passed by the executing Court and dismissed E.P.

7. Aggrieved by the concurrent findings recorded by the executing Court and appellate Court, the present revision

petition is filed reiterating the same grounds. Though the petitioner raised only one ground in the petition before the executing Court, under Order 21 Rule 54 C.P.C., during enquiry there was an improvement raising several contentions regarding non service of notice under Order 21 Rule 66 C.P.C. and sale of entire property, though the amount to be realized is Rs.3,30,000/- under the decree.

8. During hearing, Sri K.Rathangapani Reddy, learned counsel for the petitioners contended that non service of notice under Order 21 Rule 66 C.P.C. is a serious irregularity and without serving notice, property cannot be sold in execution of a decree for realization of debt due. He also contended that the sale of the property without attachment under Order 21 Rule 54 C.P.C. is a serious irregularity and placed reliance on judgments of the Apex Court in **Mannem Peda Narisi Reddi v Maddivenkayya died and others**¹ AND **M/S MAHAKAL AUTOMOBILES AND ANOTHER V KISHAN SWAROOP SHARMA**².

9. Yet another contention urged before this Court is that the sale of entire property of Ac.2.33 cents for realization of Rs.3,30,000/- is a serious irregularity and sale of part of the property is sufficient to realize the debt. Therefore, both the Courts below committed serious error in dismissing the

¹ AIR 1977 AP 234

² AIR 2008 SC 2061

petition and prayed to set aside the sale allowing the revision by exercising power under Section 115 C.P.C.

10. Sri O.Manohar Reddy, learned counsel for the respondent No.2, during hearing has drawn the attention of this Court to the contents of the affidavit filed along with the petition and the specific plea therein is only non compliance of Order 21 Rule 54 C.P.C. and no other ground was urged. He also contended that a charge is created by a decree, the Decree Holder is entitled to proceed against the property and sell the same to realize the debt due under the decree. Therefore, the executing Court and the appellate Court rightly recorded the finding that no attachment is necessary when a decree created a charge over the property was passed by the original Court in the suit. The Apex Court in **Chimakurti Bala Subrahmanyam v Samanathapudi Vijaya Lakshmi and others**³ held that a charge of fraud or material irregularity under Order 21 Rule 90 must be specifically made with sufficient particulars. Bald allegations would not do. The facts must be established which could reasonably sustain such a charge.

11. Considering rival contentions, the point that arises for consideration is:

Whether non compliance of Order XXI Rules 54 and 66 C.P.C. and sale of entire charged property for realization of debt due under the decree is a material

³ AIR 1964 SC 1300

irregularity, if not whether the sale is liable to be set aside?

12. The first contention raised before this Court is that without attaching the property under Order 21 Rule 54 C.P.C. the property cannot be sold in auction under Order 21 le 66 C.P.C. and it is a serious irregularity. Admittedly, suit i.e. O.S.No.214 of 1992 was filed for perpetual injunction was filed in O.S.No.214 of 1992 before the II Additional Junior Civil Judge, Kurnool and the said suit was decreed in compromise, whereunder the Judgment Debtor agreed to pay Rs.1,25,000/- while creating a charge over the schedule property. Thus, a charge decree was passed by the Court below. When a decree for realization of the amount creating a charge over the property was passed, the Decree Holder is entitled to straight away proceed in execution for realization of the amount due by sale of the property.

13. Section 51 C.P.C. deals with the powers of the Court to enforce execution. Clause (b) of Section 51 C.P.C. permits the Court to execute the decree by attachment and sale or by sale without attachment of any property.

14. Order 21 Rule 54 C.P.C deals with attachment of immovable property. Where the property is immovable, the attachment shall be made by an, order prohibiting the judgment-debtor from transferring or charging the property in anyway, and all persons from taking any benefit from such transfer or charge and the provisions of C.P.C. permits the

Court to proceed in execution of either with or without attachment of property depending upon nature of the property for realization of decree debt.

15. An identical question came up before the Court in an unreported judgment in **A.Choudhary and Co. v Alliance Industrial Syndicate India (Private) Ltd., Calcutta** Gauhati High Court at para 9 held that Section 51 C.P.C. allows execution to be taken by attachment and sale or by sale without attachment of any property. Where the decree it self has made a particular property a charge, it is not necessary to further attach the property again in execution before bringing it to sale and hence an attachment under Or. XXI, Kule 54 C. P. C. seems to be quite unnecessary in such a case. What is contemplated under Or. XXI, Rule 54 is an attachment by an order prohibiting the judgment-debtor from transferring or charging the property in any way and all persons from taking any benefit from such transfer or charge. That step has already been taken when the decree itself made the property a charge for the payment of the decree amount. Hence a fresh attachment does not seem to be called for.

16. In another Judgment of Calcutta High Court in an unreported Judgement in **Dhirendranath Sen and others v Santa Shila Devi and others** reiterated the same principle and when Section 51 C.P.C. permits the Court to proceed in execution either with or without attachment and failure to

attach the property of the petitioner under Order 21 Rule 54 C.P.C. is not a serious illegality or irregularity, which vitiates the sale as the decree itself was for realization of amount by creating a charge over the schedule property. Therefore, the contention that no attachment was effected under Order 21 Rule 54 C.P.C. before bringing the property for sale under Order 21 Rule 66 C.P.C. is without any substance and this contention is contrary to Section 51(b) C.P.C.

17. Learned counsel for the petitioners placed reliance in **M/s Mahakal Automobiles and another** referred supra, in para 11 it was held that the attachment under Order 21 Rule 54(1)(a) C.P.C. in the appendix B Forms 23, 24 and 29 noted that it is necessary to sell the property in execution of a decree for realization of any amount. But the Court did not advert to the nature of the decree and when a charge is created over the property for realization of the amount by way of decree. In view of Section 51 C.P.C., no attachment need be obtained. The Apex Court did not advert to Section 51 C.P.C. and without considering the nature of decree passed the order without laying down any specific law. Therefore, the principle laid down in the above judgment has no application to the present facts of the case.

18. In view of my foregoing discussion and perused by law declared by the Gauhati High Court and Calcutta High Court, coupled with Section 51 C.P.C., I find no merit in the

contention of learned counsel for the petitioners to set aside the sale on the ground that the property was sold without complying Order 21 Rule 54 C.P.C.

19. Learned counsel for the petitioners raised another ground i.e non service of notice as required under Order 21 Rule 66 C.P.C. and it is a serious irregularity. In support of his contention, he placed reliance in **Mannem Peda Narisi Reddy's** case referred supra. No doubt, notice under Order 21 Rule 66 is mandatory before sale of the immovable property, but no such plea was raised before the executing Court in the entire affidavit questioning the sale of property on the ground of non service of notice under Order 21 Rule 66 C.P.C. When no plea was raised, the 2nd respondent is not required to file any counter disputing such questions raised for the first time during enquiry or hearing. The pleading in a civil suit is vital and when no plea is raised in the pleading and no amount of evidence, if any, adduced cannot be received since object of pleading is that to give fair notice to each party of what the opponent's cause is, and to ascertain, with precision, the points on which the parties agree and those on which they differ, and thus to bring the parties to a definite issue. The purpose of pleading is also to eradicate irrelevancy. In order to have a fair trial it is imperative that the party should state the essential facts so that other party may not be taken by surprise. The parties thus themselves know what are matters left in dispute and what facts they

have to prove at the proceeding and are thus given an opportunity to bring forward such evidence as may be appropriate. The main object of pleadings is to find out and narrow down the controversy between the parties. Contentions which are not based on the pleadings cannot be permitted to be raised either at the time of arguments or at the appellate stage as held in **The New India Assurance Co Ltd. V Surender Singh and others**⁴. In the same judgment, the Court held that the Court cannot travel beyond the pleadings as no party can lead the evidence on an issue not raised in the pleadings and in case, such evidence has been adduced or a finding of fact has been recorded by the Court, it is just to be ignored. If this principle is applied to the present facts of the case, in the absence of any plea about non-compliance of Order 21 Rule 66 C.P.C. is raised, no amount of evidence need be looked into to decide the real controversy involved in the petition. When no plea was raised regarding non compliance of Order 21 Rule 66 C.P.C., the respondent had no opportunity to meet the contention by filing his counter and marking documents. Thus, in the absence of plea, the Court cannot rely on the plea raised during enquiry or at the appellate stage for the first time without affording opportunity to the respondents.

⁴ HC UAD 2007, 423

20. The Apex Court in **Bachhaj Nahar v Nilima Mandal and others**⁵ highlighted the importance of pleadings and reiterated the object of pleadings and held in paras 9 and 10 that the object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. The Apex Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take. It is further held that when the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result, the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a

⁵ 2009(1) SCCD 220

court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is no prayer for a particular relief and no pleadings to support such a relief, and when defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into to grant any relief. In deciding the case, the Apex Court followed the earlier judgments in **Nedunuri Kameswaramma v Sampati Subba Rao**⁶ and **Bhagwati Prasad v Shri Chandramaul**⁷.

21. By applying the principle laid down in the above judgments, to the present facts of the case, in the absence of any plea regarding non compliance of Order 21 Rule 66 C.P.C the evidence in support thereof adduced before the Court can be overlooked and no relief can be granted to the petitioner. On such ground, when the petitioner had no opportunity to meet such plea by filing written statement/counter. The executing Court and the appellate Court though adverted to this contention, declined to set aside the impugned order while holding that it is not an irregularity as there was no plea in the pleading, which is a basic requirement in the civil

⁶ AIR 1963 SC 884

⁷ AIR 1966 SC 735

proceedings. Therefore, basing plea of non compliance of Order 21 Rule 66 C.P.C. sale cannot be set aside treating it as material irregularity, which forms a ground for setting aside the sale while exercising power under Order 21 Rule 90 C.P.C.

22. The other contention raised before this Court is sale of entire property for realization of meager amount of Rs.3,30,000/-. When a charge was created against the entire property, the petitioner is entitled to proceed against the property charged for realization of the debt and even otherwise, no such plea was raised in the petition, as already extracted relevant portion in the earlier part of the judgment that does not disclose such plea. Therefore, in view of law referred above, such plea cannot be entertained even if any evidence is adduced extending the scope of enquiry. Therefore, the grounds urged before this Court will not stand to any legal scrutiny and no interference is called for by exercising power under Section 115 C.P.C., which is limited.

23. According to Section 115 C.P.C., the Court can call for records from any subordinate Court and interfere with the orders, if the Court below failed to exercise jurisdiction so vested on it or to exercise jurisdiction not vested by any law or to have acted in exercise of jurisdiction illegally or material irregularity.

24. In the present case, grounds enunciated under Section 115 C.P.C. have not been raised affording opportunity to the respondent to meet such plea. In the absence of such grounds, the impugned order cannot be faulted. Hence, the revision petition is liable to be dismissed as devoid of merits.

25. In the result, the revision petition is dismissed. There shall be no order as to costs.

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

01.02.2018

Note: L.R. copy to be marked.

b/o
kvrn

M. SATYANARAYANA MURTHY, J

