

HON' BLE SRI JUSTICE C. PRAVEEN KUMAR

CIVIL REVISION PETITION No. 4015 of 2018

ORDER:

1) The present Civil Revision Petition is filed under Section 115 of C.P.C., aggrieved by the order, dated 25.06.2018 passed in E.A.No.347 of 2018 in E.P.No.141 of 2016 in O.S.No.487 of 2007 on the file of the Principal Senior Civil Judge, Kakinada, wherein an application filed under Order 21 Rule 90 and Section 151 of C.P.C., was rejected.

2) Though Sri T.N.M.Panga Rao, learned counsel for the petitioners tried to contend that the order is *per se* illegal, as such revision under Section 151 of C.P.C. is maintainable, but Sri Ch.Pushyam Kiran, learned counsel for the respondent would submit that only an appeal would lie against an order passed under order 21 Rule 90 of C.P.C.

3) The issue identical to the case on hand came up for consideration before a Bench of this Court in *Sheikh Mastan v. Gubba Atchayya and others*¹. The issue before the Bench was “whether an order dismissing a petition under Order 21 Rule 90 of C.P.C., consequent upon the failure to comply with the direction contained in the proviso to that rule, fall within the ambit of Order XLIII Rule 1 (j) of C.P.C.”. After considering the provision of law including Rule 72 or Rule 92 of Order 21 of C.P.C., the Court held as under:

¹ AIR 1959 AP 667

“As already remarks, the Civil Procedure Code does not contain any provision giving a right of appeal against an order rejecting an application in limini for not making the required deposit. We feel that even a case where an application is dismissed on the ground of non-compliance with the direction to make the deposit, comes within the sweep and range of Order XLIII, Rule 1 (i) C.P.C. We are reinforced in our opinion by the judgment in *Marudamuthu Mudaliar v. Venkatarama Iyar*². The learned Judge has adduced valid reasons in support of his conclusions, if we may say so with respect.”

4) Similarly in *Konati Swamanna v. Golla Venkataswamy*³ the issue was whether an appeal is maintainable under Order XLIII Rule 1 (j) of C.P.C. when an application filed by petitioner before the executing Court under Order 21 Rule 90 of C.P.C. was dismissed. Relying on the Bench judgment of this Court referred to above, a learned Single Judge of this Court held as under:

“The above decision directly applies to the facts of the present case. By reason of dismissal of the application of the J.Dr., for setting aside the sale, the Court has to confirm the sale automatically under Rule 92. Consequently the appeal will lie under Order XLIII Rule 1 (j) C.P.C. The Court below erred in rejecting the appeal on the ground that there is no mention of Order XXI Rule 90 in Order XLIII Rule 1 (j) of C.P.C. Order XXI Rule 90 is an enabling provision for a party to apply for setting aside the sale. Rule 92 gives

² Manu/TN/0120/1938

³ 2005 (2) ALD 282

power to the Court to confirm or set aside the sale. Therefore, the cause of action in reality will arise only out of Rule 92 but not Rule 90. Therefore, viewed in this angle, I am of the clear opinion that an appeal lies against the order refusing to set aside the sale under Rule 92, filed by the J.D.R. under Order XLIII Rule 1 (j) of C.P.C.”

5) In view of the judgments referred to above, the Civil Revision Petition is dismissed on the ground of maintainability, giving liberty to the petitioners to file an appeal before the appropriate Court. The period of pendency of this revision before this Court shall be taken into consideration while calculating the period of limitation while filing the appeal. The Registry shall return the originals, which are filed along with the C.R.P., forthwith enabling the petitioners to present the same before the appellate Court.

6) There shall be no order as to costs. Miscellaneous petitions, pending, if any, shall stand closed.

JUSTICE C. PRAVEEN KUMAR

10.08.2018

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