

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA PRADESH**

CIVIL REVISION PETITION No.5834 of 2011

Between:

Rowthulapudi Primary Agricultural Cooperative Credit Society

.....Petitioner

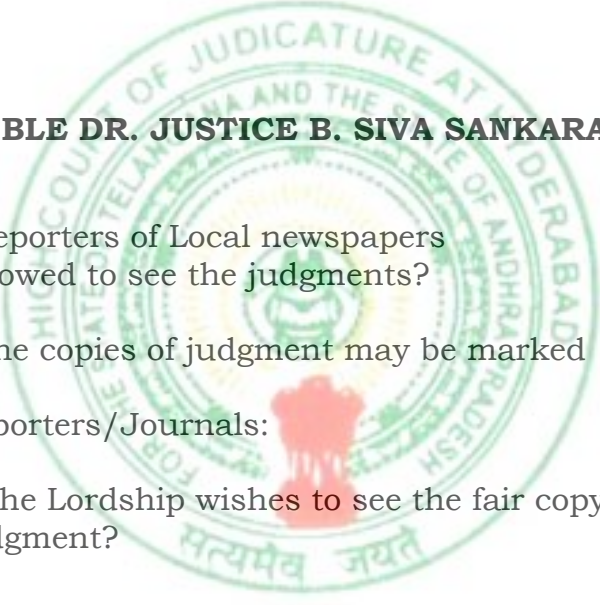
and

Kalla Sitaramam and 4 others

.....Respondents

Date of Judgment pronounced on : 09-03-2018

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

- 
1. Whether Reporters of Local newspapers : Yes/No
May be allowed to see the judgments?
 2. Whether the copies of judgment may be marked : Yes/No
to Law Reporters/Journals:
 3. Whether The Lordship wishes to see the fair copy : Yes/No
Of the Judgment?

*** HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**

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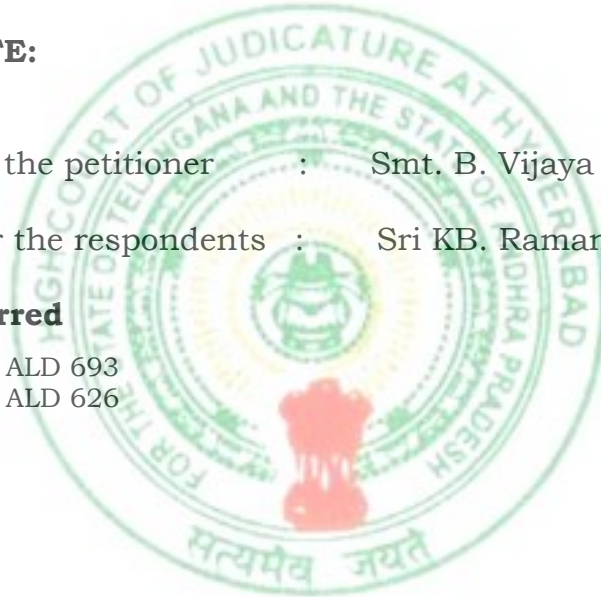
> HEAD NOTE:

! Counsel for the petitioner : Smt. B. Vijaya Lakshmi

^ Counsel for the respondents : Sri KB. Ramanna Dora

? Cases referred

1. 2015 (4) ALD 693
2. 2011 (3) ALD 626



HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**CIVIL REVISION PETITION No.5834 of 2011****ORDER:**

The revision petitioner is the unsuccessful party in E.A.No.89 of 2009 and CMA.No.36 of 2010 maintained the revision against the concurrent dismissal orders and findings of the learned Senior Civil Judge, Peddapuram (Executing Court) vis-à-vis learned III Additional District Judge, Kakinada, East Godavari District (first appellate Court). The revision petitioner is a third party to the proceedings in O.S.No.21 of 2006 and E.P.No.1 of 2008. The plaintiff in the suit was one K.Sitaramam (decree holder/auction purchaser) and the defendants are B.Lakshmi, B.Chakradharudu, B.Nookaraju and B.Sudheer (wife and 3 children of late B.Appanna Babu).

The suit O.S.No.21 of 2006 was filed based on the foot of pro-note said to have been executed by said Appanna Babu by creating the property as collateral security for the pro-note debt in maintaining suit and the suit O.S.No.21 of 2006 was decreed by the Senior Civil Judge, Yalamanchili, and the decree was transmitted for execution to the Senior Civil Judge, Peddapuram, where the property lies. It is in the course of execution, the decree holder on his application under Order 21 Rule 72 CPC was permitted to bid and became the bidder of the property and the auction held on 20.02.2009 and knocked the bid in his favour for Rs.2,26,000/- and after adjustment of the decree amount he deposited balance amount of Rs.48,916/- into Court and later for grant of sale certificate for filing of Non-judicial stamp papers to engross the sale in favour of auction purchaser/decree holder the

matter when posted, the petitioner/society states came to know of it and approached the Sub Registrar, Tuni and obtained encumbrance certificate and found that the said B.Appanna Babu created mortgage over item No.1 of E.P. schedule property on 10.06.1998 itself in favour of society and the mortgage debt is in subsistence that was not liquidated and suppressing the facts the property brought to sale. Said claim petition in E.A.No.89 of 2009 contested by decree holder/auction purchaser and the J.Drs. remained exparte and the counter of the decree holder/auction purchaser was that the petitioner society and J.Drs./respondent Nos.2 to 4 colluded in placing all the ended transactions to cause inconvenience and hardship to the decree holder/auction purchaser and it is a contested decree and based on that in execution, property was attached and after obtaining EC the property brought to sale and the decree holder became the auction purchaser. The society kept all the time silent filed the present petition at the belated stage without any just cause and has no bonafides and the claim petition is liable to be dismissed. It is therefrom by formulation of points for consideration in E.A. as to the society is entitled to the declaration that the sale held in E.P.No.1 of 2008 is illegal and irregular and to set aside. In deciding the above point in the claim petition in the course of enquiry on behalf of claim petitioner/society, the PW.1 one YSB Dora was examined and placed reliance on Exs.P1 to P4 viz., registration copy of the mortgage deed executed by B.Appanna Babu, Photostat account copy of mortgage loan transaction, EC and certified copy of the order of attachment issued by Divisional Cooperative Officer, Peddapuram. On behalf of the decree

holder/auction purchaser contesting respondent to the claim petition he came to witness box as RW.1 and no documentary evidence or further oral evidence adduced. From the above, the learned SCJ dismissed the said claim petition E.A.No.89 of 2009 on 24.08.2010 with the observation that PW.1 in his cross examination stated of no personal knowledge about the Ex.P1 mortgage transaction of the mortgage created by B.Appanna Babu covered by Ex.P2 account copy of the loan amount due and no person having personal acquaintance with the mortgage transaction on behalf of the society and marking of Ex.P1 registration copy of the mortgage deed not established the mortgage for PW.1 has no personal knowledge of the transaction and said B.Appanna Babu worked as President of the society during 1992-2005 according to PW.1 however no document filed in this regard and there is no order to say the report of Deputy Registrar of Cooperative society as Appanna Babu and Meera Mohiddin were directed to pay Rs.7,10,186/- to the society in respect of the alleged misappropriation of funds by said Appanna Babu and there is no evidence produced to consider the same thereby even Ex.P1 there is endorsement, the same was returned to the President of the society for not in proper way even to call it as proper mortgage deed and the property auctioned in E.P.No.1 of 2008 and the mortgage property not correlate to the claim and PW.1 admitted about the loans as on 31.03.2007 was waived to say a loan of Appanna Babu to take as waived. The claim petitioner cannot claim of there is valid attachment of the EP schedule property by the Deputy Registrar of Cooperative society from said evidence of PW.1 with reference to Exs.P1 to P4

including certified copy of the order of attachment issued by DCO. It is observed that RW.1, decree holder/auction purchaser deposed in his evidence about the alleged debt of Appanna Babu even if true as it is wiped out under Debt Relief Scheme, 2008, of the alleged debt of agriculturist due by 31.03.2007 and the mere pendency of departmental enquiry for the so called misappropriation cannot be a ground to say the debt not wiped out and the sale was proclaimed in Surya Telugu daily newspaper and there are no grounds to set aside the sale under Order 21 Rule 90 CPC that too when the claim petitioner/society failed to prove the so called mortgage debt over the EP schedule property. Thereby held the claim is liable to be dismissed for nothing to set aside the sale. The CMA.No.36 of 2010 filed by the society was also ended in dismissal on 08.11.2010 with the observations that evidence of PW.1 shows original defendant Appanna Babu committed irregularities in society while dealing with affairs as President and departmental enquiry conducted in directing to pay Rs.7,10,186/- along with others and for its realization Ex.P4 attachment order passed and a perusal of Ex.P4 shows Deputy Registrar, Peddapuram by order dated 23.03.2005 passed directing Assistant Registrar of DCO Office, Peddapuram, to conditionally attach the properties of Appanna Babu for recovery of the misappropriated amount of Rs.3,89,660/- with interest of Rs.4,65,173/- with subsequent interest at 18% per annum. However there is no evidence to show said attachment was affected, as PW.1 did not file any document of said attachment was affected pursuant to Ex.P4 proceedings, including from his say in cross examination of no document filed of attachment

affected thereby society failed to prove properties of the original J.Dr. were under attachment of the society. Ex.P1 registration extract of mortgage deed and Ex.P2-photostat account copy of the mortgage loan transaction and the borrowal even not disputed by filing counter by the J.Drs. or by the auction purchaser of the E.P. as one of the respondents what is contended is debt has been waived because of debt waiver scheme applies to the debts outstanding by 31.03.2007. A perusal of Ex.P1 mortgage deed shows it is only registration extract and the recitals at the fag end shows registration authority returned the document for compliance of objections and nothing to show objections complied with and if so when and which date the document was registered, though it is a compulsory registerable document and to be proved by examining anybody connected with and none connected with Ex.P1 were examined. Thereby evidence of PW.1 is of no avail and also he deposed in his cross examination of he cannot say whether there are recitals in Ex.P1 to the effect that mortgage deed returned to the President of the society due to defects and unless he see the records he cannot say details of mortgage property including survey numbers and even he deposed about Ex.P1 original is in the head office, no steps taken to get the original marked, thereby failed to prove the said mortgage transaction and PW.1's evidence shows mortgage debt has been waived of what is originally borrowed of Rs.25,000/- though PW.1 stated of no waiver given to the loans in respect of which enquiry is pending for misappropriation even according to him there is no enquiry pending with regard to mortgage loan covered by Ex.P1, leave apart original J.Dr. is an agriculturist and the loan was for

agricultural purpose availed to say it might have been waived and for the foregoing discussions, the appellant-society failed to substantiate the claim to seek set aside the sale. Thereby, CMA ended in dismissal.

In the revision impugning the same the grounds urged are that the concurrent findings of the court below are erroneous or perverse and unsustainable and devoid of merits and it results in failure of justice. The Courts below should have seen that Ex.P4 attachment proceedings dated 23.03.2005 issued by Deputy Registrar of Cooperative Societies in exercise of power conferred under Section 73 of the Act in issuing order of attachment and Courts below should have seen that for the misappropriation of funds and irregularities committed by said Appanna Babu while dealing with the affairs of the society enquiry conducted and in directing to pay Rs.7,10,186/- and for its realization Ex.P4 attachment was ordered and Courts below gravely erred in holding debt contacted by said Appanna Babu is waived without any evidence in support of it and should have seen that original J.Drs. and the decree holder/auction purchaser colluded and Exs.P1 to P3 establishes the subsistence of the mortgage debt of the mortgage over the property entered on 10.06.1998.

Whereas it is the submission of the learned counsel for the respondents to the revision, the auction purchaser of the impugned orders of the Courts below with concurrent findings no way requires interference while sitting in revision.

Learned counsel for the revision petitioner placed reliance on the expression of this Court in **NCV Subba Rao Vs. Gunda**

Anka Rao¹, saying as can be seen from Order 21 Rule 90 CPC sale of the property in execution of the decree can be set aside on the ground of material irregularity or fraud in publishing or conducting sale and the ground available for setting aside the sale is material irregularity. Once that is not shown even full description of property not given or market value shows lesser to actual value cannot be a ground to set aside the sale when such plea not taken on or before proclamation of sale drawn up. The above decision has no application since the facts are entirely different. In **Mamillapalli Jyothish Kumar Vs. Deputy Registrar, DCC Bank, Eluru**² it was held that any alienation after statutory charge under Section 36 of the Act 1964 is void.

Heard both sides and perused the material on record.

Ex.P4 is the certified copy of the order of attachment issued by the Divisional Cooperative Officer, Peddapuram. The only thing to be seen therefrom with reference to evidence of PW.1 is the attachment effected or not for the amount of Rs.7,46,186/- which includes amounts misappropriated as Ex-President of the society by late Appanna Babu that comes to Rs.7,10,186/- covered by regular departmental enquiry by the Deputy Registrar of Cooperative Societies in passing the surcharge proceedings in Roc.No.594/03 dated 03.12.2005. The claim petition averments clearly show the attachment was affected and PW.1's evidence speaks he has no personal knowledge of the attachment is effected or not. The counter filed by the auction purchaser/decreed holder of the suit O.S.No.21 of 2006 it is not shown any specific denial of attachment affected nor in the

¹ 2015 (4) ALD 693

² 2011 (3) ALD 626

evidence as RW.1 he did not specifically say no attachment effected, leave about of official acts are presumed to be duly performed unless contrary is shown and at best if at all there is any doubt, any of the Courts below should have been asked for production regarding attachment is effected if not by the lower Court remand the matter to the trial Court that too when there is a huge amount of misappropriation and what is wiped out of the agricultural debt of the mortgage for Rs.36,000/- and odd even that mortgage deed was returned with defects before registration and not even registered. Once for the agricultural loan that mortgaged is covered, the Courts below should have been considered whether the document is contemporaneous to the debt or a subsequent acknowledgment of the past transaction by the terms used therein. Once such is the case of any acknowledgment of past transaction registration is not compulsory as per the settled law rather than saying it is not proved the question of proving arise for a registered mortgage for compulsory registerable if there is a specific denial under Section 68 of the Evidence Act and not for a document nor a registered mortgage and once that is the conclusion arrived by the Courts below of not a complete registered mortgage then the question of proving does not arise even the same is stated a registration extract. Once such is the case, it is outcome of registration and even it is not a registered one and the document not in dispute by specific contentions in the cross examination, but for in saying no persona knowledge for not a case of forged or fabricated or untrue transaction, but for in saying the debt is deemed wiped out and that when evidence of PW.1 shows for those persons where

departmental enquiry and irregularities pending they did not wipe out the debt and once such is the case, the deemed wiping out does not arise for the mortgage in subsistence and any sale by attachment for recovery of any money decree then shall be subject to mortgage debt that is not done in the case on hand, leave apart even for the surcharge proceedings of the misappropriation amount attachment proceedings issued, but for not given clarification from lack of personal knowledge of PW.1. Once the proceedings is to effect and deemed effected by drawing presumption it is subject to that attachment any sale by Court attachment shall follow and it was not down in the case on hand and that too to say it is collusive one, the publication is in Surya Telugu daily non circulated local newspaper and J.Drs. not even contested being the LRs of Appanna Babu. It is the decree holder/auction purchaser with permission of the Court knocked the bid and it is not even an observation by Court in considering what is the market value of the property with reference to Sub Registrar value and Amin value and decree holder value and J.Dr. value. As it is one of the primary duties of Court under Order 21 Rule 64 CPC only to sell the extent required and not the whole property, leave apart the prior attachment if at all in subsistence and prior mortgage of the society if at all in subsistence, the sale in favour of the decree holder/auction purchaser of the suit debt shall be subject to the above dismissal of the claim petition and the dismissal of the appeal by the Court is unsustainable and accordingly set aside.

Having regard to the above, the Civil Revision Petition is allowed by setting aside the dismissal order confirmed in appeal

and by restoring the E.A.No.89 of 2009 by remanding to the Executing Court for deciding afresh by affording further opportunity to the claimant-society and the contesting respondents viz., decree holder/auction purchaser and J.Drs. of the execution proceedings of the decree in O.S.No.21 of 2006, to decide the E.A.No.89 of 2009 on own merits afresh therefrom preferably within six months from the date of receipt of this order.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

Date: 09.03.2018
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JUSTICE Dr. B.SIVA SANKARA RAO

