

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

CRP.No.1344 of 2019

ORDER:

This Revision is filed under Section 115 CPC challenging the order dt.01.06.2019 in EA.No.7 of 2019 in EP.No.2 of 2014 in O.S.No.113 of 2010 on the file of the VIII Additional District Judge, Miryalaguda.

2. Petitioner is the 2nd Judgment Debtor in the said suit, which had been filed by the 1st respondent against the petitioner and another person for recovery of money on the basis of the promissory note.

3. The suit was decreed *ex-parte* on 20.12.2012.

4. Petitioner then filed I.A.No.1068 of 2017 under Section 5 of the Limitation Act, 1963 to condone the delay of 1645 days in filing the petition under Order IX Rule 13 CPC and I.A.No.1067 of 2017 under Order IX Rule 13 CPC.

5. After contest, both these applications were dismissed on 05.12.2018. The plea that the petitioner fell ill and was unable to move out was found to be not proved by the petitioner by the Court below in the said orders.

6. Petitioner challenged the same in CMA.No.190 of 2019 and CRP.No.486 of 2019 but withdrew the same on 28.02.2019.

7. No appeal has also been preferred by the petitioner against the judgment and decree dt.20.12.2012 in O.S.No.113 of 2010. Thus the decree in the said suit has attained finality.

8. The Decree Holder filed E.P.No.2 of 2014 on 12.11.2013 for sale of the properties of the petitioner.

9. Petitioner then filed EA.No.7 of 2019 invoking Order XXI Rule 26 CPC and Rule 59(b) CPC to stop the sale alleging that the Decree Holder played fraud on the Court to obtain the judgment and decree in the suit against him. He also alleged that initially the suit had been dismissed for default on 27.10.2011 as the Decree Holder was absent, and the Decree Holder had filed I.A.No.3141 of 2012 to restore the suit. In that application, the trial Court ordered notice on 17.11.2011 and posted the matter to 23.12.2011 and on that date, counsel for the Decree Holder filed a Memo stating that the notice was served to the counsel for the 1st Judgment Debtor and on the basis of the said endorsement the trial Court allowed I.A.No.3141 of 2011.

10. Counter was filed by the Decree Holder opposing the said application. He contends that after full enquiry in the EP, publication of sale of the EP property was made, and if the petitioner had any objection, he has to challenge it by way of Revision before the Court. He also contended that no claim petition is pending and therefore the question of stay of sale would not arise.

11. By order dt.01.06.2019, the Court below dismissed the stay application EA.No.7 of 2019. It held that *ex-parte* decree had been passed in the suit and if the petitioner's claim is that it was decreed without notice to him, his remedy lies elsewhere. It also held that Order XXI Rule 26 CPC cannot be invoked by the petitioner because it does not deal with stay of execution; and Order XXI Rule 59 CPC also cannot be invoked because it relates to only investigation into possession on the date of attachment. It also declined to apply Section 151 CPC on the ground that if a procedure or remedy is expressly provided in the Code, Section 151 CPC has no application.

12. Assailing the same, this Revision is filed.

13. Counsel for the petitioner contended that fraud has been played by the Decree Holder on the Court below and on the petitioner for securing the *ex-parte* decree in O.S.No.113 of 2010 on 20.12.2012 and the petitioner should be given an opportunity to establish the said fraud.

14. It is important to note that the plea raised in this EA.No.7 of 2019 about lack of knowledge about the proceedings in the suit was not raised in I.A.Nos.1067 of 2017 and 1068 of 2017; the plea raised there was that there was a compromise in O.S.No.113 of 2010 and he had been informed about the said compromise by the Decree Holder, and he also stated that he was sick between

September and October, 2016 and signed some papers produced by the Decree Holder.

15. Admittedly, the decree in the suit has attained finality as of date in view of the fact that no appeal was preferred against it by the petitioner and also because the application under Order IX Rule 13 CPC and Section 5 Limitation Act, 1963 filed by the petitioner were dismissed on 05.12.2018 in I.A.No.1068 of 2017 and 1067 of 2017, which came to be confirmed by this Court on 28.02.2019 in CMA.No.190 of 2019 and CRP.No.486 of 2019.

16. Therefore, there is no impediment to the execution of the decree and the sale of the EP schedule property cannot be stalled invoking Order XXI Rule 26 CPC and Order XXI Rule 59 CPC or Section 151 CPC. So, I do not find any merit in this Revision.

17. Accordingly, this Civil Revision Petition is dismissed. No order as to costs.

18. Consequently, miscellaneous petitions pending if any shall stand dismissed.

M.S. RAMACHANDRA RAO, J

13th June, 2019.

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