(2002) 01 AP CK 0075

In the Andhra Pradesh High Court

Case No : CRP No. 2586 of 1988

Devu Veerabhadra Rao and Others — APPELLANT

Vs

Gollapalli Latchanna (died) by LRs. and Others — RESPONDENT

Date of Decision : 21-01-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 91, Order 21 Rule 92, Order 21 Rule 93

Citation : (2002) 2 ALD 230 : (2002) 3 ALT 608 : (2002) 1 APLJ 377

Hon'ble Judges : E. Dharma Rao, J

Bench : Single Bench

Advocate : V.L.N.G.K. Murthy, for the Appellant; V.V.L.N. Sarma, for the Respondent

Final Decision : Dismissed

Judgement

E. Dharma Rao, J.—This civil revision petition is directed against the order dated 18-4-1988 in Civil Miscellaneous Appeal No. 1 of 1985 passed by the learned III Additional District Judge, Kakinada, dismissing the appeal preferred against the order dated 5.10.1982 passed by the learned I Additional Subordinate Judge, Kakinada, in E.A. No.46 of 1982 in E.P. No.247 of 1978 in O.S. No.46 of 1976, filed u/s 47 of the CPC (for brevity the Code), allowing the petition for setting aside the sale holding that there was no sale in the eye of law and the same was treated as nullity on the ground that the petitioners herein have no saleable interest in the suit schedule property and they have played fraud both on the respondents and the Court.

2. The facts, in nutshell, leading to the filing of this revision petition, are that the first respondent who was the decree holder in OS No. 47 of 1976, brought the properties of the respondents 2 to 4 for sale in execution of the decree and the sale was held on 30.9.1981, which were purchased by the petitioner for Rs.21,000/-. The sale was confirmed and sale certificate was to be issued. While so, on 27.12.1981 the petitioner went to Karapa village and enquired with Village

Karnam with regard to the property purchased by him and came to know that the respondents have surrendered the land purchased by him to the Government under the Land Ceiling Act with an intention to defeat the decree debt and also the rights of the auction purchaser. He also came to know that the land was allotted for house sites. It is further stated that the petitioner bid the auction thinking that the respondents were the owners of the property and as on the date of auction he was unaware that the respondents have no saleable interest and thus, the respondents played fraud both on the petitioner and the Court, that they have made part payments for some time and suddenly stopped in view of suppression of the above mentioned fact in their counter and it is only on 27-12-1981, the petitioner came to know about the fraud committed by the respondents 2 to 4.

3. The above application was resisted by the respondents 2 to 4 in the above said EA 46 of 1982 contending that the petitioner has no locus standi to file the petition after confirmation of sale and the Executing Court has no jurisdiction to entertain any petition under Order 21, Rule 91 of the Code after the sale is confirmed. It is further contended that the petitioner is the son of the decree holder and the EP was pending since long time and counter was filed long time back stating that the proceedings under the Land Ceiling Act are pending. It is the bounden duty of the petitioner to verify. The allegation that the petitioner came to know about the surrender of purchased land only on 27-12-1981 and that the respondents 2 to 4 have no saleable interest is denied. It is further stated that the decree holder was receiving the part payments and got the property auctioned and the purchaser is entitled to whatever compensation paid by the Government and he cannot seek to set aside the sale, that the petitioner is an Engineer in PWD Department and is only a representative of the decree-holder and the respondents 2 to 4 never represented that they have any saleable interest. It is further contended that the petition is barred by time.

4. Having regard to these rival contentions, the trial Court considered the issue as to whether the sale is liable to be set aside.

5. Neither parties have adduced any oral evidence. Ex.A1 is the copy of the notice in Form No.13 under the A.P. Land Reforms Act, 1973 showing surrender of Ac.2.90 cents of wet land in Sy. No.224/2 and Ac.3.28 cents of wet land in Sy.No.136/lB by the 3rd respondent. In support of this, the petitioner filed certified extract of fair adangal marked as Ex.A2 which corresponds to old Sy.No.187. Thus, there cannot be any difficulty in holding that the item No.3 purchased by the petitioner was surrendered by the 3rd respondent before the sale which was held on 30-9-1981 and confirmed on 3-12-1981. Ex.A1 was published in the gazette on 5-2-1981 much earlier to the sale. The counter filed therein on 12-3-1981 does not speak anything about the surrender of the land under Land Ceiling Act. Therefore, having regard to these facts and circumstances, the trial Court has rightly held that even after overruling the objection regarding the payments, the judgment debtor went on paying some

amounts and part satisfaction was recorded from time to time and on 30-9-1981, the item No.3 was sold to the petitioner. Thus, the respondents 2 to 4 have deliberately withheld the information about the surrender of the land and thus played fraud both on the petitioner and the Court. In these circumstances, the petitioner contended that the sale is liable to be set aside.

6. The trial Court recorded that the learned Counsel for the petitioner admitted that the provisions of Order 21, Rule 91 of the Code are not applicable inasmuch as the application was filed long after the confirmation of sale. The Court below, on scrutiny of the decisions in Punjab Mercantile Bank Ltd. Vs. Sardar Kishan Singh, Balwant Rai Kumar Vs. Smt. Amrit Kaur, came to the conclusion that since the respondents 2 to 4 did not bring to the notice of the decree holder that the purchased property was subject-matter of declaration under the A.P. Land Ceiling Act, and thus they have no saleable interest in the lands and, therefore, they have patently played fraud both on the Court and the petitioner and thus, allowed the petition with costs.

7. Against that order, Civil Miscellaneous Appeal No. 1 of 1985 was filed and the learned III Additional District Judge, Kakinada, on extensively dealing with the matter on three points; viz,--

(i) Whether the petition filed by the 2nd respondent herein (auction purchaser) was not maintainable?

(ii) Whether there is no appeal against the impugned order?

(iii) To what relief?

has dismissed the appeal confirming the order passed by the trial Court. On point No.1, the learned Counsel for the petitioner - appellant contended that the petition under Article 127 of Limitation Act, the application to set aside the sale has to be filed within 60 days, the 2nd respondent has filed the application u/s 47 of the Code on 28-12-1981, whereas the sale of item No.3 was held on 30-9-1981. But it is the contention of the learned Counsel for the respondents that the limitation will not run against them because, the judgment debtor played fraud not only against the petitioner but also against the Court. The lower appellate Court on scrutiny of the principles laid down in Gulzari Lal Vs. Sheo Charan Lal and Others, Keshavan v. Bipathuma (AIR 1935 Mad. 340); Muthukumaraswamy Pillai v. Muthuswami Thevan (AIR 1927 Mad. 394); Ouseph Ouseph v. Devasia Chacko (AIR 1953 Trav 619); Deokishan Vs. Jagan Nath and Another, and Satyanarayana Soni v. State of Andhra Pradesh (1987 (1) ALT 235) and taking into consideration the fact that the judgment debtor filed petition that Land Ceiling proceedings were pending, the decree holder has not pressed the Execution petition and that one of the sons of the judgment-debtor has filed a petition stating that the property had fallen to his share. It is further observed by the lower appellate Court that when the properties were brought to sale, it is common to receive several claim petition and the first respondent - decree-holder genuinely thought that it was a petition filed to prolong the litigation more particularly in view of the fact that it was not stated in the petitioner that the said property was likely to be surrendered to the Government under the Land Ceiling Act. Thus, the lower appellate Court held that the auction purchaser has taken part in the auction bona fide believing that the judgment debtor had a saleable interest in the property.

8. With regard to the 2nd point, the lower appellate Court considering the principle laid down in G. Rammasubbayya v. G. Rajamma 1988 (1) APLJ 79 (FB) and R. Ramana v. G. Demuru 1979 (2) APLJ 250, and taking into consideration the amended provisions of the Code, held that when the EP itself was filed in 1978 (EP No.247 of 1978) the execution proceedings are totally different from the suit which was filed on 7-4-1976 and therefore, following the Full Bench Decision in Rammasubbayya''s case, held that the petitioners have no right to prefer the appeal against the impugned order and accordingly dismissed the appeal confirming the order of the trial Court.

9. Against that order, the present civil revision petition is filed.

10. Sri V.L.N.G.K. Murthy, the learned Counsel appearing for the petitioners contended that the dismissal of appeal on the ground of maintainability is not correct in view of principle laid down in Rammasubbayya ''s case. He further contended that the suit was filed on 7-4-1976 and it was decreed on 13-7-1977 and the sale of item No.3 was held on 13-9-1989 and the sale was confirmed on 3-12-1989, the petition to set aside the sale was filed on 28-12-1989 beyond sixty days period, as required under Article 127 of the Limitation Act and, therefore, the petition is barred by limitation. It is also contended that there is no warranty of title in an auction purchase and the auction purchaser has to be very careful and, thus, when there is no evidence on record with regard to playing of fraud, the orders passed by the Courts below are liable to be set aside.

11. It is the admitted case of the respondents that the EA was not filed under Order 21, Rule 91 of the Code but it was filed u/s 47 of the Code, by virtue of admission of the respondents that EA is not filed under Order 21, Rule 91 of the Code to set aside the sale in auction, Section 47 does not contemplates filing of petition to set aside the sale in auction. Therefore, the order passed by the Court below is illegal and liable to be set aside.

12. Section 47 of the Code contemplates that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. Sub-section (3) of this section further contemplates that where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court. Explanation I to this section reads that a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. Explanation II (a) reads that a purchaser of property at the sale in execution of a decree shall

be deemed to be a party to the suit in which the decree is passed; and (b) reads that all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.

13. Therefore, a reading of Section 47 manifestly makes it clear that it does not contemplate filing of a petition to set aside the sale in auction on the ground of fraud. Therefore, no petition can lie u/s 47 of the Code. On the other hand, the proper recourse is to resort to the provisions of Order 21 and relevant rules on the issues involved in this revision.

Order 21, Rule 89 of the Code reads as under:

".....89. Application to set aside sale on deposit :--(1) Where immovable property has been sold in execution of a decree any person claiming an interest in the property sold at the time of the sale, or at the time of making the application, or acting for or in the interest of such person, may apply to have the sale set aside on his depositing in Court:

(a).....

(b).....

Rule 90 reads as under;

".....90. Application to set aside sale on ground of irregularity or fraud :--(1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

Rule 91 reads as under:

"....91. Application by purchaser to set aside sale on ground of judgment-debtor having no saleable interest :--The purchaser at any such sale in execution of a decree may apply to the Court to set aside the same on the ground that the judgment-debtor had no saleable interest in the property sold.

Rule 92 contemplates as under:

"....92. Sale when to become absolute or be set aside :--(1) Where no application is made under Rule 89, Rule 90, or Rule 91, or where such application is made and disallowed, the Court shall make an order confirming the sale, the thereupon the sale shall become absolute:

Provided that where any property is sold in execution of a decree pending the final disposal of any claim to, or any objection to the attachment of, such property the Court shall not confirm such sale until the final disposal of such claim or objection.

Certain other exceptions too are provided under this rule which may not be relevant for the purpose of this revision.

Rule 93 reads as under:

" .....Return of purchase money in certain cases :--Where a sale of immovable property is set aside under Rule 92, the money, the purchaser shall be entitled to an order for repayment of his purchase-money with or without interest as the Court may direct, against any person to whom it has been paid.

A reading of the above said provisions of law, make it clear that an application can be made to set aside the sale, if any one of the contingencies contemplated in the said rules are satisfied. Accordingly, though the learned Counsel for the respondent No.2 agreed that the application is field u/s 47, but actually it was considered under Order 21, Rule 91 of the Code. Therefore, though the learned Counsel has conceded, yet it was not binding on the party. Therefore, I proceed to consider that application as one filed to set aside the sale on the ground that the judgment-debtor having no saleable interest in the property contemplated under Order 21, Rule 91. Rule 91 contemplates that the purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale on the ground that the judgment debtor had no saleable interest in the property sold and no time limit is prescribed in the above-said rule. The only condition incorporated in the above said rule is that the judgment debtor has no saleable interest in the property to set the sale aside. The learned Counsel for the petitioners contended that the suit was decreed on 13-7-1977, the sale was held on 30-9-1981 and it was confirmed on 3-12-1981 and since the petition to set aside the sale was filed on 28-12-1981, it is beyond 60 days and in contravention of Article 127 of the Limitation Act, and is, therefore, barred by limitation. But, when a party approaches the Court on the ground of fraud, no limitation is applicable. But, in the present case, the respondent No.2 came to know of the same when the visited Karapa village on 27-12-1981, the Village Karnam informed him that the petitioner has surrendered the above-said land to the Government under the provisions of A.P. Land Ceiling Act, which is excess land. Immediately, he approached the Court by way of filing the above-said application. Therefore, if the limitation is reckoned from the date of knowledge of the respondent No.2 that the petitioner has played fraud and he has no saleable interest in the property to enable the Court to put the said property to sale in discharge of the decretal debt in the above-said land, the application filed under Order 21, Rule 91 to set aside the sale on the ground of fraud or that the petitioner has no saleable interest in the property, the law of limitation has no application. Therefore, the application is filed in accordance with law.

14. Further, both the Courts below have concurrently held that though it was mentioned in the counter that the land ceiling proceedings are pending, subsequently it was not brought to the notice of the purchaser or the Court that the land was surrendered to the Government under A.P. Land Ceiling Act and this was effected prior to the auction of the property to the satisfaction of the decree.

Both the Courts have also concurrently held that the petitioner has played fraud in not bringing it to the notice about the surrender of land to the Government. Though the petitioner is son of the decree holder, but they have participated in the auction with a bona fide intention that the petitioner is having saleable interest in the land. Therefore, I am satisfied that when once both the Courts below having regard to the facts and circumstances of the case, have concurrently held that the petitioner has played fraud on Court and also the purchaser and suppressed the information about the surrender of the land, which is subject-matter in this revision, from both the Court and the purchaser, prior to the conducting of sale and since I have observed that the provisions of Limitation Act are not applicable in such a case, the petition under Order 21, Rules 89 to 93 is maintainable.

15. The learned Counsel for the petitioner mainly relied on the judgment of this Court in Yadavalli Suryakanthamma and Another Vs. Maddipatla Dorayya and Another, , wherein the Full Bench of this Court on considering the provisions of Order 21, Rules 91 to 93 has held that where the judgment debtor was found to be having saleable interest in the property sold in execution, a suit by auction purchaser for refund of purchase money is not maintainable; that a purchaser has no right of suit in the event of his being deprived of the property bought by him at the Court auction by reason of want of saleable interest of the judgment-debtor and his only remedy is to have the sale set aside under Order 21, Rule 92 before it becomes absolute. This conclusion was arrived at by the Full Bench of this Court on reviewing the case law in catena of decisions on the point. It was further held that the right to recover the auction price in cases of fraud and misrepresentation which have induced the purchaser to buy the properly stands on a different footing. If there is a taint or a touch of fraud or deceit or misrepresentation that induced the purchaser to bid for the property successfully, that goes to the root of the sale and impairs its usefulness. Such sales are outside the scope of the principles enshrined in the material provisions of the Contract Act.

16. On the basis of the judgment in Yadavalli Suryakanthamma case, the learned Counsel for the petitioner submitted that if the case of the respondent is taken to be true that the petitioner has played fraud on the Court and the auction purchaser in not brining to the notice of the Court and the auction purchaser about the surrender of the land-Item No. 3, of the suit schedule property to the Government under the Land Ceiling Act, the only remedy available to the purchaser is to proceed under the provisions of the Contract Act to prove fraud and the sale set aside for recovery of the bid price. He placed reliance on the judgment of Supreme Court in Ganpat Singh (dead) by Ganpat Singh (Dead) by Lrs. Vs. Kailash Shankar and Others, , for the proposition that no provision of the Code has been pointed out under which a sale can be set aside apart from the provisions of Rules 89, 90 and 91 of Order 21 of the Code. The Supreme Court has held that there can be no doubt that when an application for setting aside the sale is made, the order passed by the executing Court either allowing or

dismissing the application will be final and effective subject to an appeal that may be made under the provisions of the Code. It is further held that it is inconceivable that even though no appeal has been filed against an order dismissing an application for setting aside the sale, another application for setting aside the sale can be made without first having the order set aside. Such an application will be barred by the principles of res judicata. In those circumstances, the application for delivery of possession having been made within one year of the dismissal of the application of the 4th judgment debtor therein for setting aside the sale, it was held to be within the period of limitation as prescribed under Article 134 of the Limitation Act.

17. The principle laid down in this decision is not applicable to the facts and circumstances of the case for the simple reason that herein only one application is filed to set aside the sale. No doubt, it was confirmed, but fraud played by the petitioner is alleged by the respondents and proved. Therefore, as held by me in the foregoing paragraphs, once the application is filed under Order 21, Rule 91 to set aside the sale on the ground of fraud or having no saleable interest of the judgment-debtor, the Law of Limitation is not applicable.

18. On the other hand, the learned Counsel for the respondent Sri V.V.L.N. Sharma submitted that the petitioner has lost the case in both the Courts below and this Court in revisional jurisdiction has to see whether there is any material irregularity or patent illegality committed by the Courts below which warrants interference by this Court. When the respondents could establish that fraud was played by the petitioner both on the respondents and the Court, the Law of Limitation cannot be called in aid. He further submitted that both the Courts on the question of fact, have satisfied themselves that the petitioner has played fraud in allowing the Court to put the land to sale for the satisfaction of the decree, though he had no saleable interest in the land and the respondent has, with a bona fide intention, participated in the auction and bid successfully. The conduct of the petitioner shows that though Land Ceiling proceedings were pending, he made part payment for the satisfaction of the decree, but he has not filed any piece of evidence either before the Courts below or in this Court to show that he has brought to the notice of the Court or the purchaser that the lands were surrendered to the Government under the provisions of the A.P. Land Ceiling Act, before the lands were put to auction by the Court.

19. The view of the Full Bench of this Court in Yadavatti Suryakanthamma''s case that the right to recover the auction price in case of fraud and misrepresentation which have induced the purchaser to buy the property stands on a different footing, if there is a taint or a touch of fraud or deceit or misrepresentation that induced the purchaser to bid for the property successfully and that goes to the root of the sale and impairs its usefuless and such sales are outside the scope of the relevant provision of Order 21 and they fall within the principles enshrined in the material provision of Contract Act was subsequently found to be not correct, in view of the ratio laid down in Ganpat Sing''s case. In paragraph No. 18, Their

Lordships of the Supreme Court have observed as under:

".....We are unable to accept the contention. In the Full Bench decision of the Madras High Court, the application for setting aside the sale was made by the sons of the a deceased judgment-debtor and the remaining judgment-debtors, and the application insofar as it was made by the sons of a deceased judgment-debtor was admitted out of due time on the ground of fraud. In our opinion, the High Court was justified in entertaining the application on the ground of fraud by the sons of a deceased judgment-debtor who were not brought on the record as the legal representatives of their deceased father. The application was, therefore, quite maintainable and, even though the sale was confirmed and became absolute under Order XXI, Rule 92, it was subject to the disposal of the application for setting aside the sale on the ground of fraud.

20. From a reading of the above-said judgment, it is evident that when ground of fraud is raised to set-aside the sale in auction, it can be raised only under Order 21, Rule 91 of the Code and the provisions of the Indian Contract Act do not get attracted. Therefore, I am satisfied, in view of the principle laid down by the Supreme Court that the orders passed by the Court below after extensively dealing with the matter, have came to a right conclusion that the petitioner played fraud both on the Court as well as the auction purchaser and with a mala fide intention did not bring it to the notice of either of the two that the subject-matter i.e., land measuring Ac.2.93 cents 1,17 hectares in Sy. No. 187 of Karapa village, Kakinada Taluk and Sub-Registrar bounded by joint Bode on the east, Land of Devu Veerabhadrarao on the north, Puntha each on west and south, was declared and surrendered to the Government under the provisions of Land Ceiling Act. Therefore, on the date of auction he was not having saleable interest and he allowed the Court to put the said land for sale in auction to satisfy the decree and the purchaser has bona fidely participated believing that the petitioner has got saleable interest. Thus, when fraud is pleaded and proved, as held earlier, the limitation is not applicable to entertain the above said application to set aside the sale under Order 21, Rule 91 of the Code. Therefore, the respondents need not file a suit for recovery of the said amount or proceed against the petitioner under the provisions of the Contract Act to get the sale set aside on the ground of fraud, as enshrined in the provisions of the Contract Act.

21. In view of the elaborate and exhaustive dealing of the provisions of the Code in Yadavalli Suryakanthamma''s case by the Full Bench of this Court, I need not dwell upon the other authorities relied on by the learned Counsel for both the parties.

22. Therefore, in view of the concurrent finding of both the Courts below, I am satisfied on facts that the Courts below have rightly held that the petitioner has played fraud on both the Court and the auction purchaser and thus there is taint and deceit and the purchaser was induced to bid for the property and therefore, it goes to the very root of the sale that he is not having saleable interest. Therefore, for all these reasons, I do not see any irregularity or patent illegality

to entertain the revision. The civil revision petition accordingly fails and is dismissed. But in the circumstances of the case, without costs.

