(2010) 08 AP CK 0025

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1361 of 2010

G. Venkata Reddy — APPELLANT

Vs

B. Venkata Reddy and N. Chinnappa Reddy — RESPONDENT

Date of Decision : 10-08-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 72, Order 21 Rule 85, Order 21 Rule 90, Order 21 Rule 94, 151
Constitution of India, 1950 — Article 254(1)

Citation : (2010) 6 ALT 135

Hon'ble Judges : B. Seshasayana Reddy, J

Bench : Single Bench

Advocate : Srinivas Emani, for the Appellant; K. Narasimha Chari, for the Respondent

Final Decision : Allowed

Judgement

B. Seshasayana Reddy, J.—This revision is directed against the order dated 24.11.2009 passed in E.A. No. 75 of 2009 in E.P. No. 59 of 2009 in O.S. No. 156 of 2000 on the file of the Junior Civil Judge, Hujurnagar, whereby and whereunder the learned Junior Civil Judge allowed the Execution Application filed by the Judgment debtor under Order XXI Rule 90 read with Section 151 of the Civil Procedure Code, and, consequently, set aside the sale held on 9.3.2005 in E.P. No. 59 of 2005.

2. The 1st respondent herein is the Judgment debtor and the 2nd respondent is the decree holder in E.P.59 of 2009 on the file of the Junior Civil Judge, Hujurnagar. The decree holder brought the properties of the judgment debtor to sale. Auction of the properties has been held on 9.3.2005. The petitioner herein is the auction purchaser. He deposited l/3rd of the amount on the date of auction, and subsequently deposited the 3/4th of the auction amount on 21.3.2005. While so, the judgment debtor filed E.A. No. 75 of 2009 under Order XXI Rule 90 read with Section 151 C.P.C to set aside the sale conducted on

9.3.2005 on the ground of material irregularities. Initially, the Executing Court allowed the application on the ground that the auction purchaser failed to deposit stamp duty amount within the stipulated period by order dated 29.4.2008. The auction purchaser filed. C.R.P. No. 1730 of 2009 assailing the order dated 29.4.2008 passed in E.A. No. 29 of 2005 in E.P No. 37 of 2004 in O.S. No. 156 of 2000 on the file of the Junior Civil Judge, Kodad. The revision came to be allowed setting aside the order dated 29.4.2008 remanding the matter back to the Executing Court with a direction to dispose of the E.A., after giving opportunity to both the parties, within a period of two weeks, by order dated 15.7.2009. For better appreciation, I may refer to Para Nos. 6 and 7 of the order passed in C.R.P. No. 1730 of 2009, which reads as hereunder:

On the other hand, the learned Counsel for the respondent opposed the same on the ground that it is mandatory on the part of the auction purchaser to deposit the non-judicial stamps within the stipulated time. Therefore, if the non-judicial stamps have not been filed within the time, the sale is illegal. Therefore, the findings recorded by the trial Court is not put to the auction purchaser inasmuch as no such plea is taken by the judgment debtor in his application to set aside the sale. No doubt that executing court can look into the relevant provisions for the purpose of knowing whether the sale amount has been within the time or not, and whether the non-judicial stamps have been filed with a view to prepare sale certificate within time or not, but at the same time the Court should have given an opportunity to the auction purchaser to plead his case and that opportunity was not given to the auction purchaser. Therefore, the impugned order is set aside and the matter is liable for remittance to the trial Court.

The Civil Revision Petition is accordingly allowed setting aside the order dated 29-4-2008 passed in E.A No. 29 of 2005 in O.S. No. 156 of 2000 by the Junior Civil Judge, Kodad, Nalgonda District. However, the matter is remitted to the trial court with a direction to dispose of the above E.A., within a period of two weeks from the date of receipt of a copy of this order after giving opportunity to both parties with reference to non-deposit of non-judicial stamps. No costs.

3. The Executing Court, on remand, heard the counsel appearing for the parties afresh and proceeded to allow the application filed by the judgment debtor and set aside the sale held on 9.3.2005, by an order dated 24.11.2009. Hence this revision by the auction purchaser.

4. Notice before admission came to be ordered on 12.4.2010. The 1st respondent/judgment debtor entered appearance through a counsel.

5. Heard learned Counsel appearing for the parties.

6. Learned counsel appearing for the petitioner/auction purchaser submits that non-deposit of stamp duty does not constitute a material irregularity in conducting the sale, and therefore, the order impugned in the revision is liable to be set aside. A further submission has been made that after the amendment of the CPC 1976, the state amendment made to the rules prior to 1976 cease to

exist, and in which case, it is not mandatory on the part of the auction purchaser to deposit the amount required for stamp duty amount within 15 days of the date of the auction and what is required to be deposited within 15 days is only full amount of purchase money.

7. In support of his submissions, reliance has been placed on the judgment of the Supreme Court in Ganpat Giri Vs. Second Additional District Judge, Ballia and Others, the judgments of this Court in Ambati Raghavalu v. Mova Venkamma and Ors. AIR 1962 Andhra Pradesh 334, Arredla Ram Reddy and Ors. v. Arredla Alivelamma 2005 (1) ALT 28 and the judgment of Kerala High Court in Kunhambu v. Geetha, dated 12.1.2001. It is trite to refer paras 7 and 8 of the judgment of Kerala High Court in Kunhambu''s case and they are:

7. The impact of the Central amendment came up for consideration in Plaintiff. Rishikesh and Anr. v. Salma Begum (1995) 5 SCC 718 also though not with reference to the Kerala Amendment. The impact of Article 254(1) of the Constitution of India was also considered therein. The Court found that in deciding the question of repugnancy, it must be shown that the two enactments contain inconsistent and irreconcilable provisions so that they cannot stand together or operate in the same filed. There could be no repeal by implication unless the inconsistency appears on the face of the two statues. Both statues, if operate in the same filed without coming in collision with each other, there would be no repugnancy. It was also held that if Parliament amends the law, after the amendment made by the State Legislature has received the assent of the President, the earlier amendment made by the State Legislature, if found inconsistent with the Central amended law, both Central law and the State law cannot coexist without colliding with each other. Repugnancy thereby arises and to the extent of the repugnancy the State law becomes void under Article 254 (1) unless the State Legislature again makes taw reserved for the consideration of the President and receives the assent of the President. As regards the provisions of Order 21, Rule 85 of the CPC, there was no such fresh amendment brought in Kerala and hence by virtue of the aforesaid dictum, the State amendment will not be enforceable if there is repugnancy between the two provisions.

8. The aspect of repugnancy may now be considered. Under the Kerala Amendment, the auction purchaser has to deposit, besides the purchase-money, the amount required towards stamp paper for the certificate under Rule 94 as well. Under the Act 104 of 1976, the deposit of the stamp value is not essential. Certainly, there is difference between the amount payable under the two provisions and the repugnancy definitely exists. In the circumstances, I am of the view that after the enactment of Act 104 of 1976, the provision in the Kerala Amendment which makes it mandatory for the auction purchaser to deposit the stamp value as well as unenforceable. It follows that there is nothing erroneous available in the order of this Court in the matter of refusal to interfere with the order of the execution based on the provisions in Order 21 Rule 85 of the CFC.

8. Learned counsel appearing for the 1st respondent/judgment debtor submits that the sons of the judgment debtor deposited half of the decretal amount pursuant to the directions given by this Court in C.R.P No. 150 of 2006. A further submission has been made that the sons of the judgment debtor and the 1st respondent/judgment debtor also deposited the remaining balance amount, in which case, the sale held dated 9.3.2005 is also liable to be set aside.

9. The core issue involved in the Civil Revision Petition is whether there is any irregularity in conducting the sale on 9.3.2005. The Executing Court set aside the sale on the ground that the petitioner/auction purchaser has not deposited the stamp duty amount within 15 days as provided under Order XXI Rule 85 CPC.

85. Time for payment in full of purchase-money.-The full amount of purchase-money payable shall be paid by the purchaser into Court before the Court closes on the fifteenth day from the sale of the property.

Provided that in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set-off to which he may be entitled under Rule 72.

10. With regard to the High Court amendments, it is stated that the amendment made to rule by the Madras is applicable to the State of Andhra Pradesh. The amended Rule or Order XXI Rule 85 substituted the rule which reads as hereunder:

85. Time for payment in full of purchase-money and of stamp certificate of sale.-The full amount of purchase money payable and the general stamp for the certificate under Rule 94 or the amount required for such stamp, shall be deposited into Court by the purchaser before the Court closes on the fifteenth day from the sale of the property:

Provided that in calculating the amount of purchase-money to be so deposited the purchaser shall have the advantage of any set-off to which he may be entitled under rule 72.

11. At this juncture, it is necessary to note Order 21 Rule 90 which reads as hereunder:

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.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon

any ground which the application could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation.-The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under the rule.

12. The deposit of stamp amount is subsequent to the conducting sale. Failure to deposit stamp amount does not constitute a material irregularity in conducting the sale. The Executing Court has thoroughly misread the Order XXI Rule 90 in recording a finding that non-payment of stamp duty constitutes a material irregularity. Therefore, the Civil Revision Petition deserves to be allowed.

13. Accordingly, the Civil Revision Petition is allowed and consequently, the application filed by the 1st respondent-J.Dr. under Order XXI Rule 90 stands dismissed. No costs.