

(1991) 11 AP CK 0032

In the Andhra Pradesh High Court

Case No : Appeal against Order No. 1223 of 1991

Kalaparishad

APPELLANT

Vs

The State Bank of India and another

RESPONDENT

Date of Decision : 08-11-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 104(1), Order 21 Rule 105, Order 21 Rule 105(1), Order 21 Rule 105(2), Order 21 Rule 105(3)

Citation : AIR 1992 AP 225

Hon'ble Judges : N.D. Patnaik, J

Bench : Single Bench

Advocate : Mr. S. Dasaratharama Reddi, for the Appellant; Mr. C. Trivikrama Rao and Mr. C.B. Ramamohan Reddy, for the Respondent

Judgement

1. This appeal is filed by the judgment-debtor in E. P. No. 86 of 1987 in O.S. No. 387 of 1981 in the Court of the Additional Subordinate Judge, Guntur. In execution of the decree obtained by the 1st respondent against the appellant the property of the judgment-debtor/appellant was sold in Court auction on 7-12-1989. The 2nd respondent is the auction purchaser. The judgment-debtor filed an application E.A. No. 40/90 to set aside the sale under O.21, R. 90, C.P.C. That was dismissed for default on 12-6-1991 and the sale was confirmed on 20th June, 1991. The appellant/JDR filed an application E.A. No. 378 of 1991 to set aside the order dismissing E.A. No. 40/90 dated 12-6-1991. That application was dismissed by the lower Court by the order dated 31-7-1991 against which the C.M.A. is filed.

2. A preliminary objection is taken regarding the maintainability of the C.M.A. by the learned counsel for the 1st respondent. His contention is that the appeal is not maintainable but only a civil revision petition can be filed. Order 43, Rule 1(ja), C.P.C. provides for an appeal against an order rejecting an application under sub-rule (1) of Rule 106 or Order 21 provided that an order on the original application that is to say the application referred to in sub-rule (1) of Rule 105 of

that order is appealable. Therefore, the learned counsel for the 1st respondent contends that unless the order in the petition filed to set aside the sale is appealable, no appeal can lie under cl. (ja).

3. Order 21, Rule 105, C.P.C. says that the Court before which an application under any of the foregoing rules of this order is pending, may fix a day for the hearing of the application. Sub-rule (2) says that on the day fixed for hearing if the applicant does not appear when the case is called on for hearing, the Court may dismiss the application. Sub-rule (3) says that where the applicant appears and the opposite party to whom the notice has been issued by the court does not appear, the Court may hear the application ex parte and pass such order as it thinks fit. Rule 106 says that the applicant against whom an order is made under sub-rule (2) of Rule 105 or the opposite party against whom an order is passed ex parte under sub-rule (3) of that rule or under sub-rule (1) of Rule 2 may apply to the Court to set aside the order and if he satisfies the Court that there was sufficient cause for his non-appearance when the application was called on for hearing the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit and shall appoint a day for the further hearing of the application. The learned counsel for the 1st respondent has referred to Order 21, Rule 90, C.P.C. which provides for filing an application to set aside the sale on the grounds of irregularity or fraud and contended that as there is no provision for dismissal of such application the dismissal can only be u/s 151, C.P.C. by exercise of the inherent powers of the Court and against such order only a revision lies. Therefore, since that order is not appealable, no appeal can lie against an order dismissing the petition to set aside the default order under cl. (ja) of Order 32, Rule 1(i), C.P.C. He has relied on two decisions, one of the Madhya Pradesh High Court reported in *Gopilal and Another Vs. Sitaram and Others*, and another a decision of the Kerala High Court reported in *Velappan and Others Vs. Sahasranamam and Others*, .

4. Order 43, Rule 1(j) provides for an appeal against an order passed under Rule 90 of Order 21 setting aside or refusing to set aside the same. Therefore, it is contended by the learned counsel for the appellant that when application is filed under Order 21, Rule 90, C.P.C. to set aside the sale and if an order is passed thereon setting aside the sale or refusing to set aside the sale, it comes within Rule 92 of Order 21 and therefore is appealable. The learned counsel for the appellant has also referred to certain amendments made by the Madras and Andhra Pradesh High Courts regarding this Rule. The Madras High Court by amendment made in 1945 inserted clause (jj) which provides for an appeal against the order rejecting the application under sub-rule (1) or Rule 105 of Order 21 provided that an order on the main application referred to in sub-rule (1) of Rule 104 of that order is appealable. That also contains a similar clause which is now contained in cl.(ja). The present clause (ja) which is made after amendment in the year 1976 is analogous to clause (jj) inserted by the Madras Amendment. In *V. A. Narayana Raja v. Meyyappa Chettiyar* AIR 1975 Mad 36, it was held that an order of dismissal of an application under Order 21, Rule 90,

C.P.C. is appealable under Order 43, Rule 1(j). In Sheikh Mastan Vs. Gubba Atchayya and Others, , a Division Bench of this Court held that an order dismissing a petition under Order 21, Rule 90, C.P.C. for failure to deposit an amount equal to that mentioned in the sale warrant as directed by the Court under the proviso to that Rule amounts to a refusal to set aside the sale within the meaning of Order 43, Rule 1(j) and is therefore appealable. In another decision of the Madras High Court reported in Munikrishna Reddy Vs. S.K. Ramaswami and Another, , it was held that Order 43, Rule 1(j) gives right of appeal even where application under Order 21, Rule 90, C.P.C. is dismissed for default.

5. On a consideration of those decisions it can be seen that an order dismissing the application under Order 21, Rule 90, C.P.C. is appealable under clause (j) of Order 43. Therefore, when an application filed under O. 21, R. 90, C.P.C. is dismissed for default and an application is filed to set aside that order and that is also rejected an appeal lies against that order under cl. (ja) as it comes within the proviso of that clause. Hence, I agree with the contention of the learned counsel for the appellant that the appeal is maintainable.

6. As regards the merits of the case the petition was dismissed on 12-6-1991 on the ground that neither the applicant was present nor his advocate was present and no representation was made. The reason now given is that on that day the appellant was sick and has gone to Hyderabad for medical check-up. The affidavit of the appellant along with medical certificate is filed. It is stated that the advocate for the appellant went to another place on professional work on that day instructing her clerk to get the matter represented. But the clerk failed to get it represented and so went in default. The lower court dismissed the petition mainly on the ground that even in the affidavit filed in that application no reason is given for the absence of the petitioner. The learned counsel for the appellant has pointed out that the counsel for the appellant in the lower court did not properly conduct the matter and did not put forward the necessary grounds in the affidavit and therefore the appellant has to change the advocate and for the fault of the advocate the party should not suffer.

7. In these circumstances, I feel that the order dismissing E.A. No. 378 of 1991 can be set aside on the condition that the appellant J.D.R. must be ready for enquiry in the matter on the first date when it is posted for enquiry in the lower court. Since the matter is pending since 1989 the lower court is directed to dispose of the matter preferably within a period of three months from the date of receipt of the Order in the lower court. With a direction the C.M.A. is allowed. No costs.

Appeal allowed.