(1989) 06 AP CK 0019

In the Andhra Pradesh High Court

Case No : C.R.P. No. 1847 of 1987

M. Mallesu APPELLANT

Vs

Kamalapuram Mohammed Hussain and others RESPONDENT

Date of Decision : 04-06-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 49, Order 21 Rule 89, Order 21 Rule 90, Order 21 Rule 91, 151
Civil Rules of Practice — Rule 203, 203(1), 203(2), 203(3)
Sheriffs Act, 1887 — Section 20(2)

Citation : AIR 1990 AP 376

Hon'ble Judges : Jagannadha Rao, J

Bench : Single Bench

Advocate : K. Parvathesam, for the Appellant; K.V. Ramana Rao, for the Respondent

Judgement

1. The revision petitioner is the decree-holder-auction-purchaser. This application is filed questioning the order passed by the lower Court refusing to direct the judgment-debtor-respondent to pay to the petitioner the poundage amount collected at the time of the sale held by the Court.

2. The brief facts of the case are as follows :

The property which was brought to sale was admittedly partnership property of a firm in which there were two partners. The creditor obtained a money-decree and brought the properties to sale. As the property was partnership property, law required the procedure under O. XXI, R. 49 to be followed. Instead of following the same, the decree-holder got the properties sold. Before the same was confirmed, the judgment-debtor-respondent approached this Court, and at that stage, the respondent took notice in the High Court and then applied in the lower Court for advancing the date of sale and the date was advanced and sale was held. In the sale, the decree-holder became the auction-purchaser. The matter came up for final hearing before me, and I declared in my judgment rendered in

Ranga Reddy v. Mal-lesh (1986) 2 ALT 454 in C.R.P. 3458 1985 D/-23-7-1986 that the sale was a void sale, inasmuch as the same was contrary to the provisions of O. XXI, R. 49 of the Code of Civil Procedure.

3. Thereafter, restitution had to follow, on the basis that the sale was void. It was at that stage that the decree-holder-auction purchaser filed the present petition for refund of the poundage, which was approximately in a sum of Rs. 24,000/ -. He impleaded only the present-respondent partner (or his legal representatives) as parties in the Execution Application, but not the other partner, who had supported the sale earlier. The Court below refused to direct the respondents to refund the poundage amount. The Court below thought that the petitioner being responsible for the illegal sale, cannot ask for refund of the same from the judgment-debtor. It is against this order that the present revision has been filed.

4. I have heard the learned counsel for the petitioner Sri K. Parvateesam and the learned counsel for the respondent, Sri K. Venkataramana Rao.

5. It will be noticed that the sale was held to be invalid under S. 47 of C.P.C. on account of non-compliance of the provisions of O. XXI, R. 49, C.P.C. The question of refund of poundage in cases of setting aside of sales under O. XXI, C.P.C. is dealt with (in) R. 203 of the Civil Rules of Practice. That Rule is not directly in point but gives us the clue to the present case. Rule 203 reads as follows :--

"203(1) If the sale is set aside under O. XXI, R. 89 of the Code, the court may make an order for payment by the judgment-debtor of the poundage and other costs and I interest, if any, not covered by the proclamation of the sale.

(2) If the sale is set aside under O. XXI, R. 90 of the Code, the Court shall determine whether any and what party is responsible therefor, and may order such party to pay the cost and expenses of the sale and may make an order that any other party entitled to have the property sold may have the conduct of the sale and may make an order for the resale of the property.

(3) If the sale is set aside under O. XXI, R. 91 of the Code, the Court may make an order for payment by the Execution Creditor of the poundage and other costs of the sale."

6. Before adverting to the principle involved in R. 203, it is convenient to note the meaning of the word ''poundage''.

7. In Jowitt''s Dictionary of English Law, poundage is defined as follows:

"a fee payable to an officer of a Court, or to the public revenue, in respect of services performed by the Officer : It is so-called because it is calculated at so much for every pound sterling of the amount with which he has to deal. Thus, a sheriff is entitled to poundage on executing a fieri facias (Sheriff''s Act, 1887,5.20(2))."

8. In Bouvier''s Law Dictionary, ''pound-age is defined as :

"the amount allowed to the sheriff or other officer, for commissions on the money made by value of an execution. This allowance varies in different states and to different officers."

I shall now refer to a few decisions which have dealt with the question of refund of ''poundage''.

9. In Veeraraghavulu v. Chengalamma, AIR 1934 Mad 409 Curgenven J. dealt with the provisions of O. XXI and Rule 203 of the Civil Rules of Practice. In that case the properties were sold in execution of a mortgage decree even though there was no valid final decree in existence at the time when the sale was held. In those circumstances, the sale was held to be void. The learned Judge observed that inasmuch as there was no final decree, under which sales could be held, there was little doubt that the sales were nullities, The learned Judge there held that poundage is really a portion of the purchase money deducted for the discharge of the expenses of the sale and that in effect, it is a fee or charge made against the decree-holder for the services he obtains from the Court in holding the sale. Once that sale has been held, and declared a ''nullity'', as it is not clear if there exists any procedure for obtaining refund of the fee, the most that the Court could do was to recommend refund by the Government by issuing a Certificate to the party that the case was a fit one for a refund and then leave it to the revenue authorities to comply with it.

10. In Unnamalai Ammal Vs. P.A.J. Seyyadu Mohideen and Others, the Madras High Court observed that poundage paid'' under provisions of O. XXI, Rules 89 to 91, C.P.C. is in reality part of the purchase money, and is a fee or charge paid by the decree-holder for services he obtained from the Court, and is liable to be refunded under Rule 203 of the Civil Rules of Practice. It was observed that, as stated in Rule 203, in cases where a sale is set aside under O. XXI, R. 89, the judgment-debtor has to refund the poundage. In cases where a sale is set aside under O. XXI, R. 90, the Court has to first give a definite finding as to which party is ''responsible'' for the sale being set aside. In cases under O.21, R. 91, the decree-holder, who is responsible for selling properties in which the judgment-debtor had no saleable interest, the decree-holder has to refund the poundage to the auction purchaser.

11. In the present case before me, the sale was void and not voidable. The sale was set aside not under Rules 89, 90 or 91 of O. XXI but the sale is declared to be void under S. 47, C.P.C. If we go strictly by the clauses in R. 203 of Civil Rules of Practice, they are not obviously attracted, for that rule merely covers cases coming under O.21, Rules 89, 90 or 91, C.P.C. but not S. 47, C.P.C.

12. Even so, it is argued that, if the sale is a void sale the auction purchaser could claim back the poundage amount from any other person who is responsible for the sale being held in contravention of some law. Of course if he is himself responsible, in his character as the decree-holder, he has to bear the loss himself and cannot recover from the judgment-debtor. This it is argued, can be gathered

from the principle behind Rule 203.

13. A reading of R. 203 shows that it is in three parts and that under each part, the liability to refund the poundage is placed upon the person who is ''responsible'' for the sale being conducted illegally. Under Rule 203(1) in cases where the judgment-debtor had allowed the sale to proceed but had later deposited the decretal amount into Court under O. XXI, R. 89, the judgment-debtor is held to be liable to pay back the poundage amount. In cases coming under R. 203(2), the decree-holder is made liable to refund the poundage inasmuch as he is responsible for bringing the properties to sale, even though the judgment-debtor had no saleable interest in the property. In cases coming under R. 203(2), the Rule requires the Court to determine as to who is ''responsible'' for the property being sold wrongfully or in violation of some provision of law.

14. In my view, likewise, in cases where the sale is declared to be a nullity, the Court under S. 151, C.P.C. has inherent power to direct the refund of poundage to the auction purchaser by the person who is responsible for the wrongful sale. If the judgment-debtor is responsible he will have to pay back the poundage and if anybody else having interest in the property is responsible, he has to bear he burden, and, of course, if the decree-holder is responsible, he has to bear himself the loss of poundage to the State.

15. Bearing these aspects in mind, let us examine the facts of the present case. Here, what happened was that the decree-holder became the auction purchaser and he is now claiming the refund of the poundage. He has impleaded only the legal representatives of one of the partners, who questioned the validity of the sale. He has not impleaded the other partner, who supported his (i.e. decree-holder''s) application for sale, without his complying with the provisions of O. XXI, R.49, C.P.C. Be that as it may, the fact remains that, it is the decree-holder-auction-purchaser who is responsible for invoking the Court to sell the property without following the provisions of O. XXI, R. 49, C.P.C. That being the position, the decree-holder-auction purchaser must blame himself and cannot blame others or seek refund from others. So far as the State is concerned, it is entitled to the commission on the sale and one party or other has to bear it. The State cannot be put to loss. This is clear from the decision of our High Court in Chandra Rao v. Venkata Satyavathi (1979) 2 AWR 54. In that case, Venkateswar Rao, J. after holding that poundage is in the nature of commission payable to the State, observed that even though poundage is to be refunded, it does not mean that nothing at all need be credited to the State towards poundage. That was a case arising under O. XXI, R. 89, C.P.C. and it was held that the judgment-debtor should be made to bear this burden.

16. Therefore, in the present case, the decree-holder-auction-purchaser who is him-self guilty of bringing the properties to sale without following the provisions of O.21, R. 49, C.P.C. has to bear the ''poundage'' loss himself and cannot seek to recover the same from the judgment-debtor. The Court below is right in

refusing to direct the judgment-debtors to compensate him for loss of the ''poundage'' amount.

17. For the aforesaid reasons, this revision petition is dismissed. No costs.

18. Petition dismissed.

