**(1972) 07 AP CK 0002**

**In the Andhra Pradesh High Court**

**Case No :** Appeal A.A.O. No''s. 4 and 44 of 1971

Midumolu Lakshminarasimha Rao APPELLANT

Vs

Vemuru Saramma and Another RESPONDENT

**Date of Decision :** 04-07-1972

**Acts Referred:**

Andhra Pradesh Court Fees and Suits Valuation Act, 1956 — Section 71(1), 75(1)
Andhra Pradesh Process Fee Rules — Rule 3
Civil Procedure Code, 1908 (CPC) — Order 34 Rule 4(1), Order 34 Rule 5

**Citation :** AIR 1973 AP 41

**Hon'ble Judges :** Madhava Reddy, J

**Bench :** Single Bench

**Advocate :** C. Trivikrama Rao, for the Appellant; T.H.B. Chalapati, for V. Parabrahma Sastry, for the Respondent

## Judgement

1. The only question that arises for consideration in these two appeals is whether poundage fee should be levied by the court before setting aside the sale held in execution of a decree for redemption.

2. The appellant, who is the 13th defendant in the suit for a mortgage decree, purchased the decree for redemption passed in O.S.No. 60 of 1963 on the file of the Subordinate Judge''s court, Masulipatnam. The sale in execution of this decree was held in E.P.No. 33 of 1966 on 31.7.1967. A petition to set aside that sale, E.A.No. 194 of 1969 was filed under Order 34, Rule 5, Civil P.C. The executing court held that the appellant was not entitled to get the sale set aside without payment into court all the amounts due from him including poundage and subsequent costs and interest after the sale is set aside. Accordingly the court directed the appellant to deposit the poundage fee by an order dated 26.3.1970. It is also directed against the appellate order confirming that order. By yet another order dated 24.4.1970 after the parties filed calculation memo, the court fixed the amount of poundage fee to be paid by the appellant., On appeal that amount has been varied. As against that order C.M.S.A.No. 44 of 1971 is filed. In the executing court the appellant had also contended that he

 

was entitled to counter interest on the amounts deposited by him pursuant to the conditional order or stay made by the appellate court.

3. It is seen that whatever amount was deposited it was first deducted towards interest and the balance towards the principal from the date of deposit. Hence no question of payment of counter interest arises. That is what the lower court also held. The same contention that is raised in this court has therefore no merit.

4. The only point that survives for consideration, on which both the courts below have held against the appellant is, whether the appellant is bound to pay the poundage fee for seeking to set aside the sale held in execution of the mortgage decree. In order to decide this question, it is necessary to read rule 5 of the Order 34, Civil P.C. which is as follows:-

" 5 (1) Where on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into courts of all amounts due from him under sub-rule (1) of the rule 4 of the court shall, on application made by the defendant in this behalf, pass a final decree, or, if such decree has been passed, an order (a) Ordering the plaintiff to deliver up the documents referred to in the preliminary decree, and, if necessary;

(b) Ordering him to transfer the mortgaged property as directed in the said decree, and, also if necessary

(c) Ordering him to put the defendant in possession of the property

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1) deposits in court for payment to the purchaser a sum equal to five per cent of the amount of the purchase money paid into court by the purchaser.

Where such deposit has been made, the purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into court by him together with a sum equal to five percent, thereof.

(3) Where payment in accordance with sub-rule (1) has not been made the court shall on application made by the plaintiff in this behalf pass a final decree directing that the mortgaged property or a sufficient part thereof he sold and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of Rule 4."

Thus that rule lays down that only when the defendant makes payment of all amounts due under sub-rule (1) of R. 4 that the court is empowered where the mortgage property is sold in accordance with sub-rule (3) of Rule 5 of Order 34 to make an order setting aside the sale.

5. Rule 4 (1) of Order 34, Civil P.C. enjoins as under:

 

"4 (1) In a suit for sale, if the plaintiff succeeds, the court shall pass a preliminary decree to the effect mentioned in clauses (a) (b) and (c) (I) of sub-rule (1) of Rule 2 and further directing that in default of the defendant paying as therein mentioned, the plaintiff shall be entitled to apply for a final decree directing that the mortgaged property or a sufficient part thereof be sold, and the proceedings of the sale (after deduction therefrom of the expenses of the sale) be paid into court and applied in payment of what has been found or declared under or by the preliminary decree due to the plaintiff, together with such amounts as may have been adjudged due in respect of subsequent costs, charges, expenses and interest, and the balance, if any, be paid to the defendant or other persons entitled to receive the same."

In view of Rule 4 of Order 34, Civil P.C. the defendant making the application under Rule 5 is bound to pay the subsequent costs, charges and expenses and interest. It would be seen that R. 4 does not specifically prescribe that the defendant should also deposit '' poundage fee'' before his application under Rule 5 is considered. It is the contention of Sri Trivikrama Rao, learned counsel for the appellant that an '' Poundage fee'' is not specifically mentioned in the rule, the application made under rule 5 has to be considered on merits of the costs, charges, expenses and interest mentioned in R. 4 are deposited. The court cannot insist upon payment of ''Poundage fee''. It is only when the sale is held under O. 21, and an application to set aside that sale is made under Rule 90 of Order 21, Civil P.C. read with Rule 203 of the Civil rules of Practice that payment of poundage fee could be insisted upon. Rule 203 of the Civil Rules of Practice reads as follows:

"203 (1) If the sale is set aside under Order 21, Rule 89 of the code, the court, may make an order for payment of the judgment-debtor of the poundage and other costs and interest, if any, not covered by the proclamation of sale.

(2) If the sale is set aside under Order 21, Rule 90 of the code, the court shall determine if and what party is responsible therefor, and may order such party to pay the costs 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 Order 21, Rule 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. There is no other provision, either in the Civil P.C. or under the Civil Rules of Practice, which enjoins the applicant seeking to set aside the sale under rule 5 of Order 34, Civil P.C. to deposit the poundage. This contention must be upheld if poundage fee is not covered by the term charges, expenses and interest" that occurs in Rule 5 of Order 34, Civil P.C.

7. In Parvathi ammal v. Govindasami Pillai (1915) 2 MLW 861 = (AIR 1916 Mad 290 (2) ) repelling the contention that the decree-holder is not bound to pay to

 

the purchaser the poundage fee, the learned judges observed that:

"This argument proceeds on misconception of the nature of the poundage fee. It was pointed out that it is from the payment made by him, the court makes a deduction for poundage and pays the balance to the decree-holder. ''Poundage'' is the fee which is levied in England by the Sheriff as remuneration for his services. In this country as the officers of the court conducting the sale are paid a fixed salary a certain percentage of the purchase money, is taken for purchasing stamps. In effect the fee is a charge paid by the decree holder for the services he obtains from the court. In England as well as in this country, this fee is taken out of the sale proceeds. See Paragraph 71 in 14 Halsbury''s laws of England."

The learned Judges also pointed out that the omission to include the word " Poundage" in Rule 157, clause (2) of the Civil Rules of Practice (old) cannot affect the substantive right of suit which the purchaser had.

8. In S.A. Balagurumurthi Chettiar Vs. O.C. Muhammad Ismail and Others, Byers, J., held that any remuneration paid to a person appointed to conduct the sale is exclusive of the '' ''Poundage'''' which under Rule 200 of the Civil Rules of Practice is one of the expenses of sale. The fixing of such remuneration does not therefore excuse the payment of '' poundage fee''. In that decision it was also noted that as laid down in Rule 200 of the Civil Rules of Practice, the amounts deducted or paid on account of poundage shall form part of the costs and expenses of the sale." Thus though Rule 200 itself is restricted in its application to sales held under in its application to sales held under order 21, if poundage fee forms part of costs and expenses of the sale and under Rule 5 read with the rule 4 of Order 34 all costs and expenses of sale are required to be paid, poundage fee also has to be deposited.

9. From the above discussion it follows that the poundage which is actually an expense of sale held by the court and has its origin in the payment made to the Sheriff in England and to the court officers here in our country, for rendering service of conducting sales, forms part of expenses or costs incurred and must be paid by a person who seeks to apply under Rule 5 of Order 34.

10. The High court, in exercise of its power conferred by sub-section (1) of S. 75 of the A.P. Court fees and suits Valuation act, 1956, has also framed the process fee rules. Rule 3 thereof prescribe that in respect of sales, whether conducted by the court or its officers a fee by way of poundage shall be levied on the purchase money for each lot separately at the rates mentioned,. Rule 3 in its application is not restricted to sales held in execution of decrees other than mortgage decrees. This puts a quietus to any doubt that could be entertained as regards payment of poundage in execution of mortgage decrees, for the words used therein are " In respect of sales". Which takes in sales in execution of mortgage decrees, money decrees or other decrees. In the instant case the decree was made and the sale was held after these rules come into force.

 

11. In my view the courts below were right in directing the appellant to deposit the poundage fee. C.M.S.A. 4 of 1971, therefore, fails and is accordingly dismissed.

12. In C.M.S.A. No. 44 of 1971 the quantum of poundage fee was fixed on the basis of the calculation memo filed by both parties into court. As the contention regarding counter interest has been rejected no exception can be taken to the amount fixed. As the amount has not been deposited, interest on the amount directed to be deposited has also be paid. Interest on a sum of Rs. 549.29P has therefore to be paid till the date of deposit. Subject to the above modification C.M.S.A. No. 44 of 1971 is also dismissed. The amount as directed above shall be deposited within two months from the date of receipt of records in the lower court. The parties will bear their own costs in these appeals.

13. Appeals dismissed.