

(1985) 03 AP CK 0004
In the Andhra Pradesh High Court
Case No : A.A.A.O. No. 809 of 1979

P. Rami Reddy

APPELLANT

Vs

P. Sundara Rama Reddy and Others

RESPONDENT

Date of Decision : 25-03-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 72

Citation : AIR 1986 AP 29

Hon'ble Judges : K. Ramaswamy, J

Bench : Single Bench

Advocate : P. Babulu Reddy, for the Appellant;

Judgement

K. Ramaswamy, J.—The appellant-decree holder obtained a final decree in a mortgage suit on Jan. 18, 1971 on the foot of a mortgage deed dated July 27, 1959. He laid the execution in E. P. No. 48 of 1972. Items 1 and 12 of the E. P. Schedule were sold on Sept. 4, 1978 in which the second respondent purchased item 12 and third respondent purchased item 1 of the E. P. Schedule. To set aside the sale, an application has been filed under O. XXI Rr. 89 and 90 of the Civil P. C., the lower Court set aside the above sales. As against that order in respect of them 12 of E. P. Schedule the present appeal has been filed. At this stage it is necessary to clarify that the third respondent did not file any appeal. Therefore, the order setting aside the sale made in his favour was allowed to become final.

2. The sale was set aside on three grounds. The second respondent acting on behalf of the decree-holder, played fraud on the Court in undervaluing the property by the Amin. The bidders who participated in the auction are only collusive bidders propped up by the second respondent. The permission granted to the decree-holder to bid in the auction is personal and the second respondent is not entitled to bid on behalf of the appellant and he cannot get the right to set off as contemplated under O. XXI R.72 (1) of the Code of Civil Procedure. As he did not deposit 1/4th purchase price on the date of sale, the sale became illegal.

3. In this appeal Sri M. V. Ramanna Reddy, learned counsel for the appellant strenuously contends that the entire approach of the lower Court is vitiated by error of law. There is no fraud played by the second respondent. The Amin has committed the mistake in putting the incorrect value of the property in the sale istihar. The Commissioner appointed by the Court himself valued the land at Rs. 5,000/- per acre. That was also part of the record. Therefore, the finding that the second respondent played fraud is not tenable. He also further contended that the bidders are independent bidders. They have nothing to do with the second respondent. His main forceful contention is that the application, E. A. No. 58 of 1978 is to permit the second respondent to bid in the auction on behalf of the decree-holder. When the lower Court said that the petition was allowed as prayer for, it means that the second respondent was permitted to bid on behalf of the appellant. The further condition stipulated in the order that the sale price shall not be less than the upset price is imposed only to the appellant personally. On so reading it must be construed that the second respondent is permitted to bid on behalf of the decree-holder. Thereby the sale is not vitiated for non-deposit of the amount as contemplated under R. 84 (1) of O. XXIC. P. C.

4. Though the respondent is served, he is not appearing either in person or through counsel. The last contention is sufficient to dispose of the appeal. So it is not necessary to go into the first and second contentions raised by the learned counsel for the appellant. The appellant filed an application under O. XXI R. 72 of the CPC requesting the Court to permit the second respondent to bid in the auction. The order passed thereon reads thus :

"Notice served on the judgment-debtor. Judgment-debtor called absent. Set ex parte. Petition allowed. Decree-holder is permitted to bid subject to the bid being higher than the upset price. He can also adjust the bid amount to the decree amount."

5. The order is susceptible of two constructions. One is that the decree-holder is permitted to bid in the auction and the bid amount shall not be less than the upset price. He is permitted to set off. The other one as contended for the appellant. It is true that the petition itself is to permit the second respondent to bid in the auction on behalf of the decree-holder. That petition was allowed. Therefore the permission was granted to the second respondent to bid in the auction on behalf of the decree-holder subject to the condition that the bid amount shall not be less than the upset price. On a fair reading of the order, I am inclined to agree with the learned counsel for the appellant that his contention is the correct one. But still the question is : Whether the permission granted to the second respondent is legal ? In the CPC (Amendment) Act 104 of 1976, O. XXI, R. 72-A was brought on statute through S. 72 thereof with effect from Feb. 1, 1977, which reads thus :

"72-A. Mortgagee not to bid at sale without the leave of the Court. - (1) Notwithstanding anything contained in R. 72, a mortgagee of immovable property shall not bid for or purchase property sold in execution of a decree on

the mortgagee unless the Court grants him leave to bid for or purchase the property.

(2) If leave to bid is granted to such mortgagee, then the Court shall fix a reserve price as regards the mortgagee, and unless the Court otherwise directs, the reserve price shall be -

(a) not less than the amount then due for principal, interest and costs in respect of the mortgage if the property is sold in one lot; and

(b) in the case of any property sold in lots, not less than such sum as shall appear to the Court to be properly attributed to each lot in relation to the amount then due for principal, interest and costs on the mortgage.

(3) In other respects, the provision of sub-rules (2) and (3) of R. 72 shall apply in relation to purchase by the decree-holder under that rule."

6. A reading thereof would postulate that notwithstanding anything contained in R. 72, a mortgagee-decree-holder of immovable property shall not bid for or purchase property sold in execution of a decree without obtaining the leave of the Court to bid for or purchase the property. The leave granted shall be subject to the condition that the reserve price shall be not less than the amount then due for principal, interest and costs in respect of the mortgage if the property is sold in one lot. If the leave is granted to the mortgage-decree-holder to bid in the auction or purchase the hypotheca, the language couched in R. 72-A (2) thereof manifests in mandatory language that the Court "then shall fix" a reserve price as regards the mortgagee and unless the Court otherwise directs, the reserve price "shall be not less than the amount due" for principal, interest and costs in respect of the mortgage if the property is sold in one lot and if it is sold in more than one lot, not less than such sum as shall appear to the Court to be property attributable to such lots in relation to the amount then due for principal, interest and costs on the mortgage.

7. The contention of Sri Ramana Reddy, learned counsel for the appellant is that the language "unless the Court otherwise directs" would engraft within its ambit the discretion provided in R. 72 (1) and in exercise thereof the lower Court granted permission subject to the condition that the bid shall not be less than the upset price. To appreciate this contention, it is necessary to consider what is the ambit and meaning of the words "unless the Court otherwise directs", in the context of R. 72-A read as a whole. Undoubtedly, the words "unless the Court or otherwise directs" would give a meaningful construction of discretion in the Courts while granting permission to the mortgagee-decree-holder to participate in the bid. But the exercise of the discretion and direction otherwise granted would be germane to the purpose sought to be achieved under R. 72-A. The question therefore is what is the purpose of R. 72-A. The language couched in R. 72-A appears to emphasize the mandatory character of the duty cast on the Court. The manner of exercise of the power under sub-rule (2) of R. 72-A makes manifest from the words "the Court shall fix the reserve price" for sale shall not be less

than the amount due under the decree i.e., the principal amount, interest thereon and costs, if the land is sold in one lot shall be conterminous with the extinguishment of the debt due. If it is sold in more than one lot, the reserve price shall be so apportioned consistent with the nature of the property, the extent thereof or quality and the amount sought to be recovered and shall be evenly distributed so as to apportion the debt and liquidation thereof. From the language thus manifested by the statute, it gives in unmistakable terms the legislative animation that it intended to relieve the mortgagor from all the liabilities incurred under the mortgage. It also seems to eradicate or at least aimed to nip in the bud the incurable tendency on the part of the decree-holder to take undue advantage of the Court sale by purchasing the hypotheca at a lower price by procuring collusive bidders at a farce of sale and to knock off the property at a minimal price and then to take recourse to recover the residue of the decree debt by other process available under the Code. If the mortgagee-decree-holder opts to make avail of the statutory facility to bid in or purchase the hypotheca in such Court auction he shall abide by law i.e., he should be prepared to purchase the property in discharge of full quids viz., in full satisfaction of the entire outstanding debt due under the mortgage decree in execution. Considered from this perspective, the necessary conclusion is that it is the mandatory duty of the executing Court while granting leave to the mortgagee-decree-holder either under O. XXI R. 72(1) or under O. 21, R. 72-A, to comply with the fixation of the reserve price in conformity with the mandatory conditions stipulated under sub-rule (2) (a) or (b) R. 72-A. That it is mandatory is made manifest when we read the opening language of R. 72-A viz, "notwithstanding anything contained in R. 72." The non-compliance thereof renders the grant of permission to the mortgagee-decree-holder fatal and per se illegal. The exercise of discretion under sub-rule (2) of R. 72-A is in the nature of an exception and for the exercise thereof the legislature carved out large leeway to the Court by employing the language "the Court unless otherwise directs". It is obviously difficult for the legislature to foresee diverse situations or circumstances that may confront the Court invoking the rule. To meet such situation power is preserved in the Court. In a given case on its peculiar facts and circumstances, for relevant and germane reasons mentioned thereunder the Court may otherwise give directions. But such directions must always be to subserve the object of R. 72-A but not in defeasance thereof. Lest while exercising the wide discretion the purpose of working of R. 72-A would be rendered otiose and nugatory and could easily be frustrated or defeated. When permission to mortgagee is granted in conformity with R. 72-A, then and then only the mortgagee could make avail of the statutory benefit of set off under R. 84 (2) of O. 21. Otherwise the mortgagee on the sale being knocked down in his favour shall pay immediately 25% of the amount of purchase money as envisaged under R. 84 (1) and in default thereof the property shall forthwith be resold. A reading of the order of the Court below extracted earlier would clearly show that the lower Court did not accord permission to the appellant in compliance of R. 72-A (2) and thereby he is denuded the benefit of set off under R. 84 (2). Admittedly no deposit of 25% of

the amount of purchase money was immediately deposited by the second respondent either by himself personally or on behalf of the appellant. As a fact, no deposit was made nor the property was resold forthwith. The non-compliance of the mandatory requirement of R. 84 (1) renders the sale per se illegal. Broached from this perspective, I have no hesitation to conclude that the permission granted to the appellant is palpably illegal and the sale also became illegal and so the Court below has rightly set aside the sale warranting no interference in this appeal. The lower Court is directed to proceed with the execution as expeditiously as possible. In view of ORDER XXXXIV RULE 5 of the Code of Civil Procedure, it is still open to the judgment-debtor to pay the decretal amount in terms thereof and get the debt discharged. The appeal is accordingly dismissed. Since none are appearing for the respondent, there is no order as to costs.

8. Appeal dismissed.