
(2007) 02 AP CK 0059
In the Andhra Pradesh High Court
Case No : A.A.O. No. 410 of 2006

Varanasi Lakshmi

APPELLANT

Vs

State Bank of India and Others

RESPONDENT

Date of Decision : 06-02-2007

Acts Referred:

Civil Procedure Code Amendment Act, 1976 — Section 72, 97
Civil Procedure Code, 1908 (CPC) — Order 21 Rule 89, Order 21 Rule 90

Citation : (2007) 4 ALT 25

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : Taddi Nageswara Rao, for the Appellant; K. Srinivasa Murthy and B.M. Patro, for the Respondent

Final Decision : Allowed

Judgement

P.S. Narayana, J.—Ippili Appalanarasaiah Patnaik, second respondent in the civil miscellaneous appeal Auction purchaser, filed C.M.A.M.P. No. 1978 of 2006, to vacate the interim stay granted by this Court in C.M.A.M.P. No. 814 of 2006 in C.M.A. No. 410 of 2006. The Counsel on record advanced their submissions in elaboration in the civil miscellaneous appeal and made a request for disposal of the civil miscellaneous appeal itself.

2. Sri Taddi Nageswara Rao, learned Counsel representing the appellant in the C.M.A., Varanasi Lakshmi, the third judgment debtor made the following submissions.

The learned Counsel would submit that the appellant as petitioner filed an application E.A. No. 29 of 2003 in E.P. No. 16 of 2001 in O.S. No. 6 of 1999 on the file of the Senior Civil Judge, Rajam, under Order XXI Rule 90 of the CPC (hereinafter in short referred to as "the Code" for the purpose of convenience) to set aside the sale of E.P. schedule buildings held on 30-1-2003 on the grounds of irregularities and fraud in publishing and describing the building in question. The Counsel also points out that the application was dismissed without furnishing an

opportunity or atleast calling upon the appellant-petitioner to furnish security and further without giving an opportunity to the appellant-petitioner to adduce evidence. In the alternative the learned Counsel would submit that the suit itself was based on a mortgage transaction by the State Bank of India represented by its Branch Manager, Palakonda, first respondent in the C.M.A. and hence the question of applicability of the proviso or calling upon to furnish security in such a case may not be applicable at all. The learned Counsel also placed reliance on certain decisions in this regard.

3. Per contra, Sri B.M. Patro, learned Counsel representing the auction purchaser, the second respondent in the C.M.A., made the following submissions.

The learned Counsel would maintain that absolutely there are no merits in the application and when there are no merits, the application can be rejected even at the threshold. The learned Counsel placed reliance on certain decisions to substantiate his contentions. While further elaborating submissions, the learned Counsel would point out that not only on the ground of non-furnishing of security, but after recording other reasons, the application was dismissed, and hence, the impugned order cannot be found fault. The Counsel also had taken this Court through the reasons recorded in paragraphs 10 and 11 of the impugned order and further would point out to the peculiar conduct of the appellant-petitioner-third judgment debtor in E.P. No. 16 of 2001 in O.S. No. 6 of 1999 aforesaid, and would submit that in the light of the same, the application itself is not a bona fide one, and hence, dismissal of the application in the facts and circumstances to be held as just and proper.

4. Heard the Counsel.

5. The appellant herein, the third judgment-debtor in E.P. No. 16 of 2001 in O.S. No. 6 of 1999 on the file of the Senior Civil Judge, Rajam, filed an application E.A. No. 29 of 2003 under Order XXI Rule 90 of the Code to set aside the sale of the E.P. schedule property as already stated aforesaid. It is the case of the appellant that the decree-holder, State Bank of India, as already referred to above, obtained a decree in O.S. No. 6 of 1999 on the file of the Senior Civil Judge, Rajam and the said decree-holder, State Bank of India brought her building at Palakonda for sale and the sale was held on 30-1-2003 and the sale was knocked down in favour of the second respondent in the C.M.A., the auction-purchaser, for a paltry sum of Rs. 3,20,000/-which was much less than the real value of the house. Several factual details had been narrated in the said application and certain averments relating to the fraud in the conduct of sale also had been specified.

6. The decree-holder filed a counter in detail narrating several particulars and tracing the historical background of the litigation and had taken a specific stand that the application is not a bona fide one. The second respondent-auction purchaser also had denied various allegations. It was recorded by the learned judge at paragraph 7 that no witness was examined and no document was

marked on either side and at paragraph 9 framed the following point for consideration.

Whether the sales of E.P. schedule buildings are liable to be set aside?

The learned judge recorded reasons at paragraphs 10, 11, 12 and 13 and ultimately dismissed the application. The learned judge at paragraph 10 no doubt recorded that all the procedural formalities had been complied with and it was also specified that as the decree holder is a banking institution, there is no necessity to commit any irregularity, whatsoever, while bringing the mortgaged property to sale and it was also specified that the advocate who represented prior to the sale in the execution application had not contended that the upset price of sale had been fixed at a very low rate and hence sale cannot be held, hence, the application to set aside the sale on the ground that the sale was at a low price etc., cannot be taken into consideration. Further at paragraph 11 it was specified that it is very clear that the application was not filed by depositing 5 percent of the purchase money or amount specified in the proclamation of sale for which sale had been ordered by giving proper security for sale warrant amount before numbering the application filed under Order XXI Rule 90 of the Code. After referring to the decision reported in *Biruduvolu Haranadha Reddy Vs. State Bank of India, (ADB) and Another*, the learned judge came to the conclusion that inasmuch as the said decision is applicable to the facts of the case, the application is liable to be dismissed and accordingly dismissed the same.

7. This is an application filed to set aside the sale under Order XXI Rule 90 of the Code. Certain averments were made in the application relating to the irregularities said to have been committed in the conduct of sale and also the fraud committed in publication and the other aspects. The proviso of Madras as applicable to Andhra Pradesh under Order XXI Rule 90 of the Code specifies as hereunder.

Provided that the Court may, after giving notice to the applicant, call upon him before admitting the application, either to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or to that realized by the sale, whichever is less, or to deposit such amount in Court.

Provided also that the security furnished or the deposit made as aforesaid shall, be liable to be proceeded against only to the extent of the deficit on a re-sale of the property already brought to sale.

Reliance was placed on the decision of Division Bench in *Tamma Venkata Pardhasaradhi Vs. Tamma Ramachandra Rao and Others*, wherein it was held that it is not obligatory on the part of the Court to direct the applicant to furnish security or make a deposit. The word used in the first proviso is "may" and not "shall". Moreover, it is conceivable that in some cases, like a mortgage debtor, furnishing of security or making a deposit might be found to be unnecessary. Therefore, discretion is given to the Court whether or not to require security or

deposit. The learned judge of this Court had gone a step further in *Dumpa Venugopala Reddy and Anr. v. Smt. Chilla Laxmikantham and Anr.* 1983 (2) An.W.R. 138 and observed at paragraphs 9, 11 and 12 as hereunder:

There were significant differences in the proviso as it stood before 1930 and as it stood after 1936. Before Madras amendment of the year 1936, the words "after giving notice to the applicant" were not there. The above mentioned Full Bench case *Gunturu Seeta Ramanjaneyulu, minor by mother and guardian Seetamma Vs. Vishnubhotla Ramayya and Others, (F.B.)* interpreted those words in harmony with the principles of natural justice and laid down that even under that original proviso the Court cannot insist upon an applicant furnishing security without affording him a prior opportunity to show cause why he need not be called upon to do so. An order of a Court calling upon a suit or to furnish security as a condition precedent to adjudicate upon his complaint involves the suit or in serious consequences. In some cases, it amounts to total denial of justice. There may be cases where requiring the suit or furnish security may not serve any reasonable purpose. Of those applications filed to set aside the sale of hypotheca in terms of a mortgage decree passed by a Court, may prominently be mentioned. In all such cases, there is no need to insist upon the Court to exercise its power of calling upon the applicant to furnish security without reference to individual cases. It must be admitted that there are countervailing considerations frivolous and frequent applications filed by the judgment-debtors seeking to long-delay the execution of the decrees obtained by the creditors may have to be discouraged. But this purpose cannot be achieved by adopting any rule of thumb. It can only be done by conferment of judicial discretion on the Courts to be exercised in individual cases. Assuming as we must do that the allegations of fraud and material irregularity made in an application under Order 21, Rule 90, Civil Procedure Code, call for investigation, we cannot hold that the Court can reject such an application on the ground that the debtor failed to furnish security. Poverty cannot be punished. The burdens involved of a rigorous law must be smoothened by the individual consideration imparted by a Court administering justice. A rule requiring furnishing of security in all cases unless sanctioned by the express language of the statute cannot be allowed to be imposed by a Court order.

The Madras amendment of 1936 makes the whole position perfectly clear by directing the Court to give notice to the applicant before calling upon him to furnish security. The Madras amendment has been considered by a Division Bench of this Court in *T. Venkata Pardhasaradhi v. T. Ramachandra Rao* 1972 (2) An.W.R. 221 where it was ruled that the giving of notice to the applicant before directing him to furnish security is mandatory and an absolute requirement of Order 21, Rule 90, Civil Procedure Code, read with its proviso. In view of the above, I uphold this objection taken by Sri Veerabhadrayya, to the validity of the order under revision.

The CPC was extensively amended by the aforementioned Act CIV of 1976. One

of the provisions which thus stood amended was Order 21, Rule 90, Civil Procedure Code, Order 21, Rule 90, Civil Procedure Code, as stood amended by the aforementioned Union Act, does not contain any reference to the power of the Court. It merely provides certain class of persons to apply to Court to set aside the sale on the ground of material irregularity or fraud and also limits the power of the Court to set aside the sale on those grounds to situations where the applicant has sustained substantial injury by reason of such irregularity or fraud. This provision read by itself would not empower the Court to issue a notice and to compel the applicant to furnish security or to make deposit. This provision thus constitutes a clear departure from the legal provision obtaining before Order 21, Rule 90, was amended by the Union Act CIV of 1976. We have already referred to and noted the legal provision obtained prior to the Union Act that enabled the Court to issue a notice to the applicant and call upon him to furnish security or to make deposit. Now when the Union amendment has omitted such a provision, it must be taken that the Parliament has deliberately intended that the right of the applicant to make an application under Order 21, Rule 90, Civil Procedure Code, should not be burdened with these prior conditions. In other words, it must be taken that the substantive right guaranteed to an applicant under Order 21, Rule 90, Civil Procedure Code, is not intended by the Parliament to be clogged by the Court action of imposition of re-conditions. It should not therefore be normally competent for any Court now to call upon the applicant to furnish security even after affording him a prior opportunity. When we contrast Rule 90 of Order 21, with Rule 89 of the same Order, this petition becomes clear. Under Order 21, Rule 89, Civil Procedure Code, it is provided that any person claiming an interest in the property sold in a Court-auction, may apply to have the sale set aside on his depositing in Court for payment of certain amount of money. Order 21, Rule 89, Civil Procedure Code, thus makes it clear that where the Parliament intended that the substantive right guaranteed should be exercised on the fulfillment of certain pre-conditions, the Parliament has not failed to insert those conditions in the statute itself. It follows, therefore, that under Order 21, Rule 90, as amended now by the aforementioned Union Act CIV of 1976, the Court has no power to insist upon the applicant to furnish security and make deposit. But the argument advanced to the contrary on behalf of the auction purchaser is that even after the aforementioned amendment effected to Order 21, Rule 90 Civil Procedure Code, by the Union Act, the aforementioned Madras proviso, still continues to be on the statute which, if in force, would undoubtedly enable the Court to call upon the applicant to furnish security or make the deposit. This argument therefore proceeds on the basis that the abovementioned Madras amendment still continues to be on the statute which, if in force, would undoubtedly enable the Court to call upon the applicant to furnish security or to make the deposit. This argument therefore proceeds on the basis that the above-mentioned Madras amendment still continues to be a part of Order 21, Rule 90, Civil Procedure Code. It appears to me that this argument cannot be accepted. The Parliament by enacting Section 97 in Act CIV of 1976, directed that any amendment made, or any provision inserted in the principal Act

by a State Legislature of a High Court before the commencement of Act CIV of 1976, shall, except in so far as such amendment or provision is inconsistent with the provisions of the principal Act as amended by Act CIV of 1976, stand repealed. In other words, the effect of Section 97 of Act CIV of 1976 is to repeal the above-mentioned Madras proviso unless the proviso is found to be consistent with Order 21, Rule 90 of the Civil Procedure Code, as amended by the Union Act CIV of 1976. We have already seen that the provisions of Order 21, Rule 90, Civil Procedure Code, as amended by Act CIV of 1976, confers an unqualified and absolute right on the applicant to make an application to set aside a Court-sale, whereas the above-mentioned Madras amendment permits the Court to impose conditions on the exercise of that right. The question therefore arises is whether such a proviso can be said to be consistent in terms of Section 97 of Act CIV of 1976, with Order 21, Rule 90, as amended by Act CIV of 1976. It thus becomes necessary to find out whether the Madras proviso is consistent with the amended Order 21, Rule 90, Civil Procedure Code.

There are several methods adopted by law to find out whether one provision in an earlier statute is consistent or not with a later provision in another statute. Of course, the overriding condition is that these two provisions must be on the same topic. Otherwise, the question of consistency or inconsistency would be an irrelevant question that can never arise between the two in comparables. It is clear that the Madras provisos under Order 21, Rule 90, Civil Procedure Code, as amended by the Parliamentary Enactment are of the same subject-matter and that they satisfy the above mentioned condition. Then we must see whether the Madras amendment is consistent with the amended Order 21, Rule 90, Civil Procedure Code. In answering this question, the law adopted several tests. One of them is to find out whether the superior later law is intended by the law maker to govern the entire situation. In other words, if Order 21, Rule 90, Civil Procedure Code, as amended by the Parliamentary Enactment is taken to be exhaustive on the topic having been made, it must be held that the Parliament did not intend that there should be any law on the same topic by any other organ of the State. Obviously, the test cannot apply to the facts of the present case because the underlying postulate of Section 97 of Act CIV of 1976 is that there can be a law in addition to the Parliamentary law provided the former is consistent with the Parliament. The second test which is applied is whether the previous law would alter, impair or detract from the operation of a later Parliamentary law. This is the test which the great Judge Dixon, J., compounded in *Victoria v. Commonwealth of Australia* (58 CLR 618) and accepted by our Court in its Full Bench judgment reported in *Rangayya v. State* MR 1978 A.P. 106 (F.B.). Dixon J, explained the meaning of "inconsistency" in the above mentioned Australian case, in the following words:

When a State law, if valid, would alter, impair or detract from the operation of a law of the Commonwealth Parliament, then to that extent, it is invalid.

Applying that test, it appears to me that the Madras proviso must be taken to

have been inconsistent with the Parliamentary law enacted in Order 21, Rule 90, Civil Procedure Code, clearly the Madras proviso has the effect of altering, impairing and detracting from the operation of Rule 90 to Order 21. It alters the law because it authorizes the Court to impose a condition on the exercise of the right to make an application. It impairs the right of the applicant by subjecting him to perform an onerous condition of furnishing security. It therefore, detracts from the operation of Order 21, Rule 90, Civil Procedure Code, as enacted by the Parliament. For the above reasons, I hold that the Madras proviso cannot be regarded as being consistent with Order 21, Rule 90, as amended by Section 72 of Act CIV of 1976. I accordingly hold that the Madras Proviso to Order 21, Rule 90, Civil Procedure Code, stood repealed with effect from the commencement of the Union Act CIV of 1976.

Reliance also was placed on the decisions in A.C. Nagaraju Vs. N. Sreenivasa Reddy, and Pillala Marri Venkataramaiah v. Sajarjeet Kesarimal Firm, by its partner 1963 (1) An.W.R. 127. The learned Counsel representing the second (sic. first) respondent-decree holder placed strong reliance on the decision of the Apex Court in Kadiyala Rama Rao v. Gutala Kahna Rao (Dead) by LRs. and Ors. 2000(1) An.W.R. 176 (SC) : 2000 (2) ALT 53 (SC) wherein it was held that an application to set aside the Court auction sale after the delivery of property to the purchaser - Judgment debtor though present at the time of auction did not allege nor let in evidence as to fraud or material irregularity-Application held rightly rejected.

8. Reliance also was placed on the decision of the Apex Court in Putti Kondala Rao and Others Vs. Vellamanchili Sitarattamma and Another, wherein the meaning of substantial injury had been explained. Further reliance was placed on a decision in Gorrela Varalakshmi Vs. Gundu Ratnam @ Ratnavathi and Another, and E. Sahadeva Reddy v. DJP Finance and Chits Tirupati and Ors. 2006 (5) ALT 501 : 2003 (3) ALD 742.

9. It is no doubt true that when the parties to an application under Order XXI Rule 90 of the Code are not inclined to let in any evidence whatsoever, it may be that the application be disposed of. It is not clear from the record whether any opportunity had been given by the learned judge to the parties concerned to let in evidence. Apart from this aspect of the matter inasmuch as the suit itself is said to have been based on a mortgage transaction, the view expressed by the learned judge relating to the furnishing of security in the given set of facts, may not be a sustainable view.

10. Whatever the reasons may be, inasmuch as no opportunity had been given for letting in evidence to the parties concerned, the impugned order cannot be sustained and accordingly the same is hereby set aside and the matter is remitted to the learned judge to give opportunity to all the parties" on record to let in evidence on the specific pleas taken in the application and in the respective counters by the parties and dispose of the same in accordance with law keeping in view the views expressed by this Court as specified supra.

11. The civil miscellaneous appeal is accordingly allowed to the extent indicated above. No order as to costs. At this juncture the Counsel representing the auction-purchaser would contend that inasmuch as the auction-purchaser would be put to serious loss if the matter is delayed, it would be just and proper if the matter is decided at an early date. It is needless to say that the learned judge to make an endeavour to dispose of the same at the earliest point of time, preferably, within a period of four months from the date of receipt of this order.