

(2006) 02 AP CK 0053

Andhra Pradesh High Court

Case No: C.R.P. No. 5776 of 2005

M. Rajagopal Reddy

APPELLANT

Vs

State Bank of India, ADB,
Govindaraopet Branch and
Another

RESPONDENT

Date of Decision: Feb. 14, 2006

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 90, Order 21 Rule 91, Order 21 Rule 92, 11, 151
- Constitution of India, 1950 - Article 227
- Limitation Act, 1963 - Article 127

Citation: AIR 2006 AP 264 : (2006) 3 ALD 469 : (2006) 2 ALT 717

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

Bench: Single Bench

Advocate: M. Bhaskara Lakshmi, for the Appellant; K.V. Subrahmanya Narsu and A. Ravinder, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

P.S. Narayana, J.

This Court ordered notice before admission on 11-11-2005. Sri A. Ravinder, the learned Counsel who had lodged caveat on behalf of the Court auction purchaser-R.2, had taken notice. On behalf of Rule 1-decree holder, Sri K.V. Subramanya Narsu, the learned Counsel had entered appearance. While ordering notice before admission on 11-11-2005 this Court also made the following order.

Both the learned Counsel have brought to my notice that E.P.No.239 of 1998 has been posted for delivering of open plot on 14-11-2005. According to the learned Counsel for the petitioner, Smt. M. Bhaskara Laxmi, the petitioner is very much

residing in the building built in the open plot. In these circumstances, the Court below is directed to proceed further with the delivery proceedings and the delivery of the open plot shall be handed over to the auction purchaser without disturbing the possession of the petitioner herein in the construction made in the said plot.

At the request of the counsel on record, the matter is being adjourned from time to time and ultimately, the C.R.P. itself is finally heard.

2. The C.R.P. is preferred by the revision petitioner-judgment debtor No. 2 under Article 227 of the Constitution of India questioning the order made by the 1 Additional Senior Civil Judge, Warangal dt. 4-10-2005 in E.A.No.66 of 2004 in E.P.No.239 of 1998. The said application was moved by the revision petitioner u/s 151 of the CPC requesting the Court to set aside the sale. The learned Judge after recording certain reasons and further principally taking into consideration the order already made in E.A.No.62 of 2003 came to the conclusion that there are no bona fides in the objection raised by the revision petitioner and ultimately dismissed the said application. Aggrieved by the same, the present C.R.P. is preferred.

Contentions of Smt. Bhaskara Laxmi:

3. Smt. Bhaskara Laxmi, the learned Counsel representing the revision petitioner-judgment debtor No. 2 had raised two important grounds: (1) Inasmuch as at no point of time there was actual service of notice on the revision petitioner-judgment debtor No. 2, for want of service of notice the sale said to have been held being illegal to be declared as nullity in view of Section 47 of the CPC and; (2) even otherwise, it is not in serious dispute that the construction came up and the construction is in existence and the same was not shown in the sale proclamation and hence, the same amounts to excessive execution which would cause lot of prejudice to the revision petitioner. Incidentally the learned Counsel had also touched several other aspects in relation thereto. The learned Counsel initially would maintain that this application no doubt, was filed u/s 151 of the CPC and in fact under inherent powers, the things can be set right, but even otherwise, the mere quoting of wrong provision of law is of no consequence and hence, the same can be treated as one u/s 47 of the C.P.C and can be dealt with. The learned Counsel also commented that the learned Judge was principally guided away by an order made in E.A.No.62 of 2003, an application filed for recall of delivery warrant. The learned Counsel had taken this Court through the nature of the order which was made in the said application and would maintain that the question of want of service of notice and in consequence thereof the sale being nullity, this aspect was not agitated and hence, the said order would not come in the way of this revisional Court in considering the said question in elaboration. The learned Counsel also would contend that the revision petitioner-judgment debtor No. 2 would occasionally visit the village and the mere fixture of notice to such a place would not amount to service of notice and when the Court is satisfied that for want of service of notice prejudice is caused to the party automatically the subsequent proceedings

inclusive of the sale held to be declared as nullity in the light of the decisions [Lal Chand Vs. VIIIth Addl. District Judge and others](#), and [Desh Bandhu Gupta Vs. N.L. Anand and Rajinder Singh](#), . The learned Counsel also had touched the question of excessive execution and had placed reliance on [Merla Ramanna Vs. Nallaparaju and Others](#), . The learned Counsel would maintain that the house in existence at present on the land is a subsequent construction and this aspect is not in serious controversy. The learned Counsel also would maintain that in view of the serious lapse, the auction purchaser is going to derive the benefit of the house without payment of any money in relation thereto and this aspect may also have to be seriously considered. The counsel also would maintain that the land also was given as security and the question of limitation which is applicable to an application under Order XXI Rule 90 of the CPC may not be applicable to the application of this nature inasmuch as in the present application the ground raised is that sale is nullity and hence, the provisions of Order XXI Rule 90 CPC are not applicable at all. While further elaborating her submissions, the learned Counsel pointed out to the mis-description of the property and the serious prejudice caused to the revision petitioner-judgment debtor No. 2 in relation thereto. The counsel also pointed out that in view of the fact that E.A.No.62 of 2003 was filed for recalling the delivery warrant, just an interlocutory order, the said order would not operate as res judicata for the regular application filed at present and placed strong reliance on the decision of the Apex Court in [Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another](#), . The learned Counsel also placed reliance, in relation to the excessive execution and mis-description of the property, on [M. Veera Raghavaiah Vs. P. Singa Rao and Others](#), .

Contentions of Sri K.V. Subramanya Narsu:

4. Sri K.V. Subramanya Narsu, learned Counsel representing respondent No. 1-decree holder had narrated several factual details and in all fairness would submit that certain of the details had not been mentioned in the impugned order. The learned Counsel also would maintain that in fact there was service of notice by affixture in the normal dwelling house. Even otherwise, the revision petitioner had an opportunity to raise this objection and having kept quiet after the sale had been conducted at this distant point of time, the same cannot be raised. The learned Counsel also commented that it is no doubt true that the learned Judge had not referred to E.A.No.59 of 2001 in E.A.No.27 of 2001 in E.P.No.239 of 1998 but the fact remains that the brother and the sons of the present revision petitioner moved the said application u/s 47 of the CPC and Order XXI Rule 90 of the CPC to refuse the execution of decree wherein the revision petitioner was shown as Rule 3 in the said application who had engaged the counsel and also supported the version of the other side that the property is joint family property and the mortgage is not binding on the other members. The learned Counsel also would maintain that the question of want of notice cannot be agitated at this distant point of time inasmuch as the said question was not raised at all either at the stage of E.A.No.59 of 2001 or at the

stage of E.A.No.62 of 2003 where the revision petitioner had an opportunity to raise such an objection and it may have to be taken that the said objection had been waived. Even otherwise, on the principle of res judicata the self-same ground cannot be re-agitated again at different stages. The learned Counsel placed reliance on [Jagati Thimmaraju Vs. Uppuluri Brahmanna,](#) [P. Bharathi and Others Vs. State of Andhra Pradesh and Others,](#) and [P.K. Vijayan Vs. Kamalakshi Amma and Others,](#) . The learned Counsel also pointed out that by virtue of the doctrine of res judicata if the ground of want of service of notice is not available to the revision petitioner then there cannot be any doubt or controversy that the very application is a misconceived one since the same was filed u/s 151 of the CPC. Such application, if any, could have been filed only under Order XXI Rule 90 of the CPC and the same was not filed within the period of limitation as contemplated by Article 127 of Limitation Act, 1963. The learned Counsel would maintain that the provisions of Order XXI Rule 90 of the CPC cannot be circumvented in such a fashion by resorting to Section 151 of the CPC. The learned Counsel while further commenting about excessive execution would maintain that the mortgaged property was brought to sale and though at the appropriate stage the revision petitioner had an opportunity to raise an objection of this nature having kept quiet intentionally and deliberately at this distant point of time, he is raising the present objection so as to prevent the decree holder from realizing the fruits of the decree. The learned Counsel would maintain that it is unfortunate that the first respondent decree holder is unable to realize the whole of the decree amount even till this day and this is the situation where Rule 1 -decree holder is placed. The learned Counsel while concluding his submissions also placed reliance on yet another decision in [Zilludumudi Appa Rao \(died\) by LR Vs. Veerini Suryanarayana \(died\) by LRs,](#) .

Contentions of Sri Ravinder:

5. Sri Ravinder, the learned Counsel representing respondent No. 2-the court auction purchaser had pointed out to the order made in E.A.No.59 of 2001 wherein the evidence was recorded and had pointed out to certain findings that the construction had been raised without permission. Several other incidental facts also had been pointed out. The learned Counsel also pointed out to relevant dates and would maintain that E.A.No.62 of 2003 was filed virtually raising the self-same objection and the objection relating to the want of service of notice had not been specifically raised and hence, the revision petitioner cannot be permitted to raise the same. The learned Counsel placed reliance on [Boda Narayana Murthy and Sons Vs. Valluri Venkata Suguna and Others,](#) and would maintain that when the land had been mortgaged it may have to be taken that the constructions which came up also to be taken as including the said mortgaged property. The learned Counsel also had explained the meaning of Immovable property, the meaning of transfer and the other concepts in relation thereto. The learned Counsel also placed reliance on [S.A. Sundararajan Vs. A.P.V. Rajendran,](#) and [Mohammed Khan and Another Vs. Graceamma Philip and Others,](#) . On the aspect of applicability of res judicata the

learned Counsel placed strong reliance on [Sulochana Amma Vs. Narayanan Nair,](#). The learned Counsel also pointed out that even otherwise, the application is hopelessly barred by limitation. While concluding his submissions the learned Counsel would maintain that when a specific remedy under Order XXI Rule 90 of the CPC is provided for, the same cannot be circumvented. The learned Counsel would explain that in a slightly different context while dealing with the relevant provisions of the Motor Vehicles Act, the Apex Court had decided a similar question in *Sadhana Lodh v. National Insurance Co. Ltd* 2003 AIR SCW 930. The counsel also placed reliance on *Smt. Kishori Devi v. Lala Ram Narain Saigal* 1969 (1) SCWR 133.

6. Heard counsel on record and perused the impugned order.

7. The revision petitioner moved E.A.No.66 of 2004 in E.P.No.239 of 1998 on the file of I Additional Senior Civil Judge, Warangal u/s 151 of the CPC (hereinafter in short, referred to as "the Code" for the purpose of convenience) requesting the Court to set aside the sale conducted on 10-11-2000. The first respondent decree holder is State Bank of India, Govindraopet branch. The second respondent is the present court auction purchaser. It is the case of the revision petitioner that he had mortgaged the open site with respondent No. 1, the decree holder which is item No. 2 of the E.P. schedule and obtained loan and Rule 1 filed O.S.No.139 of 2002 to recover the said loan and during the pendency of the proceedings, the petitioner constructed residential house over the said property and as on the date of the filing of the E.P., the said house was in existence. The first respondent-bank without referring to the existence of the house in E.P. schedule having shown the same as open site brought the property to sale behind the back of the petitioner and the same was sold on 10-11-2000 in favour of Rule 2, the auction purchaser. Several other objections also had been raised and specific stand was taken that he was not aware of the said proceedings but came to know about the said sale only when the delivery warrant was issued and objecting to the same he filed E.A.No.62 of 2003 to recall the same and the same was dismissed and the petitioner carried the matter by way of appeal. It is also stated that an advocate of High Court advised the petitioner to file an application u/s 151 of the Code and accordingly, the said application was moved. The decree holder-respondent No. 1 had taken specific stand that the petitioner had not represented the fact of existence of such house, if any, and the petitioner is having ample knowledge about the proceedings in the suit, in the final decree petition and also in the execution. The petitioner had not filed even the building permission nor he had mentioned the year of construction nor produced any records to show that the house had been constructed. Specific stand was taken that the open site was mortgaged with respondent No. 1 bank in the year 1984 and in accordance with the same, the sale proclamation was made and the property was sold and there is no necessity to Rule 1, the decree holder either to suppress the existence of the house or to mis-describe the property and only with a view to delay the litigation, this application had been thought of.

8. Respondent No. 2 the Court auction purchaser had taken the stand that a house was constructed during the pendency of the suit and the same was not brought to the notice of the Court and the judgment debtor No. 2 failed to raise any objection when the sale was ordered, publication was made, sale was conducted and sale was confirmed and this objection was raised at the time of the execution of the delivery warrant by filing E.A.62 of 2003 to recall delivery warrant. Further, it appears specific ground was taken that the non-inclusion of the developments made in the mortgaged property is a deliberate omission amounting to misrepresentation. Despite the said plea, the said application was dismissed. It was also further stated by the auction purchaser that E.A.No.59 of 2001 was filed by his sons and the same was dismissed and the matter was carried by way of appeal A.A.O.2606 of 2002 and the same also was dismissed. The learned Judge after recording certain reasons at paras-8 and 9 ultimately dismissed the said application and aggrieved by the same, the present C. R.P. is preferred. It is no doubt true that the learned Judge had not referred to the execution application filed by the brother and sons of the revision petitioner raising an objection as to the executability of the decree. However, the fact remains that the learned Judge had taken into consideration E.A.No.62 of 2003 and came to the conclusion that in the light of the provisions of the Limitation Act, 1963 and also in the light of the specific provisions of Order XXI Rule 90, 91 and 92 of the Code, this application cannot be maintained and accordingly, the same was dismissed.

9. Strong reliance was placed on Lal Chand's case (1 supra) and Desh Bandhu Gupta's case (2 supra) to substantiate the contention that the sale held without service of notice is a nullity. This is the question, which had been argued in elaboration apart from yet another question of excessive execution. The factual matrix and the series of events narrated supra need not be repeated again in detail. Several of the facts appear to be not in serious dispute. The fact that some constructions had been raised in the property in question during the pendency of the litigation without proper permission is not in serious dispute. The construction had not been shown in the sale proclamation, is also not in serious controversy for the reason that the stand taken by the decree holder is that the property which had been mortgaged had been further proceeded with by putting the decree into execution. If the first ground of want of service of notice and the consequential effect of the sale being a nullity, if not to be accepted then there cannot be any doubt or controversy that the omission to mention or the mis-description of the property, as the case may be would fall within the four corners of Order XXI Rule 90 of the Code. While interpreting the language employed in Order XXI Rule 90 and also Section 47 of the Code, certain submissions in elaboration were made by the learned Counsel representing the revision petitioner. While appreciating the case of this nature, the conduct of the parties also may have to be taken into consideration. The fact that his kith and kin raised an objection cannot be in dispute at all and this aspect was specifically raised in the counter filed by Rule 2, the auction purchaser

though the said aspect was not seriously considered by the learned Judge, may be in the light of the fact that E.A.No.62 of 2003 had been dismissed. Be that as it may, during the long pendency of the litigation at least twice, the revision petitioner had an opportunity to raise an objection relating to the further proceedings in relation to the sale of the property on the ground of want of service of notice for reasons best known, the same had not been raised. Surprisingly, though the revision petitioner also had been arrayed as Rule 3 in E.A.No.59 of 2001, he had taken a stand in the present application that he came to know about this proceeding only when the delivery warrant was issued and when he had raised an objection in relation thereto. The stand of the revision petitioner appears to be not a bona fide stand in the considered opinion of this Court.

10. Hence, in view of the peculiar facts and circumstances, the ground urged by the revision petitioner with all seriousness that the sale is a nullity for want of service of notice, may have to fall to the ground inasmuch as, the revision petitioner had not agitated the same earlier and the same may have to be taken as deemed to have been waived or even otherwise in the light of the dismissal of E.A.No.62 of 2003, the same cannot be permitted to be re-agitated again on the ground of public policy.

11. Strong reliance was placed on the decision of the Apex Court in *Satyadhyan Ghosal and Ors. v. Smt. Deorjin Debi and Anr.* (4 supra) wherein the Apex Court at Para-7 observed as hereunder:

The principle of *res judicata* is based on the need of giving a finality to judicial decisions. What it says is that once a respondent is *judicata*, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation, When a matter - whether on a question of fact or a question of law -has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher Court or because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvass the matter again. This principle of *res judicata* is embodied in relation to suits in Section 11 of the Code of Civil Procedure; but even where Section 11 does not apply, the principle of *res judicata* has been applied by Courts for the purpose of achieving finality in litigation. The result of this is that the original Court as well as any higher Court must in any future litigation proceed on the basis that the previous decision was correct.

12. There cannot be any serious controversy relating to the preposition of law laid down by the Apex Court in this regard. Reliance also was placed on *M. Veera Raghavaiah's* case (5 supra) in relation to the excessive execution and mis-description of the property. It is no doubt true that by mere quoting the wrong provision of law if the Court is satisfied that the other provision may be made applicable, the relief can be granted. On the aspect of excessive execution reliance also was placed on *Merla Ramanna's* case (3 supra). As far as the applicability of Section 47 of the Code is concerned this Court is satisfied that in the peculiar facts

and circumstances, the revision petitioner had not availed the proper remedy specified under the Code. It is needless to say that if it is a case of non-showing of the house or mis-description of the property, the same would fall within the provisions of Order XXI Rule 90 of the Code. Even on a reading of the language of Order XXI Rule 90 of the Code, this objection cannot be permitted to be raised at this stage. Even otherwise, it is needles to say that by adopting the method of circumvention, the revision petitioner cannot be permitted to invoke Section 151 of the Code.

13. Reliance was placed on Jagati Thimmaraju's case (6 supra), P. Bharati's case (7 supra) and P.K.Vijayan's case (8 supra) and Zilludumudi Appa Rao's case (9 supra). In relation to the fact that the construction in question would run along with the land reliance was placed on M/s. Boda Narayana Murthy and Sons's case(10 supra) and MohammedKhan's case (12 supra). Yet another decision of the Apex Court in Sadhana Lodh's case (14 supra) and Smt. Kishori Devi's case (15 supra) also had been relied upon. It is not in serious controversy that within the time specified under Article 127 of the Limitation Act, 1963, the application was not moved. When a specific remedy is provided for, the general remedy cannot be resorted to and in the light of what had been recorded by this Court supra, inasmuch as Sections 47 and 151 of the Code cannot be invoked since it would amount to circumventing the regular provision of Order XXI Rule 90 of the Code.

14. This Court is of the considered opinion that the learned Judge is well justified in dismissing the said application. Before parting with the case, this Court is of the considered opinion that the petitioner was not diligent in prosecuting the remedies and such parties cannot be permitted and cannot be given an upper hand and in view of the same, this Court is well satisfied that the dismissal of the application by the learned Judge need not be found fault with in any way and accordingly, the C.R.P. is bound to fail and the same shall stand dismissed with costs.