

KADIYALA RAMA RAO

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v.

GUTALA KAHNA RAO (DEAD) BY LRS. AND ORS.

FEBRUARY 18, 2000

[S.B. MAJMUDAR AND U.C. BANERJEE, JJ.]

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Civil Procedure Code, 1908 :

Order 21 :

Issue of "saleable interest"—Auction purchaser of a house sold in execution of a decree—Application under Rule 90 filed by judgment-debtor for setting aside sale of the property on the ground that they had no saleable interest—Application dismissed by District Munsif on the ground that there was no saleable interest as a running lease of the property had a stipulation that it would not be alienated for 15 years—Held, High Court erred in allowing revision petition and setting aside the auction sale—Issue of "saleable interest" can only be raised under Rule 91—In any event the issue of "saleable interest" can only be agitated by the purchaser and not by the judgment-debtor.

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Application under order 21 Rule 90 for setting aside sale of property in execution of decree—Permitted grounds available for challenge of such application—Held, ground of challenge are stipulated in the provision itself, and these grounds are material irregularity and fraud.

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Order 21 Rule 90(3) and Section 11—Held, Rule 90(3) incorporates principles analogous to doctrine of constructive res judicata as envisaged under Section 11.

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Order 21 Rule 90 (as amended by Andhra Pradesh & Madras)—Furnishing of security by applicant—District Munsif had offered the judgment-debtor to deposit money in order to avoid sale—Held, there was due compliance of the provisions of law.

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Section 115—Revision application—Scope of—Legislative change introduced—Held, is clear enough to indicate that an order passed by court subordinate to the High Court in its appellate jurisdiction, if it is not appealable, would be within the ambit of Section 115—Thus a revisional application would be maintainable—Further, a revision application against an order

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A *which is not appealable either before the subordinate court or the High Court would also be maintainable.*

B *Interpretation of Statutes—Determination of legislative intent—Section 11 and Order 21 Rule 90(3) CPC—Held, in both provisions the legislative intent is clear and categorical that in case of intentional relinquishment of a known right, there would be no question of proceeding further.*

C Appellant purchased a house in an auction purchase pursuant to a court sale in execution of a decree. Respondent filed an application under Order 21 Rule 90 before the District Munsif to set aside the auction sale but the same was rejected and the sale was confirmed. Subsequently on an application filed under Section 115 CPC before the High Court, respondents obtained an interim stay of the proceedings upon deposit of half of the decretal amount. Later on High Court directed the respondents to deposit the remaining half of the decretal amount. Respondents duly complied with the deposit of the sale proceeds. Revision petition was allowed by the High Court and Review petition against it was dismissed. Hence this appeal.

D It was contended by the appellant the revision petition was not maintainable and that the High Court should have rejected the same.

E Allowing the appeal, this Court

F HELD : 1.1. On a plain reading of Order 21 Rule 90 CPC factors emerge and which ought to be taken note of in the matter of setting aside the sale of an immovable property, viz. material irregularity and fraud in publishing or conducting the sale, that the court dealing with such an application is satisfied that the applicant has sustained substantial injury by reason of such an irregularity or fraud; and that no application would be entertained upon a ground which the applicant could have taken or before the date of drawing up of the proclamation of sale. The third requirement deserves special mention by reason of the factum of incorporation of the principles analogous to the doctrine of constructive *res judicata* as envisaged under Section 11 CPC. The legislative intent is clear and categorical in both the provisions; that in the event of an intentional relinquishment of a known right, question of proceeding further would not arise. [1049-H; 1050-A-D]

Dhirendra Nath Gorai & Ors. v. Sudhir Chandra Ghosh & Ors., AIR A
(1964) SC 1300, relied on.

12. The provisions of Order 21 Rule 90 thus categorically envisage that material irregularity and fraud alone would confer jurisdiction on the executing court to set aside the sale. The question of saleable interest does not within the ambit of Order 21 Rule 90 and as such the judgment-debtor has not *locus standi* to apply for setting aside the sale. In the present factual context, statute recognises such a *locus standi* only in the event of material irregularity or fraud and not otherwise. Apart therefrom, saleable interest can only be challenged by the purchaser and not by the judgment-debtor since the purchaser's right would otherwise be clouded therewith by reason of there being no saleable interest in the property so far as the judgment-debtor is concerned. Order 21 Rule 91 is specific on this score and a right has been conferred on the purchaser only. [1050-F; 1051-B] B C

2. The revision petition was allowed along after the completion of sale the factum of which has been totally ignored. The High Court erroneously proceeded on a certain misconception of facts as also of law by reason of the factum of challenge of sale being on the ground of saleability. Order 21 Rule 90 does not envisage the issue of saleability and the High Court was in error in introducing such a concept under Order 21 Rule 90 CPC. In any event the issue of "saleable interest" can only be agitated by the purchaser in terms of Order 21 Rule 90 and not in any event by the judgment-debtor. The ground of challenge is specific in the provision itself, namely, material irregularity or fraud and in the absence of any evidence or even an allegation in regard thereto in the petition under Order 21 Rule 90, question of introduction of the concept of no saleable interest or other opportunity to the judgment-debtor does not and cannot arise. [1052-C-F] D E F

3. Under the Andhra Pradesh and Madras amendment to Order 21 Rule 90 CPC, District Munsif has offered an opportunity to the judgment-debtor to avoid the sale by deposit of money; as such there is due compliance of the requirement of law under the said amendment. [1051-F; 1052-B] G

4. The legislative change introduced in Section 115 CPC is clear enough to indicate that an order passed by court subordinate to the High Court in its appellate jurisdiction, if it is not appealable, would be within the ambit of Section 115 of the Code and thus a revision application would be maintainable. A revision application against an order which is not H

A appealable either before the subordinate court or the High Court would also be maintainable. [1052-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2269 of 1981.

B From the Judgment and Order dated 24.4.80 of the Andhra Pradesh High Court in C.R.P. No. 6405 of 1978.

C T.S. Krishna Murthy Iyer, M.S. Ganesh, M. Seshachari, G.S. Ramarao, P.K. Rao, K.R. Nagaraja, Alope Bhattacharya, T.V.S.N. Chari, Nikhil Nayyer, Ms. B. Sunita Rao, Ms. Rajani K. Prasad and C.V. Subba Rao for the appearing parties.

The Judgment of the Court was delivered by

D **BANERJEE, J.** This appeal pertains to the question of validity of a court sale in regard to an immovable property.

The facts in the appeal may briefly be adverted in order to appreciate the issue involved effectively.

E The petitioner is a stranger auction purchaser of a house property sold in court auction on 31st July, 1978 in pursuance of a mortgage decree dated 4.6.1975 passed in C.S. No. 1245 of 1973 in the file of the court of District Munsif, Rajamundhry, Andhra Pradesh. The court sale of the house property was effected upon payment of 25% of the sale price offered by the highest bidder. Subsequently, the sale was confirmed on 31st July, 1978 upon payment of the full purchase price.

F On 26th August, 1978 the respondents herein filed an application to set aside the auction sale dated 31st July, 1978. The learned District Munsif Rajamundhry, however, by an order dated 31st August, 1978 rejected the said application and thereafter confirmed the sale and disposed of the Execution Petition on the same day and a cheque for Rs. 4420 was issued in favour of the Advocate for the decree holder and thereupon the full satisfaction was duly recorded. It is significant to note that the appellant took delivery of the house property on 9th November, 1978.

G Subsequently, on an application filed under Section 115 of the Code of Civil Procedure before the High Court of Andhra Pradesh, the respon-

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dents herein obtained an interim stay of the proceedings on 22.11.1978 upon deposit of half of the decretal amount. On 4th April, 1980, the High Court however further directed the respondent to deposit the remaining half of the decretal amount. The records depict that the respondents duly complied with the orders of deposit. The Revision Petition thereafter upon hearing was allowed by the High Court and the appellant herein subsequently filed a Review Petition which was however, dismissed by the order dated 22nd December, 1980 by the Learned Single Judge of the High Court and hence the Appeal before this Court.

To appreciate the contentions raised in the matter, it would however, be convenient to note the provisions of Order 21 Rule 90 which reads as below :

"90 (S.311) (1) Where any immovable property has been sold in execution of a decree, the decree-holder, or the purchaser, or any any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the proclamation of sale was drawn up.

Explanation : The mere absence of or defect in, attachment of the property shall not, by itself, be a ground for setting aside a sale under this rule.

On a plain reading of the provisions thus three several factors emerge and which ought to be taken note of in the matter of setting aside the sale of an immovable property. viz.

- A (i) material irregularity and fraud in publishing or conducting the sale;
- (ii) the Court dealing with such an application is satisfied that the applicant has sustained substantial injury by reason of such an irregularity or fraud : and
- B (iii) no application would be entertained upon a ground which the applicant could have taken on or before the date of drawing up of the proclamation of sale.

C The third requirement as above needs however special mention by reason of the factum of incorporation of the principles analogous to the doctrine of constructive *res judicata* as envisaged under Section 11 of the Code. The legislative intent is clear and categorical in both the provisions as above that in the event of an intentional relinquishment of a known right question of proceeding further would not arise.

D This observations finds favour in the decision of this Court in *Dhirendra Nath Gorai & Ors. v. Sudhir Chandra Gosh & Ors.*, AIR (1964) SC 1300. It is significant to note, however, that at the time of auction the Judgment-Debtor No. 2 was present in Court and the Judgment-Debtor No. 2 was also a signatory to the application under Order 21 Rule 90.

E The provisions of Order 21 Rule 90 thus categorically envisage that material irregularity and fraud along would confer jurisdiction on to the Executing Court to set aside the same. Admittedly, the Revision Petition came up for hearing on 11th April, 1980 and the sale stands confirmed on 31st July, 1978. Therefore, the impugned order in the Revision Petition *ex facie* seems to have been passed under certain misconception of facts. The learned Judge in the order impugned has been pleased to record : "whatever it is, the sale is not yet confirmed" and it is on this score, strenuous submissions have been made by the parties that the factual basis of the judgment does not stand to the reality of the situation and as such

F the order needs to be corrected by this Court. Needless to record here that there is no evidence of fraud or material irregularity neither even an allegation in regard thereto. The only issue was of saleable interest for a period of 15 years since the deed of sale as executed by the Municipality of Rajamundhry in favour of the Judgment-Debtor, contained a condition

G that the property cannot be alienated by the Judgment-Debtor for a period

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of 15 years. It is to be noticed at this juncture that question of saleable interest does not come within the ambit of Order 21 Rule 90 and as such the Judgment-Debtor had no *locus standi* to apply to the Court for setting aside the sale. In the present factual context, statute recognizes such a *locus standi* only in the event of material irregularity or fraud and not otherwise. Apart therefrom, saleable interest can only be challenged by the purchaser and not by the Judgment-Debtor since the purchaser's right would otherwise be clouded therewith by reason of there being no saleable interest in the property so far as the Judgment-Debtor is concerned. Order 21 Rule 91 is specific on this score and a right has been conferred on to the purchaser only.

Let us now at this juncture recount the order against which the Revision Petition was moved before the High Court. The Order is set out herein below :

"Heard Mr. P.M. Gandhi, perused the petition. As stated by Mr. P.M. Gandhi, petitioners who have had sale notice did not raise the present objection regarding the nature of property raise i.e., that it is not saleable. However to give them an opportunity to avoid the sale by paying the E.P. amount their counsel if asked whether they are willing to pay the E.P. amount. He is not able to give any positive reply. Petition is *prima facie* devoid of *bonafides* besides being belated. Hence rejected."

At this juncture the Andhra Pradesh and Madras Amendment Order 21 Rule 90 are also to be noticed. The said amendment reads as below :

"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."

In the present proviso after the word "Provided" insert the word "further".

A It is on this score that the Learned District Munsif has offered such an opportunity to avoid the sale by deposit of money, as such there is due compliance thereof the requirement of law in terms of the Andhra Pradesh Amendment to the provisions of the Code as noticed above.

B The contextual facts depict that the Revision Petition was allowed on 24.4.1980 that is long after the completion of sale and the factum of which has been totally ignored and the Learned Single Judge as a matter of fact has proceeded on a total misconception of facts. Be it noted that at no point of time any question was raised as regards the price and as such the attempt on the part of the respondent herein before this Court to denounce the sale on the ground of inadequacy of price ought not to be permitted to be raised before this Court at this juncture. The Learned Single Judge erroneously proceeded on certain misconception of facts as also of law by reason of the factum of challenge of sale being on the ground of saleability. Order 21 Rule 90 does not envisage the issue of saleability and the Learned Single Judge was in error in introducing such a concept under Order 21 Rule 90 of the Code. In any event as noticed above the issue of 'saleable interest' can only be agitated by the purchaser in terms of Order 21 Rule 90 and not in any event by the Judgment-Debtor. The grounds of challenge is specific in the provision itself namely, material irregularity or fraud and in the absence of any evidence or even an allegation in regard thereto in the petition under Order 21 Rule 90, question of introduction of the concept of no saleable interest or another opportunity to the judgment-debtor does not and cannot arise.

F The learned Advocate in support of the appeal further contended that in any event the Revision Petition as framed is not maintainable and the High Court should have rejected the same. We are however unable to lend concurrence therewith since the legislative change introduced in Section 115 is clear enough to indicate that an order passed by court subordinate to the High Court in its appellate jurisdiction, if it is not appealable, would be within the ambit of Section 115 of the Code and thus a revisional application would be maintainable. A revision application against an order which is not appealable either before the subordinate court or the High Court would also be maintainable.

H In that view of the matter, this Appeal succeeds. The order passed by the Learned Single Judge as impugned in this Appeal stands set aside and

quashed and so is the order dated 22.12.80 in review petition. The order of the Executing Court dated 31.8.78 thus stands confirmed. A

In view of the fact of possession of the property being with the purchaser, we are not inclined to pass any further order or issue any directive in that regard. No order as to costs.

R.K.S.

Appeal allowed. B