

**SUPREME COURT OF INDIA**

Kadiyala Rama Rao

Vs.

Gutala Kahna Rao (Dead) By Lrs.

(S.B. Majmudar and U. C. Banerjee JJ.)

18.02.2000

**JUDGMENT**

**U.C. Banerjee, J.**

1. This appeal pertains to the question of validity of court sale in regard to an immovable property.
2. The facts in the appeal may briefly be adverted in order to appreciate the issue involved effectively.
3. The petitioner is a stranger auction purchaser of a house property sold in court and ion on 31st July, 1978 in pursuance of a mortgage deals 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 once.
4. 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 this said application and thereafter confirmed the sale and disposed of the Execution Petition on the same day and a cheque fur 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 appellatant took delivery of the house property on 9th November, 1978.
5. Subsequently, on an application filed under Section 115 of the CPC before the High Court of Andhra Pradesh, the respondents 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 appellatant 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.
6. 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 (Section 311) (1) Where any immovable property has been sold Application in execution of a decree, the decree-holder, to Set aside or the purchaser, or any a ny other person sale on entitled to share in a rateable distribution of ground o f assets, or whose interests are affected by the irregularity sale, may apply to the Court to set aside the or fraud. sale on the ground of material irregularit y 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.

7. 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.

(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

(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.

8. 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.

9. This observations finds favour in the decision of this Court in [Dhirendra Nath Gorai and Ors. v. Sudhir Chandra Gosh and Ors. AIR \(1968\) 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.

10. 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 a 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 much the order needs to be corrected by this Court. Needless to record here that there is no evidence of fraud or material regularity 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 conclusion that the property cannot be alienated by the Judgment-Debtor for period 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 other-wise 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.

11. 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.

12. 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".

13. 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 (sic) compliance thereof the requirement of law in terms of the Andhra Pradesh Amendment to the provisions of the Code as noticed above.

14. 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 an point of time any question was raised as regards the price and as such (sic) 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 (sic) reason of the factum of challenge of sale being on the ground of salability Order 21 Rule 90 does not envisage the issue of salability 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 "(sic) 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 (sic) is specific in the provision itself namely, material irregularity or fraud and in the absence of any evidence or even an allegation in regard there is the petition under Order 21 Rule 90, question of introduction of the concept of no saleable interest or another opportunity to the judge(sic) debtor does not and cannot rise.

15. 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 (sic) lend concurrence therewith since the legislative change introduced 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.

16. 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 (sic)shed and so is the order dated 22.12.80 in review petition. The order the Executing Court dated 31.8.78 thus stands confirmed.

17. 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.