

Appeal Suit No. 117 of 2016

Shaik Afzal v. Mohd. Amjad Ali

2016 SCC OnLine Hyd 212 : (2016) 5 ALD 299 : (2016) 4 ICC 584 : AIR 2016
AP 230

In the High Court of Andhra Pradesh
(BEFORE R. KANTHA RAO, J.)

Shaik Afzal Appellant/Claim Petitioner/Third party

v.

Mohd. Amjad Ali and two others

Respondents/Plaintiff/Dhr/Defendants/JDRs

Counsel for petitioner: Sri. Venkat Reddy Donthi Reddy

Counsel for respondents: Sri. M.L. Ali

Appeal Suit No. 117 of 2016

Decided on April 22, 2016

The Judgment of the Court was delivered by

R. KANTHA RAO, J.:— This appeal is directed against the order dated 18.12.2015 passed in E.A. No. 50 of 2015 in E.P. No. 776 of 2014 in O.S. No. 462 of 2006 passed by the II Additional Senior Civil Judge, Warangal.

2. For the sake of convenience, the parties hereinafter will be referred to as the plaintiff, the defendants and the claim petitioner.

3. The appellant herein is the claim petitioner. He is a third party to the suit as well as the execution proceedings.

4. The plaintiff filed the suit against the defendants on 16.04.2006 for specific performance of an agreement to sell, dated 12.07.2006 executed by the defendant in respect of the house site admeasuring 350 sq. yards. During the pendency of the suit, the defendant died in the year 2007. Thereafter, his wife and son were brought on record as his legal representatives on 31.10.2007 and they are defendants 2 and 3 in the suit. Thereafter, the suit for specific performance was decreed on 10.09.2014. During the pendency of the suit, the defendants 2 and 3 allegedly sold an extent of 143.40 square yards of house site wherein there is a built up area of 437 square feet, under registered sale deed to the claim petitioner on 07.01.2013. The said suit was decreed in favour of the plaintiff and against the defendant on 10.09.2014.

5. Subsequently, the plaintiff filed execution petition under Order XXI Rule 34 CPC seeking execution of registered sale deed by defendants 2 and 3. In the said E.P. the third party-claim petitioner filed a claim petition claiming that he purchased the part of the schedule property to an extent of 143.40 square yards with built up area of 437 square feet on 07.01.2013 from defendants 2 and 3. After making an enquiry into the claim petition, the learned executing Court dismissed the claim petition as not maintainable on the ground that there is no prior attachment of the schedule property. Against the said order, the third party-claim petitioner filed the present appeal.

6. The facts above referred are admitted. The claim petition was filed under Order XXI Rule 58 of CPC. The learned trial Court expressed the view that since there is no prior attachment of the property in execution of the decree, the claim petition filed under Order XXI Rule 58 of C.P.C. is not maintainable.

7. It is the contention of the learned counsel appearing for the appellant-claim petitioner that even though the claim petition is not maintainable under Order XXI

Rule 58(1) of CPC, the trial Court ought to have treated the petition as one filed under Order XXI Rule 97 CPC and ought not to have dismissed the claim petition.

8. On the other hand, it is contended by the learned counsel appearing for the plaintiff decree-holder that in the peculiar facts and circumstances of the case, the claim petition under Order XXI Rule 97 of CPC is also not maintainable.

9. In support of his contention, the learned counsel appearing for the appellant-claim petitioner relied on a decision in *HAR VILAS v. MAHENDRA NATH* wherein the Supreme Court held that a third person claiming to be in possession of property forming subject matter of decree in his own right can resist delivery of possession even by filing an objection under Order XXI Rule 97 of CPC in executing court itself and the objections have to be determined by executing court itself.

10. Basing on the above judgment, the learned counsel appearing for the appellant contends that the trial Court ought to have made detailed enquiry into the objection raised by the appellant by treating the claim petition as one filed under Order XXI Rule 58 of CPC and committed a grave mistake in dismissing the claim petition on the ground that it is not maintainable.

11. The judgment relied on by the learned counsel appearing for the appellant is not applicable to the facts of the present case.

12. The claim petition is filed by the appellant at the stage when the execution petition was filed seeking a direction to defendants 1 and 2 to execute the decree and in the event of their failure praying the court to execute a registered sale deed as per the decree and judgment passed by the trial Court.

13. Therefore, in the instant case, the objection is taken in the execution which is filed seeking execution of registered sale deed in terms of the decree and judgment passed by the trial Court. The crucial aspect in the instant case is that in the suit filed by the appellant against the first defendant obtained an injunction restraining him or his men or agents from alienating the suit schedule property. The same was granted and subsequently it was also made absolute. After his death, the defendants 2 and 3 were brought on record. Since the defendants 2 and 3 were brought on record as legal representatives of the first defendant, the order of injunction restraining the first defendant from alienating the property also operates against the defendants 2 and 3. Therefore, the defendants 2 and 3 in violation of the order of injunction, sold part of the scheduled property to the appellant-third party. Thus, the third party-appellant is purchaser pendente lite but not absolute owner of the property in his own right. The judgment relied on by the learned counsel appearing for the appellant cited supra is therefore not applicable to the facts of the present case. The defendants 2 and 3 adopted the written statement filed by the first defendant but they did not bring it to the notice of the trial Court that pending suit they sold the property to the appellant. The appellant also did not get himself impleaded as a party in the suit by making an appropriate application. Even though the appellant is not a party to the suit, he is bound by the decree passed by the trial Court in O.S. No. 462 of 2006 by virtue of the provisions of Section 52 of the Transfer of Property Act. Therefore, he cannot set up an independent right in the schedule property and file a claim petition taking objection to the execution of the registered sale deed in terms of the decree and judgment passed by the trial Court. Rule 102 of Order XXI of CPC lays down that a purchaser of the suit property during the pendency of the litigation cannot resist the possession. Therefore, as rightly held by the executing Court, the execution application is not maintainable.

14. Consequently, the order dated 18.12.2015 passed in E.A. No. 50 of 2015 in E.P. No. 776 of 2014 in O.S. No. 462 of 2006 by the II Additional Senior Civil Judge, Warangal is hereby confirmed and the appeal is dismissed without any order as to costs.

15. Pending miscellaneous petitions, if any, shall stand closed in consequence.

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