
(2006) 06 AP CK 0089
In the Andhra Pradesh High Court
Case No : CMSA No. 274 of 2005

Allu Appa Rao

APPELLANT

Vs

Siriki Bapu Naidu and Others

RESPONDENT

Date of Decision : 15-06-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 38 Rule 5
Transfer of Property Act, 1882 — Section 53

Citation : AIR 2006 AP 369 : (2006) 5 ALD 240

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : Venkateswara Rao Gudapati, for the Appellant; Sridevi, for E.V. Bhagirtha Rao, for the Respondent No. 1, for the Respondent

Final Decision : Dismissed

Judgement

L. Narasimha Reddy, J.—The 1st respondent filed O.S. No. 37 of 1996, in the Court of Senior Civil Judge, Vizianagaram, against one Jagarapu Simhachalam, for recovery of a sum of Rs. 34,000/-, on the strength of a promissory note, dated 12-10-1984. In the initial stages of the suit itself, Simhachalam died and his legal representatives, being respondents 2 to 4 herein, were brought on record. Thereafter, the suit was decreed. After the decree became final, the 1st respondent filed E.P. No. 106 of 1998, and got attached an item of landed property. At that stage, the appellant herein, filed E.A. No. 71 of 1999, under Rule 58 of Order 21 C.P.C., for raising the attachment. He pleaded that he purchased the said item of property, through sale deed dated 17-6-1996 from late Simhachalam, and that the same cannot be proceeded against, in the execution.

2. The 1st respondent opposed the application and contended that the sale took place, soon after a notice in an application filed under Order 38 Rule 5 C.P.C. was received by late Simhachalam, and that the sale itself was fraudulent in nature. The executing Court allowed E.A. No. 71 of 1999. Aggrieved thereby, the 1st

respondent filed C.M.A. No. 14 of 2004, before the District Court, Vizianagram. Through judgment, dated 18-7-2005, the appellate Court allowed the C.M.A. Hence this civil miscellaneous second appeal.

3. Sri Gudapati Venkateswara Rao, learned Counsel for the appellant, submits that except pleading that the sale in favour of appellant was fraudulent, the 1st respondent did not plead any specific facts, muchless adduce any evidence, to substantiate it. He contends that the sale took place much prior to the suit was decreed. He submits that the appellant did not have the notice of the pendency of the suit, and that being a bona fide transaction for consideration; it is exempted from the operation of Section 53 of the Transfer of Property Act.

4. Mrs. Sridevi, learned Counsel for the 1st respondent, on the other hand, submits that the facts of the case speak for themselves. According to her, the sale was affected after the service of notice in an application filed under Order 38 Rule 5 C.P.C. on 16-6-1996. She further contends that the sale is not bona fide, since the appellant is none other than the son-in-law of the deceased defendant, and that it is nothing but, an attempt to keep the property, out of the reach of the execution proceedings.

5. The suit filed by the respondents herein for recovery of amount, decreed ex parte. Respondents 2 to 4 did not take any steps to assail the decree, and thereby, it became final. 1st respondent filed the E.P. No. 106 of 1998 and obtained attachment of an item of property. At that stage, the appellant herein filed an application under Rule 58 of Order 21 C.P.C.

6. For all practical purposes, the claim petition under Rule 58 of Order 21 C.P.C., is a plaint and is required to be disposed of, as though it is a suit. The appellant herein narrated the manner in which he has acquired the schedule property. The mere fact that the vendor was his father-in-law, cannot defeat the transaction, if it is otherwise valid. It has come on record that the trial Court passed an order of conditional attachment in I.A. No. 259 of 1996 filed under Order 38 Rule 5 C.P.C., against this very item of property, and the same could not be affected, on account of the fact that the notice therein could not be served upon the original defendant, on account of his illness. The notice is said to have been served thereafter. The sale deed in favour of the appellant herein came into existence on 17-6-1996, i.e., one day subsequent to the order of conditional attachment.

7. Section 53 of the Transfer of Property Act mandates that every transfer of immovable property, made with an intention to defeat or delay the creditors of the transferor shall be voidable at the option of any creditor, so defeated or delayed. It however, exempts the cases, where the transfers have taken place in good faith, and for consideration. Therefore, the only question that fell for consideration before the executing Court while dealing with the E.A. No. 71 of 1999 was, as to whether Section 53 gets attracted to the facts of the case. The timing of the sale, vis-a-vis pendency of the suit, and in particular, the order passed under Order 38 Rule 5 C.P.C., would certainly create a circumstance for

application of the principles underlying Section 53. The appellant could have extricated himself from the consequences flowing out of the operation of Section 53, if only he pleaded and proved that the sale in his favour was in good faith and for consideration.

8. The first factor viz. the sale being in good faith stands on a slippery footing, having regard to his relation with the vendor, or timing of the suit. Even this factor could have been pleaded and proved by him through cogent evidence. The second factor too is a pure question of fact, and must have been pleaded and proved to the satisfaction of the Court.

9. In the instant case, except taking a plea in the petition that the property belongs to him and that the sale is bona fide, the appellant did not choose to enter the witness box, nor examine any witness, to substantiate the same. It hardly needs any emphasis that howsoever attractive, or fabulous, a plea may be, in a pleading; it would not become acceptable, unless it is spoken to by a witness. When the appellant has not chosen to depose as a witness, about the plea taken by him in the claim petition, there was no basis for the executing Court to accept it. The appellant was under obligation to adduce adequate evidence to prove that the sale was bona fide and for consideration. It was in this context, that the lower appellate Court had corrected the mistake committed by the executing Court. This Court does not find any basis to interfere with the well-considered judgment rendered by the lower appellate Court. The C.M.S.A. is accordingly dismissed.

10. Learned Counsel for the appellant submits that his client may be extended the facility of discharging the obligation under the decree, in installments. Having regard to the facts and circumstances of the case, the appellant is given the facility of paying the decretal amount, calculated upto 1-7-2006, in twelve equal monthly instalments, payable on or before 10th of every month, commencing from August 2006. In default of payment of any two consecutive instalments, it shall be open to the 1st respondent to proceed with the execution of the decree. The attachment ordered against the property in question shall continue, till the appellant clears the entire liability under the decree. As and when the instalments are deposited into the executing Court, it shall be open to the 1st respondent, to withdraw the same, without furnishing any security. There shall be no order as to costs.