
(2009) 01 AP CK 0001
In the Andhra Pradesh High Court
Case No : C.M.S.A. No. 1 of 2009

Chaganti Raghavamma

APPELLANT

Vs

Dowluri Kanthamani and Another

RESPONDENT

Date of Decision : 30-01-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 101, Order 21 Rule 103, Order 21 Rule 58(3), Order 21 Rule 58(4)
Hindu Marriage Act, 1955 — Section 28
Hyderabad Municipal Corporation Act, 1955 — Section 282

Citation : (2009) 4 ALD 294 : (2009) 3 ALT 792 : (2009) 1 APLJ 238

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

Bench : Single Bench

Advocate : P. Anjanadevi Satyanarayana, for the Appellant;

Judgement

P.S. Narayana, J.—This Civil Miscellaneous Second Appeal is coming up for admission to-day. Heard Sri P. Satyanarayana, learned Counsel representing the appellant.

2. Sri P. Satyanarayana, learned Counsel representing the appellant would maintain that the C.M.S.A as such is maintainable as against the decree and judgment made in A.S. No. 224 of 2008 on the file of the III Additional District Judge, Kakinada, dated 5-1-2009, since the said appeal was preferred as against the order, dated 9-9-2008, made in E.A. No. 318 of 2007 in E.P.No. 229 of 1996 in O.S. No. 10 of 1991 on the file of the II Additional Senior Civil Judge, Kakinada. The learned Counsel also had drawn attention of this Court to the relevant provisions of the Code of Civil Procedure, hereinafter referred to for short as "the Code", and further had drawn attention of this Court to Section 282 of the Hyderabad Municipal Corporations Act, 1955 and Section 28 of the Hindu Marriage Act, 1955 as well. The Counsel also would maintain that the nomenclature which would be given whether it is called as C.M.S.A or S.A., would not seriously alter the situation and hence the present C.M.S.A. to be admitted and appropriate interim orders to be passed. The learned Counsel also pointed

out to the elaborate grounds raised in the C.M.S.A, and further placed reliance on certain decisions also to substantiate his submissions.

Heard the counsel.

3. The present C.M.S.A is preferred as against the decree and judgment made in A.S. No. 224 of 2008 on the file of the III Additional District Judge, Kakinada. The said appeal in fact was preferred as against the order made by the learned II Additional Senior Civil Judge, Kakinada in E.A. No. 318 of 2007 in E.P.No.229 of 1996 in O.S. No. 10 of 1991 whereunder the appellant as petitioner claimed the E.P. schedule property as owner thereof and further for a direction that the respondents should not interfere with her right, title or possession of the petition schedule property. The learned II Additional Senior Civil Judge, Kakinada, after recording evidence of P.W.1 and also marking Exs.A-1 to A-5 recorded certain findings and ultimately dismissed the E.A. aforesaid. Aggrieved by the same, the petitioner carried the matter by way of appeal A.S. No. 224 of 2008 on the file of the III Additional District Judge, Kakinada and the appellate court after formulating the point for consideration at para 10, recorded reasons commencing from paras 11 to 17 and ultimately dismissed the appeal without costs. Aggrieved by the same, the present C.M.S.A had been preferred:

4. The substantial question of law which would arise for consideration had been specified in ground No. 9 (a), (b), (c), (d) and (e).

5. In Jagdish Lal and Another Vs. Surender Kumar and Others, the learned Judge of the Punjab and Haryana High Court at paras 3, 4 and 6 observed as hereunder:

After hearing the learned Counsel for the parties on this point, I do not find any force in this contention. u/s 47 of the Civil P.C., questions arising between the parties to the suit relating to the execution, discharge or satisfaction of the decree are covered whereas under Order 21 Rule 97 read with Rule 101 of the Civil P.C., questions including those relating to right, title or interest in the property arising between the parties to the proceeding on an application under Rule 97 or Rule 99 of Order 21 are to be determined by the executing Court. It could not therefore be successfully argued on behalf of the appellants that the reply-cum-objection petition filed to the application, filed on behalf of the decree holder, dated March 2, 1981 was not covered by the provisions of Order 21 Rule 97, Civil P.C. The language of Rule 97 of Order 21 provides that where the holder of a decree for possession of immovable property is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction. The language used is "obstructed by any person". It may be by the judgment-debtor or by a third person. Sub-rule (2) of the said Rule 97 further provides that where an application is made under Sub-rule (2) of Rule 98 of Order 21 further provides that whereupon such determination, the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the Judgment-debtor or by some other person at his instigation or on his behalf, he shall direct that the

applicant be put into possession of the property. Rule 101 of Order 21 provides as under:

...All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.

Thus the cumulative effect of all these rules read together is that if an application under Order 21 Rule 97 is made, then its determination will be under Rule 101 and then Rule 103 further provides that where any application has been adjudicated upon under Rule 98 or 100, the order made thereon shall have the same force and will be subject to the same conditions as to an appeal or otherwise as if it were a decree.

Even if it be assumed that the questions in the instant case related to the execution, discharge or satisfaction of the decree, even then the question depending on the right, title or interest which the appellants claimed the shop in dispute because of the alleged agreement in their favour executed by Ashok Kumar. Thus Section 47 and Order 21 Rule 101 C.P.C contemplate different situations. u/s 47 C.P.C. all question relating to the execution, discharge or satisfaction of the decree have to be determined by the executing Court whereas under Rule 101 all questions including questions relating to right, title or interest in the property arising between the parties to the proceedings have to be determined by the executing Court. Thus there is no conflict between both the provisions as argued by the learned Counsel for the appellants. Section 47 is a general provision whereas Order 21 Rule 97 and 101 deal with a specific situation. Moreover, Section 47 deals with execution of all kinds of decrees whereas Order 21 Rule 97 and 101 deal only with execution of decree for possession. Apart from that, earlier i.e., prior to the amendment, every order falling u/s 47 C.P.C., was appealable (as the terms "decree" included the order u/s 47 C.P.C) whereas now only certain orders as provided for under Order 21 have been made appealable. In the cases relied upon on behalf of the appellants, it has nowhere been laid down that the questions to be determined under Order 21 Rule 97 will be deemed to have been decided u/s 47 C.P.C, if it was between the judgment-debtor and the decree-holder. In this view of the matter, this contention is repelled. The lower appellate court rightly found that the order of the executing Court was appealable as a decree under Order 21 Rule 103 of the C.P.C.

Faced with the situation, the leaned Counsel for the appellants contended that the said partition being a pre-decree matter, the executing Court could not go into the same as it will amount to modifying the decree sought to be executed. In support of this contention, reference was made to Co-operative Bank, Harsana

Kalan Vs. Ram Sarup Ravi Datt, ; Sardarni Jaswant Kaur v. Surjit Inder Singh Sibia ILR (1972) P&H 271; and Rajappa v. Sagar Krishnappa and Sons AIR 1974 Kar 51. I do not find any merit in this contention either. The question of partition between the brothers could not be said to be a pre-decretal matter between the parties to the present suit for redemption. It is those matters between the parties as such to a decree, which are relevant to the passing of the decrees which are forbidden to be pleaded in the executing Court. The situation is different as regards the facts of the present case. Here the decree for declaration with respect to the partition between the brothers where the objectors were not arrayed as parties was passed on April 6, 1979 i.e., prior to the decree for redemption was sought to be executed. Thus it could not be successfully argued that it was a pre-decretal matter between the parties as such. The decree-holders tried to prove that Ashok Kumar decree-holder was not entitled to let out the property in dispute because he was no more the owner of the said property or a co-sharer therein because of the partition earlier. Therefore this contention also fails.

6. In Mr. Gurram Seetharam Reddy Vs. Gunti Yashoda and Another, the Full Bench of this Court dealing with Order 21 Rule 58(4) of the Code and also Order 21 Rules 98 and 100 of the Code came to the conclusion that as against order made under Order 21 Rule 58(3) and Rules 98 and 100 of Order 21 of the Code regular appeals u/s 96 of the Code, but not miscellaneous appeals u/s 104 read with Order 43 Rule 1 of the Code, would be maintainable and the judgment in B. Nookaraju Vs. M.S.N. Charities and others, does not represent the correct position of law. Further the Full Bench also held that a second appeal u/s 100 of the Code is maintainable against order passed in an appeal arising out of order made under Rule 58(3) or Rules 98 and 100 of Order 21 of the Code.

7. In the light of the said binding decision, this Court is of the considered opinion that as against the decree and judgment made in A.S. No. 224 of 2008 on the file of the III Additional District Judge, Kakinada, a Second Appeal alone would lie u/s 100 of the Code and not C.M.S.A. It is no doubt stated that except changing the nomenclature substantially there may not be any difference at all whether the C.M.S.A., to be entertained or Second Appeal to be entertained. This Court is not inclined to express any opinion relating to these aspects for the reason inasmuch as C.M.S.A., preferred as against the judgment and decree in A.S. No. 224 of 2008 on the file of the III Additional District Judge, Kakinada being not maintainable. In the peculiar facts and circumstances, the learned Counsel is permitted to convert the same into a Second Appeal after complying with other necessary formalities, if any.

8. In view of the urgency pleaded, in the event of the other formalities being complied with by the learned Counsel representing the appellant, let the Registry list the matter on 2-2-2009.