
(2010) 04 AP CK 0030

In the Andhra Pradesh High Court

Case No : C.R.P. No's. 5729 and 5890 of 2007

Charminar Pressure Vessels Pvt. Ltd. and Another

APPELLANT

Vs

B. Srinivas Rao and Others

RESPONDENT

Date of Decision : 09-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 102, Order 21 Rule 97, Order 21 Rule 98, Order 22 Rule 10, Order 9 Rule 13
Evidence Act, 1872 — Section 44
Limitation Act, 1963 — Section 5
Transfer of Property Act, 1882 — Section 52

Citation : (2010) 4 ALT 265

Hon'ble Judges : G. Bhavani Prasad, J

Bench : Single Bench

Advocate : V.L.N. Gopala Krishna Murthy, for the Appellant; M.V. Rama Rao, for the Respondent

Final Decision : Allowed

Judgement

G. Bhavani Prasad, J.—Both the Civil Revision Petitions arise out of the common order passed by the Principal District Judge, Medak at Sangareddy, on 12-10-2007 in I.A. Nos. 406 of 2007 and 407 of 2007 in S.R. No. 901 of 2007.

2. The factual background for the dispute is that O.S. No. 113 of 1994 had been filed by respondents 1 and 2 and another before the Subordinate Judge's Court at Sangareddy for declaration of title, delivery of possession and permanent injunction claiming the 1st plaintiff therein to be the purchaser along with other family members and to be continuing in possession. The property was stated to have been subsequently partitioned as per the decree passed by the Subordinate Judge's Court, Sangareddy on 30-01-1988. The vendor of the 1st defendant purchased the land in Sy. No. 318 from the 1st plaintiff and other family members in 1980 and in turn sold the property to the 1st defendant in August 1993. The 1st defendant did not purchase any other property in the locality, but taking advantage of the absence of the 1st plaintiff from the suit property, the

1st defendant company and its workmen encroached upon Ac.0.29 guntas of the suit property and on noticing the encroachment, the 1st plaintiff called upon the 1st defendant to stop the illegal activities. As during the life time of the 1st plaintiff, the land was not vacated in spite of repeated demands, he filed the suit and on his death on 20-10-1995, the 2nd plaintiff was brought on record as his legal representative. The 3rd plaintiff was impleaded as a subsequent purchaser of the suit land.

3. The 1st defendant resisted the suit contending that the 1st plaintiff and other owners sold Ac.5.00 of land under two registered sale deeds in 1980 in equal extents to Niranjana Lal Goel and Santosh Lal Gupta, who in turn sold the land to the 1st defendant on 13-08-1993. The 1st defendant did not encroach upon any area not covered by its sale deed or the original two sale deeds. There was never any demand for vacating any encroachment and hence, the 1st defendant sought for dismissal of the suit with costs.

4. By the judgment dated 27-12-2002 after trial, the trial Court dismissed the suit with costs after appreciating the evidence of PWs.1 to 3 and Exs.A.1 to A.13 and C.1 marked during trial. In appeal in A.S. No. 19 of 2003, the Principal District Judge, Medak at Sangareddy remanded the matter back for fresh disposal of the suit on merits after issuing notices to both sides and after affording an opportunity to both parties to adduce their oral and documentary evidence. It was noted that no evidence was produced by the defendants before the trial Court and observing that the plaintiffs have to succeed or fail on the strength of their own case, the trial Court rendered its decision, whereas the appellate Court felt that when the defendants in their written statement have taken certain pleas and when such pleas were never proved or disproved by any evidence, the trial Court ought not to have dismissed the suit merely considering the evidence adduced on behalf of the plaintiffs.

5. After remand, the trial Court again decided the suit by its judgment dated 12-06-2006 on the basis of the affidavit of PW.1 and Exs.A.1 to A.13 and Ex.C.1 marked by it. After setting the defendants ex parte, the trial Court considered that the plaintiffs proved the suit claim and granted a decree.

6. After the suit was originally disposed of by the trial Court on 27-12-2002 and after it was remanded by the first appellate Court on 05-07-2005, the 2nd defendant was brought on record before the second judgment of the trial Court on 12-06-2006. The 2nd defendant described as M/s. Charminar Gas Company, Surya Towers, Secunderabad, was obviously impleaded on the information of the 1st defendant about the sale of property claimed by it to be to the person impleaded as the 2nd defendant.

7. It was subsequent to the judgment dated 12-06-2006 that the present revision petitioners came up with an appeal in S.R. No. 901 of 2007 along with the petitions in I.A. Nos. 406 and 407 of 2007 for condoning the delay in filing the appeal and for leave to appeal respectively. The petitioners contended that it

is the 1st petitioner who purchased Ac.2.20 guntas of land from the 1st defendant under a registered sale deed dated 25-01-2001 and the possession delivered by the Bailiff of the Court under the decree of an extent of Ac.0.29 guntas was of a part of the property purchased by the 1st petitioner. Even before the said delivery of possession on 20-01-2007, the 1st petitioner sold the entire land of Ac.2.20 guntas to the 2nd petitioner under a registered sale deed dated 13-07-2006. Both the petitioners claimed ignorance about the pendency of the suit or the judgment therein and claiming to have been affected by the said judgment and decree, they sought for condonation of delay in filing the appeal and also for leave to appeal. The 3rd plaintiff resisted the request of the petitioners claiming that he is in lawful possession of the suit property of Ac.0.29 guntas since the delivery of possession through court in execution of decree and the petitioners are neither entitled to have any permission nor to have any delay condoned so as to enable them to pursue an appeal against the judgment and decree in question.

8. The appellate Court in the impugned order observed that the purchases by the 1st and 2nd petitioners were pendente lite and that it is contended by the 3rd plaintiff that M/s Charminar Gas Company, the 2nd defendant, and M/s. Charminar Pressure Vessels, the 1st petitioner, are one and the same company. The trial Court noted that the 1st defendant company was purchased by the 2nd defendant company to which a notice through a paper publication was given before impleading it on the next day after the publication. The appellate Court also noted whether after impleadment any notice was served calling for the written statement in the suit. The appellate Court also observed that the provisions of Order XXI Rules 97, 98 and 102 of the CPC could have been availed by the petitioners and the petitioners, who had taken steps to have the judgment and decree set aside by describing them as ex parte judgment and decree, failed in the same, but did not carry the adverse orders in that regard in appeal. The appellate Court felt that the better way to settle the dispute was to survey the entire extent of the land, but not multilateral litigation and the right course for the petitioners is a fresh suit as they were no way hit by any res judicata. Consequently, it concluded that the belated petitions cannot be permitted to open the pandora's box and the petitioners can file an independent suit if their purchase was genuine with correct boundaries.

9. The dismissal of both the applications on that ground led the petitioners to file the present revision petitions contending that the 1st respondent-3rd plaintiff misled the trial Court by misdescribing the 2nd defendant as seen from the very finding of the appellate Court that both the companies are one and the same. As persons aggrieved by the decree, the petitioners have a right to appeal and the 1st respondent himself is as much a transferee pendente lite as the petitioners are. The petitioners also claimed that when the 3rd respondent informed the trial Court about the alienation of the property and when the person impleaded as the alienee was not the alienee, interests of justice would require considering the request of the petitioners and the relief claimed by them could have been

granted even at the appellate stage when the judgment of the trial Court was not in accordance with law and when the petitioners could not have recourse to Order-IX or Order XXI of the Code of Civil Procedure.

10. Sri V.L.N.G.K. Murthy, learned Counsel for the revision petitioners referring to Medasani Venkateswara Rao Vs. Municipal Corporation of Vijayawada and Others, valiantly reiterated the grounds of revision, while Sri M.V. Rama Rao, learned Counsel for the respondents, on the strength of the decision reported in Sanjay Verma Vs. Manik Roy and Others, defended the impugned common order.

11. The point for consideration is whether the petitioners are entitled to seek condonation of delay in filing the appeal and also to seek leave to file an appeal notwithstanding that they were not parties to the original suit?

12. The suit in O.S. No. 113 of 1994 is a comprehensive suit for declaration of title, delivery of vacant possession and perpetual injunction and the question in controversy between the parties originally in the suit was as to whether Ac.0.29 guntas of the suit property was part of Ac.5.00 of land sold by the 1st plaintiff and his family members to the 1st defendant or whether it was beyond the said property sold having been encroached upon by the 1st defendant and its workmen. The 1st plaintiff's suit had to be continued by the 2nd plaintiff as a legal representative with the intervention of the 3rd plaintiff as a purchaser pendente lite, while the 1st defendant also had admittedly informed the trial Court after remand that the property was sold by it to a third party. That third party was stated to have been described as M/s. Charminar Gas Company, Surya Towers, Secunderabad, leading the plaintiff to implead the 2nd defendant with such a description, whereas it is the case of the present petitioners that it was the 1st petitioner, who purchased the property from the 1st defendant, while subsequently alienating the same to the 2nd petitioner, which purchase of property comprises the suit property also. Under such circumstances, undoubtedly, the petitioners are persons interested in the subject matter of the suit and can also be undoubtedly considered as proper parties to the suit even if they may not be necessarily described as necessary parties to the suit.

13. Order XXII Rule 10 of the CPC referring to assignment, creation or devolution of any interest during the pendency of a suit, enables the continuance of a suit by or against the person upon whom such interest has come or devolved with the leave of the Court and it is with reference to the said provision along with Section 52 of the Transfer of Property Act containing the doctrine of lis pendens that the Apex Court decided Raj Kumar v. Sardarilal and Ors. (supra), wherein the Apex Court was dealing with a comparable situation of facts. The Apex Court noted that a lis pendens transferee from the defendant, though not arrayed as a party in the suit, is still a person claiming under the defendant, who can take recourse to Section 146 of the CPC and Order XXII Rule 10 thereof. Referring to the earlier decision in Saila Bala Dassi Vs. Sm. Nirmla Sundari Dassi and Another, the Apex Court held that an appeal is a proceeding for the purpose of Section 146 and whoever is entitled to be but has not been brought on record

under Order 22 Rule 10 in a pending suit or proceeding would be entitled to prefer an appeal against the decree or order passed therein if his assignor could have filed such an appeal, there being no prohibition against it in the Code. The Apex Court was observing that a person having acquired an interest in suit property during the pendency of the suit and seeking to be brought on record at the stage of the appeal can do so by reference to Section 146 Code of Civil Procedure, which provision being a beneficent provision should be construed liberally and so as to advance justice and not in a restricted or technical sense. The Apex Court also referred to the other earlier decisions on the aspect and held that such a *lis pendens* transferee is entitled to move an application under Order IX Rule 13 of CPC.

14. While the principles laid down by the Apex Court consequently come to the aid of the revision petitioners, the decision reported in *Sanjay Verma v. Manik Roy and Ors.* (supra) is a case arising out of a suit for specific performance of the contract and the transferees of the property in dispute during the pendency of the suit attempted to intervene by getting impleaded. The Apex Court, with reference to the principles u/s 52 of the Transfer of Property Act and Order XXII Rule 10 of the CPC had, of course, observed that if a person is not a party to a suit, the decree does not affect him unless the judgment is in rem and not in personam. The absence of any affect on the transferees of the property *pendente lite* pursuant to any decree for specific performance in the suit was thus the reason for the observations of the Apex Court, more so, based on the principle referred to by the Apex Court that there is absolutely no rule that the transferee *pendente lite* without leave of the court should in all cases contest the pending suit. The Apex Court was also referring to the principle that though a person who has acquired an interest in the subject matter of the litigation by assignment or creation or devolution of interest *pendente lite*, is entitled to apply to the court for leave to continue the suit, it does not follow that it was obligatory upon them to do so. It was, hence, observed that if a party does not ask for leave, he takes the obvious risk. Hence, it is clear from the precedent itself that the transferee *pendente lite* without leave of the court had also the possibility of contesting the pending suit with the leave of the Court even if it was not obligatory for him to do so. In fact, the Apex Court had observed that mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit and the only condition postulated by Section 52 of the Transfer of Property Act is that such alienation will, in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court.

15. As such, there is no conflict in principle between *Raj Kumar v. Sardarilal and Ors.* (supra) and *Sanjay Verma v. Manik Roy and Ors.* (supra) and on the facts and circumstances of the present case, the right of a person situated in a similar situation as the present petitioners herein to prefer an appeal against the decree in question against which his vendor could have filed an appeal, has to be recognized and given effect to.

16. It is not known as to how any resistance to the execution of the decree in question could have been resorted to by the petitioners under Order XXI of the CPC when their claim to possession was not independent of the 1st defendant, who was a party to the suit but was only through the 1st defendant. Similarly, it is also not known as to how a declaration of title to the suit property against the predecessor-in-title of the petitioners, if allowed to become final, would still entitle the petitioners to pursue their remedies against the decree holders in this suit by way of an independent suit. The situation arising u/s 44 of the Evidence Act only cover cases of fraud or collusion, but not a situation like the present one where the genesis of the dispute is about the suit property being within or beyond the property sold to the 1st defendant by the 1st plaintiff and his family members admittedly. Such disputed civil rights could not have been again made the subject of an independent suit by the petitioners and disallowing the petitioners to pursue their remedies against the judgment and decree in question would be unjust and inequitable, leaving them in effect and substance without a remedy for no fault of them.

17. The appellate Court itself observed in the impugned order about the manner in which the 2nd defendant was brought on record and also about the obvious inadequate service of notice by substituted service on the 2nd defendant with a gap of only a day between the publication and the date fixed for appearance of the 2nd defendant. The impugned order also made a specific reference to the absence of notice to the 2nd defendant to file a written statement. There was a specific finding that the delay in the petitioners approaching the court against the decree and judgment may be due to the efforts before the trial Court to have the ex parte decree set aside. While the application u/s 5 of the Limitation Act has to receive a liberal approach, the delay of 222 days is to be condoned on appropriate terms and the petitioners have to be granted consequential leave to present the appeal.

18. It is to be made clear that no part of this order should be construed as an expression of opinion on the merits of the rival contentions of the parties, which have to be dealt with in accordance with law by the appellate Court on taking the appeal on file, if it is otherwise in order.

19. Therefore, I.A. No. 406 of 2007 in S.R. No. 901 of 2007 on the file of the Principal District Judge, Medak at Sangareddy will be allowed on deposit of Rs. 5,000/- (Rupees five thousand only) by the revision petitioners to the credit of the District Legal Services Authority, Medak at Sangareddy, within two (2) weeks from the date of communication of this order to the Principal District Court, Medak at Sangareddy and in default, the said petition shall stand dismissed. In the event of the conditional order being complied with and I.A. No. 406 of 2007 being consequently allowed, I.A. No. 407 of 2007 also shall stand allowed granting leave to the petitioners to prefer an appeal against the judgment and decree in O.S. No. 113 of 1994 on the file of Senior Civil Judge, Medak at Sangareddy, dated 12-06-2006 and the Civil Revision Petitions are allowed

accordingly without costs.

20. Sri V.L.N.G.K. Murthy, learned Counsel for the revision petitioners, makes a request for a direction to the first appellate Court for disposal of the appeal expeditiously, if the appeal is taken on file, if it is otherwise in order and I have absolutely no doubt that the first appellate Court will dispose of the appeal on merits in accordance with law after giving every reasonable opportunity to both parties as expeditiously as possible in the light of the age of the dispute.