

(2013) 04 AP CK 0080
In the Andhra Pradesh High Court
Case No : Appeal Suit No. 530 of 2011

Dr. M. Parvathi and Others

APPELLANT

Vs

Sri. Penumatcha Satyanarayana Raju and Others.

RESPONDENT

Date of Decision : 09-04-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 101, Order 21 Rule 97, 47

Citation : (2013) 4 ALD 608 : (2013) 5 ALT 184

Hon'ble Judges : L. Narasimha Reddy, J;K.G. Shankar, J

Bench : Division Bench

Advocate : P. Sri. Raghuram, for the Appellant; K. Ramakrishna Reddy, for the Respondent

Final Decision : Dismissed

Judgement

L. Narasimha Reddy, J.—This appeal is directed against the order, dated 30.05.2011, passed by the Court of IV Additional District Judge, Visakhapatnam, in an application filed u/s 47, Rules 97 to 101 of Order XXI C.P.C., being E.A. No. 3 of 2009 in E.P. No. 26 of 2008 in O.S. No. 326 of 2007. The facts that gave rise to the filing of the appeal are as under:

Respondents 1 and 2 filed O.S. No. 326 of 1998 against respondents 3 to 8 in the Court of IV Additional Senior Civil Judge (FTC), Visakhapatnam, for the relief of specific performance of an agreement of sale, dated 09.10.1993, in respect of the suit schedule property, being an extent of Ac. 0.65 cents of land in R.S. No. 59/P of Maddilapalem Village, Vizakhapatnam District. An ex parte decree was passed on 06.08.2004. Based upon the decree, the E.P. was filed and a sale deed was executed by the Court on 23.12.2006. Alleging that respondents 3 to 8 herein occupied the land covered by the sale deed high handedly and raised thatched sheds, respondents 1 and 2 filed O.S. No. 326 of 2007 in the Court of IV Additional District Judge, Visakhapatnam, for the relief of recovery of possession. The suit was decreed ex parte on 23.09.2008. For execution of the said decree, respondents 1 and 2 filed E.P. No. 26 of 2008.

2. The appellants state that they have purchased three plots of land admeasuring 328, 286.22 & 235.66 square yards, in survey Nos. 59/10p, 59/11c2p & 59/12c, respectively, of Maddilapalem, Vizakhapatnam, in the months of February and March, 2003 from the respective vendors. It was also stated that the three plots are contiguous and that all of them together were leased out to M/s. Sagar Durga Marbles & Granites, Visakhapatnam. Alleging that respondents 1 and 2 are trying to dispossess them, in the name of execution of the decree in O.S. No. 326 of 1998, the appellants filed E.A. No. 3 of 2009 under Rules 97 to 101 of Order XXI, read with Section 47 C.P.C. in E.P. No. 26 of 2008. It was pleaded that the very decree obtained by the 1st respondent in O.S. No. 326 of 1998 was fraudulent and collusive and knowing fully well that, none of the parties to the suit are in possession of the land, O.S. No. 326 of 2007 was filed with the sole objective of dispossessing the persons, who are in possession. They have also stated that when their vendors faced threat of dispossession from M/s. Bora Appalareddy, they filed O.S. No. 1 of 1995 in the Court of I Additional Senior Civil Judge, Visakhapatnam, and that suit has been decreed. The appellants resisted the execution of the decree by asserting title and possession of the property.

3. Respondents 1 and 2 opposed the application. They pleaded that the so-called purchase made by the appellants is long after the decree in O.S. No. 326 of 1998 was filed and there is any amount of discrepancy in the sale deed relied upon by the appellants. It is also pleaded that even according to the appellants, the land claimed by them is substantially different from the one, covered by the decree in O.S. No. 326 of 1998. Other contentions were also raised.

4. Through its order, dated 30.05.2011, the Executing Court dismissed the E.A.

5. Sri. P. Sri. Raghuram, learned counsel for the appellants, submits that the finding recorded by the Executing Court that the appellants failed to prove title to the land, is opposed to evidence and contrary to law. He contends that the whole exercise undertaken by respondents 1 and 2 was collusive and at no point of time, there was any adjudication as to the existence of title in favour of their vendors. He submits that the very fact that the second suit was filed for recovery of possession, after a suit for specific performance was decreed, and sale deed was executed, discloses that the whole exercise was collusive in nature. Learned Senior Counsel submits that the Executing Court did not take into account, the fact that the property claimed by the appellants is smaller in extent, compared to the one covered by the decree in O.S. No. 326 of 2007 and even while executing the decree, the Court could have protected the rights of the appellants. He further submits that the small discrepancy in the survey numbers and patta numbers was blown beyond proportion and the claim of the appellants were rejected without any basis. Lastly, he contends that it was equally obligatory on the part of the Executing Court to insist on respondents 1 and 2 to prove their title, since a claim petition under Rules 97 to 101 of Order XXI CPC, is dealt with, almost like a suit.

6. Sri. K. Ramakrishna Reddy, learned Senior Counsel for respondents 1 and 2,

on the other hand, submits that the decree in O.S. No. 326 of 1998 has not only become final, but also the Court has executed the sale deed, when the judgment debtor therein did not turn up. He contends that except the self-serving statement of PW. 1, there was nothing on record to prove the title of the appellants. He contends that the only witness examined on behalf of the appellants categorically admitted that he has no claim vis-?-vis the land, covered by the sale deed executed by the Court in favour of respondents 1 and 2. Learned Senior Counsel further submits that glaring discrepancies were noticed, be it as regards survey number, or patta numbers, in relation to the sale deeds, relied upon by the appellants.

7. The appeal arises out of a claim petition filed by a third party, under Rules 97 to 101 of Order XXI C.P.C., in the course of execution of a decree passed in O.S. No. 326 of 2007. Such an application is required to be dealt with, as if it is a suit. Obviously for that reason, the Executing Court framed a point equivalent to an issue, covering the controversy, viz.,

Whether the petitioners are the absolute owners of the petition schedule property and if so whether they have got right and title over the same?

8. The 3rd respondent-appellant deposed as PW. 1 and he filed Exs. A.1 to A.46. The 1st respondent deposed as RW. 1 and he filed Exs. B.1 and B.2. The point was answered against the appellants. Hence, this appeal.

9. In view of the grounds raised by the appellants and the arguments advanced on behalf of the parties, the following points arise for consideration in this appeal:

i) "Whether the appellants established the title to the property claimed by them?

ii) Whether the findings recorded by the trial Court warrant interference?"

10. For all practical purposes, the appellants can be said to have filed a suit for declaration of their title. If they are successful in their effort, the decree cannot be executed against the property, claimed by them.

11. The version of the appellants is that they purchased individual plots under sale deeds executed in February and March, 2003, marked as Exs. A.2, A.4 and A.6. The link documents in favour of their vendors are marked as Exs. A.1, A.3 and A.5. While Ex. A.1 is of the year 1972, A.3 and A.5 are of January, 1992. Apart from filing the sale deeds and link documents, the appellants have also filed receipts of payment of tax, the orders, and various proceedings, that ensued in respect of the plots purchased by them, over the period. The documents included the pleadings, judgments and decrees in O.S. No. 326 of 1998 also. The decree in O.S. No. 326 of 1998, was filed as Exs. A.22. The sale deed executed in compliance with the decree under Ex. A.22 was filed as Ex. A.24. The extent covered by it is Ac. 0.16 cents. The aggregate of the three plots claimed by the appellants is about 800 square yards. Since the appellants, on the one hand, and respondents 1 and 2, on the other hand, acquired their respective rights from different sources, the controversy would be one of overlapping. It is

in this process that the title also needs to be determined.

12. The burden to prove the title to the property in question squarely rested upon the appellants. Though the sale deeds and link documents were filed, much more was required to be done to prove the title, since respondents 1 and 2 disputed the genuinity of the transactions, through which the appellants are said to have purchased the same. However, it was only the 3rd appellant that deposed as witness and no other witnesses were examined.

13. Ex. A.2 is the source of title for the 1st appellant in respect of a plot of 328 square yards. A perusal of Ex. A.2 discloses that it is shown to be in survey No. 59/11c2p and 59/10p. No patta number is mentioned.

14. If this description accorded with the one in the link document, marked as Ex. A.1, a semblance of validity can be attached to Ex. A.2. However, in Ex. A.1, the survey number mentioned is only 59/c and patta number was mentioned as 7-B. The patta number assumes significance from the point of title of the vendor. When this serious discrepancy is pointed out, the appellants did not take any steps to examine the vendor, under Ex. A.2, nor any other record was placed. Similar discrepancies were noticed, as between Exs. A.2 & A.4 and A.5 & A.6.

15. Further, when the three transactions are separate, and are covered by three different documents, it is just un-understandable as to how the deposition of one such claimants, namely the 3rd appellant in respect of Ex. A.6, can ensure to the benefit of the other two. None of the persons concerned with Ex. A.1, A.3 and A.5 were examined.

16. The evidence of the sole witness on behalf of the appellants, presents certain curious aspects. With the amendment to CPC, the chief-examination of a witness has become a matter of past. An affidavit is filed in lieu of chief-examination hardly with any control as to its contents. There are instances where the contents of the affidavits far exceeded those in the plaints. Once the affidavit is filed, the chief-examination of the concerned witness needs to be treated as closed and the witness must be ready for cross-examination. With the deemed provision of the chief examination with the filing of affidavit, the witness does not have any right to add anything further, except with the specific permission of the Court.

17. In the instant case, PW. 1 filed his affidavit in lieu of chief-examination, running into six closely typed pages, on 16.11.2009. Along with the affidavit, he has filed 17 documents. On 08.02.2010, he filed additional affidavit, enclosing three documents. This was followed by a third affidavit filed on 27th July, 2010, wherein 16 more documents were added. A fourth affidavit was filed on 03.02.2011 and this time, six documents were filed. On each occasion, certain aspects which were totally outside the scope of the suit and contents of the plaint were dumped into the Court. The docket, in the E.P., discloses that the cross-examination of PW. 1 was completed on 10.02.2010, and RW. 1 was cross-examined on 31.01.2010. Thereafter, that PW. 1 was recalled and further

affidavits in lieu of chief-examination were filed. The very significance of the oral evidence was diluted.

18. Be that as it may, there was a sketch before the Court, which depicted a lane known as "Krishna College Road" connecting the E.P. schedule property and National Highway. One specific question was put to PW. 1 as to whether their property is located on the Krishna College Road. His answer was "I have nothing to do with the property located by the side of Krishna College Road."

19. The very fact that the E.A. was filed under Rule 97 of Order XXI means that the claimant therein has a clear idea about the property, which is the subject-matter of E.P. and the nature of rights he claims vis--vis the same. However, in his cross-examination, it is stated that he does not know the exact extent of E.P. schedule property. Since the E.P. schedule property is in survey No. 59 and the appellants claimed various bits of sub-divisions in survey No. 59, a question was put as to the details of survey No. 59. He stated that he does not know the total extent covered by survey No. 59, nor the extent of land owned by respondents 1 and 2. He further stated that he does not know as to when the survey No. 59 was sub-divided. It was elicited from him that the land covered by Ex. A.10 i.e. sale deed, executed by the Court in favour of respondents 1 and 2 is covered by patta No. 22, and survey No. 59 (part). He admitted that the lands under Exs. A.1, A.3 and A.5 are covered by patta No. 7-B. He stated that he has not filed any document showing the division of the land into plots. This is all the oral evidence adduced on behalf of the appellants.

20. When serious discrepancy is pointed out as between Exs. A.1, A.3 and A.5, the link documents on the one hand and Exs. A.2, A.4 and A.6 the sale deeds through which the appellants are said to have purchased the plots, on the other hand, it was incumbent upon the appellants to examine their vendors, to explain the discrepancy. No effort was made in that direction. At any rate, from the point of view of their claim, vis--vis E.P. schedule property, the appellants failed to establish that they have any semblance of right over it.

21. As observed in several precedents, viz. N.S.S. Narayana Sarma and Others Vs. Goldstone Exports (P) Ltd. and Others, & Vegulla Satyanarayana Murthy and Others Vs. Alluri Annapurnamma and Others, , including the one rendered by this Court in G. Veeresham Vs. D.V. Shailendra Kumari and Another, , the proceedings under Rules 58, 97 and 99 of XXI C.P.C. are equated to suits. As in the case of a suit for declaration of title, in the claim petition also, the extent to which a title must be established is always relative. In a given case, if the plaintiff is able to establish a semblance of title, though not so perfect a one, he can succeed if what is proved by him is relatively superior to that of the defendant. However, the proof of the title, even if not to the level of perfection, must be the one which is acceptable in law. If this test is applied to the facts of appellants case, it emerges that the appellants failed to prove their title, since no witness, except one of them was examined and several discrepancies pointed out and admitted by the sole witness, remain unexplained. Even if it is a case where there was

hardly any resistance from the respondents, it is difficult to infer or conclude that the appellants have established their title. Added to that, respondents 1 and 2 derive the title through an undisputed source, namely, Exs. A.24, sale deed executed by the Court itself, in compliance with the decree.

22. Before the trial Court as well as this Court, the appellants pleaded that the decree obtained by the 1st respondent in O.S. No. 326 of 1998 is a collusive and fraudulent one. If that were to be so, they could have filed a separate suit challenging that very decree. Mere taking of a plea that the decree rendered by a Court of competent jurisdiction is collusive or fraudulent would not sub-serve the purpose. Unless specifically challenged before it, no Court can address that issue. Therefore, points framed in this appeal are answered against the appellants.

23. An effort was made by the learned Senior Counsel for the appellants, to impress upon this Court that the Executing Court did not decide the E.A., on par with a suit. A perusal of the judgment and record of the trial Court however discloses that the adjudication of the claim petition was in no way different from that in a suit. The discussion undertaken by the Court in relation to the contentious evidence, and appreciation thereof does not leave any doubt and that all the tenets of adjudication of a suit were followed.

24. We do not find any merits in the appeal and it is accordingly dismissed. There shall be no order as to costs. The miscellaneous petition filed in this appeal shall also stand disposed of.