

(1966) 12 AP CK 0005

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 2090 of 1964

Gogula Basivi Reddy and Another

APPELLANT

Vs

Lakkaraju Janardana Rao and Others

RESPONDENT

Date of Decision : 09-12-1966

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 90, Order 9 Rule 13, 11, 145
Provincial Small Cause Courts Act, 1887 — Section 17, 17(1)

Citation : AIR 1968 AP 306

Hon'ble Judges : Gopal Rao Ekbote, J

Bench : Single Bench

Advocate : K. Ramachandra Rao, for the Appellant; D. Venkata Reddy, for the Respondent

Final Decision : Dismissed

Judgement

Gopal Rao Ekbote, J.—This is a revision petition filed by the decree-holder as well as the auction purchaser against the judgment of the District Judge, Guntur given on 30th September 1963. It arises in the following circumstances.

2. The 2nd petitioner had obtained a decree in Small Cause Suit No. 246 of 1956 from the Subordinate Judge's Court, Guntur against respondents 2 to 4 on 28-8-1956. The said decree was ex parte in so far as those respondents were concerned. Respondents 2 to 4 therefore filed an application, I. A. No. 1738 of 1956, to set aside the ex parte decree. u/s 17 of the Provincial Small Cause Courts Act, the 1st respondent filed a surety bond in that I. A. On 16-12-1957 ultimately the ex parte decree was set aside and upon proper inquiry the suit of the plaintiff again was decreed against respondents 2 to 4.

8. The decree-holder, 2nd petitioner, therefore filed E. P. No. 342 of 1958 against the 1st respondent who had stood surety to I. A. No. 1738 of 1956. It is contended that a notice was given to him. He appeared through an Advocate on 8-11-1958 but did not question the validity of the proceeding against him. The property belonging to the 1st Respondent was attached and sold in execution of

the decree which was purchased by the 1st petitioner. At that stage, the 1st respondent filed an application under Order XXI Rule 90, C. P. C . to set aside the sale of his property which was held on 22-6-1959 in execution of the above said decree. In that application he also raised a question that since he had stood surety u/s 17 of the Provincial Small Cause Courts Act and since the ex parte decree was set aside, he was not liable under the surety bond for the satisfaction of the decree which was subsequently passed against respondents 2 to 4.

4. The executing Court accepted the contentions of the 1st respondent and allowed his petition. The sale held therefore was set aside.

5. Dissatisfied with that order of the Subordinate Judge. Guntur dated 8-9-1961, the petitioners before me preferred an appeal to the District Judge. Guntur. The learned District Judge, agreeing with the view of the Subordinate Judge, disallowed the appeal. It is from that decision of the learned District Judge that the present revision petition is filed.

6. It was firstly contended that in view of the language employed in the surety bond it would be clear that the 1st respondent had stood surety for the performance of the decree which may ultimately be passed and not for the ex parte decree to set aside which the application was filed. After going through the surety bond. I do not find any substance in the said contention. It may also be remembered that the surety bond was filed u/s 17 of the Provincial Small Cause Courts Act. The surety had undertaken to satisfy the ex parte decree in case it is not set aside. He cannot therefore be held responsible for the satisfaction of any other decree. Since the ex parte decree was set aside, his liability ceased. There is nothing in the surety bond which warrants the interpretation sought to be put on it by the learned counsel for the petitioners.

7. It was next contended that even though the ex parte decree was set aside, the surety continued to be liable to pay the amount because subsequently a decree again was passed against respondents 2 to 4. In *Anthony v. Narayana*. ILR (1957) AP 162, an ex parte decree in favour of the petitioner against the 1st respondent was set aside on the 2nd respondent standing surety for him as required by Section 17(1) of the Provincial Small Cause Courts Act (IX of 1887). A decree was passed on merits and the petitioner sought to recover by execution the decretal amount from the surety. Mr. Justice M. A. Ansari held that the surety, under the provisions of section 17(1), could not be proceeded against in execution of the decree passed on merits and that the security under the proviso was only for the purposes of vacating an ex parte decree. I am in respectful agreement with the said decision. Both the Courts below therefore were right in holding that the surety, that is to say, respondent No. 1, is not liable to satisfy the ultimate decree which was passed on merits against respondents 2 to 4.

8. It was finally contended that in E. P. 342 of 1958. 1st respondent was served with notice and since he did not raise the objection that he was not liable to satisfy the present decree, he cannot be now permitted to raise that contention

in view of the principles of constructive res judicata. I do not think this question can arise in this case. Whether u/s 11 or under the analogous principles of res judicata, it is necessary that the person bound by the judgment is a party to the judgment and it is only then that he can be precluded from raising the objection which he might and ought to have raised under the earlier proceedings. In this case, in view of the fact that the ex parte decree was set aside u/s 17 the surety was not liable to satisfy the subsequent decree at all. He was therefore not a party to the decree which could be executed against him. The Court had no jurisdiction to attach and sell the property of a third person. No question of constructive res judicata in such a case can arise. The Courts below were right in rejecting this contention also.

9. In view of what is stated above, the revision petition fails and is dismissed with costs.