

(1954) 11 AP CK 0012

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 1591 of 1953

Gurajada Vijaya Lakshamma

APPELLANT

Vs

Yarlagadda Padmanabhan and Others

RESPONDENT

Date of Decision : 25-11-1954

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 63
Evidence Act, 1872 — Section 44

Citation : AIR 1955 AP 112

Hon'ble Judges : Umamaheswaram, J

Bench : Single Bench

Advocate : A.L. Narayana Rao, for the Appellant; K. Suryanarayana, for the Respondent

Judgement

(1) This Civil Revision Petition is filed against the findings recorded by the learned Subordinate Judge of Masulipatam on additional Issues 4 and 5 in O. S. No. 61 of 1950 on his file.

(2) The plaintiff-decree-holder sought to attach the properties of the first defendant in O. S. No. 61 of 1950 (Petitioner herein) as belonging to his judgment - debtor who is the second defendant in that suit, in execution of the decree in O. S. No. 215 of 1945 (District Munsif's Court of Gudivada). The petitioner herein filed a claim petition (E. A. No. 462 of 1949) under O. 21, R. 58, Civil P. C. and her claim was allowed. The plaintiff-decree, holder consequently filed O. S. No. 61 of 1950 seeking to set aside the Order made on the claim petition. One of the pleas raised in that suit by the petitioner herein was that the debt due to the plaintiff was a bogus one and that the decree obtained by him was vitiated by fraud and collusion. On that pleading, additional issues 4 and collusion. On that pleading, additional issues 4 and 5 were raised. The learned Subordinate Judge held that in a suit filed under O. 21, R. 63, Civil P. C. it is not open to the defendant to attack the decree or the debt on which it is based. The present revision petition is, therefore, filed by the first defendant in O. S. No. 61

of 1950, Sub-Court. Masulipatam.

(3) From the facts stated above, it is clear that the claim preferred by the petitioner herein was upheld by the executing Court, and the decree - holder had consequently to file the suit under O. 21 R. 63, Civil P. C. In such a suit, he has to establish that the properties sought to be attached belong to the judgment-debtor and it is certainly open to the defendant to raise all defence to non-suit the plaintiff. If the defendant is in a position to prove that the plaintiff is not at all a creditor or that the decree obtained by him was one obtained by fraud or collusion, the suit will have to fail. I am not, however, concerned with the question whether the suit having been filed in a representative capacity, it is not open to the other creditors to continue the suit or not.

(4) The nature and scope of a suit under O. 21, R. 63, Civil P. C., has been well set out by George Rankin J. in -- Najimunnessa Bibi Vs. Nacharaddin Sardar, , and is in the following terms :

"The suit, if brought, is not limited by any special standard of evidence or of law. The claimant may, if necessary, thrash out his title in the fullest and most ultimate sense. But, if the title which he claims is not the ultimate full title to the property, then, of course, he must be content to assert whatever the title claimed may be. So, too, the decree-holder may make out his debtor's title exactly as if it were a suit for possession by the judgment-debtor".

In -- Masina Bavamma Vs. Yendru Papanna and Others, at pp. 972--973 (B), Venkataramana Rao J., held :

"When a suit is instituted under O. 21, R. 63, Civil P. C., it is not merely a continuation of the claim proceeding, but what is essentially litigated is a question of title".

Elaborating that point, the learned Judge observed as follows :

"For example, it, may be the claimant in the claim proceedings would have succeeded by merely proceedings would have succeeded by merely showing that he was a trespasser, but the decree-holder can establish in a suit which he filed under O. 21, R. 63, that the trespass was not of sufficient duration to confer any title in the successful claimant and the property still belonged to the judgment-debtor and that therefore he is entitled to attach the property as that of the judgment-debtor".

The learned Judge followed the observations of Wallance J., in -- Donepudi Subramanyam Vs. Nune Narasimham and Others, (C), which runs thus :

"The claim enquiry merely settles whether the claimant is in possession the property in his own behalf or on behalf of the judgment-debtor. But the claimant in his suit has to establish right which he claims to the property, that is, the question of title is also raised for decision. The suit is therefore, really in part a new legal proceeding and is not entirely restricted to the questions within the

scope of the claim enquiry".

(5) The point that arises for consideration in the present case arose for decision in -- "Naranayyan v. Nageswarayyan ", 17 Mad 389 (D) and it was held that it was open to the defendant to show that the decree in execution of which the property in dispute was attached was collusively obtained. The learned Judge held that such a defence would not be ordinarily available or necessary when the defendant is an utter stranger, in no way connected with the judgment - debtor, unless it may be when the decree makes the debt a charge on the property claimed or when the defendant is interested in setting up a defence -- either as a reversioner or as a co-parcener interested in the property sought to be proceeded against. The learned Judges distinguished the decision of the Bombay High Court in -- "Gulibai v. Jagannath Galvankar", 10 Bom 659 (E) and held that, in their opinion, S. 283 (which corresponds to O. 21, R. 63, C. P. C. of the old Code) (Act 14 of 1882). did not introduce an exception to the rule that the defendant is bound to set up every defence available to him. It was further held that it would be unreasonable to compel the defendant to submit to a decree that might result in his eviction, and thereafter to bring a fresh suit for restoration of possession. I am of opinion that the reasoning contained in this judgment directly applies to the facts of the present case. When the decree-holder seeks to seize the petitioner's properties in execution of a decree, she is certainly entitled to raise all defences open to her. The learned counsel for the respondent contended that the scope of the decision ought to be confined only to a decree making the debt a charge on the property claimed or to reversioners or co-parceners interested in the attached property. I do not think that there is any warrant for so restricting the principle laid down by the Bench.

The decision of Varadachariar J., in -- Methar Rowther Vs. Sahu Moideen Rowther, also supports that conclusion. In discussing the scope of a suit under O. 21, R. 103, Civil P. C., the learned Judge observed as follows :

"If I found that there was any substance in the issue about adverse possession or the issue which attacks the validity of the decree in the promissory note suit, I should have directed an enquiry into those issues, because I cannot agree that even such questions could have been raised in the obstruction proceedings".

So, according to the learned Judge, though objections based on adverse possession or on the validity of the decree could not be raised in execution, it was open to raise those objections in a suit under O. 21, R. 63, Civil P. C.

(6) Dealing with judgments obtained by fraud and collusion, in "A Treatise on the Law of Judgments" Vol. I. (second edition), by Henry Campbell Black, the following rule is laid down at page 293 :

"However the rule may be in regard to parties and privies, it is very well settled that any third person, a stranger to the judgment, whose rights would be injuriously affected if it were allowed to stand as against him, may show, in a collateral proceeding that it was procured through the fraudulent contrivance of

the debtor or the collusion of both parties, with a design to hinder or defraud him, and so have it considered and treated as void as to him. As stated in an American case :

"A Collusive Judgment is open to attack wherever and wherever it may come in conflict with the rights or the interest of third persons. Fraud is not "a thing that can stand, even when robed in a Judgment"."

Or, as a rule is sometimes more broadly stated, a judgment which is not founded on an actual debt or other legal liability, due or enforceable at the time of its entry, will not be upheld against the creditors of the judgment-debtor. Hence, a judgment confessed without any consideration and with fraudulent intent, may be questioned by other judgment and execution-creditors of the defendant, and as to them, the judgment and execution thereon will be vacated and set aside".

This rule applies to the present case as well. When the plaintiff (respondent herein) relies upon the decree and judgment obtained by him as against the judgment-debtor for proceeding against the properties of the petitioner herein in execution, it is also open to the petitioner under the terms of S. 44, Evidence Act, to establish that the decree sought to be executed against her was obtained by fraud or collusion. The learned counsel for the respondent relied on the decision in 10 Bom 659 (E) The principle on which that decision was based is expressed in the following terms :

"to allow the claimant to deny the plaintiff's right to bring the suit, by impeaching the decree which the latter is seeking to execute as collusive, would be, we fear, to add to the difficulties (already, very great) of judgment-creditors in enforcing their decrees, by affording additional encouragement to collusive resistance by judgment-debtors and third parties."

While the principle laid down is no doubt commendable, still in my opinion properties not belonging to the judgment-debtors should not be allowed to be proceeded against on the basis of decrees obtained by fraud or collusion. When the claim is allowed and when a suit is instituted by the decree-holder, he has to satisfy the Court that he is a creditor, that he filed the suit in a representative capacity under S. 53. transfer of Property Act and that the property belongs to the judgment-debtor. The decree may no doubt afford "prima facie" evidence that a debt is due to him. But that does not prevent the claimant-defendant from establishing that the debt is not true or that the decree is not valid and binding. As already stated, the decision of the Bombay High Court referred to above was rightly dissented from by the Madras High Court in 17 Mad 389 (D).

(7) The next case relied on by the learned counsel for the respondent is -- Deoki Singh and Others Vs. Sri Thakur Raghavindra bhagwan, ; there is, however, no discussion in that case of the point involved in this case and I am not prepared to follow that decision.

(8) Reliance was next placed on the decision of the Calcutta High Court in --

Nawab Syed Mahammad Hashim Ali Khan and Another Vs. Iffat Ara Hamidi Begum and Others, . The learned Judges held that a suit under O. 21, R. 63, C.P.C. is in essence a review of the summary order passed by the executing Court on the claim and that it is merely a continuation in a different forum of the claim proceedings. Following the decisions of the Madras High Court already cited, I dissent from the view expressed in this case, as to the nature and scope of the suit under O. 21, R. 63, Civil P. C. The learned Judges preferred to follow the view in 10 Bom 659 (E) and Deoki Singh and Others Vs. Sri Thakur Raghavindra bhagwan, to the view expressed by the Madras High Court in 17 Mad 389. I am , however, of opinion that the rule is correctly laid down by the Bench decision of the Madras High Court in 17 Mad 389 (D) and I follow it in preference to the decisions of the Bombay, Calcutta and Patna High Courts.

(9) At the close of the argument, a decision of a single Judge of the Madras High Court in -- "Vellayya Reddiar v. Ramaswami Reddiar", 1954 2 Mad LJ 707 (I) was brought to my notice. A careful perusal of the judgment shows that none of the cases cited before me were placed before the learned Judge, who states at p. 708 of the report as follows :

"No authority was cited for the position that in a suit under O. 21, R. 63, Civil P. C., it will be open to the plaintiff to require the decree-holder to prove that the debt in respect of which he had obtained the decree is a genuine one." I have no doubt that, if the learned Judge's attention had been drawn to the Bench decision of the Madras High Court in -- "Naranayyan v. Nageswarayyan (D)", the learned Judge would have followed it and come to a different conclusion. Moreover on the facts of that case there is a further difference that the suit under O. 21, R. 63, Civil P. C., was filed by the claimant and not by the decree-holder.

(10) In the result, I set aside the findings recorded by the learned Subordinate Judge on Issues 4 and 5 and allow the Civil Revision Petition. The findings on the question of jurisdiction has not been pressed before me by the petitioner, and therefore, it stands. Costs of this revision petition will be provided for in the suit. The suit will be proceeded with, in the light of the observations contained in this order.

Revision allowed.