
(2007) 04 AP CK 0002
In the Andhra Pradesh High Court
Case No : CMA No. 277 of 2007

Jogani Mallaiah

APPELLANT

Vs

Y. Suresh Babu and Others

RESPONDENT

Date of Decision : 27-04-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 1 Rule 10(2), Order 22 Rule 10, Order 41 Rule 23, Order 41 Rule 23A
Transfer of Property Act, 1882 — Section 52

Citation : AIR 2007 AP 301 : (2007) 4 ALD 425 : (2007) 4 ALT 440

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

Bench : Single Bench

Advocate : Ranga Rao Nellutla, for the Appellant; M.V.S. Suresh Kumar, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—Though the civil miscellaneous appeal is of the year 2007, when the application CMA MP No. 528 of 2007 was moved to vacate the interim order dated 23-2-2007, since urgency was pleaded by Sri M.V.S. Suresh Kumar, the matter was directed to appear in the list for final hearing on 26-4-2007 and after a couple of adjournments the matter is coming up before this Court today for final hearing.

2. The present civil miscellaneous appeal is filed by the appellant-plaintiff, RI in AS No. 66 of 2006 on the file of II Additional District Judge, Ranga Reddy District, N.T.R. Nagar, Hyderabad, being aggrieved of an order of remand made thereunder. The appellants in AS No. 66 of 2006 referred to supra are non-parties to OS No. 338 of 1999 on the file of the Principal Junior Civil Judge, West and South, Ranga Reddy District, N.T.R. Nagar. It is stated that with the leave of the Court the appeal had been preferred and the learned Judge after recording certain reasons had set aside the decree and judgment made in OS No. 338 of 1999 dated 31-1-2005 and the matter was remanded permitting the appellants

therein, the third parties, to come on record in the place of the first defendant as defendants, as they purchased the property from him during the pendency of the suit and give them an opportunity to file written statement to cross-examine PWs.1 to 3 and to adduce evidence in support of their contention. No doubt, certain other directions also had been made. Aggrieved by the said order of remand, the civil miscellaneous appeal is preferred.

3. Contentions of Sri N. Ranga Rao:

Sri N. Ranga Rao, learned Counsel representing the appellant-plaintiff-RI in AS No. 66 of 2006 referred to supra made the following submissions.

The learned Counsel would maintain that this is a suit instituted by the plaintiff for the relief of perpetual injunction and the Counsel also would maintain that the suit is being one concerned with personal action, there is no cause of action as against this non-parties to the litigation and when that being so, such plaintiff cannot be forced to fight the litigation as against such non-parties. The Counsel also would submit that even otherwise these parties contend that they are purchased pendente lite and in view of the fact of lis pendens, Section 52 of the Transfer of Property Act, 1882, being applicable such parties cannot be brought on record even under Order 1 Rule 10(2) of the CPC (hereinafter in short referred to as "the Code" for the purpose of convenience) or under any other provision under the said Code. While further elaborating the submissions, the Counsel also pointed out to the relevant portion of the findings of the appellate Court and also by the Court of first instance and would maintain that in such personal action it cannot be said there is any devolution as such, at the best, such parties may be permitted to agitate their rights by instituting a separate suit and not by circumventing the procedure by permitting them to prefer an appeal and making an order of remand. The Counsel also would point out that even if the identity of the property to be carefully examined, absolutely there is no conflict, since the property covered by the suit is not the property which is being claimed by the present non-parties to the litigation and even on that ground the present civil miscellaneous appeal to be allowed. The learned Counsel placed strong reliance on certain decisions to substantiate his submissions.

4. Contentions of Sri M.V.S. Suresh Kumar:

Sri M.V.S. Suresh Kumar, the learned Counsel representing the contesting respondents-appellants-third parties, would maintain that though it is a suit for perpetual injunction, the subject-matter of the suit is in relation to the immovable property. The third parties are purchasers of the property pendente lite. When that being so, in the peculiar circumstances such parties are entitled to maintain an appeal being aggrieved of the decree made within the meaning of Section 96 of the Code. The Counsel also would maintain that all these facts had been well explained and leave had been prayed for and leave had been granted and further even the Court of first instance clearly observed that the property already had been disposed of and when that being so, the Court of first instance

just made futile exercise by granting perpetual injunction decree as against a party who was not interested in the property as on the date of passing of the decree. The learned Counsel would maintain that in such peculiar circumstances, the contesting respondents in the civil miscellaneous appeal, the appellants-third parties, as purchasers pendente lite preferred the appeal AS No. 66 of 2006 on the file of II Additional District Judge, Ranga Reddy and also produced certain documents to substantiate their stand. The Counsel also would maintain that in the peculiar circumstances, may be that the appellate Court could have given opportunity to both the parties to let in evidence and record appropriate findings, but, however, instead the appellate Court thought it fit to record appropriate findings and to make an order of remand, since the appellate Court thought it just and convenient to make an order of remand. Hence, in the peculiar facts of the case, it cannot be said that this order of remand is neither covered by Order XLI Rule 23 nor 23-A of the Code, as the case may be. The Counsel while further elaborating the submissions had made an attempt to distinguish the decisions relied upon by the Counsel for appellant and would maintain that Larger Bench of Apex Court had taken a different view and the same had not been followed, may be that the said decision was not cited before the learned Judge who had taken a particular view. The Counsel also would maintain that the Division Bench of this Court, in fact, after survey of all the decisions had laid down certain principles and if those principles are carefully examined, this case would fall within the said parameters, and hence, the order of remand made by the appellate Court is well justified. The learned Counsel placed reliance on several decisions to substantiate his submissions.

5. Heard the Counsel, perused the findings recorded by the appellate Court and also perused the findings recorded by the Court of first instance.

6. In the light of the rival contentions advanced by the Counsel on record, the following points emerge for consideration in this civil miscellaneous appeal.

1. Whether the order of remand made by the appellate Court be justified in the facts and circumstances of the case?

2. If so, to what relief the parties would be entitled to?

7. Point No. 1:

The appellant herein, the plaintiff in the suit O.S. No. 338 of 1999 on the file of the Principal Junior Civil Judge, West and South, Ranga Reddy District, instituted the suit for perpetual injunction on the ground that he had been in possession and enjoyment of the property and the same was ancestral property. It was averred in the plaint that one Subbaramaiah and his brothers tried to cause interference to the lawful possession and enjoyment of the appellant herein-plaintiff and hence the relief specified above had been prayed for.

8. Respondents 1 to 5 herein are the third parties to OS No. 338 of 1999, preferred an appeal before the learned District Judge, Ranga Reddy, bearing

ASSR No. 7084 of 2005 along with an application IA No. 2139 of 2005 for condonation of delay and another application IA No. 2140 of 2005 requesting the Court to permit them to prefer an appeal by granting appropriate leave and the said applications were allowed and accordingly AS No. 66 of 2006 on the file of II Additional District Judge, Ranga Reddy, had been heard by the learned Judge and an order of remand was made. The same is being questioned on several grounds.

9. The principal contention appears to be since these parties, the non-parties to the litigation cannot be said to be necessary parties at all to a suit for perpetual injunction and since an application under Order 1 Rule 10(2) of the Code itself by such parties may not be maintainable and also in the light of Section 52 of the Transfer of Property Act, 1882, at the instance of such parties permitting them to prefer an appeal and also making an order of remand, is not just, proper or legal. Incidentally, the Counsel representing the respective parties also had pointed out several other factual controversies.

10. Before taking up further discussion it may be appropriate to have a look at the respective pleadings of the parties as shown in OS No. 338 of 1999 referred to supra. The appellant-plaintiff for the relief of perpetual injunction instituted the suit with the following averments made in the plaint.

It was pleaded that he was the owner and has been in possession of the suit property and he succeeded the same from his forefathers. Previously there was a house with Door No. 2-74 and after formation of Serilingampally Municipality, the same was re-numbered as 2-74/1. The plaintiff and his forefathers had been in possession for more than 100 years. Since the house was in a dilapidated condition, the plaintiff demolished the said house and constructed the present house and the Serilingampally Municipality assessed the house tax at Rs. 233/- per annum and he paid tax for the years 1998 to 2000. The defendants, who were the brothers of late Subba Ramaiah, without having any title and interest over the property, were trying to dispossess the plaintiff by demolishing the said house with brutal force.

11. Defendants 1 to 3, Thota Subba Rayudu, Thota Shiva Shanker and Thota Madhu, were shown as parties in the said suit. The first defendant filed written statement pleading that he purchased the house bearing Door No. 2-1 with appurtenant land to an extent of 161.7 square yards at Chandanagar from Jamuna Bai through her general power of attorney through registered sale deed dated 14-8-1992. He also purchased another piece of land to an extent of 271.07 square yards adjacent to the above land from Smt. T.L. Sulochana vide registered sale deed dated 11-2-1992. He also purchased an extent of 36.06 square yards and 486.06 square yards from Smt. Swarna Latha vide registered sale deed dated 8-7-1993 and 21-4-1997 respectively and all the above said lands are a compact block of an extent of 956.04 yards. He paid Rs. 4,350/- towards building plan fee to construct the compound wall for the entire land and constructed the compound wall. The plaintiff had no title to the property. The plaintiff created tax receipts and proceeding dated 1-6-1999 in collusion with one

Sadanandam, who was employee of the Municipality. There were no structures in the suit property except the compound wall constructed by him.

12. Before the Court of first instance, the following issues were settled.

(1) Whether the plaintiff is entitled for perpetual injunction prayed ?

(2) To what relief ?

13. During the course of trial, the plaintiff examined himself as PW. 1 and PWs.2 and 3 were examined, Ex.A1 demand notice, Exs.A2 and A3 property tax receipts, Ex.A4 ownership certificate and Ex.A-5 rough sketch to the suit land, were marked. None had been examined on behalf of the defendants.

14. The Court of first instance recorded certain reasons and ultimately decreed the suit with costs granting perpetual injunction restraining the defendants from interfering with the plaintiffs peaceful possession and enjoyment of the suit property. It is pertinent to note that the Court of first instance recorded "it is also important to note that while cross-examining the PW.3, he was suggested whether the witness knows that the defendant sold away the entire property in favour of the third parties. Hence, the suggestion goes to show that at present they are no way concerned with the suit property and sold away the same to the third parties. There is no claim from the third party in the present suit."

15. The appellate Court in AS No. 66 of 2006 framed the following point for consideration.

Whether the appellants have any right and interest over the plaint schedule mentioned property? If so, whether their presence before the lower Court is necessary to have effective and final adjudication of the matter?

The learned Judge recorded reasons in detail commencing from Paras 12 to 15 and ultimately allowed the appeal making an order of remand with certain farther directions.

16. It is not in serious controversy that the appellants had purchased the property from the first defendant during the pendency of the suit and specific stand was taken that they had no knowledge about the pendency of the suit and they are claiming the plaint schedule property through the first defendant and in view of the fact that a decree for perpetual injunction already had been made as against those parties, though non-parties to the litigation as purchasers, their rights are seriously prejudiced. The learned Judge also recorded that an application for receipt of documents to receive as additional evidence on behalf of the appellants under Order XLI Rule 27 of the Code had been moved and the sale deeds and other documents had been produced and all these documents filed by the said appellants in AS No. 66 of 2006 in IA No. 1622 of 2006 were relevant and being necessary for disposal of the appeal. The said application filed under Order XLI Rule 27 of the Code was allowed and the documents were marked as Exs.B1 to B15. The learned Judge recorded reasons in detail in Para

15 relating to the documents which had been produced at the appellate stage and also by taking into consideration the docket entries and the examination of PWs.1, 2 and 3 as well and certain portions of the cross-examination of the said witnesses and further the findings which had been recorded by the Court of first instance in relation thereto. It is needless to say that these findings are factual findings and with these findings may be recorded to make an order of remand.

17. Now, the question in controversy is that in a suit for perpetual injunction of this nature, concerned with immovable property whether third party purchasers pendente lite be brought on record and at the instance of such parties whether an appeal be maintained and if so, whether the order of remand made by the appellate Court to be confirmed or to be set aside in the facts and circumstances of the case.

18. At the outset, it may be stated that though it is a suit for mere perpetual injunction, the subject-matter of the suit is immovable property and it is needless to say that the title also may have to be incidentally gone into. It is true that a decree for perpetual injunction is normally a personal action decree in persona. But, however, this is a case where the property had devolved on these purchasers pending litigation by virtue of sale deeds, which had been duly produced before the appellate Court. It is pertinent to note that it is not as though the Court was not conscious of the alienation made and in fact a finding had been recorded in relation thereto. But, however, a decree was made though appears to be on contest virtually it is to be taken as an ex parte decree for the reason that by that date the contesting defendants had no interest in the property and they had parted away from the property. These facts may not be in serious controversy between the parties. Strong reliance was placed on the decision of a learned Judge of this Court in Major P.T. Choudary Vs. Mohammed Abdul Basheer Khan and Others, , wherein the learned Judge followed Sarvinder Singh Vs. Dalip Singh and Others, , and observed at Para 2 as hereunder.

The only question which needs consideration is whether a subsequent purchaser of a suit property in a suit for injunction can be added as a plaintiff. The petitioners have relied on a judgment of this Court reported in Ramesh Chawla Vs. N. Srihari and Others, . In this judgment, the learned Single Judge relied on a judgment of the Supreme Court reported in Sarvinder Singh v. Dalip Singh (supra), In similar circumstances, when the defendants had dealt with the property in a pending suit, the Supreme Court held on the basis of Section 52 of the Transfer of Property Act (for short "the Act").

"It would, therefore, be clear that the defendants in the suit were prohibited by operation of Section 52 to deal with the property and could not transfer or otherwise dealt with it in anyway affecting the rights of the appellant except with the order or authority of the Court. Admittedly, the authority or order of the Court had not been obtained for alienation of those properties. Therefore, the alienation obviously would be hit by the doctrine of lis pendens by operation of Section 52. Under these circumstances, the respondents cannot be considered to

be either necessary or proper parties to the suit.

Strong reliance was placed on the decision of the Apex Court referred to above in *Sarvinder Singh v. Dalip Singh and Ors.* (supra), a decision of the two Judge Bench of the Apex Court. Strong reliance was placed on these decisions by the Counsel representing the appellant to substantiate his submissions that such parties transferee pendente lite need not be brought on record since such parties would not be necessary or proper parties. The Counsel representing the contesting respondents, the third parties to the original suit who preferred the appeal with the leave of the Court, placed strong reliance on the decision of the Division Bench of this Court in *Chappidi Subbareddy (died) and Others Vs. Chappidi Narapureddy and Others*, wherein the Division Bench observed at Para 24 as hereunder:

From a conspectus of all the aforesaid judgments, touching upon the present aspect, broadly, the following would emerge;

Firstly, for the purpose of impleading a transferee pendente lite, the facts and circumstances should be gone into and basing on the necessary facts, the Court can permit such a party to come on record, either under Order 1 Rule 10 C.P.C. or under Order 22 Rule 10 C.P.C., as a general principle:

Secondly, a transferee pendente lite is not entitled to come on record as a matter of right;

Thirdly, there is no absolute rule that such a transferee pendente lite, with the leave of the Court should, in all cases, be allowed to come on record as a party;

(Emphasis added)

Fourthly, the impleadment of a transferee pendente lite would depend upon the nature of the suit and appreciation of the material available on record;

Fifthly, where a transferee pendente lite does not ask for leave and come on record that would obviously be at his peril, and the suit may be improperly conducted by the plaintiff on record;

Sixthly, merely because such transferee pendente lite does not come on record, the concept of his (transferee pendente lite) not being bound by the judgment does not arise and consequently he would be bound by the result of the litigation, though he remains unrepresented;

Seventhly, the sale transaction pendente lite is hit by the provisions of Section 52 of the Transfer of Property Act; and,

Eighthly, a transferee pendente lite, being an assignee of interest in the property, as envisaged under Order 22 Rule 10 C.P.C., can seek leave of the Court to come on record on his own or at the instance of either party to the suit.

It is true that the Division Bench observed that a transferee pendente lite is not entitled to come on record as a matter of right and further observed that there is

no absolute rule that such a transferee pendente lite, with the leave of the Court should, in all cases, be allowed to come on record as a party. It is true that such discretion to be exercised depending upon the facts and circumstances of the particular given case.

19. Further, the Counsel representing respondents placed strong reliance on the decision of the Apex Court in *Saila Bala Dassi Vs. Sm. Nirmala Sundari Dassi and Another*, , a decision of a Four Judge Bench wherein the Apex Court observed that as a purchaser pendente lite, a person will be bound by the proceedings taken by the party in whose favour the decree is passed in execution of decree, and justice requires that she should be given an opportunity to protect her rights. The Apex Court in elaboration had discussed Section 52 of the Transfer of Property Act, 1882, Order 1 Rule 10 and Section 151 of the Code and also the object and scope of Order XXII Rule 10 and Section 146 of the Code as well. Further, strong reliance was placed on yet another decision of the Two Judge Bench of the Apex Court in *Khemchand Shankar Choudhari and Another Vs. Vishnu Hari Patil and Others*, . It is needless to say that the decisions *Khemchand Shankar Choudhari and Another Vs. Vishnu Hari Patil and Others*, and also 1996 (7) Su 210 of the Apex Court are the decisions of Two Judge Bench, whereas, the decision in *Smt. Saila Bala Dassi v. Smt. Nirmala Sundari Dassi and Anr.* (supra) is a decision of the Four Judge Bench. The learned Judge of this Court in *Major P.T. Choudary v. Mohammed Abdul Basheer Khan and Ors.* (supra) followed the view of the Two Judge Bench in *Sarvinder Singh v. Dalip Singh and Ors.* (supra), and expressed the views already specified supra. It is needless to say that there is yet another decision of the Division Bench of this Court in *Chappidi Subbareddy (died) and Ors. v. Chappidi Narapureddy and Ors.* (supra), whereunder the learned Division Bench after survey of the several decisions on the point laid down certain propositions which had been specified above.

20. In the light of the findings recorded above, it cannot be laid down as broad proposition that under no circumstances in a suit for perpetual injunction a transferee pendente lite be permitted to come on record. It is made clear that a matter to be decided depending upon the facts and circumstances of the given case. In a suit of this nature where the rights relating to immovable property are involved, especially, taking into consideration the nature of the decree which had been passed by the Court of first instance, the appellate Court entertained an application under Order XLI Rule 27 of the Code at the instance of non-parties to the litigation, the purchasers pendente lite, thought it fit to receive such documents and further thought it fit that it may not be proper to record evidence at the appellate stage and thought of giving opportunity to both the parties, and hence, made an order of remand. This Court is well satisfied that both in law and also on the ground of justness and equity the impugned order of remand needs no disturbance at the hands of this Court.

21. Point No. 2:

In the light of the findings recorded above, the civil miscellaneous appeal

deserves a dismissal and accordingly the civil miscellaneous appeal shall stand dismissed. However, the parties to bear their own costs.