
(2012) 02 AP CK 0039

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 2599 of 2009

K. Anuradha

APPELLANT

Vs

Ramadevi and A. Rajeswari

RESPONDENT

Date of Decision : 15-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 97

Citation : (2012) 3 ALD 705 : (2012) 4 ALT 410

Hon'ble Judges : C.V. Nagarjuna Reddy, J

Bench : Single Bench

Advocate : N. Aswartha Narayana, for the Appellant; Mahadeva Kanthiregala for Sri K.G. Krishna Murthy, for the Respondent

Final Decision : Allowed

Judgement

C.V. Nagarjuna Reddy

1. This civil revision petition arises out of order, dated 27.11.2008 in E.A.No. 439 of 2008 in E.P.No. 75 of 2007 in O.S.No. 134 of 2006 on the file of the learned Principal Senior Civil Judge, Anantapur. The petitioner is the third party claim petitioner. Respondent No. 1 filed the suit based on mortgage. A preliminary decree was passed in the suit. The decree, to the extent it is relevant, is reproduced hereunder:

And it is hereby further ordered and decreed that in default of payment as aforesaid, the plaintiff may apply to the Court for a final decree for the sale of the mortgage property and on such application being made the mortgaged property of sufficient part thereof shall be directed to be sold and for purpose of such sale the plaintiff shall produce before the Court or such officer as it appoints all documents in his possession of power relating to the mortgaged property.

2. Respondent No. 1 filed E.P.No. 75 of 2007 for execution of the preliminary decree. The petitioner filed E.A.No. 439 of 2008 to dismiss the E.P. Her case is that respondent No. 2 - judgment debtor and her husband executed an

agreement of sale, dated 02.11.2001, in her favour for sale of the suit property; that on their failure to execute the sale deed, she filed O.S.No. 142 of 2004 for specific performance of agreement of sale and obtained a decree; that thereafter, she filed E.P.No. 8 of 2005 on the file of the learned Senior Civil Judge, Anantapur and obtained a sale deed in her favour and that without impleading her as a party to the suit, respondent No. 1 obtained a preliminary decree against respondent No. 2. The petitioner further pleaded that since no final decree has been passed in O.S.No. 134 of 2006, the preliminary decree is not executable.

3. Having regard to the rival pleadings, the lower Court has framed two points, namely; whether the E.P. is not maintainable without obtaining a final decree and whether the suit is not maintainable without adding the petitioner as a party to the suit. On both the points, the lower Court has dismissed the E.A. filed by the petitioner.

4. As regards the maintainability of E.P., which is pressed by the learned counsel for the petitioner, I have carefully considered the reasons assigned by the lower Court. In Venkata Reddi and Others Vs. Pothi Reddi, the Supreme Court held that in a suit in which two decrees are contemplated what is executable would be the final decree and that, however, the finality of a decree or a decision does not necessarily depend upon its being executable. The Supreme Court further held that u/s 97 of CPC where a party aggrieved by a preliminary decree does not appeal from it, he is precluded from disputing its correctness in any appeal, which may be preferred from the final decree.

5. The settled principle of law, as could be seen from the above-noted judgment, is that what is executable is only final decree and not a preliminary decree where two decrees are contemplated in a suit. The lower Court has, however, misdirected itself in placing reliance on the judgment of a Division Bench of this Court in Devavathina Paradesaiah by LR. Vs. State Bank of India, Kavali, in holding that the preliminary decree is executable. A reading of the said judgment would show that a composite decree was passed in that case, namely; a personal decree as well as mortgage decree. Therefore, the Division Bench has held that to the extent of personal decree, which does not contemplate a final decree, the decree holder cannot be forced to first exhaust the remedy by way of execution of mortgage decree alone before executing the personal decree. The lower Court has lost sight of the distinction between a composite decree and a mortgage decree simplicitor. Indeed, even the terms of the decree, as reproduced above, would show that in default of payment of the amount, as directed in the preliminary decree, the plaintiff may apply to the Court for a final decree for sale of the mortgaged property and on such application being made, the mortgaged property or sufficient part thereof shall be directed to be sold and that for the purpose of such sale, the plaintiff shall produce before the Court or such officer, as it appoints, all documents in his possession or power relating to the mortgaged property. This part of the decree is in consonance with the settled

legal position that the property can be sold only in pursuance of the final decree and respondent No. 1 -plaintiff is given liberty to file an application for passing such final decree for the purpose of sale of the mortgaged property.

6. Having regard to the fact that the finding rendered on maintainability of E.P. by the lower Court is not sustainable, it is not necessary for this Court to deal with its findings on point No. 2 framed by it.

7. For the abovementioned reasons, the order of the Court below is not sustainable and the same is accordingly set aside. E.A.No. 439 of 2008 is allowed. This order, however, does not preclude respondent No. 1 from applying for passing of a final decree in accordance with law.

8. In the result, the civil revision petition is allowed to the extent indicated above. As a sequel, CRPMP.No. 3599 of 2009 is disposed of as infructuous.