
(1967) 09 AP CK 0011

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 870 of 1965

Lakkaraju Somunaidu

APPELLANT

Vs

Majji Gangamma and Others

RESPONDENT

Date of Decision : 20-09-1967

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 101, Order 21 Rule 103, Order 21 Rule 63, Order 21 Rule 98, Order 21 Rule 99

Citation : AIR 1969 AP 192

Hon'ble Judges : Gopalrao Ekbote, J

Bench : Single Bench

Advocate : M.S.R. Subrahmanyam, for the Appellant; D. Satyanarayana, for the Respondent

Judgement

1. This is a revision on petition directed against an order of the District Munsif, Chodavaram given on 5-6-1965. The essential facts are that the 1st respondent, who is the auction-purchaser, filed an application under O.21, R. 97, Civil P.C. for removing the obstruction which the petitioner before me and others were causing in delivering the property which the 1st respondent had purchased in a court auction.

2. The defence set up was that he was not bound by the proceedings in pursuance of which the 1st respondent purchased the property in court auction. He contended that the property exclusively belongs to him and not to respondents 2 and 3, who are the judgment debtors, although they are his sons, His further contention was that previously an application to remove the obstruction was made by the auction-purchaser in E. A. No. 37 of 1964 and since it was dismissed as not pressed. it operates as constructive res judicata. Consequently, the second petition for the removal of obstruction under O. 21, R. 97, Civil P.C. is not maintainable.

3. In their counter, respondents 2 and 3 contended that the order made in the previous proceedings in E. A. 37/64 operates as res judicata and that they have

no interest in the property.

4. Upon the material available, the learned District Munsif held that the 1st respondent is not in possession of the property..... on his own, that the property belongs to respondents 2 and 3 and that it was rightly sold in the court auction and purchased by the auction purchaser. In regard to the objection relating to the question raised by the petitioner of res judicata, the learned District Munsif found that the previous decision in E. A, 37/64 did not bar the fresh application for removal of obstruction, Consequently he directed delivery of possession after the removal of obstruction. It is this view that is now questioned in this revision petition filed by the obstructor.

5. The only contention raised before me was that the order passed in E. A. 37/64 was conclusive and therefore no fresh application under the same rule can be filed for removal of the obstruction. IN support of this contention, the learned Advocate for the petitioner relied upon The Cannanore Bank, Limited Vs. Pattarkandy Arayanveetil Madhavi and Others, and Gubbala Suryanarayana and Another Vs. Gadiyapu Ganesulu and Another, . His contention was that although the Full Bench decision is given under Rule 63 of Order XXI C. P. C. and Rule 103 of Order XXI, C. P. C. being identical, the Full Bench ruling applies to the facts of the present case also.

In order to appreciate the implications of this contention, it is necessary to read Order XXI Rule 63 as well as Order XXI Rule 103, C. P. C. Order XXI Rule 63, C. P. C. reads as follows:

" Whether a claim or an objection is preferred the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, in any, the order shall be conclusive."

Order XXI Rule 103, C. P. C. is in the following terms:

"Any party not being a judgment-debtor against whom an order is made under R. 98 Rule 99 or Rule 101 may institute a suit to establish the right which he claims to the present possession of the property, but, subject to the result of the suit (if any) the order shall be conclusive."

7. A close comparison of these two Rules would disclose that there is wide and substantial difference between two Rules. They not only differ in their scope but also differ in their effects. A suit under Rule 63 is instituted for the purpose of establishing the right which the plaintiff claims to the property in dispute, while a suit under Rule 103 is for the purpose of establishing the right which the plaintiff claims to the present possession of the property. Such right of possession may be based on title even without showing that the plaintiff was in actual possession at the date of the order against him.

8. Another important point of distinction between the said two rule is that while under Rule 63 even an order made without investigation will be conclusive, but an order made without investigation would not be conclusive under R. 103. The

reason lies in the different language employed in the said Rules. Whereas under R. 63 the party against whom "any" order is made may have to institute the suit to avoid the effect of the orders under R. 103 only a party against whom an order is made under R. 98, R. 99 or R. 101 need institute a suit.

9. It will be plain from a comparative reading of the two Rules That Rules 63 does not refer to any of the previous rules except stating that where the claim or objection is made the party against whom the order is made may institute the suit whereas Rule 103 makes specific reference to order made under Rules 98, 99 or 101. The obvious purpose is that a suit can be instituted by a person against whom an order is passed under Rule 58 to 63, whether such an order is passed after contest or investigation or passed without a contest or investigation, whereas Rule 103 makes specific reference to the Rr. 98m99 and 101.

10. A reading of these, Rules would indicate that an order under any one of the said rules can be made "when the Court is satisfied" in regard to the matters enumerated in those rules. Such satisfaction can only be had upon an investigation of the question involved. If this becomes necessary that the Court must come to a definite conclusion one way or the other either under Rule 98 or 99 on the question involved after making necessary inquiry in order to attract the provisions of Rule 103. If the court declines to give any decision on the question involved dismisses the petition for default or the petition is allowed to be withdrawn, in all such cases it cannot be said that there was any inquiry in regard to the question involved and upon which the Court can be said to have been satisfied one way or the other. Such an order therefore cannot fall either under Rule 98 or Rule 99 as the case may be and it is obvious that any such order shall not be conclusive so as to bar a fresh application from being filed under Rule 97 or to bar a suit instituted more than one year from the date of such order.

11. The Cannanore Bank, Limited Vs. Pattarkandy Arayanveetil Madhavi and Others, , is not decided under Rule 103. There the question arose of the interpretation of Rule 63 only. While interpreting Rule 63, the learned judges rightly, if I may say so with due respect, held that even an application , which is dismissed as not pressed would fall within the ambit of Rule 63 or Order XXI, C. P. C. I have already pointed out the differences between the language of Rule 63 and Rule 103. In view of that difference, it would not be correct to apply the Full Bench decision to a question arising under Rule 103.

12. The next decision upon which reliance was placed is Gubbala Suryanarayana and Another Vs. Gadiyapu Ganesulu and Another, . Ramaswami J. following the above Full Bench decision held that even if an application filed under Rule 97 is dismissed as not pressed, it would fall under Rule 103. The learned Judge's attention was not drawn to the differences of language in the two rules. Nor the learned Judges attention was invited to the earlier decisions of the Madras High Court. The learned Judge did not consider the language of Rule 103, with due respect, I find it very difficult to follow that ruling, particularly when the earlier

decisions of the Madras High Court were not considered nor the differences in the language of the two Rules was brought to the notice of the learned Judge, Moreover, this view is not supported by the decisions of the other High Courts also.

13. The view which I have expressed above finds sufficient support from the following decisions. In *Narayanaswami v. Veerappa*, AIR 1949 Mad 753 Mack, J. held:

"Dismissal of an application of the decree-holder under Order 21 Rule 97 filed one day beyond limitation as not pressed without in fact passing any order under Rule 98 or Rule 99 of Order 21 is not an order passed against the decree-holder within the meaning of Order 21 Rule 103. Consequently a second application under Order 21 Rule 97 for the same relief arising out of a subsequent execution petition is maintainable and is not barred by any law".

14. In an earlier decision, a Bench of the Madras High Court in *Venkatasubba Reddi v. Linga Reddi*, AIR 1918 Mad 554(1) held the same view. That this view is correct gathers support from the following decisions of the other High Courts *Rambha Bewa Vs. Prahallad Sendha and Others*, *Raziuddin Hussain v. Bindersi Prasad*, AIR 1950 Pat 25; *Wamandhar v. Kampta Prasad*, AIR 1926 Nag 423 and *Nirode Boroni Dassi and Others Vs. Monindra Narayan Chandra and Another*,

15. In am therefore satisfied that very order passed in a proceeding initiated under Rule 97 of Order XXI without inquiry or investigation would not be an order which would fall within the purview of Rule 103.

16. It is clear that when the petitioner did not desire to press the petition on account of which the Court dismissed the petition, it cannot be validly contended that it is an order falling under Rule 98 or Rule 99 of Order XXI, C. P. C. obviously because there has been no investigation nor there has been any express finding given on the question involved. Fresh application under Rule 97 therefore can be filed because the previous order was not conclusive.

17. In this case, what had happened was that the previous petition, E. A. 37/64, was obviously barred by limitation. The learned Advocate for the petitioner realising that, filed a memo to that effect and started that he did not wish to press the application. The application therefore was dismissed as not pressed. Assuming that the memo conceded that the petition filed under Rule 97 of Order XXI, C. P. C. was time barred and that is why the petitioner did not desire to press the petition and assuming further although the order does not say so expressly, that it was dismissed on the ground that the petition was time barred, even then it cannot be validly urged that the order of dismissal of the petition on the ground of limitation would fall under Rule 99 of Order XXI, C. P. C. I have already stated that Rule requires the Court to satisfy itself in regard to the question involved and that satisfaction cannot be had unless the point involved is investigated. Since there had been no investigation. what must necessarily follow is that the order dismissing the petition in those circumstances as not pressed

would not fall under Rule 99 and the order would not be conclusive as to bar a fresh application under Rule 97 of Order XXI, C. P. C. for the same relief. That this view, is correct is clear from the following decisions Bahadur Khan Vs. Bari Tala and Another, and Kotumal v. Gur Ashram, AIR 1947 Sind 118. I do not therefore think that the lower Court went in any manner wrong in holding that in these circumstances, the fresh petition was not barred because of the previous order given in E. A. 37/64.

18. For the reasons I have attempted to give, the revision fails and is dismissed with costs.

19. Petition dismissed.