
(1960) 08 AP CK 0007

In the Andhra Pradesh High Court

Case No : Second Appeal No. 161 of 1957 and C.M.P. No. 7326 of 1960

Parachuri Veerayya

APPELLANT

Vs

Yalavarti Veeraraghavayya and Others

RESPONDENT

Date of Decision : 12-08-1960

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 63, 47, 63(2), 64

Citation : AIR 1961 AP 298

Hon'ble Judges : P. Chandra Reddy, C.J.;Srinivasachari, J

Bench : Division Bench

Advocate : R. Rajeswararao, for the Appellant; K. Suryanarayana and O. Chalapathi Chowdary, for the Respondent

Final Decision : Dismissed

Judgement

Chandra Reddy, C. J.

1. This Second Appeal was referred to a Bench by our learned brother, Manohar Pershad J., on the representation of the counsel on either side that an important question of law is involved in this case.
2. The principal question raised by the appeal is whether the subsistence of an attachment before judgment of some property is a bar to the same property being sold in execution of a decree obtained subsequent to the attachment,
3. The facts material for the purpose of this enquiry may be shortly related. The appellant filed O. S. No. 89 of 1947 on the file of the District Munsifs Court, Tenali, against respondents 2 and B and attached the property in dispute before judgment. During the pendency of the suit, this very property was brought to sale in execution of an award granted by the Co-operative Deputy Registrar, Vijayavada, in respect of a debt due by the judgment-debtor (2nd respondent) to Chowtapalli Vijayalaxmi Vilas Co-operative Credit Society and was purchased by the first respondent on 27th June 1950. The sale was confirmed on 8th August 1950 and the sale certificate Ex. A. 4, was issued to the court-auction-purchaser

on 19th September, 1952.

4. O. S. No. 89 of 1947, the suit filed by the appellant, was decreed, and the subject matter of the appeal was being brought to sale. At that juncture the first respondent intervened with a claim petition (E. A. No. 468 of 1952), under Order 21, Rule 58 C.P.C. It was dismissed on the ground that the property in dispute was attached in 1947 before judgment, that the subsequent sale of that property in favour of the first respondent did not affect the prior attachment and that, therefore, the attachment could not be raised.

5. Thereupon, the first respondent laid the action (O. S. No. 319 of 1953 on the file of the District Munsif's Court, Gudivada), which has given rise to this appeal, for declaration of his title to the suit property and for setting aside the Order on the claim petition.

6. The suit was resisted on the defence that the sale was a collusive one and that the existence of prior attachment rendered that sale void. Incidentally, it was also pleaded by the first defendant that the plaintiff first respondent could not object to the attachment, as, at the material time, he had no interest in the property.

7. The trial court, over-ruling the opposition, decreed the suit. It was held by the District Munsiff that the sale in favour of the first respondent was not vitiated by collusion and it was valid. He also held that Section 64 C.P.C. did not stand in the way of the suit property being brought to sale. No issue was raised as to the effect of attachment of this property in another suit before the sale in question. Nor was this point argued before the trial court or the lower court.

8. On appeal the Subordinate Judge confirmed the decree and judgment of the District Munsiff.

9. Aggrieved by this decision, the appellant, i.e., the decree-holder in O. S. No. 89 of 1947, brought a second appeal to this Court. When it came for hearing before our learned brother, Manohar Pershad, J., the parties requested the learned Judge to have the matter posted before a Bench urging that an important point of law was involved in the case.

10. The only contention urged before us by the learned counsel for the appellant is that the plaintiff-first respondent ought to have been non-suited because no objection to the attachment of the property could be taken by him, he not having acquired any interest thereon at the relevant time, and as such the claim petition filed by him was rightly dismissed and that the scope of the suit under Order 21, Rule 63, C.P.C. could not be wider than the one under Order 21, Rule 58 C.P.C.

11. As we have already remarked, this point was not argued in either of the courts below or even before our learned brother, though this was pleaded in the written statement. But it is unnecessary for us to give any decision on the ambit of Order 21, Rule 63 C.P.C. as the appeal could be disposed of on another ground. As mentioned *supra*, the claim of the first respondent was contested

inter alia on the plea that Section 64 C.P.C. was a bar to the holding of sale of this property which was attached earlier. This objection was held untenable by the courts below and, rightly, in our opinion.

12. Section 64 C.P.C. does not enact an absolute prohibition of the sale of the property on which the attachment was subsisting. It only says that a private alienation of such property does not bind the attaching creditor or persons claiming under him. It recites :

"Where an attachment has been made, any private transfer or delivery of the property attached or any interest therein and any payment to the judgment-debtor of any debt, dividend or other monies contrary to such attachment, shall be void as against all claims enforceable under the attachment."

A private sale of property subject to attachment could be avoided by the attaching creditor or his representatives-in-interest. This does not preclude the same property from being brought to sale in execution of another decree.

13. That this is permissible could be easily gathered from Section 63 C.P.C. which is as under:--

"(1) Where property not in the custody of any court is under attachment in execution of decrees of more courts than one, the Court which shall receive or realise such property and shall determine any claim thereto and any objection to the attachment thereof shall be the court of highest grade, or, where there is no difference in grade between such courts, the court under whose decree the property was first attached.

(2) Nothing in this section shall be deemed to invalidate any proceeding taken by a court executing one of such decrees."

14. Sub-section (2) clearly implies that the attachment of the property does not operate to oust the jurisdiction of another Court to bring that property to sale. This section provides the machinery for adjudicating claims and objections to the attachment of the same property in two or three courts. Sub-section (2) lays down that even if a sale is held contrary to the procedure indicated in Sub-section (1), it is not invalidated for that reason. That being the position, the sale in question was properly held and title passed to the auction-purchaser. In other words, the title of the judgment-debtor was extinguished.

15. If that were so, could the same property be brought to sale in execution of another decree merely on the ground that the decree-holder had attached that property earlier? It is true that there was no obstacle to his attaching the property at the relevant time but he could not proceed to sell it when the property was already disposed of and the judgment-debtor had not retained any interest therein. Consequently, there is nothing to be sold and it will be futile to continue the execution proceedings.

16. As observed by Varadachariar J., who delivered the opinion of the Full Bench

in Dharapuram Janopakara Nidhi Ltd. v. Lakshminarayana Chettiar, (1939) 1 Mad. L.J. 802 : (A.I.R. 1939 Mad. 456) (S.B.)

".....if by reason of the extinction of the judgment debtor's title before the sale, there would be nothing to be sold, a declaration in the decree holder's favour in the suit under Order 21, Rule 63 will not only be futile but sometimes even be mischievous, as it may mislead an unwary purchaser into thinking that he was buying a subsisting interest."

Therefore, the person who purchased the property, could bring this fact to the notice of the Court and stop further execution in regard to that court.

17. This leads us to the question whether this could be done by invoking Order 21, Rule 58 C.P.C. or Section 47 C.P.C. In our opinion, Order 21, Rule 53 C.P.C. could not be resorted to, for, the claim petition could not be sustained as the property in question was liable to attachment at the relevant time. The attaching creditor was originally entitled to attach the property. Consequently, any objection on the basis of Order 21, Rules 58 and 61 could not be maintained. But the purchaser could object to the sale u/s 47 C.P.C. on the ground that he had already purchased the property. Such a purchaser is the representative-in-interest of the judgment-debtor and hence he could claim the benefit of Section 47 C.P.C.

18. This position is not contested. If authority is needed for this proposition, it is furnished by Srinivasachariar Vs. Appavoo Reddy alias Ayyanna Reddi and Others, , S.R.M.M. Seetharaman Chettiar Vs. A.R.M.N. Chidambaram Chettiar and Others, . Venkatasami Naidu v. Guruswami Aiyar, 38 Mad. L.J. 441 ; (AIR 1920 Mad 626) and Veyindramuthu Pillai v. Maya Nadan, ILR 43 Mad 107 : (AIR 1920 Mad. 324) (F.B.). In this situation, the petition under Order 21, Rule 58 C.P.C. was rightly dismissed. The aggrieved first respondent, instead of filing a petition u/s 47 C.P.C. which it was competent for him to do so as could be seen from AIR 1933 Mad. 166, filed the suit which has given rise to this appeal, to set aside the order on the claim petition, under Order 21, Rule 63 C.P.C.

It is now conceded by the counsel for the first respondent that his client had misconceived his remedy and that he ought to have filed a petition u/s 47 C.P.C. For this reason, the learned counsel requests us to treat the suit filed by his client under Order 21, Rule 63, as a petition u/s 47 C.P.C. If a petition u/s 47 C.P.C. was filed, there could be no opposition to it, since the appellant could not proceed with the execution of his decree, as title to the property had already vested in another person and the auction-purchaser could have resisted the former's execution petition.

19. Does the fact that the first respondent chose to file a suit instead of filing a petition u/s 47 stand in the way of his getting an appropriate relief? It is submitted by Sri Suryanarayana, counsel for the 1st respondent, that had this objection been raised in the courts below he would have requested the courts to treat the suit as a petition u/s 47 C.P.C.

The necessity for this request arose because of cur permitting the counsel for the appellant to raise in this court the question as to whether a suit would lie to set aside the order on the claim petition, having regard to the fact that at the material time the first respondent had no interest in the property. We think there is force in this argument and it must be given effect to.

In addition to making this request, counsel for the first respondent had filed a petition for conversion of O. S. No. 319 of 1953 on the file of the District Munsif's Court, Gudivada, into a petition u/s 47 C.P.C. It is unnecessary for us to send the matter back to the trial court, as there is nothing further to be done by the courts below for the reason that even the petition u/s 47 C.P.C. would have been in time as the suit was filed with-in less than a year, and the court which entertained the suit had jurisdiction to take cognisance of the petition also.

20. The petition for conversion (C.M.P. No. 7326 of 1960) is ordered.

21. In the circumstances, the second appeal is dismissed. Parties will bear their own costs throughout.