
(1972) 04 AP CK 0002
In the Andhra Pradesh High Court
Case No : C.R.P. No. 2149 of 1971

Pudi Appa Rao

APPELLANT

Vs

Gompa Narayanappa and Another

RESPONDENT

Date of Decision : 13-04-1972

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 100, Order 21 Rule 105, Order 21 Rule 97

Citation : AIR 1973 AP 16

Hon'ble Judges : Rama Chandra Rao, J

Bench : Single Bench

Advocate : D. Satyanarayana, for the Appellant; Mangu Venkata Rao, for the Respondent

Judgement

Rama Chandra Rao, J.—The petitioner and two others are decree-holders in O. S. No. 343 of 1955 on the file of the court of the district Munsif, Srungavarapukota. They filed E. P. No. 146 of 1970 for execution of the decree on O. S. No. 343 of 1955. At that stage an obstruction was caused by the defendants to the delivery of possession. The decree-holders then filed E. A. No. 84 of the 1971 complaining the obstruction and for removal of the same. That application was opposed by the respondents by filing a counter. After several adjournments, the application E. A. No. 84 of 1971 stood posted for final hearing on 4.10.1971. on that date neither the respondents nor their counsel was present. They were, therefore, set ex parte and the petition for removal of the obstruction was allowed, and the delivery of the suit property was directed to be effected. Delivery was effected on 11.10.1971. Two days later i.e., on 13.10.1971, the respondents filed E. A. No. 144 of 1971 under order 21, Rule 105 of the CPC for setting aside the Ex parte order passed in E. A. No. 84 of 1971. In the affidavit filed in support of the said application E. A. No. 144 of 1971 was alleged that they had engaged Sri B. Sambamurthy as their counsel, that their counsel's father died on 3.10.1971 in Chodavaram, that he had gone away to that place, that till that date he had not returned, that they came to their advocate's office on 11.10.1971 and learnt

that their advocate had gone away to Chodavaram, that their petition was dismissed on 4.10.1971, that on 4.10.1971, their Advocate could not be present when E. A. No. 84 of 1971 was called, that they were set ex parte and the petition was allowed, that their absence on 4.10.1971 was not wilful and therefore the ex parte orders passed on 4.10.1971 should be set aside and the petition restored and reheard on merits.

2. A counter was filed on behalf of the petitioners stating that the respondents were present on that date and the allegation that they were not present is not true and there are no grounds for setting aside the ex parte order. It is, however, not disputed that the respondents' counsel's father died on 3.10.1971 and that he had gone to Chodavaram. It was also contended that delivery having been effected on 11.10.1971 the application filed under order 21, Rule 97, CPC could not be restored and re-heard and that the petition for setting aside the ex parte order was not maintainable.

3. The lower court on the consideration of the averments in the affidavit and the counter-affidavit held that in the circumstances stated in the affidavit there were just grounds to set aside the ex parte order. The contentions that as delivery was already effected the respondents should file a separate application under Order 21, Rule 100, CPC and that the application for restoration and for setting aside the order in E. A. No. 84 of 1971 was not maintainable, were however rejected. Accordingly the Lower court allowed E. A. No. 144 of 1971 setting aside the ex parte order.

4. In this revision it is contended by Sri D. Satyanarayana, the learned counsel for the decree-holder, petitioner firstly, that the Lower Court erred in allowing the petition without being satisfied on merits, that there was sufficient cause for the absence of the parties or their counsel and that the order of the Lower Court allowing the petition setting aside the ex parte order is unsustainable. I find it difficult to accept this contention. The learned District Munsif clearly stated in paragraph 2 of his order that " In the circumstances stated in the affidavit enclosed to the petition, there are just grounds to set aside the ex parte order." The allegations in the affidavit clearly show that the respondent's counsel's father died on 3.10.1971 and that he had gone to Chodavaram. This fact is also not disputed in the counter-affidavit. Therefore sufficient cause was shown for the absence of the respondent's counsel in the lower court when the petition was called on 4. 10.1971.

5. It is however contended by Sri Satyanarayana that the respondents were themselves present in the Lower Court when the petition was called on 4.10.1971. But, the order of the Lower Court in E. A. No. 84 of 1971 says that the respondents were called but were absent. The lower court must have noted if the respondents were present. It is next contended that delivery of possession having been effected on 11.10.1971 and the only remedy open to the respondents is to file an application under Order 21, Rule 100, CPC for restoration of the possession and not to ask for setting aside the ex parte order

passed in E. A. No. 84 of 1971. But this submission is also devoid of any force. Order 21, Rule 97, CPC enables a decree-holder of a decree for possession of immovable property or the purchaser of any such property sold in execution of a decree to make an application to the court complaining of resistance or obstruction caused by any person in obtaining possession of the property. The court then should issue notice to the party against whom the application is made and investigate into the matter. If the court finds that the obstruction is caused by the judgment debtor or by some other person at his instigation, it shall direct, under Order 21, Rule 98, CPC the decree holder or the purchaser, as the case may be, to be put in possession. But if the obstruction is caused by any person (other than the judgment debtor or some other person at his instigation) claiming in good faith to be in possession of the property on his own account or on account of some person other than the judgment-debtor, the court shall make an order dismissing the application. Order 21, Rule 99 read with Rule 97, CPC clearly requires the court to issue notice to the obstructors and consider their objections and dispose of the application after hearing. The procedure to be followed when such applications are made under Order 21, Rule 97, is prescribed in Rule 104 of the said order. Order 21, Rule 104(2) provides that on the date fixed for the hearing, if the applicant does not appear, the court may dismiss the application. Order 21, Rule 104(3) provides that if the applicant appears and the respondent does not appear, the court may dispose of the application ex parte. Order 21, Rule 105 provides for setting aside the order passed either under Order 21, Rule 104(2) or under Rule 104(3).

6. On the reading of the provisions of Order 21, Rule 97, 99 and 104, it is clear that when an application is disposed of ex parte, if sufficient cause is shown for the non-appearance of the applicant, the court should set aside the ex parte order and dispose of the application on merits. In the instant case, sufficient cause has been shown by the respondents for their absence on 4.10.1971 when the petition E. A. No. 84 of 1971 filed under order Order 21, Rule 97 was called. Therefore, they are entitled to invoke the provisions of order 21, Rule 105, C. P. C. And ask for setting aside the ex parte order, though delivery has already been effected. That would not, in any way, bar the maintainability of an application under order 21, Rule 105 C. P. C. For setting aside the ex parte order when sufficient cause is shown for their absence. The order of the lower court setting aside the ex parte order dated 4.10.1971 in E. A. No. 84 of 1971 is therefore correct and it cannot be said that the lower court has committed any error of law or of jurisdiction in allowing the said petition.

7. In the result the revision fails and is dismissed with costs.

8. Revision dismissed.