
(2008) 07 AP CK 0119
In the Andhra Pradesh High Court
Case No : S.A. No. 803 of 2008

Rahatunnisa

APPELLANT

Vs

Md. Saber Ali Khan and Others

RESPONDENT

Date of Decision : 25-07-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 101, Order 21 Rule 58, Order 21 Rule 97, Order 21 Rule 99

Citation : (2008) 5 ALD 615 : (2009) 1 ALT 284

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : Mohd. Moin Ahmed Quadri, for the Appellant;

Final Decision : Dismissed

Judgement

L. Narasimha Reddy, J.—The 1st respondent filed O.S. No. 364 of 1981, in the Court of Principal District Munsif, Warangal, for the relief of declaration of title and recovery of possession of the suit schedule property. The suit was decreed on 7.8.1981. After the decree became final, the 1st respondent filed E.P. No. 41 of 1992.

2. The appellant, who is a third party, filed E.A. No. 401 of 2007, under Rule 58, read with 97 of Order XXI CPC. She impleaded respondents 2 to 6, who are the legal heirs of the defendant/judgment-debtor, also. According to her, the suit schedule property was purchased by her father from one Mr. Mushaq Hussain, in the year 1960, and in the year 1973, he made a oral Hiba, in favour of the appellant. It was stated that when respondents 2 to 6 raised dispute, in the year 1975, as regards the suit schedule property, it was settled thereafter. She has also "stated that when at a later stage respondents 2 to 6 raised dispute, she filed OS No. 151 of 2007, in the Court of II Additional Senior Civil Judge, Warangal, claiming ownership right over it.

3. The 1st respondent opposed the claim petition. It is stated that during the

pendency of the suit, an attempt was made by the mother of the appellant herein, claiming that she had an agreement of sale in her favour in the year 1965, and that the same was negated by the trial Court.

4. Respondents 2 to 6, in a way, supported the case of the appellant. According to them, the decree was obtained by fraud.

5. Through its judgment dated 6.11.2007, the trial Court dismissed the E.A. Thereupon, the appellant filed A.S. No. 154 of 2007, in the Court of IV Additional District Judge, Warangal. The appeal was dismissed on 23.4.2008. Hence this second appeal.

6. Learned Counsel for the appellant submits that the claim petitions, under Rules 58 and 97 of Order XXI CPC, are to be heard and disposed of, as independent suits, and the Courts below have committed irregularity, in disposing of the petition, as well as the appeal, almost as interlocutory proceedings. He submits that the delay in presenting the E.P., or the manner in which the decree came into existence, would clearly indicate the lack of bona fides in the entire proceedings. He places reliance upon the judgment of this Court in *G. Veeresham Vs. D.V. Shailendra Kumari and Another*, .

7. The appellant is a third party to the decree in O.S. No. 364 of 1981. The suit was filed by the 1st respondent against one Mr. Syed Ismail, for the relief of declaration of title and recovery of possession. The suit was decreed on 7.8.1981, and the decree became final. She filed the E.P. against respondents 2 to 6, who were legal representatives of the sole judgment-debtor. For one reason or the other, the EP remained undisposed of, for the past 1 1/2 decades. The appellant came forward with the claim petition, under Rule 58, read with Rule 97 of Order XXI CPC in the year 2007. She pleaded her exclusive rights over the property. In addition to that, she filed an independent suit, being O.S. No. 151 of 2007, in the Court of II Additional Senior Civil Judge, Warangal. The claim petition was rejected, and the same was affirmed in the appeal. From the averments made by the learned Counsel for the appellant, two questions arise for consideration, viz; (a) whether the executing Court was justified, in rejecting the claim petition, without recording evidence; and (b) whether the appellant had substantiated her case on merits.

8. Apart from the judicial pronouncements, Rules 58 and 99 of Order XXI CPC confer the status of a suit, upon the application made under the said provisions. It is a matter of common knowledge that whenever application for execution of a decree for recovery of possession is presented, the persons, who are not parties to decree, are also conferred with the right to offer resistance. In case, the execution petition is at the stage of attachment and before delivery of possession, an application by a third party has to be made under Rule 58, and on the other hand, if as a result of the execution, the third party is evicted from any property, the claim has to be made under Rule 99 of Order XXI CPC. In the instant case, the petitioner invoked Rules 58 and 97 of Order XXI CPC. Rule 58

contemplates the claimant being in possession of the property, Rule 97, on the other hand, is a provision, which enables a decree holder, to apply for removal of resistance offered by the judgment-debtor, or a third party, in the course of recovery of possession. It is just impermissible for the same party, to invoke Rules 58 and 97, at one and the same time. Therefore, there existed lack of clarity, on the part of the appellant, about her rights.

9. As regards the procedure to be followed in a claim petition, presented under Rules 58 and 99, the submission on the part of the learned Counsel for the appellant that they must be treated as suits, accords with the settled principles of law. In G. Veeresham's case (*supra*), this Court observed as under:

An application filed under Rule 99 of Order 21 is equated to a suit This is evident from the purport of Rule 101 of Order 21 . CPC, which mandates that all questions arising between the parties to the proceeding shall be determined by the Court dealing with the application, and not in a separate suit. Rule 103 equates the order passed on an application under Rule 99 to a decree for the purpose of appeal. The parties to such applications have to place their pleadings and adduce their evidence, as if it is a separate suit. It hardly needs any emphasis that any pleadings or assertions of the parties to suits or applications conferred with such a status can be accepted by the Court only when they are proved through evidence....

There is nothing on record to disclose that the executing Court did not treat E.A. No. 401 of 2007 presented by the appellant, as a suit. The appellant gains an impression that the procedure prescribed was not followed from the fact that the evidence was not recorded. It is no doubt true that the order passed by the executing Court does not disclose that any evidence was recorded. However, it was for the appellant to adduce oral or documentary evidence, in support of her claim. It is not evident that the appellant had made any effort to adduce evidence. Whether in the ordinary suits or in an application under Rule 58 or 99 of Order XXI CPC, which in turn, is equated to a suit, the concerned Court cannot compel the parties to adduce evidence. The burden is squarely upon the plaintiff or the petitioner, as the case may be, to prove the contents of the pleadings, by adducing evidence. If they fail to adduce evidence, the Courts cannot be found fault with.

10. Strictly speaking, the claim petition of the appellant was liable to be rejected, on the sole ground that the contents thereof were not proved, through evidence. All the same, the executing Court as well as the lower appellate Court have undertaken extensive discussion, and arrived at the just and proper conclusions. A meak attempt was made by the learned Counsel for the appellant that the efforts made by his client were thwarted. However, neither from the grounds of appeal in A.S. No. 154 of 2007, nor from the other record, it is clear that appellant made any effort to adduce any evidence.

11. Coming to the next question, the appellant came into picture only in the year

2007. It was about quarter of century from the date of decree, and 1 Vi decades, from the date on which the E.P. was filed. It has also been mentioned that an application under Rule 58 can be filed by a party, who is in possession of the subject-matter of a decree for recovery of possession. If the third party is not in possession, and such dispossession is traceable to the execution of the decree, an application is to be filed under Rule 99. Under no circumstances, a party, who is not in possession of the property, can make an application under Rule 58 of Order XXI CPC. In the instant case, there is no dispute that the appellant is not in possession of the schedule property. This is clear from the pleadings in O.S. No. 151 of 2007, in the Court of II Additional Senior Civil Judge, Warangal, filed by the appellant. The relief claimed in that suit is, declaration of ownership right over the suit schedule property, and for recovery of possession thereof, from respondents 2 to 6. When on her own showing the appellant is not in possession of the property, the question of her making an application under Rule 58 does not arise.

12. At any rate, the appellant miserably failed to establish her rights mentioned in the claim petition. Neither she deposed as a witness, nor any other persons were examined as witnesses on her behalf. No document was made part of the record. The fate of a suit, which is pursued in such a manner, is not difficult to imagine. The pleadings in a suit or petition are required to be proved through oral and documentary evidence. Therefore, the appellant has failed to establish her case on merits also. This Court does not find any substantial question of law in this second appeal. The second appeal is, accordingly, dismissed. There shall be no order as to costs.