
(2007) 03 AP CK 0002
In the Andhra Pradesh High Court
Case No : CMA No. 925 of 2004

Tammana Rajasekhar

APPELLANT

Vs

Palakurthi Kanyaka Parameswari and Another

RESPONDENT

Date of Decision : 05-03-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 43 Rule 1
Constitution of India, 1950 — Article 226, 227
Income Tax Act, 1961 — Section 222, 276
Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 17, 18, 29
Recovery of Debts Due to Banks and Financial Institutions Rules, 1993 — Rule 11

Citation : (2007) 5 ALD 82 : (2007) 6 ALT 142

Hon'ble Judges : P.S. Narayana, J

Bench : Single Bench

Advocate : Meherchand Noori, for the Appellant; M. Narender Reddy, for the Respondent

Final Decision : Dismissed

Judgement

P.S. Narayana, J.—This civil miscellaneous appeal is filed as against the order made in I.A. No. 283/2004 in O.S. No. 81/2000 on the file of Senior Civil Judge, Machilipatnam under Order XLIII Rule 1 of the Code of Civil Procedure, hereinafter in short referred to as "Code" for the purpose of convenience.

2. The appellant/petitioner/plaintiff filed the said application praying for a temporary injunction restraining the 2nd respondent-State Bank of India, Main Branch, Machilipatnam, represented by its Chief Manager, Machavaram from bringing the schedule properties to sale in execution proceedings in O.A. No. 311/2002 on 24.3.2004 or any other further date pending disposal of the main suit in the interest of justice. The said application was resisted and the application was dismissed.

3. The facts are not in serious dispute between the parties. It is the case of the

appellant/petitioner/plaintiff that he filed a suit for specific performance of agreement of sale on the file of Senior Civil Judge, Machilipatnam praying for the relief of specific performance as against only the 1st defendant/1st respondent in the present civil miscellaneous appeal since the 1st defendant/1st respondent failed to perform her part of the contract in pursuance of the agreement of sale dated 2-2-1999. It is also his case that he paid entire sale consideration and the plaint schedule property also was delivered to him on 3-3-1999 and ever since the appellant/petitioner/plaintiff has been in actual physical possession and enjoyment of the said property by paying land revenue. It is also the case of the appellant that the 2nd respondent-State Bank of India, hereinafter in short referred to as "Bank" for the purpose of convenience, alleging that the 1st respondent/1st defendant in the suit borrowed a loan from the Bank and deposited the title deeds in order to create equitable mortgage, got impleaded itself as 2nd defendant in the suit. Further, specific stand is taken that the said borrowing and the deposit of title deeds are subsequent to the agreement of sale and hence the alleged mortgage is not binding on the appellant/petitioner/plaintiff. Further, it is stated that though the 2nd defendant/2nd respondent has knowledge about the agreement of sale of the appellant/petitioner/plaintiff and without impleading him as a party instituted O.A. No. 311/2002 on the file of Debt Recovery Tribunal, Visakhapatnam for recovery of amount due to the Bank. Hence it is stated that inasmuch as though the Bank had knowledge about the agreement of sale in question, without impleading the appellant/petitioner/plaintiff since the O.A. aforesaid had been instituted, the decree or order if any obtained would be vitiated by fraud.

4. The application was resisted and as already aforesaid the relief was negatived.

5. Sri Meher Chand Noori, the learned Counsel representing the appellant would submit that the very fact that the Bank had knowledge about the agreement of sale and also the pendency of the litigation and despite the same without impleading the appellant/petitioner/plaintiff as a party to the said O.A. since some order had been obtained behind the back the same is vitiated by fraud and hence it would be just and proper to make an order of restraint relating to the property covered by the agreement of sale. The learned Counsel also placed strong reliance on certain decisions to substantiate his contentions. While further elaborating his submissions, the learned Counsel would maintain that even on comparing the schedules, the property which had been mortgaged is only a small extent in the total extent of the property and even if the boundaries are compared there is no conflict between these two properties -the property covered by the agreement of sale and the property which is said to have been mortgaged as one of the items to the Bank. The learned Counsel also would submit that if the Bank or the Recovery Officer concerned is inclined to proceed as against the said property only within the specified boundaries, the appellant/petitioner/plaintiff has no objection at all. But however, under the guise of executing the order made by the Debt Recovery Tribunal, hereinafter in short referred to as "Tribunal", the Bank is trying to bring the total extent of the

property in the said survey number, which is impermissible.

6. Per contra, Sri Narender Reddy, the learned Counsel representing the 2nd respondent/Bank made the following submissions. The learned Counsel would submit that virtually the temporary injunction which is being prayed for in the present application is to restrain the Bank from further proceeding with the execution of the order made in O.A. No. 311/2002. This would amount to granting temporary injunction restraining the Bank and the Recovery Officer as well from further proceeding with the lawful remedies available under law. The learned Counsel also would submit that if such applications are to be allowed, the banking institutions may not be able to realize the amounts though the properties are mortgaged and though such debts are secured and the very object of enacting the Recovery of Debts due to Banks and Financial Institutions Act, 1993, in short referred to as "Act" for the purpose of convenience, would be defeated. The learned Counsel also would maintain that it is not as though the appellant is not having any remedy whatsoever. The appellant could have agitated this question in O.A. No. 311/2002 or could have preferred a claim objecting to the further proceedings and in the event of the appellant/plaintiff raising such claim the banking institution also will have an opportunity to resist the said claim and it would be just and proper for such officer investigating into the claim to decide whether these properties are one and the same and what is the extent of property which had been mortgaged and what is the extent of property which is leftover and whether these so-called boundaries shown would tally and all the other relevant aspects. The learned Counsel also would submit that even otherwise when special machinery is provided for under the provisions of the Act and the Rules framed thereunder, it would not be just and proper to make an order of temporary injunction by a civil Court. The learned Counsel had brought to the notice of this Court Sections 18 and 17 of the Act and also Section 29 of the Act. The learned Counsel also pointed out to the second schedule providing for recovery of tax under Sections 222 and 276 of the Income Tax Act which was made applicable by virtue of Section 29 of the Act and Rule 11 of the said Rules dealing with investigation by Tax Recovery Officer and in the light of the same, the Counsel would contend that it would be just and proper if the appellant is permitted to invoke the aforesaid Rule 11 in the peculiar facts and circumstances. The learned Counsel also placed strong reliance on a decision of the Division Bench of this Court in G. Siva Prasada Reddy and Company, and another Vs. Presiding Officer, Debts-Recovery Tribunal of Andhra Pradesh and Karnataka, Bangalore and others, .

7. Heard the Counsel.

8. As already referred to supra, the application for temporary injunction was filed by the appellant/petitioner/plaintiff praying for the relief of temporary injunction restraining the Bank from bringing the schedule properties to sale in execution proceedings in O.A. No. 311/2002 on 24-3-2004 or on any other future date. It is needless to say that the appellant/petitioner/plaintiff is claiming right by virtue

of an agreement of sale dated 2-2-1999 said to have been executed by the 1st respondent/1st defendant. No doubt, relating to the rights flowing out of the said agreement of sale coupled with delivery of possession, strong reliance was placed on a Division Bench decision of this Court in B. Ratnamala Vs. G. Rudramma, . Further, the schedules also had been placed before the Court and it was shown that the extent of property covered by the agreement of sale is Acs.1-02 cents out of Acs.2-43 cents in R.S. No. 447/1 in village of Arisopalli, Bandar Mandal, Pedana Sub-Registry whereas in the schedule of properties shown in R.P. No. 229 of 2002 in O.A. No. 311/2002 on the file of the Tribunal under Schedule IV the mortgaged property by K. Kanyaka Parameswari i.e., 1st respondent/1st defendant, the land measuring an extent of Ac.0-50 3/4 cents out of Acs.2-43 cents in R.S. No. 447/1 in the same village aforesaid within the specified boundaries, had been shown. Certain submissions were made that the interest of both the Bank and also the appellant/petitioner/plaintiff can as well be protected inasmuch as there is no conflict at all and the extent shown in the schedule in the debt recovery proceedings being only Ac.0-50 3/4 cents whereas the extent shown in the agreement of sale being a larger extent. However, Schedule V of the debt recovery proceedings also had been referred to in this context.

9. This Court is not inclined to express any opinion relating to these aspects. However, the Counsel for appellant placed strong reliance on S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, and also Hamza Haji v. State of Kerala and Anr. 2006 (7) SCJ 155 and submissions at length were made that inasmuch as the banking institution though expected to act as an ideal creditor, in a way had played fraud by non-impleading this agreement holder in the O.A. proceedings and hence the proceedings are vitiated. The mere non-impleading of a party especially before the Tribunal where the mortgaged properties, ultimately, in pursuance of an order, are being brought to sale, cannot be said to be amounting to the play of fraud. Even otherwise, it is needless to say that it is stated that a suit for specific performance is pending and any such transaction would be subject to the mortgage, may be depending upon the facts and circumstances whether these transactions are prior or anterior thereto. Be that as it may, in the light of the scheme of the Act, the Division Bench of this Court in the decision referred in G. Siva Prasada Reddy & Co. v. Debts Recovery Tribunal (supra), while dealing with the entertaining of a writ; petition under Article 226 of the Constitution of India in relation to the provisions of the Act observed that when the statute provided appellate forum, party aggrieved by the decree of the Tribunal shall approach that forum only.

10. Section 29 of the Act dealing with Application of certain provisions of Income Tax Act reads as hereunder:

The provisions of the second and third schedules to the Income Tax Act, 1961 (43 of 1961) and the Income Tax (Certificate Proceedings) Rules, 1962, as in force from time to time shall, as far as possible, apply with necessary

modifications as if the said provisions and the rules referred to the amount of debt due under this Act instead of to the Income Tax Act:

Provided that any reference under the said provisions and the rules to the "assessee" shall be construed as a reference to the defendant under this Act.

Section 18 of the Act dealing with Bar of Jurisdiction reads as hereunder:

On and from the appointed day, no Court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under Articles 226 and 227 of the Constitution in reaction to the matters specified in Section 17).

Section 17 of the Act deals with Jurisdiction, powers and authority of Tribunals. By virtue of Section 29, the Second Schedule, procedure for Recovery of Tax under Sections 222 and 276 of the Income Tax Act had been made applicable and Rule 11 dealing with Investigation by Tax Recovery Officer reads as hereunder:

(1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or objection:

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer shall deem fit.

(3) The claimant or objector must adduce evidence to show that--

(a) (in the case of immovable property) at the date of the service of the notice issued under Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment, he had some interest in, or was possessed of, the property in question.

(4) Whereupon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own account or as his own property but on account of or in trust for some person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property and not on account

of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil Court to establish the right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be conclusive.

11. In the light of the scheme available under the provisions of the Act and the Rules referred to supra, this Court is of the considered opinion that the appellant is having a remedy to pursue in accordance with law as specified above. Even otherwise, it is needless to say that a temporary injunction normally not to be granted when the opposite party is pursuing the lawful remedies. It is no doubt true that if a decree is vitiated by fraud and if the same is established, may be that a Court may be inclined to exercise the discretion of granting a restraint order depending upon the facts and circumstances in a particular given case. In the light of the provisions of the Act referred to supra and on a careful analysis of the scheme of the Act, in the facts and circumstances, it cannot be said that the appellant/petitioner/plaintiff had made out a strong prima facie case for granting temporary injunction in his favour. However, this Court is satisfied that in the light of the material placed before this Court, liberty to be given to the appellant/petitioner/plaintiff to pursue the remedies available to him in law.

12. With the above observation, the civil miscellaneous appeal shall stand dismissed No order as to costs.