
(1990) 04 AP CK 0018

In the Andhra Pradesh High Court

Case No : C.R. Ps. No's. 2661, 2662, 2901 to 2904 of 1986

V. Chinna Lakshmaiah

APPELLANT

Vs

Samurla Ramaiah and others

RESPONDENT

Date of Decision : 12-04-1990

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 34 Rule 2(2), Order 34 Rule 4, Order 34 Rule 4(2), 11, 151
Limitation Act, 1963 — Article 137
Limitation Rules, 1963 — Rule 8

Citation : AIR 1991 AP 177

Hon'ble Judges : Neeladri Rao, J

Bench : Single Bench

Advocate : N. Ramamohana Rao, for the Appellant; R. Prasad, for the Respondent

Judgement

1. The revision petitioner herein all these revision petitions is the decree holder in O.S. Nos.9/70 and 10/70, Sub Court, Adoni. He filed two suits on the basis of mortgage deeds dated 17-7-58 and 25-4-58 respectively. Preliminary decree was passed in the above two suits on 30th December, 1971. The time for redemption was granted Up to 30th April, 1972.

2. The decree-holder filed I.A. 227/82 in O.S.9/70 and LA. 228/82 in O.S. 10/70 on 26-6-82 praying for passing a final decree. In the affidavits filed in support of the above I. As, the decree-holder alleged that the time for redemption was granted up to April, 1982 and those petitions were within time. Notice was ordered in the above I. As to all the seven judgment-debtors. While judgment-debtors 1 and 2 remained ex parte, J. Drs. 3 to 7 engaged Sri Kuppaswami Iyyar as their advocate in the above I.As. Repeated adjournments were granted for filing their counter. Ultimately time was granted for filing counter on payment of costs. The costs were not paid and the counter was also not filed. Final decrees were passed in both the suits on 16-10-82 in the presence of the advocate for judgment-debtors 3 to 7.

3. E. P. 205/82 in O.S.9/70 and E. P. 206/82 in O.S. 10/70 were filed praying for sale of mortgaged properties. The decree-holder with the leave of the court purchased the same in the court-auction that was held on 15-3-85.

4. The judgment debtor No. 2 filed E.A.244/85 in E.P.205/82 in O.S. 9/70 and E.A.246/85 in E.P.206/82 in O.S.10/70 under Sec. 47 C. P.C. praying for setting aside the sales. Those petitions were allowed. Against the same, Orders CRPs.2904/86 and 2903/86 were respectively filed.

5. The judgment-debtor No.6 filed E.A.248/85 in E.P.205/82 in O.S.9/70 and E.A.249/85 in E.P.206/82 in O.S.10/80 praying for dismissal of E.Ps.205/82 and 206/82. Those petitions were allowed and C.R.Ps.2901/86 and 2902/86 were filed respectively. In view of the orders in E.A. 248/85 and E.A.249/85, E.Ps.205 and 206/82 were dismissed. Against the orders of dismissals of E.Ps.205 and 206 of 1982, C.R.Ps.2662 and 2661 of 1986 were filed respectively.

6. As the same point was involved in E.As.244/85 and 246/85, 248/85 and 249/85, the Executing Court passed common order. As the same point was involved in all these revision petitions, they were heard together and a common judgment is now delivered.

7. In the affidavits filed in support of I.As. 227 and 228 of 1985 it was alleged that time was granted till April, 1982 for redemption. The said allegation was not substantiated.

8. The petition praying for passing the final decree has to be filed under Article 137 within a period of three years from the date up to which time was granted for redemption. The time was granted for redemption up to 30th April, 1972 only. So I.As 227 and 228/82 which were filed long after the period of three years are barred by limitation. So the final decrees passed in these two suits are nullity. The sales held in pursuance of the void decrees are not valid. It was so pleaded for the judgment debtors 2 and 6. The Executing Court accepted the said contentions and allowed all the four I.As and dismissed those two E.Ps.

9. The decree is not a nullity even though the suit is barred by limitation (vide Ittavira Mathai Vs. Varkey Varkey and Another, . The Supreme Court held in the above judgment as follows:--

"Where a court having jurisdiction over the subject matter and the party, passes a decree, it cannot be treated as a nullity and ignored in subsequent litigation even in the suit barred by limitation."

If the court granted a decree even when the suit is barred by time, the court would be committing an illegality and the remedy of the aggrieved party is to get it set aside by preferring an appeal against it. So long as the court is having jurisdiction, the decree cannot be ignored even if it is erroneous and the only way it can be corrected is by preferring an appeal or revision. It is not open to a party to contend in another suit or in a collateral proceeding that a decree passed against him is void merely on the ground of illegality. The Execution Court

cannot go beyond a decree. It is not for the Executing Court to decide whether the decree passed is legal or illegal or whether it is erroneous or not but it is open to the Executing Court to consider whether the decree sought to be executed is void or not. Any decree passed by any court or forum is void if the court or the forum which passed it has no jurisdiction over the subject matter of the party. In fairness to the learned counsel for judgment-debtors, it has to be stated that it was not urged that a decree passed even in suit that was barred by limitation is a nullity. Thus it can be stated that the final decrees in O.S. Nos.9 and 10 of 1970 cannot be held as void merely on the ground that the I.As 227 and 228/82 are barred by limitation. 10. It was urged for the judgment-debtors that as the allegations in the affidavits filed in support of I.As. 227 and 228/82 that the time for redemption was granted till April, 1982 are false to the knowledge of the decree and as those allegations were made fraudulently with a view to get the final decrees and as fraud was played Upon the court, the two final decrees have to be held as void.

11. The learned counsel for decree holder submitted as under :--

Probably the court might have extended time for redemption as and when it was orally requested and for one reason or the other, the decree-holder could not establish it, and so the allegations in regard to the extension of time up to April, 1982 cannot be held as false. The judgment-debtors had not chosen to allege in the I.As 227 and 228 of 1982 that the said allegations in regard to the extension of time "for redemption are false, and hence under Sec. 11 CPC they are debarred from challenging the same in the latter proceedings. The principle of res judicata applies not only in a case where it was finally decided earlier, and also in cases where it ought to have been raised in the earlier proceedings but not raised. If the allegations in the two affidavits in regard to the extension of time for redemption are false, the judgment-debtors ought to have raised the said plea in the I.As 227 and 228 of 1982 and having failed to raise the said objections in the said I.As., Sec. 11 CPC is attracted and they cannot contend in the latter proceedings that the said allegations are false. In *Satyadhan Ghosal and Others Vs. Sm. Deorajin Debi and Another*, it is held that Sec. 11 C.P.C. is equally applicable in regard to I.As. In *Balraj v. Gurucherenam* (1963) 1 ALT 257 : (AIR 1963 SC 409) it was held that if the sale ordered in the earlier E.P. was not challenged, the judgment-debtors are not entitled to challenge the sales in the subsequent E.Ps. Even the suit for declaration challenging the validity of a court sale is not maintainable [vide *Venkata Seshayya v. Virayya* AIR 1958 AP 1.

12. It was next submitted for the decree-holder as under:--

1. The judgment-debtors 2 and 6 had not complained that they had no notice in the I.As 227 and 228 of 1982 or in E.Ps. 205 and 206 of 1982.

2. The judgment-debtors 3 to 7 were represented by an advocate and time was taken on more than one occasion to file counters in the I.As. 227 and 228/1982; but the counters were not filed.

3. In the presence of the advocates for judgment-debtors 3 to 7 and when without opposition from him final decrees were passed. Before the final decrees were passed, the bar of limitation was not raised. Probably the said allegations are not false and hence the said objection was not raised by the learned counsel for judgment-debtors 3 to 7. There is no bar for the learned counsel to raise the plea of limitation even when counter was not filed; the correctness or otherwise of the allegations in the affidavits could have been verified on the basis of the court record.

13. It was finally urged for the decree-holder that even assuming that the allegations in the affidavits filed in support of I.As 227 and 228 of 1982 in regard to the extension of time for redemption are deliberate falsehood, still the final decrees passed cannot be held as void. No decree can be challenged in collateral proceedings or in another suit on the ground that the decree was obtained by fraud which is intrinsic. The decree obtained by fraud can be ignored if that fraud is extrinsic (vide *The Weavers Mills Ltd., Rajapalayam Vs. Balkis Ammal and Others*, . If by reasonable diligence the fraud can be detected even during the pendency of the proceedings, it cannot be held as fraud and in any case it is not extrinsic fraud. The decision in *Flower v. Lloyd* (1879) 10 Ch. D 327 : 39 LT 613 is relied in this context.

14. It was also urged for the decree-holder that the mortgagor can waive the period fixed as held in *Seth Harak Chandas Vs. Hyderabad State Bank, Hyderabad*, and if such a contention was raised during the pendency of the I.As 227 and 228 of 1982, it would have been submitted that the mortgagors waived the period fixed.

15. It was vehemently urged for these judgment-debtors that it is a case of deliberate fraud and the courts cannot permit the decree-holder to take advantage of such fraud. In any case fraudulent allegation in this case is extrinsic fraud and so the judgment-debtors can ignore it and on that basis, the impugned orders have to be held as legal.

16. So the points that arise for consideration are:--

1. Whether the allegations in the affidavit filed in support of I.As 227 and 228 of 1982 constitute extrinsic fraud, and

2. Whether the judgment-debtors are prevented from raising such plea in the E.As when it was not raised in the I.As. 227 and 228/82 in view of Sec. 11, CPC.

As no attempt was made on the part of the decree-holder to substantiate the allegations in the affidavits referred to the effect that the period for redemption was extended up to April, 1982 as correct, the same have to be held as misrepresentations and the said misrepresentations were made with deliberate intention so as to appear that the I.As. 227 and 228/82 were filed in time. Such frauds have to be held as immoral and improper. They have to be deprecated.

17. But it has to be seen whether it is intrinsic or extrinsic fraud. If the fraud is

extrinsic, the decree obtained on the basis of such fraud can be challenged in a collateral proceeding or a suit can be instituted to declare such decree as void, (vide Logdapatti Chinnayya v. Kotla Ramanna AIR 1916 Mad 364. Whether a decree obtained on the basis of fraud which is intrinsic can be challenged in a collateral proceeding or whether a suit can be filed to declare it as void is a matter for consideration. If a judgment is obtained by committing deliberate perjury and by suppressing the evidence, the aggrieved party can initiate a suit praying for setting aside such a judgment on such ground, as per the judgment in Venkatappa Naick v. Subba Naick ILR (1906) Mad 179. But the said judgment was doubted in Logdapatti Chinnayya v. Kolla Ramanna (supra). The facts that had arisen in the said case are as under:--

A filed a suit against B for recovery of a sum of money alleged to be due to dealings between the parties. B therein pleaded that certain items were wrongly debited against him in the account maintained by him (A). Later, B filed a suit praying for setting aside the above money decree on the ground that it was obtained by fraud and for an injunction to restrain A from executing it. Therein fraud alleged was that A having bought Timber worth of a particular amount from B, did not give him credit for the whole amount, but only for lesser amount, In the latter suit, A pleaded that the contract of sale referred to by B was made on his behalf (A's behalf) by his son in his absence and that it was part of agreement that timber should be of certain quality and what was supplied by B was not the quality agreed to and that A in consequence refused to ratify the same, and B agreed to an arrangement whereby he sold timber and credited the account of B with the actual sale proceeds realised after deducting expenses. At first instance the trial court dismissed the latter suit by holding that it was barred by rule of res judicata. Appeal thereon was allowed and the matter was remanded. The trial court believed the transaction in regard to the sale of timber by B to A and he disbelieved the version of A in regard to the agreement and the consequential sale and so that suit was decreed, in the appeal thereon, the findings of the trial court were confirmed and the appeal was allowed in part and the decree in the latter suit was passed only in regard to the difference in amount i.e. difference between the value of the timber sold by B to A, and the amount for which B's account is credited, in the account books of A. An application under Rule 8 of the Rules applicable to the Godavari Agency was filed before the High Court to direct the appellate authority to review his judgment. 18-19. In the above case the following points have arisen for consideration:-- On the basis of the rule of res judicata, the judgment which was passed on merits cannot be reconsidered in another suit. Where the judgment was obtained by fraud which is extrinsic, the rule of res judicata cannot be followed. It is manifest that in such cases the party against whom such a judgment is obtained is prevented from putting forth his case and hence the same cannot be held as a judgment which was obtained after contest.

20. But conflicting views were noticed by the Madras High Court in Logdapatti Chinnayya v. Kolla Ramanna (AIR 1916 Mad 364) (supra) as to whether the rule

of res judicata can be ignored even in a case where judgment was obtained by fraud which is intrinsic. Majority in *Flower v. Lloyd*, (1879) 10 Ch D 327 : 39 LT 613 (supra) held that rule of res judicata had to be made applicable in such cases and the judgment cannot be permitted to be re-opened. If it is permitted to be re-opened on the ground of per-jury of the principal witness and subordination of perjury. Then the aggrieved party might again file a suit on the same grounds and the parties may go on alternately ad infinitum. It was held that in a case where intrinsic fraud is committed, guilty can be punished, and must be punished severely. But such a judgment cannot be challenged in a separate suit. Such fraud can be corrected in an appeal or by way of review if the fraud could be detected only on the basis of fact that could be known later and it could not be known earlier even in spite of due diligence. But a different view was taken in *Abouloff v. Oppenheimer & Company* (1883) 10 QBD 295 : 52 LJQB 1. Therein it was held that the issue involved in the former suit is different from the issue in the latter suit. For the material issue in the latter suit is as to whether fraud was committed in obtaining the earlier judgment. In *Greene v. Greene* 2 Gray 361 : 61 America December, 454, the following observations were made;

"The maxim that" fraud vitiates every proceedings must be taken like other general maxims to apply to cases where proof of fraud is administrative but where the same matter has been either actually tried, it is not again admissible; or so in issue it might have been tried; the party is estopped to set up such fraud because the judgment is the highest evidence and cannot be controverted."

Thus even the American Court held that a judgment though obtained by fraud intrinsic cannot be sought to be set aside by filing another suit. The Calcutta High Court had also taken a similar view in *Muhomed Colab v. Mahmood Sulliman* ILR (1894) Cal 612. The same view was followed in *Abdul Huque Chowdhree v. Abdul Hafiz* (1910) 5 Ind Cas 648 and *Moruful Huq v. Surendra Nath Roy* (1912) 15 Ind Cas 893. But as already observed Madras High Court had taken a different view in *Venkatappa Naick v. Subba Naick* ILR (1906) Mad 179 and also in *Lakshtni Charan Shaha v. Nur Ali* ILR (1911) Cal 936 wherein it was held that-a deliberate perjury committed by the successful party is a ground on which the judgment may be set aside.

21. In *Logdaparti Chinnayya v. Kotla Ramanna* AIR 1916 Mad 364 (supra), the Bench had not chosen to refer the matter to a Full Bench even though it doubted the judgment of the Bench reported in *Venkatappa Naik v. Subba Naik* (supra). In view of the facts in that case it was observed that there was no finding to the effect that there was deliberate perjury. Later it was observed that the power of court to set aside judgment on the ground of fraud is discretionary one.

22. In this context the observation of Lord Justice Black in *Baker v. Wads Worth* (1898) 67 LJQB 301 can be referred to.

"To entitle a party to have a judgment vacated, he must show a sufficient reason

why he did not assert and enforce his rights at the proper time and in the regular manner and that his whole conduct throughout has been from fraud or in terpitute and he must free himself from all imputation of laches for the judgment will not be disturbed if it appears to have been entertained as a result of his own heedlessness or sloth or lack of diligence in protecting his own interest."

In this case fraud alleged is a detectable fraud. If there was neither carelessness nor negligence on the part of the judgment-debtors, the alleged fraud could have been detected. If the judgment-debtors traversed the relevant allegations in respect of period of redemption, it would have been in issue. It cannot be stated that such fraud could be detected only on the basis of material that could be discovered after the judgment was pronounced. So the fraud alleged is fraud intrinsic. As observed above, it is discretionary on the part of the court whether to set aside a judgment on the ground of fraud or not. This is a case where the judgement-debtors respondents have not established that there were no laches on their part and inspite of due diligence, they could not detect the fraud alleged. So even assuming that a suit can be initiated to declare the decree obtained on the ground of intrinsic fraud is void, still in view of the laches on the part of the judgment-debtors and their carelessness and negligence in not filing the counter in the I.As. 227 and 228 of 1982, this is not a fit case for setting aside the final decrees in I.As. 227 and 228 of 1982. Further, this is not a case of unjust enrichment. The suits were filed on the basis of mortgage deeds and time was granted for redemption. The only plea that is raised is that I.As. 227 and 288/82 praying for passing the final decrees are barred by limitation. So in the circumstances, I do not feel it necessary to refer it to a Bench for determining whether the judgment in Venkatappa Naik v. Subba Naik ILR 1906 Mad 179 (supra) requires reconsideration. In view of the above discussion even if it can be held that the judgment obtained on the basis of fraud intrinsic can be set aside in a separate suit or it can be challenged in a collateral proceeding, still as it is discretionary and in view of the various circumstances referred to in this judgment, this is not a fit case where such a discretion has to be exercised.

23. In Dadu Dayal Mahasabha Vs. Sukhdev Arya and Another, , relied upon for the respondents/judgment-debtors distinction between fraud on court and fraud on party was referred to. If a party pleads that he has not given his consent for the decree passed as consent decree, it constitutes an allegation of fraud on court, if the party pleads that his consent was obtained by fraud, then it is a case of fraud on party. In regard to the former, the court can exercise its jurisdiction u/s 151 CPC for setting aside a consent decree if it is found that consent was not given by one or more of the parties. But in regard to the latter type is fraud on party the remedy is by way of suit. But whether in a particular case fraud is intrinsic or extrinsic. If it is a former whether the suit can be filed to get the judgment and decree obtained on the basis of intrinsic fraud set aside were not considered in the above judgment. So that judgment is not helpful to the respondents/ judgment-debtors.

24. In *Malathy Amma and Another Vs. Jos, son or Kattukkaran Varu and Others*, majority held that confirmation of- sale in favour of decree-holder auction-purchaser, when he failed to deposit the balance of sale consideration in time can be challenged only by a petition under Sec.47 CPC and not by a separate suit. That judgment does not throw any light for consideration of this point.

25. In the above view there is no need to advert to the contentions raised on the basis of Sec.11 CPC or circumstances under which time for redemption can be extended under Order 34, Rule 2 (2) or Order 34, Rule 4(2) CPC. For the same reason the decision in *Raghunath Pradhani Vs. Damodra Mahapatra and Others*, need not be discussed for disposal of these revision petitions. It is suffice to observe that it was Held therein that there was no bar under Sec.11 C.P.C. when the judgment-debtor had not pleaded at the earliest stages that the court-auction sale was illegal as the permission of the concerned authority was not taken, for even the decree-holder therein stated that the said land belonged to Scheduled Tribe person implying thereby that the permission as per clause-6 of the Orissa Established Areas of Transfer of Immovable Property (vide S.Ts Regulation No. 2 of 1956 read with Rule 4 made thereunder) was necessary. 26. In the result all these revision petitions are allowed. E. As. 244, 246, 248 and 249 of 1985 are dismissed. The orders dismissing the E.Ps.205 and 206 of 1982 are set aside. In the circumstances, the parties have to bear their respective costs throughout.

26. Petitions allowed.