
(2004) 11 AP CK 0077
In the Andhra Pradesh High Court
Case No : CMA No. 3567 of 2004

Vikaruddin Ali Khan @ Rasheed Nawab and Another	APPELLANT
Vs	
Syed Abdul Majid and Others	RESPONDENT

Date of Decision : 09-11-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58, Order 21 Rule 77, Order 21 Rule 84, Order 21 Rule 85, Order 21 Rule 90

Citation : AIR 2005 AP 112 : (2005) 1 ALD 54 : (2005) 1 ALT 775

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : Vilas V. Afzulpurkar, for the Appellant; D. Prakash Reddy and T. Venkat Raju for Respondent Nos. 1 to 4 and Syed Waheedullah Hussaini, for Respondent Nos. 7 to 14, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—This C.M.A arises out of an order, passed by the Court of I Additional Senior Civil Judge, City Civil Court, Hyderabad, rejecting an application filed under Rule 90 of Order XXI C.P.C. The facts, which gave rise to this C.M.A, are as under:

2. O.S. No. 790 of 1984 was filed in the Court of I Additional Senior Civil Judge, City Civil Court, Hyderabad, by one Seshi Kumar Mohatta, the 5th respondent herein, against Mir Ibrahim Ali Khan (deceased 6th respondent), for recovery of a sum of Rs. 4, 43, 430/-. The first appellant appears to have been shown as Defendant No. 2, more in his capacity as G.P.A, and not as an independent debtor or guarantor. During the pendency of the suit, 6th respondent died and his legal representatives, Respondents 7 to 14 herein, were brought on record as Defendants 2 to 9. The suit was decreed on 27.8.1991. The name of the first appellant was not shown as a judgment debtor; in the decree. The Respondents 7 to 14 alone, figured as judgment debtors therein.

3. In the meanwhile, disputes arose between the first appellant on the one hand,

and the Respondents 7 to 14, on the other hand. According to the former, the 5th respondent executed an agreement of sale in his favour, to sell various items of property, forming part of an estate, known as "Narayanguda Maktha", and thereafter, a G.P.A was also executed in pursuance of the sale. He stated that the Respondents 7 to 14, the legal representatives of Respondent No. 6, have admitted and affirmed the agreement of sale, after the death of their father, and have also executed an independent agreement G.P.A. on same terms. When he apprehended that the Respondents 7 to 14 were about to cancel the G.P.A., he filed O.S. No. 211 of 1993, in the Court of XIII Asst. Judge, City Civil Court, Hyderabad. The suit was partly decreed by the Trial Court through its judgment, dated 17.4.1998. Further relief was granted to him in A.S. No. 182 of 1998 filed in the Court of III Additional Chief Judge, City Civil Court, Hyderabad.

4. During the pendency of O.S. No. 790 of 1984, an item of immovable property situated between Liberty Talkies and Tirumala Tirupathi Devasthanam Kalyana Mantapam, was attached before judgment. The 5th respondent filed E.P.70 of 1992, to bring the attached property, to sale. It was pending ever since then.

5. Respondents 7 to 14 filed E.A. No. 357 of 2003 before the Executing Court with a prayer that the property in House No. 3-6-527, Himayat Nagar, admeasuring 2,700 square yards (hereinafter referred to as "the property in question"), alleged to be in possession of the appellant herein, who was shown as Judgment Debtor No. 10, be attached and put to sale, instead of the attached item of property. In the affidavit filed in support of the C.M.A, it was stated that the property, which was initially attached, is the subject-matter of various claims and proceedings and instead of that, the property in question, which is in possession of the first appellant, on behalf of Respondents 7 to 14, be brought to sale. The Executing Court acceded to the request, and on 22.1.2004, the same was attached. Thereafter, on 19.3.2004, the Executing Court sold it, in favour of Respondents 1 to 4. On the same day, all the proceedings including confirmation of sale, are said to have been concluded, and a warrant for delivery of possession was also issued. At the stage of delivery of possession, the appellants came to know about it and they filed E.A. No. 176 of 2004, under Rule 90 of Order XXI C.P.C. to set aside the sale. The Executing Court dismissed the application through its order, dated 17.9.2004. Hence, this appeal.

6. Sri Vilas V. Afzul Purkar, learned Counsel for the appellants, submits that the sale conducted by the executing Court is an utter violation of the procedure prescribed under C.P.C, and is outside the scope of the decree in O.S. No. 790 of 1984. He contends that the Respondents 7 to 14, who are the judgment debtors, colluded with the 5th respondent, the decree-holder, and both of them, attempted to knock away the property in question, which is in possession and enjoyment of the appellants. He submits that though the first appellant was not shown as a judgment debtor in the decree, he was included as JDR No. 10 in E.A. No. 357 of 2003, and an order was obtained substituting the attached property, with the property in question held by the appellants. He contends that the very

fact that the judgment debtors have chosen to substitute the attached property with another item, particularly when the decree-holder did not feel any grievance, establishes lack of bona fides in the matter.

7. Learned Counsel also submits that being the holder of an agreement and G.P.A coupled with interest, the first appellant is very much an interested person, within the meaning of Rule 90 of Order XXI C.P.C. He submits that though voluminous evidence was placed before the Executing Court, establishing substantial interest of the first appellant in the property, it has chosen to ignore it, and declined to address itself, to the glaring irregularities in the execution. He contends that the Respondents 7 to 14 have chosen the Forum of the Executing Court, to dispossess the appellants from the property, which they were otherwise, not entitled to. He points out the nature of several irregularities, said to have taken place, during the execution and places reliance upon several judgments in support of his contention.

8. Sri D. Prakash Reddy, learned Senior Counsel, appearing for Respondents 1 to 4, submits that the first appellant admitted in several proceedings that he is in possession of the property in question, for and on behalf of the Respondents 7 to 14, as their G.P.A, and that he cannot be said to have any interest in it independent of his principals. He submits that it is always open to Respondents 7 to 14, to offer an alternative property, to liquidate their liability under the decree in O.S.No.790 of 1984. He contends that, once it is clear that the appellants do not hold any interest or right in the property, they have no locus standi, to point out any defects in the sale of the property, in the execution. He submits that the executing Court has taken the various steps, strictly, in accordance with the procedure prescribed under the relevant provisions, and that the sale in favour of Respondents 1 to 4 does not suffer from any infirmity. He further contends that without challenging the order passed, in E.A. No. 357 of 2003, the Appellants cannot question the sale. He too has cited precedents in support of his contentions.

9. Sri Syed Waheedullah Hussaini, learned Counsel for Respondents 7 to 14, submits that, his clients are the absolute owners of the property in question and that the appellants have no right or interest in it. He submit, that taking advantage of the GPA executed in his favour, the first appellant has resorted to several acts and omissions, detrimental to the interests of his principals, i.e., Respondents 7 to 14, and that he cannot claim any right or interest, vis-a-vis the property. In other respects, he adopts the arguments of D. Prakash Reddy, learned Counsel for Respondents 1 to 4.

10. The 5th respondent filed E.P. " No. 70 of 1992, for executing the decree in O.S. No. 790 of 1984. As observed earlier, an item of property between Liberty Talkies and Tirumala Tirupathi Devasthanam Kalyana Mandapam, was got attached before judgment. For variety of reasons, the execution did not proceed for more than a decade. It was nearly after 11 years that Respondents 7 to 14 have filed E.A. No. 357 of 2003, for substitution of the attached property with

another item. They invoked Rule 82 of Order XXI C.P.C. That Rule has absolutely no application or relevance for the relief claimed in the application. Even assuming that the application can be sustained under the general or residuary provision, namely, Section 151 C.P.C, it needs to be seen as to how far, the steps taken by Respondents 7 to 14, are in accordance with law.

11. It is not in dispute that the first appellant was not shown as a judgment debtor in the decree. Respondents 7 to 14 alone were the judgment debtors. However, in E.A. No. 357 of 2003, the first appellant was shown as judgment debtor No. 10. It was not as if the first appellant joined them voluntarily, or that his inclusion was innocuous. In the affidavit filed in support of the E.A.357 of 2003, Respondents 7 to 14 pleaded inter alia as under:

"That, J.D.R. No. 10 is in physical possession alleged to be in the capacity of GPA holder of these JDRs, which is denied as false by these JDRs. It is submitted that, except the said property, the JDRs are not owning any other property jointly and as such, the JDRs are coming with an intention before this Hon"ble Court towards execution of the decree in O.S. No. 790/84 in EP No. 70/ 1992 and pray that this Hon"ble Court may be pleased to put the above said property to sale through Court in the interest of justice."

This discloses that the Respondents 7 to 14 admitted that the property is in possession of the first appellant and there is dispute as to the nature of such possession.

12. Even if the application was otherwise maintainable in law, the minimum that was expected of Respondents 7 to 14, was to have put the first appellant on notice. At least, the Executing Court ought to have heard him, before it proceeded further. The order, dated 22.1.2004, passed by the Executing Court in E.A. No. 357 of 2003 reads as under:

"This petition is filed under Order 21, Rule 82 CPC to put the petition schedule property under attachment and sale instead of the EP schedule property under attachment. The respondent decree holder filed the counter. Since the petitioners have filed Encumbrance Certificate showing that they are owners of the proposed property under this petition whatever the objections raised from the D.Hr will not hold good. Besides both Counsels on record have given consent for attachment of the proposed property of the petitioners and for sale. Accordingly, this petition is allowed."

13. A reading of this order discloses that the Court was so careless that it did not even verify the relevance of the provision that was invoked, and it has virtually permitted itself to become a tool in the hands of Respondents 7 to 14, for playing fraud upon itself as well as on the first appellant. It is understandable, as to how the application came to be numbered, when the cause title itself did not accord with the decree, and when the provision invoked by the applicants therein, was totally irrelevant. The Court did not care to verify as to why the judgment debtor was so anxious to substitute the property, that too, when the decree holder did

not express any difficulty in proceeding with the attached property. It also failed to pause for a minute and think as to why Respondents 7 to 14 wanted the assistance of the Court, if the property was without encumbrance, and why they cannot sell the same and meet the liability under the decree. The steps taken after this order, are indeed shocking and surprising.

14. A perusal of the docket in E.P. No. 70 of 1992, particularly those after E.A. No. 357 of 2003 was allowed, disclose that the entire proceedings were piloted by the judgment debtors, and not the decree holders. On 17.2.2004, the Court directed issuance of sale notice. Thereafter, the Counsel for the 5th respondent and Respondents 7 to 14, are said to have offered to bring a prospective buyer. On 19.3.2004, a joint memo was filed by both the Counsel for knocking down the sale in favour of Respondents 1 to 4. The order does not disclose whether any bids were called or any auction was held. An interesting part of the matter is that the 5th respondent filed a memo of Full Satisfaction, on the same day, certifying that he received a sum of Rs. 10 lakhs. Respondents 7 to 14 filed a memo instantly stating that they have received a sum of Rs. 41 lakhs, from Respondents 1 to 4. The bid was knocked down, the sale was confirmed, and Sale Certificate was issued on the same day, so much so, Respondents 1 to 4 have filed the non-judicial stamps and bank challan during the Court hours. It can simply be stated that the whole exercise of the sale in execution was reduced to a mockery. While the participation of Respondents 1 to 5 and 7 to 14 was direct, that of the Executing Court was indirect, in perpetrating fraud on the first appellant.

15. The first appellant came to know about all these proceedings, only when the Court Bailiff went to the property in question, on 17.4.2004, for delivery of possession. Immediately, he filed E.A. No. 176 of 2004. He narrated the nature of interest he held over the property and referred to various proceedings that ensued between himself and Respondents 7 to 14 in various Courts. In support of his plea, he filed Exs.P-1 to P-34. On behalf of the respondents, reliance was placed only on Exs.B-1 and B-2, counter-affidavits filed in W.A.M.P. No. 968 of 1996 in the High Court, and LA. No. 1679 of 1996 in O.S. No. 85 of 1996, in a Civil Court. After considering the contentions advanced on behalf of the parties, the Executing Court held as under:

"Since in the present case, the petitioner failed to prove that he has got interest in the property and as per the respondents under the GPA executed under Exs.A2 and A4 the first petitioner is only asked to look after the property and subsequently the GPA was cancelled by publishing in newspaper and necessary notices were issued to the first petitioner and other JDRs, in execution petition and the property was sold and a Sale Certificate was also issued in favour of the auction purchasers, the said citations are, no way helpful to the petitioners. Thereby, the petitioners failed to prove that the first petitioner has got interest in the petition schedule property and he is not aware of the sale of the property in execution petition and any irregularity is committed in conducting such sale,

hence the petitioners are not entitled for the relief of set-aside the sale."

16. In effect, the Court held that the G.P.A, which was executed by Respondents 7 to 14, in favour of the first respondent, was cancelled, and that he is not an interested party, within the meaning of Rule 90 of Order XXI C.P.C. On the face of it, the observation as to cancellation of G.P.A is incorrect and it is a matter of record that in O.S. No. 790 of 1984 and in A.S. No. 182 of 1998, arising out of it, it was held that the GPA executed by Respondents 7 to 14, in favour of first respondent is coupled with interest and that it cannot be cancelled. A decree of perpetual injunction, as to possession of the property covered by the G.P.A. was also granted.

17. Now, it needs to be seen as to whether the first appellant is a person interested as contemplated under Rule 90 or Order XXI C.P.C. Rule 90 of Order XXI C.P.C reads as under:

"Rule 90. Application to set-aside sale on ground of irregularity or fraud.-(1) Where any immovable property has been sold in execution of a decree, the decree- holder, or the purchaser, or any other person entitled to share in a rateable distribution of assets, or whose interests are affected by the sale, may apply to the Court to set- aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

(2) No sale shall be set-aside on the ground of irregularity or fraud in publishing or conducting it unless, upon the facts proved, the Court is satisfied that the applicant has sustained substantial injury by reason of such irregularity or fraud.

(3) No application to set-aside a sale under this rule shall be entertained upon any ground which the applicant could have taken on or before the date on which the sale proclamation of sale was drawn up.

[Explanation :-The mere absence of, or defect in, attachment of the property sold shall not, by itself, be a ground for setting aside a sale under this rule]."

18. It discloses that an application to set-aside the sale in an execution can be maintained by,

- (a) the decree-holder, or
- (b) the purchaser, or
- (c) any other person;
- (i) entitled to share in a rateable distribution of assets, or
- (ii) Whose interests are affected by the sale.

The appellant asserts that he falls into the category of (C) (ii), whereas the respondents dispute his contention. The true purport of the expression "whose interests are affected", can be appreciated if the same is compared or contrasted with the types of persons, who can maintain applications under Rule 58 or 99 of

Order XXI C.P.C. Applications under those provisions can be maintained by any persons having claim, vis-a-vis, the attached or sold property. A reading of those provisions discloses that the claimants therein, have to establish not only a right, claim or interest of their own, but such right etc., must be superior to that of the judgment debtors.

19. Howsoever valid a claim may be, unless it is superior in nature, to that of the judgment debtors, it cannot be recognized in applications filed under Rules 58 or 99 of Order XXI C.P.C. However, to maintain an application under Rule 90, a party does not have to establish a superior claim in comparison to that of the judgment debtor. It would be sufficient if a semblance of interest or claim in the property is shown. The very fact that a person entitled to share in a rateable distribution of assets is also empowered to maintain such applications, buttresses this point of view. The legislative background, in which the Rule in its present form came to be emerge, was explained by a Full Bench of the High Court of Mysore, in *Chikkiah Setty v. Aswathanarayana*, AIR 1952 Mysore 63. After taking note of the corresponding provision in C.P.C. of 1882, and the various judgments touching on the subject, the Full Bench held as under:

"Under Section 311 of the Code of 1882 only the decree-holder or any person whose immovable property was sold was entitled to apply for cancellation of the sale. The substitution of "whose interests are affected by the sale" for "whose property was sold" in the new Code would be rendered ineffective if notwithstanding the apparent enlargement of the class of persons allowed to avail themselves of the rule the application is circumscribed to those having an interest of their own in the property. The use of the plural "interests" also denotes that comprehensively persons besides owners and having rights in the property, who are subject to disadvantage, loss or risk on account of the sale can invoke the benefit of the Rule.

20. Rule 89 of Order XXI CPC, also refers to persons "claiming interest in the property", which is brought to sale in an execution. A Division Bench of the Patna High Court in *Radharaman Choudhary Vs. Gulab Thakur and Others*, , held that the expression "persons holding interest", occurring in Rule 89 C.P.C, is very wide in its scope, and that it is not necessary for a person to hold or establish title, in respect of the attached property, as a condition precedent to maintain an application under that Rule.

21. In the present case, it is evident that, an agreement of sale, and G.P.A were executed by the 6th respondent, in favour of the first appellant, way back, on 13.7.1981. They were placed before the Executing Court and were marked as Exs.P-1 and P-2 respectively. After the death of the 6th respondent, his legal representatives, Respondents 7 to 14, executed an agreement of sale and G.P.A on 26.10.1984, in the same terms and they are marked as Exs.P-3 and P-4. The Respondents 7 to 14 cancelled the G.P.A through document, dated 21.7.1992. Aggrieved thereby, the appellants filed O.S.No.211 of 1993, in the Court of XIII Asst. Judge, City Civil Court, Hyderabad, for a declaration that the deed of

cancellation is inoperative, null and void, and for perpetual injunction against them, from interfering with the property covered under it. The suit was partly decreed on 17.4.1998 to the extent of declaration. The appellant filed A.S.No.182 of 1998, before the III Additional Chief Judge, City Civil Court, Hyderabad. The appeal was allowed and the suit was decreed in its entirety. These two decrees were placed before the Executing Court as Exs.P-7 and P-9. The appellant has also filed several documents such as electricity bills, telephone bills, tax receipts, assessment register etc., to show that he is in possession. In fact, the Respondents 7 to 14 admitted possession of the first appellant, but claimed that it is on their behalf. Therefore, it cannot be said that the appellant has no interest in the property and that he cannot maintain the application.

22. Now remains the question as to whether the sale conducted by the Executing Court is vitiated on any account. The manner, in which the property in question, was got attached and was brought to sale, was already referred to in the preceding paragraphs. Learned Counsel for the respondents have referred to certain steps taken by the appellant, subsequent to the sale, to impress upon this Court that his conduct was not fair and that he was attempting to resort to all possible steps to deprive the respondents of the property. What becomes relevant in this C.M.A is the nature of the proceedings and steps taken by the Executing Court, when it conducted the sale. The conduct of the parties subsequent to the same, becomes hardly of any relevance. It is for the respective parties to workout their remedies, if they feel aggrieved by such steps, or to ignore them if they are of no legal consequence.

23. In this case, a substantial extent of valuable property was attached under Order 38, Rule 5 C.P.C several years back. The E.P itself was pending since 1992. It is not the decree holder, but the judgment debtors that swung into action by pleading that the property attached under Order 38, Rule 5 C.P.C is subject to several claims, and sought for attachment of the property in question. Rule 11 of Order XXI C.P.C, prescribes the form of an application to be filed in an execution. It is the decree holder, who has to furnish all the details including the description of the property to be attached in execution. Attachment of property at the instance of the judgment debtor, that too, in a suit for recovery of money, is unknown to law.

24. When the decree holder did not have any complaint as to the saleability of the property attached under Order 38, Rule 5 C.P.C, the generosity expressed by the judgment debtor by pointing out the claims pending against it, ought to have been viewed by the Executing Court, with care and caution. However, the Court readily acceded to the request of Respondents 7 to 14. With a view to bind the appellant to the consequences flowing out of such an exercise, they have included him as decree holder No. 10, though he is not a party to the decree. So much about the manner, in which the property in question, was got attached.

25. A perusal of the proceedings in the execution discloses that, the Court adopted a procedure, which is more casual than the one adopted to sell an

inconsequential item of immovable property, while dealing with immovable property, the value of which, according to Basic Value Register, runs into several crores. Respondents 1 to 4 alone were the persons, who were treated as bidders. No reference is made to any auction notification or the conduct of auction. On the same day, the decree-holder is said to have been paid Rs. 10 lakhs, and the judgment debtors, a sum of Rs. 41 lakhs. Not a rupee went into the account of the Court.

26. Rules 77, 84 and 85 of Order XXI C.P.C prescribe the procedure for deposit of the amount in- to the Court wherever, an item of property is sold in an execution. The sale consideration has to be deposited into the Court. After confirmation of the sale, the decree-holder has to be paid the decretal amount, and if any excess amount is received, it has to be paid to the judgment debtors. It is impermissible for a Court to confirm a sale without receiving consideration, except where the decree-holder himself participates in the auction with the permission of the Court, and where the sale consideration is less than the decretal amount. All these settled principles were left to wind and the Executing Court has put its seal of approval on the illegal and irregular activities brought about, and played by the respondents.

27. Learned Counsel for the respondents have relied upon several judgments, which dealt with the circumstances under which, the execution of the sale can be interfered with. When every step in the execution was observed by the Court below in breach, there hardly exists any necessity to verify as to whether any illegality has been committed. This case presents an instance, where the necessity if at all, would be to examine whether any step taken by the executing Court was in conformity with the prescribed procedure. Therefore, the proceedings conducted by the Executing Court from the stage of attachment, deserves to be set-aside.

28. The contention of the learned Counsel for respondents that unless the order passed in E.A. No. 357 of 2003 is challenged, the appellants cannot maintain application under Rule 90 of Order XXI C.P.C, is untenable. The order passed therein is one of the steps in the execution leading to sale. When the sale is sought to be set aside, the challenge, takes in its fold, leading to the sale.

29. The C.M.A is accordingly allowed. The sale as well as attachment of the property, bearing House No. 3-6-527, Himayat Nagar, Hyderabad, is set-aside. The proceedings are relegated to the stage, where Respondents 7 to 14 filed E.A. No. 357 of 2003 in E.P. 70 of 1992. The first appellant, who was shown as decree holder No. 10, shall stand transposed as Respondent No. 2 in that E.A. The Executing Court shall give an opportunity to the appellant to file counter-affidavit and contest the same. The further proceedings in the EP., vis-a-vis, the property referred to above, shall depend on the orders that may be passed in the EA No. 357 of 2003. There shall be no order as to costs, v