

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

A.S.No.566 OF 2014

JUDGMENT :

This appeal is preferred by the appellants-petitioners in E.A.No.12 of 2014 in E.P.No.46 of 2010 in O.S.No.8 of 2007 before the I Additional District Judge, Ongole, under Section 96 C.P.C. claiming that the schedule property is a joint family property and they are entitled to 1/3rd share in the said property.

2. The judgment debtor mortgaged the property with the respondent herein by borrowing a sum of Rs.1,00,000/-and later the respondent filed a suit and obtained a preliminary decree. Since the judgment debtor did not discharge the debt within the time fixed for redemption, the respondent herein obtained final decree for sale and filed E.P. for realization of decree debt by sale of the property.

3. The appellants came to know about the pendency of the execution petition and filed E.A.No.12 of 2014 under Order 21 Rule 58 of CPC claiming 1/3rd undivided share in EP schedule property and sought relief to declare that they are entitled to 1/3rd share.

4. The respondent filed counter denying material allegations, *inter alia*, contending that the property was mortgaged by the judgment debtor, who is no more and since the judgment debtor failed to pay the amount due under the mortgage and as she is not aware of the 1/3rd undivided share as claimed by the appellants prayed for dismissal of the petition.

5. During the course of enquiry, the petitioner herself examined as PW.1 and marked Exs.A.1 to A.3. On behalf of the respondent none were examined and no documents were marked. Upon hearing argument of both counsel, considering the oral and documentary

evidence produced by the claim petitioners, the trial Court dismissed the petition assigning its own reasons.

6. Aggrieved by the order and decree of the trial Court, the present appeal is preferred by the claim petitioners on various grounds.

7. The first ground urged before this Court is that the question of pious obligation for payment of debt by the claim petitioners does not arise and no such plea was raised before the executing Court, but the Court unnecessarily considered the pious obligation and dismissed the petition holding that the claim petitioners are also liable to discharge the debt.

8. Secondly, it is contended that the debt was for the benefit of joint family. Therefore, the claim petitioners are not equally liable to discharge the debt and their share of property is liable for sale and for realization of the debt. When this contention was raised before the trial Court by the respondent, the executing Court unnecessarily discussed many aspects which are not raised before it and committed an error in dismissing the claim petition.

9. Sri N.Ravi Prasad, learned counsel for the appellants while reiterating the above contentions contended that though a specific contention about the maintainability of claim petition under Order 21 Rule 58 was raised, the trial Court referred the law laid down by this Court in four decisions i.e. **M.Satish Krishna v. V.Saraswathamma and another**^[1], **T.Nabi Sab v. G.Venkateswarlu and another**^[2], **T.Muniratnam (died) by LRs v. T.Ashok**^[3] and **M.S.Doraisami Iyer v. A.R.Arunachalam Chettiar and others**^[4] and extracted the gist of the judgments without recording any finding as to maintainability of the petition and committed an error and requested to remand the matter to the executing Court.

10. Sri K.Rama Mohan Mahadeva, learned counsel for the respondent would contend that the claim petition under Order 21 Rule 58 CPC is not maintainable since there was no attachment and the decree was only based on a mortgage and placed reliance on the judgment in **T.Nabi Sab's case** (2nd supra) in support of his contention.

11. Considering the rival contentions, perusing the evidence on record and the order under challenge, the question that arises for consideration is:

“Whether a petition under Order 21 Rule 58 CPC is maintainable in a decree obtained based on mortgage for realization of the amount by way of sale of the property?”

12. Indisputably the respondent obtained final decree based on mortgage and filed execution petition for realization of decree, but under Order 21 Rule 67 of CPC for sale, there was no attachment of EP schedule property till today.

13. The appellants claimed 1/3rd undivided share in the property on the ground that it is a joint family property. But the petition under Order 21 Rule 58 CPC is not maintainable when there is no attachment of property. Order 21 Rule 58 CPC permits where any claim is preferred to, or any objection is made to the attachment of any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions contained in CPC.

14. A bare reading of Order 21 Rule 58 CPC, it is clear that a party can file a petition under the said Order objecting attachment of property or execution of decree. Since there is no attachment of property, question of entertaining an application under Order 21 Rule 58 does not arise, but the remedy of the appellants is else where. The identical question came up before this Court in **T.Nabi Sab's case** (2nd supra) , wherein, this Court while deciding the objection raised by the third party

by filing an application under Order 21 Rule 58 CPC for realization of the amount based on mortgage held as follows:

“In the present case, there being admittedly no attachment ordered in execution of the decree, the claim petition filed by the appellant herein is not maintainable and the same was rightly dismissed by the Courts below. No substantial questions of law arise for adjudication in the Second Appeal and dismissed the appeal.”

15. In view of the law declared by this Court and unless there is an attachment of property in execution of decree, a petition under Order 21 Rule 58 CPC is not maintainable. Applying the principle laid down in the above judgment, I find no illegality in the impugned order though the executing Court did not address the issue effectively. Therefore, the appeal is liable to be dismissed.

16. Learned counsel for the appellants sought liberty to take appropriate legal steps in proper forum.

17. Accordingly, the appeal is dismissed with liberty to the appellants to take appropriate legal steps before the appropriate forum subject to permissibility under law. There shall be no order as to costs.

M.SATYANARAYANA MURTHY,J

12.06.2015
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HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

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- [\[1\]](#) 2009(5) ALD 329
[\[2\]](#) 2008(4) ALD770
[\[3\]](#) 2002 And.WR 1-287
[\[4\]](#) AIR 1991 MADRAS 275