

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

SECOND APPEAL No.745 of 2014

JUDGMENT:

This Second Appeal is filed under Section 100 of C.P.C challenging the judgment and decree dt.21-03-2014 in A.S.No.26 of 2009 of the Principal District Judge, Kadapa confirming the judgment and decree dt.19-01-2009 of the Principal Junior Civil Judge, Kadapa in O.S.No.408 of 2007.

2. The appellant herein is 4th defendant in the above suit. He claims to have purchased the plaint schedule property in a Court auction in O.S.No.1013 of 2003 filed by one Samuel against one Job Joseph in E.P.No.299 of 2005 therein under a sale certificate

dt.11-12-2006, which sale was confirmed on 09-02-2007.

3. The property in question originally belongs to one Job Joseph and is an open site adjacent to a house belonging to the said Job Joseph. Under Ex.A-1 dt.04-09-1997, this open site had been sold by Job Joseph in favour of 1st respondent/plaintiff. It appears that this open site along with the house of Job Joseph was mortgaged to one Samuel under a mortgage deed dt.12-09-2001 (Ex.A-5). On the basis of the said mortgage, Samuel had filed O.S.No.1013 of 2003 against Job Joseph for recovery of money borrowed under the mortgage. Pending the suit, both Job Joseph and Samuel died, and their legal representatives were brought on record. Thereafter the suit was decreed. An auction was held in E.P.No.299 of 2005 for sale of the mortgaged property and in that auction, the

appellant/4th defendant herein participated and became the highest bidder. Ex.A-2 sale certificate was issued to him and the sale was confirmed as stated above.

4. The plaintiff/1st respondent was not impleaded in the suit. Therefore, the plaintiff filed O.S.No.408 of 2007 on the file of the Principal Junior Civil Judge, Kadapa for declaration of his title to the plaint schedule property and for consequential permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the property. In the suit, he impleaded the wife of late Samuel as 1st defendant, son and daughter of late Job Joseph as defendant Nos.2 and 3, and the auction purchaser/appellant herein as 4th defendant.
5. The plaintiff contended that without verifying the title or right of Job Joseph in respect of the open site, 4th defendant had participated in the Court auction held on 11-12-2006 and purchased it, and the plaintiff was not aware of the attachment or sale or auction at the relevant time. It is contended that 2 days prior to the filing of suit, 4th defendant had come to the property and stored material to make constructions and informed the plaintiff that he was the auction purchaser, and since 4th defendant cannot get any right in the plaint schedule property because it is in the possession and enjoyment of plaintiff and sale certificate obtained by 4th defendant is not conclusive, the suit was filed.
6. The 1st defendant filed a written statement alleging that the suit is not maintainable and Job Joseph did not execute Ex.A-1 sale deed in favour of plaintiff on 04-09-1997. She contended

that it is part and parcel of the residential house belonging to Job Joseph, who mortgaged both the house and vacant site in favour of Samuel; that the property was auctioned by the Executing Court after following the due procedure and therefore, the suit be dismissed.

7. 4th defendant filed a written statement on similar lines and contended that plaintiff is not the rightful owner of the plaint schedule property and it was purchased by 4th defendant in a Court auction on 11-12-2006 in execution of the decree in E.P.No.299 of 2005 in O.S.No.1013 of 2003, which was confirmed by the Executing Court on 09-02-2007. He claimed that he is paying water tax and property tax in his name and mutation was also effected. He denied that plaintiff was in possession and enjoyment of the plaint schedule property and contended that 4th defendant is a *bonafide* purchaser and is in continuous possession and enjoyment of the property.

8. The trial Court framed the following issues and additional issue:

“1. Whether the plaintiff is entitled for a permanent injunction against defendant Nos.1 to 4, their men, agents, associates and all such other persons claiming right or authority with respect to the suit schedule property as prayed?”

2. To what relief?

Additional Issue:

1. Whether the plaintiff is entitled for declaration of right, title, interest and possession with respect to the plaint schedule property?”

9. Before the trial Court, the plaintiff examined P.Ws.1 and 2 and marked ExsA-1 to A-5. The defendants examined D.W.1

and marked Exs.B-1 to B-4.

10. By judgment dt.19-01-2009, the Court below decreed the suit.
11. The trial Court held that in spite of the plea of defendant Nos.1 and 4 that Ex.A-1 sale deed dt.04-09-1997 is not true and correct, it was suggested to plaintiff in his cross-examination as P.W.1 that Job Joseph had executed Ex.A-1 as security for the amount borrowed by him from the plaintiff, which suggestion was denied. It therefore held that the burden is on defendants to establish that Ex.A-1 is nominal document intended as surety for a loan obtained and no evidence is adduced in that regard. It held that since the property in question is a vacant site, recitals in the document in so far as declaration of title and possession are concerned, are very important. It pointed out that mortgage transaction under Ex.A-5 is subsequent to Ex.A-1 sale and therefore the plaint schedule property could not have been mortgage or sold away by way of auction since by the date of mortgage, the borrower/mortgager Job Joseph himself had no right, title and possession of the property. A contention was advanced in the suit that plaintiff ought to have filed a petition under Section 47 of C.P.C and ought not to have filed a separate suit. But the said contention was rejected. The trial Court took the view that only parties to the decree can agitate under Section 47 of C.P.C and cannot file a separate suit, but that such a prohibition would not apply to a third party, who is not a party to the suit. It relied upon the judgment in **Ajit Chopra Vs.Sadhuram and others** and **Kopparapu Venkata Subbaiah Vs. Gaddam Brahman Reddy and another**. It further held that

Ex.A-1 transaction was reflected in the Encumbrance Certificate Ex.A-3 and therefore, the Decree Holder in E.P.No.299 of 2005 in O.S.No.1013 of 2003 ought not to have proceeded for sale of the plaint schedule property and ought to have confined the said proceedings only to the house property. It therefore decreed the suit with costs and also granted a perpetual injunction.

12. Questioning the same, 4th defendant filed A.S.No.26 of 2009 before the Principal District Judge, Kadapa.
13. By judgment dt.21-03-2014, the said appeal was dismissed confirming the findings of the Court below.
14. Questioning the same, this Second Appeal is filed.
15. The learned counsel for appellant would contend that the suit filed by plaintiff is not maintainable and the plaintiff ought to have filed an application under Section 47 of C.P.C to set aside the sale in the Court auction in O.S.No.1013 of 2003. He further contended that the appellant had acquired title to the property in the auction sale conducted in E.P.No.299 of 2005 in O.S.No.1013 of 2003, and that the plaintiff's title ought not have been accepted by the Court below.
16. I have noted the submissions of the learned counsel for appellant.
17. Ex.A-1 sale deed in favour of plaintiff in respect of the open site executed by Job Joseph was on 04-09-1997. This is prior in point of time to the mortgage Ex.A-5 dt.12-09-2001 executed by Job Joseph in favour of Samuel in respect of both the open site as well as the house adjacent there. After selling the open site to plaintiff on

04-09-1997, Job Joseph could not have mortgaged the open site to Samuel in 2001 since he had no right, title or interest in the open site after 04-09-1997. Admittedly, the sale Ex.A-1 was reflected in the Encumbrance Certificate Ex.A-3. When such is the position, the Decree Holder in O.S.No.1013 of 2003 ought not to have brought to auction the open site sold by Job Joseph to plaintiff under Ex.A-1. Even if such a sale took place, no right accrues to 4th defendant because there is no warranty of title in a Court sale.

18. Section 47 of CPC. States:

“47. Questions to be determined by the Court executing decree.(1)

All questions arising between parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. (2) [x x x x]

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I. For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.”

19. A reading of the above provision indicates that only questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. Admittedly, the plaintiff/1st respondent is not a party in O.S.No.1013 of 2013. Therefore, he cannot invoke

Section 47 of C.P.C. He cannot also be said to be a representative of the parties in the said suit because he had already become the owner of the property prior to the filing of the suit.

20. In **Kopparapu Venkata Subbaiah** (2 supra), a learned Single Judge of this Court has held that a third party to the suit cannot file a petition under Section 47 of C.P.C to question the sale held in execution of a decree in a suit. He relied upon the judgment in **Ganpat Singh Vs. Kailash Shankar**. In that case, on 01-01-1979 while dismissing an application by one of the judgment debtors under Order XXI Rule 90 of C.P.C, the Court confirmed the sale. Another judgment-debtor filed a petition On 27-01-1979 to set aside sale on grounds other than those mentioned in Order XXI Rules 89, 90 and 91 of C.P.C. It was dismissed by the trial Court on 21-07-1979 on the ground that after confirmation of sale, the Court is not authorized to entertain an application. The Supreme Court on those facts held that there is no provision in the C.P.C. except Order XXI Rules 89, 90 and 91 to set aside the sale and that when an application for setting aside the sale is dismissed, the order of the Court will be final, subject to appeal, and that when no appeal has been filed, another application for setting aside the sale cannot be made and it would be barred by principles of *res judicata*. The learned Single Judge held that the Supreme Court in this case had laid down that if no petition to set aside the sale had been filed at all, the Court is bound to confirm the sale and sale would become final.

21. In view of above referred decisions, I am of the opinion that the contention of the appellant that application under Section 47 of C.P.C is the only remedy available to plaintiff to challenge the auction sale in his favour, cannot be accepted since the plaintiff is not a party in the said suit filed by Samuel against Job Joseph i.e. O.S.No.1013 of 2003. So he can maintain a separate suit.
22. I therefore do not find any merit in the appeal and the same is accordingly dismissed at the stage of admission. No costs.
23. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 10-04-2015

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