

***THE HON'BLE SRI JUSTICE SANJAY KUMAR**

+SECOND APPEAL NO.352 OF 2015

% DATED 04th SEPTEMBER, 2015

Between:

Ayitam Venkata Anjani ..
Appellant .. Petitioner

and

\$ Ganeshula Uma Parvathi and another
.. Respondents

<Gist:

>Head Note:

! Counsel for Appellant : Smt. Bobba Vijaya Lakshmi

^Counsel for 1st respondent : Sri K. Siva Reddy

^Counsel for 2nd respondent : Sri Ram Mohan Palanki

? CASES REFERRED:

1. AIR 1963 Supreme Court 1150
2. ILR 43 Madras 760
3. 1990(2) The Law Summary 41 = (1991) 1 SCC 715
4. 2004(1) ALT 655

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

SECOND APPEAL No.352 OF 2015

Between:

Ayitam Venkata Anjani

.. Appellant

and

Ganeshula Uma Parvathi and another

.. Respondents

DATE OF JUDGMENT PRONOUNCEMENT : 04th SEPTEMBER,
2015

SUBMITTED FOR APPROVAL:

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THE HON'BLE SRI JUSTICE SANJAY KUMAR

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| 1. | Whether Reporters of Local newspapers
may be allowed to see the judgment? | Yes/No |
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|----|--|--------------------|
| 2. | Whether the copies of judgment may be marked to Law Reporters/Journals | Yes/ No |
| 3. | Whether His Lordship wishes to see the fair copy of the judgment? | Yes/ No |

THE HON'BLE SRI JUSTICE SANJAY KUMAR

SECOND APPEAL NO.352 OF 2015

J U D G M E N T

O.S.No.1193 of 2002 was filed by the first respondent herein before the learned Principal Senior Civil Judge, Ranga Reddy District at L.B. Nagar, Hyderabad, against the second respondent for recovery of monies along with costs. The suit was decreed by the said Court and the decree was transmitted under Section 39 CPC for execution. The first respondent/decreed holder accordingly filed E.P.No.70 of 2007 before the learned Senior Civil Judge, Narsapur, to bring the EP schedule property to sale. Pertinent to note, by order dated 31.12.2002, the learned Principal Senior Civil Judge, Ranga Reddy District, had ordered attachment before judgment of this property under Order 38 Rule 5 CPC.

While so, the appellant herein filed an application under Order 21 Rule 58 CPC in E.A.No.545 of 2007 in E.P.No.70 of 2007 in O.S.No.1193 of 2002 to declare her ownership rights over the EP schedule property and to raise the attachment over the said property. According to the appellant/claimant, she was the absolute owner of the EP schedule property by virtue of the registered settlement deed dated 02.12.2002 (Ex.A.1) executed in her favour by the judgment debtor in the suit, the second respondent herein. She claimed that she had been in possession and enjoyment of the said property since that date with

absolute rights. She further stated that she had been granted a pattadar passbook and title deed in relation to the land and alleged that the second respondent/judgment debtor had no subsisting right or title over the EP schedule property.

The first respondent/deed holder filed a counter before the executing Court stating that the appellant/claimant was none other than the wife of the second respondent/judgment debtor but she had suppressed this fact for unlawful gain and to cause obstruction to the sale of the EP schedule property pursuant to the suit decree. She stated that the EP schedule property belonged to the second respondent/judgment debtor and with a view to defeat her claim, he had transferred the EP schedule property in favour of his wife by bringing into existence Ex.A.1 settlement deed dated 02.12.2002. She further stated that she had gotten issued registered notice dated 17.11.2002 to the second respondent/judgment debtor and he settled the property in his wife's name upon receipt of the said notice so as to defeat her suit claim. She pointed out that the second respondent/judgment debtor did not mention during the suit proceedings that he had settled the EP schedule property in his wife's name though the same was subjected to attachment before judgment as long back as on 31.12.2002. She therefore asserted that the transfer of the EP schedule property in favour of the judgment debtor's wife was hit by Section 53 of the Transfer of Property Act, 1882 (for brevity, 'the Act of 1882').

The second respondent/judgment debtor filed a counter before the executing Court stating that the appellant/claimant was the absolute owner of the EP schedule property by virtue of Ex.A.1 registered settlement deed dated 02.12.2002 and that she was in possession and enjoyment of the same with absolute rights. He contended that he had no saleable interest in the said property and that the executing Court had directed the sale thereof without enquiry. He further stated that he had preferred C.R.P.No.3912 of 2007 before this Court against the steps taken by the executing Court for putting the property to sale and that the

said case was pending. He also claimed that there were no amicable terms between his wife, the appellant/claimant, and himself since 2001 and as per the terms settled by the elders, the EP schedule property was settled by him in her favour towards maintenance.

The appellant/claimant examined herself as P.W.1 while one of the attestors of Ex.A.1 registered settlement deed dated 02.12.2002 was examined as P.W.2 and Exs.A.1 to A.6 were marked in evidence on her behalf. The first respondent/decree holder deposed as R.W.1, while the second respondent/judgment debtor deposed as R.W.2. R.W.3 was the Secretary of the Primary Agricultural Co-operative Society, Sitharamapuram, who was examined in connection with the loan said to have been availed by the second respondent/judgment debtor from the said society on the security of the EP schedule property. On behalf of the respondents, Ex.B.1 was marked in evidence. Exs.X.1 to X.3 were marked in evidence through the Court.

By order dated 20.11.2009, the executing Court allowed the application declaring that the appellant/claimant had title over the EP schedule property and raised the attachment. Aggrieved thereby, the first respondent/decree holder filed A.S.No.65 of 2010 before the learned VI Additional District Judge (FTC), Narsapur. By judgment dated 19.01.2015, the lower appellate Court allowed the appeal and set aside the order and decree dated 20.11.2009 passed by the executing Court. Aggrieved by the reversal of the order passed by the executing Court, the appellant/claimant is before this Court in second appeal.

Heard Smt. Bobba Vijaya Lakshmi, learned counsel for the appellant/claimant, Sri K. Siva Reddy, learned counsel on caveat for the first respondent/decree holder and Sri Ram Mohan Palanki, learned counsel for the second respondent/judgment debtor.

By order dated 19.06.2015, this Court granted interim suspension of the lower appellate Court's order being of the opinion that the second appeal itself could be disposed of at the stage of admission.

It is an admitted fact that all the parties are related. The first

respondent/decreed holder is also related to the second respondent/judgment debtor. She is none other than his niece, being his sister's daughter. The appellant/claimant, as already stated, is the wife of the second respondent/judgment debtor. The undisputed sequence of events demonstrates that the first respondent/decreed holder issued notice dated 17.11.2002 to her uncle, the second respondent/judgment debtor, in connection with her suit claim and shortly thereafter, under Ex.A.1 registered settlement deed dated 02.12.2002, the second respondent/judgment debtor settled the EP schedule property upon his wife. Though it is claimed that relations between the husband and wife were not amicable, not an iota of evidence was placed before either of the Courts below or even this Court to substantiate the same. In fact, the appellant/claimant did not even disclose her relationship with the second respondent/ judgment debtor in her claim petition or in her affidavit filed in lieu of chief examination.

In any event, the evidence of R.W.3, the Secretary of the Primary Agricultural Co-operative Society, Sitharamapuram, more or less clinched the issue. A copy of his deposition is placed before this Court and reflects that this witness asserted that the second respondent/judgment debtor borrowed a sum of Rs.25,000/- on 04.06.2007 from the society by mortgaging the EP schedule property and discharged the said loan on 19.06.2008. He was stated to have again borrowed a sum of Rs.25,000/- on 23.06.2008 by mortgaging the EP schedule property and the said loan was yet to be fully repaid as on the date of his examination. Significantly, his evidence remained undisturbed and clearly indicated that though the EP schedule property was settled by the second respondent/ judgment debtor in the name of his wife, the appellant/claimant, he continued to deal with the same by asserting ownership rights, as he mortgaged the said property to secure his loans in 2007 and 2008, long after the execution of Ex.A.1 registered settlement deed.

Notwithstanding this fact, the executing Court was of the opinion

that as the attachment before judgment of the EP schedule property was subsequent to the execution of Ex.A.1 registered settlement deed, it had no effect and the property already stood transferred. The executing Court therefore held in favour of the appellant/claimant observing that there was nothing to show that Ex.A.1 registered settlement deed was executed with an intention to defraud the first respondent/deGREE holder. This finding was rendered as the executing Court was inclined to believe that the appellant/claimant had no knowledge of the suit proceedings and was further inclined to doubt the genuineness of the suit transaction. Holding that the appellant/claimant had succeeded in establishing her title over the EP schedule property, the executing Court allowed her application filed under Order 21 Rule 58 CPC.

This Court is at a loss to understand as to how the executing Court could have gone behind the decree and voiced doubts as to the genuineness of the suit transaction. Such an issue had not been raised for consideration before the executing Court and the comment made in this regard by the executing Court was completely uncalled for. The executing Court also failed to understand the scope and intent of Section 53 of the Act of 1882.

In appeal, the learned VI Additional District Judge (FTC), Narsapur, no doubt, reversed the erroneous order and decree of the executing Court. But this judgment also left a lot to be desired. Perusal of the judgment of the lower appellate Court reflects that the lower appellate Court merely set out the facts and baldly concluded that Ex.A.1 registered settlement deed was hurriedly brought into existence by the second respondent/judgment debtor in favour of his wife only to avoid the suit claim and, therefore, it would not create any rights. There is no discussion whatsoever as to how this conclusion was arrived at. No reference was made to the evidence of R.W.3 or the fact that no evidence was adduced to substantiate the alleged lack of amicable relations between the husband and wife.

On the strength of the shortcomings in the judgment of the lower

appellate Court, Smt. Bobba Vijaya Lakshmi, learned counsel, contended that the case on hand is a fit one for remand to the lower appellate Court for consideration afresh. She pointed out that questions of law had been framed in this regard which warranted consideration.

However, this Court is not inclined to accept this submission. Merely because the judgments of the Courts below leave something to be desired, it does not constitute a just and valid reason to protract the proceedings further. When the facts of the case speak for themselves, this Court is not inclined to prolong the litigation on mere technicalities.

Section 53 of the Act of 1882 states to the effect that every transfer of immovable property made with intent to defeat or delay the creditors or the transferors shall be voidable at the option of any creditor so defeated or delayed.

Smt. Bobba Vijaya Lakshmi, learned counsel, would contend that in terms of this provision, the first respondent/decree holder should institute a separate suit to seek a declaration that the transfer of the EP schedule property under Ex.A.1 registered settlement deed is fraudulent and that the said plea cannot be raised in the application filed by her client under Order 21 Rule 58 CPC.

This aspect is no longer *res integra*. As long back as in the year 1963, the Supreme Court had occasion to consider this very issue in **C.**

ABDUL SHUKOOR SAHEB V/s. ARJI PAPA RAO^[1]. The case before the Supreme Court related to an application under Order 21 Rule 63 CPC and the respondent-creditor raised the plea of fraudulent transfer under Section 53 of the Act of 1882. One of the points raised in the appeal was that on a proper consideration of Section 53 of the Act of 1882 read in the light of provisions of the Code of Civil Procedure, 1908, particularly those relating to claim petitions under Order 21 Rules 58 to 63, a transfer which was voidable under Section 53 could be avoided only by a representative suit filed on behalf of the creditors and not by an individual creditor, who may be defeated or delayed, by way of defence to a suit to set aside a summary order under Order 21 Rule 63 CPC. The

Supreme Court categorically rejected this contention. Reliance was placed by the Supreme Court on the decision of a Full Bench of the Madras High Court in **RAMASWAMI CHETTIAR V/s. MALLAPPA REDDIAR**^[2] and it was held that there is nothing in Section 53 of the Act of 1882 which precluded a defence by an attaching-creditor that a sale is vitiated by fraud. It would therefore not be necessary for an individual creditor taking recourse to Section 53 of the Act of 1882 to independently file a suit and such defence can be raised by him/her in an application filed under Order 21 Rule 58 CPC.

Reliance placed by Smt. Bobba Vijaya Lakshmi, learned counsel, on **HAMDA AMMAL V/s. AVADIAPPA PATHAR**^[3] is of no avail as that was not a case where the creditor assailed the sale under Section 53 of the Act of 1882. In those circumstances, the Supreme Court was of the opinion that the sale deed executed in favour of a third party prior to the attachment before judgment would prevail.

Reliance was also placed by Smt. Bobba Vijaya Lakshmi, learned counsel, on **MADHAVARAPU HARANADHABABA V/s. KALIGINEEDI MAHALAKSHMAMMA (DIED) PER LR**^[4]. Therein, this Court opined that in a claim petition filed under Order 21 Rule 58 CPC to raise an attachment over the E.P. schedule property, the Court would not be entitled to consider and decide whether a transaction was fraudulent in terms of Section 53 of the Act of 1882. Significantly, this Court was not apprised of the law laid down by the Supreme Court in **C. ABDUL SHUKOOR SAHEB**¹. Reference was made by this Court only to **HAMDA AMMAL**³ which was not even a case arising under Section 53 of the Act of 1882. This decision therefore does not constitute good law in the light of the contrary view taken by the Supreme Court in **C. ABDUL SHUKOOR SAHEB**¹.

On the above analysis, the contention of Smt. Bobba Vijaya Lakshmi, learned counsel, that the plea of the first respondent/ decree

holder that the transfer of the E.P. schedule property, under Ex.A.1 registered settlement deed, could not be considered to be a fraudulent one in terms of Section 53 of the Act of 1882 in the application filed by the appellant/claimant, under Order 21 Rule 58 CPC, is rejected.

Though the lower appellate Court did not discuss all the aforesaid aspects of the matter satisfactorily, the finding ultimately arrived at by the said Court is in accordance with the above legal position.

The established facts therefore demonstrate that the second respondent/judgment debtor, having received the legal notice addressed to him by the first respondent/decreed holder on 17.11.2002 executed Ex.A.1 registered settlement deed in favour of his wife on 02.12.2002. He thereafter suffered the attachment before judgment of the said property on 31.12.2002 but never disclosed the factum of its transfer thereafter during the suit proceedings. Further, notwithstanding the said transfer, he continued to deal with the said property as his own, as is clear from the fact that he mortgaged it for availing loans long after the execution of Ex.A.1 settlement deed. In addition to this, though the second respondent/judgment debtor and the appellant/claimant asserted that there were no amicable relations between them, no evidence was adduced to prove the same and on the other hand, the very fact that the second respondent/judgment debtor continued to deal with the property long after executing the settlement deed in his wife's favour showed that their relations were, in fact, amicable.

In the light of these established facts, the lower appellate Court was justified in drawing an inference that Ex.A.1 settlement deed was hurriedly executed only for the purpose of defeating the suit claim of the first respondent/decreed holder. Such a transfer was therefore clearly a fraudulent transfer in terms of Section 53 of the Act of 1882. The judgment and decree of the lower appellate Court holding to this effect therefore does not warrant interference, be it on facts or in law. Consequently, no question of law, much less a substantial question of

law, arises for consideration in this second appeal.

The second appeal is devoid of merit and is accordingly dismissed. Interim order dated 19.06.2015 shall stand vacated. Pending miscellaneous petitions, if any, shall also stand dismissed. No order as to costs.

SANJAY KUMAR, J

04th SEPTEMBER, 2015

Note: L.R. copy to the marked.
B/o Svv

[\[1\]](#) AIR 1963 Supreme Court 1150

[\[2\]](#) ILR 43 Madras 760

[\[3\]](#) 1990(2) The Law Summary 41 = (1991) 1 SCC 715

[\[4\]](#) 2004(1) ALT 655