

THE HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

CIVIL MISCELLANEOUS SECOND APPEAL No.27 OF 2008

JUDGMENT:

The decree holder in E.P.No.27 of 2003 in O.S.No.502 of 2001 and the 1st respondent in E.A.No.402 of 2005 on the file of Principal Junior Civil Judge, Kavali, preferred this appeal, aggrieved by the judgment, dated 15.04.2008, in A.S.No.25 of 2007 passed by the Senior Civil Judge, Kavali, whereunder the claim petition filed by the 1st respondent herein was allowed.

During pendency of the appeal, the 2nd respondent – Shaik Jilani Baasha, S/o.Patchmia, R/o.Maddurupadu Village, Kavali Mandal, died and his legal representatives were brought on record as respondents 3 and 4 vide order dated 03.02.2012 in C.M.S.A.M.P.No.64 of 2011.

For the convenience of reference, the parties herein will be referred to as arrayed before the trial Court in E.A.No.402 of 2005.

The claim petitioner – Shaik Jilani Basha, S/o.Patchamia, aged about 44 years, R/o.Trunk Road, Kavali, filed a petition under Order XXI Rule 58 C.P.C. claiming that the property in question is purchased from one Shaik Masthan Saheb, S/o.Khaja Saheb of Kavali under a registered sale deed, dated 12.03.1998. Since then he has been in peaceful possession and enjoyment of the same by paying property tax and electricity consumption charges to the authorities concerned and availed loan from State Bank of Hyderabad, Kavali. Thus, he is the owner of the property but the decree holder/1st respondent without any lawful entitlement brought this property to sale after attachment and, therefore, sought to raise attachment raising a specific objection on the attachment.

The decree holder filed counter contending that the 2nd respondent is the brother of the claim petitioner. He admitted that originally the schedule property belongs to Shaik Masthan Saheb and denied the purchase of the property by the claim petitioner under registered sale deed, dated 12.03.1998, and also his continuing in possession and enjoyment of the property including the mortgage of the property to the State Bank of Hyderabad. It is specifically contended that the property was mortgaged by impersonation by the 2nd respondent, who is none other than the brother of the petitioner. Therefore, the said mortgage is not valid. However, it is a collusive petition between the claim petitioner and the 2nd respondent, who are the brothers, and, therefore, not entitled to claim any relief more particularly to raise attachment over the schedule property and finally prayed to dismiss the petition.

The 2nd respondent filed counter totally supporting the petitioner's claim and, therefore, the specific contentions urged by him are not relevant for deciding the present controversy.

During the course of enquiry, PWs.1 to 3 were examined and Exs.P1 to P3 were marked. On behalf of the respondents, RWs.1 to 4 were examined and Ex.R1 was marked. Exs.X1 to X4 were also marked.

Upon hearing argument of both the learned counsel and considering the oral and documentary evidence available on record, the Principal Junior Civil Judge, Kavali, dismissed E.A.No.402 of 2005 holding that the claim petitioner is not entitled to claim relief of raising attachment over the schedule property on the ground that the 2nd respondent was the purchaser of the property.

Aggrieved by the same, the claim petitioner preferred A.S.No.25

of 2007 before the Senior Civil Judge, Kavali. The learned Judge upon hearing the argument of both the counsel, allowed the appeal.

Feeling aggrieved by the judgment, dated 15.04.2008 in A.S.No.25 of 2007 passed by the Senior Civil Judge, Kavali, the decree holder/1st respondent before the trial Court preferred the present appeal on various grounds and raised a substantial question of law. The only point that arises for consideration is:

Whether the reversal of the order passed by Principal Junior Civil Judge, Kavali by the Senior Civil Judge, Kavali is in accordance with law?

POINT:- Admittedly, the claim petitioner and the 2nd respondent are brothers and sons of Patchamia, but they are residing at different places. The claim petitioner is resident of Trunk Road, Kavali, near Ramakrishna Hotel, whereas the 2nd respondent is resident of Maddurupadu Village, Kavali Mandal, Nellore District. The only contention of the decree holder/1st respondent before the trial Court and the appellate Court and before this Court is that the 2nd respondent – Shaik Jilani Basha, aged about 52 years, R/o.Maddurupadu Village, Kavali Mandal, Nellore District, alone is the purchaser of the property under registered sale deed, dated 12.03.1998, which is marked as Ex.P1, and taking advantage of the similar name of the claim petitioner, the decree holder filed the present appeal.

Ex.P1 is the sale deed, dated 12.03.1998, for an amount of Rs.76,800/- executed by Shaik Mastan Saheb in favour of Shaik Jilani Basha, S/o.Patchamia, carrying on old iron scrap business in Vayunandana Press Street, Kavali Town, Nellore District. Thus, by the time of execution of Ex.P1, Shaik Jilani Basha, who is carrying on iron scrap business purchased the property under Ex.P1, whereas the

2nd respondent is resident of Maddurupadu Village, carrying on hotel business. Therefore, both the claim petitioner and the 2nd respondent are residents of two different places. However, Ex.P1 disclosed that the property was purchased by Shaik Jilani Basha, resident of Kavali Town, Nellore District. Hence, the person who purchased the property might be the claim petitioner alone, but not the 2nd respondent.

Besides Ex.P1, the claim petitioner produced Exs.P2 and P3, house tax receipts and bank pass books. These two documents also does go to establish that the property was mortgaged with the concerned authority. Ex.X1 to X4 are the police complaint receipts, Stamped letter and ration card. All these documents cumulatively establish that the claim petitioner is the owner of the property having purchased the same under Ex.P1, dated 12.03.1998. If really Shaik Jilani Basha, resident of Maddurupadu Village, Kavali Mandal, purchased the property, his address would have been mentioned in Ex.P1 as a purchaser. It is the contention of the appellant before this Court that earlier, the 2nd respondent was the resident of Kavali Town, and later shifted to Maddurupadu Village. But this was not raised in the counter and for the first time this contention is urged before this Court without any foundation in the pleadings. Hence, the same cannot be accepted.

On perusal of the entire material on record, the claim petitioner could establish that he purchased the schedule property under Ex.P1 for a sum of Rs.76,800/- and he is in peaceful possession and enjoyment of the same by paying property tax and electricity charges to the Municipality and Electricity Department separately. But the decree holder herein attached the property belonging to him and therefore the claim petitioner is entitled to raise objection about attachment of property for realization of the decree debt due to the decree holder by the 2nd respondent/judgment debtor.

As the claim petitioner is able to establish his *prima facie* title to the property, the attachment of property belonging to him is illegal and it cannot be sold in execution of decree for realization of money due under the decree. The appellate Court upon reappraisal of entire evidence more particularly the identity of the purchaser under Ex.P1 rightly held that *prima faice* the claim petitioner is the purchaser of the property and allowed the appeal setting aside the order and decree, dated 02.07.2008, in E.A.No.402 of 2005 in E.P.No.27 of 2003 in O.S.No.502 of 2001 passed by the Principal Junior Civil Judge, Kavali. Even after discerning the material, this Court being the second appellate Court, finds no legal infirmity in the judgment passed by the Senior Civil Judge, Kavali, warranting interference by this Court and the appeal is devoid of any merit.

The Civil Miscellaneous Second Appeal is, accordingly, dismissed, but the claim petitioner may agitate his legal right in any other forum subject to permissibility under law. There shall be no order as to costs.

Miscellaneous Petitions, if any, pending in the appeal shall stand closed.

M.SATYANARAYANA MURTHY, J

22.06.2015

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