

THE HONOURABLE SRI JUSTICE A.V.SESHA SAI

CRP No.3027 of 2009

Oral Order :

Plaintiffs in O.S.No.46 of 2009 on the file of the Court of the I Additional Chief Judge, City Civil Court, Secunderabad are the petitioners in the present Civil Revision Petition filed under Article 227 of the Constitution of India. This revision assails the order dated 12.6.2009 passed by the said Court in I.A.No.852 of 2009 in O.S.No.46 of 2009.

Heard the learned counsel for the petitioners and the learned counsel for the respondents, apart from perusing the material available before this Court.

The petitioners herein earlier filed R.C.C.No.185 of 2000 against the respondents herein for eviction before the Principal Rent Controller, Secunderabad on the grounds of bona fide requirement, acts of waste and default in payment of rents.

The learned Rent Controller, Secunderabad by way of order dated 19.4.2002 allowed the said RCC, ordering eviction of the respondents. As against the

said order, the respondents herein filed R.A.No.195 of 2004 before the appellate authority-cum-Chief Judge, City Small Causes Court, Hyderabad. The respondents herein deposited the amounts as directed by the learned Rent Controller before filing the appeal before appellate authority. The appellate authority-cum-Chief Judge, City Small Causes Court, Hyderabad allowed the said appeal by way of order dated 21.7.2005 in R.A.No.195 of 2004. Thereafter, the petitioners herein filed CRP No.3843 of 2005 before this Court and this Court dismissed the same on 10.9.2008, granting liberty to the petitioners to file suit for eviction.

Thereafter, the petitioners herein instituted the present O.S.No.46 of 2009 on the file of the Court of the I Additional Chief Judge, City Civil Court, Secunderabad for eviction of the respondents, for damages and for future mesne profits. In the said OS.No.46 of 2009, the petitioners herein filed the present I.A.No.852 of 2009 under Order 38 Rule 5 and Order 21 Rule 52 read with Section 151 CPC., seeking orders for withholding the amount of Rs.1,60,000/- deposited by the respondents before the appellate authority at the time of preferring the

R.A.No.195 of 2004. The respondents opposed the said application by filing counter. The learned Judge, on consideration of material on record, dismissed the said I.A.No.852 of 2009, by way of order dated 12.6.2009, which is under challenge in the present revision petition.

The submissions of the learned counsel for the petitioners are –

- 1) The order under challenge is erroneous, contrary to law and opposed to the very spirit and object of provisions of Order 38 Rule 5 and Order 21 Rule 52 CPC.
- 2) The Court below should have taken into consideration the dismissal of O.S.No.264 of 2002 instituted by the respondents for partition of the schedule property and should have allowed the application to protect the interests of the petitioners, pending the present suit.
- 3) The reasons assigned by the Court below for dismissal are neither valid nor convincing.
- 4) In the event of success of the petitioners in the suit, it would be highly

difficult to recover the arrears from the respondents.

The submissions of the learned counsel for the respondents are –

- 1) There is no error nor there exists any infirmity in the impugned order and in the absence of the same, the revision petition is not maintainable and, the order under challenge is not amenable for judicial review by this Court.
- 2) The very basis for seeking the relief in the present application is dismissal of suit O.S.No.264 of 2002 instituted by the respondents for partition and in fact the said suit was dismissed for non-prosecution and the same cannot be construed as recognition of rights of the petitioners in the schedule property.
- 3) The order of eviction passed by the learned Rent Controller was set aside by the learned Chief Judge in R.A.No.195 of 2004 and the same was confirmed by this Court in CRP No.3843 of 2005 by an order dated 10.9.2008.
- 4) Since the title of the petitioners in respect of the schedule property is under dispute, without any enquiry in the main suit, the petitioners herein are not entitled for relief sought for in the

present I.A. and the same is contrary to spirit of Section 12(2) and Order 20 and 12 of CPC.

- 5) Since the order which directed the respondents to deposit the amount was also set aside, the request of the petitioners cannot be considered.

In support of his contentions, the learned counsel for the respondents placed reliance on the decisions of the Supreme Court in **SHEODAN SINGH V. DARYAO KUNWAR**^[1], **GANGABAI V. CHHADUBAI**^[2], and decision of the Division Bench of this Court in **YERRAM KRISHNA RAO V. MUTTAMALLA NARASAMMA**^[3].

In the above background, the issues that emerge for consideration by this Court are –

- 1) Whether the order under challenge is in accordance with law ?
- 2) Whether the impugned order warrants any interference of this Court ?

The information available before this Court vividly reveals that the parties to the lis are closely related and the 1st respondent (since deceased) is none other than the paternal uncle of the petitioners.

According to the petitioners, their father one Shanker purchased the house property and inducted his brother, deceased 1st respondent, in one of the portions in the said house and that the respondents have no right in the property. On the other hand, it is the case of the respondents that the respondents are also entitled for the share in the property and the said house is ancestral property.

There is absolutely no controversy on the reality that earlier, the petitioners filed RCC No.185 of 2000 praying for eviction of the respondents on the ground of bona fide requirement, wilful default and acts of waste and the same was allowed by the Rent Controller and against which the respondents filed RA No.195 of 2004 before the appellate authority and the appellate authority allowed the said appeal, setting aside the order of eviction passed by the primary authority and the same was confirmed by this Court in Civil Revision Petition No 3843 of 2005 dated 10.9.2008. As a condition precedent, for filing the said Rent Control Appeal, the respondents deposited an amount of Rs.1,60,000/-. According to the learned counsel for the petitioners, since the Rent Controller arrived at

the said amount towards arrears of rent and since the suit instituted by the respondents for partition was dismissed, the said amount should go to the petitioners.

In the considered opinion of this Court, the said contention can neither be approved nor countenanced in view of the reason that the order of eviction passed by the learned Rent Controller was set aside by the appellate authority and the same was confirmed by this Court in CRP No.3843 of 2005 dated 10.9.2008. Another significant aspect is that O.S.No.264 of 2002 filed by the respondents herein on the file of the Court of the III Additional Senior Civil Judge, City Civil Court, Secunderabad was dismissed for non-prosecution on 26.7.2005, and not on merits. A copy of the said judgment is also placed on record. In the considered opinion of this Court dismissal of the said suit, instituted by the respondents herein for partition for non-prosecution, does not automatically enure to the benefit of the petitioners herein in the absence of any adjudication in the said suit on the rights of the parties. In this context, it would be appropriate to refer to the decisions of the honourable Supreme Court and the Division Bench of this Court, cited by

the learned counsel for the respondents.

In SHEODAN SINGH (1 supra) the it was held by the Supreme Court that –

“ Re. (iv).

This brings us to the main point that has been urged in these appeals, namely, that the High Court had not heard and finally decided the appeals arising out of suits Nos. 77 and 91. One of the appeals was dismissed on the ground that it was filed beyond the period of limitation while the other appeal was dismissed on the ground that the appellant therein had not taken steps to print the records. It is therefore urged that the two appeals arising out of suits Nos. 77 and 91 had not been heard and finally decided by the High Court, and so the condition that the former suit must have been heard and finally decided was not satisfied in the present case. Reliance in this connection is placed on the well-settled principle that in order that a matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former suit was dismissed by the trial court for want of jurisdiction, or for default of plaintiff's appearance, or on the ground of non-joinder of parties or misjoinder of parties or multifariousness, or on the ground that the suit was badly framed, or on the

ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any), the decision not being on the merits would not be res judicata in a subsequent suit. But one of these considerations apply in the present case, for the Additional Civil Judge decided all the four suits on the merits and decided the issue as to title on merits against the appellant and his father. It is true that the High Court dismissed the appeals arising out of suits Nos. 77 and 91 either on the ground that it was barred by limitation or on the ground that steps had not been taken for printing the records. Even so the fact remains that the result of the dismissal of the two appeals arising from suits Nos. 77 and 91 by the High Court on these grounds was that the decrees of the Additional Civil Judge who decided the issue as to title on merits stood confirmed by the order of the High Court. In such a case, even though the order of the High Court

may itself not be on the merits, the result of the High Court's decision is to confirm the decision on the issue of title which had been given on the merits by the Additional Civil Judge and thus in effect the High Court confirmed the decree of the trial court on the merits, whatever may be the reason for the dismissal of the appeals arising from suits Nos. 77 and 91. In these circumstances though the order of the High Court itself may be not be on the merits, the decision of the High Court dismissing the appeals arising out of suits Nos. 77 and 91 was to uphold the decision on the merits as to issue of title and therefore it must be held that by dismissing the appeals arising out of suits Nos. 77 and 91 the High Court heard and finally decided the matter for it confirmed the judgment of the trial court on the issue of title arising between the parties and the decision of the trial court being on the merits the High Court's decision confirming that decision must also be deemed to be on the merits. To hold otherwise would make res judicata impossible in cases where the trial court decides the matter on merits but the appeal court dismisses the appeal on some preliminary ground thus confirming the decision of the trial court on the merits. It is well-settled that where a decree on the merits is appealed from, the decision of the trial court loses

its character of finality and what was once res judicata again becomes res subjudice and it is the decree of the appeal court which will then be res judicata. But if the contention of the appellant were to be accepted and it is held that if the appeal court dismisses the appeal on any preliminary ground, like limitation or default in printing, thus confirming in toto the trial court's decision given on merits, the appeal court's decree cannot be res judicata, the result would be that even though the decision of the trial court given on the merits is confirmed by the dismissal of the appeal on a preliminary ground there can never be res judicata. We cannot therefore accept the contention that even though the trial court may have decided the matter on the merits there can be no res judicata if the appeal court dismisses the appeal on a preliminary ground without going into the merits, even though the result of the dismissal of the appeal by the appeal court is confirmation of the decision of the trial court given on the merits. Acceptance of such a proposition will mean that all that the losing party has to do to destroy the effect of a decision given by the trial court on the merits is to file an appeal and let that appeal be dismissed on some preliminary ground, with the result that the decision given on the merits also

becomes useless as between the parties. We are therefore of opinion that where a decision is given on the merits by the trial court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing, it must be held that such dismissal when it confirms the decision of the trial court on the merits itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal.”

In GANGABAI's case (2 supra), it was held by the Supreme Court, at paragraph 9, as follows :

“ It seems to us that when a finding as to title to immovable property is rendered by a Court of Small Causes res judicata cannot be pleaded as a bar in a subsequent regular civil suit for the determination or enforcement of any right or interest in immovable property. In order to operate as res judicata the finding must be one disposing of a matter directly and substantially in issue in the former suit and the issue should have been heard and finally decided by the court trying such suit. A matter which is collaterally or incidentally in issue for the purposes of deciding the matter which is directly in issue in the case cannot be made the basis of a plea of res judicata. It has long been held that

a question of title in a Small Cause suit can be regarded as incidental only to the substantial issue in the suit and cannot operate as res judicata in a subsequent suit in which the question of title is directly raised. Poholi Mullick v. Fukeer Chunder Patnaik, (1874) 22 Suth WR 349, Chet Ram and others v. Ganga, 1886 All WN 44, Anwar Ali v. Nur-UI-Haq (1907) 4 All LJ 517, Khandu valad Keru v. Tatia valad Vithoba. (1871) 8 Bom HC AC 23(24). See also Mohd. Yusuf and another v. Abdul Wahid AIR 1948 All 296 and S.A.A. Annamallai Chettiar v. Molaiyan and others AIR 1970 Mad 396. Our attention has been drawn to Explanation VIII to s. 11 in the Code of Civil Procedure recently inserted by the Code of Civil Procedure (Amendment) Act, 1976. Section 97(3) of the Amendment Act declares that the new provision applies to pending suits, proceedings, appeals and applications. In our opinion the Explanation can be of no assistance, because it operates only where an issue has been heard and finally decided in the earlier suit.”

The Division Bench of this Court in YERRAM KRISHNA RAO (3supra) held as follows:

“ In Gangabai’s case (supra), the Supreme Court held that the bar imposed by sub-section

(1) of Section 92 applies only when a party seeks to rely upon a document embodying the terms of the transaction. In that event, the law declares that the nature and intent of the transaction must be gathered from the terms of the document itself and no evidence of any oral agreement or statement can be admitted as between the parties to such document for the purpose of contradicting or modifying its terms. The sub-section is not attracted when the case of a party is that the transaction recorded in the document was never intended to be acted upon at all between the parties and that the document is a sham. Such a question arise when the party asserts that there was a different transaction altogether and what is recorded in the document was intended to be of no consequence whatever. For that purpose oral evidence is admissible to show that the document executed was never intended to operate as an agreement but that some other agreement altogether, not recorded in the document was entered into between the parties.”

In the main suit, the respondents filed written statement, claiming right in the schedule property

and unless full fledged enquiry takes place in the suit as to the mesne profits and unless the petitioners establish their exclusive right in the schedule property, the petitioners are not entitled to the relief claimed. In fact, the trial Court, after taking into account of all these aspects, rightly dismissed the I.A. It is a settled law that unless the impugned order suffers from patent perversity or illegality, interference of this Court under Article 227 of constitution of India is not warranted. Having regard to the principle laid down in the above referred judgments, this Court does not find any justification to meddle with the impugned order. Accordingly the Civil Revision Petition is dismissed as being devoid of merits. No costs.

Having regard to the fact that the suit was instituted in the year 2009, the trial Court shall make endeavour to dispose of the main suit itself as expeditiously as possible preferably within a period of six months from the date of receipt of copy of this order, uninfluenced by any of the observations made by it in the impugned order or by this Court in this order, as per law. Miscellaneous petitions pending, if any, shall stand closed.

JUSTICE

A.V.SESHA SAI

Dt: 16.8. 2016

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- [\[1\]](#) AIR 1966 SUPREME COURT 1332
[\[2\]](#) AIR 1982 SUPREME COURT 20
[\[3\]](#) 2009 (2) ALT 631 (D.B.)