

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

Civil Revision Petition No.2364 of 2013

ORDER:

This civil revision petition under Section 115 of the Code of Civil Procedure, 1908 by the 2nd judgment debtor is directed against the order dated 18.03.2013 of the learned Senior Civil Judge, Huzurabad passed in E.A.no.51 of 2012 in E.P.no.20 of 2011 in O.S.no.52 of 2008 filed under Section 151 of the Code requesting to set aside the *ex parte* proceedings in E.P.no.20 of 2011.

2. I have heard the submissions of the learned counsel for the revision petitioner/2nd judgment debtor ('2nd JDr', for brevity) and the learned counsel for the respondents/Decree Holders (DHrs', for brevity). I have perused the material record.

3. The case of the 2nd JDr in support of his request, in brief, is this:

No notice in the execution petition is served on the 2nd JDr. Therefore, he has no knowledge of the execution proceedings. He was suffering from ill-health and heart disease. He is bed ridden. The DHrs/plaintiffs/respondents 1 to 3 and the JDrs 1, 3 and 4 formed into one group in order to deprive the vested rights of this judgment debtor and his interest in the suit properties. Therefore, a collusive suit for partition was filed. They all had committed fraud upon the court and on the 2nd JDr. They have managed to obtain an *ex parte* decree without the knowledge of this judgment debtor and without information to him. On obtaining such a decree, the present E.Pno.20 of 2011 was filed. Even without notice in the execution proceedings, the execution proceedings are being taken up. This judgment debtor is suffering the consequences. Hence, the aforementioned petition is filed to set aside the *ex parte* proceedings in the execution petition and to enable the said judgment debtor to participate in the execution proceedings and contest the same. The 2nd JDr had already filed an interlocutory

application on the original side for setting aside the *ex parte* preliminary decree and the final decree passed in the suit. The final decree is not yet drawn/engrossed on non-judicial stamp, which was purchased as per the orders dated 19.04.2011 of the court below. Since the final decree is not drawn on non-judicial stamp papers, the said final decree has to be discarded.

4. The case of the DHrs, in brief, is this:

The material allegations in the affidavit of the 2nd JDr are false. No notice is served on the 2nd JDr in the execution petition is false. As per the proceedings in the EP and as per the report of the Bailiff, the 2nd JDr has refused to receive the notice. His refusal to take notice had happened in the presence of the village elders. The 2nd JDr had received notice in I.A.no.342 of 2008 filed in the original suit and therefore, the proceedings of the court would reveal that he has knowledge regarding passing of the order in I.A.no.342 of 2008 and also the injunction orders and all further proceedings. Having received notice, the 2nd JDr had intentionally failed to contest the matter and had filed a false affidavit to delay the proceedings and defeat the decree obtained by the DHrs. The allegations that he is suffering from ill-health and heart disease and that he is bed ridden are all false. The allegations that the DHrs and the 1st judgment debtor had formed into a group and had played fraud on the 2nd JDr and had obtained an *ex parte* decree by playing fraud on the Court are all false allegations. As the 2nd JDr did not choose to contest the suit and the final decree proceedings, the preliminary decree and the final decree were passed and they have become final. The petition is liable to be dismissed.

5. On merits, the Court of execution had dismissed the petition of the 2nd judgment debtor. Therefore, the 2nd judgment debtor is before this Court.

6. The learned counsel for the 2nd JDr would contend as follows: “The *ex parte* decree in the partition suit was passed on 18.11.2009. The

execution petition was filed along with the final decree. Without issuing notice in the execution petition and without due service of notices, the executing Court had proceeded with the execution proceedings. The service of summons in the suit was managed. This 2nd JDr is not having knowledge of passing of the preliminary decree and the final decree. The Court below ought to have seen that the JDrs 1, 3 and 4 have colluded with the plaintiffs (D.Hrs) to defeat the rights and interests of the 2nd JDr in respect of the suit schedule properties and had collusively brought the suit for partition and had obtained an *ex parte* decree without service of summons on the 2nd JDr and without his knowledge. No opportunity was given to the 2nd JDr to contest the execution proceedings. No injunction order copy was either served on the 2nd JDr or was a fair opportunity given to contest the suit. The alleged service of summons and notices on this 2nd JDr was purely managed by the plaintiffs/DHrs. The registered post covers clearly show that the 2nd JDr had refused to receive the same. Hence, there is no actual service of notice in the execution petition. The refusal endorsement on the notices sent by registered post shall not be deemed as proper service as such endorsements are managed.”

7. On the other hand, the learned counsel for the DHrs had supported the orders of the Court below by reiterating the contentions of the DHrs, which are already stated supra.

8. A perusal of the affidavit filed in support of the petition would show that the averments in the affidavit filed in support of the petition are made in a casual manner. Except complaining that the plaintiffs/DHrs and some of the other defendants/JDrs had colluded together and had brought the suit and that the DHrs had thus obtained an *ex parte* decree, no necessary details are pleaded in the affidavit. It is not stated as to when the 2nd JDr came to know about the *ex parte* preliminary decree or the final decree proceedings and the final decree. It is not even stated as to when and how the 2nd JDr has come to know about the execution proceedings when he is neither served with the

summons in the suit nor notice in the final decree proceedings and also notices in the execution proceedings. On one hand, it is contended that no summons or notices are served and on the other, it is contended that the refusal endorsement on the notices is managed by the plaintiffs. The Court below having perused the material record including the registered post covers whereby notices were sent had observed in the orders impugned that the petitioner/2nd JDr had refused to receive the notices sent by registered post and that the cover sent by registered post was returned with an endorsement 'refused' and therefore, there is no force in the contention of the 2nd JDr that no notice in the execution proceedings was served upon him. The Court below, having noted that neither adequate details nor reasons are assigned in support of the request for setting aside the *ex parte* orders and that the 2nd JDr had failed to file any medical record to show that he is unwell and bed-ridden had recorded a final finding that there is no merit in the petition filed by the 2nd JDr to set aside the *ex parte* order in the execution proceedings. It is to be noted that as per the observations in the orders of the Court below, the aforementioned petition for setting aside the *ex parte* proceedings in the execution petition is filed at a very belated stage at the time of the delivery of EP schedule property, as per the terms of the decree. The *ex parte* decree was passed on 18.11.2009 in a suit for partition. Subsequently, a final decree was passed. The execution petition was filed in the year 2011. At the stage of delivery of possession, the aforementioned E.A.51 of 2012 was filed for setting aside the *ex parte* proceedings in the execution petition, that too, at a stage, when the execution proceedings had reached the stage of delivery of property. In such circumstances, it is for the 2nd JDr to furnish all the necessary details in his affidavit as to when he has come to know about the *ex parte* preliminary decree in the suit, the final decree that was subsequently passed and also the execution proceedings, and also as to why he could not file the aforementioned petition at an earliest stage of the matter. However, the affidavit is conspicuously silent on all material aspects. Further, it is the case of the 2nd JDr that he had already filed an interlocutory application on the original side for setting aside the *ex parte*

preliminary decree and the final decree passed in the suit. If really he has a tenable defence, he ought to have preferred an appeal at least against the final decree, if not against the preliminary decree after having come to know of the same. He did not do so. Having alleged that fraud was played upon him and the Court below, he did not substantiate the said ground.

9. Viewed thus, this Court finds that there is no merit in the revision and that the order of the Court below does not brook interference.

10. In the result, the Civil Revision Petition is dismissed. There shall be no order as to costs.

Miscellaneous petitions, if any, pending in this revision shall stand closed.

M. SEETHARAMA MURTI, J

01st June, 2016
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