

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA PRADESH**

CIVIL REVISION PETITION Nos.1581 & 1630 of 2015

Between:

CRP.No.1581 of 2015

Tatineni Subash Chandra Bose

.....Petitioner

and

Alla Satya Veera Pothuraju and another

.....Respondents

CRP.No.1630 of 2015

Bodempudi Sujani

.....Petitioner

and

Alla Satya Veera Pothuraju and another

.....Respondents

Date of Judgment pronounced on : 26-12-2016

HON'BLE DR. JUSTICE B. SIVA SANKARA RAO

1. Whether Reporters of Local newspapers : Yes/No
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : Yes/No
to Law Reporters/Journals:
3. Whether The Lordship wishes to see the fair copy : Yes/No
Of the Judgment?

*** HON'BLE DR. JUSTICE B. SIVA SANKARA RAO****+ CIVIL REVISION PETITION Nos.1581 & 1630 of 2015**

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< GIST:**> HEAD NOTE:**

! Counsel for the petitioner : Smt. Deepika Gadde

^ Counsel for the respondents : Sri M.R.S. Srinivas

? Cases referred

1. AIR 1963 SC 1150
2. A.S.No.854 of 1998 dated 19.03.2014
3. AIR 2012 SC 1727
4. AIR 1960 SC 335
5. AIR 1954 Bombay 95
6. AIR 1956 SC 593,para 23 page 602
7. AIR 1971 Mad 184
8. 2015 (6) ALT 634
9. AIR 1956 SC 593,para 23 page 602
10. AIR 1965 SC 241 at para 17&18
11. AIR 1964 SC 880 (from AIR 1958 AP 131)
12. 1952(2) MLJ-448
13. AIR 1961 patna Page 158
14. AIR 2004 SC 1257=2004(1) SCC page 581

HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO**CIVIL REVISION PETITION Nos.1581 and 1630 of 2015****COMMON ORDER:**

The respective revision petitioner are the sole plaintiff respectively by name TSC Bose in both the suits viz; O.S.No.505 of 2009 and O.S.No.72 of 2008 filed by him for recovery of Rs.42,72,330/- and Rs.15,48,199/- respectively with interest and costs against the self-same defendant (J.Dr.) by name A.S.V. Pothuraju and said suits were decreed on 30.07.2012 and 23.10.2009 respectively and in pursuance to said decrees, the respective revision petitioner (decree holders) filed E.P.No.100 of 2012 and 74 of 2012 respectively under Order XXI Rules 64 and 65 CPC, against the J.Dr. and by not showing son of the J.Dr./3rd party to the two suits as 2nd respondent in both the Execution Petitions, even the contest of J.Dr. was that he settled the property in favour of his son for proclamation and sale of the E.P. schedule property, which was attached before judgment in both the suits, to realize from the sale proceeds the respective decree debts by the D.Hrs.

2. It was after filing of sale papers and upon verification of the record by the executing Court, it was noticed about the non-compliance of Order 21 Rule 14 CPC and therefrom on 25.11.2013, directed the D.Hr. to comply the same by filing certificate of transferable interest of the J.Dr. over the property and taxes due if any to the revenue department. It was on compliance noticed from memo of D.Hr. the property stands in the name of son of J.Dr. by name Gowtham, the executing Court directed notice before

proclamation if any and settlement of terms to ascertain value of the property. The son of J.Dr. appeared and permitted to lead evidence by order dated 07.07.2014 to decide his claim if any else the salable interest of J.Dr. for D.Hr. to bring the property to sale. D.Hr. deposed as PW.1 and relied upon Exs.A1 to A4 and the son of J.Dr. (R2) deposed as RW.1 and cause examined one K.V. Sridhar as RW.2 and Exs.B1 to B8 marked. It was after hearing arguments from said evidence and on contest the learned II Additional District Judge, West Godavari at Eluru, dismissed the respective Execution Petitions and said D.Hr. respectively having been aggrieved preferred both the revisions impugning the respective orders, with the similar contentions in the grounds of two revisions.

3. The contentions in the revision grounds and oral submissions are that the lower Court acted illegally in ordering notice and calling upon D.Hr. to comply with Order XXI Rule 14 by filing certificate of J.Dr's transferable interest and tax dues if any to the revenue Department when the Court has already decided to proceed with the respective Execution Petitions by order dated 03.04.2013 by disbelieving the contention of J.Dr. as to the absence of his salable interest in the E.P. schedule property. The lower Court further acted illegally by once again issuing notice on 06.03.2014 to the J.Dr. and his son, as it is evident and the issue has already been decided that the E.P. Schedule property belongs to J.Dr. only but he has executed a settlement deed in favour of his son (who is 3rd party to the present proceedings) and subsequently the J.Dr. has cancelled the settlement deed, as such the title and salable interest in the property vests in the J.Dr. only. The lower

Court ought to have seen that even as per the objections raised by the son of J.Dr., the property belongs to J.Dr. only and that the J.Dr. executed a settlement deed in favour of his minor son and later cancelled which goes to show that the property belongs to J.Dr. only in view of the cancellation, and also prior to it, the J.Dr. alone has got salable interest in E.P. Schedule property. The lower Court ought to have seen that once it is accepted that the J.Dr. has got right and title to convey the property to his minor son, it must also be accepted that he has got power to revoke conveyance of the property and his son cannot claim any independent right or vested interest in the property, merely because the entries were not affected by revenue authorities. The lower Court ought to have seen that the Court executing Decree cannot go beyond the decree. The lower Court acted illegally in issuing notice and calling for objections from third parties to the proceedings more so when the issue is already decided and proceeded with the Execution Petition. The lower Court ought to have seen that the J.Dr. himself has set up his son as third party to defeat the claims of the D.Hr. and to defraud the creditors. The lower Court ought to have seen that the J.Dr. has executed a settlement deed in favour of his minor son for a brief period for defeating the rights of certain creditors. The Court below failed to see that the order dated 03.04.2013 was not challenged by the J.Dr. and as such the same is final. The lower Court ought to have seen that there is an attachment before judgment in respect of the E.P. Schedule property right from beginning of the suit since 2009 and the same was made absolute in the E.P. proceedings and the J.Dr. never claimed that he has no

right over the attached property, hence to allow the revision by setting aside the order in the E.P.No.505 of 2009 impugned herein.

4. The crucial and relevant factors arisen in the Execution Petitions in brief are that the EP Schedule property originally belongs to one Alla Satyanarayana, the grand father of J.Dr. and the J.Dr. got it by virtue of bequeaths in the registered will, document No.102 of 1999 dated 15.04.1999 and thereby the property absolutely belongs to J.Dr. The J.Dr. has executed a settlement deed dated 29.03.2001 registered No.2620 of 2001 in favour of his son RW-1-Alla Naga Gowtham (who is third party to the suit proceedings) and subsequently the J.Dr. has cancelled that settlement deed by revocation deed dated 03.03.2008 registered document No.582 of 2008. The attachment before judgment of the said property was by order dated 04.11.2008 in I.A.No.2593 of 2008 in O.S.No.72 of 2008 and similarly in I.A.No.3005 of 2009 in O.S.No.505 of 2009 on the file of III Additional Chief Judge, City Civil Court, Hyderabad dated 25.08.2009. The original will not exhibited but for so called certified copy of it as Ex.A2 dated 12.04.1995. The will is not proved of twin requirements of Section 63 of the Indian Succession Act, 1925, by examination of at least one of attestors unless shown both the attestors are no more to consider the proof otherwise and same is lacking. Once a will is not proved for admission does not confer proof even, the will cannot be relied. Once such is the case, it is the paternal grand father's property of the J.Dr. in the hands of J.Dr. and his son is the coparcenary property undivided. Once same is the case, the settlement/gift of undivided joint family property in whole or any extent is void adnitio and that does not

confer any title or right, but for at best to treat as relinquishment of the undivided interest of the father in favour of the son having other undivided interest to get the whole. Here it cannot even be, for there is no basis to execute settlement deed to treat even as relinquishment bonafide. In the absence of which, it is only for any oblique motive behind it of apparently to defraud any creditors existing or to be incurred, by screening the property, that can be suffice to hold as fraudulent transaction and thereby not binding on the D.Hr. and other creditors as per the settled expression of the Apex Court in **C. Abdul Shukoor Saheb Vs. Arji Papa Rao And Others**¹ and the recent past expression of this Court in **Dakarapu Lakshmana Swamy Vs. Maddula Narasimha Rao and others**². The learned II Additional District Judge, West Godavari at Eluru, did not advert to these crucial aspects in dismissing the respective Execution Petitions, though should have gone into in considering any entitlement of right over the property by the son of the J.Dr. Needless to say *judging includes by obligation of an impartial search for truth in the voyage of trial/enquiry for in which truth is the quest and that alone triumphs, not falsehood. Needless to say, even in case of conflict between stability and truth, truth alone preferable as truth should be the guiding star in the entire judicial process as held by the Apex Court in Maria M.S. Fernandes Vs.Erasmo J.De Sequerio*³. The Apex Court in **Mrs. Rukhmabai Vs.late Laxminarayana**⁴ at para-19 by relying upon the Privy council's expression held that, it sometimes happens that

¹ AIR 1963 SC 1150

² A.S.No.854 of 1998 dated 19.03.2014

³ AIR 2012 SC 1727

⁴ AIR 1960 SC 335

persons make statements which serve their purpose or proceed upon ignorance of the true position; and there it is not their statements, but their relations with the estate, which should be taken into consideration in determining the issue. In **Provident Investment Company Limited Vs.Court of I.T.**⁵ at para-3 speaks that Court is not confined merely to looking to the form of the transaction between the parties (in giving affect to the legal rights and obligations thereunder), but the true legal position that arises out of the document (by ignoring the form to ascertain real nature) in which the transaction was embodied and for that the Court may even look at the surrounding circumstances in construing the document. It is not in dispute that relinquishment is only giving up the joint right and not by creating any right by transfer to stranger. In fact, the settlement deed even to treat as relinquishment deed execution is not in dispute, but for it is genuine or fraudulent and as contended by the D.Hr. in claiming rights saying the J.Dr. alone got absolute rights and the document is a sham and nominal or fraudulent one as the case may be and not intended to act upon, cannot then again though rely on cancellation of the settlement deed, for right once vested will not divest, unless shown fraudulent and not binding as also can be seen of what is laid down the distinction in this regard by the three Judge Bench of the Apex Court long back in **Nagubai Ammal Vs.B.shyam Rao**⁶. No doubt as held in **Abdul Kareem Vs.Zuleika bi**⁷ (referring to AIR 1918 Cal. 786) that where a gift is made by a father to his infant son, no change of possession is necessary, the principle is that the

⁵ AIR 1954 Bombay 95

⁶ AIR 1956 SC 593,para 23 page 602

⁷ AIR 1971 Mad 184

declaration of gift is deemed to change the possession by the father on his own account into possession as a guardian on his son's account). Even admission or no dispute of execution does not prove will without compliance of Section 63 of Indian Succession Act and the presumption of 30 years old document cannot be drawn to a will as per the wording of Sections 68 & 100 of Evidence Act vide decision in **Cheedella Padmavathi Vs. Cheedella Radhakrishna Murthy**⁸. However, unless the will is duly proved, the J.Dr. cannot be the absolute owner even to execute any settlement deed to his son and once proved as owner from proof as legatee of the will and further proved as not a fraudulent transaction then right vests and cannot cancel the settlement in such event for vested right does not divest unless suit filed by donor/settler showing fraudulent under Section 44 of the Evidence Act, which is different from right of creditors to impugn as fraudulent under Section 53 of the Transfer of Property Act.

5. Then from to decide, for the will is not proved to say but for J.Dr.-himself and his son having undivided interest, cannot execute settlement of undivided interest being void and then to treat as relinquishment and even then unless shown the pre-existing debts decreed for realization of the joint family property including undivided share of son also to bind if not shown tainted by Avyavaharika and no pious obligation doctrine that apply to the transaction for deletion of pious obligation by amended Hindu Succession Act, 2005 is only prospective and even then if the

⁸ 2015 (6) ALT 634

settlement is shown prior to the debt contacted or before attachment in the suit and not fraudulent to claim right by son. It is also relevant to consider that parties cannot approbate and reprobate. Even in case of election, it presupposes plurality of rights, with an intention of the party who has a right to control one or both, that one is substitute for others. The party who is to take has a choice, but he cannot enjoy the benefit of both as laid down in **Streatfield Vs.Streat field** and explained by the three judge Bench in **Nagubai Ammal Vs.B.shyam Rao**⁹ that the doctrine of election is not however confined to instruments. A person cannot say at a time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid and then turned round and say it is void for the purpose of securing some other advantage, to approbate and reprobate the transaction. In Halsbury's laws of England Vol.13, page: 454 para 572, the principle has been described as species of estoppels. The said principle is also been accepted in **C.Bwepathuma Vs.Velasine S.Kadamboli phaya**¹⁰. The decision of **Kalwadevadatham Vs. Union of India**¹¹ Full Bench of Apex Court at Para 14 held that registered partition deed between father and sons, even contended as real to protect the interest of minor sons, showing mother as guardian of said minors with averments father not living with family, there was nothing to show father ill-disposed towards the sons or actuated by desire to harm their interest, it is nothing but a nominal document with a real purpose to save the property by showing in sons shares and for no provision for debts existing by

⁹ AIR 1956 SC 593,para 23 page 602

¹⁰ AIR 1965 SC 241 at para 17&18

¹¹ AIR 1964 SC 880 (from AIR 1958 AP 131)

them to discharge, the suit as per evidence shows Nagappa (father) and his wife(mother) behind the litigation, that too, when evidence show all living together, the story of he was living away proved false and shows he was in possession of all properties even later and his showing interest in the lis by attending Court, the partition deed held never intended to act upon and not to be validated. This decision squarely applies to the present facts to conclude from what is discussed supra on the facts of the so called settlement deed even to treat as relinquishment is sham and unreal and never intended to act upon and not acted upon and the JDR never parted with possession. The decisions in **Thanubuddi Venkatappareddi Vs.Gopavarapu Brahmayya**¹² and **Rangabadi Vs.United Bank of India**¹³ also supports the conclusion; so also of the decision of the Apex Court in **Nagubai Ammal supra** where on facts of husband executed gift to wife without intention to pass title to act upon in holding as sham transaction and not intended to act upon. The decision in **Abdul Shakoor supra** is very clear of when there is nothing to show other property left to meet the debts, it shall be presumed the alienation is to defeat the creditors particularly the transaction without consideration. It is needless to say from the settled law the creditors include prospective creditors and there need not be existence of debt by the time of transfer.

6. From the above legal position coming back to facts, the lower Court has already once decided to proceed with the E.P. by orders dated 28.02.2013 disbelieving the contentions of J.Dr. as to absence of his salable interest in respect of the E.P. Schedule

¹² 1952(2) MLJ-448

¹³ AIR 1961 patna Page 158

property, the contention of the 3rd party (son of J.Dr.) is that observations as to absence of his title were made in his absence and execution of settlement deed was done several years prior to attachment and the cancellation of settlement deed by the J.Dr. is a unilateral transaction, hence, it will not bind him and as on the date of attachment of the property, the J.Dr. was not possessing salable interest and he (3rd party son of J.Dr.) was possessing clear title and therefore, the E.P. Proceedings in respect property owned by the third party does not sustain. The lower Court by orders dated 28.02.2013 ordered for filing of sale papers and encumbrance certificates for proceeding further with the execution petition and after filing of sale papers, the lower Court on 25.11.2013 by its order directed the D.Hr. to comply Order XXI Rule 14 CPC by filing certificate of J.Dr's. transferable interest and tax dues if any to the Revenue Department and in compliance of which, the D.Hr. filed a memo stating that the property is standing in the name of one Alla Naga Gowtham, Son of J.Dr. but the property belongs to J.Dr., however, the lower Court on 06.03.2014 directed notice to the J.Dr. and son of J.Dr. considering the scope of Order XXI Rule 66 and Rule 54 of C.P.C. As the D.Hr. filed certificate issued by the Tahasildar filed in compliance of Order XXI Rule 14 disclosed the name of son of J.Dr. in respect of the property in question, the notice was ordered to the J.Dr. and his son to avoid multiplicity of litigation and to protect interest if any of the 3rd party. Said notice ordered was not questioned by the D.Hr and he in fact complied with and it was on service of the notice, the J.Dr. and his son appeared and the son of J.Dr. filed memo seeking permission to lead evidence and the D.Hr. filed

memo objecting the same but the lower Court passed orders dated 07.07.2014 permitting the son of J.Dr. to lead evidence by convinced that the name of son of J.Dr. in the document filed by the D.Hr. issued by the Tahsildhar is found and it is necessary to find out truth by examining of saleable interest of J.Dr. for proceeding further and for ordering sale of the E.P. Schedule property, that enquiry into the rights of J.Dr. and his son will avoid unnecessary inconvenience to the third parties. In fact said power of Court traced from Order I Rule 10 Clause (2) and Section 146 CPC. In the trial, the D.Hr. examined herself as P.W.1 and got marked Exs.A.1 certified copy of attachment before judgment order in I.A.No.2593 of 2008 in O.S.No.72 of 2008, Ex.A.2 certified copy of will deed executed in favour of J.Dr. Ex.A.3 is certified copy of revocation deed executed by the J.Dr. cancelling his earlier settlement deed executed in favour of his son, Ex.A.4 is the encumbrance certificate. It is needful to say there is no claim made by son of J.Dr. if he is really in possession and got interest over the property pursuant to so called Ex.B1, for the attachment before judgment ordered on different dates in respect of the two suits respective claims. Once there is attachment before judgment as per Order XXXVIII Rule 11-A, there is no further need of attachment under Order XXI Rule 54 CPC but for to proceed from subsequent stage of test, settlement of terms, proclamation and sale. On the other hand, the 3rd party/son of the J.Dr. examined himself as R.W.1 and examined one Kommina Venkata Sridhar as R.W.2 and got marked Ex.B.1 settlement deed dated 29.03.2001, Ex.B.2 and B.3 title deed and pattadar passbook issued by the Tahasildar, Ex.B.4 dated 18.11.2008 and Ex.B.5 dated 20.06.2013

land revenue receipt, Ex.B.6 birth certificate and Ex.B.7 is orders of the Hon'ble High Court of A.P. in W.P.M.P.No.22617 of 2013 in W.P.No.18530 of 2013. Ex.B.8 copy of revocation deed dated 03.03.2008 corresponding to Ex.A.3. During the course of hearing, the learned counsel for the D.Hr. submitted that the settlement deed inter se J.Dr. and his son was not acted upon, and it was brought into existence to defeat the claims of the creditors of J.Dr. and said document was cancelled by the J.Dr. reasserting his title and interest over the property. Therefore, the rights of the J.Dr. over the property in question have been intact and the pattadar passbooks etc., are manipulated by the J.Dr. and his son in collusion with the officials of Revenue Department. Therefore, the saleable interest of J.Dr. can be believed and the contention of 3rd party is not acceptable. Per contra, the learned counsel for 3rd party (son of J.Dr.) submits that the registered settlement deed was executed on 29.03.2001. The revocation deed executed by the J.Dr. is non-est in law as the same was unilateral document.

7. On hearing both sides, the lower Court, discussing Section 55 of the Transfer of Property Act and Order XXI Rule 14 of C.P.C., held that the Executing Court is not estopped from enquiring into the saleable interest of the J.Dr. and the orders dated 20.02.2013 will not operate as estoppel. The summary of reasons are that the orders dated 28.02.2013 were passed in the absence of third party/son of J.Dr. who is claiming interest, 2) the said orders were passed while conducting enquiry in terms of Order XXI Rule 22 of C.P.C. only, 3) There is change in the circumstances after passing of the orders dated 29.02.2013, particularly compliance of Order XXI Rule 14 by the D.Hr. and

placing of document/certificate is issued by Tahasildar wherein the name of the 3rd party or son of J.Dr. is shown as owner/possessor and Saleable interest of J.Dr. and rights of the son of J.Dr. were not directly and substantially in issue while passing orders dated 28.02.2013 by the lower Court and concluded that the lower Court can proceed with the enquiry as to saleable interest of J.Dr.

8. The lower Court therefrom observed that the document Ex.B.1 settlement deed executed by the J.Dr. in favour of his son has its legal effect as to passing of title in favour of the settlee and transfer of right by postponing enjoyment is a valid transfer as per the expression of Apex Court in **K.Balakrishnan Vs. K.Kamalam**¹⁴ and held that the objections raised by the D.Hr. are unsustainable and from the gift covered by Ex.B.1 held that the J.Dr. is not having saleable interest in respect the E.P.schedule property and eventually dismissed both the Execution Petitions.

9. Heard both sides and perused the material on record.

10. As discussed supra of the legal position, the said conclusion of the lower Court is absolutely incorrect. The lower Court should have seen the factum of the will is not proved as contemplated by Section 63 of the Indian Succession Act and once not proved of J.Dr. got no absolute rights over entire property. It is from the ancestral property of J.Dr. and his son who thereby got undivided interest and for the undivided interest of J.Dr. only the settlement/gift cannot be executed of the joint family property which is void ab initio and even to treat as relinquishment of so called settlement since void and there are no circumstances

¹⁴ AIR 2004 SC 1257=2004(1) SCC page 581

compelling or necessitating execution. The so called pattadar passbook issued is not even immediately pursuant to the document from its perusal. Leave about the same does not confer right that too when the very document speaks only right conferred possession and enjoyment with J.Dr. that should have been reflected which is lacking to rely on the so called revenue records in any manner with any sanctity. Once the relinquishment is for gift invalid as referred supra for no need equally for gift or settlement and the contest of the D.Hr. is it is a fraudulent transfer and same shown not acted upon otherwise, though sham and nominal are distinct to fraudulent transfer and even shown acted upon, same is voidable at the instance of the creditors and for that there need not be an existing debt but even prospective creditor is within the meaning of Section 53 of the Transfer of Property Act for the undivided interest of the J.Dr. the relinquishment is per se fraudulent for not valid as gift/settlement and same is otherwise even from the expressions referred supra and the trial Court thereby went wrong in blindly relying upon the document as if same is proved without examination of at least one of the attestors to prove as contemplated by Section 68 of the Evidence Act for not even discussed from the D.Hr. disputing saying the same as fraudulent to defeat the creditors. It is needless to say decree holder need not file suit and even in execution proceedings and bring the property to sale by questioning the alienation by J.Dr. as fraudulent to defraud the creditors, it shall for the general benefit of all the creditors and not the decree holders' alone there are other creditors even if any and for nothing shown of there are other properties of J.Dr. suffice to satisfy the 2 decree debts of the decree

holder under execution. Thus the matters require reconsideration from the scope of law involved referred supra with reference to the facts on record.

11. Accordingly and in the result, both the revision petitions are allowed and the impugned orders of the lower Court are set aside and the execution petitions are restored and the lower Court is directed to conduct fresh enquiry with regard to the above observations by affording fresh opportunity and decide on own merits.

Consequently, miscellaneous petitions, if any shall stand closed. No order as to costs.

Dr. B. SIVA SANKARA RAO, J

Date: 26.12.2016

Note: L.R. Copy to be marked
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