

HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU

CIVIL MISCELLANEOUS APPEAL No.415 OF 2009

JUDGMENT:

This is an appeal filed against the order dated 16.03.2009 in I.A.No.1173 of 2008 in O.S.No.60 of 2001 passed by the IV Senior Civil Judge, Hyderabad.

I.A.No.1173 of 2007 is an application filed under Order IX Rule 13 read with Section 151 CPC by one Sri Kishore Kumar Lunia, S/o Prakash Chand Lunia to set aside the ex parte decree passed against him in the suit O.S.No.60 of 2001. The deponent states that he was set ex parte after paper publication of notice was made by substituted service. He states that he was not aware of the said decree till he received the summons in E.P.No.47 of 2008 from the III Senior Civil Judge on 02.09.2008. He states that he has a serious contest in the suit.

The contesting Decree Holder filed a counter-affidavit denying the allegations of the applicant. The deponent states that the present petitioner resides in the same address as other defendants and is aware of the facts. He also states that prior to E.P.No.47 of 2008, the Decree Holder filed E.P.No.38 of 2004 in which Prakash Chand Lunia-petitioner signed as a witness in the panchanama conducted by the bailiff. The deponent also states that later another E.P.No.42 of 2005 was filed wherein notices were ordered and served on all the JDrs including the present petitioner. The deponent states that the petitioner is guilty of suppression of facts and requests the Court to dismiss the petition with costs.

The lower Court after hearing the parties and considering the oral evidence adduced by both parties, passed the impugned order dated 16.03.2009 dismissing the application. The said order is challenged in the present appeal.

Heard Sri K.Mohan, learned counsel for the appellant and Sri G.Vasantha Rayudu, learned counsel for the respondents.

The short and simple question that arises is that does the material on record show that the deponent was aware of the filing of the case and consequently is the impugned order passed by the Lower Court correct or not?

In para 8 of the impugned order, the lower Court had held that the petitioner and his grandfather (6th respondent) lived at the same address. In para 9, the lower Court states that P.W.1 (deponent) admits that his mother filed a claim petition E.P.No.38 of 2004. In para 10, the lower Court holds that the deponent attested the panchanama when the movables were attached in E.P.No.38 of 2004. Hence, the application was dismissed.

This Court feels after a reading of the entire evidence including the complete cross-examination of the witnesses that the order of the lower Court cannot be sustained because 1) The lower Court did not read the evidence in its entirety. P.W.1 stated that he was not served with any notice till he received notice in E.P.No.37 of 2008 only. This positive assertion is not disproved by any evidence. 2) P.W.1 admitted that his mother filed a claim petition in E.P.No.38 of 2004 but he immediately states that “I have no idea in E.P.No.38 of 2004, I was arrayed as 6th J.Dr” Therefore, from this it cannot be concluded that he was aware of the decree passed against him on 09.06.2003. 3) In para 10 of the

impugned order, the lower Court holds that the “petitioner” has not denied the fact about attesting the panchanama when the bailiff conducted the panchnama in E.P.No.38 of 2004. The Court failed to notice the counter filed and evidence of R.W.1 in the impugned proceedings; wherein it is clearly stated that the person who signed the panchnama is Prakash Chand Lunia and not the present deponent Kishore Chand. 4) Further, the cross-examination of the respondents witness R.W.1 makes it clear that a) Prakash Chand Lunia is not a defendant in the suit. b) that substituted service was taken out in the suit against the present petitioner. c) that petitioner was not served with suit summons through Court or by Registered Post. d) the documents R1 to R6 filed by him do not reveal the signature of the present petitioner Kishore Kumar Lunia. e) that notice was served on him only in E.P.No.47 of 2008. f) that there is no document filed to show that the deponent was aware of the earlier proceedings. g) that there is no averment to the effect that there was personal meeting between the petitioner and decree holders prior to E.P.No.47 of 2008.

The lower Court unfortunately came to a conclusion that the deponent is the signatory to the Panchanama (para 10 of the impugned order); that as he has furnished the same address as Prakash Chand, he has knowledge of the decree passed and as he stated that his mother has filed a claim petition, he is aware of the Court proceedings. The finding that he attested the panchnama is clearly wrong and contrary to the facts. The other two points could have been accepted if there was further cross-examination on the points. Merely because his mother filed a claim petition or merely because he resides in the same address; knowledge of an ex parte

decree being passed against him on 06.09.2003 cannot be attributed to deponent. If there was further cross-examination may be a different conclusion could have been drawn. But the available evidence does not lead to this conclusion.

The learned counsel for the appellant also relied upon ***M.Narasimha Reddy and others v. Begari Samuel***¹ and drew support from paras 18, 20-24 of the reported Judgment. The same is applicable to the present facts also.

He also drew the attention of this Court to the fact that even the lower Court is not clear in its findings. It is a fact that the lower Court stated as follows in the penultimate para of the impugned order (para 13) “.....it is probable that the petitioner has knowledge about the suit proceedings as he knows about his mother filing claim petition in E.P.No.38 of 2004 and he is living along with his grant father who is one of the defendants in the suit, in the same residence.” The learned counsel is right in his submission on this issue.

(emphasis supplied)

For all the reasons mentioned above including the failure to consider the evidence carefully and in totality, the C.M.A. is allowed. The impugned order is set aside and the ex parte decree against the present applicant/appellant, dated 09.06.2003 in O.S.No.60 of 2001 is set aside.

Consequently, miscellaneous petitions, if any pending in this C.M.A. shall stand closed.

D.V.S.S.SOMAYAJULU,J

Date : 11.12.2017
ssp

¹ 2002(6) ALD 473