

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

CIVIL REVISION PETITION No.3848 OF 2014

ORDER:

This civil revision petition is filed under Section 115 of CPC challenging the order dated 03.9.2014 in E.A. No.447 of 2014 in E.A. No.147 of 2012 in E.P. No.43 of 2011 in O.S. No.77 of 2010 on the file of the Court of the Senior Civil Judge, Adoni.

2. The learned counsel for the petitioners assailed the impugned order on the following grounds: (1) the order passed by the learned Senior Civil Judge is beyond the scope of the judgment and decree dated 27.12.2013 in A.S. No.2 of 2014 on the file of the Court of II Additional District Judge, Kurnool at Adoni; and (2) the Executing Court, by allowing E.A. No.447 of 2014, permitted the respondent to challenge the legality or otherwise of judgment and decree dated 10.3.2011 in O.S. No.77 of 2010, which is impermissible under law, therefore the impugned order is liable to be set aside. ***Per contra***, the learned counsel for the respondent submitted that no prejudice would be caused to the petitioners even if P.W.1 is recalled for further cross-examination in order to establish whether the notice was served on the defendant in O.S. No.77 of 2010 or not. He further submitted that there is no illegality or irregularity in the order under challenge, therefore, the civil revision petition is liable to be dismissed.

3. The facts leading to filing of the revision petition are briefly as follows: The petitioners have filed O.S. No.77 of 2010 on the file of the Court of Senior Civil Judge, Adoni, for specific performance of agreement of sale dated 26.11.2009 executed by Smt.K.Yellamma in favour of the petitioners. By order dated 01.4.2010 the trial court allowed I.A. No.352 of 2010, filed by the petitioners under Order XXXIX Rules 1 and 2 of CPC, restraining Smt.K.Yellamma from alienating the suit schedule property. Smt.K.Yellamma appeared in the suit through her counsel. The suit was decreed in favour of the petitioners on 10.3.2011. During the pendency of the suit, first petitioner, who is husband of the second petitioner, died and second petitioner has been prosecuting the proceedings as plaintiff No.2 as well as legal representative of the plaintiff No.1. Thereafter, the petitioner has filed E.P. No.43 of 2011 for execution of the decree and judgment dated 10.3.2011 in O.S. No.77 of 2011. On 18.2.2012, the Executing Court executed a registered sale deed in respect of the schedule property in favour of the petitioner, who in turn filed E.A. No.147 of 2012 for delivery of the E.P. schedule property. On 27.3.2012, the petitioner and Amin went to the E.P. schedule property to take possession of the same. The respondent, who is a third party to the suit and the E.P., obstructed to take possession of the property alleging that he has purchased the property under registered sale deed dated 16.9.2010 from Smt.K.Yellamma-Judgment debtor.

4. The petitioner filed E.A. No.401 of 2012 under Order XXI Rule 97 of CPC seeking removal of obstruction. In the said application, notice was served on the Judgment Debtor. On 27.12.2013, the Executing Court allowed E.A. No.401 of 2012 directing removal of obstruction created by the respondent. Feeling aggrieved by the order and decree dated 27.12.2013 in E.A. No.401 of 2012, the respondent preferred A.S. No.2 of 2012 on the file of the court of II Additional District Judge, Kurnool at Adoni. The appellate court, after affording reasonable opportunity to both the parties, allowed the appeal setting aside the order and decree dated 27.12.2013 in E.A. No.401 of 2012 and remanded the matter to the Executing Court for fresh disposal, after giving opportunity to prove the agreement of sale allegedly executed by Smt.K.Yellamma in favour of the respondent. After remanding the matter, the respondent filed E.A. No.447 of 2014 and the same was allowed by the impugned order dated 03.9.2014. Hence, the present revision petition.

5. Before advertng to the findings of the Executing Court, it is apposite to refer relevant portion of the affidavit, which reads as follows:

“Though the endorsement in the suit records is that the respondent No.1 is residing at Gangavathi in Karnataka State steps were taken by way of publication in Prajashakthi daily newspaper in Kurnool edition. During the course of pendency of the suit, the petitioners not impleaded me as a party to the suit, so it is just and necessary to recall P.W.1 in this case and an opportunity may be given to me to cross-examine the P.W.1 with regard to above aspect.”

A perusal of the above paragraph clearly indicates that the respondent filed E.A. No.447 of 2014 to recall P.W.1 in order to ascertain whether the summons was served on Smt.K.Yellamma, who is the defendant in the suit and the Judgment debtor in the E.P. A perusal of the record clearly reveals that Smt.K.Yellamma engaged counsel on her behalf. For one reason or the other, Smt.K.Yellamma did not choose to contest the suit. The trial court, after affording reasonable opportunity to the defendant, decreed the suit. It is not in dispute that the respondent is not a party to O.S. No.77 of 2010. There is no necessity to recall P.W.1 to establish that the respondent is not a party to the suit. The judgment and decree dated 10.3.2011 in O.S. No.77 of 2010 is binding on the parties to the suit viz., the petitioner and Smt.K.Yellamma, unless and until the same was set aside by the competent court. The respondent is not entitled to challenge the legality or otherwise of the judgment and decree in O.S. No.77 of 2010 in this E.A. No.447 of 2014. The material placed on record clinchingly establishes that the summons was served on Smt.K.Yellamma. In such circumstances, recalling P.W.1 to ascertain whether the summons was served on Smt.K.Yellamma or not, is nothing but a futile exercise. Even otherwise, the same can be ascertained basing on the material available on record.

6. It is a settled principle of law that once the matter is remanded to the court below, it has to pass judgment and

decree in pursuance of the remand order. For better understanding of this aspect, it is not out of place to extract hereunder relevant paragraph of the remand order:

25. In the result, the appeal is disposed of with the following direction: The Senior Civil Judge, Adoni, is directed to give a fair opportunity to the appellant/objection petitioner to prove the agreement of sale which he contends to be earlier to the agreement of sale of the Decree-Holder. While considering the objection petition, the Senior Civil Judge may appreciate the case law reported in AIR 2000 SC 2921.

The appellate court remanded the matter so as to enable the respondent to establish the agreement of sale alleged to have been executed by Smt.K.Yellamma in his favour is earlier to the agreement of sale executed by Smt.K.Yellamma in favour of the petitioners-decree holders. The respondent can prove this aspect by producing the agreement of sale purported to have been executed by Smt.K.Yellamma in his favour. A perusal of the record reveals that P.W.1 was cross-examined at length by the respondent's counsel. As observed earlier, the respondent's counsel put suggestion to P.W.1 with regard to agreement of sale. It is apposite to refer relevant portion of the cross-examination of the petitioner herein (P.W.1) conducted on 05.3.2013, which reads as follows:

“It is not true to suggest that the agreement of R2 is much prior to my agreement and even sale deed was prior to my sale deed.”

A perusal of the same clearly reveals that the respondent cross-examined the petitioner with regard to agreement of sale in his favour. The Executing Court, without considering

the scope of the remand order, allowed E.A. No.447 of 2014 so as to enable the respondent to cross-examine P.W.1 with regard to service of summons on Smt.K.Yellamma. As observed above, the respondent is not entitled to challenge the legality or otherwise of the judgment and decree dated 10.3.2011 in O.S. No.77 of 2010. The impugned order passed by the Executing Court is beyond the scope of the remand order passed by the appellate court in A.S. No.2 of 2014. If the impugned order is allowed to stand, it would amount to miscarriage of justice.

7. Having regard to the facts and circumstances of the case, I am of the considered view that it is a fit case to set aside the order dated 03.9.2014 in E.A. No.447 of 2014, while exercising the jurisdiction under Section 115 of CPC.

8. In the result, the civil revision petition is allowed, setting aside the order dated 03.9.2014 in E.A. No.447 of 2014 in E.A. No.147 of 2012 in E.P. No.43 of 2011 in O.S. No.77 of 2010 on the file of the Court of the Senior Civil Judge, Adoni. No order as to costs. Miscellaneous petitions if any pending in this petition shall stand closed.

T.SUNIL CHOWDARY, J.

Date: 13.4.2017
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