

THE HON'BLE SRI JUSTICE M.SEETHARAMA MURTI

CIVIL MISCELLANEOUS APPEAL No.1038 of 2002

&

SECOND APPEAL No.1074 of 2006

COMMON JUDGMENT:

The appellant in both these appeals is the auction purchaser.

2. C.M.A.No.1038 of 2002 is filed by him under Order 43 Rule 1(u) of the Code of Civil Procedure, 1908, (for short, 'the Code'), assailing the decree and judgment, dated 16.07.2001, of the learned Principal Senior Civil Judge, Gudur, passed in A.S.No.73 of 1999, whereby the learned Principal Senior Civil Judge, Gudur, while allowing the said Appeal Suit of the respondents 1 to 3 herein/claim petitioners had set aside the order and decreetal order, dated 30.04.1999, in the claim petition E.A.No.198 of 1996 in E.P.No.31 of 1989 in O.S.No.395 of 1986, passed by the learned Junior Civil Judge, Sullurpet, and remanded the said E.A. to the Court below/Court of Execution with certain directions.

3. S.A.No.1074 of 2006 is also filed by him under Section 100 of the Code assailing the decree and judgment, dated 16.07.2001, of the learned Principal Senior Civil Judge, Gudur, passed in A.S.No.57 of 1999, whereby the learned Principal Senior Civil Judge, while allowing the said appeal of the respondents/claim petitioners/defendants, dismissed the suit in O.S.No.279 of 1996, filed by the auction purchaser/plaintiff for a perpetual injunction in respect of the land in an extent of Ac. 3.16 cents, bearing Patta No.77, in Survey No.35/1 of Palachur Village, Pellakur Revenue Mandal, Nellore District, morefully described in the schedule annexed to the plaint.

4. I have heard the submissions of Sri *K.Sitaram*, learned counsel for the appellant/auction purchaser, and of Sri *P.Ganga Rami Reddy*, learned counsel for the respondents/claim petitioners.

5. The parties in these appeals shall hereinafter be referred to as the appellant-auction purchaser and the respondents-claim petitioners for convenience and clarity.

6. Before proceeding further, it is necessary to state briefly the history of the case, which is as under:

The afore-stated subject land was brought to sale by a decree holder in E.P.No.31 of 1989 in G.O.S.No.395 of 1986. In the auction held in the said Execution Proceedings, the appellant purchased the said property, on 13.09.1993, for a consideration of Rs.16,400/-. The said sale was confirmed by the Court of Execution, on 16.11.1995, and a Sale Certificate was issued to the auction purchaser, on 22.11.1995. When the auction purchaser sought delivery of the subject property purchased in the Court auction sale by him, there was an obstruction by the respondents/claim petitioners. They filed E.A.No.198 of 1996 in the afore-stated Execution Proceedings under Order XXI Rule 97 of the Code claiming right, title and interest over the subject land and also filed E.A.No.196 of 1996 under Section 151 of the Code for grant of stay of delivery of possession till the disposal of the application filed under Order XXI Rule 97 of the Code. The auction purchaser filed an Execution Application for grant of Police Aid. The Court of Execution summarily dismissed the application of the claim petitioners filed under Order XXI Rule 97 of the Code by orders, dated 01.11.1996,

as the subject property was already delivered to the auction purchaser in view of the orders of Police Aid granted in E.A.No.4 of 1996. Aggrieved thereof, the claim petitioners filed A.S.No.16 of 1997, on the file of the Court of the learned Additional Senior Civil Judge, Gudur. The learned Additional Senior Civil Judge, Gudur, by judgment, dated 06.11.1997, in A.S.No.16 of 1997 allowed the appeal of the claim petitioners and set aside the order, dated 01.11.1996, of the Executing Court in E.A.No.198 of 1996 and directed for restoration and disposal of the said Execution Application as per the procedure prescribed under Order XXI Rule 101 of the Code. In the meanwhile, on 11.11.1996, the auction purchaser filed the suit O.S.No.279 of 1996 for perpetual injunction against the claim petitioners in respect of the subject property, which suit is the subject matter of the Second Appeal. The learned Junior Civil Judge, Sullurpet (hereinafter, the Court of first instance) jointly tried O.S.No.279 of 1996 for perpetual injunction filed by the auction purchaser and E.A.No.198 of 1996, filed by the claim petitioners under Order XXI Rule 97 of the Code and disposed of both the said proceedings by a common judgment, dated 30.04.1999. By the said common judgment, the Court of first instance partly decreed the suit for perpetual injunction of the auction purchaser in respect of Ac. 2.76 cents and made the *ex parte* injunction absolute in respect of the afore-stated extent and vacated it in respect of the remaining extent of Ac. 1.30 cents and partly allowed the claim petition in respect of the said extent of Ac. 1.30 cents by accepting that Ex.B-1 – Registered Sale Deed, in favour of the claim petitioners, in respect of the said extent of land, is genuine; and dismissed the claim petition

in respect of the remaining extent of Ac. 2.76 cents by not accepting the sale agreement relied upon by them as genuine. The auction purchaser has not assailed the said common judgment by filing any appeal. However, aggrieved of the said common judgment, the claim petitioners filed two First Appeals viz., 1) A.S.No.57 of 1999 assailing the decree and judgment in the Original Suit O.S.No.279 of 1996; and 2) A.S.No.73 of 1999 assailing the judgment in the claim petition E.A.No.198 of 1996 insofar as they related to Ac. 2.76 cents. The learned Principal Senior Civil Judge, Gudur, allowed the A.S.No.57 of 1999 of the claim petitioners and dismissed the suit of the auction purchaser in its entirety i.e., even in respect of Ac. 2.76 cents on the ground that a civil suit is not maintainable and the auction purchaser is having efficacious relief under Order XXI Rule 27 of the Code and under Section 74 of the Code; and, further allowed the other appeal of the claim petitioners in A.S.No.73 of 1999 and remanded E.A.No.198 of 1996 to the Court of Execution, that is, Court of first instance and further set aside the orders, dated 12.07.1996, in E.A.No.4 of 1996, which is already allowed granting Police Aid to the auction purchaser and directed the Court of Execution to dispose of both the Execution Applications i.e., one for Police Aid filed by the auction purchaser and the other under Order XXI Rule 97 of the Code filed by the claim petitioners *inter alia* holding that the application for grant of Police Aid was allowed without notices to the claim petitioners and that the claim petitioners, who are third parties, cannot be compelled to resort to Order XXI Rule 97 of the Code and that it is for the auction purchaser to file an application under Order XXI Rule 97 of the

Code, but not for the third parties/claim petitioners. Thus, since the Court below eventually dismissed the suit of the auction purchaser for perpetual injunction even in respect of Ac. 2.76 cents with an observation that the auction purchaser is having an efficacious remedy under Order XXI Rule 97 of the Code and further remanded the application under Order XXI Rule 97 of the Code filed by the third parties/claim petitioners for fresh disposal *inter alia* observing that they are not entitled to file such an application, but it is for the auction purchaser to file an application under the said provision of law, the aggrieved auction purchaser filed these Civil Miscellaneous Appeal and Second Appeal.'

7. At the outset, be it noted that this Court admitted the Second Appeal noting that the following substantial questions of law are involved:

- “a) Whether appellate Court was right in holding a suit for perpetual injunction was not maintainable by an auction purchaser over looking the fact that the stage of Sec 74 and order 21, Rule 97 of C.P.C is over especially when there is court Amin’s report to the effect delivery of possession given to the Auction purchaser?**
- b) Whether the lower appellate court was right in thinking that the delivery of possession by Court Amin is only a paper delivery especially when there is no pleading to that effect by the defendant and there is no concept of “Paper delivery” in the Civil Procedure Code.**
- c) Whether the lower appellate court was right in holding that the clubbing of E.A.No.198 of 1996 in E.P.No.31 of 1989 in G.O.S.No.395 of 1986 and O.S.No.279 of 1996 by the Trial Court is not correct especially having regard to the fact the parties are the same and subject matter of the both**

proceedings are also same and in-fact such a clubbing is necessary to avoid conflicting decisions.

- d) Whether the Lower appellate Court lost the sight to the well established principle that when there is discrepancy or conflict between the survey numbers and the boundaries of a property for identification if the boundaries that prevail over the survey number and in this case, when the appellate did not disturb the finding of the trial court that suit land is within specified boundaries and thus there is dispute with regard to identify of the property.”**

[Reproduced verbatim]

8. Therefore, the Second Appeal and the Civil Miscellaneous Appeal are coming together for hearing and disposal.

9. Common submissions made by the learned counsel for both sides are heard.

10. Both the learned counsel are broadly in agreement that the observations of the Court below in the two judgments impugned in these two Appeal Proceedings that the third parties/respondents herein cannot be compelled to file an application under Order XXI Rule 97 of the Code and that it is for the auction purchaser only to file an application under Order XXI Rule 97 of the Code when the auction purchaser encounters obstruction from third parties like the respondents is an incorrect observation in view of the settled legal position. Therefore, it is apt to refer to the following decisions:

(i) In **Silverline Forum Pvt. Ltd. Vs. Rajiv Trust and another**¹, the facts and ratio are as follows: ‘The sub-tenant, who was not a party to a decree for eviction, resisted execution of the decree; and, the first Court ordered enquiry under Section 151 of the Code; and, the

¹ AIR 1998 SUPREME COURT 1754

High Court of Calcutta upheld that order. That order was challenged before the Supreme Court. The High Court held that resistance or obstructions made by a third party to a decree of execution cannot be gone into under Order XXI Rule 97 of the Code.’ The Supreme Court, while observing that it is difficult to agree with the High Court, held as follows:

“9. Rules 97 to 106 in Order 21 of the Code are subsumed under the caption “Resistance to delivery of possession to decree-holder or purchaser”. Those rules are intended to deal with every sort of resistance or obstructions offered by any person, Rule 97 specifically provides that when the holder of a decree for possessing of immovable property is resisted or obstructed by “any person” in obtaining possession of the property such decree-holder has to make an application complaining of the resistance or obstruction. Sub-rule (2) makes it incumbent on the Court to proceed to adjudicate upon such complaint in accordance with the procedure laid down.

10. It is true that R. 99 of O. 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule 101 stipulates that all questions “arising between the parties to a proceeding on an application under Rule 97 or Rule 99” shall be determined by the executing Court, if such questions are “relevant to the adjudication of the application”. A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree.”

(ii) In **Shreenath and another Vs. Rajesh and others**², the facts and ratio are as follows: ‘The third party in possession of property claimed independent right as tenant and resisted the decree for possession of immovable property under execution.’ In the said factual backdrop, the Supreme Court held as follows:

² AIR 1998 SUPREME COURT 1827

“14. We find both either under the old law or the present law the right of a tenant or any person claiming right on his own of the property in case he resists, his objection under Order 21, Rule 97, has to be decided by the Executing Court itself.

15. In other words, when such person is in possession the adjudication to be under Rule 97 and in case dispossessed adjudication to be under Rule 100 (old law) and Rule 99 under the new law. Thus a person holding possession of an immovable property on his own right can object in the execution proceeding under Order 21, Rule 97. One has not to wait for his dispossession to enable him to participate in the execution proceedings. This shows that such person can object and get adjudication when he is sought to be dispossessed by the decree-holder.”

(iii) In **N. S. S. Narayana Sarma and others Vs. M/s. Goldstone Exports (P) Ltd. And others**³, the facts and ratio are as follows: ‘The appellants claimed independent title to the property as the transferees from the pattadars whose land did not vest in the State Government under the provisions of Andhra Pradesh (Telangana Area) Abolition of Jagirdar Regulation Act, 1958. They obstructed the attempt by the decree holder to dispossess them from the said property by claiming independent right to the property from which they are sought to be evicted in the execution of the decree and tried to obstruct delivery of possession of the property to the applicants. Some of the appellants filed petitions under Order XXI Rule 97 read with Rule 101 of the Code resisting the execution. The District Judge dismissed the petitions, as he was of the view that he is implementing the orders of the High Court. The appellants were unsuccessful before the High Court. Therefore, they filed the Civil Appeals before the Supreme Court. Both parties were earlier directed to approach the Executing Court and the Executing Court

³ AIR 2002 SUPREME COURT 251

was directed to decide the question of maintainability of the applications under Order XXI Rule 99 of the Code and along with other questions. The Supreme Court, having referred to the legal position, reiterated the legal position that the person holding possession of immovable property on his own right can object in Execution Proceedings under Order XXI Rule 97 of the Code and that one has not to wait for his dispossession to enable him to participate in the Execution Proceedings and that such person can object and get adjudication when he is sought to be dispossessed by the decree holder.'

11. Therefore, as fairly conceded, the observations in the judgments impugned of the Court below that the third parties/respondents are not entitled to and cannot be compelled to file applications under Order XXI Rule 97 of the Code, as they are the obstructers claiming to be in possession of the property and that it is for the auction purchaser to file an application under Order XXI Rule 97 of the Code is clearly erroneous and is unsustainable.'

12. In this backdrop, the only question that falls for consideration in these two appeals is as to whether the judgments impugned in these two appeals of the learned Senior Civil Judge, Gudur, are unsustainable under facts and in law? And, if so, what shall be the appropriate order to be made in these appeals?

13. POINT:

To begin with, be it noted that after purchase of the property that was auctioned in the execution proceedings, the appellant

herein, who is the auction purchaser, sought delivery of the property, which he purchased in the Court auction sale. The respondents-claim petitioners having resisted the delivery of possession by claiming right, title and interest in the property, filed a claim petition. The auction purchaser sought police aid for delivery of the property. By orders, dated 01.11.1996, the claim petition was summarily dismissed as property was delivered to the auction purchaser with police aid. Aggrieved thereof, the claim petitioners filed A.S.No.16 of 1997, on the file of the learned Additional Senior Civil Judge, Gudur. The learned Additional Senior Civil Judge, Gudur, by judgment, dated 06.11.1997, in A.S.No.16 of 1997 allowed the appeal of the claim petitioners and set aside the order, dated 01.11.1996, of the Executing Court in E.A.No.198 of 1996 and directed for restoration and disposal of the said Execution Application as per the procedure prescribed under Order XXI Rule 101 of the Code. In the meanwhile since property is already delivered, the auction purchaser filed OS.No.279 of 1996 for perpetual injunction in respect of the two items of property viz., Ac.2.76 cents and Ac.1.30 cents. Since claim petition was remanded for fresh disposal, the said claim petition and the Original Suit were disposed of by a common judgment, dated 30.04.1999, by the learned Junior Civil Judge, Sullurpet. The suit was partly decreed in favour of the auction purchaser in respect of Ac.2.76 cents of land and was dismissed in respect of Ac.1.30 cents of land. Similarly, claim petition was partly allowed in respect of Ac.1.30 cents in view of a registered sale deed in respect of that property which was held to be genuine and was dismissed in respect of Ac.2.76 cents of land for

which there is no sale deed but there was only an agreement of sale. The auction purchaser did not prefer any appeals. However, the claim petitioners preferred A.S.No.57 of 1999 insofar as part of the decree for Ac.2.76 cents and also A.S.No.78 of 1999 insofar as dismissal of the claim in respect of the said extent. By separate impugned judgments pronounced on the same day, i.e., 16.07.2001, the Court below while allowing the appeal against the orders in the claim petition remanded the claim petition to the Court of first instance for fresh disposal and further allowed the appeal of the claim petitioners against the decree and judgment of the civil Court filed by the auction purchaser and dismissed the suit even in respect of Ac.2.76 cents, for which extent the suit is decreed in part. Aggrieved thereof, the auction purchaser preferred these Civil Miscellaneous Appeal and the Second Appeal.

14. It is pertinent to note that when once the Court below was of the view that the claim petition deserves to be remanded for fresh disposal, the Court below ought not to have decided the appeal arising from the decree and judgment in the original suit and ought not to have allowed that appeal and dismissed the suit on merits as such a course would cause prejudice to the auction purchaser in defending the claim petition, which is remanded for fresh disposal. The grievance of the appellant-auction purchaser is that basing on the judgment passed by the Court below in the appeal suit arising from the decree and judgment in the Original Suit, if contentions are raised invoking the principle enshrined in the doctrine of *res judicata* or constructive *res judicata*, it would be difficult for the auction purchaser to meet such contentions for no fault of him. Therefore,

as rightly contended and conceded, the Court below committed a grave error in allowing one appeal and remitting the matter and allowing the other appeal and dismissing the Original Suit of the auction purchaser in entirety ignoring the fact that such a course would cause prejudice to the auction purchaser. Therefore, sustaining the impugned judgment in S.A.No.1074 of 2006 would lead to injustice is apparent from the record. As per the well established legal position, the claim petition of the claim petitioners-respondents herein has to be decided as a regular civil suit and the issue of title has to be gone into while deciding the claim petition on its merit. Hence, the Court below ought to have seen that any observations and findings made in the judgment passed in the appeal suit arising from the decree and judgment in the Original Suit would adversely affect the auction purchaser and also come in the way of the Court of first instance in independently deciding, on its merit, the claim petition which is remanded for fresh disposal as such observations are likely to influence the result in the claim petition. Therefore, the only course now open is to dismiss the appeal in C.M.A.No.1038 of 2002 and further allow the appeal in S.A.No.1074 of 2006 filed by the auction purchaser and set aside the impugned judgment passed in A.S.No.57 of 1999 for the limited purpose of remanding the suit, O.S.No.279 of 1996, to the Court of first instance for disposal of the same afresh, on merits, along with the claim petition. The above course would protect the interests of both the parties and remedy the injustice.

15. In the result, C.M.A.No.1038 of 2002 is dismissed. S.A.No.1074 of 2006 is allowed and the decree and judgment, dated

16.07.2001, in A.S.No.57 of 1999 on the file of the Court of the learned Principal Senior Civil Judge, Gudur, are set aside. As a sequel, A.S.No.57 of 1999 is allowed; and, O.S.No.279 of 1996 is remitted to the Court of learned Junior Civil Judge, Sullurpet, for disposal afresh simultaneously with the claim petition filed by the respondents herein. It is made clear that since one proceeding is a claim petition and the other is an Original Suit, the matters shall be disposed of simultaneously, without consolidation, but by pronouncing separate judgments on the same day, however, in strict accordance with the procedure established by law.

25.04.2018
KL/Vjl

M.SEETHARAMA MURTI, J