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

A.S.No.3083 of 1999

JUDGMENT:

This appeal is filed against the judgment and decree dated 27.03.1999 passed in O.S.No.228 of 1991 by the Additional Senior Civil Judge, Chittoor.

For the sake of convenience, the parties are referred to as plaintiffs and defendants only.

The suit is filed for a declaration that the sale held and conducted by the District Court on 03.12.1982 in E.P.No.4 of 1981 in respect of the plaint schedule property is null and void and for restraining the defendants from taking any other steps through court to take possession of the same and in the alternative to pass a decree, setting aside the sale conducted on 03.12.1982 and for costs.

The plaint averments of the plaintiffs are that the 1st defendant obtained a decree against the 1st plaintiff and another in O.S.No.78 of 1961 before the High Court of Madras for a sum of Rs.45,463.05 paise. Subsequently, the High Court of Madras transferred E.P.No.55 of 1971 to the District Court, Chittoor for execution by its order dated 17.09.1971. The District Court, Chittoor entertained the said execution petition as E.P.No.4 of 1972; brought the plaint schedule properties to sale. The proclamation of sale was ordered on more than 20 occasions. The 1st plaintiff paid Rs.40,000/- towards part satisfaction of the decree during pendency of the above execution petition. Defendants 1 & 2 saw to it that the 1st plaintiff was not served with the requisite statutory notice. They also got reduced the upset price and prevented notice of that petition being served on the 1st plaintiff. On 03.12.1982 the sale was conducted by the District Court and that the 1st defendant/decree holder purchased the properties described in plaint 'A' schedule. The 2nd defendant purchased the properties mentioned in plaint 'B' schedule. The sale held on 03.12.1982 is null and void due to fraud and non-observance of statutory procedural requirements in attachment, proclamation and sale resulting in serious irregularities. The plaint schedule properties have been sold for a low price, whereas the real market value was very high on the date of the sale. The 1st plaintiff filed the suit for the reliefs prayed for. The 3rd defendant along with 2nd defendant lodged a caveat claiming interest in the plaint schedule property. Hence, the 3rd defendant is impleaded as a formal party.

The defendants 1 & 2 filed written statements. The 3rd defendant adopted the written statement of 2nd defendant. The allegation that 1st defendant colluded with 2nd defendant to knock away the suit properties is denied. The attachment and the publication of the proclamation have been done in accordance with the prescribed procedure. Since the petition under Order XXI Rule 90 CPC was dismissed by the Court, the 1st plaintiff has no right to file the suit on the same grounds. Section 47 CPC is a bar for the entertainment of the suit. The suit is not maintainable. The District Court being a transferee Court has the jurisdiction to entertain the execution proceedings. There is absolutely no cause of action to file the suit. The suit is barred under the principles of *res judicata*. The 1st plaintiff was represented by an advocate and he made several payments. He did not raise any objection against the alleged irregularities during the execution proceedings. This Court has no jurisdiction to entertain the suit. Hence, the suit has to be dismissed.

The case of the 2nd defendant is that the procedural formalities to conduct the court sale have been followed and that the 1st plaintiff was served with statutory notice at every stage of the proceedings. The sale held on 03.12.1982 is perfectly valid and legal. There are no illegalities or irregularities committed in the conduct of the sale.

Based on the above pleadings, the lower Court framed the following issues for trial:

Issues:

i) Whether the plaintiff is entitled for a declaration that the sale held and conducted by the District Court, Chittoor on 03.12.1982 in E.P.No.4 of 1981 in respect of the plaint schedule properties is null and void?

ii) Whether the sale held and conducted on 03.12.1982 in respect of the plaint schedule properties is liable to set aside as contended by the plaintiff alternatively?

iii) Whether this Court has no jurisdiction to entertain the suit?

iv) Whether the suit is barred under Section 47 of Civil Procedure Code?

v) To what relief?

Additional issues:

i) Whether the suit is barred under the principles of *res judicata*?

ii) Whether the suit is barred by limitation?

iii) Whether the suit is bad for non-joinder of necessary parties?

For the plaintiffs, PWs.1 to 3 were examined and Exs.A.1 to A.13 were marked. For the defendants, DWs.1 to 6 were examined and Exs.B.1 to B.19 were marked.

Based on the above issues, the parties went to trial and the lower Court after considering the oral and documentary evidence came to a conclusion that the plaintiff is not entitled to any of the reliefs that are prayed for. It is this judgment that is now assailed in the present appeal.

This Court has heard Sri P.R. Prasad, learned counsel for the appellant/3rd plaintiff and Sri S.V. Muni Reddy, learned counsel for the respondents/defendants respectively.

Before embarking into the merits of the matter, this Court notes that this case is a saga of perseverance in the case of the decree holder. A suit of 1961 resulted in a decree and an E.P. that was filed in April 1972 for sale of the property finally resulted in a sale in December 1982. Yet the story did not stop there and the suit of 1991 is now filed challenging the sale that was held through the process of the Court, then this appeal of 1999. Thus even till date there is no certainty attached to the decree passed because of the challenge moved by this suit.

Certain important facts which the lower Court noticed and which are visible from the record are reproduced here.

The 1st plaintiff suffered a decree on 29-11-1963 in O.S.78/1961 for a sum of Rs.45,463.05 paise. The decree was transferred from High Court of Madras to the District Court, Chittoor for execution. Thereupon, execution proceedings began against him in E.P.4/1972 for recovery of Rs.53,821-73 paise being the balance. The 1st plaintiff engaged an advocate. On 27-9-1973 the properties were also attached. On 31-8-1976, the EP was dismissed for default. On 2-9-1976, it was restored. During the proceedings the 1st plaintiff paid several part-payments towards the E.P. amount. Ultimately, the plaint schedule properties were brought to sale as he failed to pay properties the balance. On 13-7-1983, the 1st defendant who is the decree holder was permitted to participate in the auction. On 3-12-1982, D-1 and D-2 purchased the properties in the Court auction. Subsequently, the sale was confirmed and sale certificate were issued to them. Possession of the properties was also delivered to D-1 and D-2. Ten years thereafter, D-1 sold away his share of properties to D-3. The above facts are not in dispute.

During the pendency of the suit, the 1st plaintiff died. The 2nd plaintiff and 3rd plaintiff being his wife and daughter respectively were brought on record."

Issue Nos.1 & 2 are on the question whether the plaintiffs are entitled to a declaration that the sale is bad and is to be set aside. The first legal issue argued is that the decree that was transferred from Chennai to the Court at Chittoor should not have been executed by the said Court and should have been sent to Subordinate Judges Court. The contention is that the Subordinate Judge's Court alone has jurisdiction and that the District Court did not have the jurisdiction to execute the decree. The learned counsel for the respondents drew the attention of this Court to the language of Order XXI Rule 5 CPC as it stood prior to the amendment which clearly says when a decree is sent for execution to a District Court, it may execute the decree by itself or it may transfer the same to a Subordinate Court for competent jurisdiction for execution. In view of this clear language of Order XXI Rule 5 CPC as it stood, the District Court had the jurisdiction to execute the decree. This was rightly decided by the lower Court.

Another factor which was noted by the lower Court and which in view of this Court is also important is the conduct of the judgment debtor. It is settled law that at any objection as to the jurisdiction has to be raised at the very outset and pointed out to the Court. Order XXI Rule 5 CPC as it stood permits the District Court to execute the decree. If the judgment debtor was of the opinion that the District Court did not have the jurisdiction, a duty was cast upon him to raise an objection about the same and to participate if necessary in the subsequent proceedings subject to his objection about the jurisdiction.

As noticed by the lower Court and as is evident from the evidence, the second judgment debtor is experienced businessman, well travelled and with sufficient exposure to the world. He was represented by a counsel all through but at no point of time he raised the issue of jurisdiction. On the contrary, Exs.B.6 and B.7 are the certified copies of a bunch of sale adjournment petitions and the affidavits filed over a period of time by the judgment debtor. These applications show that the judgment debtor unconditionally submitted himself to the jurisdiction of the Court and also made part payments of the decree amount over a long period of time. Therefore, having got the benefit of getting the sale adjournments number of times and having got time for making part payment, this Court feels that the judgment debtor unconditionally submitted to the jurisdiction of the Court and his conduct debars him from raising any objection whatsoever about the lack of jurisdiction in the executing Court. This Court therefore clearly holds that the executing Court had the jurisdiction and also that the conduct of the judgment debtor clearly debars/aspects from raising any objection whatsoever about the jurisdiction of the Court.

The next contention of the learned counsel for the appellant is that there are material irregularities committed in the sale of the property. As noticed earlier, the essential evidence of the defendants is based on the certified copies of the documents representing various steps taken by the judgment debtor in the contest of the E.P. Ex.B.2 is the certified copy of E.P. No.4 of 1970 in O.S.No.78 of 1961. The other documents are all the documents are on the conduct of the sale itself leading to the sale certificate of April 1983. A perusal of these documents in sequence goes to show that the judgment debtor derived every single benefit possible under law before the sale was confirmed. The judgment debtor was always represented by a counsel and he got the benefit of the sale being adjourned, he was aware of the fact that the bidders were not available on many dates ultimately leading to the decree holder seeking permission to bid for the property. The issues about the valuation of the properties, the sale of the half schedule of the properties etc. were all matters which were deliberated and decided by the Court before the sale was conducted.

A reading of E.P. proceedings makes it clear that the objections of the judgment debtor were considered at all stages. The number of adjournments of the sale is also clear from the record. The adjournment of sale was ordered a number of times and the settlement of the proclamation took place a number of times. The decree holder furnished the details for the sale of the half share of the judgment debtor which was noted along with the boundaries. As per the joint memo, only one half share of the property was brought to the sale. The Court also noticed that the judgment debtor has not furnished any value of the properties. Ultimately, the sale was held on 03.12.1982 wherein four items were sold for a total sale consideration of Rs.37,000/- in all. After the sale was held, the judgment debtor also filed a petition under Order XXI Rule 90 CPC, which was disallowed as it was barred by time and the sale was confirmed.

The judgment debtor also introduced oral evidence. PW.1 was the wife of first plaintiff/judgment debtor. A reading of her entire evidence would show that she was not completely aware of the facts and circumstances of the case. She also admits that she is not living in Pakala village for 20 years or more. Therefore, she cannot raise any objection about the physical aspects of the sale like failure to affix the notice, failure to beat 'tom-tom' etc. Similarly, PW.2's evidence also is not very effective to take the case of the judgment debtor forward. PW.3 is a retired Thalari, who deposed that there was no proper beat of 'tom- tom' etc., about the sale of the properties. But in the cross-examination, he admits that he is one of the 'Thalaris' in the village who are discharging their duties. This Court therefore concurs with the opinion of the lower Court that PWs.2 & 3 are not witnesses who have any personal knowledge of the facts of the case and their evidence was introduced with a view to support the case of

PW.1 and that they are not aware of the facts and circumstances of the case.

The lower Court went into the evidence adduced by the defendants in the case. Ultimately, after analyzing the oral and documentary evidence in paras 17 to 19 of the impugned judgment, the lower Court came to a conclusion that no material was forthcoming to hold that the sale was vitiated in any manner whatsoever. The oral evidence of the plaintiff's witnesses was also not clear or categorical nor does it lead this Court to a conclusion that the sale is to be set aside. Even with regard to the so-called under valuation of the property which is urged as a ground, the plaintiff did not file an application under Order XXI Rule 64 CPC nor did the plaintiff introduce any evidence to show the 'true valuation' of the property and the sale thereof at a so-called low price. The defendants also introduced the evidence of the process server who deposed about the sale proclamation. They also deposed about the contents of Ex.B.12 to B.19. Therefore, on a review of the entire material that is filed in the lower Court, this Court is of the opinion that no material irregularity was pointed out which would entitle the plaintiff to a relief. This Court therefore concurs with the findings of the lower Court on the issues 1 & 2.

The other important matter which has to be considered is about issue No.4. The record of the lower Court shows that the judgment debtor filed an application under Order XXI

Rule 90 CPC on 13.02.1983. The said application was rejected as it is barred by time. The judgment debtor did not take any further steps also. In addition, from a reading of Order XXI Rule 92 (3) CPC, it is clear that no suit is set aside an order made under this rule shall be brought by any person against whom such order is made. Therefore, the judgment debtor is clearly prohibited by the mandatory language in this sub-Rule (3) from filing any suit and challenging the same. Section 47 CPC is also important in this context and it clearly says that all questions arising between the parties to the suit and relating to the execution, discharge or satisfaction of the decree shall be decided by the court executing the decree and not by a separate suit. This Court is thus of the opinion that the suit is squarely barred under the provisions of Section 47 CPC and Order XXI Rule 93 (2) CPC which states that a separate suit is not maintainable at all in the facts and circumstances of the case. As it is noticed by the lower Court that the additional issues 1 & 2 were not really pursued, but this Court notices that the plaint was initially presented on 13.06.1983 although it was numbered in the year 1991. Therefore, no question of limitation arises in this case.

The other issue is about the non-joinder of necessary parties also, which was already decided in I.A.No.217 of 1989. The additional issue No.1 is to the effect whether the suit is barred under the principles of *res judicata*. Explanation-4 to Section 11 of CPC is a facet of the principle of constructive *res judicata* and what is popularly known as 'might and ought' doctrine. This was the principle of law that was considered in ***Petambar Pujari v. Bhikari Meher and another***[1] by the lower Court. In ***Konda Lakshmana Bapujiv. Government of Andhra Pradesh and Ors***,[2] the Hon'ble Supreme Court held as follows:

> "But a matter which might and ought to have been made a ground of attack or defence in the former suit but which was not done so by any of the parties, will also be deemed to have been a matter directly and substantially in issue in such suit and the rules of *res judicata* will equally apply to it. Such a matter is regarded as having been constructively in issue and since the parties had an opportunity of putting it forward, it is considered as having been actually controverted and decided.
>
> If a plea, which might and ought to have been taken in the earlier suit has not been taken, such a plea shall be deemed to have been taken and decided against the person raising the plea in the subsequent suit."

This Court is of the opinion that the principles of the constructive *res judicata* or *res judicata per se* are not applicable to the facts and circumstances of the case. Additional issue No.1 in the opinion of this Court is not decided correctly.

If the principles of constructive *res judicata* will apply, there should be adequate pleading and proof and the same is missing in this case. The application under Order XXI Rule 90 CPC, which was filed challenging the sale on various grounds, was dismissed *in limine* as it is barred by time. Thereafter, the suit is filed with certain pleadings and various allegations were made that the sale was not valid according to

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[1] AIR 1977 Orissa 16
[2] AIR 2002 SC 1012

the plaintiff. It can at best be said that his conduct estops the plaintiff from raising these grounds since he did not take these pleas earlier and participated in the execution proceedings. However, on this basis, it cannot be said that the suit is barred by 'constructive *res judicata'*.

With regard to issue No.5, for all the above reasons, this Court is of the opinion that the judgment and the decree passed by the lower Court are correct in all respects except on additional issue No.1. This Court also concurs and holds that the sale of the property is valid and correct and there are no grounds made out to set aside the same.

In the result, the appeal is dismissed. In the circumstances of the case, there shall be no order as to costs. As a sequel, miscellaneous petitions, if any, pending in this appeal shall stand closed.

Before parting with, the passage from ***Ravinder Kaur v. Ashok Kumar and another***[3] is reproduced below:

> "Courts of law should be careful enough to see through such diabolical plans of the judgment debtors to deny the decree holders the fruits of the decree obtained by them. These type of errors on the part of the judicial forums only encourage frivolous and cantankerous litigations causing law's delay and bringing bad name to the judicial system."

This passage is absolutely applicable to the facts and circumstances of the case on hand.

D.V.S.S. SOMAYAJULU, J

Date: 06.04.2018
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[3] 2003 (8) SCC 289