

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

CRP.No.1645 of 2015

O R D E R:

This revision petition is filed questioning the order dated 13.02.2015 passed in EP.No.104 of 2013 in OS.No.222 of 2011 by the Senior Civil judge, Puttur.

The decree holder in EP.No.104 of 2013, who is the plaintiff in OS.No.222 of 2011, obtained a decree against the judgment debtor. The judgment debtor's son was the original borrower. He died and so the suit was filed for recovery of the amount due from the estate of the borrower in the hands of the judgment debtor. The suit was decreed. The Execution Petition was then filed. In the Execution Petition, the impugned order was passed after oral evidence etc., was let in. The Execution Petition came to be dismissed. This revision is filed questioning the said orders.

The question for consideration is, whether the impugned order suffers from any error warranting interference?

This Court has heard Sri Thoom Srinivas, learned counsel for the petitioner and Sri N.Aswarth Narayana, learned counsel for the respondents.

The facts leading to the decree are not in dispute. The Execution Petition is filed for sale of $\frac{1}{2}$ share in Ac.3.31 $\frac{1}{2}$ cents of land. This property belonged to one Ramakrishna

Raju also called Gundraju. He died. After his death, it is stated that his two sons R.Narayana Raju and his brother orally partitioned the property and are enjoying their shares. As the property was partitioned, it is the self acquired property of R.Narayana Raju (judgment debtor No.1). His son (the original borrower) thus did not have a share in the property. Hence, the same cannot be attached or sold. This argument appealed to the Executing Court, which dismissed the Execution Petition.

The learned counsel submits that the order is *per se* wrong. After the partition between the judgment debtor No.1 and his father; the son (original borrower) was born. Hence, the property again becomes ancestral property. The learned counsel relies upon ***Rohit Chauhan v. Surinder Singh***¹ for this. He also points out that in the same Execution Petition, another order was passed allowing the petition on 19.03.2014, which is filed with the material papers. Hence, he questions the passing of the impugned order dismissing the Execution Petition.

Counsel for the respondent/judgment debtor relies upon ***Padala Prasad v. Padala Anandarao***² and ***Bhanwar Singh v. Puran and others***³ to argue that the impugned order is correct. He states that once the property is the self

¹ 2013 (9) SCC 419

² 2011 (5) ALT 448

³ 2008 (3) SCC 87

acquired property of judgment debtor No.1; it cannot be attached or sold in the present execution petition.

This Court is of the opinion that the impugned order dated 13.02.2015 cannot be passed in view of the earlier order passed in the same execution petition on 19.03.2014. The reasons are not clear why another order was passed in the same Execution Petition. However, the difference is that in the impugned order; oral and documentary evidence came to be introduced. The parties appear to have participated again. Even otherwise, this Court holds that the Court below failed to notice that the property of judgment debtor No.1 again becomes the coparcenary property once a son is born to the father (judgment debtor No.1). The Hon'ble Supreme Court of India held as follows in para 11 of the judgment in ***Rohit Chauhan vs. Surinder Singh***⁴:

“We are further of the opinion that so long, on partition an ancestral property remains in the hand of a single person, it has to be treated as a separate property and such a person shall be entitled to dispose of the coparcenary property treating it to be his separate property but if a son is subsequently born, the alienation made before the birth cannot be questioned. But, the moment a son is born, the property becomes a coparcenary property and the son would acquire interest in that and become a coparcener.”

⁴ 2013 (9) SCC 419

In addition, in the cross-examination of judgment debtor, it was clearly admitted that he and his son mortgaged the EP schedule properties and obtained a loan. It is clear that there is no proof of any oral partition. Neither is the date of partition mentioned. Even in Ex.P.2; the judgment debtor No.1 admits that the property is shown as ancestral property.

This court is of the opinion that the lower Court overlooked the law and also the evidence introduced. The facts/law mentioned in the preceding paragraph were overlooked. The proof of oral partition is not there. The birth of the son to judgment debtor No.1 and his conduct in jointly mortgaging the property was over looked. Hence, the impugned order dated 13.02.2015 is set aside totally. Execution proceedings are directed to be continued.

The civil revision petition is allowed. No order as to costs.

As a sequel, miscellaneous petitions, if any, pending in this revision shall stand closed.

D.V.S.S.SOMAYAJULU, J

Date:19.12.2018
KLP