

HON'BLE SRI JUSTICE M.SATYANARAYANA MURTHY

C.R.P. No.4220 OF 2017

ORDER:

This revision petition is filed under Article 227 of the Constitution of India challenging the order dated 28.07.2017 passed in I.A.No.184 of 2016 in O.S.No.97 of 2015 by the VI Additional District Judge, Krishna District at Machilipatnam, whereby the petition filed under Order I Rule 10 C.P.C. by the 1st respondent/3rd party was allowed impleading him as the 2nd defendant in the main suit.

The petitioner/plaintiff filed suit for specific performance of agreement of sale against the 2nd respondent, but the 1st respondent/third party allegedly obtained a decree in O.S.No.22 of 2006 and attached the property by initiating execution proceedings to realize the decree by sale.

The contention of the 1st respondent/3rd party before the Court below is that he has direct interest in the property and consequently he is entitled to come on record to defend the suit so as to avoid multiplicity of proceedings.

The petitioner filed counter and the 2nd respondent did not oppose the petition. It is the contention of the petitioner/plaintiff that he purchased the plaint schedule property from the 2nd respondent for consideration of Rs.60 lakhs and paid advance of Rs.15 lakhs, who in turn executed agreement of sale in his favour incorporating terms of contract. Subsequently, the 2nd respondent paid Rs.5 lakhs on 20.09.2004 and Rs.5 lakhs on 25.09.2009 towards part advance sale consideration and thus paid total consideration of Rs.25 lakhs as advance on three occasions and still an amount of Rs.35 lakhs has to be paid to obtain regular sale deed. Therefore, his rights cannot be defeated in view of subsequent attachment of the schedule property and requested to dismiss the petition.

Upon hearing, the Court below made certain observations about the collusion and fraud between the parties, allowed the petition holding that the 1st respondent is proper party to the proceedings in O.S.No.97 of 2015, pending on the file of VI Additional District Judge, Krishna District at Machilipatnam.

Aggrieved by the impugned order, the present revision petition is filed mainly on the ground that in a suit for specific performance, only parties to the contract or agreement are necessary parties and the third party cannot come on record to defend the suit claim for specific performance placing reliance in **Kasturi v Iyyamperumal and others**¹ that the impugned order is contrary to the principles laid down in the judgment and requested to set aside the impugned order.

During hearing, learned counsel for the petitioner reiterated the grounds urged in the petition while drawing attention of this Court to the judgments of the Apex in **Kasturi's case** referred supra and **Mumbai International Airport Pvt. Ltd. v Regency Convention Centre and Hotels Pvt. Ltd and others**² and requested to set aside the impugned order.

Whereas, learned counsel for the 1st respondent contended that when the petitioner got attached the property during pendency of O.S.No.22 of 2006 by invoking Order XXI Rule 54 C.P.C i.e. attachment, he is entitled to come on record since he acquired interest in the property directly. Therefore, the 1st respondent is proper party though not necessary party in a suit for specific performance.

Considering rival contentions, perusal of material available on record the point that arise for consideration is:

¹ (2005)6 SCC 733

² (2010) 7 SCC 417

“Whether the third party, who obtained decree and attached property is proper or necessary party to the suit for specific performance, if not, whether the impugned order be sustained?”

POINT:

The undisputed fact is that the 1st respondent obtained decree in O.S.No.22 of 2006 for recovery of money and to realize the decree debt, he filed E.P.No.24 of 2012 and got attached the property and to bring it for sale of the property. The attachment must have been effected only during 2012, but not prior to that. Whereas, the petitioner filed suit for specific performance in the year 2015 to enforce the agreement of sale dated 18.09.2003 and allegedly paid an amount of Rs.25 lakhs on three different occasions as advance while agreeing to pay the balance of Rs.35 lakhs on the date of execution of regular sale deed. The suit is pending for plaintiff's evidence after setting aside the exparte order. At that stage, the 1st respondent filed petition under Order 1 Rule 10 C.P.C claiming that he is also interested in the suit property having obtained order of attachment under Order XXI Rule 54 C.P.C. to realize the decree debt by sale of property. The 1st respondent mainly contended that when he attached the property is by private sale and thereby he is entitled to contest the suit since the agreement is collusive one and placed reliance on judgment of the Apex Court in **P.G.Munnuswami Reddi v P.R.Panduranga Chetty**³ where the single Judge discussed the scope of private sale after attachment of the property and concluded that execution of document during subsistence of attachment and private sale will not affect the rights of the parties. The Court also held that any private transaction or any title created by the Judgment debtor pending the attachment cannot in any way affect the right of the attaching creditor to have the property sold and delivered free of title created by the judgment debtor. The provisions of Section 64 C.P.C. are

³ AIR 1978 AP 47

clear in its terms that no one gets a title from a judgment-debtor pending attachment against the attaching creditor or execution purchaser. Thus, the rights of the attaching creditor as well as the execution purchaser are protected as against an alienation pending attachment of the property. As such, the transactions entered into by the judgment debtor during the pendency of the attachment are of no consequence either against the attaching creditor or the execution purchaser.

But here, it is not the case of the petitioner that private sale took place during subsistence of attachment. The agreement of sale was allegedly obtained long prior to the attachment i.e. 18.09.2003, whereas the attachment under XXI Rule 54 C.P.C. was affected in the year 2012 during pendency of E.P. If the private sale was prior to attachment, the affect of such sale has to be considered in separate proceedings, but not in the present proceedings. In any view of the matter, the suit is filed for specific performance, pending for adjudication, the rights of the third parties cannot be decided in a suit for specific performance between the parties to the contract or the agreement. Moreover, the agreement itself will not create any title or interest in immoveable property under Section 54 of the Transfer of Property Act. Even assuming for a moment that the agreement of sale was concocted and it was fraudulent transaction between the parties to the suit, the petitioner cannot be impleaded as party to the suit for specific performance in view of law laid down by the Apex Court in **Mumbai International Airport Pvt. Ltd's** case referred supra that the third party cannot be permitted to come on record to decide their right in suit for specific performance.

The Apex Court while dealing with the application under Order 1 Rule 10 C.P.C. in a tenant suit for specific performance discussed about the scope of nature of trial and who are necessary parties and who are proper

parties. A necessary party is a person who ought to have been joined as a party and in whose absence no effective decree could be passed at all by the Court. If a necessary party is not impleaded, the suit itself is liable to be dismissed. A proper party is a party who, though not a necessary party, is a person whose presence would enable the Court to completely, effectively and adequately adjudicate upon all matters in disputes in the suit, though he need not be a person in favour of or against whom the decree is to be made. If a person is not found to be a proper or necessary party, the Court has no jurisdiction to implead him, against the wishes of the plaintiff.

In the present case, neither of the parties to the suit filed any petition under Order 1 Rule 10(2) C.P.C., but third party, who got attached the suit schedule property invoked Order I Rule 10(2) C.P.C. in view of decree obtained for recovery of amount and attached the property invoking Order XXI Rule 54 C.P.C. The Apex Court also adverted to the earlier judgment in **Sumtibai v Paras Finance Co.**⁴ and **Kasturi's** case referred supra, held as follows:

Learned counsel for the respondent relied on a three judge Bench decision of this Court in **Kasturi v Iyyamperuma**. He submitted that in this case it has been held that in a suit for specific performance of a contract for sale of property a stranger or a third party to the contract cannot be added as defendant in the suit. In our opinion, the aforesaid decision is clearly distinguishable. In our opinion the aforesaid decision can only be understood to mean that a third party cannot be impleaded in a suit for specific performance if he has no semblance of title in the property in dispute.

On the basis of the principle laid down by the Apex Court in **Mumbai International Airport Pvt.Ltd's case** referred supra, at para 10 approved the view taken in **Kasturi's case** referred supra and finally concluded that the third party, who is not a party to the agreement or contract is not a proper and necessary party in a suit for specific

⁴ 2007(10) SCC 82

performance. Therefore, in view of the law declared by the Apex Court in the judgments referred supra, the 1st respondent is not proper and necessary party to the suit for specific performance based on contract between the petitioner and the 2nd respondent in O.S.No.97 of 2015 pending on the file of VI Additional District Judge, Krishna District at Machilipatnam and at best the 1st respondent is having attached the property even to proceed with the execution proceedings to realize the decree debt.

The Court below on the basis of alleged fraud etc. concluded that the petitioner is proper and necessary party, but the conclusion arrived by the Court below is contrary to the principles laid down in the judgments of the Apex Court supra, whereby the 1st respondent is not a proper and necessary party to the proceedings and consequently, the impugned order is liable to be set aside. Accordingly, the point is answered in favour of revision petitioner and against the respondents.

Accordingly, the civil revision petition is allowed setting aside the order dated 28.07.2017 passed in I.A.No.184 of 2016 in O.S.No.97 of 2015 by the VI Additional District Judge, Krishna District at Machilipatnam while dismissing I.A.No.184 of 2016 in O.S.No.97 of 2015.

Pending miscellaneous petitions in the petition, if any, shall stand closed.

M.SATYANARAYANA MURTHY,J

26.10.2018
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