

THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM

C.C.C.A. No. 249 of 2017

JUDGMENT:

For the sake of convenience, the appellants herein are referred to as the claim petitioners, the 1st respondent as the decree holder and the remaining respondents as the judgment debtors.

This Appeal is filed questioning the order dated 16.10.2017 in E.A.No.24 of 2017 in E.A.No.19 of 2017 in E.P.No.29 of 2014 on the file of the Court of the III Additional Chief Judge, City Civil Courts at Hyderabad. Along with this Appeal, CCCAMP No. 713 of 2017 (I.A. No. 1 of 2017) was also filed and on 23.11.2017, this Court granted interim stay of all further proceedings in E.P.No.29 of 2014 up to 27.12.2017 and the same was being extended from time to time. The decree holder moved CCCAMP.No.806 of 2017 seeking vacation of the interim order granted earlier, however, at the request of the parties, the main Appeal itself is heard on 19.07.2019, as there will be nothing to be considered thereafter.

The brief facts, relevant for the purpose of disposal of the Appeal are:

The decree holder filed O.S.No.132 of 1999 on the file of the Andhra Pradesh Waqf Tribunal, Hyderabad against the judgment debtors, seeking their eviction from the suit schedule property. The suit came to be decreed on 13.11.2002. Challenging the said judgment and decree, Civil Revision Petition No. 5863 of 2002 was filed by the judgment debtor – Respondent No. 2 which came to be dismissed, confirming the orders of the Waqf Tribunal dated 13.11.2002, however, granting one year time for vacating the suit schedule property. As the judgment debtors failed to vacate the suit property, E.P.No.29 of 2014 was filed by the decree holder, wherein E.A. No. 19 of 2017 was filed by the claim petitioners purportedly invoking Order 21 Rule 58 and Rules 97 to

101 read with Section 151 of the Code of Civil Procedure objecting for execution of the judgment and decree dated 13.11.2002, as modified by this Court in Civil Revision Petition No. 5863 of 2002. A counter-affidavit was filed opposing the said EA and further, an Application also came to be filed by the decree holder in E.A.No.24 of 2017 under Order 7 Rule 11 of the CPC seeking dismissal of E.A.No.19 of 2017. The learned III Additional Chief Judge, after considering the respective claims and counter-claims of the parties, allowed E.A.No.24 of 2017, holding that the executing Court does not have jurisdiction to enquire into and decide the claim of the claim petitioners whether Nawab Mahboob Alam Khan, S/o Nawab Shah Alam Khan Saheb was the Secretary of the Waqf and whether he has authority to file E.P.No.29 of 2014 as the jurisdiction to decide anything relating to the Waqf and its management exclusively vests with the Waqf Tribunal under Section 7 of the Waqf Act, 1985. Consequent on allowing E.A.No.24 of 2017, holding that the executing Court lacks jurisdiction, E.A.No.19 of 2017 was dismissed.

The case of the claim petitioners, in brief, as put-forth before the executing Court in E.A.No.19 of 2017 is that claim petitioner No.2/appellant No.2 was appointed as the Secretary of the Waqf institution by Resolution dated 31.01.2017 and the same was also informed to the Waqf Board on 18.02.2017 and the claim petitioners and other office bearers are alone attending to / looking after the management of the Waqf institution and the school being run by it. Mr. Mahboob Alam Khan, S/o Nawab Shah Alam Khan, taking advantage of the cause title in O.S. No. 132 of 1999, filed the E.P. purporting to represent the waqf institution though he ceased to be the Secretary of the waqf institution and thus, he has no *locus standi* to file the EP for execution of the decree on behalf of the waqf institution. In the Application, the details relating to various litigation pending between the claim petitioners on the one hand and the said Nawab Shah Alam Khan on the other

were set out (it is not necessary for this Court to record all the other details, as, in the light of the core issue that is required to be considered, the same are irrelevant). Suffice to say the sum and substance of the contention of the petitioners to the effect that the EP filed by the decree holder cannot be proceeded on account of the fact that the said Nawab Shah Alam Khan does not have authority as Secretary to represent the waqf institution. In the counter-affidavit filed by the decree holder, an objection was taken as to the maintainability of EA No. 19 of 2017, in terms of Order 21 Rule 58 and Rules 97 to 101 read with Section 151 CPC. It is specifically asserted that Order 21 Rule 58 would be applicable to a case where there is an adverse claim on the property, which is under attachment, by a third party and Rules 97 to 101 would apply only when the 3rd party, is dispossessed/sought to be dispossessed and the petitioners are two individuals, who do not have any claim over the property and the dispute raised by them with respect to the authority of Nawab Shah Alam Khan to represent the waqf institution – decree holder cannot be examined and decided by the executing Court as the jurisdiction exclusively vests with the Waqf Tribunal to decide those issues. The counter-affidavit also, in detail, had made a reference to the orders in OA No. 64 of 2013, now re-numbered as OA No. 74 of 2016, pending before the Waqf Tribunal and other orders passed in various proceedings at the instance of Mahboob Alam Khan.

On behalf of respondent 2 – judgment debtor, counter-affidavit was filed raising objection with regard to maintainability of the EP at the instance of Sri Mahboob Alam Khan, as he is neither Secretary of the Waqf Institution nor have any right to file the suit /EP. The counter was also filed by the claim petitioners in E.A.No. 24 of 2017 raising an objection with regard to maintainability of the Application under Order 7 Rule 11 CPC with a further prayer to read the affidavit filed in support of EA No. 19 of 2017 as part of the counter-affidavit.

Learned Judge after hearing the respective parties, framed two points for consideration: 1) whether the petition is liable to be rejected in E.A.No. 19 / 2017 on the ground of jurisdiction as prayed for? 2) whether the petition is liable to be rejected on the ground of no cause of action of E.A.No. 19/ 2014?

Exs.P1 to P10 were marked on behalf of the decree holder and Exs.R1 to R9 were marked on behalf of the claim petitioners. On appreciation of oral and documentary evidence, the learned Judge answered point No.1 in favour of the decree holder. So far as the second point is concerned, it is answered in favour of the claim petitioners and against the decree holder.

Learned counsel appearing for the appellants – claim petitioners, while copiously taking this Court through various orders passed by the Waqf Tribunal and the High Court in the dispute relating to the claim of Nawab Shah Alam Khan as Secretary of the waqf, would contend that EP No. 29 of 2014 is not maintainable and the Court below ought to have allowed EA No. 19 of 2017 and dismissed EA.No. 24 of 2017. He would further assert that inasmuch as EP was filed by Mahboob Alam Khan, who did not have authority to represent the waqf institution, the orders of the Executing Court are patently illegal and unsustainable. Meeting with regard to the objection raised by the learned counsel for the decree holder, he would rely on the judgment of the Supreme Court in *N.S.S. Narayana Sarma v. M/s Goldstone Exports (P) Ltd.*¹, particularly para 19 and assert that any person having interest in the waqf institute can file the objection. According to him, there was a settlement reached between the waqf institution represented by the present Managing Committee and the judgment debtors, thus, the EP itself had become infructuous. He would further assert that the conclusion reached by the learned

¹ AIR 2002 Supreme Court 251

Judge that an Application under Order 7 Rule 11 as maintainable and thus allowing EA No. 24 of 2017 is patently illegal and the learned Judge ought to have seen that Order 7 has no application to the Execution Proceedings.

On the other hand, learned counsel for the decree-holder would contend that the Court below had considered the maintainability of EA No. 19 of 2017 at the instance of two individuals and found that the claim petition filed by the appellants as not maintainable, as, admittedly, neither they have a right nor claim in the property of the waqf which was the subject matter of O.S.No.132 of 1999. In that view of the matter, EA No. 19 of 2017 filed purportedly under Order 21 Rule 58 and Rules 97 to 101 of CPC read with Section 151 CPC is misconceived and the Court below is right in rejecting the said Application. Placing reliance on the judgment of the learned Single Judge of this Court in *Mothukuri Ranga Rao v. Royyala Laxminarayana*², the learned counsel would submit that in view of Explanation to Section 141 CPC, Order 7 Rule 11 would also apply to the execution proceedings. However, going through the said judgment, the learned counsel fairly conceded that Order 7 Rule 11 has no application in execution proceedings and thus, reliance placed by him on Order 7 Rule 11 was inappropriate. Even though Order 7 has no application, the Application filed by the claim petitioners invoking Order 21 Rule 58, Rules 97 to 101 read with Section 151 of the Code is not maintainable as they do not have any interest in the property and they have also not made any claim in the property which, admittedly, belongs to the Waqf institution. He would assert that the executing Court having framed an issue answered the same and thus, the dismissal of Execution Application cannot be found fault.

At the outset, it may be noted that this Court having perused the claim in E.A.No.19 of 2017 filed by the appellant invoking Order 21 Rule 58 and Rules

² 2008(3) ALD 311

97 to 191 read with 151 of CPC, to dismiss E.P.No.29 of 2014 filed by the decree holder, and the petition filed by the decree holder to reject the objections filed by the claim petitioner, had passed orders in E.A.No.24 of 2017. The executing Court did not address the core issue. In the facts of the present case, this Court having considered the respective submissions, and having perused the record, finds the points for consideration in the appeal as under:

- (i) Whether the claim petition filed by the claim petitioners in E.A.No.19 of 2017 was maintainable;
- (ii) Whether the applicants had *locus standi* to file such an application; and
- (iii) Whether dismissal of the Application filed by the appellants allowing the application filed for rejection of E.A.No.19 of 2017 is justified and legal?

The crucial facts, which are not in dispute are that the decree holder is a Waqf institution and is the owner of the suit schedule property in O.S.No.132 of 1999 and the suit came to be decreed whereunder a judgment and decree was passed against defendants/respondents 2 to 8 which order became final on the dismissal of Civil Revision Petition No. 5863 of 2002 by this Court.

E.P.No.29 of 2014 filed by the decree holder against the judgment debtors is pending before the executing Court. A careful perusal of the Application filed by the claim petitioners – appellants, who are the petitioners in E.A.No.19 of 2017, does not disclose that they have any right, title or interest over the subject property. Order 21 of CPC which deals with “*Execution of Decrees and Orders*” gives a right for any person, though not a judgment debtor, interested in the subject matter of judgment and decree, to file objections and oppose execution of the judgment and decree.

The Application filed by the claim petitioners is under Order 21 Rule 58, 97 to 101. It will be useful to notice the provisions (so far as relevant for the purpose of this case).

“Order 21 Rule 58 of CPC reads as under:

58. Adjudication of claims to, or objections to attachment of, property

(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained :

Provided that no such claim or objection shall be entertained-

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) ***

(4) ***

(5) ***

Rule 97 dealing with “Resistance to delivery of possession to decree-holder or purchaser” reads as under:

“97. Resistance or obstruction to possession of immovable property.”

(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.

[(2) Where any application is made under sub-rule (1), the Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.]

101. Question to be determined

All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions.”

In the language employed in Rule 58 as well as Rules 97, 101, to invoke the provisions opposing attachment / sale of the property – the claimant is required to establish his right, title or interest in the property attached or its delivery in favour of the decree holder, which is required to be considered under Order 21 Rule 101 of CPC.

The above provisions make it clear that while adjudicating the claim petition either under Order 21 Rule 58 CPC or under Rule 101, the executing Court is duty-bound to consider the right, title or interest of the claimant *qua* the property and decree holder and the objector/petitioner.

As stated supra, the claim petitioners did not spell out their right, title or interest in the property of Waqf. The entire of the pleadings, evidence and assertion of the claim petitioners is only to the effect that the execution petition filed by the judgment debtor is not maintainable at the instance of Janab Nawab Mehboob Alam Khan, as the said individual ceased to be the Honorary Secretary of the Waqf institution at the relevant point of time and further, there was a settlement arrived at between the Waqf institution represented by them and the judgment debtors. In other words, objection is only relating to Mr.

Nawab Mahboob Alam Khan, representing the Waqf institution, and not with respect to execution of the decree on the ground that the petitioners have personal interest in the property which is the subject matter of the suit.

The argument of the learned counsel for the appellants, by placing reliance on the judgment of the Supreme Court in N.S.S. Narayana Sarma's case (*supra*), particularly relying on paragraphs 17 and 19 of the judgment, to contend that any person could resist delivery and execution of the Judgment and Decree, is liable to be rejected as the judgment categorically holds that "any person" includes all persons resisting delivery of possession, claiming right in the property, and even those bound by the decree including tenants or other persons claiming right on their own. (emphasis supplied).

The first point framed by the executing Court was "Whether the petition is liable to be rejected in E.A.No.19 of 2017 on the ground of jurisdiction as prayed for"? In the process of answering the same, the learned Judge had considered the issue and held in paragraph 23 as follows:

23. The two citations relied regarding can be filed before the Civil Court cannot be applicable to the court since the same are pertaining to the immovable property herein. The claim petition is filed regarding the trusteeship of Mumtaz Yarud Dowla Wakf can be considered. Hence, not applicable to the present case. From the above discussion it is clearly established the rejection of claim petition is considered for want of jurisdiction under wakf Act regarding trusteeship of Mumtaz Yarud Dowla Wakf.

Hence Point No.1 is answered in favour of petitioner and against the respondents."

It would have been more appropriate, in the facts and circumstances of the case, for the learned Judge to have posed a question as to whether the applicants had any right, title or interest in the suit schedule property, and whether the applicants had *locus standi* to object to the execution of judgment and decree. Instead of straightaway addressing the said issue on account of

the pleadings and the evidence adduced with respect to the management of the Waqf Institution, the points have been framed in a circuitous manner, resulting in the Court unnecessarily entering into the issue relating to who was in management of the Waqf institution. In this context, the judgment of the learned single Judge cited by the learned counsel for the decree holder to the effect that when a jurisdictional issue is raised, particularly with respect to the maintainability of a petition, it is the duty of the Court to address and decide the jurisdictional issue as a preliminary issue, is apt and appropriate.

While the Court rightly came to the final conclusion that E.A.No19 of 2017 is not maintainable, the reason therefor is primarily on account of the claim petitioners not having any right, title or interest in the schedule property, and thus not having locus to file such an application. The executing Court having come to the conclusion that on account of the claim petitioners having no interest in the property, could not have answered the second issue “whether the petition is liable to be rejected on the ground of no cause of action in E.A.No.19 of 2017” in favour of the respondents as the respondents in E.A.No.24 of 2017 in which the main order has been passed are the petitioners in E.A.No.19 of 2017. The above anomaly appears to be by oversight and on account of the fact that instead of passing a common order in E.A.No.24 of 2017 and E.A.No.19 of 2017, detailed order was made in E.A.No.24 of 2017, and by allowing E.A.No.24 of 2017, E.A.No.19 of 2017 came to be rejected. This appears to be on account of the fact that E.A.No.24 of 2017 was made under Order 7 Rule 11(a) and (d) read with Section 151 CPC, in E.P.No.29 of 2014 in OS.No.132 of 1999 on the ground of lack of jurisdiction and non-disclosure of cause of action and the right to sue.

In dealing with E.A.No.24 of 2017, the objection raised by the petitioners in E.A.No.19 of 2017, that Order VII Rule 11 has no application in execution proceedings, was rejected placing reliance on the judgments of the Supreme

Court as well as this Court that the execution proceedings are to be enquired into like suit proceedings. Before this Court, initially the learned counsel for the decree holder placed reliance on the judgment of this Court reported in *Mothukuri Ranga Rao's case (supra)* and contended that in view of Section 141 of CPC, Order VII Rule 11 could be invoked even in respect of an application seeking rejection of a claim petition filed under Order 21 and relevant Rules.

On further investigation, a doubt having raised by this Court, particularly pointing out that in Paragraph 10 of the judgment referred to, reference to Order 21 appears to be a typographical error, the learned Counsel Sri B. Nalin Kumar, on further research, had fairly conceded that mentioning of Order 21 was a typographical error and the judgment is no authority for the proposition that on account of Section 141 CPC, the procedure prescribed under the Code would apply even in execution proceedings. The learned counsel had brought to the notice of this Court the judgment of the Supreme Court in *Dokku Bhushayya v. Katragadda Ramakrishnayya*³ clarifying that Section 147 of CPC has no application to the execution proceedings, and the issue was, in fact, settled by the Privy Council in *Thakur Prasad v. Sheikh Fakir-Ullah*⁴. It may also be noted that Section 141 of CPC came to be amended by adding Explanation with effect from 01.02.1997, and, as it stands today, application of Section 141 is restricted only to proceedings under Order 9, thereby, by implication, excludes applicability to other proceedings under the Code including execution proceedings. A reference also may be made to the judgment of a learned single Judge of this Court in *Maimoona Begum v. G. Sarat Babu*⁵.

³ AIR 1962 Supreme Court 1886

⁴ ILR 17 All 106 : 22 Ind App 44 (PC)

⁵ 2016 (2) ALD 610

In that view of the matter, the application filed by the claim petitioners and the grounds raised therein cannot be entertained; and thus, there was no jurisdiction vested with the executing Court to consider the aspect of removal of trustees for want of jurisdiction on that issue, and consequently E.A.No.19 of 2017 is liable to be rejected on merits.

In the light of the discussion above, this Court coming to the conclusion that the application filed by the applicants-claim petitioners i.e., E.A.No.19 of 2017 is liable to be rejected as they did not have any right, title or interest in the Waqf property, and as the Execution Petition is still pending against Respondents 2 to 8 before the executing Court, it is unnecessary for this Court to advert to and deal with the arguments of the learned counsel for the judgment debtors with respect to their objections for executing the judgment and decree.

In the result, the Appeal is dismissed. No costs. Miscellaneous petitions, if any pending, shall also stand dismissed.

CHALLA KODANDA RAM,J

09th September, 2019

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THE HON'BLE SRI JUSTICE CHALLA KODANDA RAM



C.C.C.A. No. 249 of 2017

09th September, 2019

KSM