

**IN THE HIGH COURT FOR THE STATE OF TELANGANA
AT HYDERABAD**

**TUESDAY, THE TWENTY NINTH DAY OF AUGUST
TWO THOUSAND AND TWENTY THREE**

PRESENT

THE HONOURABLE SRI JUSTICE SAMBASIVARAO NAIDU

CITY CIVIL COURT APPEAL NO: 168 OF 2018

Appeal under Section 96 R/W order XLI Rule 1 & 2 of C.P.C against the Judgment and Decree Dated 27/01/2017 made in E.A. NO. 67 of 2017, in EP NO. 152 OF 2016 on the file of the Court of the V Senior Civil Judge, City Civil Court at Hyderabad.

Between:

1. DODDA MALLAMMA, W/o late D.Mallaiah, Aged about 73 years, Occ House hold.
2. P.Mani, W/o P.Venkata Swamy, Aged about 52 years, Occ Teacher, (both are residents of H.No. 1-7-510/A/5/3, Harinagar, Jamistanpur, Musheerabad, Hyderabad).

...APPELLANTS/CLAIM PETITIONERS.

AND

1. KADARI RAMA SWAMY, S/o late Kanakaiah, Aged about 66 years, Occ Retd. Employee, R/o H.No 1-7-513/1, Harinagar, Jamisthanpur, Musheerabad, Hyderabad.
2. M/s Neha Enterprises, represented by its Proprietor.
3. D.Sundaram, S/o late D.Mallaiah, Aged about 48 years, Occ Business, R/o H.No. 1-7-510/A/5/5, Harinagar, Jamistanpur, Musheerabad, Hyderabad.

...RESPONDENTS/JDRS

Counsel for Appellant : Mr. G ANANDAM

Counsel for the Respondents : None Appeared

The Court made the following : JUDGMENT

HONOURABLE SRI JUSTICE SAMBASIVA RAO NAIDU

C.C.C.A.NO.168 of 2018

JUDGMENT :

Being aggrieved by the order of the learned V Senior Civil Judge, Hyderabad in EA.No.67 of 2017 in E.P.No.152 of 2016 dated 27-01-2017, by which the learned trial Judge dismissed the interlocutory application filed by the petitioners, who are appellants in the present appeal and rejected the claim petition, the petitioners in the said interlocutory application filed this Civil Appeal under Section 96 r/w Order 41 Rule 1 and 2 Civil Procedure Code(for short 'C.P.C.').

2. As could be seen from the impugned order, the petitioners, who are third parties to the execution proceedings vide EP.No.152 of 2016 filed E.A.No.67 of 2017 under Order 21 Rule 58 C.P.C. with a prayer to declare them as rightful owners of the properties mentioned in the E.P. schedule and dismiss EP.No.152 of 2016. In fact, EP.No.152 of 2016 has been filed by the respondent/D.Hr. against respondent/J.Drs. seeking execution of decree which he has obtained in OS.No.1730 of 2010 by way of sale of the schedule mentioned properties. However, the present appellants moved the above said interlocutory application stating that one Dodda Mallaiah was the absolute owner of the property

bearing Municipal No.1-7-510/A/5/5 admeasuring 78 Sq.yrds at Zamistanpur, Musheerabad, Hyderabad, having purchased the same under a registered sale deed document No.1565 of 1966. Since the date of purchase, the claim petitioners i.e., the present appellants and said Mallaiah are living in the property. Appellant No.1 is the wife and appellant No.2 is the son of said Mallaiah who died on 10-02-1997.

3. The appellants have claimed that since the death of Mallaiah, appellants herein and third respondent/J.Dr. became joint owners of item number No.2 of E.P. schedule property, thereby R3/J.Dr.No.2 is not the exclusive owner of the said property. There was no partition. The appellants herein are shown as defendants No.4 and 5 in OS.No.1730 of 2010 that the suit was dismissed against the present appellants/claim petitioners. The appellants have claimed that respondent/D.Hr. filed execution petition by suppressing the material facts and right of the appellants over the E.P. schedule property. The appellants came to know about the E.P. proceedings only when bailiff came to the house for serving the sale notice. Thereby, the appellants sought for declaration of their right on the schedule mentioned property and for dismissal of the execution petition.

4. The first respondent/D.Hr. filed a counter disputing the material averments and further submitted that the appellants being defendants No.4 and 5 in the main suit have cross-examined PW.1, who was examined on behalf of the plaintiff/D.Hr. but did not adduce any evidence on their behalf. They filed vakalth on behalf of J.Dr. Nos.1 and 2 but no counter was filed in the E.P, therefore, right of J.Drs.No.1 and 2 to file counter was forfeited. Therefore, D.Hr. while disputing the right of appellants over the schedule property sought for dismissal of the claim petition. The learned Senior Civil Judge having heard both parties and appreciating the averments made on behalf of the parties to the petition, came to the conclusion that the claim made by the appellants herein can also be characterized as a suit, there is no legal impediment for rejecting the plaint which is akin to the rejection of the suit under the provisions of Order 7 Rule 11 C.P.C, thereby, rejected the petition stating that claim petition is not maintainable. There was no order on merits.

5. Being not happy with the said finding, the appellants filed this appeal on the following grounds:

The Court below has misconstrued the material evidence on record and misinterpreted the true spirit and object of under Order 21 Rule 58 C.P.C. and rejected the claim petition filed by the

appellants. The finding of the Court below that the appellants herein are not entitled to file the claim petition as they are neither strangers nor third parties to the decree passed in the suit is only erroneous and unsustainable one. The Court below lost its sight that the suit against the appellants was dismissed. The Court below ought to have seen the right conferred on the appellants cannot be taken away and their right to hold the property under the law cannot be deprived of just because they are parties to the suit. There is no legal impediment in laying a claim at any time irrespective of the fact that they are parties to the suit or not.

6. The appellants have find fault with the findings recorded by the Court below to the effect that there is no legal impediment for rejecting of the claim petition which is akin to the rejection of a suit under the provisions of Order 7 Rule 11 C.P.C. It is settled principle of law that claim petition cannot be thrown out without consideration at the threshold without allowing the parties to substantiate their respective claims. Therefore, according to the appellants, the Court below committed an error in applying the principles of Order 7 Rule 11 C.P.C. to the claim petition.

7. The appellants have further contended that the Court below committed an error by holding that the claim petition filed

by the appellants is not maintainable for the reason that J.Dr. did not contest the execution proceedings in a serious way and the Court below ought to have seen that the heavy burden lies on the decree holder to establish that the properties sought to be attached and sold in the process of execution of the decree belong to J.Dr. alone but not the properties of any other person.

8. The appellants have also contended that the Court below ought to have appreciated the documents filed by the claim petitioners goes to show that J.Dr. is not the sole owner but the claim petitioners have got two third right in respect of item No.2 of E.P. schedule property. They have filed Gift settlement deed evidencing the first appellant herein is the soul and absolute owner and J.Dr. has no right in respect of the property. Therefore, even though there is sufficient documentary evidence that J.Dr. has no right in respect of E.P. schedule property, the Court below committed an error by rejecting the claim petition with a finding that appellants have no right to resist the execution. The appellants have claimed that the Court below committed a grave error in placing reliance on the documents exhibited in the suit when they have not been exhibited in the claim petition by either of the parties to the petition. Therefore, the Court below travelled beyond the jurisdiction which is not vested in it. Therefore,

rejection of their claim petition is incorrect. They have also claimed that there is no bar in raising objection in execution proceedings without raising objection to the attachment during the pendency of the suit.

9. The appellants have find fault with the order of the Court below on the ground that their application was rejected without conducting any inquiry and without providing opportunity to the parties and petition was decided without seeing merits. Therefore, the order impugned in the present appeal is liable to be set aside. They have also contended that the Court below ought to have seen that in terms of Order 21 Rule 58 C.P.C., the enquiry cannot be dispensed as it runs contrary to law and unsustainable. Therefore, the appellants have contended that the Court below committed a manifest error by rejecting their claim petition without deciding it on merits and sought for setting aside the impugned order.

10. Heard both parties.

11. Now the point for consideration is:

Whether the order of the trial Court in rejecting the petition filed by the appellants under Order 21 Rule 58 C.P.C. by exercising jurisdiction under Order 7 Rule 11 C.P.C. is incorrect, if so, whether the order is liable to be set aside?

12. As already stated in the previous paragraphs, the petition filed by the appellants vide EA.No.67 of 2017 was under Order 21 Rule 58 C.P.C. with a specific contention that they have got 2/3rd right over the second item of EP schedule property, therefore, they prayed the Court to decide their claim. However, the Court below while considering the averments made in the petition filed by the appellants and counter filed by the respondent/D.Hr. was of the opinion since the appellants herein were defendants in the main suit in which respondent/D.Hr. obtained a decree against the other judgment debtor and as the judgment debtors did not raise any serious contest in the execution proceedings, petition filed by the appellants herein is not maintainable and rejected the petition under Order 7 Rule 11 C.P.C. For convenience sake, order 7 Rule 11 C.P.C. is extracted here under:

11. *Rejection of plaint.*

The plaint shall be rejected in the following cases-

- (a) where it does not disclose a cause of action;
- (b) where the relief claimed is undervalued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;
- (c) where the relief claimed is properly valued, but the plaint is returned upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;
- (d) where the suit appears from the statement in the plaint to be barred by any law;

Provided that the time fixed by the Court for the correction of the valuation or supplying of the requisite stamp-paper shall not be extended unless the Court, for reasons to be recorded, is satisfied that the plaintiff was prevented by any cause of an exceptional nature from correcting the valuation or supplying the requisite stamp-paper, as the case may be, within the time fixed by the Court and that refusal to extend such time would cause grave injustice to the plaintiff.

13. According to the material placed before this Court, it appears that respondent No.1/D.Hr. filed a suit against the defendants including respondent No.3 herein and appellants vide OS.No.1730 of 2010. According to the averments made in the said suit, it was specifically contended by the first respondent/D.Hr. that one Neha Enterprises i.e., respondent No.2 herein is a Proprietor concern. Respondent No.3, who is shown as second defendant is Proprietor of the said Neha Enterprises. He has approached Syndicate Bank, Chikkadpally, and availed overdraft for an amount of Rs.4,40,000/-. The first respondent/D.Hr. stood as guarantor for the repayment of the said loan and executed a deed of guarantee in favour of third defendant Bank. But the defendants No.1 and 2 in spite of his repeated requests, failed to repay the loan. They were irregular in repayment of the loan amount. Subsequently, the Bank issued a legal notice to all the defendants including the respondent/D.Hr. under the provisions of 'Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest Act, 2002'

(for short 'SARFAESI Act') and it appears that the first respondent/D.Hr. paid Rs.5,90,000/- to defendant No.3 Bank, therefore, filed the above said OS.No.1730 of 2010 to realize the said amount together with costs and subsequent interest. OS.No.1730 of 2010 disposed by V Senior Civil judge, City Civil Court, Hyderabad passing a decree in favour of respondent No.1/D.Hr. against respondents No.2 and 3/defendants No.1 and 2, for a sum Rs.9,28,600/- with future interest. It is true, the appellants herein were shown as defendants No.4 and 5 in OS.No.1730 of 2010.

14. It also appears that the first respondent herein filed EP.No.152 of 2017 for execution of the decree referred above by way of sale of immovable properties shown as item Nos.1 and 2 in the E.P. schedule.

15. The appellants herein filed EA.No.67 of 2017 by claiming right over second item of the E.P. schedule property. According to their contest, the properties were originally purchased by the husband of the first appellant, father of the second appellant. Thereby, after the death of Mallaiah, they became owners of the property along with respondent No.3/J.Dr/Defendant No.1. Respondent No.3 is no other than the another son of Mallaiah. According to the material averments made in the

interlocutory application filed by the appellants, they have claimed 2/3rd right over the second item of E.P. schedule property. The petition was filed under Order 21 Rule 58 C.P.C. The claim petition is just like a suit and to dispose of the petition, the Court has to conduct an enquiry and decide the rights of the parties. It may be a fact that the petitioners herein were shown as defendants and they might not have seriously contested the suit. That itself may not disqualify the appellants herein to file an application under Order 21 Rule 58 C.P.C. which has to be decided as if a suit. However, the Court below having found that there is no dispute that one Dodda Mallaiah purchased item No.2 of E.P. property and he died on 10-02-1997. Even though, the appellants herein have averred that the said property was not partitioned among the legal heirs of Mallaiah. They did not take any steps even from the date of their impleadment in OS.No.1730 of 2010. The third respondent/J.Dr. who suffered a decree in the above said original suit is one of the joint owners of the property but did not resist the execution proceedings by filing counter. The appellants who are defendants No.4 and 5 having allowed the decree to be passed which became final cannot take the stand that the property cannot be sold more so, when they are not strangers or third parties to the proceedings.

16. The Court below having recorded the above stated findings did not go further and in a cut short manner, rejected the claim petition by exercising powers under Order 7 Rule 11 C.P.C. It is true, a claim petition is akin to a suit but even as per Order 7 Rule 11 C.P.C., there are certain limitations for rejection of the plaint. Such ingredients are missing in the present interlocutory application which ought to have been decided on merits after allowing the parties to adduce their respective contentions. It is not the case of appellants herein that they are exclusive owners of the entire E.P. property. Their claim even as per the petition filed before the Court is only to the extent of right on a 2/3rd share of second item of the schedule property. It may be a fact that the principal debtor i.e., respondents No.1 and 2 having availed a loan when the first respondent/D.Hr. herein stood as guarantor and having failed to discharge the loan, forcing the first respondent to clear the loan amount, kept quite without contesting the execution proceedings. The first respondent/D.Hr. simply because he stood as guarantor for the loan availed by respondents No.2 and 3 herein were forced to clear the loan and there is no finality to the litigation since 2010. There is no dispute about the suit filed by Syndicate Bank, which is shown as defendant No.3 in OS.No.1730 of 2010, there is no dispute about the decree that was passed in

favour of the first respondent/D.Hr. The execution petition was only to realize the decretal amount but the appellants herein successfully prolonged the litigation by filing interlocutory application which was not decided on merits. The finding recorded by the Court below that the petition being akin to the suit, liable for rejection is incorrect and Court below ought to have decided the petition on merits. Therefore, instead of deciding the present appeal on merits, this Court feels there is a necessity to remand the matter to the Court below for disposal on merits. Therefore, the impugned order is set aside. The matter is remitted to the Court below for disposal of the claim petition filed by the appellants herein on merits not being influenced by the present order. Accordingly the C.C.C.A. is disposed.

17. In the result, C.C.C.A. is disposed of.

Consequently, Miscellaneous applications if any, are closed.

No costs.

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Sd/- B.S.CHIRANJEEVI
JOINT REGISTRAR
SECTION OFFICER

To,

1. The V Senior Civil Judge, City Civil Court at Hyderabad (With Records)
2. One CC to SRI. G ANANDAM Advocate [OPUC]
3. Two CD Copies

ASR2/KBSK

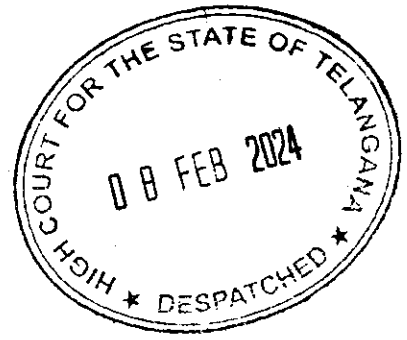
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HIGH COURT

DATED:29/08/2023

JUDGMENT

CCCA.No.168 of 2018



Disposing CCCA without Costs

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