

HON'BLE SRI JUSTICE D.V.S.S.SOMAYAJULU**APPEAL SUIT No. 865 of 2018****JUDGMENT :**

The present application is filed questioning the order dated 23.03.2018, passed in E.A.58 of 2013 filed under order 21 Rule 97 C.P.C. in E.P No.10 of 2018 in O.S.No.36 of 2001, by the Senior Civil Judge, Zaheerbad. The appellants are the claim petitioners in E.P No.10 of 2008.

2. The appellants / claim petitioners claimed to have entered into an oral agreement of sale with regard to the suit schedule property with respondents No.2 to 9 on 26.08.1997. According to the claim petitioners, on 03.05.2007 the respondents 2 to 9 have received the entire sale consideration from the appellants and had also executed a sale deed dated 03.05.2007, bearing documents No. 9006 of 2007 conveying the schedule property. They claimed to be in possession of the property and that they also state that their names are mutated in the Revenue records.

3. Sri N.Hanumantha Reddy (presently - Respondent No.1), is a person who is said to be holding an agreement of sale with respondent Nos. 2 to 9, in I.A.No.1 of 2018, for the same land. This agreement was supposedly executed on 29.12.1997. The said Humanath Reddy filed a suit O.S. 36 of 2001 for specific performance of the agreement of sale in his favour. The respondents in that suit remained ex parte and the suit was decreed in favour of the plaintiff - N.Hanumantha Reddy in the year 2005. The said Hanumanth Reddy as plaintiff - decree holder, filed E.P 10 of 2008 for the execution of the sale deed. At this stage respondent Nos. 2 to 9 filed an application to set aside the ex-parte order along with a delay condonation application. The same was allowed. The delay was condoned and the ex-parte decree was set aside. Aggrieved by the same, the

plaintiff filed CRP.No. 1926/2013 and CRP.No. 1927/2013 both of which were allowed. The unsuccessful respondents preferred a Special Leave Petition before the Hon'ble Supreme Court of India, which was dismissed on 25.07.2016. A Review application was also filed and the same was dismissed. The respondents 2 to 9 then preferred an appeal against the ex-parte decree passed against them and the same is pending with ASSR No. 13561 of 2016. The delay condonation application is still pending. This is the factual matrix of the case.

4. The present appellants/claim petitioners filed E.A 58 of 2013 under order 21 Rule 97 CPC, claiming that they have a right and interest in the property. They also state that the plaintiff in the suit O.S. No. 36 of 2001, who is the respondent No.1 herein also executed a relinquishment deed/declaration on 22.07.2002 in their favour.

5. Thus, by virtue of an earlier agreement of sale which culminated in a sale deed during the pendency of suit O.S. 36 of 2001 and a relinquishment declaration dated 22.07.2002, the claim petitioners wanted the court to adjudicate their rights. This was strongly opposed by the respondents. Ultimately, by the impugned orders dated 23.03.2019, the claim petition came to be dismissed in totality. Questioning the same the present A.S 865 of 2018 was filed. In the said claim petition I.A. 1 of 2018 was filed for stay of all proceedings and this Court by on order dated 18.06.2018 granted an interim stay of all further proceedings in E.P. 10 of 2008. Vacate stay petition in I.A. 2/2018 was filed to vacate the stay.

6. This Court has heard Sri P. Badri Premnath - learned counsel for the petitioners and Sri V Hariharan, learned counsel for the respondents / vacate stay petitioners. Both the counsel argued the matter thoroughly. The matter was re-opened once and on a query by the Court; both the

learned counsel agreed that the main appeal itself can be disposed of as their arguments were on the complete merits of the matter.

7. The contention of the learned counsel for the appellants is that the dismissal of the claim petition is contrary to law. He submits that the claim petition should be adjudicated like a suit and that a trial should be conducted. According to him, after the amendment to the Civil Procedure Code, all questions of right, title and interest with regard to a person claim in the property have to be decided by the executing Court itself. Therefore, as this procedure is a substitute for a suit, the contention of the learned counsel for the petitioners is that the Lower Court committed a fundamental error in passing the impugned order wherein it summarily rejected the claim petition. The counsel for the appellants points out that along with his claim petition, he has filed 25 documents, which were not considered at all by the Court in passing the impugned order. He points out that neither oral nor documentary evidence was taken and that there is no appendix of evidence itself. In addition he also states that it is his case that apart from an earlier agreement of sale there is a relinquishment deed / declaration dated 22.07.2002. The Lower Court rejected the same on the ground that it had no validity in law. This finding, as per the counsel, is totally wrong and no reasons were actually assigned for rejecting this document. Hence, he prays that the impugned order should be set aside in its totality.

8. In reply to this, the learned counsel for the respondents / plaintiffs, Sri N. Humantha Reddy and the vacate stay petitioner states that after giving adequate opportunities only the impugned order was passed. He also points out that the claim petitioner filed E.A 2 of 2018 under order 7 Rule 11 C.P.C. to reject the claim petition and the same was heard along with the claim petition and arguments were advanced on both the claim

petition and the order 7 Rule 11 application. His contention is that law does not mandate that the hearing should be like in a suit.

9. The learned counsel also relied upon that the procedure to be followed for application under 21 Rule 97 which is described in the later provisions of the C.P.C. particularly, Order 21 rule 102 and points out that it is mentioned that nothing in rules 98 to 100 that they shall apply to a person, who has purchased the property *pendente lite*. He also draws the attention of this Court to the explanation to Rule 102, which clearly states the transfer includes transfer by operation of law. The learned counsel also argued that as the sale deed in favour of the claim petitioner is dated 03.05.2007, it is a *pendente lite* purchase since the specific performance suit was filed in the year 2001 and is numbered as O.S. 36 of 2001. He contends that there are no merits in the application and that the same was rightly dismissed.

10. The point for consideration now is:

Whether the Lower Court was right in passing the impugned order in the manner in which it was passed ?

11. Learned counsel for the appellant relied upon the following judgments:

- (1) **Arif Abdul Ghani and others v Maheshwar Rao and others**¹,
- (2) **Silver Forum Pvt. Ltd. vs. Rajiv Trust and Anr**²,
- (3) **Shreenath & Anr. Vs. Rajesh & Ors.**³,
- (4) **Brahmdeo Choudhary vs Rishikesh Prasad Jaiswal**⁴ and finally
- (5) **Rajan and others Vs. Yunuskutty and others**⁵

¹ 1999 (4) ALT 306

² (1998) 3 SCC 723

³ (1998) 4 SCC 543,

⁴ (1997) 3 SCC 694

⁵ AIR 2002 Kerala 339

12. The learned counsel for the respondents relied upon the following judgments:

(6) **Sanjay Verma v. Manik Roy**⁶ ,

(7) **Forum Pvt. Ltd. vs. Rajiv Trust and Anr**⁷, which is relied upon the appellant also and

(8) **A.V. Raju v H.Phoolchand**⁸ and **Usha Sinha V Dina Ram and Ors.**⁹

13. As the facts are not really in dispute and are described earlier, the case law is being considered straightaway. The 1st judgment, relied upon by the learned counsel for the appellant is **Arif Abdul Ghani's** case (1 supra), wherein the learned single Judge of this Court relying upon the earlier judgments of this High Court and other High Courts, came to the following conclusion:

“In Tahera Sayeed v. Shannmugam, , this Court while dealing with the claim petitions under Order 21, Rule 97 CPC observed that "when a third party, not bound by the decree approaches the Court to protect this independent right, title or interest before he is actually dispossessed from the immovable property and files an application under Order 21, Rule 97, it must be treated to be an intimation to the Court as caveat to the decree-holder or purchaser or a person claiming through him and the Court is to treat it as a complaint or a counter in opposition as an application for the purpose of Order 21, Rule 97 and to adjudicate it under Rule 98 or Rule 101 which shall be final and conclusive between the parties. Justice K. Ramaswamy (as His Lordship then was) went to the extent of holding that if such facts are brought to the notice of the Court even by way of a counter in the execution proceedings or as an intimation in whatever manner, may have to be treated as an application under Order 21, Rule 97 and the same is maintainable. This judgment completely answers the plea putforth by the learned Counsel for the appellants that no relief could be granted to the respondents/claim petitioners, on the basis of an ill-drafted claim petition.”

14. In para 27, the learned judge ultimately came to the conclusion that the claim petition filed under order 21 Rule 97, cannot be decided in a summary manner. The learned Single Judge held that questions relating to right title and interest in the property will have to be decided by the Court. For that purpose the parties may have to given an opportunity to lead oral

⁶ AIR 2007 SC 1332

⁷ (1998) 3 SCC 723

⁸ AIR 2011 Madras 83

⁹ AIR 2008 SC 1997

and documentary evidence. The Learned single judge held that the claim petition is required to be tried and decided like it is a suit. However, the single judge cautioned that the extent of the applicability of the procedure may vary, depending upon the fact situation. The purpose of the amendments in the CPC dispensing with the filing of the separate suit was also noticed by the learned single judge. The learned judge however held that the parties to a claim petition cannot insist upon the Court to follow the entire procedure, commencing from Order -1 to Order 20 of the CPC.

15. The next judgment relied upon the **Silver Forum's** case (2 supra) which was also relied upon by the counsel for the respondents. The learned counsel for the appellant / petitioner argued that relying upon para 12 that an executing Court must decide the following two points :

- (i) That all questions arising between the parties should have legally arisen between the parties and
- (ii) Such questions must be relevant for consideration and determination between the parties.

16. Therefore, the learned counsel for the appellants argued that questions that have arisen in this case squarely fall with what is mentioned in para 12 of this judgment. The Learned counsel also pointed out that in paragraph 16, the Hon'ble Supreme Court considered the judgment reported the case of **Brahmdeo Choudhary's** case (4 supra). The learned counsel pointed out that the application filed in that case before the Supreme Court was for the grant of an armed force (police aid) for removing the objection. The Hon'ble Supreme Court in **Brahmdeo Choudhary's** case (referred supra) held that the resistance offered was enough to bring it within the ambit of Order 21 Rule 97 and the said passage was approved in this judgment.

17. The next judgment relied upon the case of **Shreenath's** case (3 supra). The counsel pointed out that the appellant in that case filed an application stating that they cannot be dispossessed as they are not parties to the suit. The word "any person" was interpreted by the Hon'ble Supreme Court to mean all persons resisting the delivery by claiming a right in the property including persons claiming an independent right and those not bound by the decree. The learned counsel pointed out as in para 19 that the Hon'ble Supreme Court directed the Executing Court to dispose the matter after giving the opportunity to both parties. The learned counsel lastly relied upon the case of **Shreenath's** case (3 supra) and relied upon the following passage from paragraph 9 of the judgment which is to be following effect.

"By the amendment, one has not to go for a fresh suit but all matter pertaining to that property even if obstruction by a stranger is adjudicated and finally given even in the executing proceedings. We find the expression "any person" under sub-clause (1) is used deliberately for widening the scope of power so that the executing court could adjudicate the claim made in any such application under Order 21 Rule 97. Thus by the use of the words "any person" it includes all persons resisting the delivery of possession, claiming right in the property, even those not bound by the decree, including tenants or other persons claiming right on their own, including a stranger."

18. The learned counsel therefore, argued that even before actual dispossession he can raise the issues and get them properly adjudicated.

19. In reply to this learned counsel for the respondents argued that the present applicant is a *pendente lite* purchaser and that as per the provisions of order 21 Rule 102, the provisions of these rules do not apply to a person who acquired the property through transfer after the institution of the suit. Learned counsel argued that the sale deed obtained by the applicants/claim petitioners dated 03.05.2007 is long after the suit for specific performance as filed and decreed. Therefore, his contention is by virtue of the judgments reported in **Sanjay Verma, Forum Pvt. Ltd.,**

which is relied upon the appellant also and **A.V. Raju and Usha Sinha's** cases (referred supra) that the persons who acquire the property *pendente lite* do not have any independent rights in the properties and that his rights as per Section 52 of the Transfer of Property Act cannot be said to be rights that have accrued on his own. The learned counsel points out, relying upon the case reported in **Silver Forum's** case (2 supra), that the enquiry that is contemplated is a limited enquiry on question between the decree holder and claim petitioner. He argues that if it is clear that he is a transferee *pendente lite*, it is not necessary for the court to conduct a further enquiry. Basing on the principle of Section 52 of Transfer of Property Act (*pendente lite* transfer), the leaned counsel argued that the petitioner does not have any independent right and therefore, nothing survives for consideration in this case. It is his contention that an elaborate enquiry is not contemplated as admitted facts clearly show that the claim petitioner is a *pendente lite* purchaser. Therefore, learned counsel supported the order.

20. This Court after listening to the both the learned counsel and after perusal of the entire law cited across the bar is of the opinion that the claim petitioner in this case is not merely claiming title by virtue of a sale deed dated 03.05.2007. The genesis of the present case is an agreement dated 26.08.1997, which is prior to the plaintiffs / respondents agreement of sale dated 29.12.1997. The claim petitioner bases his rights on an agreement dated 26.08.1997. In addition to this earlier agreement, the claim petitioner also relied upon the document dated 22.07.2002 by which he states that the plaintiff executed a declaration, stating that he has no rights in the petition schedule property and in the suit OS.No.36 of 2001. This document is pleaded and is filed as document No.1. The same is also denied in para – 8 of the counter affidavit filed. These three documents are the basis of the claim.

21. This Court on an examination of the case law, particularly, the law laid down by the learned single judge of this Court in **Arif Abdul Ghani's** case (1 supra) which follows an earlier judgment of the learned single judge reported in **Tahera Sayeed v. Shanmugam**¹⁰ is of the opinion that the claim petition deserves to be adjudicated in a more comprehensive manner. This Court is also of the opinion that as the present appellant is claiming rights as per an agreement of sale dt.26.08.1997, which is anterior at point of time (4 months prior to the plaintiffs agreement of sale), the claim petitioner has made out a point that needs to be adjudicated. The claim petitioner is also relying upon the declaration dated 22.07.2002 supposedly executed by the plaintiff/respondents and also the sale deed dated 03.05.2007. These facts make a fundamental difference in this case. The claim of the claim petitioner is an independent right which he is seeking to establish. He not only stated that he has an anterior agreement of sale but he also states that the rights in the suit O.S.No.36 of 2001 are given up by the declaration executed by the plaintiff. These are matters which need to be adjudicated and decided upon. They cannot be dealt with in a very summary manner.

22. This court is conscious of the fact that the suit filed in 2001 has not resulted in a final order till date. While the rights of the decree holder are to be protected and he should be allowed to enjoy the fruits of the decree at the same time this Court cannot loose sight of the fact that if a person has a genuine claim it cannot be thrown out at the threshold itself after a summary enquiry.

23. In matters of this nature, if the claim petitioner is not a *pendent elite* purchaser pure and simple and Order 21 Rule 102 CPC does not apply, the executing Court should give an opportunity to both parties to adduce

¹⁰ AIR 1987 AP 206

oral and documentary evidence. The entire procedure for trial of civil suits however need not be adopted. The parties cannot be allowed to go on a roving enquiry to establish their rights. If the parties wish to proceed with the enquiry on the basis of documents the same should be noted clearly. If a request for oral evidence is made, a strict timetable must be fixed. List of witnesses must be filed in advance and the procedure under Order 14 should be adhered to strictly. In addition, requests for any adjournment must be dealt with strictly. The Executing Court should be conscious of the fact that the difficulty of the decree holder often commences when he obtains a decree and puts it to execution on the same time as the 1976 amendment to CPC empowers the Executing Court to decide all questions it must proceed to do so in a quick but sure manner. The following passages from **Arif Abdul Ghani's** case (1 supra) should be guiding beacon for the executing Court.

The claim petition is required to be heard and decided as if it is a suit. That is the scope of the proceedings. But, it does not mean that the Court is required to follow the same procedure as provided for in the enquiry and trial of a suit. The procedure prescribed for the trial and disposal of the suit, ultimately resulting in judgment and decree may be applicable for the disposal of the claim petition. But neither the result, nor the proceedings would be vitiated, if the entire procedure as such is not followed in a given case, by the Court. Wherever it is necessary for the effective disposal of the claim petition, the civil Court may follow the same procedure for the disposal of the claim petition, as is applicable for the disposal of the suit. The extent of applicability of the procedure may vary and depend upon the facts situation. Mere failure to frame issues or points for consideration would not vitiate the proceedings nor the decision itself. May be it is better and advisable for the civil Courts to reduce the controversy between the parties by focusing the same and by framing issues or points for consideration. The very purpose of the amendment dispensing with the requirement of filing of another suit to go into the question relating to right, title and interest in a claim petition is with a view to provide cheap and speedy justice. Therefore, the proceedings may not be converted into a cumbersome one by compulsorily applying the entire procedure applicable for the disposal of the suit. Such a view would defeat the very purpose and object of the amendment. It would be sufficient if the civil Court decides the matter after referring to the pleadings and the evidence available on record. Of course, it is needless to observe that whole of the Code of Civil Procedure would be applicable depending upon the facts situation and desirability of such an application. The Courts below can always insist upon for compliance of such

provisions of the Code of Civil Procedure, which may be necessary for the disposal of the case. But, the parties to the claim petition cannot insist upon the Court to follow the entire procedure commencing right from Order 1 to Order XX of the Code of Civil Procedure, which is applicable for the disposal of a suit

24. Therefore, this Court is of the opinion that AS.No.865 of 2018 is to be allowed. However, the same is allowed with the following directions and conditions:

a). The executing court is directed to give an opportunity to the parties to adduce oral and documental evidence.

b) Both the parties have to file their list of witnesses with documents etc., within 30 days from the date of receipt of the copy of this order. Request for adjournment shall be dealt with very strictly and on a case to case basis. Liberal adjournments should not be granted. If the Court comes to a conclusion that either parties is delaying the matter the Court should act in compliance with the relevant provisions of the law to stop such requests. The Executive Court shall keeping in mind the law laid down in **Arif Abdul Ghani's** case (1 supra) and also endeavour to dispose off the matter as quickly as possible.

25. Consequently, miscellaneous applications pending if any shall stand closed. No costs.

JUSTICE D.V.S.S.SOMAYAJULU

Date: 11-09-2018

JR

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



Date: 11-09-2018

