

* HON'BLE SMT JUSTICE M.G.PRIYADARSINI

+ A.S.Nos.162, 163 & 164 of 2021

AND

C.R.P.Nos.1062, 1075, 1076 & 1078 of 2021

% 08.08.2023

1. Katta Venkateswara Rao, S/o.Venkata Narayana,
Age 54 Yrs, Occ. Agriculture, R/o. Lingala Village,
Kalluru Mandal, Khammam Dist.

... Petitioner

Vs.

\$ 1. Maddela Shiva Krishna, S/o.Late Venkateswarlu,
Age 19 yrs, Occ.Student, R/o.Lingala village,
Kalluru Mandal, Khammam District.

2. Maddela Amrutha, W/o.Late Venkateswarlu,
Age 48 yrs, Occ.Housewife, R/o.Lingala village,
Kalluru Mandal, Khammam District.

3. Maddela Baby Rani, D/o.Late Venkateswarlu,
Age 22 yrs, Occ.Student, R/o.Lingala village,
Kalluru Mandal, Khammam District.

4. Maddela Nandini, D/o.Late Venkateswarlu,
Age 22 yrs, Occ.Student, R/o.Lingala village,
Kalluru Mandal, Khammam District.

... Respondents

! Counsel for the Petitioner: Mr. Y.V.V.V. S.Jwala

Counsel for Respondents: Mr. Chalakani Venkat Yadav

< Gist:

> Head Note:

? Cases referred:
Nil.

THE HON'BLE JUSTICE M.G. PRIYADARSINI**A.S.Nos.162, 163 & 164 of 2021****AND****C.R.P. Nos.1062, 1075, 1078 & 1076 of 2021****COMMON JUDGMENT:**

Inasmuch as the issue involved in all the appeals and revision petitions is common, interconnected and arising out of the common orders, they are heard together and being disposed of by this common judgment.

2. By common orders, dated 28.11.2019, the learned Principal District Judge, Khammam, allowed E.A. Nos. 213, 214 & 215 of 2016 filed by the children (representatives) of judgment debtor. By the same common orders, E.A. Nos. 1, 2 & 3 of 2019 filed by the decree holder to reopen the case, recall R.W.1 and to receive additional evidence were dismissed. All these applications arose out of the execution proceedings in E.P. No. 31 of 2015 in O.S. No. 39 of 2010.

3. A.S. Nos. 162, 163 & 164 of 2021 are preferred by the decree holder being aggrieved by the common orders passed in E.A. Nos. 213, 214 & 215 of 2016 respectively, in allowing the applications filed by the representatives of the judgment debtor to declare them as the owners and possessors of the petition

schedule properties and to delete the same from the E.P. schedule property. Whereas, C.R.P. Nos. 1062, 1075 & 1078 of 2021 are preferred by the decree holder challenging the dismissal of applications filed by him in E.A. Nos. 2, 1 & 3 of 2019 respectively, for reopening the case for receiving the documents; to recall R.W.1 for marking additional documents; and to receive additional documents i.e., orders, plaint and written statement in O.S. No. 72 of 2010. Whereas, C.R.P. No. 1076 of 2021 is filed by the decree holder challenging the docket orders dated 28.11.2019 in E.P. No. 31 of 2015 dismissing the E.P. in view of allowing E.A. Nos.213 to 215 of 2016.

4. For the sake of convenience, hereinafter, the parties are referred to as per their array before the Executing Court.

5. In this batch of cases, there are two sets of facts, one relating to the claim petitions i.e., E.A. Nos. 213 to 215 of 2016 and the other relating to E.A. Nos. 1 to 3 of 2019. Since the purview of E.A. Nos. 1 to 3 of 2019 is limited to that of reopening the case; recall R.W.1 and to receive additional documents in relation to O.S. No. 72 of 2010, this Court is of the view that the facts relating to E.A. Nos. 213 to 215 of 2016

are sufficient to deal with for the purpose of deciding the present batch of cases.

6. The facts that are necessary for disposal of the batch of these cases are that seeking specific performance of agreement of sale, dated 06.07.2009, executed by the judgment debtor for sale of the suit schedule property i.e., agricultural land to an extent of Ac.4.16 guntas, situated in Sy. Nos. 333/EE/E, 341/UU & 342/A of Chandrupatla Revenue Village, Kalluru Mandal, Khammam District, the decree holder instituted O.S. No. 39 of 2010 on the file of the Principal District Judge, Khammam, which came to be decreed ex parte on 17.09.2014. Since the judgment debtor did not come forward to execute the registered sale deed in terms of the decree, E.P. No. 31 of 2015 came to be instituted seeking execution of registered sale deed through the court. Pending the E.P. proceedings, the children of judgment debtor namely, Maddela Shiva Krishna, Maddela Nandini and Maddela Baby Rani filed applications i.e., E.A. Nos. 213, 214 & 215 of 2016 respectively, under Order XXI Rule 58 r/w Section 151 C.P.C. to declare them as the owners and possessors of the petition schedule properties i.e., the land to an extent of Ac.2.16 guntas in Sy. No. 341/UU; Ac.1.00

guntas in Sy. No. 333/EE/E; and Ac.1.00 guntas in Sy.No.333/EE/E and to delete the said properties from the E.P. schedule properties contending that they are in exclusive possession of the said properties as lawful owners as their mother i.e., the judgment debtor, had executed registered gift settlement deeds bearing document Nos. 3392/2009, 3393/2009 & 3394/2009, all dated 10.12.2009 respectively. Since the date of settlement deeds, they are in possession and enjoyment of the same with absolute rights and that the revenue authorities have also mutated their names in respect of the said properties. It is their case that the judgment debtor had no knowledge about the suit agreement of sale with the decree holder since the said transaction took place in between the father of the claim petitioners and the decree holder. The suit was instituted claiming the judgment debtor to be the owner and possessor of the suit schedule property but in fact, by the time of institution of the suit, the judgment debtor was not the owner of the E.P. schedule properties, but the claim petitioners are the owners and possessors.

7. Resisting the claim petitions, the decree holder filed his counter contending that the very claim petitions, which were

filed invoking the provisions under Order XXI Rule 58 r/w Section 151 C.P.C. are not maintainable inasmuch as there is no attachment made against the property by the Court in the E.P. proceedings. It is contended that the claim petitioners are not having any right for declaring them as owners and possessors of the petition schedule properties in the E.P. proceedings filed by the decree holder and that the remedy for the claim petitioners is to file a separate suit for the said relief. The claim petitioners are the family members of the judgment debtor and that the documents relied on by them are subsequent to the filing of the suit and later on proceedings. It is further contended that the alleged registered gift settlement deeds filed by the claim petitioners are not having any legal sanctity inasmuch as they were executed by the judgment debtor in their favour and that the gifts were not accepted by the donees since they were minors. Only in case the donee accepts the gift, then only the gift deed shall be enforceable under law and as the claim petitioners were minors by then, the same are unenforceable under law. Since the properties are not under attachment, the claim petitions shall not be entertained under Order XXI Rule 58 C.P.C. Even if the registered settlement deeds are genuine, still they are not

binding on the decree holder who is having first charge over the properties in the form of agreement of sale.

8. To prove the claim, on behalf of the claim petitioners, claim petitioner in E.A. No.213 of 2016 was examined as P.W.1 and got marked Ex.A.1, original gift deed, dated 10.12.2009. Whereas, the decree holder himself examined as R.W.1 and got marked revenue records such as Panani for the year 1427 Fasli and 1-B Namoon (ROR) as Exs.B.1 to B.4.

9. Considering the respective pleadings and evaluating the evidence, both oral and documentary, adduced by the parties, the Executing Court has allowed the petitions filed by the claim petitioners holding that the registered gift settlement deeds, which were prior to the institution of the suit, were acted upon and the claimants were put in possession of the properties and title deeds and pattadar pass books were also issued in their favour. Further, in view of allowing the claim petitions, the Executing Court dismissed the applications, three in number, filed by the decree holder for reopen, recall and receiving additional documents on the ground that they are not relevant to the facts in issue. Hence, the decree holder before this Court by way of the present appeals and revision petitions.

10. It is contended by the learned counsel for the appellant-decree holder that the Executing Court has lost sight of the fact that after issuing legal notice to the judgment debtor in the suit on 20.11.2009, the judgment debtor gave a reply on 05.12.2009 and within five days thereafter, the alleged registered gift deeds were executed in favour of her children i.e., the claim petitioners, apparently, in order to avoid execution of registered sale deed in favour of the decree holder. It is further contended that to maintain an application under Order XXI Rule 58 C.P.C., the condition precedent is that there must be an attachment of property inasmuch as the words used in XXI Rule 58 C.P.C. are that *adjudication of claims to, or objection to attachment of property*. In the present case, as there was no order of attachment of property, the claim petitions ought not to have been entertained by the Executing Court. Without there being any basis, the Executing Court, on assumptions, held that the claim petitioners are in continuous possession of the properties on the basis of alleged gift deeds. Even the alleged gift deeds are not proved as required by law, inasmuch as not even a single attester thereof was examined. The earlier suit filed by the judgment debtor in O.S. No. 72 of 2010 on the file of Senior Civil Judge, Sathupally seeking perpetual injunction

was dismissed for non-prosecution and it is with a view to only avoid legal consequences. It is pleaded that as seen from the evidence of P.W.1, he had knowledge of dismissal of suit but did not participate in the proceedings intentionally.

11. On the other hand, the learned counsel appearing on behalf of claim petitioners i.e., the representatives of judgment debtor, contends that the impugned common order passed by the learned Executing Court is on evaluation of evidence in proper perspective and the same needs no interference by this Court.

12. As seen from the record, the agreement of sale entered by the judgment debtor with the decree holder for sale of the suit property was on 06.07.2009. As the judgment debtor did not come forward for execution of the sale deed, the decree holder got issued a legal notice to the judgment debtor on 20.11.2009, to which, the judgment debtor issued a reply on 05.12.2009. It is curious to note that, within five days thereafter i.e., on 10.12.2009, the alleged registered gift settlement deeds were executed by the judgment debtor in favour of her children i.e., the claim petitioners, gifting the suit schedule property. The defence taken by the judgment debtor in the suit is total denial

of execution of agreement of sale and alleged that it is a forged one. In support of her claim, she had also filed an application under Section 45 & 73 of the Evidence Act before the trial Court being I.A. No. 538 of 2012 to send the agreement of sale to the handwriting expert for comparison of the signature thereon with her admitted signatures. Although the said application was allowed on 15.10.2012, for the reasons best known to her, the judgment debtor did not take any further steps. She was called absent and remained ex parte even in the suit and thereby allowed the suit to be decreed ex parte. The obvious reason for her remaining ex parte in the suit appears to be the execution of gift settlement deeds in favour of her children in respect of the suit property. But the fact remains that by the time of execution of alleged gift settlement deeds by the judgment debtor, a charge is already created in the form of suit agreement in favour of decree holder.

13. Coming to the findings of the Executing Court, as rightly pointed out by the learned counsel for the decree holder, the condition precedent for maintaining an application under Order XXI, Rule 58 C.P.C. is that there must be an attachment of property. In the case on hand, as there was no attachment of

property, the applications under Order XXI, Rule 58 C.P.C. are not maintainable. However, since the claim petitioners come under the definition of 'representatives' because they are transferees of the property from the judgment debtor, the Execution Court has rightly held that mere quoting of wrong provision of law, will not entail the petitions into dismissal and rightly decided the applications as having been filed under Section 47 of C.P.C. Further, the Executing Court has rightly rejected the other contention of the decree holder as to the consent of claim petitioners being the donees under the gift settlement deeds as they were minors at the relevant point of time. In this regard, the Executing Court has rightly held that since the donees are family members of donor and they lived under same roof, the evidence is sufficient to assume the acceptance of gift by the donees, if they had knowledge about the gift.

14. The claim petitioners relied on the three gift settlement deeds stated to have been executed by their mother i.e., the judgment debtor in their favour in respect of the Execution Petition schedule. The Executing Court has observed that *the gift deeds were executed by the judgment debtor much prior to*

filing of the suit and there is no legal embargo for the minor to accept the gift. But the fact remains that the alleged gift deeds were executed by the judgment debtor subsequent to the agreement of sale entered with the decree holder i.e., after creation of charge over the property in favour of the decree holder. Further, the Executing Court has observed at para No. 19 that *the evidence in the present case categorically goes to show that they are in possession of petition schedule property the moment gift deeds were executed.* In this regard, it is to be seen that except the oral testimony of P.W.1, claim petitioner in E.A. No. 213 of 2019, no other evidence is forthcoming to come to the conclusion that the claim petitioners were in possession of the petition schedule properties. Furthermore, except marking the gift settlement deeds, no attesor thereto was examined for the reasons best known to the claim petitioners. Inasmuch as the basis for the Executing Court to conclude that the claim petitioners were in possession of the petition schedule properties is the gift settlement deeds, dated 10.12.2009, it is apt to refer to Section 68 of the Evidence Act, which reads thus:-

“Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution...”

(Emphasis added)

15. The documents, being gift deeds, require attestation at least by two witnesses. Therefore, when the claim petitioners claim that they became owners and possessors of the petition schedule properties by virtue of gift settlement deeds, all dated 10.12.2009, they ought to have examined at least one attesting witness to the gift settlement deed to prove their claim. In the absence of examination of any of the attesting witnesses, the Executing Court ought not to have relied heavily thereon to hold that the claim petitioners were in possession of the petition schedule properties, more particularly, in the absence of any supporting revenue records.

16. As already observed above, the judgment debtor having filed a petition under Section 45 & 73 of the Indian Evidence Act, to send the agreement of sale to the handwriting expert for comparison of her signature and having got it allowed, did not proceed further and did not participate in the suit proceedings and allowed the suit to be decreed ex parte. Furthermore, the evidence of P.W.1 (claim petitioner in E.A. No. 213 of 2016)

discloses that he was having knowledge about the pendency of suit between the decree holder and the judgment debtor. Admittedly, by the time of institution of the suit, the gift settlement deeds were executed. Such being the case, no reasons are forthcoming as to why the claim petitioners did not take steps to get themselves impleaded in the suit. For the forgoing discussion, this Court is of the view that the learned Executing Court fell in error in allowing the Claim Petitions filed by the claim petitioners and the impugned common order, in this regard, is liable to be set aside.

17. Coming to the aspect of dismissal of E.As. by the Executing Court that were filed by the decree holder seeking to reopen, recall R.W.1 and receive additional documents, this court is of the view that as the additional evidence i.e., order copy, plaint copy and written statement copy, sought to be marked is in relation to the suit in O.S. No. 72 of 2010 filed by the judgment debtor which was eventually dismissed for non-prosecution, they are not much relevant for deciding the execution proceedings. Therefore, this Court is not inclined to interfere with the impugned common order so far as it deals

with dismissal of E.A. Nos. 1 to 3 of 2019 filed by the decree holder.

18. In the result, A.S. Nos. 162, 163 & 164 of 2021 are allowed setting aside the common orders dated 28.11.2019 and consequently, E.A. Nos. 213, 214 & 215 of 2016 shall stand dismissed. Whereas, C.R.P. Nos. 1062, 1075 & 1078 of 2021 are dismissed confirming the orders of the Executing Court in dismissing E.A. Nos. 1, 2 & 3 of 2019. Further, C.R.P. No. 1076 of 2021 stands allowed of in terms of findings in the appeals and the E.P. shall stand restored to its file. As the decree holder had already deposited the balance sale consideration way back in 2014, the Executing Court is directed to take up the E.P. and shall dispose of the same on merits within a period of three months from the date of receipt of a copy of this order. No costs.

Pending Miscellaneous Petitions, if any, shall stand closed.

M.G.PRIYADARSINI, J

08.08.2023

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Note:- L.R. Copy to be marked.

THE HON'BLE JUSTICE M.G. PRIYADARSINI

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AND
C.R.P. Nos.1062, 1075, 1078 & 1076 of 2021

DATE: 08-08-2023