
(1997) 04 AP CK 0042

In the Andhra Pradesh High Court

Case No : Second Appeal No's. 612 and 613 of 1992 and CRP No. 3979 of 1992

Bandi Narsaiah (died) and Others

APPELLANT

Vs

Virabathini Mallesham and Another

RESPONDENT

Date of Decision : 01-04-1997

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 31, Order 42 Rule 2, Order 6 Rule 2, 100, 144

Citation : (1997) 4 ALT 583 : (1997) 2 APLJ 266 : (1997) 3 CivCC 10

Hon'ble Judges : V. Bhaskar Rao, J

Bench : Single Bench

Advocate : J.V. Suryanarayana, in S.As. and G. Dhananjai, in CRP, for the Appellant; M. Chandrasekhara Rao, for the Respondent

Final Decision : Dismissed

Judgement

V. Bhaskar Rao, J.—These two Second Appeals arise from a common judgment in A.S. No. 11/1987 and cross-objections therein on the file of Additional District Judge, Warangal, dated 15-7-1992 and affirming the findings of the trial Court in O.S. No. 33 /1974 of Additional Subordinate Judge, Warangal, dt. 23-10-1986, except the issue relating to possession and dismissing the appeal and at the same time reversing the finding relating to possession and allowing the cross-objections filed by respondent-defendant No. 2. Pursuant to the above judgment and decree, the Appellate Court directed that the cross-objector-defendant No. 2 be put in possession of the suit land by an order dated 24-11-1992 in E.P.No. 193/1992. The revision petition is directed against the order directing delivery of possession. Hence, common questions arise in both the Second Appeals and C.R.P. and thus, they are being disposed of together.

2. The facts giving rise to these appeals and revision petition in brief are:

That the appellants-Plaintiffs filed O.S.No. 33/1974 for specific performance of agreement and perpetual injunction on the foot of an agreement of sale dated 7-1-1970 stating that plaintiff No. 1 purchased the suit land for a consideration

of Rs. 4,500/- from respondent No. 1 and paid Rs. 3,500/- as part-payment and agreed to pay the balance of Rs. 1,000/- at the time of registration. Ex.A-2 is the agreement of sale and Ex.A-3 is the receipt dated 7-1-70. It is also his case that he has been in possession of the suit land since 1966-67 and he was allowed to continue in possession and he has always been ready and willing to perform his part of contract, but respondent No. 1 postponed the execution of registration and thereafter respondent No. 2 obtained a registered sale deed on 18-3-1972 although he had knowledge of the agreement in favour of the appellants.

Respondents No. 1 and 2 filed separate written statements and contested the suit. The agreement of sale as well as the receipt, passing of part-payment thereunder and handing over possession of the land are all denied. On the other hand it is asserted by both of them that respondent No. 2 purchased the land from her under a registered sale deed and possession and also delivered to him and respondent No. 2 is in possession of the suit land. It is asserted by her that herself and her sister Mahmudunnisa, owner of adjoining land, together executed an agreement of sale on 3-8-1971 in favour of respondent No. 2 for the suit land as well as the adjoining land of her sister and received part-payment of Rs. 1,000/- which was shared by both of them equally. While so, appellant No. 1 threatened her sister and brother-in-law and managed to take a sale deed in respect of her sister's land and the matter was placed before mediators and they decided that she should transfer the suit land to respondent No. 2 as her sister had already executed the sale deed in favour of appellant No. 1. Thus, she executed the registered sale deed on 18-3-1972 and put respondent No. 2 in possession of the suit land.

On the above pleadings, the following issues have been framed by the trial Court:-

1. Whether the agreement of sale dated 7-1-1970 is true, valid and supported by consideration?
2. Whether the plaintiff is in possession of the suit land as alleged in the plaint?
3. Whether the 2nd defendant is a bona fide purchaser for value and without notice of the alleged agreement in favour of the plaintiff?
4. Whether the plaintiff is entitled for specific performance prayed for?
5. Whether the plaintiff is entitled for permanent injunction prayed for?
6. To what other reliefs plaintiff is entitled?

During the trial, seven witnesses have been examined on behalf of the appellants. P.W.1 is appellant No. 1 . P.W.2 C.Mallaiah is examined to prove another sale deed Ex.X-1 executed by respondent No. 1 . P.W.3 T.Narsaiah is the attester of Ex.A-1. P.W.4 B.Sundaraiah is scribe of Exs.A-2 and A-3 and P.W.5 A. Bhoomaiah is the attester. P.W.6 Mallaiah an adjacent cultivator speaks about possession of appellant No. 1 over the suit land and P.W.7 Bandi Yadagiri is third

plaintiff and he is examined to prove the purchase of adjoining land from the sister of respondent No. 1 under Ex.A-4. Four more documents are got marked as Exs.X-1 to X-3 and C-1 and relied on by the appellants. In rebuttal, respondent No. 1 examined herself as D.W.I and she denied the execution of the agreements Exs.A-1 and A-2 and receipt Ex.A-3 and her brother-in-law Khaja Moinuddin is examined as D.W.2. D.W.3 is respondent No. 2 and D. W.4 Mohd. Yousufuddin is one of the mediators, who speaks about the mediation pleaded by the respondents and D.W.5 Syed Shamsuddin is a licenced stamp vendor of Siddipet. Ex.B-1 dated 3-8-1971 is agreement of sale in favour of respondent No. 2. Ex.B-2 is a receipt for part payment; Exs. B-3 and B-4 are acknowledgment cards and Ex.B-5 dated 18-3-1972 is the sale deed in favour of respondent No. 2 executed by respondent No. 1 Exs. A-1 to A-3 have been compared with the admitted signatures on the written statement, vakalat and other documents under a magnifying glass by the Presiding Officer. The learned Additional Subordinate Judge scrutinized the above oral and documentary evidence and held on issue No. 1 that the execution of suit agreement of sale, Ex.A-2, is not satisfactorily proved; on issue No. 3 that respondent No. 2 is a bona fide purchaser for a valuable consideration and without notice of the alleged agreement in favour of the appellants; on issue No. 4 that the appellants are not entitled for specific performance and on issue No. 5 that the appellants are not entitled for permanent injunction. However, on issue No. 2 relating to possession, it is held that since in I.A.No. 294/1972 (temporary injunction petition) it was found that PW.1 was in possession of the suit land on the date of the suit and the issue was held in favour of the appellants, but the findings on all other issues being against the appellants, the suit has been dismissed with costs.

3. Aggrieved by the above findings on issues No. 1 and 3 to 5 and the judgment and decree dismissing the suit, appellants preferred AS.No. 11 /1987 while respondent No. 2 filed cross-objections challenging the finding on issue No. 2. The learned Additional District Judge, Warangal, before whom the appeal and cross-objections came up for hearing, referred the disputed documents Exs.A-1 to A-3 to a Hand Writing Expert for comparison with the admitted signatures of respondent No. 1 and the Hand Writing Expert has been examined as DW.6 on commission. The evidence of D.W.6, Professor Bawa Jung Bahadur, is that he has compared the signatures on Exs. A-1 to A-3 with the signatures on Exs. B-1, 2 and 5 and written statement of respondent No. 1 and came to the conclusion that the signatures on the questioned documents Exs. A-1 to A-3 are forged. Ex.X-4 is the opinion of the Hand Writing Expert and Ex.X-5 is comparative signatures chart. Upon reappraisal of the evidence on record and taking into consideration the evidence of D.W.6 Hand Writing Expert together with elaborate reasons set out by DW.6 in Ex.X-4, the learned Additional District Judge has affirmed the findings of the trial Court on issues 1 and 3 to 5 and dismissed the appeal. He reversed the finding on issue No. 2 and held that respondent No. 2 was in possession of the suit land on the date of the suit. In doing so, he has not approved the approach of the trial Court in basing the conclusion as to

possession upon the result in I.A.No. 294/1972 injunction petition and on the contrary it is held that an interim order passed in that LA. can be varied after full trial and he has referred to the pahanies for the years 1967-68 to 1971-72 marked as Ex.A-3 to A-10 and held that no material is placed by the appellants to show their possession beyond 1971-72, whereas Ex.B-5 sale deed is dated 18-3-1972 and hence, respondent No. 2 is in possession of the suit land since that date. Thus, the cross-objections filed by respondent No. 2 are allowed and finding on issue No. 2 has been set aside.

4. Aggrieved by the dismissal of A.S.No. 11/1987, the appellant preferred S.A.No. 612/1992 and against allowing cross-objections, they preferred S. A.No. 613/1992. Pursuant to the above common judgment in A.S.No. 11/1987 and cross-objections and decree dated 15-7-1992, the respondent No. 2 filed E.P.No. 193/1992 under Order XXI Rule 35 of the CPC seeking delivery of possession of suit schedule land evicting the appellants and the same has been allowed by the learned First Additional Subordinate Judge, Warangal, by an order dated 24-11-1992. Accordingly the Bailiff has been directed to put respondent No. 2 in possession of the said land by removing the appellants and any person bound by the decree who may refuse to vacate the same. CRP.No. 3979/1992 is filed assailing that order.

5. The learned counsel for both sides have been heard at length and during the course of hearing the following substantial questions of law have been formulated :

1. Whether the lower appellate Court was justified in reversing the finding of the trial Court on the question of possession?
2. Whether lower appellate Court granted any executable decree in favour of respondent No. 2?
3. Whether the approach of both the Courts below is vitiated by non-consideration of each issue or point for determination and in not recording separate findings on each of them?

6. Question No. 1:

Mr. J.V. Suryanarayana, learned senior counsel for the appellants adverted to the evidence of P.W.I who deposed that he was a tenant over the suit land prior to his purchase under Exs.A-1 and A-2 and he has been permitted to continue his possession thereunder. On that basis he strenuously argued that it is for the respondents to show as to when and in what proceedings the tenants have been evicted by the landlord. He took the aid of certified copies of pahanies for the years 1967-68 to 1971-72 marked as Exs. A-5 to A-10 to buttress the above contention, whereas Mr. M. Chandrasekhar Rao, learned counsel for the respondents pointed out that there is no plea in the plaint that the appellants were in possession of the land as tenants and hence any amount of evidence on this aspect cannot be looked into. On the contrary, his argument is that no

evidence is placed by the appellants to show their possession beyond 1971-72 whereas Ex.B-5 sale deed in favour of respondent No. 2 is dated 18-3-1972 and both the Courts below have held that it is a true and valid transaction and it follows that respondent No. 2 is in possession of the suit land by applying well established principle that possession follows title. He supported the approach of the lower appellate Court stating that it was wrong on the part of the trial Court in recording a finding as to possession upon an earlier order in I.A.No. 294/1972 instead of scrutinizing the relevant evidence on this issue and that the lower appellate Court being a Court of fact and law chose to scrutinize the evidence and for reasons recorded, reversed the findings of the trial Court on this issue and in any event it being a finding on a question of fact based on appreciation of evidence, this Court cannot go into the same in the Second Appeal.

7. I carefully considered the contentions of both sides on this important question. It is firstly contended by Mr. J.V. Suryanarayana, learned senior counsel that the appellant No. 1 was a tenant of respondent No. 1 and he was in possession of the suit land in that capacity. I carefully perused the plaint. What all was pleaded is that he has been in possession of the suit land since 1966, but in what capacity he was in possession it is not stated. For the first time in the evidence of PW. 1 it is brought out that he was a tenant of respondent No. 1. It is an elementary principle that no evidence without pleading can be looked into. It is, therefore, rightly pointed out by Mr. Chandrasekhar Rao that the contention of Mr. Suryanarayana cannot be accepted without there being a plea that appellant No. 1 was a tenant.

8. The question that falls for consideration is who was in possession of the suit land on the date of suit. A perusal of the judgment of the trial Court would go to show that Court had merely referred to the result of LA. No. 294/1972, injunction petition, and adopted the same in the suit. In other words, the trial Court did not advert to the oral and documentary evidence on this aspect, whereas the first appellate Court has scrutinized the above oral and documentary evidence as is evident from the impugned judgment and rightly held that there is no evidence adduced by the appellants to establish their possession over the suit land beyond 1972. The approach of the trial Court is, therefore, not approved and upon reappraisal of evidence, the lower Court recorded a finding that it was respondent No. 2 who was in possession of the suit land on the date of suit mainly because Ex. B-5 sale deed dated 18-3-1972 is held to be a genuine and valid sale deed vis-a-vis Exs.A-1 to A-3 which are forged and invalid documents. Possession follows title is a well known maxim and respondent No. 2 being the title holder is, therefore, held to be in possession of the suit land. I am, therefore, satisfied that the lower appellate Court has rightly reversed the finding of the trial Court on the question of possession. Question No. 1 is answered accordingly against the appellants.

9. Question No. 2:

This question arises in the context of the order impugned in C.R.P. It is

contended by Mr. J.V. Suryanarayana, learned senior counsel that no executable decree in favour of respondent No. 2 has been granted and hence the question of directing delivery of possession to respondent No. 2 does not arise and therefore, the order dated 24-11-1992 in E.P.No. 193/1992 is liable to be set aside. On the other hand Mr. Chandrasekhar Rao, learned counsel for the respondents contended that the lower appellate Court has recorded a finding that respondent No. 2 was in possession of the suit land on the date of suit, but subsequently the appellant No. 1 obtained an ex parte interim injunction in IA.No. 294 /1972 and taking advantage of that order, dispossessed him unlawfully. He once again reiterated that appellant No. 1 manipulated Exs.A-1 to A-3 which are ultimately found to be forged documents and hence he had no manner of right or title, whereas respondent No. 2 is held to be bonafide purchaser for consideration without notice of any agreement in favour of any other party. Since he was unlawfully dispossessed taking advantage of the ex parte interim injunction issued by the Court, the learned Additional Subordinate Judge issued a direction to the Bailiff to put back respondent No. 2 in possession in exercise of inherent powers. He further dilated on this aspect and contended that a temporary injunction can be used as a shield to protect ones possession, but not as a sword to dispossess another and in this case respondent No. 2 was dispossessed by using the temporary injunction as a sword and the wrong done to him is, therefore, rightly set at thought. He relied on Judgments reported in Mahjibhai Mohanbhai Barot Vs. Patel Manibhai Gokalbhai and Others, and Jamaluddin Vs. Mirza Quader Baig (Tenant) and Another, .

10. I applied my anxious consideration to the rival contentions. It is true that the lower appellate Court has recorded a finding that respondent No. 2 was in possession of the suit land on the date of suit and I am also satisfied with the reasoning and approach of the lower appellate Court in reversing the finding of the trial Court on this issue and in recording that it was respondent No. 2 in possession on the date of suit. It being a finding of fact, its correctness cannot be canvassed in Second Appeal. I am fortified in my above view by a Judgment of the Supreme Court in Ramaswamy Kalingaryar Vs. Mathayan Padayachi, wherein it is held:

"It is a plain that the High Court itself demolished what it built by concluding in the manner above stated. Suggested short comings in the findings of fact recorded by the Courts below would not alter the situation that those were findings of facts, unquestionable, under the provisions of Section 100, C.P.C., which defines the contours of the powers of the High Court in second appeal. Significantly, no question of title or an issue thereon was raised by the parties before the Courts below. Though the High Court points out that question of title was raised as an alternative ground in the written statement but no argument on that account was raised by the defendant before the first appellate Court. Rather title and possession on the land in dispute was asserted by Muthiah only on the basis of Will in his favour which plea of his miserably failed and has remained failed throughout. The only issue before the Courts below, on the strength of

which the fate of the case rested was whether Ramasamy was in sole possession of the suit property. That finding was in his favour. The High Court itself has left the question of title open to be decided in appropriate proceedings. It was for the protection of possession of Ramasamy that the grant of injunction became necessary and having regard to the facts and circumstances, the plaintiff-Ramasamy was given relief on the basis of the case set up by him and supported by evidence. The High Court had thus no jurisdiction either to reassess the evidence or without reassessing as such find any infirmity in it. The measure of proof is within the domain of the two Courts of fact in the hierarchy. Sufficiency of proof can be no ground for the High Court to interfere in a finding of fact".

11. The case of respondent No. 2 is that he is entitled for restitution u/s 144 of the Code of Civil Procedure. In the judgment cited supra (2), it is held:

"It needs no emphasis to say that if an order is granted by the Court, those who are bound by that order should respect the order and comply with the same. They cannot, at their option, choose to violate the order and if they do so, the Court is not powerless to see that the wrong done to a party to the order is remedied and the wrong-doer is made to set right the position and the person who is the victim of the wrong is granted the appropriate remedy. Inherent powers of the Court are meant to do substantial justice between the parties. Therefore, if the interests of justice demand, the Court u/s 151 C.P.C. can restore the possession in case Section 144 C.P.C is not applicable. In the instant case, admittedly Section 144 C.P.C. is not applicable. Therefore, the power u/s 151 C.P.C. can be exercised to grant restoration of possession".

In the judgment cited supra (1), it is held :

"An application for restitution u/s 144 C.P.C. is an application for execution of a decree."

Section 144 defines the powers of the Court and expressly bars the maintainability of a suit in respect of a relief obtainable under this section. The section does not either expressly or by necessary implication change the nature of the proceedings. Its object is limited. It seeks to avoid the conflict and to make the scope of restitution clear and unambiguous. It does not say that an application for restitution, which till the new Procedure Code was enacted, was an application for execution, should be treated as an original petition. Whether an application is one for execution of a decree or is an original application depends upon the nature of the application and the relief asked for. When a party, who lost his property in execution of a decree, seeks to recover the same by reason of the appellate decree in his favour, he is not initiating any original proceeding, but he is only concerned with the working out of the appellate decree in his favour. The application flows from the appellate decree and is filed to implement or enforce the same. He is entitled to the relief of restitution, because the appellate decree enables him to obtain that relief, either expressly or by necessary implication. He is recovering the fruits of the appellate decree.

Prima facie, therefore, having regard to the history of the section, there is no reason why such an application shall not be treated as one for the execution of the appellate decree."

It is further held :

"the argument, that if an application u/s 144 is an application for execution it will be inconsistent with Section 38, C.P.C, cannot be accepted. u/s 144 an application can be filed only before the Court of the first instance, whereas u/s 38 a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution. But u/s 37, C.P.C. the expression "Court which passed a decree" includes the Court of first instance where the decree to be executed has been passed in the exercise of appellate jurisdiction. A combined reading , of Sections 37 and 38 indicates that the Court of first instance is the Court which passed the decree within the meaning of Section 38, and, therefore, an application for execution of the decree can be filed therein. When the Court of first instance is deemed to be the Court which passed the decree, there is no difficulty in holding that the said Court can transfer the decree u/s 39 of the Code.

The definition of decree u/s 2(2) takes in both an order made u/s 17 and that made u/s 144 of the Code. The two sections are included for the purpose of giving a right of appeal, if an execution application to which Section 47 applies does not cease to be an execution application by reason of the section being included in the definition of "decree" an execution application u/s 144 cannot likewise cease to be one for the reason that the section is included in the definition of decree".

Following the ratio laid down by the Supreme Court in the above case, I have no hesitation to hold that an order of restitution or of that nature whether it is passed u/s 144 of the CPC or in exercise of inherent powers u/s 151 of the CPC has to be treated as a decree. In that view of the matter, the order dated 24-11-1992 is perfectly valid and hence the C.R.P. has no legs to stand. Question No. 2 is answered accordingly.

12. Question No. 3:

Mr. Suryanarayana assailed the impugned judgment on the ground that each issue or each point for determination is not considered separately and separate findings are not recorded thereon. As far as the appellate Court's Judgment is concerned, he has set at one point for determination and he has discussed the point on all its facts with reference to the relevant evidence and I do not see any merit in the criticism that it suffers from any such defeat as pointed out by Mr. Suryanarayana. On the contrary, the lower appellate Court has taken all pains to reassess the evidence especially the testimony of Hand Writing Expert and recorded the findings. Question No. 3 is, therefore, held against the appellants.

13. For all the reasons given above, I am unable to find any merit in both the Second Appeals as well as C.R.P. and they are liable to be dismissed.

14. In the result, Second Appeals and C.R.P. are dismissed confirming the judgment and decree in A.S.No. 11/1987 and cross-objections and also the order dated 24-11-1992 directing the re-delivery of the suit schedule property to respondent No. 2. The parties are directed to bear their own costs.