

**(2004) 08 AP CK 0101**  
**In the Andhra Pradesh High Court**  
**Case No : CMA No. 4289 of 2003**

G. Veeresham

APPELLANT

Vs

D.V. Shailendra Kumari and Another

RESPONDENT

**Date of Decision :** 20-08-2004

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 101, Order 21 Rule 103, Order 21 Rule 99

**Citation :** (2004) 5 ALD 521 : (2004) 6 ALT 796 : (2004) 3 APLJ 211

**Hon'ble Judges :** L. Narasimha Reddy, J

**Bench :** Single Bench

**Advocate :** P. Shiv Kumar, for C. Kumar, for the Appellant; K. Mahipathi Rao, for the Respondent

**Final Decision :** Dismissed

## Judgement

L. Narasimha Reddy, J.—The decree holder in O.S. No. 928 of 1992 on the file of the II Senior Civil Judge, City Civil Court, Hyderabad, has filed this C.M.A., aggrieved by an order passed by the executing Court, accepting the claim submitted by the 1st respondent under Rule 99 of Order 21 C.P.C.

2. The appellant filed O.S. No. 928 of 1992 for the relief of specific performance of an agreement of sale dated 11-5-1990, in relation to an extent of 310 sq. yards in premises bearing No.10-5-2/1/1/A, of Masab Tank, Hyderabad. The suit was decreed ex parte on 5-7-1993. He filed E.P. No.40 of 1993 for execution of the decree. Since the 2nd respondent did not comply with the decree, the Court itself executed the sale deed on 25-7-1995. The appellant was inducted into possession only on 2-2-1999.

3. The 1st respondent filed E.A. No. 8 of 1999 under Rule 99 of Order 21 C.P.C., alleging that the appellant dispossessed her from the property in premises No. 10-5-2/1/36/2, under the guise of the decree. She pleaded that she purchased the property through registered sale deed dated 17-1-1966, and ever since then, she has been in continuous possession of the land. It was also her case that she

constructed the compound wall, and when the same was sought to be demolished, she filed a writ petition in this Court and obtained necessary orders. According to her, there is no comparison between the property, in respect of which the sale deed was executed and the one that was delivered to the appellant. The appellant resisted the E.A. On behalf of the 1st respondent, PWs.1 to 3 were examined and Exs.A-1 to A-22 were marked. The Trial Court appointed Advocate Commissioner to identify the property. The report and sketch submitted by him were marked as Exs.C-1 and C-2. The appellant has not chosen to adduce any oral or documentary evidence. Through the order under appeal, the executing Court accepted the claim of the 1st respondent, and directed the bailiff of the Court to put her into possession of the property.

4. Sri Shiv Kumar, learned Counsel for the appellant submits that the appellant was put in possession of the property, which is clearly covered by the agreement of sale and sale deed, and that there was no basis for the claim of the 1st respondent. He contends that the 1st respondent was not in possession of the property, when the possession of the same was delivered to the appellant, and in that view of the matter, the application filed by her was not maintainable in law. Pointing out to the alleged discrepancies in the evidence adduced on behalf of the 1st respondent, learned Counsel submits that the executing Court was not justified in allowing the application.

5. Sri K. Mahipati Rao, learned Counsel for the 1st respondent, on the other hand, submits that his client placed voluminous oral and documentary evidence before the executing Court, in support of her claim, and except contradicting the evidence of the 1st respondent, the appellant has not chosen to adduce evidence of any kind whatever. Learned Counsel submits that the suit itself was filed in collusion with the 2nd respondent, to grab the property of the appellant. He has invited the attention of this Court, to some suits filed by the appellant and his vendor, to support his contention, as to the lack of bona fides on the part of the appellant and his vendor, the 2nd respondent, and collusion between them.

6. The suit filed by the appellant for the relief of specific performance, in relation to the suit schedule property, was decreed ex parte against the 2nd respondent. The decree became final and the appellant initiated execution. A sale deed was ultimately executed by the Court on 25-9-1995. He was put in possession of the property on 2-2-1999. Immediately the 1st respondent filed an application under Rule 99 of Order 21 C.P.C., alleging that the possession of her property in different premises was delivered to the appellant under the guise of the decree.

7. The agreement of sale dated 11-5-1990, said to have been executed by the 2nd respondent, in favour of the appellant, is in relation to 310 sq. yards of land, situated at 10-5-2/1/1/A, Masab Tank, Hyderabad. The boundaries to this property are stated to be as under:

North - Lane

South - Neighbours land

East - 20" Road

West - 3" Lane

8. The 1st respondent, on the other hand, claims that the property, which in fact was delivered to the appellant is the one in 10-5-2/1/36/2, with the following boundaries:

North-10-5-2/1/36/1

South-10-5-2/1/36/3

East - Road

West - Municipal Park

9. She states that the property was purchased through sale deed Ex.A-1, dated 17-1-1966. She also filed certain documents to state that she has been in possession of the property. Before undertaking any discussion as to whether the property that was put in possession of the appellant was the same, as covered by the sale deed, or whether it belongs to the 1st respondent, it is necessary to refer to certain developments that have taken place between the parties.

10. The 2nd respondent, the vendor of the appellant, earlier filed O.S. No. 5311 of 1989 against the mother of the 1st respondent, in the Court of VIII Assistant Judge, City Civil Court, Hyderabad, for permanent injunction, in respect of the property, in House No. 10-5-2/1/1/A. The mother of the petitioner claimed ownership of the premises with the above description. The suit was dismissed for non-prosecution on 28-1-1991. The appellant came into picture on the strength of an agreement of sale dated 11-5-1990, said to have been executed by the 2nd respondent, in respect of the premises bearing No. 10-5-2/1/1. He filed O.S. No. 600 of 1990 in the Court of I Additional Judge, City Civil Court, Hyderabad, for specific performance of that agreement. He asserted that he was put in vacant and peaceful possession of the said premises on the strength of that agreement. The 2nd respondent herein was impleaded as Defendant No. 1. He impleaded the mother of the 1st defendant and another by name D.B. Kumar as Defendants 2 and 3, alleging that they are interfering with the possession of the property. The relief claimed was only for a decree for specific performance of the agreement of sale. The relief of delivery of possession was not at all claimed. The relevant pleading and prayer read as under:

Pleading:

"The Defendant No. 1 entered into an agreement of sale on 11-5-1990 in favour of the plaintiff to sell the above said property for a total sale consideration of Rs. 1 lakh. The Defendant No. 1 has also received a sum of Rs. 15,000/- towards the earnest money on 11-5-1990. The Defendant No. 1 has passed a separate receipt to that. The defendant has also put the plaintiff in vacant and peaceful possession of the extent."

Prayer:

(i) For the specific performance of the agreement of sale dated 11-5-1990 executed by the Defendant No. 1 by giving him necessary direction to execute and register a proper and regular sale deed in accordance with law in favour of the plaintiff for the scheduled property.

(ii) To grant the decree providing the Hon"ble Court to execute a registered sale deed in respect of scheduled property in favour of the plaintiff, if the defendants failed to comply with the decree of specific performance.

(iii) Costs of the suit may be awarded."

11. The mother of the 1st respondent filed a written statement, disputing the claim of the appellant. The suit was dismissed as withdrawn. The order of dismissal dated 20-2-1992 discloses that the appellant did not reserve any right to file another suit on the same cause of action.

12. Thereafter, the appellant filed the present suit. This time, he has not chosen to implead the mother of the 1st respondent or any other person and the 2nd respondent is the sole defendant in it. The suit was decree ex parte. The existence of collusion between the appellant and the 2nd respondent is evident from the fact that the 2nd respondent has not chosen to contest either O.S. No. 600 of 1990 or the present suit. The cause of action for filing the present suit is the same as the one for filing the earlier suit. In case the appellant intended to file a fresh suit, it was necessary for him to seek necessary permission of the Court. Absence of such a permission would disentitle him to file another suit. Order 23, Rule 1 is very clear in this context. Sub-rule (4) thereof reads as under:

"Where the plaintiff-

(a) abandons any suit or part of claim under Sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in Sub-rule (3),

he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

13. It is not in dispute that the judgment dated 20-2-1992 dismissing the suit as withdrawn, marked as Ex.A-3, does not speak of such permission, having been granted. Therefore, the suit O.S. No. 928 of 1992 itself was barred. The appellant suppressed such vital fact before the Trial Court and he deliberately omitted to implead the mother of the petitioner, who was defendant in O.S. No. 600 of 1990; in the present suit.

14. An application filed under Rule 99 of Order 21 is equated to a suit. This is evident from the purport of Rule 101 of Order 21 C.P.C., which mandates that all questions arising between the parties to the proceeding, shall be determined by

the Court dealing with the application, and not in a separate suit. Rule 103 equates the order passed on an application under Rule 99 to a decree for the purpose of appeal. The parties to such applications have to place their pleadings and adduce their evidence, as if it is a separate suit. It hardly needs any emphasis that any pleadings or assertions of the parties to suits or applications conferred with such a status can be accepted by the Court only when they are proved through evidence. On her part, the 1st respondent has examined PWs.1 to 3 and marked Exs.A-1 to A-22. The appellant has not chosen to adduce oral or documentary evidence. Therefore, his pleading, in the counter to the application of the 1st respondent, remained unproved. Hence, the appellant, had in fact left no alternative for the executing Court, except to allow the claim of the 1st respondent

15. It is not as if the executing Court accepted the claim of the 1st respondent only on the ground that it was not properly resisted by the appellant. It had undertaken extensive discussion with reference to the evidence on record and principles laid down in several precedents. It had appointed an Advocate Commissioner to help in identification of the property in question. Specific findings were recorded to the effect that the property, that was delivered to the appellant was different from the one covered by the sale deed, executed in the suit.

16. Since the appellant expressed serious doubts about the accuracy of the report of the Advocate Commissioner appointed by the Trial Court, this Court appointed another Commissioner lest the appellant reels under an impression that there was no proper identification, or that the subject-matter of the appeal did not receive proper consideration. In view of the fact that serious dispute existed as to the location of the suit schedule property, specific direction was issued to the Commissioner to take the assistance of the Municipal Authorities in identifying the house numbers of the premises, that was delivered to the appellant as well as those surrounding it. The Advocate Commissioner has undertaken extensive verification and surveyed the area duly, taking the help of the officials of the Municipal Corporation. From the report and the sketch filed by him, it is evident that the property that was delivered to the appellant does not fit into the description or location of the one in the E.P. schedule. The report and the other material placed by the Commissioner before this Court discloses that the house property of the premises that was delivered to the appellant is 10-5-2/1/36/2, with the following boundaries:

North - 10-5-2/1/36/1, belonging to one T. Girdari Singh

South - 10-5-2/1/36/3 of T. Ganesh Singh

East-41" Road

West - Municipal park

17. This description squarely conforms to the property claimed by the 1st

respondent and is in no way nearer to the subject-matter of the suit. Therefore, this Court finds no ground to interfere with the order under appeal.

18. Further, in O.S. No. 600 of 1990 the appellant herein claimed that he was delivered the "property covered by the agreement of sale. The relief of specific performance alone was claimed. With the execution of sale deed on 25-7-1995, the grievance of the appellant stood redressed completely. That being the case, the filing of application for delivery of possession was nothing but gross misuse of the process of the Court. The various events referred to above clearly discloses that the appellant played fraud on the Court as well as the 1st respondent.

19. Hence, the appeal is dismissed with costs, quantified at Rs. 3,000/- (Rupees Three thousand only).