

(2004) 10 AP CK 0051

In the Andhra Pradesh High Court

Case No : Appeal No's. 1098, 1101 and 1102 of 2004 in CS No. 14 of 1958

Government of A.P. and Another

APPELLANT

Vs

R. Brahmaramba and Others

RESPONDENT

Date of Decision : 29-10-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 101, Order 21 Rule 35, Order 21 Rule 36, Order 21 Rule 99, 151

Citation : (2005) 1 ALD 62

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : Government Pleader, for the Appellant; N. Raghavan, for Respondent Nos. 1 to 4, M.A. Bari, Receiver-cum-Commissioner for Respondent No. 6 and P. Venugopal, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—These applications are filed under Rules 99 to 101 of Order XXI, read with Section 151 CPC (C.P.C), to set aside the order, dated 11.9.2002, passed by this Court, in Application Nos.989 and 990 of 2002, in C.S. No. 14 of 1958.

2. The petitioners are the Government of A.P., represented by the District Collector, Hyderabad and Commissioner of Prohibition and Excise, Government of A.P. The facts that lead to filing of these applications may briefly be stated as under:

In C.S. No. 14 of 1958, on the file of this Court, one of the lineal descendants of Khurshid Jahi Paigah claimed the relief of partition of the Matruka properties of her ancestor. These properties comprised of Jewellery, Bungalows with surrounding lands, and vast extents of lands in Makthas and Jagirs, in and around the City of Hyderabad. A preliminary decree was passed on 8.6.1963, on the basis of the compromise entered into between some of the parties, as well as certain findings recorded by this Court.

3. H.E.H. The Nizam and one Mr. Khazim Nawab Jung purchased the undivided shares of several parties to the suit. The transfer in their favour was recognized and they were impleaded in the suit as Defendant Nos.156 and 157. Subsequently, H.E.H. The Nizam, transferred his undivided share in favour of Dinshaw Limited, which was later known as M/s Cyrus Investments Limited, the 5th respondent herein. The assignment/ transfer in favour of the 5th respondent was also recognized and it was impleaded as Defendant No. 206.

4. Respondents 1 to 4 approached this Court by stating that the 5th respondent assigned its right in respect of Plot Nos. 45 to 48 in Survey Nos.116 (old), new Survey No. 178 of Zamisthanpur Revenue Village, Hyderabad (Part of Item No. 29 in Schedule IV of the suit) through a document, dated 21.6.1990, and that they be delivered possession of the suit plots, by issuing necessary directions to the Receiver- cum-Commissioner, the 6th respondent herein.

5. Respondents 1 to 4 filed Application No. 988 of 2002 with a prayer to implead them as defendants in C.S. No. 14 of 1958 on the strength of such an assignment. Application No. 989 of 2002 was filed u/s 151 C.P.C to direct the Receiver- cum-Commissioner, the 6th respondent herein, to deliver possession of Plot Nos.45 to 48 in their favour. Application No. 990 of 2002 was filed under Order XXI, Rule 16, read with, Section 151 C.P.C to approve the assignment in their favour. The Respondents 5 and 6 alone were made parties to these applications. All these applications were ordered as unopposed on 11.9.2002. Soon thereafter, the Respondents 1 to 4 filed Application No. 1159 of 2002 to pass orders empowering the receiver, the 6th respondent to take assistance of police, alleging that there are obstructions. This application was also ordered on 25.10.2002.

6. The petitioners state that the land in question is vested in the Government and that the revenue and town survey records amply establish this. It is pleaded that though there were several hundreds of defendants in the suit, including Defendant No. 43, the jagir administrator and the Government of A.P., represented by its Chief Secretary, Defendant No. 53, none of them were impleaded in the applications referred to above, and a collusive order was obtained to forcibly take possession of the Government land. It is represented that the land in question was allotted to the Excise Department long back, and that no one else including Respondents 1 to 5 or their assignors have any title to that land.

7. These applications are resisted by Respondents 1 to 4. It is pleaded on their behalf that the present applications are not maintainable, for the reason, that the petitioners are already represented by Defendant No. 53 in the suit, and it is not open to it to raise objection at this stage, once the preliminary decree, and several steps taken thereto, have become final. It is also stated that an application under Rule 99 of Order XXI C.P.C can be filed only at the instance of third parties to the suit, and not the judgment-debtors or any persons claiming through them. It is pleaded that the land in Zamisthanpur has been in the

custody of the 6th respondent from the beginning and the various revenue and survey records filed by the petitioners are of no consequence.

8. On the basis of the pleadings of the parties, the following issues were framed:-

(1) Whether in a suit for partition, any parties, or persons claiming through them, are entitled to be inducted into possession of the suit schedule property, or part thereof, before a final decree is passed?

(2) Whether in a suit for partition, the Court can direct delivery of possession of one of the items of the suit schedule property, unless otherwise than through the process of execution, under Order XXI, Rule 35 C.P.C?

(3) Whether the applicants herein have any right, title or interest over the property in question, and

(4) Whether the applicants herein are in anyway estopped from making any claim as regards any items in the suit schedule property, in the light of the preliminary decree, to which they are parties?

9. On behalf of the petitioners, PWs. 1 and 2 were examined and documents Exs.A-1 to A-8 are marked. On behalf of the respondents, RW-1 is examined and Exs.B-1 to B-22 are marked. Out of them, Exs.B-1 to B-5 were marked during the course of cross-examination of PW-1.

10. The learned Government Pleader for Appeals, submits that the land in question is classified as a Government land in Town Survey that took place several decades ago, and that Respondents 1 to 5 have no title or claim to that land. He submits that the Government of A.P. is in possession of the schedule property as well as other lands surrounding it. He states that there is no final decree as yet in the suit, much less, the land in question has been allotted to Respondents 1 to 5 or their assignors; and the question of their deriving any title to that land does not arise. He submits that even where a final decree exists, possession of property in a suit for partition can be obtained by filing an application under Order XXI C.P.C, and an application u/s 151 C.P.C, for this purpose is not maintainable in law. He urges that the respondents have deliberately omitted to implead other defendants in the suit or at least Defendant No. 53 and an order was obtained collusively by impleading the 5th respondent alone. It is also his case that if the receiver was in possession, there was no necessity to seek police help, and if the third parties were in possession, the only course open to them was to have filed an application under Rule 97 of Order XXI C.P.C, and to take further steps in accordance with law.

11. Sri N. Raghavan, learned Counsel for the respondents submits that the present applications are not maintainable since the petitioners are claiming title through Defendant No. 53 against whom the decree has become final. He submits that though no formal final decree was passed in the suit, several steps taken by the Court subsequent to preliminary decree on the basis of the reports submitted by Commissioner/ Receiver from time to time, disclose that the land in

Zamisthanpur was specifically allotted to the assignors of Respondent No. 5, and Respondents 1 to 4 being the subsequent assignees were entitled to be delivered possession of the land. He submits that there is clear record in the form of orders passed by this Court in Application No. 25 of 1980, dated 12.11.1981 and affirmed in the order, dated 29.2.1988 in O.S.A. No. 2 of 1983 to the effect that the 6th respondent was in possession of the land in Zamisthanpur, from the inception of the suit. He contends that once the property is in possession of the receiver, it is not necessary to file execution petition, much less an application under Rule 97 of Order XXI C.P.C.

12. The learned Government Pleader as well as the learned Counsel for Respondents 1 to 4 have relied upon several precedents in support of their contentions.

13. The fourth issue relates to the maintainability of the applications. Therefore, it deserves to be taken up first.

Issue No. 4:

14. It is a matter of record that the Government of A.P., represented by its Chief Secretary was impleaded in the suit as Defendant No. 53, and that a preliminary decree came to be passed on 8.6.1963. The decree is certainly binding on Defendant No. 53. Though it is contended on behalf of the applicants that they cannot be treated as a representative of Defendant No. 53, it is too difficult to accept the same. Once the State is represented through its Chief of the Executive, it is deemed to have been represented at all lower levels also. The State is represented in several capacities depending on the nature of claim or dispute, and the department to which it relates, not to speak of the hierarchy in the administration. Therefore, the petitioner can be said to be Defendant No. 53, for all practical purposes. The real controversy is as to whether it is estopped from filing this application under Rule 99 of Order XXI C.P.C.

15. Ordinarily, whenever a judgment debtor or any one claiming through him is dispossessed, he is not entitled to seek redelivery of possession. The reason is that the concerned judgment debtor figures as a party in the suit, as well as in the E.P. and the possession is recovered by instituting execution proceedings. Where dispossession is otherwise than through execution proceedings, or by instituting execution proceedings without impleading the concerned judgment debtor, it cannot be said that the judgment debtor or any one claiming through him is without any remedy. What becomes final against the judgment-debtor is the decree, in relation to a specified item of property. Under the guise of a decree, which is binding on the judgment debtor, the decree holder cannot seek delivery of a totally different item of property. In an E.P. in which the judgment debtor is naturally to be impleaded, it is always open to him to point out any discrepancies or irregularities as long as they do not relate to adjudication, vis-a-vis the suit schedule property. For example, instead of property "A" which is included in the schedule, property "B" is sought to be taken possession of the

judgment debtor can certainly object to it, and on being satisfied, the Court can protect his interests.

16. Seeking delivery of possession on the basis of a decree of whatever nature, otherwise than through the process of execution is unknown to law. Even if the property is in the custody of a Court receiver, the delivery should be through execution proceedings, in which all the parties to the decree are impleaded. This becomes imperative in cases of suits for partition, because of the reason that the interests of the sharers are common irrespective of the fact whether they figure as plaintiffs or defendants.

17. In the instant case, admittedly, no E.P. was filed. There did not exist any final decree allotting the property in question to Respondent No. 5 or its assignor. Even assuming that the application No. 989 of 2002, has to be treated as an execution petition under Order XXI C.P.C, except the assignor and the receiver, none of the parties to the suit were impleaded. In the affidavit filed in support of the application, it was stated that the Government, Defendant No. 53 has no interest in the matter. This assertion could have been properly verified, only if Defendant No. 53 was made a party in the application. Respondents 1 to 4 have not chosen to do so. Therefore, once possession was taken otherwise than through execution of the decree and without impleading an affected party to the suit, Respondents 1 to 4 cannot plead that the application filed by the petitioner under Rule 99 of Order XXI C.P.C is not maintainable.

18. The respondents cannot have the luxury of deviating from the normal and routine course, and at the same breath, to insist that applications of the petitioners be rejected on the ground that they do not accord with the procedure prescribed by law.

Issues 1 and 2 :

19. These issues touch on the legality of the possession obtained by Respondents 1 to 4 through the order in Application No. 989 of 2002 etc. It has already been observed that the suit was filed for partition of matruka properties of Kurshid Jahi Paigah and a preliminary decree was passed way back on 8.6.1963. Vast extents of property were involved therein. The property in question is part of Item No. 29 of Schedule IV. A perusal of the judgment and preliminary decree discloses that Item No. 29 of Schedule IV was not matruka property of Kurshid Jahi Paigah, but was the exclusive property of Defendants 51 and 52. If that were to be so, strictly speaking, it ought not to have constituted the subject-matter of the suit at all. In the compromise, Defendants 51 and 52 have relinquished their rights in favour of some other parties. They have chosen to take a share out of it, as legal representatives of Defendant No. 1, as is evident from the orders passed in subsequent stages. The receiver was appointed in terms of preliminary decree. Many items of property were partitioned by mutual adjustment between the parties. The learned Counsel for the respondents does not dispute-that no final decree, at least, in relation to Item 29 of Schedule IV

was passed.

20. The scope of a preliminary and final decree in a suit for partition and the various steps to be taken at different stages in the suit were considered in C.S.No.14 of 1958 itself by this Court. In IDPL Employees Co-operative Housing Building Society Ltd. and Another Vs. B. Rama Devi and Others, after referring to the judgments of the Supreme Court in Rachakonda Venkat Rao and Others Vs. R. Satya Bai (D) by Lr. and Another, , it was held as under:

"Depending on the outcome of the adjudication, or area of agreement between the parties, the suit (for partition), can be disposed of in one stroke, or by way of two decrees namely the preliminary and final. Where the subject-matter of the partition is a land, being part of estate and assessed to revenue, the steps subsequent to preliminary decree are required to be undertaken by the District Collector u/s 54 C.P.C. In other matters, the Court has to undertake steps to divide the properties by metes and bounds and deliver the same to the parties concerned in accordance with their respective shares. A party can seek delivery of possession in accordance with the final decree, only after it is engrossed on a stamp of adequate value and by initiating execution proceedings. Any other step in between a preliminary and final decree is almost impermissible."

Therefore, the very filing of Application No. 989 of 2002 by Respondents 1 to 4 is opposed to law laid down by the Supreme Court, since there did not exist any final decree in their favour.

21. Learned Counsel for the respondents submits that after the preliminary decree, this Court passed an elaborate order in Application No. 73 of 1990 on 29.1.1971 allotting various items of properties to the parties to the suit and that the same deserves to be treated as a final decree. As observed in the judgment referred to above, a final decree needs to be engrafted on a stamp of proper value, to become enforceable. Even assuming that the order passed by this Court in Application No. 73 of 1970 has to be treated as a final decree for the properties dealt with therein, it needs to be seen as to what sort of right has accrued to Defendant No. 5. As observed in the preceding paragraphs, the, Respondent Nos. 1 to 4 claim rights to the property in question on the basis of assignment in their favour, by Defendant No. 206, i.e., Respondent No. 5. The latter is said to have purchased the undivided share of Defendant No. 156. In many proceedings in this suit, Defendant No. 156 was treated as H.E.H. The Nizam himself. He is stated to have purchased the undivided shares of several parties to the suit through sale deed, dated 27.4.1964. Ex.B-5 is the certified copy of that sale deed. The purchaser therein is described as "Khan bahadur Sri C.B. Tarapourwala, constituted attorney and financial adviser to H.E.H. The Nizam of Hyderabad". Whether Sri Tarapourwala himself was the purchaser and was described as the attorney and financial advisor of H.E.H. The Nizam, or whether he represented the Nizam himself, is besides the issue, in this application.

22. In the order in Application No. 73 of 1970, Item No. 29 of Schedule IV was dealt with as the property in "Group V". It was divided into several plots and was allotted to several parties. It needs to be noted that the 5th respondent figured as Respondent No. 208 (Defendant No. 206). Item No. 29 was allotted to two out of the three branches of the paigah. No portion of Item No. 29 was allotted to the 5th respondent. Its objection was only in relation to allotment of portion of this property in favour of Defendant No. 16. The relevant portion of the order reads as under:

"Now, we come to Group V: Group V relates to Item 29, Zamisthanpur, which was not held to be matruka but is regarded as the exclusive property of Defendants 51 and 52. Defendants 51 and 52 entered in to compromise with various defendants and the plaintiff, known as the compromising parties including their father Defendant No. 1. They had relinquished their shares in favour of compromising parties with the result that the only share that they can now get after relinquishment is the share of Defendant No. 1 as his legal representatives. Some of the properties therein have been acquired for purposes of the Housing Board and the Road Transport Corporation. The compensation amount with regard to the same has not been received and the property is not included in the scheme of partition. After excluding the said property, the total value of Item 29 has been assessed at Rs. 7,87,779/-.

The objection was dealt with as under:

"D-157 and D-206 raised their objections and prayed that the adjustment should be relatably made so that good and bad may be equally mixed or shared. It was represented that the adjustment would be just only if it is made in proportion to his shares in each of the said groups so that good and bad may be equally shared by him. D-16 raised demur stating that as per the order, the deficiency has to be made good firstly out of Group V and then what is left thereafter alone should be adjusted from out of the share in Group IV. Inasmuch as D-16 has been allotted in Group I, the property of the value far in excess of his share and that as per his choice, it is equitable that inconvenience that will be experienced by other sharers may be neutralized by making adjustment proportionate to his share in other groups so that no sharer may suffer any disadvantage."

23. If D-16 is one of the parties who has transferred his undivided share in the suit schedule properties to Defendant No. 156 (later replaced by Defendant No. 206) and 157, it is debatable as to how there existed any conflict of interests between himself and his assignees, Defendant Nos. 157 and 206. Therefore, it is evident that there did not exist any final decree, be it as regards the entire suit schedule properties or Item No. 29 of Schedule IV of the suit schedule.

24. Assuming that there existed a decree, the only course through which possession can be delivered to a party to the suit, is by an order in an execution petition, if filed. The recovery of possession from persons, who are not parties to the suit, is not contemplated in a suit for partition. Rules 35 and 36 of Order XXI

C.P.C prescribe the manner in which possession can be delivered.

25. A party from whom the possession is sought to be taken has invariably to be impleaded in the E.P. In a suit for partition every sharer fits into the description of a decree holder or the judgment debtor, depending on the nature of relief claimed in it. Therefore, all the parties to the decree have to figure in the E.P. also. In the present case, no E.P. was filed by Respondents 1 to 4, obviously because there did not exist any executable decree. In Application Nos.988, 989, 990 of 2002, neither Defendant No. 53 nor any other defendants except Defendant No. 206 (Respondent No. 5) were made parties. The range of objections raised during the course of execution is very wide. If a judgment debtor is able to point, out that the decree itself suffered from any basic infirmities or it was not executable or it violated any specific provisions of law, or the parties played fraud on the Court in bringing out the decree, it shall be open to him to canvass these aspects even during the course of execution.

26. In *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, , the Supreme Court held that if a decree is obtained by playing fraud on the Court, the same can be pleaded in collateral proceedings such as those for final decree, or in execution proceedings. The manner in which thousands of acres of land covered by Andhra Pradesh (Telangana Area) Jagir's (Abolition) Regulation, included in the 9th Schedule of the Constitution of India, was sought to be made available to the parties to the suit, could certainly have been urged by the petitioners or Defendant No. 53, had any proceedings been initiated for drawing the final decree or during the course of execution, if they were impleaded in them. The omission on the part of the Respondents 1 to 4 to implead the other defendants cannot be said to be either accidental or inadvertent.

For the foregoing reasons, Issues 1 and 2 are answered in favour of the petitioner and against the respondents.

Issue No. 3:

27. This relates to the title of the petitioners over the land in question. PW-1 is the Mandal Revenue Officer and PW-2 is the Deputy Director of Survey and Land Records. They have placed before this Court, the certified copy of town survey and land records, Sethwar, Gazette notification, dated 18.4.1997, panchanama under which the land was entrusted to Excise Department (Exs.A-1 to A-6 etc.). PWs. 1 and 2 have stated in their affidavits in lieu of chief examination as well as during the course of cross-examination that the land in question was held throughout, by the Government, and after Survey No. 169, no other survey number existed consequent on that revision. It is their case that all the lands other than those covered by survey numbers 1 to 169 belong to the Government.

28. RW-1 is the General Power of Attorney holder of Respondents 1 to 4. Through him, several documents were marked. Most of them are certified copies of deeds of assignment and orders passed by this Court in the proceedings from

time to time.

29. Learned Government Pleader submits that the evidence on record is sufficient to hold that the title to the land in question is held by the Government. He emphasized the fact that the survey was conducted after issuing notice to the concerned parties, and once it became final on being published in the Gazette, no one can dispute its correctness except, by initiating proceedings" in accordance with Survey and Boundaries Act.

30. Learned Counsel for the respondents on the other hand submits that the land has been in possession of the Receiver from the beginning and the survey does not have any impact on the possession of the 6th respondent over the land. In particular, he places reliance upon the judgment of this Court in Application No. 25 of 1980, dated 12.11.1989. In that application, the receiver sought for an injunction against a third party in Plot Nos.45 to 48 in Survey No. 179. On recording a finding that the possession was with the receiver, injunction was granted against third party. This order was affirmed in O.S.A. No. 2 of 1983.

31. It has already been observed that there did not exist any final decree, nor any execution proceedings were initiated. The question of considering the title of the petitioners, even if they are treated as third parties, would arise, if only the E.P is filed and objections are raised therein in the form of application under Rule 97 or 99 of Order XXI C.P.C. Since such an eventuality did not arise, this Court does not feel it necessary to decide the question of title in respect of the land referred to above. It can certainly be considered at an appropriate stage, depending upon the nature of proceedings that may be initiated.

32. Learned Counsel for the Respondents 1 to 4 submits that his clients intend to take steps to obtain final decree, in relation to the property in question, and if in the meanwhile, the petitioners alter the nature of the land, it will be difficult for them to execute the final decree. The interest of the parties can certainly be protected by issuing directions:

For the foregoing reasons:

- (a) the applications are allowed, and the 6th respondent is directed to restore possession to the petitioner forthwith,
- (b) It shall be open to the Respondents 1 to 5 to take necessary steps to obtain a final decree in accordance with law, duly impleading the parties to the suit,
- (c) Petitioners shall not alter the nature of the land on being redelivered, for a period of three months from today,
- (d) There shall be no order as to costs.