
(1999) 04 AP CK 0050

In the Andhra Pradesh High Court

Case No : SA No. 539 of 1998 and CRP No. 1918 of 1998

Kotakadi Lakshmi Devi

APPELLANT

Vs

Badam Nageswara Reddy

RESPONDENT

Date of Decision : 15-04-1999

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 35, Order 21 Rule 35(3), 100, 115

Citation : (1999) 3 ALD 325 : (1999) 3 ALT 278 : (1999) 1 APLJ 19 : (1999) 2 CivCC 564

Hon'ble Judges : B.S. Raikote, J

Bench : Single Bench

Advocate : Mr. Subramanya Reddy for P. Veera Reddy, for the Appellant; Mr. D. Sudershan Reddy for G. Dasaratha Rami Reddy, for the Respondent

Judgement

1. These two cases relate to same subject matter and between the same parties. Hence, I am disposing both of them by this common judgment.

2. CRP No. 1918/1998 is filed by the judgment-debtor in OS No.494 of 1984, being aggrieved by the judgment and order dated 20-4-1998 passed by the Principal Junior Civil Judge, Kurnool on EA No.672 of 1997 in EP No.364 of 1996 in OS No.494 of 1984. It has to be noted at this stage itself that B. Nageswara Reddy filed a suit in OS No.494 of 1984 against B. Laxmi Devi for specific performance of the contract on the basis of an agreement of sale dated 18-6-1984. The said suit was decreed vide judgment and decree dated 17-7-1985 and the said decree has become final. In those circumstances," decree holder filed an execution petition against the judgment-debtor for executing the sale-deed. As the judgment-debtor did not execute the sale-deed, it was the Court that ultimately executed the sale-deed, it was the Court that ultimately executed the sale-deed in EP No.231 /1985. The decree-holder also filed an execution petition for possession in terms of the decree. On that petition, the executing Court ordered the delivery of the possession to the decree-holder. When the Ameen went to the suit site, he found that the judgment-debtor has

encroached the suit schedule property by putting up construction. In those circumstances, Ameen returned the delivery warrant mentioning these facts. The decree-holder filed another petition requesting the Court to deliver the property by demolishing the constructions made by the judgment-debtor over the suit site subsequent to the decree. To that petition, the judgment-debtor filed a counter stating that the decree-holder had already taken possession of the portion of the site sold to him under agreement of sale and also encroached over the site belonging to the judgment-debtor. It is further stated that the judgment-debtor also filed a separate suit in OS No.3 12 of 1990. The said suit being dismissed, an appeal was pending in AS No.65 of 1996. On these grounds, the judgment-debtor prayed for the dismissal of the execution petition. By the impugned order, the Court below allowed EA No.672 of 1997 in EP No.364 of 1996 in OS No.494 of 1984, directing the Ameen to deliver the vacant possession of the schedule site measuring in all one cent to the plaintiff by demolishing the construction made by the judgment-debtor. It is in these circumstances, the judgment-debtor has filed the above revision petition in CRP No.1918 of 1998.

3. As I have already stated above, the judgment-debtor has filed a separate suit for perpetual injunction in OS No.312 of 1990 on the file of II Additional Principal District Munsif, Kurnool. The said Munsif Court dismissed the suit vide judgment and decree dated 1-7-1996 and the appeal filed by the judgment-debtor in AS No.65/ 1996 on the file of II Additional District Judge, Kurnool was also dismissed by confirming the judgment and decree of the trial Court. It is in these circumstances, the judgment-debtor has filed a separate appeal in SA No.539/1998. This appeal is also placed before me for disposal today. Having regard to these circumstances, I think it appropriate to refer the parties as per the ranking assigned to them in OS No 494/1984, as the decree-holder and judgment-debtor for the sake of convenience.

4. I am now taking up first the second appeal filed by the judgment-debtor in SA No.539/1998. In this case, the judgment-debtor filed a suit for perpetual injunction regarding the suit site situated in plot No. 12 in Sy. No.23 of Roja village, now Prakash Nagar, Kurnool District, described as ABCDEF in the plaint plan, contending that out of the said plot, plaintiff has sold one cent of the site to the defendant marked as EFDP and she has retained with herself the site marked as FXOP and she has constructed the house over the site marked as MNOC, hence the site in FXOP belong to her and on that site, the defendant has put up construction, therefore, the decree-holder shall be restrained from putting up any construction and whatever the construction that is there, shall be removed by mandatory injunction. The judgment-debtor also prayed for injunction against the defendant regarding the passage marked as ABMNOP in the plaint plan. The plaintiff examined herself as PW1 and another witness PW2, by name Sulthan Khan and got marked Ex.A1, the registered sale-deed and Ex.A2, the plaint plan. The defendant got himself examined as DW1 and also examined one independent witness DW2 by name Azecm Miah and got marked Ex.B1, the agreement of sale dated 18-6-1984, Ex.B2, registered copy of sale-deed dated 12-3-1984 and

EXs.B3 and B4 sale-deeds dated 23-9-1968 and 26-3-1969. The trial Court after appreciation of the entire evidence, held that on the basis of Ex.A1 registered sale-deed, the plaintiff got the property from her vendor to an extent of 132 Sq. yards. In Ex.A1, southern boundary is measuring 28 feet 6 inches, but the original sale-deed of Ex.A1 shows that she purchased 25 feet, which has been tampered and altered so as to read as 28 feet in Ex.A1. The plaintiff thus has? corrected the registered document to suit her convenience and as such she is not entitled to any equitable relief. The trial Court also held that according to the Commissioner's report Ex.C1, the plaintiff's house have no doors and windows towards the north (towards the south of the defendant's suit property) and she is having only ventilators towards the west. According to the evidence of DW2, the suit passage towards the west was the passage made use by the defendant and his mother for more than 30 years and there is no other passage on any other side of their suit house and as such they have got both easementory right of necessity an easementory right by prescription over the suit passage towards the west of the plaintiffs house. The trial Court also found that the judgment-debtor has no possession over the disputed open space marked as ABMNOPF and she is not entitled to any injunction. This finding of the trial Court has been confirmed by the appellate Court. However, the learned Counsel for the appellant contended that the appellate Court has not specifically considered regarding the construction made by the plaintiff over the site marked as FXOP. Therefore, there is error in the finding recorded by the appellate Court. From reading of the judgment of the appellate Court, I find that the appellate Court found that the southern boundary in the plaintiffs sale-deed Ex.A1 is not clear and northern boundary of the plaintiffs house as per Ex.A1 is the house of one Badam Bachu Laxmamma (the mother of the defendant), but not public rasla. The appellate Court also took note of the fact that there are no windows and doors towards the western side of her site as per the Commissioner's report and her case that there is another site towards west for the defendant was not accepted. From the reading of the entire judgment, I find that the appellate Court took the entire disputed site as one unit including the western passage of the plaintiff's house and ultimately confirmed the finding of fact recorded by the trial Court. The appellate Court also found that as per Ex.A1 sale-deed, the northern boundary of the plaintiff's house is the house of Badam Bachu Laxmamma. As per the evidence, there are no doors or windows towards the northern side, nor there are any doors or windows towards the western side, except ventilators. Thus both the Courts below concluded that plaintiff has not proved her possession over the suit passage towards the west of her house and the suit site towards the north of her house and ultimately dismissed her suit. Thus, both the Courts below gave concurrent finding of fact that the plaintiff has failed to prove her possession over the disputed property and accordingly, they refused injunction. In this view of the matter, I do not find that this appeal raises any substantial question of law, for interference of this Court u/s 100 CPC and accordingly, the appeal is liable to be dismissed.

5. As contended by the learned Counsel for the decree-holder the judgment-debtor has been obstructing the decree for specific performance passed in OS No.494 of 1984. She did not execute the registered sale-deed, having suffered the decree. Therefore, the Court had to execute the registered sale-deed in favour of the decree-holder and also had to pass a decree for possession of the property sold under agreement of sale. When the judgment-debtor did not deliver the possession, the decree-holder filed the present EA No.672/1997 for possession under Order 21, Rule 35 CPC. As per the report of the Ameen, the judgment-debtor had put up some construction over the disputed site during the pendency of the litigation and also she has refused to deliver the property on the ground that she has filed a separate suit in OS No.312 of 1990. Taking note of the report of the Ameen, the Court below did not accept the version¹ of the judgment-debtor that the decree-holder was put in possession of the property as per the decree voluntarily by the judgment-debtor and it also found that when the judgment-debtor did not execute the sale-deed, it was the Court that executed the sale-deed and judgment-debtor has not produced any evidence to show that she has voluntarily put the decree-holder in possession of any part of the property under the decree and accordingly, the executing Court held that the decree holder is entitled to possession of that one cent of property as per the decree for specific performance, for which a separate sale-deed is executed by the Court and consequently directed the Ameen to put the decree-holder in possession of that one cent of property, by demolishing the construction made by the judgment-debtor. It is this order, as I have already stated above, that is challenged by the judgment-debtor in this revision petition. The learned Counsel appearing for the petitioner in the revision petition contended that if there are structures existing on the suit site, the Court could not have ordered for demolition under Order 21, Rule 35 CPC. In support of his contention, he relied upon the judgment of the High Court of Calcutta reported in *Bir Bikram Kishore Manikya Bahadur Vs. Raj Kumar Pal and Another*, . The Court below held that if there is construction on the property for which there is a decree, the Court can order delivery of possession by demolishing the existing structures, by relying upon the judgments reported in *Narain Singh v. Imam Din*, AIR 1934 Lahore 978. *Ramrup Rai Vs. Mst. Gheodhari Kuer and Others*, and also *Mohd. Ismail Vs. Ashiq Husain*, . From reading these judgments, I find that there is some conflict of opinion between the High Court of Calcutta in *Bir Bikram v. Raj Kumar* (supra), on the one hand and the High Courts of Patna and Allahabad in *Ramnip Rai v. Gheodhari Kuer* (supra) and *Mohd Ismail v, Ashiq Hitssain* (supra), on the other. The High Court of Calcutta held that inhere is a permanent structure on the property for which there is a decree, demolition cannot be ordered. On the other hand, the High Courts of Patna and Allahabad have held that the Court in order to execute the decree for possession, can order for demolition of the existing structure made during the pendency of the litigation. In my humble opinion, the proposition of the High Courts of Patna and Allahabad is acceptable to me for the reason that by putting up some construction, permanent or otherwise, the judgment-debtor cannot frustrate the decree for possession passed by a

competent Court and in such cases, Courts have all the powers to order for demolition of such construction made during the pendency of the litigation. The Courts are not only supposed to pass decrees, but also make the decrees effective and execute them by removing the illegal construction made during the pendency of the litigation. Moreover, to the same effect is the law declared by the Supreme Court in B. Gangadhar Vs. B.G. Rajalingam, , which has been brought to my notice by the learned Counsel appearing for the decree-holder. By interpreting Order 21, Rule 35 CPC, the Hon''ble Supreme Court in the said judgment has declared the law for the country as under :

"6. Rule 35(3) of Order 21 itself manifests that when a decree for possession of immovable property was granted and delivery of possession was directed to be done, the Court executing the decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the decree for possession. That power also includes the power to remove any obstruction or super-structure made pendants lite. The exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the" decree. No doubt, the decree does not contain a mandatory injunction for demolition. But when the decree for possession had become final and the judgment-debtor or a person interested or claiming right through the judgment-debtor has taken law in his hands and made any construction on the property pending suit, the decree-holder is not bound by any such construction. The relief of mandatory injunction, therefore is consequential to or necessary for effectuation of the decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the Court. Otherwise, the decree becomes inexecutable driving the plaintiff again for another round of litigation which the Code expressly prohibits such multiplicity of proceedings."

From the above law declared by the Supreme Court it is clear that the judgment of the High Court of Calcutta reported in Bir Bikram v. Raj Kumar (supra), does not hold the field any more. In this view of the matter, I do not think that there is any error of jurisdiction in the impugned order passed by the executing Court, directing the Ameen to put the decree-holder in possession by demolishing the construction put up by the judgment-debtor over the site for which there is a decree for possession in favour of the decree-holder. For these reasons, I do not think that the impugned order of the executing Court calls for interference at the hands of this Court u/s 115 CFC.

6. For the above reasons, I pass the order as under :

7. SA No.539/1998 and CRP No.1918/1998 are hereby dismissed, but in the circumstances without costs.