
(1996) 03 AP CK 0064

In the Andhra Pradesh High Court

Case No : AAO No's. 57, 60, 61, 62 and 63 of 1996

Mohd. Abdul Majid Khan and Others

APPELLANT

Vs

Afsar Khan and Others

RESPONDENT

Date of Decision : 29-03-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 144

Citation : (1996) 2 ALT 131

Hon'ble Judges : P. Ramakrishnam Raju, J

Bench : Single Bench

Advocate : N. Narsing Rao and B. Dayakar Reddy, for the Appellant; C. Jayasree Sarathy and Mirza Munawwar Ali Baig, for the Respondent

Final Decision : Dismissed

Judgement

P. Ramakrishnam Raju, J.

C.M.A. No. 57 of 1996:

1. This appeal is filed against an order rejecting the application filed under Order 21, Rule 97C.P.C. seeking for adjudication of the rights of the petitioner in the petition schedule property which is a house bearing Municipal No. 4-1-1/3, King Koti, Hyderabad. The respondent No. 1 filed E.P.No. 46 of 1990 u/s 144 of CPC for restitution of possession on the ground that he was dispossessed on 21-10-1989 by virtue of an ex parte decree dated 1-9-1987 in O.S.No. 499 of 1989.

2. The property in question was originally owned by respondent Nos.2 and 3. One Haji Mohd. Misbhaudhin Qureshi obtained agreement of sale dated 11-7-75 from respondent Nos.2 and 3. He filed O.S.No. 293 of 1982 on the file of the Fifth Additional Judge, City Civil Court, Hyderabad for specific performance of agreement for sale against them and obtained an ex parte decree on 30-6-1983. Sale deed was also got executed through Court on 25-1-1991. The petitioner claims that he paid a sum of Rs. 1,60,000/- to the said Qureshi under a

mortgage deed dated 22-6-1991 and he was in peaceful possession and enjoyment of the said premises having been inducted into possession in the month of June, 1991. As the first respondent obtained orders for delivery of possession, the petitioner came forward with this application to declare his rights.

3. The case of respondent No. 1 is that he was inducted into possession of the premises in question as a tenant originally by respondent Nos. 2 and 3. Later, respondent Nos. 2 and 3 mortgaged the said property to him on 21-7-1994 and ever since he was in possession of the said property as a possessory mortgagee. While the mortgage was subsisting, respondent Nos. 2 and 3 again entered into an agreement for sale with him on 13-2-1977. The mortgagors filed O.S.No. 1720 of 1979 on the file of the Second Additional Judge against him for redemption of the mortgage. However, the suit was dismissed on 21-10-1992 and the said judgment became final. As the respondent Nos. 2 and 3 did not execute the sale deed as per the agreement of sale, he filed O.S.No. 101 of 1980 for specific performance while the suit was pending, respondent Nos. 2 and 3 in collusion with Qureshi filed O.S.No. 499 of 1989 on the file of the Second Additional Judge and obtained an ex parte decree against him on 1-9-1989 and dispossessed him on 21-10-1989 through a Panchanama. Thereupon he filed I.A.Nos. 1527 of 1989 and 1528 of 1989 to set aside the ex parte decree dated 1-9-1989 and also for restitution of possession. Mohd. Qureshi has also filed I.A.No. 1717 of 1989 to set aside the ex parte decree and for restitution of possession to him. Both the applications filed by respondent No. 1 were allowed and the ex parte decree passed in O.S.No. 499 of 1989 was set aside on 18-6-1990. Consequently, the application filed by Mohd. Qureshi to set aside the ex parte decree was also formally allowed, but the application filed by Mohd. Qureshi for restitution of possession was dismissed. Aggrieved by the said order, he carried the matter in appeal in C.C.C.A. No. 66 of 1990 before the High Court which was also dismissed. Mr. Qureshi has also filed E.A.No. 36 of 1991 objecting to the delivery to the respondent No. 1. As the same was dismissed on 19-4-1991, he carried the matter in revision before the High Court in C.R.P.No. 1333 of 1991 which was dismissed on 15-7-1991. He unsuccessfully carried the matter to the Supreme Court in S.L.P.No. 12934 of 1991 which was also dismissed on 22-8-1991. After dismissal of E.A.No. 36 of 1991 on 19-4-1991, the petitioner obtained a receipt dated 22-4-1991 from Mohd. Qureshi claiming to have been inducted into possession under an unregistered mortgage deed. Therefore, the petitioner claims under Mohd. Qureshi whose claim was rejected by the High Court and Supreme Court.

4. Before the lower Court, the petitioner examined two witnesses including himself to establish that Mohd. Qureshi had executed a mortgage deed having received a sum of Rs. 1,60,000/- from him under Ex.A-1 receipt dated 22-6-1991; and that possession was also delivered to him on 30-6-1991. The said mortgage deed is not exhibited. It is said to be an unregistered deed. The petitioner, therefore, failed to establish the alleged mortgage deed dated 22-6-1991 in this favour. He is claiming to have been inducted into possession on

30-6-1991 in pursuance of the said mortgage deed executed by Mohd. Qureshi filed I.A.No. 1718 of 1989 for restitution of possession. As the same was dismissed, he unsuccessfully filed C.C.C.A.No. 66 of 1990 in the High Court. The application filed by him E.A.No. 36 of 1991 objecting to the delivery to the 1st respondent was dismissed on 19-4-1991. Questioning the said order, he filed C.R.P. No. 1333 of 1991 in the High Court unsuccessfully as well as SLP in the Supreme Court. After dismissal of E.A.No. 36 of 1991 on 19-4-1991,, it is therefore clear, the petitioner appears to have obtained a receipt under Ex.A-1 from Mohd. Qureshi. The petitioner who is claiming rights through Mohd. Qureshi cannot get better rights than his mortgagor. When Mohd. Qureshi himself failed in his claim to obtain possession, the petitioner who is claiming through him cannot seek possession, nor object recovery of possession by the Respondent No. 1 Sri N. Narsing Rao, the learned Counsel for the petitioner contends that inasmuch as the petitioner is not a party to O.S.No. 499 of 1989 or the other earlier proceedings, he is not bound by those order; but in as much as his mortgagor, Mohd. Qureshi is a party to those proceedings and as the petitioner is claiming through his mortgagor only, this contention, in my view, has no force.

5. As already stated, Mohd. Qureshi obtained an ex parte. decree in O.S. No. 293 of 1982 against the respondent Nos. 2 and 3 which is a decree for specific performance of the agreement of sale dated 11-7-1975. Respondent Nos. 2 and 3 filed O.S.No. 499 of 1989 to set aside the said decree. O.S.No. 499 of 1989 was decreed ex parte on 1-9-1989 and in pursuance of the said ex parte decree, the first respondent was evicted from the premises under a Panchanama on 21-10-1989. An application in I.A.No. 1527 of 1989 by the 1st respondent set aside the ex parte decree passed against him was allowed on 25-2-1990 and I.A.No. 1528 of 1989 for restitution was also allowed on 18-6-1990. Consequently, the application filed by Mohd. Qureshi in I.A.No. 1717 of 1989 to set aside the ex parte decree was also formally allowed, but his application for restitution filed in I.A.No. 1718 of 1989 was dismissed. As already stated, the said order was confirmed in CCCA.No. 66 if 1990. In fact, at one stage, the petitioner filed O.S.No. 1721 of 1991 on the file of the Fifth Assistant Judge, City Civil Court, Hyderabad claiming that he was a tenant under Mohd. Qureshi under a lease deed dated 1-3-1991. As Mohd. Qureshi failed in E.A.No. 36 of 1991 in objecting to the delivery to the respondent No. 1 the petitioner also seems to have shifted his stand and is now claiming to be the mortgagee under an unregistered mortgage deed. Sri Narasing Rao, the learned Counsel for the petitioner next contends that there is no material that the first respondent was dispossessed under a Pachanama on 21-10-1989 in execution of the decree in O.S.No. 499 of 1989. No doubt, the Panchanama dated 21-10-1989 and the ex parte decree in O.S.No. 499 of 1989 dated 1-9-1989 were not marked in these proceedings. But the fact remains that the decree and the E.P. proceedings including recording of Panchanama were on the file of the Second Additonal Judge's Court only. The enquiry in execution applications is summary in procedure. Hence, the same degree of rigour and strictness with which the

documents should be filed and. proved in a suit cannot be insisted upon in execution proceedings. Certain execution proceedings can be even by oral applications as provided under Rule 11 of Order 21 C.P.C. Further, when the decree and the other orders passed in the execution of the said decree are available on the file of the same Court, mere is no point in insisting that all these proceedings should be marked in the execution petition once-again, particularly, when there is no dispute about the existence of those orders. Even here, the petitioner has not placed any material before me to disprove any of those proceedings. As such, this contention also, in my view, has no force.

6. As already seen the order for restitution in favour of respondent No. 1 made in I.A.No. 1528 of 1989 has become final having been confirmed by the High Court in C.C.C.A.No. 66 of 1990 and CR.P.No. 1333 of 1991. Therefore, the petitioner who claims through Mohd. Qureshi or Mohd. Qureshi himself cannot challenge the same. As already seen, the orders already passed in those Interlocutory Applications which have become final long back cannot be challenged either by respondent Nos. 2 and 3 or Mohd. Qureshi or anybody claiming through them. The trial Court observed that according to the petitioner as P.W.1, the mortgage in his favour was for a period of one year, and therefore, he has got a right to realise the amount by proceeding against the alleged mortgagor viz., Mohd. Qureshi. The lower Court has also rightly found that in the Panchanama dated 21-10-1989 there was no reference about the possession of the petitioner nor Mohd. Qureshi. The claim of the petitioner is that he was inducted into possession on 30-6-1991. Therefore, he cannot object to restitution regarding the possession as was obtaining on 21-10-1989 i.e., the date of dispossession of respondent No. 1. The learned Counsel for the petitioner has lastly submitted that Section 144 C.P.C. has no application to a case like this. The trial Court has rightly rejected this argument. This aspect is discussed elaborately in the succeeding paras.

7. For all the above reasons, I am of the view that there is no error in the order of the trial Court warranting my interference.

C.M.A.No. 60 of 1996:

8. The petitioners claiming to be tenants of a part of the above mentioned schedule premises wherein a Barber shop was run, filed a similar E.A.No. 224 of 1991 in E.P.No. 46 of 1990. Apart from the three respondents shown in the above C.M.A., Haji Mohd. Misbahuddin Qureshi was also shown as respondent No. 4. The petitioners are claiming to have been inducted into possession under Ex. A-34, lease deed dated 6-11-1989 by respondent Nos. 2 and 3. As already seen on 21-10-1989, the respondent No. 1 was dispossessed. Respondent No. 2 and 3 who are parties to I.A.No. 1527 of 1989 and 1528 of 1989 cannot induct the petitioners to defeat the orders passed thereon which were confirmed by the High Court. The petitioners cannot claim better rights than respondent Nos.2 and 3. As respondent Nos.2 and 3 were bound by the orders of restitution of possession, the petitioners who are claiming rights under them cannot nullify the

effect of those orders. The respondent Nos. 2 and 3 also cannot be permitted to circumvent those orders by inducting third parties into possession in contravention of those orders. The application filed by the petitioners was rightly dismissed. The lower Court also observed that if the petitioners are in possession on 21-10-1989, they would have certainly objected when delivery of possession was effected and Panchanama was recorded. For all these reasons I am entirely in agreement with the view taken by the Court below.

C.M.A.No. 61 of 1996:

9. This petitioner is also similarly claiming tenancy rights in respect of a part of the premises (Mulgi) in question. In the Panchanama? referred to above, whereunder the respondent No. 1 was evicted, no reference whatsoever was made about the occupation of the petitioner of any part of the premises on that date. The documents filed by him are subsequent to 21-10-1989. His suit, O.S.No. 899 of 1991 on the file of the Fifth Assistant Judge, for declaration that he is the tenant of the petition schedule property was much later to the date of Panchanama. His application for temporary injunction pending the said suit was also dismissed. The receipt filed by the petitioner dated 15-9-1990 issued by the General Power of Attorney of Respondent Nos. 2 and 3, has no value as respondent Nos. 2 and 3 are bound by the orders passed in I.A.Nos. 1527 and 1528 of 1989. Therefore, the lower Court has rightly dismissed the application filed by the petitioner and I do not find any ground to interfere with the said order.

C.M.A.No. 62 of 1996:

10. The petitioner also similarly filed E.A.No. 237 of 1991 in E.P.No. 46 of 1990 claiming tenancy rights in respect of a part of petition schedule premises (Mulgi). The possession of the petitioner was also not noted in the Panchanama dated 21-10-1989. Had he been in possession, he would have certainly raised an objection for delivery of possession. The documents filed by the petitioner were subsequent to the said proceedings, including the rent control proceedings initiated by him. The petitioner filed O.S.No. 900 of 1991 on the file of the Fifth Assistant Judge. He also filed an application for temporary injunction which was dismissed. He also filed a receipt (Ex.A-6) dated 18-11-1989 issued by respondent No. 4. The said receipt was also originated subsequent to the delivery under a Panchanama dated 21-10-1989. Apart from that, the fourth respondent who is a party to the orders in I.A.Nos. 1527 and 1528 of 1989 cannot induct third parties, more so, when his appeal in C.C.C.A.No. 66 of 1990 as well as C.R.P.No. 1333 of 1989 were dismissed. Therefore, in my view, the lower Court has rightly dismissed the application filed by the petitioner. The said order is unassailable.

C.M.A.No. 63 of 1996:

11. This is also another similar appeal. The petitioner who is claiming rights of tenancy in respect of part of the premises (Mulgi). As already seen, the fourth

respondent filed E.A.No. 36 of 1991 seeking stay of execution in E.P.No. 46 of 1990. The same was dismissed by the lower Court by an order dated 25-2-1991. Aggrieved by the same, respondent No. 4 carried the matter in revision before the High Court in C.R.P.No. 1333 of 1991 which was dismissed on 5-7-1991. The petitioner filed O.S.No. 899 of 1991 on the file of the Eighth Assistant Judge claiming that he was inducted into possession by respondent No. 4 under a lease deed dated 1-3-1991. But in this petition, he is claiming tenancy rights under respondent Nos. 2 and 3. Respondent Nos. 2 and 3 who are bound by the order in L.A.No. 1527 and 1528 of 1989 cannot induct third parties into possession and defeat those orders. The documents filed by the petitioner are subsequent to the Panchanama. The rent control proceedings initiated by him are also of subsequent origin. He cannot claim better rights than respondent Nos. 2 and 3. The suit filed by him in O.S.No. 899 of 1991 is also of later origin and the I.A., seeking temporary injunction was dismissed. Even the receipt (Ex.A-2) dated 7-6-1991 issued by respondent No. 4 is also subsequent to the date of Panchanama. The said receipt after the delivery was effected under Panchanama on 21-10-1989 cannot have any effect as respondent No. 4 himself suffered order of restitution in I.A.No. 1528 of 1989 and as C.C.C.A.No. 66 of 1990 and C.R.P.No. 1333 of 1991 preferred by him were dismissed. The attempt of respondent Nos. 2 to 4 seems to be to nullify the order of restitution passed in favour of respondent No. 1 and to drag on the proceedings. The petitioner cannot derive any rights either from respondent Nos. 2 and 3 or respondent No. 4. therefore, his application was rightly dismissed by the Lower Court and I have no two minds in confirming the said order.

12. However, Sri Mirza Munawwar Ali Baig, the learned Counsel for respondent No. 4 submits that Section 144 has no application in this case; inasmuch as the decree for specific performance obtained by respondent No. 1 does not ripen into a sale deed so far, and these applications were filed even in 1989 much before the respondent No. 1 obtained a decree on 16-4-1992. I cannot accede to this contention. A similar contention was repelled in *Gurjoginder Singh Vs. Jaswant Kaur (Smt) and Another*, .

13. u/s 144 C.P.C. the Court which passed the decree or order shall on the application of any party entitled to the benefit by way of restitution place the parties in the same position which they would have occupied but for such decree or order which was reversed, modified, set aside etc., The mandate contained u/s 144 does not leave any discretion in the hands of the Court except to order restitution. It is now well settled that the Court of first instance is the Court that has passed decree notwithstanding the fact that the decree was confirmed, modified or reversed in appeal or in revision, or even in review. As already stated, respondent Nos. 2 to 4 who suffered an order of restitution u/s 144 C.P.C., and the respondent No. 4 having carried the matter to the High Court and the Supreme Court unsuccessfully cannot open a second round of litigation through their nominees. It is immaterial whether the first respondent has obtained a decree for specific performance subsequently. The fact remains that

he was dispossessed on 21-10-1989 under the Panchanama, and therefore, possession has to be restored to him. The subsequent decree obtained by him need not be taken cognizance of for purpose of ordering restitution. Applications for restitution cannot be resisted normally, as restitution is the rule and the thesis of it is an exception. The doctrine of restitution implies that where a party derives benefit by virtue of a decree or order which was later set aside or modified has to be surrender the said benefit derived by him; no matter whether the decree or order which was reversed or modified was again restored later. The underlying principle is that on the date when the restitution application was filed the decree which was executed was reversed or modified and therefore, status quo ante has to be restored as no litigant should suffer on account of a wrong order passed by the Court. This doctrine of restitution which is a normal rule may have a few exceptions like the decree which has varied or reversed the earlier order is void, or the same has become inexecutable by virtue of operation of law. These are the few instances of such exceptions and in all other cases the Court is bound to order restitution. Usual defences cannot be pleaded to resist restitution however sound they may be. It is not a case where such defences are permissible to resist restitution. There may be valid defences also for resisting restitution including the one that the decree which is reversed or modified in pursuance of which the application for restitution was filed, was subsequently modified or reversed. Therefore, soundness of defence is no answer for restitution. As this is a simple case of restitution, which was ordered long back cannot be resisted by setting up nominees to drag on the proceedings, Therefore, the lower Court has rightly dismissed the application filed by the petitioner.

14. For all the above reasons, the Civil Miscellaneous Appeals are devoid of merits and they are accordingly dismissed.

15. Having regard to the fact that school is running in a portion of the premises and schools will be closed for Summer vacation in a few days and will be reopened in June, 1996, I deem it appropriate to grant two months time from today to vacate and deliver vacant possession, in all the appeals.