
(2006) 09 AP CK 0137
In the Andhra Pradesh High Court
Case No : CRP No. 463 of 2006

T. Penchalaiah

APPELLANT

Vs

Jaladanki Saroja (died) and Others

RESPONDENT

Date of Decision : 15-09-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97, Order 3 Rule 1, Order 3 Rule 2, 11, 144
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 58
Partnership Act, 1932 — Section 69(2)

Citation : (2006) 6 ALD 560

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : M.V.S. Suresh Kumar, for the Appellant; S.R. Sanku, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—This civil revision petition is filed under Article 227 of Constitution of India assailing the decretal order, dated 16-12-2005, passed by the Court of III Additional Junior Civil Judge, Nellore in E.A.No. 363 of 2002 in E.P.No. 69 of 1993 arising out of an ex parte decree for declaration of title and recovery of possession passed by the said Court in O.S.No. 676 of 1990. The petitioner herein is the decree holder and the first respondent in E.A. No. 363 of 2002 whereas one Jaladanki Saroja is a third party to the said suit, who filed E.A.No. 363 of 2002. After her death, her legal representatives, namely, the husband and two daughters were brought on record before the lower Court, who are respondents 2 to 4 herein.

2. The brief fact of the matter is as follows: The petitioner was assigned/allotted land admeasuring Acs.331/2 ankanams bearing Plot No. 13 in Block "B" in Survey No. 78/2 situated at Vedayapalem, Nellore, on payment of market value under proceedings, dated 22-6-1978, which was marked as Ex.X. 1. He was

allegedly put in possession of vacant land. When there was dispute about his title, he filed the suit being O.S.No. 676 of 1990 for declaration of title and recovery of possession based on the assignment made in his favour. The suit was decreed on 26-7-1991 by the Court of III Additional Junior Civil Judge, Nellore, against respondents 5 and 6 herein, who were defendants 1 and 2 in the suit. The petitioner, therefore, filed E.P.No. 69 of 1993 for execution of the decree. At that stage, Jaladanki Saroja, filed E.A.No. 96 of 1993 under Order XXI Rule 97 of Code of Civil Procedure, 1908 (CPC). She alleged that she was assigned Plot No. 3 in Survey No. 78/ 4, that she was in possession of the property and that she obtained ex parte decree in O.S.No. 538 of 1989, dated 20-9-1992 on the file of the Court of the Principal Junior Civil Judge, Nellore, against the petitioner herein. The said execution application was dismissed on 30-6-1995 on the ground that the property claimed by Saroja is different from the suit schedule property in O.S. No. 676 of 1990.

3. Saroja filed C.R.P. No. 2452 of 1995 against E.A. No. 96 of 1993, dated 30-6-1995. This Court dismissed the same on 19-2-2002. The petitioner herein then executed decree in O.S.No. 676 of 1990 and took possession of the site as well as a residential house, which was allegedly the same as suit schedule in O.S.No. 676 of 1990. Saroja, however, disputed this. Throughout her contention was that the land, which was assigned to her and the house, which was constructed, are in Survey No. 78/4 bearing Plot No. 3, which is different from the suit schedule property in the suit filed by the petitioner. Taking such a plea, she filed E.A.No. 363 of 2002 u/s 144 of CPC on the file of the Court of III Additional Junior Civil Judge, Nellore. She prayed for restoration of the property from which she was dispossessed by the Court bailiff in purported execution of the decree in O.S. No. 676 of 1990. E.A.No. 363 of 2002 was allowed on 21-10-2002. The petitioner then filed C.M.A.No. 69 of 2002 on the file of the III Additional District Judge, Nellore. By order, dated 24-4-2002, the appellate Judge allowed the matter and remanded to the lower Court. After remand, the lower Court by order, dated 16-12-2005 allowed E.A.No. 363 of 2002. Feeling aggrieved by which, the petitioner filed C.M.A., on the file of the District Court, which was returned as not maintainable. Therefore, the present civil revision petition is filed against the order, dated 16-12-2005. Be it also noted, before the lower Court, the contesting respondents examined P.W.1 to P.W.4 and marked Exs.A.1 to A.27. The petitioner examined himself as R.W.1, besides examining R.W.2 and R.W.3 and marked Exs.B.1 to B.4. C.W.1 to C.W.4 were also examined and Exs.X.1 to X.25 were also marked. X.18 is the delivery warrant and Ex.X.19 is the report of the Court Amin of delivery receipt handing over possession of property in possession of Saroja to the petitioner herein.

4. Learned Counsel for petitioner, Sri M.V.S. Suresh Kumar, submits that the application filed by Saroja u/s 144 of CPC for restitution is not maintainable. As she was not a party to the suit filed by the petitioner nor the said decree was reversed in the appeal filed by her. Secondly, he contends that the order in E.A.No. 96 of 1993, dated 30-6-1995, marked as Ex.B1 operates res judicata. It

is his third submission that in the absence of any finding that the property claimed by Saroja is the same as that of suit schedule property in O.S.No. 676 of 1990, the lower Court could not have allowed the application. Lastly, he contends that Saroja, who filed the application before the lower Court died before the commencement of the enquiry by the Court. Though her legal representatives were brought on record, none of them came to witness box to depose in favour of the allegation that the property, which was delivered to the petitioner under Ex.X.19 is different from the suit schedule property. He adds further that PW.4, was examined on behalf of respondents 2 to 4 is general power of attorney holder of the second respondent and his evidence cannot be treated as evidence of the respondents. He placed reliance on the decision of the Supreme Court in *Janki Vashdeo Bhojwani and Another Vs. Indusind Bank Ltd. and Others*, .

5. Learned Counsel for respondents 2 to 4, Sri S.R. Sanku submits that Section 144 of CPC is not exhaustive in relation to Law of Restitution and even u/s 151 of CPC, it is competent to the Court to order restitution to avoid miscarriage of justice and to avoid prejudice caused to third parties by the orders passed by the Court. He relied on *Mrs. Kavita Trehan and another Vs. Balsara Hygiene Products Ltd.*, , *South Eastern Coalfields Ltd. Vs. State of M.P. and Others*, , *Zafar Khan and Others Vs. Board of Revenue, U.P. and Others*, , *Jotindra Nath Ghose Vs. Jugal Chandra Santra and Another*, and *Payre Chand Vs. Ashrafunnissa Begum and Others*, . Nextly he relies on Ex.B.2 which is the copy of the order of this Court in C.R.P. No. 2452 of 1995 and submits that the earlier proceedings are not res judicata as this Court earlier observed that property which does not form part of suit schedule cannot be delivered to the decree holder. Nextly, he points out that Saroja filed a suit being O.S.No. 538 of 1989 claiming possession in respect of property in Survey No. 78/4, whereas the petitioner claimed property in Survey No. 78/2, and therefore, the burden lied on the petitioner to show by disclosing proper boundaries of the suit schedule property in O.S.No. 676 of 1990. The petitioner did not even give the boundaries of the property whereas the respondents produced evidence to show that Amin delivered the property in Survey No. 78/4, which is also admitted by the petitioner as P.W.1.

Restitution

6. Section 144 of CPC lays down that when a decree or order is varied or reversed by appellate/ revisional Court, the decreeing Court may order restitution placing the parties in the same position, which they occupied before the decree. There cannot be any doubt that on a true interpretation, Section 144 deals one and only situation where the decree of the original Court is reversed by the appellate/revisional Court. Therefore, in matters of restitution not falling within the scope of Section 144 of CPC, would it be correct to say that the civil Court has no such power of restitution ? There is abundant authority that there can be number of situations where the Court can exercise its inherent power u/s 151 of CPC to prevent miscarriage of justice by reason of its orders. Such power is to be exercised by the civil Court in discharge of its duty, which is explained by

the well known maxim *actus curiae neminem gravabit*. The power is exercised by civil Court to order restitution to ensure that no person - whether such person is party to the suit/application or not; gets undue advantage by its orders, is no party grossly prejudiced by its proceedings/orders.

7. In *Arunchalam v. Pratapasimha Rajah* AIR 1930 Mad. 988 a Division Bench of Madras High Court considered this aspect of the matter and held as under:

As to the technical argument that the order is erroneous because it purports to have been passed u/s 144 and that that section will not apply because no decree has been varied or reversed, we are not satisfied that the principle of Section 144 is confined exclusively to matters in execution. The Privy Council has in *Jai Barham v. Kedarnath Marwari* AIR 1922 PC 269 : 69 IC 278 : 49 IA 351 : 2 Pat. 10 (PC) laid down that the power of restitution is inherent in the Court and should be exercised when necessary in order to do justice. This Court has so exercised that principle in a suit at a stage between preliminary decree and the final decree in a case, *Cunnaiah Mudaly v. Rangaswami Mudaly* (1918) 48 IC 7.

8. In *Cheni chenchaiiah Vs. Shaik Ali Saheb and others*, the facts noticed by this Court are as follows. The petitioner therein filed suit on the file of the Court of the District Munsif for permanent injunction. He also filed an interlocutory application for temporary injunction, which was dismissed. The plaintiff filed interlocutory application along with Miscellaneous Appeal and the appellate Court granted an order of injunction in the said application. In the meanwhile the defendants forcibly thrown out the belongings of the plaintiff and evicted him from the suit premises. Thereafter the defendants filed a civil revision petition before this Court, aggrieved by the order of injunction granted by the appellate Court, namely, the Court of Subordinate Judge. The said C.R.P., was disposed of by this Court ordering status quo with a direction to the Sub-Court to dispose of the C.M.A., itself. The C.M.A., was allowed and, therefore, the plaintiff filed an application u/s 144 read with Section 151 of CPC for restitution. The same was dismissed by the learned Subordinate Judge. Aggrieved by which the plaintiff filed C.R.P. A contention was raised before this Court that as the plaintiff was not dispossessed by virtue of any order of Court, restitution cannot be claimed u/s 144 of CPC and that the plaintiff should have recast a suit and not application u/s 144 of CPC. This Court rejected these contentions and ordered restitution to the plaintiff as he was forcibly and unauthorisedly evicted by the defendants during the pendency of the proceedings. It was observed as under:

... on a consideration of the decisions referred to above, it can be seen that in the absence of specific provision in the Code which deals with particular situation or unless there is any prohibition either express or implied, the Court is entitled to exercise its inherent powers u/s 151 of Code of Civil Procedure. In this case, as I stated above, Section 144 of CPC is not applicable to the facts of the case because possession was not taken by any order of the Court. There is no other provision, which applies to the facts of the case i.e., where the possession has been taken forcibly by a party during the pendency of the proceedings i.e., when

the application is dismissed by the trial Court and before filing the appeal. In these circumstances, I agree with the contention of the learned Counsel for the petitioner that in such circumstances, the Court would be justified to do justice and put back the parties in the same position in which they were, but for the order of the trial Court by invoking the inherent jurisdiction. Therefore, I agree with the contention that the Court in exercise of its jurisdiction u/s 151 can grant restitution, even though Section 144 CPC may not strictly apply. That view of mine, as I have stated above, is supported by the two Division Bench decisions stated supra in *State Govt. of Andhra Pradesh Vs. Manickchand Jeevraj and Co., Bombay*, and *P. Lingeshwararao v. Venkata Subbarao* 1966 (2) An. WR 144.

9. In *Kavita Trehan v. Balsar Hygiene Products* 's case (supra) the Supreme Court considered the question as to the scope of restitutionary jurisdiction of the Courts. The appellant firm was clearing and forwarding agents to the respondent. The principal terminated the agreement due to non-payment of large sums of commission amount. The appellant filed suit for declaration of the appellant's lien to an extent of about Rs. 16,00,000/- and obtained ex parte injunction directing the respondent not to interfere in the disposal of the stock by the plaintiff. The appellant then sold away the bulk of stocks under the authority of the Court's interim order and recovered a sum of Rs. 23,00,000/- when the goods were worth about Rs. 32,00,000/-. The suit was later transferred to Delhi High Court by order of the Supreme Court. The learned Single Judge of Delhi High Court dismissed the suit as hit by Section 69(2) of Indian Partnership Act, 1932. The learned Single Judge also considered the question of restitution of goods to the respondent or their money value. On that question, the learned Single Judge directed the plaintiff to furnish security by way of an F.D.R., from a Nationalized Bank in the name of the Registrar of the Court. The view was confirmed by Division Bench. Before the Supreme Court, it was urged that Section 144 of CPC did not apply as no transfer of possession of any property pursuant to any order of the Court had taken place. It was also contended that Section 151 of CPC cannot be invoked in aid of jurisdiction that manifestly exist and cannot in itself be seen as a source of jurisdiction. The Supreme Court while observing that Section 144 of CPC incorporates only a part of the general law of restitution and not exhaustive, laid down as under:

The jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands. It will be exercised under inherent powers where the case did not strictly fall within the ambit of Section 144. Section 144 opens with the words "where and insofar as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose....". The instant case may not strictly fall within the terms of Section 144; but the aggrieved party in such a case can appeal to the larger and general powers of restitution inherent in every Court....

...We have considered this submission of Sri Grover relying on *Sakamma v.*

Eregowda (1974) 2 Kar. LJ 357 that the mere fact that the suit for permanent injunction was dismissed resulting in the vacation of the interim order of injunction granted during its pendency, would not entitle the successful defendant to seek restitution u/s 144, C.P.C. That principle has no application in this case. In the case before us the injunction granted by the learned Senior Sub-Judge, Chandigarh, was not merely negative in terms interdicting interference from the respondent with the custody of the goods by the appellants; it went much further and expressly enabled the appellants to sell the goods. Pursuant to this order, the appellants disturbed the status quo as on the date of the suit and sold away respondent's goods and converted them into money. The High Court while declining the prayer for payment of the sale proceeds to the respondent, however, sought to relegate the parties to the extent practicable, to the same position as obtained on the date of the suit. This High Court did by directing furnishment of security to the extent of the value of the goods sold away under the cover of the interlocutory order. That an appeal filed against the said interlocutory order was withdrawn, does not, in our opinion make any difference. Upon dismissal of the suit, the interlocutory order stood set aside and that whatever was done to upset the status quo, was required to be undone to the extent possible. It is unfortunate that the learned Sub-Judge, 1st Class made an order which, we think, ought not to have been made. If the trial Judge, felt that it was in the interest of justice that the goods required to be disposed of, he should have ordered the sale by or under the supervision of a Commissioner of the Court ensuring that the sale proceeds were under the Court's control.

10. Therefore, it is well settled that even in a situation where Section 144 of CPC per se is not applicable, still the civil Court has inherent jurisdiction to order restitution to avoid prejudice to a party who suffered by reason of the orders passed by the civil Court, if it is ultimately found that such orders were passed under mistake of fact or such orders are vitiated by fraud and misrepresentation.

Res Judicata

11. In this case the earlier proceedings arising out of first respondent's application being E.A. No. 96 of 1993 filed under Order XXI Rule 97 of CPC was denied by the Courts observing that the property claimed by her is different from the suit schedule property in the suit filed by the petitioner. The order in E.A.No. 96 of 1993 was marked as Ex.B.1 and the order in civil revision petition arising out of it in C.R.P. No. 2452 of 1995, dated 19-2-2002, was marked as Ex.B.2. Both the Counsel have taken this Court with these orders. A perusal of Ex.B.1 would show that the executing Court dismissed the application of late Saroja on the ground that she did not adduce any evidence to show that the Court Amin tried to deliver the property in her possession in Survey No. 78/4. The executing Court also observed that while executing the decree in O.S. No. 676 of 1990 obtained by the petitioner herein, the property in Survey No. 78/4 would not be delivered to him. Before this Court, late Saroja did not place any material in support of her contention that Court Amin attempted to deliver property in

Survey No. 78/4, which was suit schedule property in O.S.No. 538 of 1989. For this reason, this Court held that the application under Order XXI Rule 97 of CPC was not maintainable and the decree holder in O.S.No. 676 of 1990 (petitioner herein) had to file a separate application, if necessary for taking possession of the property in Survey No. 78/2. The relevant observations made by this Court are as under:

No material is placed by the revision petitioner before the Executing Court to show that Amin in fact attempted to deliver the house property situated in S.No. 78/4. Undisputedly, the documents produced by the revision petitioner before the executing Court do not indicate that for some reason or the other, the Court Amin attempted to deliver a wrong property to the decree holder. The revision petitioner did not place any material or basis for coming to conclusion that wrong property was attempted to be delivered to decree holder. He did not examine any of neighbours of the disputed property to prove that the Court Amin attempted to deliver a wrong property to the decree holder while executing the decree in O.S.No. 676 of 1990. Even otherwise, I make it clear that while executing the decree in O.S.No. 676 of 1990, the executing Court cannot deliver property other than the property covered by the decree in O.S.No. 676 of 1990 to the decree holder in that suit. This position is made clear so as to remove any doubt in the minds of the revision petitioner,(emphasis supplied)

12. In the light of the observations made by the executing Court in LA. No. 96 of 1993 and C.R.P. No. 2452 of 1995 whether late Saroja was barred from moving E.A. No. 363 of 2002 on the principle of res judicata.

13. Section 11 of CPC postulates that an issue which has been directly an issue in a former suit decided by a competent Court would operate as res judicata and a civil Court is prohibited from trying such an issue. This is subject to the condition that the issue which arose in the subsequent suit was same or substantially same between the same parties or parties litigating under the same title. The principle in Section 11 of CPC is also applicable to the proceedings taken out for execution (Explanation VII to Section 11). When two persons litigate separately or litigate in the same suit in respect of two different items of property, the principle of res judicata has no application. The observations made by this Court in C.R.P.No. 2452 of 1995 extracted hereinabove would clearly show that the earlier application of late Saroja under Order XXI Rule 97 of CPC was rejected on the ground that she failed to adduce any evidence to show that the Court Amin tried to deliver her property in Survey No. 78/4. The submission of the learned Counsel for the petitioner is, therefore, not sound and lack substance on the question of res judicata.

Justification for Restitution

14. Notwithstanding the principles as above whether the lower Court was justified in ordering restitution in favour of the legal representatives of late Saroja ? The criticism of the learned Counsel for the petitioner on this is two fold.

There was no finding that the property claimed by Saroja is same as the suit schedule in O.S.No. 676 of 1990 and no evidence was adduced on behalf of the respondents to show that the land in Survey No. 78/4 was assigned to late Saroja. Considering these two aspects together, be it noted that in the earlier round of litigation by late Saroja or in the litigation arising out of present application, there has never been any dispute that the petitioner claimed the property in Survey No. 78/2 situated at Vedayapalem and admittedly the said property is an open plot/house site whereas all through late Saroja claimed property in Survey No. 78/4 with house constructed thereon. Therefore, at this stage the absence or otherwise of any document of assignment in favour of late Saroja is insignificant.

15. Whether non-examination of the respondents is fatal to their case ? The respondents examined P.W.4, J.V. Subba Rao, who is GPA holder of the second respondent herein. He spoke about the respondents come on oath. He was subjected to lengthy cross-examination by the petitioner. He marked Ex.X.4, allotment order in favour of late Saroja. An objection was raised before the lower Court that the evidence of P.W.1 has to be assured as GPA cannot give evidence on behalf of the party to the proceedings. The lower Court, however, got over the objection referring to the decisions of the Division Bench of this Court in Mallipudi Babu Rao Vs. Mallipudi Prameela Kumari, . The Division Bench took the view that the evidence of GPA cannot be thrown out and that the same can be given credence to the extent GPA is personally in the know of the things. Learned Counsel for the petitioner has placed reliance on the decision of the Supreme Court rendered subsequent to the decision of the Division Bench of this Court. In Janki Vashdeo Bhojwani v. Indusind Bank Limited (supra) the Supreme Court laid down that the GPA cannot depose for the principal for the acts done by the principal and not by him. The ratio laid down by the Supreme Court is as under:

Order 3 Rules 1 and 2 CPC empower the holder of power of attorney to "act" on behalf of the principal. In our view the word "acts" employed in Order 3 Rules 1 and 2 CPC confines only to in respect of "acts" done by the power of attorney holder in exercise of power granted by the instrument. The term "acts" would not include deposing in place and instead of the principal. In other words, if the power-of-attomey holder has rendered some "acts" in pursuance of power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him. Similarly, he cannot depose for the principal in respect of the matter of which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined.

16. Therefore, it may now be taken as well settled that though a person can represent a party to a suit or proceeding as GPA, such GPA or Special Power of attorney holder cannot depose on behalf of the party, whom he/she is representing but can depose as a separate witness speaking to the facts, which is personally aware of. On this principle, if the evidence of P.W.4 as GPA of second

respondent assured, still the case of the respondents cannot be treated as "not proved".

17. Ex.X.4 is the document marked by P.W.4, and therefore, there cannot be any objection to look into the same as it is a final document i.e., assignment order. Secondly, it is axiomatic that what is admitted need not be proved. Section 58 of the Evidence Act, 1872, deals with situation where a party to the proceeding need not prove the fact, which the other party admits and in such an event, the Court can always believe and consider the existence of such fact, which is admitted. The lower Court relied on the following admission of the petitioner herein, who was examined as R.W.1.

I deposed in EP No. 96/93. It is true that the petitioner Saroja constructed a pucca terraced building in the house covered by the site in OS No. 538/1989. I deposed in my chief examination in EA No. 96/93 that the subject-matter in O.S.No. 676 of 1990 and 538 of 1989 are different. It is true that the said Saroja constructed the pucca building in Plot No. 13, Block-B within the boundaries specified in OS No. 538/1989. It is true that the schedule in OS No. 538 of 1989 and EA No. 363/2002 (present petition) are one and the same. No appeal was filed against the judgment in OS No. 538/1989 and it became final. It is true that Saroja constructed a building in Plot No. 13 in Block-B and identified the same in Ex.A.7 and rounded it off with red ink. Again witness says that the plot is situated in S.No. 78/2.... I have not mentioned the boundaries of the suit schedule in my plaint OS No. 676/1990. It is true that I mentioned in my plaint in OS No. 676/1990 that the suit schedule property is shown as a vacant site. It is true that the claim petitioner mentioned in her suit schedule OS No. 538/1989, ward number, door number, municipal assessment number and survey number, extent of construction, but I have not mentioned any ward number, door number, etc, in my plaint but I mentioned survey number, plot number and block number. Again the witness says that he mentioned the suit schedule mentioned property is in Survey No. 78/2, Plot No. 13/B Block.

18. When the petitioner himself admitted that the plaintiff (sic plaint schedule) in O.S. No. 676 of 1990 is a vacant site, that the suit schedule property in O.S. No. 538 of 1989 filed by late Saroja is property with ward number, door number and municipal assessment number, there is always possible to draw an inference that the property claimed by the petitioner is altogether different from the property claimed by late Saroja. Secondly, there is no denial that under Ex.X.19, report of the Amin, what was delivered to the petitioner is the property consisting a house with ward number and house number, which was subject-matter of the suit of Saroja. The admission of the petitioner as R.W.1 and Ex.X.10 would certainly lead to an inference that in execution of the decree in O.S. No. 676 of 1990, the petitioner got possession of the property, which is suit schedule property in O.S.No. 538 of 1989 belonging to late Saroja. Therefore, the illegality pointed out by the learned Counsel for the petitioner is misconceived.

19. The trial Court has considered the evidence on record with great caution and

care and has drawn correct inferences in arriving unimpeachable conclusions that the petitioner was delivered the property belonging to Saroja. The respondents suffered prejudice due to this and therefore, it is certainly a fit case to order restitution directing the petitioner to deliver back the possession of the property in Survey No. 78/4 of Vedayapalem Village bearing Door No. 264-A in Ward No. 26 in Nellore District.

20. In view of the above conclusions, it must be held that the lower Court has not committed any illegality or error apparent on the face of record. This civil revision petition under Article 227 of Constitution of India is devoid of any merit and is accordingly dismissed, but in the circumstances of the case, there shall be no order as to costs.