

* HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

+ CIVIL REVISION PETITION No.5514 of 2016

%21-11-2016

Between:

Ramesh Gaikwad and another

...petitioners

Vs.

N.S.Prakasam and another

... Respondents

!Counsel for the petitioners : Sri Ch.Janardhan Reddy

Counsel for the Respondents: Sri V.S.Somayajulu

<Gist :

>Head Note:

? Cases referred:

¹ 1999(2) Civil Court Cases 1 (S.C.)

² AIR 1954 All 643 (DB)

³ AIR 1982 SC 818

⁴ (2008) 7 SCC 144

⁵ (1857) 1 De G & J 566

⁶ (1998) 3 SCC 723

⁷ (1996) 5 SCC 539

IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH

CIVIL REVISION PETITION No.5514 of 2016

Between:

Ramesh Gaikwad and another ...petitioners

Vs.

N.S Prakasam and another ... Respondents

DATE OF JUDGMENT PRONOUNCED: 21.11.2016

SUBMITTED FOR APPROVAL:

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

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- 1 Whether Reporters of Local newspapers may be allowed to see the Judgments? Yes/ No
 - 2 Whether the copies of judgment may be marked to Law Reports/ Journals Yes/ No
 - 3 Whether Their Ladyship/ Lordship wish to see the fair copy of the Judgment? Yes/ No

HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

CIVIL REVISION PETITION No.5514 of 2016

ORDER:

The revision petitioners are the claim petitioners in E.A.No.79 of 2013 in E.P.No.121 of 2008 in O.S.No.1675 of 2001 and along with the claim petition, they filed a stay application in E.A.No.78 of 2013. They are claiming through Judgment Debtor (for short 'J.Dr.') as pendentilite alienees. The E.A.No.79 of 2013 was ended in dismissal and to restore the same, E.A.No.177 of 2016 was filed and the same was ended in dismissal on merits on 28.04.2016 by order of the Executing Court-cum-VII Senior Civil Judge, City Civil Court, Hyderabad and impugning the same, present revision is maintained.

2. The suit O.S.No.1675 of 2001 was filed on 30.08.2001 by the plaintiff by name, N.S.Prakasam (revision 1st respondent-cum-Decree Holder (for short 'D.Hr.') of O.S.No.1675 of 2001) against V.Dasarath (revision 2nd respondent J.Dr.), for specific performance of the contract for sale and the suit was decreed, ex parte with a direction to the defendant to receive the balance sale consideration and execute sale deed within

30 days from date of said decree in favour of the plaintiff and to pay costs.

3. It is pursuant to said decree, the revision 1st respondent-D.Hr. obtained registered sale deed through Court. It was in the course of execution, E.P.No.121 of 2008 was filed under Order XXI Rule 35 C.P.C. by said D.Hr. against the J.Dr. thereby the decree became final and even the so alleged earlier dismissal of E.P.No.152 of 2003 and on what merits, order copy not even filed to consider the contest of that earlier dismissal of E.P. operates as *resjudicata* though there is no *resjudicata* for fresh execution petition despite opportunity and sufficient time, suffice to draw adverse inference, apart from what is laid down in Iswar Bhai C. Patel & Bachu Bhai vs. Harihar Behera¹ to draw adverse inference against J.Dr. for not even chosen to come to witness box, much less to demonstrate the record.

4. Coming to the other contention of the D.Hr. filed another suit in O.S.No.1830 of 2003 for recovery of possession that was rejected on contest by the J.Dr. as defendant, pursuant to order in I.A.No.796 of 2004 on 07.07.2006; the D.Hr. filed certified copy of the plaint and the order in I.A.No.796 of 2004 of O.S.No.1830 of 2003 and the plaint rejected was by opining that a reading of Section 28(4) of the

¹ 1999(2) Civil Court Cases 1 (S.C.)

Specific Relief Act makes it clear of no separate suit is required, as relief of possession can be asked after decree obtained under execution as held in Pt. Balmukand v. Veer Chand² that in a suit for specific performance even possession not asked and not specifically decreed, once decree granted for specific performance of contract for sale that includes everything incidentally to be done to complete the sale transaction for the rights and obligations of the parties are being arisen statutorily under Section 55 of the Transfer of Property Act and the ratio squarely applies herein.

5. For the above, the objections are over-ruled in permitting the D.Hr. to proceed with execution to deliver the property as per the sale warrant issued under Order XXI Rule 35 C.P.C.

6. In the E.P.No.121 of 2008, the order passed in favour of the D.Hr. for delivery of property by the J.Dr., even the decree is silent referring to the expressions, on 07.03.2011 undisputedly made final, for J.Dr. did not prefer appeal.

7. It is in that matter, the present claimants filed E.A.No.79 of 2013 and a petition in E.A.No.78 of 2013 for stay of the order for delivery passed in E.P.No.121 of 2008, on 07.03.2011. There was no stay granted therein undisputedly. It is while pendency of the E.A.No.79 of 2013 claim petition,

² AIR 1954 All 643 (DB)

the same was dismissed on 28.04.2016. It is impugning the said dismissal order under Order XXI Rule 106 and Section 151 C.P.C. E.A.No.177 of 2016 was filed and the restoration application filed in E.A.No.177 of 2016 was since dismissed, same is impugned in the present revision.

8. Factual matrix further in relation to the claim petition in E.A.No.79 of 2013 which is part of the material of the revision record filed by the claimants is that, both the claimants entered with the J.Dr. possessory sale agreement dated 02.01.2007 for self-same property covered by the specific performance decree in O.S.No.1675 of 2001 dated 28.02.2002, which is nearly five years after decree, the sale agreement entered. It is their claim that the J.Dr. of O.S.No.1675 of 2001 supra having entered the sale agreement on 02.01.2007 in favour of the two claimants for Rs.15 lakhs received advance amount of Rs.12 lakhs and agreed to receive balance of Rs.3 lakhs at the time of registration of sale deed to be executed, having delivered vacant possession of the property and also took further sum of Rs.50,000/- on 09.10.2009 having endorsed on the back of the agreement, and even the claimants are ready and willing to perform their part of the contract entered by the J.Dr. supra, he was dodging which made them to issue legal notice for specific performance on 14.11.2011, to register sale deed pursuant to the agreement

dated 02.01.2007 and he avoided to receive notice, which made them to file the suit O.S.No.750 of 2011 which is pending on the file of II Additional Chief Judge, City Civil Court, Hyderabad, (since stated transferred and now pending on the file of 24th Additional Chief Judge, City Civil Court, Hyderabad) for specific performance of the contract for sale dated 02.01.2007. It is further averred referred to the facts in the claim petition in E.A.No.79 of 2013 particularly at paras 3 and 4 that the claimants came to know when Court bailiff came to the property on 21.08.2013 to attach the property and when they questioned about passing of the decree and attachment order and thereby the decree obtained against the J.Dr. by the D.Hr. in O.S.No.1675 of 2001 dated 28.02.2002, is unenforceable and the claim thereby to be adjudicated. The claimants also filed application to call for the original sale agreement dated 02.01.2007 and legal notice dated 14.11.2011 which were filed in the suit O.S.No.750 of 2011 for the purpose of marking in the claim petition and it is while so the claim petition was dismissed as referred supra while under enquiry, on 28.04.2016 for non-prosecution.

9. The affidavit averments of 1st claimant in E.A.No.177 of 2016 sought for restoration of E.A.No.79 of 2013 referred supra show that for conducting enquiry, chief examination affidavit of him filed on 15.07.2013 itself, he already filed

O.S.No.750 of 2011 for specific performance of sale agreement dated 02.01.2007 and to call for the original sale agreement and notice filed in O.S.No.750 of 2011 to the claim petition record of E.A.No.79 of 2013 in E.A.No.436 of 2013 that was allowed on 04.09.2013 and the suit was later transferred to 24th Additional Chief Judge and they were under the impression that the matter will be proceeded after receipt of the documents only and their counsel could not appear before the Court as busy in attending care of his new born baby boy in hospital and thereby for non-appearance on 28.04.2016, the E.A.No.79 of 2013 was dismissed, though the non-appearance of his counsel was neither willful nor wanton but for the above reason, hence, to set aside the dismissal order and restore E.A.No.79 of 2013, else they will suffer prejudice and irreparable loss and injury.

10. Same was opposed by counter-affidavit of the D.Hr. while denying said averments that the Executing Court in the claim petition has given ample opportunities to the claim petitioners to appear before the Court and express their views and for the reasons best known to them neither the claimants nor their counsel attended the matter and after failure to attend the matter was finally posted to 28.04.2016 and on that day also neither the claimants nor their counsel attended with utter disregard to the Court of law and the allegation of

they or their counsel were under the bonafide impression that matter will not be proceeded further until receipt of documents is baseless, so also the allegation of the advocate attended his new born baby child and busy there with and there is no mention as to why the claimants any of them did not even attend either during call work or even subsequent to that on that date, for the Court waited for a long time and having taken a right decision, after waiting with no option in dismissal for non-attendance and it no way requires interference much less to restore. The other averments were that the very suit for specific performance in O.S.No.750 of 2011 is not maintainable as the so called agreement in January, 2007 is long subsequent to the decree passed in O.S.No.1675 of 2001 and pursuant to the decree, there was a registered sale deed executed by the Court in execution of the decree, on 29.04.2003 itself and once the property through Court of law registered the subsequent entering of the sale agreement, no way gives any right to maintain a suit much less even pending suit to maintain the claim in E.A.No.79 of 2013 and the dismissal for non-proseuction on 28.04.2016 also no way requires restoration invoking Order XXI Rule 106 CPC and thereby sought for dismissal of the restoration application.

11. It is pursuant to the facts and from the averments and rival contest supra by impugned order dated 19.10.2016 the E.A.No.177 of 2016 was dismissed by the executing Court with observation in the order that, to say that their counsel on 28.04.2016 was busy in attending a new born baby in hospital and could not attend the Court on that date when same was opposed by counter with no truth therein, no proof even filed and there is no satisfactory explanation forthcoming from the claimants/petitioners and they did not even file sworn affidavit of said counsel to support that fact despite dispute and there is no explanation worth for non-appearance even by them on 28.04.2016, much less their counsel, and from a perusal of the record, it is evident that the E.A.No.79 of 2013 was coming for enquiry and it was finally posted to 28.04.2016 on payment of costs of Rs.200/- and they failed to pay costs imposed and there was no representation from their even and thereby it was dismissed for default and they suppressed the factum of conditional order in the sworn affidavit filed and thereby they are guilty of suppression of material facts, they did not come forward with any satisfactory explanation for their non-appearance and non-payment of costs and for no representation even and thereby ended in dismissal rightly on 28.04.2016 and there are no bonafides in the application and thereby dismissed.

12. It is the contention impugning the same in the grounds of revision that unless the records of the II Additional Chief Judge received as called for in E.A.No.436 2013 in claim petition E.A.No.79 of 2013 it cannot be proceeded with and the executing Court ought to have seen that the affidavit filed for restoration application in E.A.No.177 of 2013 reasons are given and the lower Court did not give any reasons in dismissing the application, that too when the claimants are claiming rights in E.A.No.79 of 2013 over the house property, pursuant to the sale agreement dated 02.01.2007 in their favour executed by the J.Dr. and when the rights are involved over the house property, Court should have been decided E.A.No.79 of 2013 on merits and ought to have seen that E.P.No.121 of 2008 is filed for delivery of possession of the property in O.S.No.1675 of 2001 and same is not maintainable as beyond scope of decree passed in O.S.No.1675 of 2001 dated 28.02.2002 and that relief could not have been granted by the Executing Court of decree in O.S.No.1675 of 2001 and the relief sought in O.S.No.1675 of 2001 is only to execute sale deed and no relief regarding possession asked and seeking relief for delivery of possession in O.S.No.1830 of 2003 filed by the D.Hr. and thereby could not have maintained E.A.No.121 of 2008 in O.S.No.1675 of 2001 for delivery and for

these grounds, the order of the lower Court is liable to be set aside.

13. Elaborate arguments in more than two sittings addressed by the learned counsel for the revision petitioners vis-à-vis claimants vis-à-vis learned counsel for the Decree Holder/ revision respondent No.1. Respondent No.2 endorsed as not necessary party to the appeal.

14. Heard and perused the material on record.

15. Learned counsel for the revision petitioners, though addressed arguments at length regarding the very granting of relief for delivery of possession in E.A.No.121 of 2008 by impugning the same in the course of ultimate submission stated that deciding on merits of E.A.No.177 of 2016 is enough. However, the court cannot ignore when grounds are raised as referred supra in the revision impugning the very executability but to answer at least cursory.

16. The law is fairly settled right from the Division Bench expression of the Allahabad High Court in Pt. Balmukand (supra) that was followed by several expressions that referred the earlier expressions of the Calcutta High Court, Patna High Court, Allahabad High Court and referring to the said Division Bench of Allahabad in Pt. Balmukand (supra), several other High Courts delivered the expressions including Mysore High Court in 1973, Delhi High Court in 1975 and 1976, apart from

the Apex Court on the scope of decree whether it tantamounts to beyond scope of the relief granted in the decree and referring to Joginder Singh v. State of Punjab (AIR 1979 SC 1876), from what is laid down by the Division Bench of Allahabad High Court in Pt. Balmukand (supra) the Apex Court in Babu Lal v. Hazari Lal Kishore Lal³ referring to the scope of Sections 21, 22 and 28 of the Specific Relief Act, 1963, Section 47 C.P.C. order II Rule 2 C.P.C. and Section 55 of the Transfer of Property Act, particularly in paras 11 to 16 and conclusion in paras 29 and 30 held that Section 22 of the Specific Relief Act provides that a person in a suit for specific performance of a contract for the transfer of immovable property, may ask for appropriate reliefs namely he may ask for possession or for partition or for separate possession including the relief of specific performance. These requirements he can claim notwithstanding anything contained in the C.P.C. contrary. Sub-section (2) of 22 of the Act specifically provides that all these requirements cannot be granted by the Court unless they have been specifically claimed. However, says, where the plaintiff has not specifically claimed in the initial stages, Court may permit the plaintiff at any stage of the proceedings to include one or more of the reliefs by means of amendment and on such

³ AIR 1982 SC 818

terms, as it depends prayer the only purpose of this whole enacted provision is to avoid multiplicity of suits and that the plaintiff may get appropriate relief without being hampered by procedural complications. The expression in an appropriate case used in Section 22 is very significant. The expression only indicates that it is not always incumbent on the plaintiff to claim possession or partition or separate possession in a suit for specific performance of contract for the transfer of immovable property that is to be done, where the circumstances demanding the relief in the specific performance of a contract of sale expressed within its ambit not only the execution of the sale deed but also possession conveyed under the sale deed and it is not always necessary for the plaintiff to specifically claim possession over the property as the relief of possession being inherent in the relief for specific performance of the contract for sale. Besides that, the Act provides for amendment on such terms as may be just for including a claim for such relief at any stage of the proceedings. In case where exclusive possession is with contracting party, a decree of specific performance of contract for same covered implicitly, as without specifically providing for delivery Court may not give complete relief to the D.Hr. nor can satisfy the decree against J.Dr. completely, Thus, he is bound not only to execute sale deed but also to

put the property in possession of the D.Hr. This is in consonance with Section 55(1) of the Transfer of Property Act. The word 'proceeding' has not been defined in the Act, that term is very comprehensive and it includes execution proceedings.

17. The expression of the Apex Court in Babulal (supra) thereby says even in a suit for specific performance prayer asked is only for specific performance of the contract for sale and no possession or other reliefs asked and sale deed once obtained, the possession can be asked by filing E.P. within the sweep of any proceeding or at any stage of the proceeding. Thus, it is untenable now to raise by the revision petitioners as claimants in E.A.No.79 of 2013 in the restoration application in E.A.No.77 of 2016 dismissed for default, saying in the E.P.No.121 of 2008 delivery through Court sought under Order XXI Rule 35 is unsustainable. In fact that contest of JDR already raised and on that contest the other suit plaint was rejected holding that a separate suit is not maintainable, but for the relief for possession can be asked in execution in the decree for specific performance granted though plaint is silent and decree is silent. Once that aspect thereby is made final, it is not left open to the claimants to re-agitate, for having no better rights than J.Dr. and fromt heir claim through only J.Dr. Once the relief can be

asked and rightly granted for delivery invoking Order XXI Rule 32 C.P.C. as Order 21 Rule 35 delivery includes delivery under Order 21 Rule 95 CPC which says, where the immoveable property sold is in the occupancy of the judgment-debtor or of some person on his behalf or of some person claiming under a title created by the judgment-debtor subsequently to the attachment of such property and a certificate in respect thereof has been granted under Rule 94 CPC, the Court shall, on the application of the purchaser, order delivery to be made by putting such purchaser or any person whom he may appoint to receive delivery on his behalf in possession of the property, and, if need be, by removing any person who refuses to vacate the same. The rule is very clear of not only the J.Dr. but also the persons claimed through J.Dr. are also bound to deliver possession.

18. Once this is the proposition of law even there is an obstruction, re-delivery invoking Rule 35 CPC itself can be asked by the D.Hr, leave about other available provisions either Section 94 or 151 CPC or specifically under Rule 74 CPC arrest of J.Dr. or any persons claiming through J.Dr. or for break open locks or for police aid from any person bound by the decree, if causes obstruction. A reading of Order XXII Rule 10 CPC it is no way applicable to execution from the wording of equally Order XXII Rule 12 CPC which says rules 3, 4 and 8

of Order XXII have no application to the execution. Section 146 CPC is comprehensive enough from the very wording of save as otherwise provided by this Code or by any law for the time being in force, where any proceedings may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him. The Section is very clear of not only the J.Dr. but also any person claiming through J.Dr. are also bound by the decree to submit delivery of possession to D.Hr. Once such is the case, leave about O.S.No.750 of 2011 claimed by the D.Hr. in the counter to E.A.No.79 of 2013 as not maintainable, as person bound by the decree i.e., J.Dr. and his subsequent alienee are equally bound by the decree and in claiming through J.Dr., the claimants are not entitled for specific performance against J.Dr. that too behind the back of the D.Hr. herein. Leave about D.Hr. herein made an attempt to come on record in O.S.No.750 of 2011 that was opposed by the claimants herein as plaintiff therein on the concept of *dominus litus* that was ended in dismissal that is even no way a finality, as a Court got power invoking under Order I (2) C.P.C. at any stage of a proceeding to impelad any necessary or proper party even without request of a party or third party. It is thus on the scope of lis covered- by O.S.No.750 of 2011 where this Court -

need not go further but for to consider E.A.No.79 of 2013 dismissal is correct or not and got any legs to stand or not.

19. Leave about under Section 52 of the Transfer of Property Act *lispendence* alienee bound by the decree which difficulty also herein does not arise for claiming any equities by the alienee as it is a post decree alienator and that too subsequent to the registered sale deed, in the suit for specific performance in O.S.No.1675 of 2001 executed and cause registered by the Court from the J.Dr. failed to execute. Section 3 of the Transfer of Property Act also clearly says registration itself is a notice and if any bonafide enquiry made by the so called claimants in purchase of the property in 2007 nearly 4 years after execution of the registered sale deed as per the specific performance decree, they could know the lis. Thus, their claim has no legs to stand and practically the claim petition ought to have rejected by the lower Court before numbering or at least later for rejection can be made even before pronouncing final order/ decree invoking Order VII Rule 11 (a) and (d) C.P.C. of bar by any law or want of cause of action. Leave about the same, Order XXI Rule 102 CPC is almost a kin and more powerful to Section 52 of the Transfer of Property Act from its close reading, needless to elaborate further for the purpose of the petition.

20. Coming to the very dismissal order of E.A.No.79 of 2013, the record clearly shows from the lower Court's order the deliberate suppression in the affidavit by the claimants about the conditional order passed when posted matter as a last chance, subject to costs of Rs.200/- . It was kept silent in the affidavit. It cannot be believed of they are ignorant of that fact having conscious of the proceeding and party in the proceedings and for several adjournments failed to attend that is reflecting from the order saying even after abstinence in person or through advocate to represent, despite the matter posted for enquiry including on costs, there is no reason assigned for that and affidavit petition is suppressing the factum of the matter posted conditionally subject to costs that was not complied. What more reason is required for the lower Court to dismiss the application filed under Order XXI Rule 106 CPC in EA No.177 of 2016-. An order need not cover several pages to say as reasoned order. Even a single and cogent reason is suffice to meet the legal requirement. In fact, it is an elaborate order in giving cogent reasons. Once such is the case, there is nothing to interfere apart from claim petition has no legs to stand at the threshold, leave about locus of specific performance suit in O.S.No.750 of 2011.

21. The Apex Court has also clarified the position in this regard in *Usha Sinha Vs. Dina Ram & Others*⁴ on the scope of Order XXI Rule 102 & Section 52 of the Transfer of Property Act, by referring to several expressions earlier of the Apex Court in *Silverline Forum (P) Limited Vs. Rajiv Trust*⁵, *Sarvinder Singh Vs. Dalip Singh*⁶ & *Bellamy Vs. Sabine*⁷, holding from Paras 18, 24 to 26 as follows:

“18. Before one and half century, in *Bellamy supra*, Lord Cranwoth, L.C. proclaimed that where a litigation is pending between a plaintiff and a defendant as to the right to a particular estate, the necessities of mankind require that the decision of the Court in the suit shall be binding not only on the litigating parties, but also on those who derive title under them by alienations made pending the suit, whether such alienees had or had not notice of the pending proceedings. If this were not so, there could be no certainty that the litigation would ever come to an end.

24. In *Silverline supra*, this Court held that where the resistance is caused or obstruction is offered by a transferee pendente lite, the scope of adjudication is confined to a question whether he was a transferee during the pendency of a suit in which the decree was passed. Once the finding is in the affirmative, the Executing Court must hold that he had no right to resist or obstruct and such person cannot seek protection from the Executing Court. The Court stated;

"It is true that Rule 99 of Order 21 is not available to any person until he is dispossessed of immovable property by the decree-holder. Rule 101 stipulates that all questions arising between the parties to a

⁴ (2008) 7 SCC 144

⁵ (1998) 3 SCC 723

⁶ (1996) 5 SCC 539

⁷ (1857) 1 De G & J 566

proceeding on an application under rule 97 or rule 99" shall be determined by the executing court, if such questions are "relevant to the adjudication of the application". A third party to the decree who offers resistance would thus fall within the ambit of Rule 101 if an adjudication is warranted as a consequence of the resistance or obstruction made by him to the execution of the decree. No doubt if the resistance was made by a transferee pendente lite of the judgment debtor, the scope of the adjudication would be shrunk to the limited question whether he is such transferee and on a finding in the affirmative regarding that point the execution court has to hold that he has no right to resist in view of the clear language contained in Rule 102. Exclusion of such a transferee from raising further contentions is based on the salutary principle adumbrated in Section 52 of the Transfer of Property Act." (emphasis supplied) [See also Sarvinder Singh supra]

25. We are in respectful agreement with the proposition of law laid down by this Court in Silverline Forum. In our opinion, the doctrine is based on the principle that the person purchasing property from the judgment debtor during the pendency of the suit has no independent right to property to resist, obstruct or object execution of a decree. Resistance at the instance of transferee of a judgment debtor during the pendency of the proceedings cannot be said to be resistance or obstruction by a person in his own right and, therefore, is not entitled to get his claim adjudicated.

26. For invoking Rule 102, it is enough for the decree holder to show that the person resisting the possession or offering obstruction is claiming his title to the property after the institution of the suit in which decree was passed and sought to be executed against the judgment debtor. If the said condition is fulfilled, the case falls within the mischief of Rule 102 and such applicant cannot place reliance either on Rule 98 or Rule 100 of Order XXI."

Ultimately there from that the transferee from a J.Dr. is presumed to be aware of the proceedings before a Court of law as recognized by the doctrine of *lis pendence* under Section 52 of the Transfer of Property Act and consequently Rule 102 of Order 21 CPC and if unfair equitable or undeserved protection is afforded to a transferee *pendenti lite*, a decree holder will never be able to realize the fruits of decree and thereby not entitled to any protection under law.

22. Accordingly, the Civil Revision Petition is dismissed. No costs.

23. Consequently, miscellaneous petitions pending, if any, shall stand dismissed.



Dr. B. SIVA SANKARA RAO, J

Date:21.11.2016
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Note: L.R.copy to be marked-yes

