

THE HON'BLE SRI JUSTICE A.V. SESA SAI

APPEAL SUIT No.574 of 2016

JUDGMENT:

Heard Mr. M.P. Chandrmouli, learned counsel for appellants and Smt. Y.L. Siva Kalpana Reddy for respondents.

2. This appeal, filed under Section 96 read with Order 41 Rule 1 of the Civil Procedure Code, challenges the common order passed in E.A.No.12 of 2014 dated 29.06.2016 in EP.No.21 of 2010 in O.S.No.34 of 2001 on the file of the Court of I Additional District Judge, Nellore.

3. Plaintiffs in O.S.No.34 of 2001 before the Court below are the appellants in this present appeal. Appellants herein instituted the said suit for declaration and recovery of possession and the suit was decreed by the Court below on 05.02.2010 and the said decree reads as under:

1. That the suit be and the same is hereby partly decreed with proportionate costs.
2. that the plaintiffs 1 and 2 be and hereby are declared as the absolute owners of the plaint 'A' and 'B' schedule properties.
3. that the defendants 1 and 2 are hereby directed to deliver vacant possession of the plaint schedule properties to the plaintiffs 1 and 2 within one month from 05.02.2010 the date of decree.
4. that the claim of plaintiffs for grant of damages at the rate of Rs.2,000/- per month be and the same is hereby dismissed, and
5. that the defendants 1 and 2 do also pay the plaintiffs a sum of Rs.49,29,750/- towards the costs of plaintiffs

1 & 2 and do bear their own costs of Rs.Nil/- (Costs Memo not filed.)

4. The defendants/respondents herein preferred A.S.No.156 of 2010 before this Court. On 10.03.2010, in ASMP.No.428 of 2010, this Court passed the following order:

“Interim stay of all further proceedings in O.S.No.34 of 2001 on the file of the III Additional District Judge (Fast Track Court), Nellore, subject to the condition of the petitioners depositing an amount of Rs.1,000/- per month towards damages for use and occupation of the schedule property, from the date of suit i.e. 07-12-2001 till March,2010 by the end of April 2010, and continue to deposit an amount of Rs.1,000/- per month from April 2010 onwards by the 10th of every succeeding month. In default, the said interim stay stands vacated and it is open to the respondents to get the decree executed. On such deposit, the respondents-plaintiffs are permitted to withdraw the same without furnishing any security.”

5. Thereafter, the respondents in A.S.No.156 of 2010, who are appellants herein, filed ASMP.No.584 of 2010 seeking to vacate the stay order and this Court, on 02.07.2010, passed the following order:

“This petition is filed to vacate the interim stay granted by order dated 10-3-2001 passed in ASMP.No.428 of 2010, which was dismissed by order dated, 1-6-2010 and again restored by order dated, 21-6-2010.

Learned counsel for the petitioners submits that the conditional order has been complied with by handing over the demand drafts, as recorded by this court in its order dated 21-6-2010. It is also asserted by the learned counsel for the petitioners that the rent for suit schedule premises is Rs.7,000/- per month, as the property is situated in main Nellore town.

Learned counsel for the respondents submits that the claim of the petitioners for Rs.2,000/- per month has been negated by the court below, hence, the petitioners are not entitled to the same.

In view of the fact that the suit schedule property is situated in Nellore town, suffice it to direct the respondents to pay the rents at the rate of Rs.2,000/- per month from the month of July, 2010 onwards, for the use and occupation of the premises, payable by the end of every month and continue to pay the same regularly by the end of every month, till disposal of the appeal. The amounts shall be deposited to the credit of the suit and on such deposit, the petitioners are entitled to withdraw the same, without furnishing security.”

6. Subsequently, the appellants herein filed EA.No.4 of 2010 on 01.07.2014 before the Court below, praying the Court to proceed with the E.P. immediately for the wilful disobedience and non-compliance of the Hon'ble A.P. High Court Order dated 02.07.2010 passed in A.S.M.P.No.428 of 2010 and to deliver the E.P. schedule property to me in the interests of justice. On 17.07.2014, the learned District Judge, passed the following order:

“Heard DHR, Notice served on JDR, there is no representation. Hence this petition allowed and issued delivery warrant over E.P. Schedule property. Hence, this E.A. allowed.”

On 22.07.2014, the appellants herein also filed E.A.No.7 of 2014 under Section 151 CPC, praying the Court below to issue fresh delivery warrant to the Court Amin with a direction to break open of the keys put up by the Respondents herein for effecting the delivery ordered by this Hon'ble Court in the interests of justice. On 22.07.2014, the Court below passed the following order:

“Heard. Amin is directed to execute warrant and break open to locks of the schedule property and deliver the same to DHR if any obstructions is made by JDR or any other person, Amin may initiate appropriate action against such obstructions. Hence, this petition is allowed.

Subsequently, on the same day the property was delivered to the appellants and the Amin also returned the warrant on 26.07.2014.

7. The defendants/respondents herein filed EA.Nos.10 and 12 of 2014, seeking to set aside the order dated 17.07.2014 and for restitution of the EP schedule property respectively under the provisions of Section 144 CPC. The learned Additional District Judge, by way of order dated 29.06.2016, allowed EA.No.12 of 2014, declaring that the judgment debtors 1 and 2 are entitled for restitution of the E.P. schedule property and the decree holder is directed to deliver the Execution Petition schedule property to the judgment debtors 1 and 2 by way of restitution within 72 hours. Assailing the validity and legal sustainability of the said order passed by the I Additional District Judge, Nellore, the present appeal suit is preferred under Section 96 read with Order 41 Rule 1 CPC.

8. According to the learned counsel for appellants, the order passed by the learned Additional District Judge is erroneous, contrary to law and opposed to the very spirit and object of Section 144 CPC. Learned counsel submits that had the contents of the counter and the written arguments been considered by the Court below, the order under challenge in the present appeal would not have emanated. Learned counsel further submits that the learned Judge failed to assign any valid and convincing reasons for arriving at the conclusion.

9. On the contrary, it is submitted by the learned counsel for respondents that the Court below is perfectly justified in passing the

impugned order and the same is in accordance with the provisions of Section 144 CPC. Learned counsel submits that since the appellants herein played fraud, they are not entitled to any indulgence by this Court under Section 96 CPC. Learned counsel further submits that the respondents herein regularly paid rents and as such, the order passed by the Court below is not amenable to any judicial review.

10. In the above backdrop, now the points that emerge for consideration are:

1. Whether the Court below is justified in allowing EA.No.12 of 2014 seeking restitution and the same is in accordance with the provisions of Section 144 CPC?
2. Whether the order impugned warrants any interference by this Court under Section 96 read with Order 41 Rule 1 CPC?

POINTS:

11. The information available before this Court vividly discloses that earlier in EA.No.12 of 2014, on 31.12.2015, the learned Additional District Judge, Nellore passed order, holding that in view of the stay order in ASMP.No.428 of 2010 in AS.No.156 of 2010 on the file of this Court, the Court below cannot pass any orders on merits and directed the said EA to be posted along with EP. Questioning the said order, the defendants/respondents herein filed CRP.No.1187 of 2016. This Court allowed the CRP on 21.03.2016, setting aside the said order dated 31.12.2015 and remanded the matter to the Court below for consideration and disposal along with EA.No.10 of 2014, while further directing the executing Court to consider the illegalities complained from the date of filing EA.No.4 of 2014 and the stay granted by this Court in ASMP.No.428 of 2010. On remand, the Court of the

I Additional District Judge, Nellore, took up EA.No.12 of 2014 and passed the order under challenge.

12. As evident from the record, the third respondent in EA.No.12 of 2014 filed counter running into 15 pages so also written arguments running into number of pages, raising various issues.

13. The principal grievance of the appellants, as submitted by the learned counsel, is that the Court below did not consider the contents of the said counter and written arguments and the ledger copy enclosed, which shows regular payments. On the contrary, it is the emphatic submission of the learned counsel for respondents that only after thoroughly and meticulously considering all the issues, the Court below passed the order under challenge and as such, it does not warrant any interference of this Court under Section 96 CPC.

14. In the counter affidavit and written arguments, the third respondent in EA.No.12 of 2014 pointed out number of aspects and raised various issues. A perusal of the order under challenge clearly shows that the Court below did neither consider the counter nor the contents of the written arguments. As the third respondent in EA.No.12 of 2014 filed elaborate counter and written arguments, it would be incumbent on the part of the Court below to consider the same and answer all the points. In the instant case, the said exercise is conspicuously absent. The ledger extracts filed before the Court below by the respondents also show irregular entries and also improper maintenance of the records *prima facie*. In view of the above reasons, this Court is inclined to set aside the order under challenge

for the purpose of consideration of application afresh by the Court below.

The points are answered accordingly.

For the aforesaid reasons, the appeal suit is allowed, setting aside the order dated 29.06.2016 passed in EA.No.12 of 2014 and EA.No.12 of 2014 is remanded to the Court below for fresh consideration and for passing fresh orders after hearing all the stakeholders and after considering the entire material available on record including the written arguments filed by the appellants and respondents. The Court below is directed to dispose of EA.No.12 of 2014 within a period of two (2) months from the date of receipt of a copy of this order. As a sequel, the miscellaneous applications, if any pending, shall stand closed. There shall be no order as to costs.

September 7, 2016
DSK

A.V. SESA SAI, J

