

THE HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.R.P.Nos.1257, 1260 and 1265 of 2017

COMMON ORDER:

These three Revisions arise out of the same suit between the same parties. Therefore they are being disposed of by this common order.

O.S.No.336 of 1989

2. Smt.Kama Mariyamma, the predecessor in interest of respondents, filed O.S.No.336 of 1989 on the file of the Principal District Munsif, Eluru against respondent Nos.1 to 3 and another for perpetual injunction restraining the latter from interfering with her peaceful possession and enjoyment of the plaint schedule property. She claimed to have purchased plaint schedule property the under sale deed dt.07-09-1988 and alleged that she was in possession of the said property. She contended that petitioner Nos.1 to 3 and another, who have property on the northern side, were trying to encroach the plaint schedule property even though she was granted permission on 24-11-1988 by the Executive Officer, Vatluru Gram Panchayat, Vatluru to make constructions therein.

3. Pending suit, the said Mariyamma died, and respondents herein were impleaded as her legal representatives.

4. A written statement was filed by petitioners alleging that petitioner Nos.1 to 3 and another are in possession and enjoyment of the site and there is thatched house therein and it was not a vacant site.

5. The said suit was dismissed on 27-07-1995. It was held that there was a hut in the plaint schedule property and the plaintiff was not able to establish her possession though there was a recital in the sale deed dt.07-09-1988 that she was given possession of the land. An observation was made therein that the plaintiff ought to have sought for declaration of title if advised, since petitioner Nos.1 to 3 and another, who were defendants therein, have disputed the title of her vendors.

A.S.No.135 of 1995

6. Thereafter Smt.Mariyamma filed A.S.No.135 of 1995 before the District Judge, West Godavari at Eluru questioning the judgment and decree dt.27-07-1995 in O.S.No.336 of 1989. The said appeal was also dismissed on 14-07-2003 confirming the findings of the trial Court.

O.S.No.130 of 2004

7. She then filed O.S.No.130 of 2004 before the Principal Junior Civil Judge, Eluru for eviction of petitioner Nos.1 to 3 and for recovery of possession of the plaint schedule property. She mentioned the plaint schedule property as an extent of 229 sq. yards

of vacant site equivalent to Ac.0.4³/₄ cents in R.S.No.422/1 of Vatluru village, Pedapadu Mandal, West Godavari District within the specified boundaries. She reiterated that she was the owner of the property by virtue of the sale deed dt.07-09-1988 and stated that after the first appeal A.S.No.135 of 1995 was dismissed on 14-07-2003, the petitioners forcibly and high handedly occupied the plaint schedule property with the assistance of rowdy elements without having any right, title or interest in the plaint schedule property.

8. Petitioner Nos.2 and 3 filed a written statement, which was adopted by 1st petitioner, opposing the suit claim. They contended that they had succeeded in O.S.No.336 of 1989 as well as in A.S.No.135 of 1995 and that it was Mariyamma, who was trying to evict them by force. They contended that in O.S.No.336 of 1989 and in A.S.No.135 of 1995 it was held that that Mariyamma had no title to the plaint schedule property. They stated that they have been living in the plaint schedule property by constructing sheds therein and that the Record of the Village Panchayat showed that one Smt.V.Arogyam was living in a thatched house therein since time immemorial and that she sold the property to petitioner Nos.1 and 2 for Rs.90/-.

9. O.S.No.130 of 2004 was decreed by the Principal Junior Civil Judge, Eluru on 08-09-2009 directing the petitioners to hand over vacant possession of the schedule property within two months.

10. The petitioners questioned the same in A.S.No.232 of 2009, which was dismissed on 25-04-2016.

11. Thereafter they filed S.A.No.699 of 2016 before this Court, which was dismissed on 14-10-2016. This Court held that there is no finding regarding title to the property in O.S.No.366 of 1989 or in A.S.No.135 of 1995, that the issue of title was incidental and both the suit O.S.No.336 of 1989 and A.S.No.135 of 1995 were decided only on the basis of possession of the parties and there was no bar for Mariyamma to file a fresh suit for recovery of possession basing on her title. This Court held that the dismissal of O.S.No.336 of 1989 filed by Mariyamma for injunction did not bar her from filing the subsequent suit for recovery of possession of the same property. It also rejected the contention of the petitioners that Mariyamma should have sought the relief of declaration of title and ought not to have sought merely recovery of possession. It held that if the title of the plaintiff is clear and is supported by documents, and a trespasser, without any claim to title or interloper without any apparent title denies plaintiff's title, it would not amount to raising a cloud over the title of plaintiff necessitating the plaintiff to suit for declaration. It held that trial Court and lower appellate Court concurrently held in O.S.No.336 of 1989 and A.S.No.232 of 2009 that Mariyamma had title to the property, that petitioners, having pleaded acquisition of title by sale from one V.Arogyam, did not file any document to

substantiate the said plea and while petitioner Nos.1 and 2 pleaded that they purchased the property from V.Arogyam in 1970, the 2nd petitioner stated that he alone purchased it, in his evidence as D.W.2.

E.P.No.286 of 2014

12. Pending A.S.No.232 of 2009, the respondents filed E.P.No.286 of 2014 before the I Additional Junior Civil Judge, Eluru for execution of the decree for delivery of possession secured by them by evicting the petitioners therefrom. The Court issued delivery warrant against petitioners on 23-09-2014. But the said warrant was returned on 18-10-2014 with an endorsement that delivery could not be affected on the ground that 4th petitioner was residing therein, that there was a structure with Door No.8-70 with electrical Service No.1047 and that she refused to vacate the E.P. schedule property.

E.A.No.939 of 2014/E.A.No.512/2014

13. The respondents then filed E.A.No.939 of 2014 seeking police aid to the Court Amin to execute the warrant and another E.A.No.512 of 2014, and both were allowed. But in the meantime, the matter was stayed by the Court.

E.A.No.259 of 2016

14. Just prior to the dismissal of Second Appeal, the petitioners filed E.A.No.259 of 2016 alleging that the report dt.18-10-2014 of the

Central Nazir, Eluru stated that there was a semi permanent structure in the suit schedule property, that respondents had filed applications for removal of the said structure and for police protection and the Execution Petition itself is not maintainable since there was no decree for removing the existing structure in the suit schedule property. They contended that the question whether there was a decree for removal of semi permanent structure in the suit schedule property and whether there was suppression of fact about the existence of such structure therein is a question relating to execution and discharge should to be decided by the Court under Section 47 C.P.C.

15. They contended that they purchased the suit schedule property along with a thatched house from Arogyam and prior to the institution of the suit itself, they had raised the existing semi permanent structure (shed) by modifying the hut, that the structure measures 348 sq. ft. and consists brick walls built with cement and asbestos sheets and respondents never objected to it.

E.A.No.258 of 2016

16. They also filed E.A.No.258 of 2016 invoking Section 51 of Transfer of Property Act, 1882 stating that the value of the semi permanent structure is Rs.2,11,200/- as per their estimation, that this is an improvement to the suit schedule property, that they believed in good faith that they were absolute owners and were entitled to the suit schedule property and raised the semi permanent structure therein and

this amount should be paid to them before eviction is directed by the Court as compensation for improvements made to the property.

THE ORDER DT.31-01-2017 IN E.A.No.259 of 2016

17. By order dt.31-01-2017, the Court below dismissed E.A.No.259 of 2016 filed under Section 47 of the Transfer of Property Act, 1883 stating that the petition itself is filed only to procrastinate the proceedings and to deprive the respondents of their right to enjoy the fruits of the decree and that no plea was raised during the pendency of the suit upto the stage of Second Appeal that respondents should have also sought mandatory injunction for removal of semi permanent structure, and that since the said contention was not raised in the suit, it cannot be raised in the E.P. proceedings. It also held that the Executing Court cannot go into the merits of the decree and it has to execute it in toto.

ORDER DT.03-02-2017 IN E.A.No.258 of 2016

18. It also dismissed E.A.No.258 of 2016 on 03-02-2017 for the same reasons and held that once the decree in O.S.No.130 of 2004 did not provide for any compensation for structures to the petitioners, the Executing Court cannot grant the said relief and the Executing Court cannot go beyond the decree.

ORDER DT.03-02-2017 IN E.P.No.286 of 2014

19. As a consequence to the dismissal of E.A.Nos.259 of 2016 and 258 of 2016, E.P.No.286 of 2014 was allowed and delivery warrant was ordered to be given to the bailiff to effect delivery of E.P. schedule property to respondents and the E.P. was posted for recoding of delivery to 01-03-2017.

THE PRESENT REVISION PETITIONS

20. Assailing the order dt.03-02-2017 in E.A.No.258 of 2016, the petitioners filed C.R.P.No.1257 of 2017, assailing the order dt.03-02-2017 in E.A.No.259 of 2016, the petitioners filed C.R.P.No.1260 of 2017, and assailing the order dt.03-02-2017 in E.P.No.286 of 2014, the petitioners filed C.R.P.No.1265 of 2017.

21. Heard Sri Y.N.Vivekananda, learned counsel for petitioners and Sri V.Subrahmanyam, learned counsel for respondent Nos.1 to 4.

CONTENTIONS OF COUNSEL FOR PETITIONERS

22. Learned counsel for petitioners vehemently contended that in the plaint schedule property, the petitioners have erected semi permanent structure even prior to the filing of the suit, in spite of the same, respondents or Mariyamma showed the plaint schedule property only as a vacant site, that they did not seek the relief of mandatory injunction to remove the semi permanent structure; and since there is no decree to remove the structures found in the E.P. schedule property

by the Central Nazir, Eluru in his report dt.08-10-2014, the decree cannot be executed.

CONTENTION OF RESPONDENTS

23. This contention was refuted by the learned counsel for respondents stating that the existence of semi permanent structures made with cement and asbestos sheets was not pleaded in the written statement by the petitioners in O.S.No.130 of 2004; that they did not contend that the suit for perpetual injunction was not maintainable and the petitioners should seek relief of mandatory injunction; that in fact there was no semi permanent structure on the date of filing of the suit in the E.P. schedule property; and if such structure had been there, petitioners would have raised the above pleadings and sought for appointment of an Advocate-Commissioner to visit the E.P. schedule property to note down the physical features. He contended that without raising this point at any stage till the Second Appeal S.A.No.699 of 2016 was decided on 14-10-2016, the petitioners are precluded from agitating the same in view of the principle of constructive *res judicata*.

THE CONSIDERATION BY THE COURT

24. I find considerable force in the submission of the learned counsel for respondents. If really there was a semi permanent structure in the E.P. schedule property on the date of filing of the suit

O.S.No.130 of 2004, the petitioners would have mentioned about its existence in the written statement filed by them. They simply mentioned that there were sheds, without mentioning about the nature of construction. They did not raise the plea that the suit is not maintainable on the ground that the relief of mandatory injunction was not sought for. This leads to an inference that semi permanent structures was constructed after the suit was filed and was not in existence as on the date of filing of the suit.

25. In **B.Gangadhar Vs. B.G.Rajalingam**¹, the respondent had filed a suit O.S.No.375 of 1985 for declaration of title to and for possession of the property bearing No.21-6-652 situated at Chelapura, Hyderabad. By decree dt.25-01-1991, the trial Court declared him to be absolute owner of the suit property and directed that the petitioner before the Supreme Court be evicted. This decree became final.

When warrant was issued to execute the decree for delivery of possession, the bailiff returned it on the ground that the petitioner had constructed shops and inducted tenants into possession and therefore he cannot execute the warrant.

In view of this, the respondent filed an application under Order 21 Rule 98 read with Section 151 C.P.C. to issue warrant to the bailiff to demolish the shops constructed by the petitioners and deliver vacant possession of the suit house.

¹ AIR 1996 SC 780

The executing Court passed an order on 30-09-1993 directed bailiff by warrant to demolish the shops and to deliver vacant possession to the respondent. The petitioner questioned the same in Revision before the High Court. The High Court dismissed it on 17-02-1995.

The petitioner then carried the matter to the Supreme Court.

It was contended before the Supreme Court that in the absence of mandatory injunction granted in the decree, the executing Court is devoid of power and jurisdiction to direct demolition of the shops constructed by the petitioner.

The Supreme Court referred to Order 21 Rule 101 C.P.C. and held that the executing Court is mandated to decide all questions relating to right, title or interest in the property in the executing proceedings and not by way of a separate suit, notwithstanding anything contained contrary in any other law for the time being in force. It held that ownership is *de jure* recognition of a claim to certain property and that possession is the objective realization of ownership and was the *de facto* exercise of a claim to certain property and a *de facto* counterpart of ownership. It observed that ownership chiefly imports the right of exclusive possession and enjoyment of the thing owned, and owner in possession of the thing has the right to exclude all others from the possession and enjoyment of it, and if he is wrongfully deprived of what he owns, the owner has a right to recover

possession of it from the person who wrongfully gets into possession of it. *It observed that if any obstruction or hindrance is caused for its enjoyment or use, the owner, of necessity, has the remedy to have it removed and if any obstruction is raised by raising construction pendente lite or prevents the passage or right to access to the property pendente lite, the plaintiff has been given right and the decree-holder is empowered to have it removed in execution without tortuous remedy of separate suit seeking mandatory injunction or for possession so as to avoid delay in execution or frustration defeating the decree. It held that executing Court would be justified to order its removal of unlawful or illegal construction made pendente lite so that the decree for possession or eviction, as the case may be, is effectually and completely executed and the delivery of possession is given to the decree-holder expeditiously.*

It held that since the petitioner had constructed shops and inducted tenants in possession without permission of the Court, the only course would be to decide the dispute in the execution proceedings and not by a separate suit.

It quoted Order 21 Rule 35(3) C.P.C. and held:

“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 orders incidental, ancillary or necessary orders for effective enforcement of the decree for

possession. That power also includes the power to remove any obstruction or superstructure made pendente 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 constructions 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.

It observed that the exercise of incidental, ancillary or inherent power is consequential to deliver possession of the property in execution of the decree and that when the decree for possession had become final, the decree-holder is not bound by any such construction made *pendente lite* without obtaining permission from the Court. It held that it is not necessary to file separate suit when construction is made pending suit without permission of the Court.

26. This principle was reiterated in **Kotakadi Lakshmi Devi Vs. Badam Nageswara Reddy**² by a single Judge of this Court. This Court also reiterated that the executing Court has got power under Order 21 Rule 35 C.P.C. to order demolition of constructions illegally

² 1999 (3) ALT 278

made in the site in question during pendency of litigation for effective enforcement of decree for possession even though the decree does not contain a mandatory injunction for demolition.

27. Similar view has been taken by the Madras High Court in **Kannu Gounder Vs. Natesa Gounder**³.

28. Learned counsel for petitioners placed reliance on the decision of the Supreme Court in **Ramesh Vs. Harbans Nagpal and others**⁴. In that case, a decree for mandatory injunction had been passed directing defendants to hand over the balcony occupied by them to plaintiff, but dimensions in respect of the said balcony were not mentioned in the plaint. Later the suit was decreed without referring to any dimensions of the balcony or incorporating or referring to any sketch from which dimensions could be gathered. At the stage of execution, plaintiff filed an amended site plan and sought amendment of the decree because of non-disclosure of precise location of place ordered to be given over to be delivered possession by defendants to him. This was rejected by the trial Court, but the High Court allowed it. The Supreme Court reversed the decision of the High Court and held that there was no clerical error or accidental omission in the decree and that taking on record the amended site plan at the execution stage would amount to going behind the decree and modifying the terms of the original decree.

³ AIR 2005 Madras 31

⁴ (2015) 8 SCC 716

29. I am of the opinion that this decision has no application to the present case since the petitioners, who claimed to have erected some permanent structure in the plaint schedule property, have failed to show that such property was in existence on the date of filing of the suit. Since the said structure was obviously erected *pendente lite*, there is no necessity for respondents to seek amendment of the decree nor did they file any application seeking to amend the decree by asking for mandatory injunction. The instant case is squarely covered by the judgment of the Supreme Court in **B.Gangadhar** (1 supra).

30. It is settled law that a point which was not raised during pendency of the suit, cannot be raised during the execution proceedings particularly if it relates to the maintainability of the suit on the ground that proper relief was not sought for in the plaint.

31. In **Dr.Ghanshyam Jaiswal Vs. Kamal Singh**⁵, on the basis of a compromise between parties, a decree for eviction was passed on 05-04-1984, but the respondent did not deliver possession of the property in terms of the compromise decree. When the appellant filed execution petition for recovery of possession of the property, the respondent contended that under Section 47 C.P.C., he was challenging the validity of the compromise decree. This was turned down by the executing Court. Writ Petition filed against it was dismissed by the High Court on 19-08-1994. Thereafter he filed

⁵ (1996) 3 SCC 54

another application under Section 47 C.P.C. contending that the decree obtained is vague and incapable of being executed. This was rejected by the executing Court on 30-09-1994. Respondent challenged it in the High Court and the High Court allowed it on 21-06-1995 on the ground that the appellant's counsel reported no instructions. The Supreme Court held that respondent, having entered into compromise and having suffered a decree on the foot of a compromise and also having raised the plea of non-executability of the compromise decree and failed, is precluded by the doctrine of constructive *res judicata* enshrined in Explanation-VI to Section 11 C.P.C. to raise any other plea of the executability of the decree. Thus constructive *res judicata* principle applies between different stages of the execution proceedings.

32. The contention of the petitioners that he is entitled to compensation under Section 51 of the Transfer of Property Act, 1881 is without merit since the said provision applies to a transferee who made improvements in good faith. The alleged transfer pleaded by petitioners has been held to be not proved by the trial Court in O.S.No.130 of 2004 or in A.S.No.232 of 2009 as well as in S.A.No.699 of 2016. Further, the construction was made *pendente lite* without obtaining permission of the Court and it cannot be said that the construction was made in good faith under belief that petitioners were absolutely entitled to the property.

33. Therefore it has to be held that since semi-permanent structure pleaded by petitioners had come into existence *pendente lite*, the executing Court has certainly power under Order 21 Rule 35 C.P.C. to direct demolition of the said structure and deliver possession of the property to respondents and merely because there was no decree for mandatory injunction, the respondents cannot be denied the fruits of the decree obtained by them against petitioners.

34. As rightly held by the Court below, the executing Court cannot go behind the decree and the petitioners never took the plea about the existence of a semi-permanent structure upto the stage of Second Appeal S.A.No.699 of 2016. So they cannot be allowed to now defeat the decree by raising such a plea. In fact, such a plea is barred by the principle of constructive *res judicata*.

35. Though learned counsel for petitioners sought to rely upon the findings in his clients' favour in O.S.No.336 of 1989, the said findings have lost their value in view of the judgment in S.A.No.699 of 2016.

36. Therefore, I do not find any merit in these Revisions and they are accordingly dismissed. No costs.

37. As a sequel, miscellaneous petitions, if any pending, in these Revisions shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 22-03-2017

Vsv