

THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD

SECOND APPEAL No. 864 of 2017

JUDGMENT:

This second appeal is arising out of the judgment dated 28.06.2017 passed in A.S.No.24 of 2015 by the IV Additional District & Sessions Judge, Vizianagaram.

2. The matter is coming up for admission. Heard the arguments of learned counsel for appellant and learned counsel for respondents with regard to the framing of substantial question of law.

3. Learned counsel for the appellant submits that respondents 1 to 10 filed execution petition to deliver the land situated in Survey No.44 of Kondakarakam village to an extent of Ac.12-91 cents as per the Commissioner's plan which has been allotted to them and Kondapaka Kamala and Smt. Vangala Saroja who are the executants in the execution petition. It is further stated that Smt. Kondapaka Kamala and Smt. Vangala Saroja did not swear to be shown as parties to the execution petition. The respondents 1 to 10 asked for delivery of properties of Kondapaka Kamala and Smt. Vangala Saroja and according to the appellants, it is not permissible under law. It is further stated that respondents 1 to 10-decree holders fraudulently trying to take delivery of

properties which are not covered under the decree. It is further stated that the lower Court did not pass any orders directing the field assistant of the Court to take assistance of Surveyor. In spite of that there is an endorsement on the warrant filed by the field assistant which shows that the filed assistant has taken the assistance of the Surveyor for identification of the land.

4. The learned counsel for appellant contended that the decree holder, to take delivery of the property, has played fraud and trying to take possession by deceitful means. It is further argued that the property sought for delivery is land consisting of mango and cashew-nut, but as for final decree the same is described as dry lands as such the field assistant of the Court ought to have returned the delivery warrant of the immovable property endorsing the said fact. It is further argued that with oblique motive to cover up their laches the decree holders have filed execution petition without enclosing schedule of the property which is sought to be delivered.

5. On these grounds, the learned counsel for the appellant argued that the orders passed by the Court below in execution petition E.A.No.148 of 2011, vide orders dated 04.09.2015 passed by the Senior Civil Judge, Vizianagaram, and the judgment dated 28.06.2017 passed in A.S.No.24 of 2015 by the IV Additional District and Sessions Judge, Vizianagaram, are not in accordance with law.

6. To sum up the arguments advanced by the learned counsel for the appellant, there are three grounds. Firstly, it is urged that the Court below has directed the Field Assistant to execute the warrant but the field assistant has taken the help of Surveyor for identification of the land without permission of the Court and, therefore, the field assistant has violated the orders of the Court only with an intention to deliver the property by deceitful means. Secondly, it is contended by the learned counsel for the appellant that the report of the field assistant does not contain any date of visiting the site and date of report. Therefore, it is contended that since the report of the bailiff does not contain any date, the authenticity of preparation of report is incorrect. Thirdly, it is urged that the schedule of the property delivered is not shown in the bailiff report. Learned counsel submits that these points were raised before both the Courts below but they were not considered.

7. With regard to the first ground, as a matter of fact, the learned counsel for the appellant has not brought to the notice of this Court as to the prejudice caused to the appellant in taking the assistance of the Surveyor by the field assistant for identification of the land. There is no illegality committed by the bailiff in taking the assistance of the surveyor for identification of the land. If there is any prejudice caused to the appellant, they should have raised

objection with regard to taking assistance of surveyor by the field assistant, specifically stating the nature of prejudice caused to them. Learned counsel for the appellant has not brought to the notice of this Court any prejudice caused to the appellant, except contending that this is not in accordance with law. This Court is of the considered view that there is no illegality committed by the field assistant in taking the assistance of a surveyor in identifying the land. The bailiff or Field Assistant was directed to deliver the land basing on the boundaries of land. He has taken the help of Surveyor for identification of land. So there is no illegality in the execution of warrant.

8. As far as the second and third ground are concerned, the learned counsel for the respondent submits that these points were considered by the Court below in paragraphs 15, 16, 17 and 18 of the order dated 04.09.2015 in E.A.No.148 of 2011, which read as under:

“15. The learned counsel for the objectors contended that non examination of the Court Field Assistant by the petitioners is fatal to the case of the petitioners however the learned counsel for the petitioners contended that since the objectors happened to be the purchasers of the decreed property during pendency of the litigation (lis.pendency), the petitioners need not examine the Court Field Assitant since the objectors being bound by law and having purchased the property during lis from the persons bound by the decree, are bound to vacate the decreed property however this Court, while in disagreement with the learned counsel for the objectors,

holds that non examination of Court Field Assistant by the petitioners as one of their witnesses is not fatal for the prime reason that even as per the cited decision of the objectors reported in 2002 (2) ALT Page 186 held between Chalugu Basivinaidu and others and Chalugu Bheeminaidu and others, examination of Court Field Assistant as one of the witnesses by either of the parties or the Court is suffice and since the said task was complied by the objectors by examining the Court Field Assistant as RW5 and since the attempt of execution of delivery warrant by the Field Assistant and raising objection by the objectors in effecting delivery warrant, were not only not disputed but also admitted and reiterated by the objectors.

16. Before peeping into the Record for passing order in the present application, a glance at the principal proceeding is necessary which reveals that on filing of the suit O.S.No.26/1985 by the plaintiffs against the defendants seeking preliminary decree of partition, it was decreed on 27.03.1992 by granting preliminary decree by holding that the plaintiffs 1 to 3 and 5th and 6th defendants are jointly entitled to 1/3rd share in the plaint schedule properties apart from mesne profits, thereafter final decree petition FDIA 638/1995 was filed by 1st and 3rd plaintiffs and legal representatives of deceased 2nd plaintiff, in the said final decree petition, the then Presiding Officer of this Court, on 12.07.2007, passed final decree allotting land of an extent of Ac.4.53 cents in plot No.5, Ac.4.53 cents in plot No.6 and Ac.3.85 cents on western part of plot No.7 for a total contiguous plot of Ac.12.91 cents covered under Sy.No.44 to the petitioners and respondents 5 and 6 Kandarpa Kamala and Vangala Saroja and allotting some other properties to some other parties to the proceedings, while leaving rest of the extent of the land of Ac.16.60 cents to D2, who died leaving R27 and R29 Kandarpa Ramanamma, Kandarpa Kasiviswanadham and Kandarpa Srinivas, as his legal heirs from whom vendors of the objectors were alleged to have purchased property.

17. As seen from the record, none of the parties to the proceeding carried the matter in appeal consequently the final decree dated 12.07.2007 became final.

18. The record discloses that in furtherance of the final decree, the petitioners, herein by filing E.P.29/2011 and by showing the defendants 27 to 29 as respondents/judgment debtors, got delivered an extent of Ac.3.58 cents covered by item Nos. 2, 3 and 7 of the plan, on 09.08.2012.”

9. As far as the schedule of property delivered is not shown in the bailiff report, the learned counsel for the respondent referred to paragraph 23 of order dated 04.09.2015 in the E.A.No.148 of 2011, which reads as under:

“23. Under Rule 209 of Civil Rules of Practice, annexing of particulars of property which is literally called as schedule to the execution petition is sine quo non in as much as in the absence of furnishing accurate particulars of the property, such execution proceeding cannot attain with positive result however in the instant case non-annexing of schedule to the execution petition has no negative consequence for more reasons than one among which the crucial is the commissioner’s maps attached to the final decree would certainly leave absolute scope and feasibility to the Field Assistant of the Court in effecting delivery warrant and the secondary is that it is not contended by the objectors that taking advantage of the delivery warrant, the Court Field Assistant attempted or is intending to effect delivery of the objectors personal property which is unconnected with the final decree property.”

10. Learned counsel for the respondent submits that there is no dispute with regard to schedule of the property and the property was delivered under Order XXI Rule 35 under delivery warrant and it is stated that under Order XXI Rule 35, delivery warrant is issued for delivery of the property. It is further submitted that there is no dispute with regard to the identity of the property.

11. Learned counsel for the respondent submits that mere non-mentioning of the date in the report of the Field Assistant does not make the proceedings null and void. The purport of the report would disclose that the report was executed as per the orders passed in the decree.

12. On consideration of the arguments of the learned counsel for the respondent and in view of the fact that the warrant issued by the Court for execution to the Field Assistant and the Field Assistant has taken the assistance of the surveyor and identified the land, the Courts below have given a clear and categorical finding on merits of the case and they do not require any interference. There is no substantial question of law arising in this second appeal for consideration. The orders passed by both the Courts below are well reasoned orders which do not require any interference. Therefore, the second appeal is liable to be dismissed at the admission stage.

13. **IN THE RESULT**, the second appeal is dismissed at the admission stage. No order as to costs. Miscellaneous petitions, if any pending, shall also stand dismissed.

GUDISEVA SHYAM PRASAD, J

18th August, 2017

KSM



THE HON'BLE SRI JUSTICE GUDISEVA SHYAM PRASAD



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