

THE HON'BLE SRI JUSTICE M. SATYANARAYANA MURTHY

CIVIL REVISION PETITION No. 5226 OF 2012

ORDER:

This civil revision petition, under Section 115 of the Code of Civil Procedure, 1908 (for short 'CPC'), is filed challenging the order dated 04.06.2012 in E.A. No.901 of 2009 in E.P. No.299 of 2009 in O.S. No.263 of 1993 passed by the XI Junior Civil Judge, City Civil Court, Secunderabad.

The parties will hereinafter be referred to as petitioners and the respondents for convenience sake.

The first petitioner filed execution petition under Rule 32 of Order XXI of CPC alleging that they obtained decree in O.S. No.263 of 1993, on the file of XI Additional Junior Civil Judge, against the respondents restraining them from interfering with the peaceful possession and business being carried on in plot No.9/1 admeasuring 20 sft., situated at Himssam Gunj, Monda Market, Secunderabad. Thereafter, the legal representatives of respondent No.2 i.e. respondent Nos.3 to 6 made hectic efforts to interfere with peaceful possession and enjoyment of the suit schedule property, threatened to dispossess the petitioners from the schedule premises. Therefore, the petitioners sought enforcement of the decree against the respondents by attaching their immovable property.

Respondent No.5 filed his affidavit on his behalf and on behalf of respondents 3, 4, and 6, contending that respondent No.3 is the house wife, Respondent No.4 is doing vegetable business in Monda Market, Secunderabad and Respondent No.6 is college

going student. His grand father – Bala Lingam was blessed with five more sons and 6 daughters apart from his father-M.Krishna, who is the second respondent herein. The execution petition itself is not maintainable without bringing respondents 3 to 6 as legal heirs of the deceased on record, filed the execution proceedings after death of their grand father without impleading the respondents, thereby the execution proceedings are liable to be dismissed on the sole ground. Respondent No.5 also narrated about earlier legal proceedings between the parties, but they are not relevant for the purpose of deciding the present petition.

Respondent No.5 is carrying on vegetable business, which is far away to the shop of the petitioners. They never made any attempt to interfere with the possession and enjoyment of the property of the petitioners. In the month of June 2008 and on 25.10.2009, the second petitioner and her sons tried illegally and unauthorizedly to extend their area by encroaching open space in front of shop of the respondents. But they have not allowed the petitioners into their shop MCH No.1. The petitioner No.2 and his sons are carrying on business in the open place on the Southern side of their mulgie which is far away. The petitioners themselves made hectic efforts to encroach the open place. In such situation, the respondents lodged a complaint on 24.03.2009 complaining about the theft of empty plastic boxes etc., and receipt of the same was acknowledged by the police. Thereafter the respondent No.5 brought bricks to construct a permanent protection gate to their mulgi. On 20.06.2009 some articles like balances, measurement, weights, vegetables and tomato boxes were stolen from his shop due to mix up with the vegetable boxes of the petitioners. When he

questioned, the second petitioner and her sons abused, tried to keep their vegetable bags in front of the shop of the respondents by threatening to kill them if they object. Thus the petitioners themselves made hectic efforts to interfere with the enjoyment of the shop bearing No.MCH 1 in Monda Market and business being carried therein by the respondents. Therefore, the petitioners are not entitled to claim relief in the absence of any violation of perpetual injunction under Rule 32 of Order XXI of CPC and prayed for dismissal of the petition.

To prove their case, the petitioners examined P.Ws.1 and 2 and Exs.P.1 to P.12 were marked and on behalf of the respondents, R.W.1 was examined and Exs.R.1 to R.36 were marked.

Upon hearing argument of both the counsel, the executing court by its order dated 04.06.2012 dismissed the E.A. on the following three grounds.

- 1) Respondents 3 to 6 were not parties by date of filing suit, as they were not impleaded after death of respondents 1 and 2.
- 2) The petitioners failed to establish the alleged violation or infringement of perpetual injunction granted by the court in O.S. No.263 of 1993.
- 3) The petitioners themselves made an attempt to interfere with the possession and enjoyment of the property and when their acts are resisted, they filed E.A. without any basis and therefore the petitioners did not approach the court with clean hands, dismissed the petition.

During hearing, Sri G.M. Ravi Kumar, learned counsel for the petitioner, contended that dismissal of execution petition on the ground that the petitioners failed to implead legal heirs of respondents 1 and 2 and filed a petition straight away against respondents 3 to 6 is an error apparent on the face of record as they were shown as respondents 3 to 6 in the execution proceedings since the decree was passed restraining the respondents 1 and 2, their men, and heirs etc. Therefore, it is binding on the respondents who are claiming right in the property through them. But the executing court did not consider this contention in proper perspective.

It is further contended that there is voluminous evidence on record to establish that the respondents infringed or violated the perpetual injunction granted in favour of the petitioners. In such case the petitioners are certainly entitled to proceed against the respondents under Rule 32 of Order XXI of CPC to enforce perpetual injunction. Finally, the counsel for the petitioners requested this court to allow the revision petition ordering attachment of immovable property exercising jurisdiction under Rule 32 (1) of Order XXI of CPC.

Per contra, Sri Mahadeva Kantrigala, learned counsel for the respondents, would contend that the respondents 3 to 6 are not parties to the decree, mere passing the decree against the legal heirs or any person claiming through the original defendants, the decree cannot be executed against the legal heirs of the defendants without bringing them on record. The second contention of the counsel for the respondents is that the oral evidence adduced by the petitioners by examining P.Ws.1 and 2 is suffice to conclude

that the respondents never made any attempt to violate the perpetual injunction granted to the petitioners, as such, the executing court rightly dismissed the petition on these grounds and prayed to confirm the order passed by the executing court dismissing this revision.

Considering rival contentions, perusing the material papers available on record, the points that arise for consideration are,

1) Whether the execution petition is liable to be dismissed in the absence of bringing respondents 3 to 6 on record by following the procedure under Order XXII of CPC?

2) Whether the petitioners established infringement or violation of perpetual injunction granted in their favour? If so, the immovable property of respondents 3 to 6 is liable to be attached under Rule 32(1) of Order XXI of CPC?

POINT No.1:

The first ground for dismissal of the execution petition filed by the petitioners is that respondents 3 to 6 were not parties to the suit and the decree was passed against the respondents 1 and 2 restraining them from interfering with the peaceful possession and enjoyment of the property.

This fact is not disputed, but contended that the perpetual injunction is granted against respondents 1 and 2, their heirs and others, from interfering with the peaceful possession of the property of the petitioners as per clause (1) of the decree dated 16.01.1998. As such, the heirs of respondents 1 and 2 were also restrained by perpetual injunction from interfering with the peaceful possession and enjoyment of the petitioners. The

petitioners filed execution petition straight away arraying the respondents 3 to 6 in the execution petition and sought for attachment of immovable property belonging to them. When perpetual injunction is granted against respondents 1 and 2, on their heirs, and persons who are claiming through them, impleading respondents 3 to 6 as parties to the decree, straight away without following the procedure under Order XXII of CPC is not fatal and this issue is no more *res integra* in view of law laid down by the Apex Court in **Prabhakara Adiga v. Gowri and Ors**¹. In the facts of the judgment, suit for permanent injunction was decreed against judgment debtor and their heirs and friends, but the legal heirs of Judgment debtor made an attempt to interfere with the peaceful possession and it was contended before the court that after the death of original judgment debtor, the force of the decree lapsed, the executing court held that respondents were not bound by the decree. Aggrieved by the decree, the respondent filed a petition before the High Court and the High Court held that the decree for permanent injunction cannot be enforced against the legal heirs of judgment-debtor as injunction does not travel with land. Aggrieved by the order, the decree holder approached the Apex Court contending that decree was not lapsed on account of the death of the judgment debtor. The decree holder was in possession and enjoyment of the property and the decree had no concern with the same. However, the judgment debtor tried to destroy the fence and made an attempt to forcibly dispossess the decree holder. Therefore, the defendant had denied the averments and contended that there was no division of the land and had asserted ownership and possession. In the facts of the above

¹ AIR 2017 SC 1061

judgment, it was resisted by the heirs of the judgment debtor on the ground that they were not bound by the decree for permanent injunction. The force of the decree lapsed by the death of judgment debtor, the decree was enforced placing reliance on the legal maxim "*actio personalis moritur cum persona*". The executing court held that the heirs of judgment-debtor were bound by the decree and directed them to furnish an undertaking to the effect that they would not disobey the decree of the court. Aggrieved thereby the respondents preferred the petition in the High Court, it was allowed and the order of the High Court was challenged before the Apex Court on various grounds while allowing the appeal the Apex court held that on the basis of the title of the plaintiff over the disputed land, decree for permanent injunction had been granted. It was found that the defendant had sold the property which had fallen to his share in the partition of his own family, it was held in the suit that the defendant was not the owner of the disputed property and it belonged to the plaintiff. In execution proceedings filed within 24 months of decree, a question arose whether after the death of judgment debtor, his heirs could start interference in the property and plaintiff was obliged to file another suit for injunction or could execute the decree for permanent injunction which was granted in his favour as against the heirs of judgment-debtor. It is crystal clear from a perusal of section 50(2) CPC that a decree for permanent injunction can be executed against the judgment debtor or his legal representatives. Normally personal action dies with person but this principle has application to limited kinds of causes of actions. The right which had been adjudicated in the suit in the present matter and the findings which have been recorded as basis for grant of injunction as to

the disputed property which is heritable and partible would enure not only to the benefit of the legal heir of decree-holders but also would bind the legal representatives of the judgment-debtor. It is apparent from Section 50 of CPC when a judgment debtor died before the decree has been satisfied, it can be executed against the legal representatives. Section 50 is not confined to a particular kind of decree. Decree for injunction can also be executed against legal representatives of the deceased judgment-debtor. The maxim “action personalis moritur cum persona” is limited to certain class of cases and when the right litigated upon is heritable, the decree would not normally abate and can be enforced by legal representatives of decree-holder and against the judgment-debtor or his legal representatives. It would be against the public policy to ask the decree-holder to litigate once over again against the legal representatives of the judgment-debtor when the cause and injunction survives. Therefore, the order passed by the High Court dismissing the execution proceedings on the ground that the decree lapsed after the death of judgment debtor was turned down by the Apex Court and ordered execution of the decree under Rule 32 of Order XXI of CPC.

The facts in the above judgment are almost identical to the present facts. Therefore, in view of the law declared by the Apex Court, one of the reasons recorded by the trial court for dismissal of the execution proceedings does not stand to any scrutiny and it is contrary to the purport of Section 50(2) of CPC. Thus the executing court committed serious error.

Therefore, the finding of the executing court regarding maintainability of the execution proceedings without impleading

respondents 3 to 6 following procedure under Order XXII of CPC is erroneous. Therefore, the finding is hereby set aside holding in favour of the petitioners and against the respondents.

POINT No.2:

The second ground for dismissal of the execution petition is that no satisfactory evidence is available on record to accept that respondents 3 to 6 violated the perpetual injunction granted against the respondents 1 and 2 who are no more. Undisputedly, the original defendants against whom the decree was passed are no more, but respondents 3 to 6 succeeded the estate of the respondents 1 and 2 and it is also an undisputed fact, in view of the admissions made in the counter that the third respondent is only a house wife and that she is unconnected with the business being carried on by the 6th respondent.

P.W.1 though admitted that she was house wife, but carrying on business for the last many years in the premises opposite to the petition schedule premises. P.W.2 also testified in support of the alleged infringement. In the counter, respondents 3 to 6 referred the earlier litigation between the parties and obtaining injunction against the petitioners in various suits. Though their predecessors-in-title obtained decree in various suits, that is irrelevant for the purpose of deciding the present dispute since the decree in O.S. No.263/1993 dated 16.01.1998 attained finality and this court cannot go beyond the decree and decide the rights of the parties as held by the Apex Court in **Brakewel Automotive Components (India) Pvt. Ltd., v. P.R. Selvam Alagappan**². Hence, earlier litigation between the parties in the present

² AIR 2017 SC 1577

execution petition or their predecessors-in-title is wholly unnecessary for deciding the present issue. In any view of the matter, the question before this court is to limited extent regarding violation of injunction order. The evidence on record, more particularly, the evidence of P.Ws. 1 and 2 would show that the respondents 3 to 6 made sincere attempts to violate the perpetual injunction granted against respondents 1 and 2. The contention of the respondents is that as the plaintiffs made an attempt to disturb the possession of respondents 3 to 6 in shop bearing No.MCH 1 they lodged a complaint with the police for commission of theft on two occasions. Therefore, boring grudge against these respondents, the present petition is filed even without specifying the exact date infringement violation of perpetual injunction.

According to Rule 32(1) of Order XXI of CPC where the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed, has had an opportunity of obeying the decree and has willfully failed to obey it, the decree may be enforced in the case of a decree for restitution of conjugal rights by attachment of his property or, in the case of a decree for the specific performance of a contract, or for an injunction by his detention in the civil prison, or by the attachment of his property, or by both.

Therefore, the petitioners, on account of willful failure to obey the decree granting perpetual injunction by the respondents 3 to 6, filed execution petition before the executing court. It is for the petitioners to establish that the respondents 3 to 6 had violated the perpetual injunction unless the petitioners established the willful disobedience of the decree for perpetual injunction, the

court cannot order attachment where the decree for injunction is violated the other party is liable to the penalties like attachment of property or detention in civil prison.

In the present case one of the reason for dismissal of the execution petition is that the petitioners failed to establish the alleged violation and disobedience of the perpetual injunction. But it is evident from the record that the executing court did not appreciate the evidence in proper perspective, but this court while exercising power under Section 115 of CPC cannot appreciate the evidence, since the jurisdiction of this court under Section 115 is limited and it permits the court to interfere with the order passed by the subordinate courts only when subordinate court appears to have exercised jurisdiction not vested in it by law or to have failed to exercise the jurisdiction so vested or to have acted in the exercise of jurisdiction illegal or with material irregularity. But, here the appreciation of evidence by the executing court may, at best, fall under clause (c) of sub-clause (1) of Section 115 of CPC. At the same time, the proviso annexed to Section 115 CPC further says that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceeding, except where the order, if it had been made in favour of the party applying for revision, would have finally disposed of the suit or other proceedings. Therefore, the jurisdiction of this court under Section 115 CPC is limited. But when the executing court did not exercise its jurisdiction properly or exercised its jurisdiction illegally or irregularly, this court can exercise jurisdiction under Section 115 CPC. Therefore, wrong appreciation of evidence by the executing court, failure to

array the legal heirs of respondents 1 and 2 following procedure under Rule 32 of order XXI of CPC is patent error, as such the executing court irregularly exercised jurisdiction. Therefore, the order is liable to be set aside. However, this court while sitting in revision cannot reappraise the evidence. In such circumstances, the course open to this court is to remand the matter to executing court to pass appropriate order based on the evidence available on record, recording its finding whether the respondents 3 to 6 being the legal representatives of respondents 1 and 2 will-fully disobeyed the perpetual injunction granted against the respondents 1 and 2.

In view of my aforesaid discussion, the civil revision petition is allowed, setting aside the order dated 04.06.2012 in E.A. No.901 of 2009 in E.P. No.299 of 2009 in O.S. No.263 of 1993 passed by the XI Junior Civil Judge, City Civil Court, Secunderabad, while remanding the matter to the executing court with a direction to decide E.A. based on the evidence available on record, recording its finding whether respondents 3 to 6 willfully disobeyed the perpetual injunction granted against respondents 1 and 2, after affording reasonable opportunity to both parties to advance their argument, within three months from the date of receipt of a copy of this order.

Miscellaneous petitions, if any, pending in this CRP shall stand closed.

M.SATYANARAYANA MURTHY, J

Date:10.07.2017
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