

HON'BLE SRI JUSTICE M.S.RAMACHANDRA RAO

C.R.P.No.663 of 2018

ORDER:

This Revision Petition is filed under Section 115 CPC challenging the order dt.04-10-2017 in E.P.No.157 of 2008 of the III Senior Civil Judge, City Civil Court, Hyderabad.

2. The respondent/plaintiff herein filed the said suit against the 1st petitioner herein for specific performance of oral agreement of sale dt.10-01-1977 and for recovery of the possession of the property covered by the said agreement.

3. The said suit was decreed on 30-07-1991.

4. The 1st petitioner preferred A.S.No.62 of 1991 before the Additional Chief Judge, City Civil Court, Secunderabad, but the said appeal was also dismissed on 27-12-1994.

5. Thereafter, the 1st petitioner filed S.A.No.352 of 1995 before this Court. Pending the said Second Appeal, she died and her legal representatives were brought on record. They are petitioner Nos.2 to 6 in this Revision Petition.

6. The said Second Appeal was dismissed after contest on 25-01-2002.

7. Petitioner Nos.2 to 6 preferred a Special Leave Petition No.9291 of 2002 to Supreme Court of India, but the said Special

Leave Petition was also dismissed on 30-07-2004. Thus, the decree of specific performance obtained by the respondent attained finality.

8. The respondent had filed E.P.No.157 of 2008 before the III Senior Civil Judge, City Civil Court, Secunderabad, for executing conveyance in his favour in respect of the property which was subject matter of the suit and also for grant consequential relief of possession and to deliver vacant possession of the property.

9. The respondents had also filed E.A.No.135 of 2009 for appointment of an Advocate Commissioner to measure the decree schedule property and to file a report with plan. The said application was allowed and both parties were directed to assist the Advocate Commissioner by giving documents or plans, but the petitioners did not furnish any material.

10. The Advocate Commissioner then took the help of the local planner and got measured the suit schedule property and filed report with a plan. The plan prepared by the Advocate Commissioner was marked as Ex.P-5 and the draft sale deed filed by the respondent was marked as Ex.P-6. The respondent also filed another plan to annex to the draft sale deed which was marked as Ex.P-7.

11. In Ex.P-5, the plan prepared by the Advocate Commissioner, the extent of property is shown as 278.80 sq yds with ground, first floor and terrace on the first floor; in Ex.P-7, the other

plan furnished by the respondent, the extent of property is shown as 250 sq yds without full description.

12. The 3rd petitioner filed objections as well as further objections in November and December 2008 and again filed objections on the plan of the proposed sale deed in March 2009. Further objections to the Commissioner's report were also filed with the petitioners' plan in November 2009 and petitioners marked Ex.R-7 for their convenience.

13. By order dt.04-10-2017, the Court below, by allowing the E.P., rejected their objections with costs, and permitted the respondent to file new draft sale deed as per directions contained therein to enable it to execute the registered sale deed on behalf of the petitioners and the original defendant/J.Dr. The directions given by it are as under:

“(i) Schedule of property must be mentioned with extent in 201 sq yds, old boundaries as per Ex.R-1 (=Ex.B-5 in main suit) and new/present boundaries as per plans annexed to Ex.R-1 (=Ex.B-5 in main suit) excluding Ex.R-2 plan described 61 sq. yds;

(ii) Recitals of payment of Rs.6000/- and Rs.2500/- can be incorporated in draft sale deed as sale consideration amount paid to original defendant/J.Dr. Smt. Susheela Solomon during her lifetime;

(iii) The decree holder has to mention in draft sale deed that “after registration of sale deed, delivery of possession be given through process of law, if respondents fail to put him in possession and

(iv) For the sake of market value and payment of stamp duty on sale deed for registration, present market value shall be taken up in the interest of the State.”

14. Assailing the same, this Revision Petition is filed by the petitioners.

15. On 29-08-2018, while directing notice in this Revision, this Court granted stay of all further proceedings in E.P.No.157 of 2008 subject to the petitioners' depositing Rs.12,000/- to the credit of the E.P. Subsequently, the interim order was extended on 03-12-2018 up to 31-01-2019. The respondents then filed I.A.No.1 of 2019 to vacate the order dt.29-08-2018 in C.R.P.No.663 of 2018.

16. Heard the learned counsel for the petitioners and Sri S.Ashok Anand Kumar and Smt. Tara Sharma, learned counsel for the respondent.

17. It is the contention of the learned counsel for the petitioners that the plaint filed by the respondent did not contain schedule of property and in the absence of the same, the execution petition cannot be ordered by the Court below. He contended that objections filed by the petitioners were not properly considered by Court below and it could not have allowed the E.P. He referred Order 7 Rule 3 CPC which requires the plaint to contain description and boundaries of the property sufficient to identify the property which is subject matter of this suit, and stated that in the absence of those details, the Execution Petition could not have been entertained. According to him, as on the date of oral agreement, only ground floor portion was existing, and even assuming that respondent is entitled to any relief, he is entitled to only ground floor portion and not entire

building which now consists of ground-3 floors, a bore-well and a sump. He also contended that Executing court cannot go beyond the decree and so the order passed by the Court below cannot be sustained.

18. Learned counsel for the respondent refuted the said contentions. She pointed out that respondent is a Senior Citizen, aged 88 years and the petitioners have been harassing him in spite of the suit being decreed on 30-07-1991 till date by preventing execution of the decree. It was pointed out that the decree passed by the trial Court was confirmed up to the Supreme Court and the petitioners cannot now contend that there is no schedule mentioned in the plaint in respect of which the suit had been decreed and Execution petition is filed.

19. Before dealing with the contentions of the parties, I shall first consider the reasons assigned by the Court below in allowing the E.P.

20. The Court below first referred to the schedule of Ex. R-1 sale deed (equivalent to Ex.B-5 in the suit on 21-12-1967) under which the original defendant/J.Dr. purchased the property and recorded that in the said documents, it is mentioned that she had purchased a plot measuring 201 sq yds and a house bearing Municipal No.11-4-322-8/1 at Chilakalaguda, Secunderabad, within specified boundaries. It also noted that there was a plan annexed to the said

document. The Court below recorded that the petitioners in the E.P. intentionally withheld the said plan.

21. Next it referred to plaint and the decree wherein the suit schedule property was described as H.No.11-4-322/8/1 at Chilakalaguda, Secunderabad, and observed that this property was nothing but the house purchased under the original Ex.R-1 (which was filed as Ex.B-5 in the suit) under which, the sole J.Dr. purchased the property on 21-12-1967.

22. It then took note of the fact that the original defendant purchased another parcel of open land on south of extent of 61 sq yds belonging to one M/s.Mary Theresa, which was also mentioned as the southern boundary to the plaint schedule property in Ex.R-1, but they suppressed the sale deed under which she purchased the said extent of 61 sq yds to delay the execution proceedings.

23. It therefore observed that the respondent should confine to the plot and house admeasuring 201 sq yds bearing Municipal No. 11-4-322-8/1 at Chilakalaguda, Secunderabad, as per Ex.B-5 title document of the original defendant in the draft sale deed.

24. It then referred to the objection of the 3rd petitioner that initially there was only a single storied building for which the suit was filed and decreed but thereafter, the original defendant constructed the first floor in 1990 or 1992 and during the pendency of the suit/first appeal, she completed the same without obtaining any permission. It

observed that if any improvements are made by the original defendant, it would be subject to the risk of result of the suit/appeal because she never pleaded the said defence in the suit before the decree was passed, and in fact, the petitioners did not adduce any evidence to prove that the first floor was constructed in the year 1990 or 1992. It therefore held that petitioners cannot take such objection after 20 years and the first floor need not be excluded in the schedule property.

25. It next considered another objection of third petitioner that the original defendant had carried out extensive repairs, compound wall construction, obtained electricity, water and drainage connections, dug bore-well, constructed the sump and renovated and extended the ground floor. It rejected the said contention stating that the executing Court cannot go beyond the decree and petitioners cannot raise such objection after 20 years.

26. It then considered the third objection of the petitioners that the decree did not allow the respondent/D.Hr. to seek relief by way of execution of the document and decree holder cannot seek delivery of property also because relief of possession was not sought. It observed that the Court never passes an order for the fun of passing it, and it is passed only for the purpose of being carried out; and as per Section 55 (1) of the Transfer of Property Act, 1882, the seller is bound to give, on being so required, the buyer or such person as he directs, such possession of the property as its nature admits and under

Section 28 (3) of the Specific Relief Act, 1963, the purchaser was entitled to seek delivery of possession and need not file a separate suit.

27. It also rejected the contention that the sale consideration was not paid to the legal representatives of the deceased defendant/J.Dr. and noted that the respondent had paid more than that what was due payable to the original defendant; and that for the purpose of registration, the market value is to be taken into account for determination of the stamp duty payable.

28. It also rejected the contentions raised by the petitioners about the extent of boundaries of the schedule property and noted that having suppressed the documents such as plans attached to Ex.R-1 and R-2 and having failed to file draft sale deed according to their version, they cannot be allowed to raise vexatious defenses.

29. I shall now consider the contentions of petitioners herein.

30. In my opinion, the contention raised by the petitioners that the plaint did not contain schedule of property as mandated by Order 7 Rule 3 CPC and therefore, the execution petition cannot be allowed, is not tenable. Such plea was not raised by the original defendant/J.Dr. in the suit at all and judgment in the suit does not disclose that such a point was even argued by the original defendant/J.Dr.

31. No doubt such a contention was raised in A.S.No.62 of 1991 by her i.e. the description of the property was not properly given, but the same was rejected on the ground that the house number had been mentioned and there was no dispute with regard to identity of the property.

32. In the Second Appeal No.352 of 1995 filed by the petitioners against the judgment and decree in A.S.No.62 of 1991, the petitioners did not raise the contention that the description of the property was not given properly.

33. Thus, the petitioners had acquiesced with the finding of the first appellate Court on the said point and the said finding had thus attained finality.

34. Admittedly, the judgment in the Second Appeal was confirmed by the Supreme Court in Special Leave to Appeal (Civil) No.9291 of 2002 on 30-07-2004.

35. As held by the Supreme Court in **Arya Singh Vs. Mohindra Kumar BRA**¹, the principle of *resjudicata* would be applicable at different stages of the same suit. Thus a finding given during the pendency of the first appeal on the issue regarding adequacy of description of the property for which specific performance was sought, would be binding even at the execution stage, and such contention cannot be raised during the course of execution.

¹ AIR 1964 SC 993

36. Therefore, in my considered opinion, the contention of the petitioners that the plaint did not contain the schedule of property properly as per order 7 Rule 3 CPC and therefore, the E.P. schedule property cannot be identified cannot be entertained and the said contention is barred by the principle of *res judicata* since it was urged by the original defendant in A.S.No.62 of 1991 before the Additional Chief Judge, City Civil Court, Secunderabad, and was rejected by the said Court in its judgment dt.27-12-1994, but was not urged thereafter by the petitioners in the Second Appeal or before the Supreme Court.

37. Coming to the other contention of the petitioners that during the pendency of the suit, the original defendant/J.Dr. had constructed three floors and the petitioners cannot be allowed to have execution of a sale deed in respect of this entire property consisting of ground + 3 floors, this plea also cannot be countenanced because the said point was not argued either in the suit or in the first appeal or in the Second Appeal or before the Supreme Court and the principle of constructive *resjudicata* would be attracted and the petitioners would be debarred from raising such contention during the course of execution.

38. As rightly observed by the Court below, the petitioners deliberately suppressed material such as plans annexed to Exs.R-1 and Ex.R-2 which would have facilitated early execution of decree and dragged on the proceedings for more than 20 years. Such technical objections raised by the petitioners cannot be entertained at this stage

when substantive contentions/objections raised by them were found to be without merit by the Court below giving proper and valid reasons.

39. Section 28 (3) of the Specific Relief Act, 1963 reads that if the purchaser or lessee pays the purchase money or other sum which he is ordered to pay under the decree within the period referred to in Sub-section (1) thereof, the Court may, on application made in the same suit, award the purchaser or lessee such further relief including execution of proper conveyance *and* also delivery of possession of the property on the execution of such conveyance and under Sec.28(4), it is not necessary for the purchaser to file a separate suit.

40. Therefore, there is absolutely no merit in the contention of the petitioners that the decree did not grant relief of delivery of possession and petitioners cannot therefore get it.

41. I therefore do not find any error of jurisdiction in the order passed by the Court below warranting interference by this Court under Section 115 CPC.

42. Accordingly, the Civil Revision Petition fails and is dismissed with costs of Rs.20,000/- (Rupees Twenty Thousand only) to be paid by the petitioners to the respondent. The interim order granted on 29-08-2018 is vacated and I.A.No.1 of 2018 is allowed.

43. As a sequel, the miscellaneous petitions pending, if any, shall stand closed.

JUSTICE M.S.RAMACHANDRA RAO

Date: 19-02-2019
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