

THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA RAO

Interlocutory Application No.1 of 2016

(C.R.P.M.P.No.6865 of 2016)

in

Civil Revision Petition No.2321 of 2016

and

Civil Revision Petition No.2321 of 2016

COMMON ORDER :

This Revision is filed under Article 227 of the Constitution of India challenging order dt.19.02.2016 in E.P.No.41 of 2009 in O.S.No.556 of 1983 of III Additional Chief Judge, City Civil Court, Hyderabad.

2. The petitioner herein is judgment-debtor no.1 in the said suit.
3. The said suit was originally filed as O.S.No.470 of 1982 by 1st respondent against the petitioner and the A.P. Wakf Board for declaration of his title to the plaint schedule property and for consequential permanent injunction restraining the petitioner and the A.P. Wakf Board from interfering with his possession and enjoyment of the said property and in the alternative for declaration of his title, for recovery of possession and for costs.
4. It was the case of the 1st respondent/plaintiff in the suit that he had purchased the plaint schedule property under a registered sale deed Ex.A-1 dt.06.07.1978 from Md. Abdul Huq and 4 others who

inherited the same from one Khanan Jahan, w/o.Md. Abdul Raheem. He contended that Khanan Jahan had earlier purchased the same from one Ahmedi Begum and others under a registered sale deed Ex.A-2 dt.07.12.1961 and that the said Ahmedi Begum inherited it from one Safdar Ali, brother of Fatima Bee.

5. It was the contention of the petitioner that the plaint schedule property was constructed in 1935 along with a mosque during the lifetime of Fatima Bee Saheba @ Yasin Bee and it is a wakf property by user and there is no wall dividing it from the mosque and that a common boundary wall was constructed for the mosque and the plaint schedule property. It is their contention that Fatima Bee Saheba purchased 9250 sq. yds in Sy.No.123 of Panjagutta under a registered sale deed dt.28.04.1932; that she died on 19.03.1950 unmarried.

6. The plaint schedule property is premises No.6-3-454 and 455 standing on open land admeasuring 1321.58 Sq.Yds. at Punjagutta, Hyderabad.

7. The said suit was tried with O.S.No.604 of 1983 and O.S.No.17 of 1986 by the Additional Chief Judge, City Civil Court, Hyderabad and a common judgment was pronounced therein dismissing O.S.No.556 of 1983.

8. The 1st respondent challenged the said judgment and decree in CCCA.No.71 of 1993 before this Court. The said appeal was heard along with CCCA.No.31 of 1994 filed against judgment in

O.S.No.604 of 1983 and CCCA.no.51 of 1994 filed against judgment in O.S.No.17 of 1986.

9. By common judgment dt.28.12.2001, CCCA.No.71 of 1993 was allowed; judgment and decree dt.03.03.1993 in O.S.No.556 of 1983 was set aside; and the suit was decreed as prayed for granting relief of declaration of title, that 1st respondent is entitled for possession of the property and also consequential permanent injunction was granted in favour of the 1st respondent against petitioner and 2nd respondent. CCCA.No.31 of 1994 was allowed and O.S.No.604 of 1983 was decreed; and CCCA.No.51 of 1994 was also allowed and O.S.No.17 of 1986 was dismissed.

10. It was held by the learned Single Judge that under Ex.A-1 sale deed, 1st respondent purchased from Md. Abdul Huq and others house bearing No.6-3-454 and 6-3-455, Panjagutta, Hyderabad with open land admeasuring 1321 sq. yds; they had inherited it from Khanan Jahan; under Ex.A-2, Khanan Jahan had purchased it from Ahmedi Begum and others who were legal representatives of Syed Safdar Ali; that Safdar Ali was the brother of Fatima Bee and he got it towards his share under Ex.A-4 partition with his brothers after she died. He held that the Wakf property was only having Municipal number 6-3-453 and 6-3-456 and is distinct from the plaint schedule property which has Municipal No.6-3-454 and 6-3-455; that the plaint schedule property did not form part of the wakf property which is being claimed by the Wakf Board and the Mosque Committee. So the suit

was decreed holding that 1st respondent was entitled to possession of the plaint schedule property and also injunction.

11. L.P.A.No.72 of 2002 was filed by the 1st respondent challenging the judgment and decree dt.28.12.2001 in CCCA.No.71 of 1993, L.P.A.No.49 of 2003 was filed by the A.P. State Wakf Board against the same judgment and decree. L.P.A.No.51 of 2003 was filed by the 1st respondent against the judgment in CCCA.No.51 of 1994.

12. All the Letters Patent Appeals were dismissed by a Division Bench of this Court by a common judgment dt.28.02.2008. The Division Bench also held that the Mosque is located in Municipal Nos.6-3-453 and 6-3-456 and it does not relate to the property claimed by the 1st respondent which has Municipal Nos.6-3-454 and 6-3-455; that the plaint schedule property does not form part of the Wakf property and that no document is filed by the Mosque Committee i.e. petitioner or the Wakf Board to show that the plaint schedule property is Wakf property.

13. Special Leave Petitions 20947, 20949 of 2008 were filed against the said common judgment before the Supreme Court of India which were dismissed on 17.10.2008.

14. Thus, the judgment and decree in O.SN.o.556 of 1983 as decreed on 28.12.2001 in CCCA.No.71 of 1993 attained finality.

15. The 1st respondent / Decree Holder filed E.P.No.41 of 2009 for delivery of possession of the plaint schedule property in O.S.No.556 of 1983.

16. Counter-affidavit was filed in the E.P. by petitioner stating that claim of the 1st respondent for the extent of 1321.58 Sq.Yds. with residential houses No.6-3-454 and 6-3-455 at Punjagutta, Hyderabad is not sustainable; that 1st respondent has to establish the existence of such property which should strictly be outside the precincts of Masjid Bee Saheba which admeasures 5833.7 Sq.Yds. and is enclosed by a compound wall before he can seek execution of any decree; that the Mosque structure together with appurtenant land is enclosed by a compound wall, and the whole such area is Masjid Bee Saheba; and this is borne out by authentic records of the A.P. Wakf Board, Town Survey Records of Government of Andhra Pradesh and also a judgment of this Court dt.28.02.2008. It is contended that the western boundary of the plaint schedule property is vaguely described as “neighbour’s land” whereas the boundary on the southern side is also vaguely described as “neighbour’s land”; the northern boundary is shown as “land of N. Anjaiah, common passage and house of Khalid Mohammed and Shazadi Begum”. It is contended that in O.S.No.556 of 1983 and O.S.No.604 of 1983 one Mr. Reddaiah appeared for the plaintiff as G.P.A. of Sesha Reddy (1st respondent) and as Managing Partner of Saradhi Engineering Corporation in O.S.No.603 of 1983; reliefs were claimed in both suits in respect of property bearing

H.No.6-3-454 and 455, Punjagutta, Hyderabad, but there are vast discrepancies between the boundaries of the properties described in the schedules of the complaints; and in L.P.A.No.72 of 2002 and batch, the Division Bench held that Masjid area is 5833.7 Sq.Yds. in Municipal Nos.6-3-453 and 6-3-456 and also that the plaint schedule property did not form part of this Wakf property; and so, the E.P. should be dismissed.

17. The A.P. Wakf Board (2nd respondent) also supported the petitioner stating that execution cannot be ordered against Wakf property and the E.P. is liable to be dismissed against it.

18. By order dt.28.02.2011, the said E.P. was allowed by the III Additional Chief Judge, City Civil Court, Hyderabad rejecting the contentions of the petitioner and the 2nd respondent and they were directed to deliver vacant possession of the suit schedule premises. Delivery warrant was issued returnable by 24.03.2011. The executing court held that once the decree in CCCA.No.71 of 1993 decreeing O.S.No.556 of 1983 was confirmed in LPA.No.49 of 2003 on 28.02.2008 and S.L.P.s 26947, 26949 of 2008 were dismissed on 17.10.2008, it has to execute the same and cannot go beyond the recitals of the decree.

19. This was questioned by the petitioner in CRP.NO.856 of 2011 before this Court. The *only* contention urged in the said Revision on behalf of the petitioner was that the executing court could not have

given a direction to it to deliver possession of the plaint schedule property to the 1st respondent / decree holder since no decree for possession was passed by the High Court in CCCA.No.71 of 1993; and even the decree which was drawn up is silent about delivery of possession.

20. The said CRP was dismissed on 27.02.2015. The above referred contention of the petitioner was rejected holding that in the judgment in CCCA.No.71 of 1993, the single Judge of this Court had clearly held that 1st respondent was entitled to possession of the plaint schedule property; and petitioner cannot take advantage of defect in drafting of the decree. However, since there was a request by the petitioner that it would carry the matter to the Supreme Court, the 1st respondent / Decree Holder was directed not to take possession till 10.04.2015.

21. Thereafter, the petitioner filed an Objection Petition on 06.11.2015 against the execution of the decree and also Written Submissions on 31.12.2015, without approaching the Supreme Court.

22. For the first time, in this Objection Petition and in the Written arguments a contention is advanced that there was *fraud* committed by the 1st respondent / Decree Holder because of which the judgment in CCCA.No.71 of 1993 is *non est* in the eye of law and doctrine of *res judicata* does not apply. It is contended that Ex.A.4 marked before the Trial Court was “Plan of Masjid” marked by PW.1, but in the

judgment in CCCA.no.71 of 1993 findings were based on ExA.4 which it found to be “Original Partition Deed Document No.2598 of 1950” whereunder there was a partition among legal heirs of Late Fatima Bi. It is contended by petitioner that on enquiry it came to know that only Xerox copy of the said partition deed was filed before the appellate court by counsel for the 1st respondent and not the original; that when petitioner applied for certified copy of the same, the High Court Registry Copying Section returned it with endorsement “*material papers are not issued in E.R. Section, hence C.D. returned*”. It is alleged that petitioner then applied for Certified Copy of said partition deed from the Office of the District Registrar, Red Hills, Hyderabad and that this plea of the 1st respondent – Decree Holder is contrary to the plea of Gift by Late Fatima Bi in favour of Syed Safdar Ali. It is contended that nowhere in the document, the total extent of land left behind by Fatima Bi in Survey No.123 of Punjagutta is mentioned and the Schedule in the document did not mention how much extent each party including Syed Safdar Ali got. According to the petitioner, though in the said Deed it is stated that areas allotted to legal heirs of Late Fatima Bi including Syed Safdar Ali are shown in colours (Rose, Red, Green and Blue), in the original records of the District Registrar, Red Hills, Hyderabad the colours are not indicated. It is contended that any document filed before the appellate court should be filed under Order 41 Rule 27 C.P.C. In the

Written Submissions, this point was elaborated and certain decisions of the Supreme Court dealing with fraud were mentioned.

23. By order 19.02.2016, the III Additional Chief Judge, City Civil Court, Hyderabad rejected the said contention of fraud and also the ground of discrepancy in boundaries. It observed that petitioner is not a stranger to the earlier proceedings but is a party thereto; allegation of fraud in obtaining the decree could have been made and proved in the earlier proceedings by the petitioner; such pleas cannot be raised before the executing court and invite it to go into the merits of the matter once again; and this is not permitted in law. It held that the discrepancy, if any, in the boundaries of the property or allegation of obtaining the decree by fraudulent means, cannot be a ground to stall the execution of the decree. It issued warrant of delivery under Order 21 Rule 35 (1) C.P.C. returnable by 31.03.2016.

24. Challenging the same, the present Civil Revision Petition is filed.

25. On 28.04.2016, this Court directed maintenance of *status quo* obtaining as on that date.

Interlocutory Application No.1 of 2016 (CRP.MP.NO.6865 of 2016 :

26. Interlocutory Application No.1 of 2016 (CRP.MP.No.6865 of 2016) is filed to vacate the order dt.28.04.2016 passed in

CRP.M.P.No.2959 of 2016 in Civil Revision Petition No.2321 of 2016.

27. The matter was heard on 03.07.2019 and orders were reserved.

28. The counsel for petitioner sought to contend that the Court could not have rejected objections of the petitioner to the execution of the decree passed in CCCA.No.71 of 1993 and particularly the plea of fraud raised in the objection petition and the Written Submissions. He also sought to place reliance on the decisions of the Supreme Court in **S.P. Chengalvaraya Naidu vs. Jagannath¹, A.V. Papayya Sastri vs. Government of Andhra Pradesh².**

29. Sri M.V.S. Suresh Kumar, Senior Counsel appearing for Sri S. Subba Reddy, supported the order passed by the Court below.

30. It is important to note that the contention about Ex.A.4 not being a partition deed, and being only a plan of the Masjid, was not raised by the petitioner in L.P.A.No.72 of 2002 filed by it challenging the judgment dt.28.12.2001 in CCCA No.71 of 1993.

31. The Division Bench in para 20 of its common judgment in L.P.As.72 of 2002, 49 of 2003 and 51 of 2003 stated that “*Further it has to be observed that even as per Ex.A.4 partition deed, the property of Fatima Bi was apportioned between her legal heirs, among whom Syed Safdar Ali is one and that in the boundaries also*

¹ 1994 (1) S.C.C. 1

² 2012 (1) S.C.C. 476

there is a reference to the compound wall of the Mosque Bee Saheba and also the house of Syed Safdar Ali. It is also to be observed that in the said document itself specific boundaries were given.”

32. The above passage indicates that the Division Bench which decided the L.P.A. actually looked into Ex.A.4 and concluded that it was a partition deed. During the hearing in the L.P.A., nothing prevented the petitioner to contend that Ex.A.4 is not a partition deed but it is only a plan of the Masjid, but the petitioner did not raise such a contention at all.

33. This plea was also available for the petitioner in S.L.P.Nos.20947-20949 of 2008. But there is no evidence to show that the petitioner raised the said contention in the Supreme Court either.

34. Also, such a contention based on Ex.A.4 was not raised by petitioner in its counter dt.07.12.2010 in E.P.No.41 of 2009 and it was only argued that wrong / vague boundaries were shown in the E.P. Schedule.

35. In CRP.No.856 of 2011 filed by petitioner against the order dt.28.02.2011 in E.P.No.41 of 2009 also this plea of fraud relating to Ex.A.4 was not urged and para no.7 of the order dt.27.02.2015 in the said CRP shows that only the contention that there was no decree for possession in CCCA.No.71 of 1993 was canvassed by the petitioner and nothing else.

36. When the petitioner did not raise such a contention before the Division Bench in L.P.A.No.72 of 2002, or before the Supreme Court in SLP.No.20947-49 of 2008, or before the executing court in E.P.No.41 of 2009, or in CRP.NO.856 of 2011, it is not open to the petitioner to raise such contention based on fraud in relation to Ex.A.4 or vague boundaries by way of Objection Petition.

37. The principle of constructive *res judicata* bars the petitioner from raising such contention in its Objection Petition dt.06.11.2015.

38. In fact, it is a sheer abuse of process of Court for the petitioner to raise such a contention in the Objection Petition and in this Revision.

39. The decisions relied upon by the petitioner cannot assist the petitioner since the petitioner having had opportunity to raise the plea of fraud on several occasions as mentioned in para 36 supra, did not raise it.

40. I therefore do not find any merit in the Revision Petition.

41. Since the conduct of the petitioner is manifestly vexatious, the Revision is dismissed with costs of Rs.50,000/- to be paid by petitioner to 1st respondent within four (04) weeks.

42. Consequently, Interlocutory Application No.1 of 2016 (CRP.MP.No.6865 of 2016) which was filed to vacate the order dt.28.04.2016 passed in CRP.M.P.No.2959 of 2016 in Civil Revision

Petition No.2321 of 2016 is allowed and interim order granted earlier shall stand vacated.

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

JUSTICE M.S.RAMACHANDRA RAO

Date: 09.08.2019

Ndr

