(2013) 12 AP CK 0081

Andhra Pradesh High Court

Case No: CRP. No. 1940 of 2008

M/s. Kamakshi Builders		APPELLANT
	Vs	
Dr. Ambedkar Educational Society		RESPONDENT

Date of Decision: Dec. 12, 2013

Hon'ble Judges: M.S. Ramachandra Rao, J

Bench: Single Bench

Advocate: B. Adinarayana Rao, for the Appellant; M. Papa Reddy, Sri D. Ranganath Kumar and Ms. Manjani S. Ganu, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

M.S. Ramachandra Rao, J.
This Revision is filed under Article 227 of the Constitution of India challenging the order dt. 14.03.2008 of the IV Senior Civil Judge, City Civil Court, Hyderabad in E.A. No. 550 of 2007 in EP. No. 90 of 2007 in O.S. No. 161 of 1989. The subject matter of this suit is property described in the schedule to the plaint therein as "all that western side portion of building bearing H. No. 1-8-1, Baghlingampally, Hyderabad, consisting of plinth area of 780 Sq.yds. with open yard of 2196 sq.yds." within boundaries specified in the plaint.

2. One Nawab Mohd. Misbahuddin Khan was the owner of the above property. He entered into a partnership with petitioner under a deed of partnership dt. 01.04.1986 for the purpose of carrying out the business of development and construction. Disputes arose between petitioner and Misbahuddin Khan and other partners which were referred to an arbitrator who rendered an award dt. 22.11.1987. Under the said award, a sum of Rs. 4,00,000/- was awarded to Misbahuddin Khan towards his share in the partnership, and the suit property was awarded to petitioner, with Misbahuddin Khan retiring from the partnership. The

said award was also made Rule of Court by judgment and decree dt. 29.02.1988 in OP. No. 2193 of 1987 by the V Addl. Judge, City Civil Court, Hyderabad.

3. The 1st defendant/respondent herein was the tenant of the plaint schedule property since 16.05.1973. After the award was passed in favour of the petitioner by the arbitrator, Misbahuddin Khan issued a notice dt. 22.11.1987 to the respondent directing him to pay the rent with all arrears to the petitioner. The petitioner also issued a notice on 13.10.1988 to respondent informing about the transfer of title to it. In the same letter, petitioner determined the lease of respondent on the ground that the latter had committed breach of the terms of the lease by (i) making unauthorised constructions, (ii) sub-letting to the State Bank of Hyderabad and also (iii) on the ground of non-payment of arrears of rent. In the said notice, the respondent was directed to handover possession of the plaint schedule property on expiry of the tenancy month ending on 15.12.1988 and if it did not do so, the petitioner stated that it would be liable for eviction and damages for use and occupation at the rate of Rs. 21,000/- per month.

4. The petitioner thereafter filed the above suit for eviction of the respondent seeking damages for use and occupation, arrears of rent and costs.

5. A written statement was filed by respondent contending that it is a Society registered under the A.P. (Telangana Area) Public Societies Registration Act, 1350 Fasli; that Misbahuddin Khan offered to donate the plaint schedule property to enable the respondent to establish an educational institution permanently and orally gifted it to the respondent on 01.10.1975; since then, the respondent is in peaceful possession and enjoyment of the property as owner thereof; that Misbahuddin Khan later confirmed the oral gift by a letter dt. 14.09.1980; and therefore, the respondent had not paid any rents since 01.10.1975 onwards. Even otherwise, the respondent pleaded that it had acquired title to the plaint schedule property by adverse possession and so, the petitioner had no authority to evict the respondent. It also contended that the termination of lease by petitioner is null and void as petitioner is not its landlord. It was denied that there was a landlord and tenant relationship between petitioner and respondent.

6. By judgment dt. 05.09.1998, the suit was decreed directing the respondent and the State Bank of Hyderabad to deliver possession of the plaint schedule property to petitioner and also for damages and costs.

7. Aggrieved thereby, the respondent filed appeal CCCA. No. 182 of 1998 in the High Court of Andhra Pradesh. The said appeal was allowed on 31.12.1999.

8. Challenging the same, petitioner filed Civil Appeal No. 6345 of 2000. The said appeal was allowed on 18.05.2007 and the judgment of the trial court was confirmed.

9. Thereafter, the petitioner filed EP. No. 90 of 2007 under Order XXI Rule 35 CPC for delivery of possession of the plaint schedule property and other reliefs. The respondent filed a counter opposing the delivery of possession to petitioner.

10. The respondent also filed EA. No. 550 of 2007 under Order XXVI Rule 9 CPC r/w Order XXXIX Rule 7 for appointment of an Advocate-Commissioner to identify the plaint schedule property in Sy. No. 55 of Baghlingampally, Hyderabad with specific reference to the land leased to the respondent under registered deed of lease dt. 01.01.1998 admeasuring Acs.2.10 gts. and 74 Sq.yds. and the land withdrawn from acquisition in favour of the respondent, admeasuring Acs. 1.20 gts. in G.O.Ms. Dt. 19.10.1978, including the land in Sy. No. 55 lost for road widening, if necessary, by taking assistance from a surveyor of A.P. Housing Board as well as from the Department of Survey, Settlement and Land Records.

11. In the affidavit filed in support of this application, it is the contention of respondent that the plaint schedule property was never in possession of Misbahuddin Khan so as to enable him to offer the same to the petitioner as a capital investment in the alleged partnership; that the petitioner had played a fraud on the court in regard to the plan annexed to the amended plaint; that the plaint schedule property was sought to be acquired under the provisions of the Land Acquisition Act, 1894 along with other property; as per the award dt. 13.12.1975 filed by respondent, Misbahuddin Khan claimed 7291.55 Sq.yds. in Sy. No. 55 and also claimed land value at the rate of Rs. 125/- per sq.yd. as compensation for a portion of the building on the western side, wherein the respondent was in occupation, without giving any measurements of the alleged constructed area; that his brother Ghousuddin Khan claimed 9207 Sq.yds. and constructed area of 1530 sq.yds.; their total claim was only in respect of 16,498.55 sq.yds. equivalent to Acs. 3.37 gts.; but the plaint plan incorrectly shows that the claim of the brothers was for 5278 sq.yds. each; the actual building existing then was totally different from what is claimed by the decree-holder on the basis of the alleged plaint plan; that under GO. Ms. No. 40/A dt. 19.10.1978, an area admeasuring Acs. 1.20 gts. was released by the State in favour of the respondent from acquisition in favour of the respondent; the A.P. Housing Board had also executed a registered lease deed in favour of respondent for an area of Acs. 2.10 gts. on 01.01.1998; and if the area as shown in the plaint plan is to be accepted, then the balance constructed area after deducting the above extents would be only 534.96 sq.yds. and not 780 sq.yds. shown in the plan. It is further contended that the boundaries of the area admeasuring Acs. 1.20 gts. released in favour of the respondent from acquisition are not available and the petitioner cannot claim that plaint schedule property falls within this area. It is further contended that the respondent had an existing building not only on the land which originally belonged to Misbahuddin Khan but also on the land of Ghousuddin Khan and others admeasuring Acs. 1.20 gts.; in the registered lease deed executed by the Housing Board in favour of respondent, the existing college was shown as the northern boundary; so everything towards the South of the building shown in

the plaint plan was acquired by the A.P. Housing Board and then leased out to the respondent independently; that these facts were suppressed and fraud was played upon the Court; and unless and until the exact area admeasuring Acs. 1.20 gts., which was released in favour of the respondent, is identified in juxtaposition with the actual area leased under the lease deed dt. 01.01.1998 by the A.P. Housing Board, the true facts cannot be culled out; and therefore, an Advocate-Commissioner should be appointed and a survey be conducted as sought.

12. The petitioner opposed this application contending that the executing court cannot go behind the decree, that the respondent is not entitled to raise the above pleas; that this issue was not raised at any time either in the trial court, High Court or in the Supreme Court; therefore, they cannot be allowed to raise this issue at this stage; and that under the guise of appointment of Advocate-Commissioner, the petitioner cannot be allowed to re-open issues which have attained finality with the judgment of the Supreme Court and dispute the identity of the property which was subject matter of the suit. It was further contended that any release of properties from acquisition would result in reversion of title to the owners, i.e., Misbahuddin Khan and Ghousuddin Khan, and the respondent cannot claim any benefit of the same. It was specifically contended that the Acs. 1.20 gts. of land which is the subject matter of the lease is the open area used as play ground and the northern side thereof is the existing college building; that the respondent had obtained on rent the place, building and appurtenant land for the purpose of running its educational institution; and that the respondent cannot be allowed at this stage to urge that the property which was available with Misbahuddin Khan could not have been offered as a capital investment in the partnership firm.

13. Before the Court below, the respondent marked Exs. P. 1 to P. 4 and the petitioner marked Exs. R. 1 to R. 11.

14. By order dt. 14.03.2008, the Court below allowed the EA. No. 550 of 2007. It held that the award passed by the Land Acquisition Officer Ex. P. 1 dt. 13.12.1975 would show that the entire land of Misbahuddin Khan was acquired by the State and compensation was paid; that prima facie, the question of offering a portion of the said property by Misbahuddin Khan, as a partnership asset, as capital investment does not arise; and therefore, it is a fit case to investigate the identity of the property before passing an order of delivery of possession. The Court however observed that the allegation of the respondent that the petitioner played a fraud or not (by allegedly suppressing the extent of property originally acquired from Misbahuddin Khan), cannot be decided while dealing with this EA, and that there was no finding in the suit as to the acquisition and de-requisition of any part of the land which is the subject matter of the suit, in OS. No. 161 of 1989. It therefore directed the appointment of an Advocate to conduct the survey as sought by the respondent.

15. Challenging the same, this Revision is filed by the petitioner/decree-holder.

16. Heard Sri B. Adinarayana Rao, Senior Counsel for the petitioner and Sri Sunil B. Ganu, counsel for the respondent.

17. The counsel for petitioner contended that no dispute as to identity of the plaint schedule property was raised by respondent at any time previously in the Suit, First appeal or in the Civil Appeal; that the executing court cannot go behind the decree; that the application for appointment of Advocate-Commissioner filed by the respondent in the execution proceedings is only to aid its plan to create a doubt as to the identity of the property, and facilitate it to persuade the executing court to go behind the decree; that this is impermissible in law; and therefore, the order of the Court below deserves to be set aside as it is vitiated by error in the exercise of jurisdiction vested in it. He also placed reliance upon the judgment of the Apex Court in Satyawati Vs. Rajinder Singh and Another,

18. The counsel for respondent on the other hand contended that petitioner has not disputed about the attempt to acquire the land of Misbahuddin Khan, or the withdrawal from acquisition by the State in 1978 of a portion of the acquired land, in which the respondent was housed; that the facts pleaded by the respondent in the EA clearly demonstrate that the petitioner played a fraud on the Court in securing the decree; that the appointment of an Advocate-Commissioner is a step in the process to aid the respondent to show that Misbahuddin Khan had no title to the plaint schedule property; that the Court below had given cogent reasons for allowing the said EA and therefore, the CRP be dismissed. He also placed reliance o Haji Sk. Subhan Vs. Madhorao, and S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others,

19. I have noted the submissions of both sides.

20. It is settled law that an executing court cannot go behind a decree. This is declared by the apex court in several decisions. In Kanwar Singh Saini Vs. High Court of Delhi, , the Supreme Court held:

25. It is a settled legal proposition that the executing court does not have the power to go behind the decree. Thus, in absence of any challenge to the decree, no objection can be raised in execution. (Vide State of Punjab and others Vs. Mohinder Singh Randhawa and another,

21. In Darshan Singh Vs. State of Punjab, , the Supreme Court reiterated this principle and held that unless the decree is a nullity or passed by a court without jurisdiction, it cannot be questioned.

22. In the present case, the Supreme Court had rejected the plea of the respondent that it became the owner of the plaint schedule property by virtue of a hiba/oral gift in its favour by Misbahuddin Khan or by adverse possession. Thus it upheld the title of Misbahuddin Khan. By raising in execution proceedings, the question whether Misbahuddin Khan had the right to alienate the plaint schedule property to

petitioner, respondent is now trying to question the correctness of the decision of the Supreme Court wherein the title of Misbahuddin Khan was upheld. This would amount to a collateral attack on the judgement of the Supreme Court which is impermissible. It is not as if the acquisition proceedings or the de-notification proceedings were not within the knowledge of the respondent. The respondent in its written statement at para. 17 had specifically adverted to the same.

23. Therefore, I am of the opinion that the plea now raised by respondent in its counter in the EP and in the EA filed by it, might and ought to have been raised by it, at the time when the suit was pending. Therefore, the principle of constructive res judicata would apply and the respondent is precluded from raising such a plea in the execution proceedings and collecting evidence to establish the said plea by seeking appointment of an Advocate-Commissioner.

24. In Kamlabai and Others Vs. Mangilal Dulichand Mantri, the Supreme Court held:

28. The next question which is of some importance is about raising of the objections at the earlier stage. Admittedly when the award was filed in the court, notice was served and no objection was raised. It the tenant intended to raise the objection that this decree on the basis of the award could not be passed as it was in contravention to clause 13 of the Rent Act and therefore was absolutely without jurisdiction, such an objection could have been raised there and then. The tenant admittedly did not raise this objection which was open to him. In this view to the matter, the contention on behalf of the appellant about the constructive res judicata also is of some significance. This question of constructive res judicata in execution proceedings came before this Court in Mohanlal Goenka v. Benoy Krishna Mukherjee. In this decision following the earlier decision of the Privy Council, this Court ruled that the principles of constructive res judicata will be applicable even in execution proceedings.

25. In Bharmappa Nemanna Kawale and another Vs. Dhondi Bhima Patil and others, the Supreme Court held that a judgment-debtor cannot be allowed to raise a plea at the time of execution that he was a tenant under the Bombay Tenancy and Agricultural Lands Act, 1948, when a decree for eviction was passed against him holding that he was not a tenant.

26. In Barkat Ali and Another Vs. Badri Narain (D) by LRs., the Supreme Court held:

13. The principles of res judicata not only apply in respect of separate proceedings but the general principles also apply at the subsequent stage of the same proceedings also and the same court is precluded to go into that question again which has been decided or deemed to have been decided by it at an early stage.

14. In Arjun Singh v. Mohindra Kumar it was observed as follows: (AIR pp. 999-1000, paras 10-11)

10. ... Scope of principle of res judicata is not confined to what is contained in Section 11 but is of more general application. Again, res judicata could be as much applicable to different stages of the same suit as to findings on issues in different suits. ...

11. ... where the principle of res judicata is invoked in the case of the different stages of proceedings in the same suit, the nature of the proceedings, the scope of the enquiry which the adjectival law provides, the decision being reached, as well as the specific provisions made on matters touching such decision are some of the material and the relevant factors to be considered before the principle is held applicable.

15. In Satyadhyan Ghosal v. Deorajin Debi it was observed as follows: (AIR pp. 943-44, para 8)

8. The principle of res judicata applies also as between two stages in the same litigation to this extent that a court, whether the trial court or a higher court having at an earlier stage decided a matter in one way will not allow the parties to re-agitate the matter again at a subsequent stage of the same proceedings.

27. In view of this legal position, the respondent cannot be allowed to plead in the execution proceedings that petitioner''s predecessor in title, Misbahuddin Khan had no right in the plaint schedule property and could not have alienated it to the petitioner and seek to collect evidence in support of such a plea by getting an Advocate Commissioner appointed.

28. In Haji Sk. Subhan Vs. Madhorao, , cited by the counsel for the respondent, a decree for possession of property on the basis of a proprietary right was passed in ignorance of the passing of M.P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950. The Supreme Court held that in such a situation the principle that the executing Court cannot go behind the decree would not apply. It held that the effect of the provisions of the Act was to deprive the respondent of his proprietary rights, including the right to recover possession of the land in the suit and as such the executing Court was entitled to refuse to execute the decree, holding that it has become in executable on account of change in the law and its effect. In the present case, the situation is entirely different. There is no statute which had taken away, prior to decree, the title of the petitioner in the land or his right to recover possession thereof. Therefore, the said decision has no application.

29. As regards the plea of fraud raised by the respondent, by merely alleging fraud and suggesting that the petitioner somehow misled the Court, one cannot seek to get over an order of eviction passed by the Supreme Court.

30. It is no doubt true that in S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, cited by the counsel for respondent, the Supreme Court held that a decree or judgment obtained by fraud is a nullity and can be questioned

even in collateral proceedings. In that case, an application for final decree in a partition suit was opposed on the ground that the preliminary decree had been obtained by fraud. The trial court accepted the said plea and dismissed the application for grant of final decree. The High Court allowed the appeal from the judgment of the trial court. The Supreme Court reversed the said decision on the ground that the predecessor-in-interest of the plaintiff by name Jagannath had purchased at a Court auction, the properties in dispute which belonged to the appellants on behalf of the decree holder Sowcar, as a Benamidar of the decree holder. By a registered deed dt. 25.11.1945, Jagannath relinquished all his rights in the property in favour of Sowcar. Thereafter, the appellants, who were judgment debtors, had paid the total decretal amount to Sowcar. So Sowcar was no longer entitled to the property which he had purchased through Jagannath. Without disclosing that he had executed a release deed in favour of Sowcar, Jagannath filed the suit for partition of property and obtained a preliminary decree. During the pendency of the suit, the appellants did not know that Jagannath had no locus standi to file the suit because he had already executed a registered release deed, relinquishing all his rights in respect of the property in dispute in favour of Sowcar. It was only at the hearing of the application for final decree that the appellants came to know about the release deed; so they challenged the application on the ground of nondisclosure on the part of Jagannath that he was left with no right in the property in dispute; that this vitiated the proceedings; and as such, the preliminary decree obtained by Jagannath by playing fraud in the Court was a nullity. The Supreme Court accepted the said plea and held:

5. ... ... The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, who''s case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

31. The said principle has no application to the present case since the plea of fraud was raised in the above case, not at the time of execution proceedings, but during the pendency of the suit, before the passing of final decree. The appellants therein had no knowledge of the fraud prior to passing of preliminary decree. But in the present case, such a plea is being raised for the first time in execution proceedings by seeking to rely upon certain proceedings for acquisition of property belonging to Misbahuddin Khan, although the respondent was fully aware of the acquisition and de-notification proceedings during the pendency of the suit (as mentioned in para. 17 of the Written Statement).

32. In Satyawati Vs. Rajinder Singh and Another, relied upon by the counsel for the petitioner, a decree for possession passed in favour of the appellant by the District Judge, Faridabad, had become final. When the execution petition was filed, the executing court rejected it observing that the decree was not executable because of some contradictory reports of a local Commissioner. The judgment in favour of the plaintiff was delivered by considering a report dt. 17.09.1989 and a sketch of the land in question made by the local Commissioner, but the executing court, on the basis of some other reports dismissed the EP as not executable and this was confirmed by the High Court. The Supreme Court set aside the decision of the executing court and the High Court holding that the executing court ought not to have considered other factors and facts which were not forming part of the judgment and decree passed in favour of the appellant. It held:

12. It is really agonising to learn that the appellant-decree-holder is unable to enjoy the fruits of her success even today i.e. in 2013 though the appellant-plaintiff had finally succeeded in January 1996. As stated hereinabove, the Privy Council in General Manager of the Raj Durbhunga v. Coomar Ramaput Sing had observed that the difficulties of a litigant in India begin when he has obtained a decree. Even in 1925, while quoting the aforestated judgment of the Privy Council in Kuer Jang Bahadur v. Bank of Upper India Ltd. the Court was constrained to observe that: (AIR p. 448)

Courts in India have to be careful to see that the process of the Court and the law of procedure are not abused by judgment-debtors in such a way as to make courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.

13. In spite of the aforestated observation made in 1925, this Court was again constrained to observe in Babu Lal Vs. Hazari Lal Kishori Lal and Others,

29. Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree-holder starts in getting possession in pursuance of the decree obtained by him. The judgment-debtor tries to thwart the execution by all possible objections.

14. This Court, again in M/s. Marshall Sons and Co. (I) Ltd. Vs. M/s. Sahi Oretans (P) Ltd. and Another, was constrained to observe in para 4 of the said judgment that: (SCC p. 326)

4. ... it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and, on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue

advantage and a person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes a long time.

15. Once again in Shub Karan Bubna @ Shub Karan Prasad Bubna Vs. Sita Saran Bubna and Others, this Court observed as under: (SCC p. 699)

27. In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant.

16. As stated by us hereinabove, the position has not been improved till today. We strongly feel that there should not be unreasonable delay in execution of a decree because if the decree-holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain.

33. These observations, in my opinion, apply on all fours, to the present case. Although the petitioner had succeeded on 18.05.2007 in Civil Appeal No. 6345 of 2000, 6 1/2 years later, it is still unable to enjoy the fruits of the decree because of the untenable pleas raised in the counter to the execution petition by the respondent and filing of EA. No. 550 of 2007 by it. The respondent cannot be allowed to circumvent the decree of eviction granted by the Supreme Court by raking up fresh issues as to title of the petitioner in the execution proceedings and stalling the same. In this view of the matter, I am of the opinion that the order dt. 14.03.2008 in EA. No. 550 of 2007 in EP. No. 90 of 2005 in OS. No. 161 of 1989 of the Court below is unsustainable. It is accordingly set aside. The Civil Revision Petition No. 1940 of 2008 is allowed accordingly. No costs.