

(2016) 03 KAR CK 0258

In the Karnataka High Court

Case No : Writ Petition Nos. 42434-435/2015 (GM-CPC)

Gangahutchaiah

APPELLANT

Vs

Jayamma and Others

RESPONDENT

Date of Decision : 17-03-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 18, Order 21 Rule 11, Order 21 Rule 35, Section 151, Section 54

Citation : (2016) 03 KAR CK 0258

Hon'ble Judges : Aravind Kumar, J.

Bench : Single Bench

Advocate : Vigneshwar S. Shastri, Advocate, for the Appellant; M.B. Chandra Chooda, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Aravind Kumar, J.—1. Heard Sri Vigneshwar S. Shastri, learned counsel appearing for the petitioner and Sri M B Chandra Chooda, learned counsel appearing for respondents 1 and 2. 3rd respondent is reported to be dead and petitions stand abated.

2. Respondents 1 and 2 in order to enjoy the fruits of the decree passed in O.S. No. 166/96 have filed the execution petition No. 59/12. During the pendency of the execution petition, Judgment debtor filed an interlocutory application under Section 151 CPC to examine the issue regarding the maintainability of the execution petition as per Annexure "D". The decree holder filed interlocutory application under Section 151 CPC seeking for direction to the jurisdictional police to extend protection to execute the delivery warrant as per Annexure "F". These two applications came to be examined by the Court below and by a common impugned order dated 18.09.2015 - Annexure "H", application filed by the decree holder came to be allowed while the application filed by the judgment debtor came to be rejected. Hence, the present Writ Petitions have been filed by the judgment debtor challenging both orders.

3. It is the contention of the Mr. Shastri, learned counsel appearing for the petitioner that execution petition filed under Order 21 Rule 11 of CPC is not maintainable since final decree having been drawn in FDP 11/2002. He would also submit that grievance of the parties to final decree proceedings, if any, has to be addressed by the same Court adjudicating the final decree proceedings and as such, independent or separate Execution proceedings could not have been filed and as such it was liable to be rejected. Non-consideration of this vital aspect by the trial Court according to Mr. Shastri has resulted in an erroneous order being passed by the Court below. Hence, he prays for allowing the writ petition by dismissing the execution petition.

4. Per contra, Sri Chandra Chooda - learned counsel appearing for the respondents would justify and support the impugned order. In support of his submissions, he has relied upon the Judgment of the Apex Court in CHINTAMAN vs. SHANKAR AND OTHERS ((1999) 1 SCC 76).

5. Having heard the learned advocates appearing for the parties and on perusal of the records, it would clearly indicate that deceased 3rd respondent herein had filed a suit in O.S. 166/96 for the relief of partition and separate possession. Said suit came to be decreed by judgment and decree dated 27.02.2002 - Annexure "A" and it was affirmed by the First Appellate Court as well as in Second Appeal and it has reached finality. There is no dispute with regard to this fact. Subsequently, final decree proceedings was initiated by the deceased 3rd respondent in FDP 11/2002 i.e., plaintiff. Pursuant to the same, final decree is said to have been drawn on the requisite non-judicial stamp paper furnished by the parties. The said Chikkamma had filed Execution No. 78/07 and obtained possession through the process of the Executing Court is also not disputed by the writ petitioner herein. Defendants 1 and 2 in O.S. 166/96 alleging that they have not been delivered possession of the property, of the share allotted to them in final decree proceeding No. 11/02 filed an execution petition which was numbered as Execution Case No. 59/12 which is the subject matter of the present writ petition. Records do not disclose that the Tahsildar/Taluka Surveyor appointed by the Court, adjudicating the Final Decree Proceeding FDP 11/2002 had submitted the report for having delivered possession of the properties allotted to respective sharers. It is because of this precise reason i.e., non delivery of possession that the deceased plaintiff i.e., deceased Chikkamma had filed Execution Petition No. 78/2007 in which the present writ petitioner was also a party and undisputedly possession of the property allotted to his share in FDP 11/2002 came to be delivered in the said execution proceedings.

6. A bare reading of Order XX Rule 18 would indicate that, Where the Court passes a decree for the partition of property or for the separate possession of a share therein and insofar as the decree relating to estate assessed to the payment of revenue to the Government, the decree should not only declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector or any gazetted subordinate

of the Collector deputed by him in this behalf, in accordance with such declaration read with Section 54 of CPC.

Insofar as the State of Karnataka is concerned, Section 54 has been amended by Act 36 of 98 and it reads as under:

"54. Partition of estate or separation of share:-Where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Government, or for the separate possession of the share of such an estate shall be made by the Court in accordance with the law if any, for the time being in force relating to the partition or the separate possession of shares, and if necessary on the report of a Revenue Officer, not below the rank of Tahsildar or such other person as the Court may appoint as Commissioner in that behalf".

A perusal of the above provision would clearly indicate that where the decree is for partition of an undivided estate assessed to the payment of revenue, the partition of the estate or the separation of the share shall be made by the Court, and, if necessary, on the report of a Revenue Officer who shall not be below the rank of Tahsildar or such other person as the Court may appoint as a Commissioner in that behalf.

7. Taking note of this provision, the Court adjudicating the final decree proceeding in FDP 11/02, had appointed the Taluka Surveyor as the Court Commissioner who submitted report and same came to be accepted on account of respondents 1 and 2 herein not disputing the report as also deceased Chikkamma indicating their no objection for same being accepted. As such, report came to be accepted and final decree was drawn pursuant to Commissioner's report. The writ petitioner herein does not assert or contend in the present writ petition to the effect that in the said final decree proceeding, possession of the respective shares so demarcated, possession was delivered to the respective sharers. At the cost of repetition, it requires to be noticed at this juncture itself, that possession was not delivered to deceased Smt. Chikkamma and as such he had filed Execution Petition No. 78/07 where under he took possession of the property to the extent of share allotted to him under the final decree. On account of possession having not been delivered to decree holders, they filed E.P. No. 59/2012, seeking delivery of possession of properties allotted to their share in FDP 11/2002, the maintainability of which is questioned in this Writ Petition.

8. Hon"ble Apex Court in the case of Chintaman vs. Shankar ((1999) 1 SCC 76) has held that, "Where possession has not been delivered, execution petition or application if any, filed by a sharer seeking possession of such property, then such application is to be construed as one filed under Order XXI Rule 35 CPC seeking decree for delivery of possession of immovable property". It has been held that Executing Court cannot reject such application as not maintainable. It came to be held by the Apex Court to the following effect:

"6. In view of the appellant. Even though the decree was passed as early

as in 1968, unfortunately still the appellant has not been put in possession of his 6 acres 20 gunthas. It is true that the appellant moved the executing court under Order 21 Rule 35 seeking execution of that decree in 1980 and in that application, he stated that he was put in possession but Defendants 1 and 2 were obstructing his possession.....

8. This order was challenged by Respondent 1 before the High Court in civil revision application. The learned Judge of the High Court took the view that when the final decree in a partition suit is passed, such an application before the executing court was not maintainable. Only on this short ground, the order of the trial court was set aside. That is how the appellant is before the order of the trial court was set aside. That is how the appellant is before us.

9. Now it is obvious that once the partition decree has been passed as per Order 20 Rule 18, Section 54 of the CPC of the directly gets attracted and when the grievance of the appellant was found well established on record by the trial court that the Collector had not put the appellant in possession of his share of the property and only the plaintiff's 2/3rds share was carved out and put in possession of the plaintiff, it is obvious that the applicant's application was a sort of a reminder to the trial court to direct the Collector to complete his work under Section 54 as per the final decree. It was, strictly speaking, not an application under Order 21 Rule 35. To that extent, the learned Judge of the High Court was right. But that is not the end of the matter. Further question remains as to whether the ultimate order of the trial court was justified on facts or not. It is found as a fact that the appellant was actually not put in possession of his 6 acres 20 gunthas decreed to him as early as in 1968 and that finding was never challenged before the High Court by the appellant. In the light of this well-established factual position on record, it must be held that despite the decree of 1968 decreeing 6 acres 20 gunthas of land in favour of the appellant and the direction contained in the decree itself as per Order 20 Rule 18 calling upon the Collector to effect partition of the landed property as mentioned in the first part of para 6 of the decree, it was not complied with by the Collector. The trial court was, therefore, perfectly justified in issuing further direction to the Collector for completing the task which unfortunately has remained incomplete for 30 years by now. Under these circumstances, there is no escape from the conclusion that the appellant must be permitted to be put in possession of the land which was already decreed in his favour years back in 1968 by the civil court and which decree, we are told, has become final as no higher court has upset that decree. Consequently, this appeal is allowed. The judgment and order of the learned Single Judge of the High Court are set aside and the order passed by the learned trial Judge is restored. No order as to costs."

9. In the light of the dicta laid down by the Hon"ble Apex Court cited above when the facts on hands are examined, it would clearly indicate that it is neither the case of the writ petitioner nor the case of respondents 1 and 2 that in the final decree proceeding, possession came to be delivered to sharers who were allotted

respective shares in FDP 11/2002 either by the Taluka Surveyor or the Court drawing up the final decree. As such, the deceased/plaintiff had rightly initiated Execution Case No. 78/07 and took possession of property allotted to his share which was granted to in the Final Decree Proceeding No. 11/02. In the instant case, respondents 1 and 2 herein have filed execution in Execution No. 59/12 seeking for delivery of possession of their share which was granted or ordered in FDP No. 11/02, contending inter alia that possession was not delivered to them. Trial Court having considered the fact that decree holders were not delivered with the possession of the property allotted to their shares, has rightly rejected the application filed by the judgment debtor by arriving at a conclusion that execution petition is maintainable and said order did not suffer from any error. Hence, this Court is of the considered view that impugned order passed by the Executing Court does not suffer from any infirmity calling for interference. Insofar as, application filed by the decree holder for extending police help which is allowed is also justified inasmuch as the threat posed by the judgment debtors or through their agents to obstruct the decree, being executed has necessitated the Executing Court to issue such direction viz., to grant police protection. There is no error committed by the Executing Court in issuing such direction for grant of police help.

10. In that view of the matter, for the reasons stated herein above, I proceed to pass the following:

ORDER

(i) Writ Petitions are hereby dismissed.

(ii) The order dated 18.09.2015 passed by the 2nd Addl. Civil Judge and JMFC, Tumkur in Execution Petition No. 59/2012 as per Annexure - "A" stands affirmed.

(iii) Costs made easy.

In view of Writ Petitions having been dismissed on merits, I.A. 1/16 for vacating stay does not survive for consideration and it stands rejected.