

(1984) 12 KAR CK 0044
In the Karnataka High Court
Case No : Ex. S.A. No. 26 of 1977

Gundappa Achari

APPELLANT

Vs

Seshappa Upadhyaya

RESPONDENT

Date of Decision : 07-12-1984

Acts Referred:

Karnataka Land Reforms Act, 1961 — Section 112, 133, 2 (20), 2 (3)

Citation : (1985) ILR (Kar) 283 : (1985) 1 KarLJ 362

Hon'ble Judges : Kulkarni, J

Bench : Single Bench

Advocate : K.I. Bhatta, for the Appellant; B.P. Holla, for R-1 and R-2, for the Respondent

Final Decision : Dismissed

Judgement

Kulkarni, J.

1.This second appeal by judgment-debtor-2. Gundappa Achari is directed against the order dated 19-2-1977 passed by the Civil Judge, Udupi , in Execution Appeal No. 9 of 1976 affirming the order dated 18-10-1976 passed by the Munsiff, Coondapur, in R. E.P. No. 158 of 1966 over-ruling the objections of judgment debtor-2 and ordering the execution to proceed.

The material facts leading to the case are as under :-

S.No. 83/13 of Pandeswar village measuring 24 cents originally belonged to one Kasi Holla. The said owner Kasi Holla granted on mulgeni the said 24 cents of land to one Subraya Aksali, the father-in-law of judgment debtor-2, under a deed dated 9-12-1912, with a condition that the mulgeni tenant Subraya Aksali should not transfer his rights to any one. The mulgani tenant Subraya Aksali executed a registered deed of settlement on 28-3-1939 in favour of his wife Sarasamma and his only son Krishnaya Achari and retained for himself the right to enjoy the said property-during his life time. The said settlement was to take effect after the death of the mulgeni tenant Subraya Aksali, Krishnaya Achari the only son of the

mulgeni tenant Subraya Aksali released all his right, title and interest in the said property in favour of his mother Sarasamma under a registered release deed dated 28-8-1941. Thereafter Sarasamma and her husband Subraya Aksali sold their rights in the eastern 16 cents to their daughter Minakshi on 24-11-1941. The said Minakshi was put in possession of the eastern 16 cents. The western 8 cents were bifurcated from the eastern 16 cents by means of a fence. Minakshi continued to be in possession and enjoyment of the suit property i.e. eastern 16 cents for some time. Thereafter the said Minakshi sold the eastern 16 cents to her father Subraya Aksali (original mulgeni tenant) on 1-5-1945 for Rs. 300/- and he was put in possession of the same. He continued to be in possession thereof till his death on 30-8-1946. After the death of the said Subraya Aksali on 30-8-1946, his only son Krishnaya Achari succeeded to his interest as the sole heir of Subraya Aksali. They were governed by Hindu Mitakshara Law. The said Krishnaya Achari sold the property in question on 27-2-1947 in favour of one Narayana Bhatta for Rs. 500/-. The said Narayana Bhatta in turn assigned his mulgeni right in favour of Narasimha Upadhyaya on 19-1-1950 under a registered deed. The present decree holder is the son of Narasimha Upadhyaya.

2. Narasimha Upadhyaya filed a suit-O.S. No. 396/58 on the file of the Munsiff, Coondapur, against the present judgment debtor-2 Gundappa Achari, Sarasamma, Krishnaya Achari and others, for a declaration that the suit property belonged to him and that the sale deed dated 5-2-1947 was invalid and was not binding on the plaintiff and for possession of the suit properties from the defendants.

3. It is the case of judgment-debtor-2 that he purchased the mulgeni rights in the entire 24 cents from his mother-in-law Sarasamma under a deed dated 5-2-1947. Thus he claimed permanent tenancy rights not only in the suit property but also in the western 8 cents of area.

4. The said suit was decreed on 30-9-1963 declaring that the plaintiffs are the mulgeni tenants of the eastern 16 cents in S. No. 83/13 and ordering the present judgment-debtor-2 and another to hand over possession of the suit property to plaintiff-2 for and on behalf of the plaintiffs and ordering defendant-2 to pay past mesne profits as well as to pay future mesne profits. There was no appeal against the said judgment and decree in O.S.No. 396/1958. The said decree became final. The certified copy of the decree in the said suit is found in the papers relating to Writ Petition No. 4123 of 1976.

5. The decree holder sued out execution in R.E.P. No.158 of 1966 to recover possession of the property. In that execution, judgment debtor-2 contended that he was a tenant of the suit property and that he was also a deemed tenant. The said objections were over-ruled. The matter ultimately came up in Execution Second Appeal No. 87 of 1972 which was filed by the present Judgment debtor-2. It was dismissed.

6. Again judgment debtor-2 has asserted that he is a tenant in respect of the suit

land and that he is a permanent tenant thereof or for atleast he is a deemed tenant thereof and that the suit land has vested in the Government and that the suit land is an agricultural property and all these questions according to him, will have to be gone into only by the Tribunal as required by Section 133 of the Karnataka Land Reforms Act. The Munsiff by his order dated 18-10-1976 overruled all the said contentions. Judgment-debtor-2 approached the Civil Judge with Execution Appeal No. 9 of 1976. That Execution Appeal was also dismissed. Hence this second appeal.

7. The narration of the said facts above would go to show that the original permanent tenant Subraya Aksali and his wife Sarasamma sold the suit property to their daughter Minakshi on 24-11-1941. Thus on account of the said deed executed by the original permanent tenant Subraya Aksali and his wife Sarasamma in respect of the suit land, they lost all right, title and interest in the suit eastern 16 cents. It is undisputed that Minakshi has sold away her right, title and interest in favour of her own father Subraya Aksali on 1-5-1945. Thus as on 1-5-1945 the original permanent tenant got back his permanent tenancy rights in the suit 16 cents. Thus Subraya Aksali became the only permanent tenant of the suit 16 cents again with effect from 1-5-1945. As on 1-5-1945, Sarasamma had no subsisting interest in the suit property at all. It becomes clear from the judgment in O.S. No. 396/1958 that Subraya Aksali died on 30th August, 1946. The date of death is not disputed before me. The Hindu Womens' Right to Property Act, 1937, was amended by Madras Act No. 26/47 and that Act was given retrospective effect with effect from 26-11-1946. By this amending Act, the Hindu Womens' Right to Property Act, 1937, was made applicable also to agricultural lands. As already stated above, Subraya Aksali died on 30th August, 1946, i.e. much earlier to the said Madras Act coming into force with effect from 26-11-1946. Therefore Sarasamma, the widow of Subraya Aksali was not entitled in law to get the benefit under the said Madras Act. Admittedly the said Subraya Aksali and his family members are governed by the Hindu Mitakshara law. Under the Madras law as it stood then, the widow had no share at all in the property left by her husband. The mother also was not in law then prevailing in Madras area, entitled to get any share in the property of her son.. Thus Sarasamma could not succeed to the property of her husband Subraya Aksali who died on 30th August, 1946. It is un-disputed that Krishnaya Achari is the only son of Subraya Aksali and his wife Sarasamma. Therefore under the Hindu law prevailing at that time, he was the only heir entitled to succeed to the property of his father Subraya Aksali. Therefore Krishnaya Achari exclusively succeeded to the permanent tenancy rights in the suit 16 cents. Sarasamma, as already shown above, had no subsisting interest in the suit property at all. Therefore as held in O.S. No. 396/1958, the sale deed executed by Sarasamma in favour of her son-in-law judgment-debtor-2 regarding the said 16 cents was absolutely invalid and did not convey any interest to Gundappa Achari. Therefore Gundappa Achari did not get any right at all in the said 16 cents notwithstanding the execution of the sale deed by his mother-in-law Sarasamma in his favour. The judgment in O.S.

No. 396/1958 which was decreed in entirety, has declared that the sale deed executed by Sarasamma in favour of her son-in-law judgment-debtor-2 was invalid and did not convey any interest to him at all in the suit property. The judgment in O.S. No. 396/1958 has declared that Narasimha Upadhyaya who died during the pendency of the suit, and his sons including the present decree holder had got the exclusive permanent tenancy rights in the said 16 cents.

8. As already stated above, the judgment and decree in O.S. No. 396/1958 not having been appealed against by judgment-debtor-2 or any one else, have stood the test of time and have become final. The sum and substance of the judgment in O.S. No. 396/1958 is that the present judgment debtor-2 is a pure and simple trespasser in respect of the suit 16 cents and that he is in unlawful possession of the suit property without having any right to hold the same. Further judgment debtor-2 had contended in the present execution Petition itself that he was a tenant, permanent tenant or a deemed tenant and that these issues could be decided only by the Tribunal. The said contentions were over-ruled. Even in Execution Second Appeal No. 87/1972 which arose out of the present execution and against the order passed rejecting the contention of judgment debtor-2, it was held that judgment debtor-2 was neither a tenant nor a permanent tenant nor a deemed tenant at all in respect of the suit property. That Second Appeal was disposed of on 13-6-1974 i.e. after the Karnataka Land Reforms Amendment Act No. 1 of 1974 came into force with effect from 1-3-1974. As already stated above, the Amending Act No. 1 of 1974 on which judgment-debtor 2 wants to place reliance now, was in force since some 3 months before the Execution Second Appeal came to be disposed of. Therefore whatever contentions were open to him under the said Amending Act No. 1/1974 ought to have been raised in the said Execution Second Appeal No. 87 of 1972. He not having raised them at that stage, cannot be permitted to raise them in the subsequent stage at all. He not having raised them in the said Execution Second Appeal is now barred from raising the present contentions. There-fore his present contentions, viz., that he is a permanent tenant or that he is a tenant or that he is a deemed tenant or that the suit property in question is an agricultural property or that the suit property has vested in the Government, are all bared by resjudicata.

9. The Learned Counsel Shri Bhatta for the appellant-judgment-debtor-2 urged that the said judgment debtor-2 had raised the contentions that he was a tenant or permanent tenant or deemed tenant or that the suit property is an agricultural property and that the suit land vested in the State Government. According to him, whether the said contentions raised by him have got any substance or not, will have to be determined by the Tribunal only u/s 133 of the Karnataka Land Reforms Act and that the executing Court which is a Civil Court, cannot go into these questions and the jurisdiction of the executing Court to decide these questions is barred by the provisions of the Land Reforms Act.

10. Merely because a person raises some contentions covered by the various provisions of the Land Reforms Act, the executing Court should not hasten to

frame issues and refer them to the Land Tribunal. That has been also the view of this Court in Poovani Poojary -v.- Narayana Bhat 1977 (1) KLJ 69 and another. It is held in the said case as :?

"An issue relating to the agricultural tenancy pleaded by one party to a suit should not be blindly framed by the Civil Court. So also an issue relating to the nature of the property in dispute, as to whether it is or not an agricultural land should not be lightly framed. Before settling such issues, the Court should exercise caution and look for particulars on the plea of tenancy or on the nature of the premises in dispute."

All these contentions could have been raised in the Execution Second Appeal No. 87 of 1972 and they were not urged by the present appellant in the said appeal. Not having done so, the present pleas raised by him, as already shown above, are barred by resjudicata. The question as to whether he is a tenant or a permanent tenant or a deemed tenant were all negatived in the said Execution Second Appeal. It has been also held in O.S. No. 396/1958 that the status of the present appellant is that of a pure and simple trespasser. Now it is rather too late for him to again raise the Court by again urging that he is a tenant, permanent tenant, or a deemed tenant or that the property in question is an agricultural property or that the property has vested in the State Government. The repeated raising of such contentions even in spite of the decree in O.S. No. 396 of 1958 and in spite of the order in Execution Second Appeal No 87 of 1972 would only show that this his attempt is nothing but to protract the proceedings for as long a period as possible. The parties have already fought well for more than quarter of a century. I am amazed at the tenacity of both the parties in this case. Judgment debtor-2 even in spite of having been vanquished in all his attempts, still wants to stick on the battle field. Therefore the present contentions of judgment debtor-2, viz., 1) that he is a tenant, 2) that he is a permanent tenant, 3) that he is a deemed tenant, 4) that the property in question is an agricultural property and 5) that the suit land has vested in the Government, are without any substance and cannot be allowed to stand the test of law at all. They are absolutely without any substance as he has been repeatedly held to be a trespasser. Therefore in view of the decision in the said Poovani Poojary's case , both the Courts below rightly refused to frame the issues relating to the points urged by judgment debtor-2 and have rightly refused to refer these issues to the Tribunal.

11. The Learned Counsel Shri Bhaatta referred me to Section 133 of the Karnataka Land Reforms Act. It reads as :-

"133 (1) Notwithstanding anything in any law for the time being in force --

(i) no Civil or Criminal Court or Officer or Authority shall, in any suit, case or proceedings concerning a land decide the question whether such land is or not agricultural land and whether the person claiming to be in possession is not a tenant of the land said from prior to 1st March, 1974 ;

(ii) such Court or Officer or Authority shall stay such suit or proceedings in so far as such question is concerned and refer the same to the Tribunal for decision ;

(iii) all interim orders issued or made by such Court, Officer or Authority, whether in the nature of temporary injunction or appointment of a Receiver or otherwise, concerning the land shall stand dissolved or vacated, as the case may be;

(iv) the Tribunal shall decide the question referred to it under Clause (1) and communicate its decision to such Court, Officer or Authority. The decision of the Tribunal shall be final.

(2) Nothing in sub-section (1) shall preclude the Civil or Criminal Court or the Officer or Authority from proceeding with the suit, case or proceedings in respect of any matter other than that referred to in that sub-section-

He also referred me to Section 112 of the Karnataka Land Reforms Act which clearly defines the duties of the Tribunal. It is no doubt true that Section 112 clearly lays down that it is the duty of the Tribunal to find out as to whether a particular person is or is not a tenant or permanent tenant or deemed tenant or as to whether the property in question is an agricultural property or not.

12. Section 112 and Section 133 require that a person claiming right should be a tenant. The word "tenant" postulates that there is relationship of landlord and tenant between the parties. If there is no relationship of landlord and tenant between the parties i.e. the plaintiff and defendant, Section 133 or Section 112 of the Karnataka Land Reforms Act, would not come into play at all. In this case, judgment debtor-2-appellant does not claim that he is a tenant under the present decree holder.

Thus, on his own admission, there is no relationship of landlord and tenant between the plaintiffs-decree holders and himself. If it is so, then the provisions of the Land Reforms Act will not come into play at all.

13. What judgment debtor-2 appellant claims is that he is a permanent tenant in respect of the suit land after having got it assigned in his favour by one Sarasamma. The decree holder, on the other hand, also claimed assignment of permanent tenancy right after having purchased it from Krishnaya Achari, son of Sarasamma who is the assignor in favour of the present judgment debtor-2. Such contentions are described as cases of rival tenancies. In the case of rival tenancies, either of the parties will be a tenant and the other would be a trespasser. Technically speaking, it is not a case of rival tenancy. Such contention would only require the determination as to which of the two parties is a tenant and as to which of them is a trespasser. In such cases, Sections 112 or 133 of the Land Reforms Act would not come into picture at all.

14. Section 2(3) of the Karnataka Land Reforms Act defines "agriculturist" as :-

""agriculturist" means a person who cultivates land personally;"

Section 2(20) of the Act defines the word "landlord" as :-

""landlord" means a person who has leased land to a tenant and includes a person entitled to receive rent from a tenant."

The word "permanent tenant" has been defined in Section 2(23) of the Act as :-

"2(23) : " "permanent tenant" means a tenant who cultivates land personally":-

a) the commencement or duration of whose tenancy cannot satisfactorily be proved by reason of antiquity of such tenancy ; or

b) whose name or the name of whose predecessors-in-title has been entered in the record of rights or any public record or in any other revenue records as a permanent tenant; or

c) who by custom, agreement or the decree or order of a Court holds the land on lease permanently ; or

d) who holds land as mulgenidar, miradar or khata kul; and includes any person whose tenancy is under the provisions of any law presumed to be co-extensive with the duration of the tenure of the landlord ; "

The word "tenant" has been defined in Section 2(34) of the Act as :--

" "tenant" means an Agriculturist who cultivates personally the land he holds on lease from a landlord and includes,--

(i) a person who is deemed to be a tenant u/s 4;

(ii) a person who was protected from eviction from any land by the Karnataka Tenants (Temporary Protection from Eviction) Act, 1961;

(ii-a) a person who cultivates personally the land on lease under a lease created contrary to the provisions of Section 5 and before the date of commencement of the Amendment Act.

(iii) a person who is a permanent tenant;

(iv) a person who is a protected tenant.

Explanation.-- A person who takes up a contract to cut grass, or to gather the fruits or other produce of any land, shall not on that account only be deemed to be a tenant."

Therefore, the underlying idea of all these definitions is that only a person who cultivates the land personally will answer the description of a tenant or a permanent tenant or a deemed tenant.

15. Admittedly judgment debtor-2 does not claim to have paid any rent to the present decree holder. At one stage, he stated that he had sent the amount by money order and the landlord refused to receive the same. The decree holders rightly refused to accept the rent because he was not their tenant at all. Therefore in view of this clear position of law, no question of tenancy at all arises

in the present execution proceedings. Therefore the question of referring the issues as to whether he is a tenant or a deemed tenant or a permanent tenant and sending them to the Land Tribunal, does not arise at all in this case.

16. Then Shri Bhatta urged that still the question remains as to whether the suit property is an agricultural property or not. According to him, this question also will have to be decided by the Land Tribunal. The description of the suit property in the various deeds under which the present decree holders have become assignees of the permanent tenancy rights or under which the present judgment debtor-2 claims to have purchased the permanent tenancy, rights, goes to show that the property is described as the eastern 16 cents containing coconut trees and a tiled house and a kottige cattle pen and a well. According to the Learned Counsel Shri Bhatta, in the first deed of 1912 under which the permanent tenancy rights were created, the property is described as a land. The Court is not concerned with the nature of the property as it stood in 1912. The Court is only concerned with the nature of the property at the time when the disputes between the parties started. The disputes between the parties started for the first time in 1947. At that time the property itself has come to be described mainly as a house site containing some coconut trees, tiled residential house, a kottige and a cattle pen and a well. Therefore the property which might be initially a land, became a house site later on, on account of the long user by the parties. Again Shri Bhatta contended that as to whether it is a house site or an agricultural property, must be determined by the Land Tribunal itself. There is no substance at all in the contentions raised and it is rather idle and waste of time to refer the issues again to the Tribunal. Tribunal at the most can decide the question only whether the property is an agricultural property. When there is absolutely and prima facie no substance at all in the contention raised, it would not be proper for the Court to encourage the litigation between the parties by unnecessarily framing an issue in this connection and by referring the same to the Land Tribunal. Further, as already stated above, this issue could have been raised by him in the Execution Second Appeal No. 87/1972. He has not raised the same. Therefore he is debarred by the principle of resjudicata from raising the same. Shri Bhatta referred me to Bhagirathi Amma and Others -v.- Land Tribunal Udupi and Others 1979 (1) K.L.J.307. It reads as :

"Even if the concerned party fails to have recourse to sub-section (1) of Section 3 to have the matter reopened or even if the application made for reopening is rejected by the Civil Court, the Tribunal is not bound by any decree or order of the Civil Court and it can investigate the genuineness of any claim of tenancy as also the reasons and circumstances under which the plea of tenancy was not raised or given up before the Civil Court and can come to its own conclusions."

This decision is based on Section 3(2) of the Karnataka Act No. 31 of 1974. It reads as :

" Notwithstanding any judgment, decree or order of any Civil Court, the Tribunal constituted u/s 48 of the Karnataka Land Reforms Act, 1961 shall enquire into

any claim for registration as occupant made by a person who was a tenant within the meaning of the said Act immediately prior to 1st March 1974 and who by reason of any such judgment, decree or order has subsequent to the said date been dispossessed of the land of which he was a tenant or is any way precluded from pleading his tenancy, and direct, if the merits of the case so warrant, that such person be registered, subject to the other provisions of the said Act, as occupant of such land"

(underlining is mine).

This Section requires that the person claiming these rights must be a tenant. It is already stated above that judgment debtor-2-appellant cannot be considered to be a tenant at all within the meaning of the Land Reforms Act, because he does not claim any relationship of landlord and tenant between the plaintiffs and himself. Further the said Section requires that there should be a dispossession. Judgment-debtor No.2 does not claim to have been dispossessed at any point of time. Therefore the said ruling will not be of any help to him.

17. The Learned Counsel Shri Bhatta urged that the question as to whether the land has become vested in the State Government, will have to be gone into by the Land Tribunal. The question of the suit property vesting in the State Government does not arise, because it has been already shown above that the suit property is nothing else but a house site. A house site cannot vest in the State Government at all. Therefore, in my opinion, there does not appear to be any substance in the contention.

18. The Learned Counsel Shri Bhatta urged that when-ever an application u/s 48A of the Karnataka Land Reforms Act for conferment of occupancy rights is filed by a tenant, the Tribunal has to go into the question as to whether the land has become vested in the State Government or not. This presupposes that the application must be filed by a tenant. If there is no relationship of land-lord and tenant, it would not be necessary for the Tribunal at all to go into the question whether the land has vested in the State Government. The question as to whether the land has vested in the State Government or not, will have to be incidentally gone into by the Tribunal while determining the application filed u/s 48A of the Karnataka Land Reforms Act. Technically u/s 112 of the Act, it is not the duty of the Tahsildar or the Land Tribunal to find out the question as to whether the land has become vested in the State Government or not. This question will have to be incidentally gone into by the Tribunal only while enquiring into the application filed u/s 48A of the Act,

19. Thus in the result, both the Courts were justified in over-ruling all the said objections or contentions raised by judgment -debtor-2. They were also justified in holding that the execution should proceed. Therefore, there is no merit in the appeal and it is accordingly dismissed. The Munsiff should proceed with the present execution itself and should proceed to pass necessary orders without any further loss of time as the matter has been pending enquiry since the last more

than quarter of a century.