
(2013) 05 KAR CK 0022

In the Karnataka High Court

Case No : Writ Petition No. 14832 of 2013 (GM-CPC)

K. Bhagyamma, K. Kumar and K. Basavaraja

APPELLANT

Vs

Smt. Parvathamma and Others

RESPONDENT

Date of Decision : 27-05-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 5, 144, 151
Land Acquisition Act, 1894 — Section 6
Limitation Act, 1963 — Section 5

Citation : (2013) 4 AKR 121 : (2013) 4 KarLJ 31 : (2013) 3 KCCR 2435

Hon'ble Judges : A.N. Venugopala Gowda, J

Bench : Single Bench

Advocate : A.V. Gangadharappa for M/s. A.V.G. Associates, for the Appellant;
Sharada H.V. Advocate for C/R1 to R3, Notice to R4 to R13, for the Respondent

Final Decision : Allowed

Judgement

A.N. Venugopala Gowda, J.—Petitioners were the plaintiffs and respondents were the defendants in O.S. No. 38/2006 in the Court of the Additional Civil Judge (Jr. Dn.,) and JMFC at Hosadurga. The suit was filed on 7.2.2006 to pass a decree declaring various sale deeds executed by the 1st defendant in favour of defendants 2 to 11 in respect of the plaint schedule properties as not binding on them and for delivery of possession of the same to them. The Trial Court passed a Judgment dated 21.10.2009 and decreed the suit. The petitioners filed Ex. Case No. 34/2010 on 21.7.2010 for issue of a direction to the judgment debtors 2 to 11, to put them in possession of the suit properties. On 31.1.2011, decree holders filed I.A. No. 1 to pass an order for delivery of possession of suit properties in their favour. Judgment debtors filed statement of objections and interalia contended that the Ex. petition having been filed based on a preliminary decree, until a final decree is drawn, the Ex. case is not maintainable. By an order dated 13.1.2012, it was held that rights of the plaintiffs has been completely determined in the suit and that there is nothing left to be decided except putting the decree holders in possession. The contention of judgment

debtors that the decree is preliminary in nature was not accepted and as a consequence, it was ordered that, if the decree holders were to take steps, there is no impediment for ordering the removal of the judgment debtors from the property and to put the decree holders in possession of the same. Office was directed to issue delivery warrant, if requisite process fee is paid. Steps having been taken, delivery warrant was issued. The same was returned unexecuted in the first instance, with a shara "for want of help of decree holders" and in the second instance with a shara "police help needed". On 9.3.2012, judgment debtors 2 to 5 submitted that they intend to prefer an appeal against the decree put in execution and sought time. Prayer was not granted. Decree holders filed I.A. No. 2 under S. 151 CPC for providing police help to execute the decree. I.A. No. 3 filed by judgment debtor No. 3, for adjournment of the case was dismissed. In view of the shara of the bailiff on the delivery warrant, I.A. No. 2 was allowed and the jurisdictional PSI was directed to render necessary assistance to the bailiff in executing the delivery warrant. Office was directed to re-issue delivery warrant, if requisite fee is deposited and was further directed to intimate the jurisdictional police accordingly. I.A. No. 4 to prepone the case and I.A. No. 5 to recall delivery warrant were dismissed on 13.1.2012, upon finding that Misc. appeal No. nil of 2012 filed by the judgment debtors has stood dismissed. As a consequence, delivery warrant with police help having been issued, was executed, in so far as decree schedule item Nos. 1, 2, 5, 6, 8 and 9 are concerned and was returned in respect of item Nos. 3, 4 and 7. By an order dated 10.12.2012, delivery warrant was ordered to be issued in respect of said 3 items of properties against the judgment debtors 4, 5 and 8.

2. On 11.2.2013 the L.R. of defendant No. 9 and defendant No. 10 filed R.A. No. 19/2013 in the Court of Itinerary Senior Civil Judge at Hosadurga. Along with the appeal, I.A. 1 was filed under S. 5 of the Limitation Act, to condone the delay of 1208 days in filing the appeal. I.A. 2 was filed under Order 41 Rule 5 r/w S. 151 CPC to stay the operation of the impugned Judgment and Decree. I.A. 3 was filed under O. 41 R. 27 CPC. The appellate Judge passed an order dated 21.2.2013, the material portion of which reads as follows:

The appellants contended that due to ill health they could not file appeal against the judgment decree. Further contended that they have sufficient documents to substantiate their defence. Hence prays to condone delay. Further prays to stay the entire proceedings in execution case and judgment decree passed in O.S. 38/06. I perused the judgment decree wherein the defendants have not filed written statement. Having regard to facts, that the defendants-appellants challenged the judgment and decree and respondents have been filed execution and about to take steps to take possession of suit property it is just and proper to consider the grievance of appellants. In order to meet the justice and to avoid further multiplicity of litigations stay is to be granted in the ends of justice by keeping open objections to I.A. I to III. Thus I pass the following:

ORDER

Register the case. The operation of judgment and decree in OS 38/06 dated 21/10/2009 on the file of Addl. C.J. (Jr. Dn.) and JMFC Hosadurga is hereby stayed till filing of objection to I.A. II. Issue emergent notice of IA I to III and appeal memo with said stay order to respondents. Call for record by-call on 8/3/13.

Assailing the said order, the plaintiffs-decree holders have filed this writ petition.

3. Sri A.V. Gangadharappa, learned advocate for the petitioners firstly contended that the respondents 1 to 3 though were very much aware of passing of the decree by the Trial Court, did not challenge the same for a period of more than 3 years and filed R.A. No. 19/2013 only after the actual delivery of possession of property which they claim to be the owners and the said fact clearly establishes the mala fide intention on their part in filing the belated appeal. He submitted that valuable right has accrued to the petitioners since they have already been put in possession and that the appellate Judge has mechanically passed the impugned order. Secondly, in view of the provision of Order 41 Rule 3-A(3) CPC, the appellate Court has no jurisdiction to pass the impugned order, until I.A. 1 filed in. the appeal is heard and the delay is condoned. Reliance was placed on the decision in the case of Mahadevappa and others Vs. Mallappa and others, 1991 (2) KLJ 468.

4. Smt. Sharada H.V., learned advocate for the respondents 1 to 3, on the other hand contended that the appellate Court can grant an interim stay ex parte, under Order 41 Rule 5(4) CPC, even though an application for condonation of delay is not decided and hence, the provision under Order 41 Rule 3-A(3) does not preclude the Court from making of such an interim order. She submitted that the impugned order has been passed by the Court below in exercise of inherent power under S. 151 CPC and the same is permissible in law. She further submitted that the decision in the case of Mahadevappa (supra) was not followed in the case of S.V. Munikrishnappa and Others Vs. S.V. Narayanappa, Learned counsel placed reliance on a decision in the case of Gouse Bi Vs. Salima Bi, and sought dismissal of the writ petition.

5. Perused the writ record. Keeping in view the rival contentions, the point for consideration is;

Whether the appellate Court can order stay of execution of decree against which the appeal has been filed, pending disposal of the application for condonation of delay?

6. Material facts noticed supra are not in dispute. There was delay of 1208 days as on 11.2.2013, when R.A. No. 19/2013 was filed to set aside the decree passed in O.S. No. 38/2006. It is beneficial to extract the provision under Order XLI Rule 3-A(3) CPC to find out whether the same is mandatory or directory. The provision reads thus:

3-A (3) Where an application has been made under sub-rule (1), the Court shall

not make an order for the stay of execution of the decree against which the appeal is proposed to be filed so long as the Court does not, after hearing under Rule 11, decide to hear the appeal.

7. Having regard to the plain language of the said provision, in the case of Mahadevappa (supra), it was held that, where a belated appeal is preferred against a decree, until the delay is condoned, stay of the decree appealed against, cannot be granted.

8. However, in the case of S.V. Munikrishnappa (supra), it was held that the said provision does not apply to the preliminary decrees passed, particularly in partition suits, as there can be no question of preliminary decree being called an executable decree that can be straightaway be put into execution. The material portion of the said decision reads thus:

In the circumstances, when as appeal is preferred against a preliminary decree like the present one, what is asked to be stayed is not execution of a decree, but only further proceedings in pursuance of the preliminary decree appealed against i.e., stay of further proceedings in the final decree proceedings. It is this distinction that makes all the difference. I am, therefore, of the opinion that Order XLI Rule 3-A(3) CPC cannot come in the way of an Appellate Court staying further proceedings in a final decree proceeding even before the application for condonation of delay in preferring the appeal is heard and disposed of

(Emphasis supplied by me)

9. Rule 3-A under Order 41 CPC was inserted by CPC (amendment) Act No. 104/1976. The language of the provision is clear and unambiguous. In Vijay Narayan Thatte and Others Vs. State of Maharashtra and Others, it has been held that, when the provision is couched in negative language, it is ordinarily regarded as peremptory and mandatory in nature. Therein, while interpreting clause (ii) of the proviso to S. 6 of Land Acquisition Act, it has been held as follows:

22. In our opinion, when the language of the statute is plain and clear then the literal rule of interpretation has to be applied and there is ordinarily no scope for consideration of equity, public interest or seeking the intention of the legislature. It is only when the language of the statute is not clear or ambiguous or there is some conflict, etc. or the plain language leads to some absurdity that one can depart from the literal rule of interpretation. A perusal of the proviso to Section 6 shows that the language of the proviso is clear. Hence the literal rule of interpretation must be applied to it. When there is a conflict between the law and equity it is the law which must prevail. As stated in the Latin maxim *dura lex sed lex* which means "the law is hard but it is the law".

(Emphasis supplied by me)

10. In the case of The State of West Bengal and Others Vs. Somdeb Bandyopadhyay and Others, in a writ appeal, without condoning the delay,

interim orders having been passed, when questioned before the Apex Court, it has been held as follows:

7. It is to be noticed that even without condoning the delay and entertaining the writ appeal the High Court has passed a series of interim orders. Such a course is impermissible as the appeal was non est in the eye of the law without it being entertained. Admittedly, the delay in preferring the writ appeal was not condoned at the time when the interim orders were passed.

(Emphasis supplied by me)

11. The decision in the case of S.V. Munikrishnappa (supra), is with respect to a preliminary decree passed in a suit for partition and an interim order of stay of further proceedings in the final decree case was the subject matter of consideration. The said decision has no application to the instant case, since in the instant case the Trial Court passed a decree of declaration and recovery of possession and conclusively determined the rights of the parties and nothing further was left to be decided, except execution of the decree, subject to the final outcome of the case in the appeal. The decision in the case of S.V. Munikrishnappa (supra), has no application to the facts of the present case and does not advance the case of the respondents.

12. A bare reading of the provision extracted above makes it clear that the Court shall not make an order for the stay of execution of the decree till the appellate court decides in the first instance to hear the appeal under Rule 11 of Order XLI CPC. Thus, in view of the plain language of the provision, it is a mandatory provision and there is a clear bar for making an order of stay of execution of the decree, before the Court decides to hear the appeal, as above.

13. There is specific provision in Order XLI Rule 5 CPC enabling the appellate Court for sufficient cause to order stay of decree appealed. In view of the availability of the said specific provision, inherent power u/s 151 CPC cannot be invoked for stay of the execution of the decree appealed. In K.K. Velusamy Vs. N. Palanisamy, Apex Court after noticing catena of decisions explaining the scope of 151 CPC has summarized as follows:

12(a) Section 151 is not a substantive provision which creates or confers any power of jurisdiction on courts. It merely recognises the discretionary power inherent in every court as a necessary corollary for rendering justice in accordance with law, to do what is "right" and undo what is "wrong", that is, to do all things necessary to secure the ends of justice and prevent abuse of its process.

(b) As the provisions of the Code are not exhaustive, Section 151 recognises and confirms that if the Code does not expressly or impliedly cover any particular procedural aspect, the inherent power can be used to deal with such situation or aspect, if the ends of justice warrant it. The breadth of such power is coextensive with the need to exercise such power on the facts and circumstances.

(c) A court has no power to do that which is prohibited by law or the Code, by purported exercise of its inherent powers. If the Code contains provisions dealing with a particular topic or aspect, and such provisions either expressly or by necessary implication exhaust the scope of the power of the court or the jurisdiction that may be exercised in relation to that matter, the inherent power cannot be invoked in order to cut across the powers conferred by the Code or in a manner inconsistent with such provisions. In other words the court cannot make use of the special provisions of Section 151 of the Code, where the remedy or procedure is provided in the Code.

(d) The inherent powers of the court being complementary to the powers specifically conferred, a court is free to exercise them for the purposes mentioned in Section 151 of the Code when the matter is not covered by any specific provision in the Code and the exercise of those powers would not in any way be in conflict with what has been expressly provided in the Code or be against the intention of the legislature.

(e) While exercising the inherent power, the court will be doubly cautious, as there is no legislative guidance to deal with the procedural situation and the exercise of power depends upon the discretion and wisdom of the court, and in the facts and circumstances of the case. The absence of an express provision in the Code and the recognition and saving of the inherent power of a court, should not however be treated as a *carte blanche* to grant any relief.

(f) The power u/s 151 will have to be used with circumspection and care, only where it is absolutely necessary, when there is no provision in the Code governing the matter, when the bona fides of the applicant cannot be doubted, when such exercise is to meet the ends of justice and to prevent abuse of process of court.

(Emphasis supplied by me)

14. The decision in the case of *Ghouse Bi* (supra) being distinguishable, has no application to the instant case. The contention of Smt. Sharada H.V. that the impugned order can be construed as having been passed in exercise of the power under S. 151 CPC cannot be accepted in view of the express provisions under Order 41 CPC. That in view of the mandatory provision under Order 41 Rule 3-A(3) CPC and the decision in the case of *Mahadevappa* (supra), there is both material irregularity and illegality on the part of the appellate Judge in passing the impugned order. In the circumstances, the impugned order is clearly indefensible.

In the result, writ petition is allowed and the impugned order is quashed. The appellate Court is directed to consider I.A. No. 2, in case the prayer in I.A. 1 is allowed and the delay is condoned. Contentions of both the parties are left open for consideration and the appellate Court is directed to decide the matter with expedition and within a period of three months from the next hearing date of the appeal. Needless to observe that in case the appellants succeed in RA. No.

19/2013, they can seek restitution under S. 144 CPC.

Costs made easy.