

(1958) 07 KAR CK 0010

In the Karnataka High Court

Case No : Civil Revision Petition No. 264 of 1957

Krishna Hanumant Shetty and Others

APPELLANT

Vs

Ganappa Jattu Gowda

RESPONDENT

Date of Decision : 07-07-1958

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 2 (12)

Citation : AIR 1959 Kar 25 : (1958) ILR (Kar) 461 : (1958) 36 MysLJ 617

Hon'ble Judges : A. Narayana Pai, J

Bench : Single Bench

Advocate : K.I. Bhatta, for the Appellant; H.B. Datar, for the Respondent

Judgement

1. The petitioners are the legal representatives of the original defendant in original Civil Suit No. 50/1954 on the file of the Civil Judge, Junior Division, Kumta. The respondent is the original plaintiff in that suit. For the sake of convenience I shall refer to the parties as plaintiff and defendant.

The plaintiff was a tenant under the defendant in respect of the suit lands. He having kept the rents in arrears, the defendant sued him for recovery of possession of the demised lands together with arrears of rent and future mesne profits in O. S. (118/1948 on the file of the trial Court.

A decree as prayed for was passed in his favour. The defendant put the decree in execution in Regular Darkhast No. 149/1950 and recovered possession of the lands in September 1951. In that Darkhast the present plaintiff filed an application contending that the Court had no jurisdiction to deliver possession at the lands in view of the provisions of the Bombay "Tenancy Act of 1939 as amended by the Act. of 1946. The executing Court rejected the plaintiff's objections to the Darkhast but on appeal No. 179/1951 on the file of the District Court of Kanara the order of the executing Court was set aside, it having been conceded by counsel that the civil Courts had no jurisdiction in view of the Tenancy Act.

The appellate Court concluded its order by stating that the lower Court (i.e., the executing Court) should direct the respondent to secure possession of the Darkhast property through the Mamlatdar. This appellate order was passed on 12-11-1952. The defendant who had already obtained possession in execution proceedings, handed back possession of the lands to the plaintiff. It is not quite clear whether this handing back of possession was merely in the presence of the Mamlatdar out of Court or in enforcement of any order passed by the Mamlatdar. This, however, does not make much difference to the present controversies.

This delivery of possession was on 9-2-1953. On 11-2-1954 the tenant-plaintiff commenced the Original Civil Suit No. 50/1854 out of which the revision petition arises.

2. The suit is for recovery of Rs. 499-4-0 as mesne profits with costs and future interest from the defendant in respect of the two years 1951-52 and (1952-58) during which the defendant was in possession, on the allegation that the defendant's possession during that period was wrongful. The trial Court dismissed the suit holding that the defendant's possession in the circumstances could not be held to be wrongful.

The trial Court took the view the tenancy of the plaintiff having been duly terminated and a decree for his eviction also having been passed he was no longer entitled to possession and that the possession of the defendant as true owner cannot be said to be wrongful as against the quondam tenant the plaintiff. On appeal by the tenant the District Court of Kanara has come to an exactly contrary conclusion. According to the lower appellate Court the defendant leaving obtained possession through the order of the executing Court in Darkhast No. 149/ (1950) which order was set aside in Civil Appeal No. 1170/1951, the possession of the defendant must be held to be wrongful, whether the order in Civil Appeal No. 179/1951 was right or wrong, the same not having been set aside in appeal or otherwise.

He observes that the judgment or decision in Civil Appeal No. 179/1951 must be taken to be binding between the parties, although the view of the law on which that decision was based has since been shown to be wrong by decisions of the Bombay High Court, particularly *Rajesab v. Harischandra* 56 BomLR 638 (A) and *Prithviraj v. Hari* 56 BomLR 1076 (B). According to these rulings of the Bombay High Court, where a landlord having terminated a tenancy by notice had already filed a suit for recovery of possession from his tenant before the coming into force of the Tenancy Act of 1948, a civil Court would continue to have jurisdiction not only to hear such suit and pass a decree therein but also to execute any such decree. According to these rulings, not merely the decree in O.S. 118/ 1948 but also the order of the executing Court in Darkhast No. 149/1950 would be perfectly valid and within the jurisdiction of the Court which passed that decree and of the executing Court which passed that order.

3. One more fact has to be stated before proceeding to discuss the arguments on

this petition, in the trial Court the plaintiff stated that he went on appeal against the decree in O.S. 118/1948, but denied knowledge of the result of that appeal as against which the defendant swore that the plain, tilt's appeal was dismissed and the decree in O.S. 118/1948 confirmed,.

Neither party produced the copy of the appellate decree, if any, and in the absence of such record the trial Court proceeded on the basis that the decree in O.S. 118/1948 remained unchallenged. Nothing has been pointed out to me why this view of the trial Court should not be accepted as correct. Hence I proceed on the assumption that the decree in O.S. 118/1948 stands unchallenged.

4. There is a long discussion in the judgment of the lower appellate Court on the question as to how far and in what circumstances a finding on an issue of law constitutes *res judicata* between the parties, at the end of which the lower appellate Court concludes that the order in Civil Appeal No. 179/1951 should be held to be binding as between the parties.

This entire discussion appears to be irrelevant or unnecessary because the defendant petitioner does not seriously contest the position that the order in Civil Appeal No. 179/1951 is binding on him. What the lower appellate Court has missed or overlooked! is that the same arguments and the same line of reasoning would lead to the conclusion that the decree in O.S. 118/1948 which, as already stated, stands unchallenged must also be held to be binding between the parties. His failure to bear this circumstance in mind has, in my opinion, taken the learned Judge away from the most vital circumstance in this case.

5. In support of his argument that the defendant's possession during the period in question was perfectly lawful and never wrongful, the learned Counsel for the petitioner has relied upon not merely the fact that the defendant was the owner of the lands in question but also on the fact that he had in his favour the decree in O.S. 118/1948 granting him possession of the lands.

According to him, so long as that decree was in force it was open to him to take possession even out of Court without taking out execution and that his having had recourse to the executing Court for obtaining possession cannot make his position any the worse than it would have been even if he had taken possession out of Court by force or by unlawful means. He cites the judgment of the Bombay High Court reported in *Bandu v. Naba*, ILR 15 Bom 238 (C). In that case a person who had obtained a decree for possession against one Manku allowed it to get buried without taking out execution but after the death of Manku took possession without the intervention of the Court. Later the daughter of Manku filed a suit for recovery of possession.

The trial Court held that the original decree-holder who had so obtained possession without intervention of Court was a trespasser and that the daughter of Manku was entitled to have possession given to her until ousted in due course of law. The decision of the trial Court was reversed by a Bench of the Bombay High Court, which held that there is no reason for holding that the rightful owner

dispossessing another is a trespasser or that he may not rely for the support of his possession on the title vested in him. The principle of this ruling supports the contention of the petitioner.

The title vested in him in this case is not merely his title as the owner of the lands but also his title to possession under the decree in O.S. 118/ 1948. In my opinion the recovery of possession by him is based on title traceable to the decree in O.S. 118/1948 and not merely to the order of the executing Court in the Darkhast No. 149/1950. The fact that the execution order was held to be without jurisdiction could mean at the worst that the defendant had taken possession through an invalid order which cannot place him in a position worse than what he would have occupied if he had without the intervention of the Court taken possession by unlawful means.

6. The learned counsel for the plaintiff-respondent however, argues that the appellate order in Civil Appeal No. 179/1951 directed the executing Court to intimate to the decree-holder that he should secure possession through the Mamlatdar and that this direction means the decree in O.S. 118/1948 was of, no avail to the defendant. I do not think that such an effect is possible. The order which the appellate Court set aside in Appeal No- 179/1951 is an order of the executing Court. No executing Court can go behind the decree which it is asked to execute or question the validity thereof.

What an appellate Court can by its order do or direct to be done can only be what the Court from whose order the appeal is preferred can or should have done. Hence sitting in appeal against an order of the executing Court an appellate Court cannot pass an order which has the effect of nullifying the decree under execution. I do not, therefore, accept the argument that by reason of or as a result of an order passed on appeal from an order in execution of the decree, the decree itself has got set aside. No doubt, by reason of the order against him in Appeal No. 179/1951 the petitioner will not be in a position to put it into execution again.

But it is not the same thing as saying that he cannot use the decree to defend his possession if he had already got into possession by virtue or under colour of the title conferred by that decree. A decree that is barred by limitation is not executable. It was exactly under such a decree that the defendant in ILR Bom 238 (C) obtained possession and which possession the Bombay High Court held could not be described as a possession of a trespasser.

7. The learned Counsel for the respondent relied upon the judgment of a Full Bench of the Madras High Court: reported in Ponnappalli Venkatappayya and Another Vs. Pushadapu Ramaswami and Others, and the judgment of Vivian Bose J. reported in Ramnath v. Mohanlal AIR 1939 Nag 23 (E). The Full Bench ruling does not help the respondent because in that case what was set aside was not a mere order in execution but the very decree for eviction of the tenant obtained by the landlord.

Strong reliance is however placed on the judgment of Vivian Bose J. in the Nagpur case for the proposition that to recover mesne profits it is unnecessary to prove that the person against whom the claim is made is a trespasser in the full sense of that term. It is true that the term "wrongful possession" in Section 2(12) of the CPC need not necessarily mean the possession of a trespasser. The following passage from the judgment of Vivian Bose J. may be usefully extracted :

"The truth of the matter is that the word "wrongful" in Section 2(12) C.P.C. is used in a special sense. It does not mean possession which is wrongful for all purposes. It only means that the person who has no right to possession as against the party claiming it is in wrongful possession as against that party or certain purposes including mesne profits but not wrongful for all purposes".

The facts of the case decided by Vivian Bose J. are shortly these: The plaintiff in the case traced his title to certain mortgages which were foreclosed in his favour. In execution of money decrees against some of the mortgagors the property was sold in execution and purchased at the auction by the first defendant in that case. The plaintiff's claim to the property having been rejected he filed a claim suit and succeeded in two Courts and the judgment of the Nagpur High Court was delivered in the defendant's appeal.

The auction-purchaser (defendant) contended that he took possession under the process of civil Courts and that he purchased in good faith and that therefore his possession was not wrongful at any rate" till it was declared to be so by a Court of competent jurisdiction.

This plea was rejected and it was held that although his possession had been rightful until the plaintiff succeeded in establishing his superior title, the plaintiff was entitled to mesne profits as against the auction-purchaser (defendant) for the entire period during which the auction purchaser had been in possession. It is observed .

"The situation changes the moment the rights of strangers intervene. Possession which may be rightful for certain limited purposes as against the judgment-debtor may be wrongful as against third parties, and the mere fact that the possession was obtained through the instrumentality of the Courts will not avail either the decree-holder or the auction purchaser as against persons who were not parties to the decree."

8. It will be noted the decree in question in the Nagpur case was a money decree in execution of which the property was sold and purchased by the defendant. The plaintiff, who had already acquired title by foreclosure of mortgages was a stranger to that decree. Hence the possession of the auction-purchaser, which was rightful as against the parties to the suit in which the money decree was passed, was held to be wrongful as against the plaintiff who was stranger to the suit in which the money decree was passed.

In the Nagpur case reliance was placed on the judgment of the Madras High Court, reported in *Perumal Udayar v. Krishnama Chettiar* ILR Mad 251. (F), in which a purchaser who had entered into possession on the strength of a sale under the Revenue Recovery Act was held to be in rightful possession until the sale was held to be irregular but was nevertheless held to be accountable for mesne profits for the entire period of his occupation. The principle underlying this decision as formulated by Vivian Bose J. is the one that I have extracted above. In both the Nagpur and Madras cases the auction-purchasers could trace their possession only to the auction sales, but in the present case the defendant traces his title to possession not merely to an execution order but to a decree anterior to that.

9. If, therefore, the possession of the defendant petitioner during the relevant period can be traced, as it should be, to the decree in his favour passed in O.S. 1.18/1948 which decree, as already stated, remains unchallenged, it is not possible to hold that such possession was wrongful even for purposes" of Section 2(12) of the Civil Procedure Code. Applying the test formulated by Vivian Bose J. in AIR 1939 Nag 23 (E), it cannot be said that the defendant had no right to possession as against the plaintiff or that the plaintiff could have claimed possession from the defendant in the face of the decree in O.S. 118/1948.

It must be remembered the tenancy of the plaintiff had been terminated before the suit was filed and the suit itself had been filed before the Tenancy Act of 1948 came into force. So, when the Tenancy Act came into force the plaintiff had ceased to be a tenant and no provision of the Tenancy Act has been pointed to me entitling the plaintiff to claim possession in spite of such a decree as the one in O.S. 118 of 1948.

10. In passing a decree for mesne profits in favour of the plaintiff by ignoring the legal effect on the rights of parties which the decree in O.S. 118/1948 undoubtedly had, I think the lower appellate Court has acted illegally. Hence the decree of the lower appellate Court deserves to be set aside.

11. The Civil Revision Petition is accordingly allowed, the decree of the lower appellate Court is set aside and the plaintiff's suit is dismissed. The respondent will pay the costs of the petitioners in all the three Courts.

12. Revision allowed.