

(2013) 10 KAR CK 0058

In the Karnataka High Court

Case No : Regular First Appeal No. 1402 of 2013

Mrs. Sirajunnissa and Mr. Abdul Wahid

APPELLANT

Vs

Dr. H.S. Hanumanthappa, Sri A. Vijaya Kumar and Sri M.
Appaiah

RESPONDENT

Date of Decision : 07-10-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 103, Order 21 Rule 98, 151, 47

Citation : (2013) 10 KAR CK 0058

Hon'ble Judges : L. Narayana Swamy, J

Bench : Single Bench

Advocate : S. Shekar Shetty, for the Appellant; M.S. Bhagwat, Advocate for R1,
for the Respondent

Final Decision : Dismissed

Judgement

L. Narayana Swamy, J.—This appeal is filed by the applicants/objectors before the Court of the XIX Additional City Civil & Sessions Judge, at Bangalore City being aggrieved of the order on I.A. No. 3 dated 24.7.2013 in Execution No. 29/1996 rejecting the said application filed u/s 47 r/w Section 151 and under Order 21 Rule 98 to 103 of C.P.C. The case of the applicant-objectors (Appellants herein) in brief is that the decree-holder, the first respondent filed suit O.S. No. 3987/1985 against the judgment debtors No. 1 & 2 and father of objector No. 2 and husband of objector No. 1 by name Sri Abdul Khader (who was defendant No. 3). The prayer in the suit was joint and inseparable against all the defendants for declaration of title and for consequential possession by ejecting all the defendants and for mesne profits. It is alleged, the defendants 1 & 2 created leasehold rights in favour of the third defendant. Sri Abdul Khader expired during pendency of the said suit and thereafter decree came to be passed against the defendants including the dead person Sri Abdul Khader. It is stated that defendant No. 3 was in possession of the suit schedule property in which there was a building put up by 1st and 2nd defendants and third defendant was a

lessee in the said building and he was residing with his wife and children. In a portion of the said building, the third defendant was running a fuel depot and in the other half portion, the third defendant was residing with his family members. After the death, the 2nd objector - 2nd appellant is running a mechanic workshop in a portion and in the other portion he is residing with his family members. The appellants have got electricity and water connections to the building. As on the date, the appellants have been in peaceful possession and enjoyment of the schedule property. Since the objectors are in possession of the suit schedule property, it was necessary for the decree holder to bring them on record after the death of defendant No. 3 in the suit. Failure to implead the legal representatives of one of the deceased defendant affects the suit and the suit stood abated in toto as the alleged cause of action was joint and inseparable. The decree cannot be executed against L.Rs. of the defendant No. 3. The appellants were not aware of passing of the judgment and decree and they came to know the same recently when the 2nd appellant had gone to the 2nd respondent to pay the rent. Immediately, the appellants took step to object execution of the decree, to which they were not parties. Hence they sought to dismiss the execution petition.

2. The first respondent-decree holder filed objections to I.A. No. 3. He denied, the decree sought was joint and inseparable. The prayer of the first respondent was that defendants 1 & 2 have illegally encroached the suit schedule property for which they had no right or title and that defendant No. 3 claimed to be a tenant under defendant Nos. 1 & 2. The decree passed by the trial court was later confirmed by this Court in R.F.A No. 118/95. It is contended that the appellants have not furnished the date of death of defendant No. 3 and it is left blank in the affidavit. Therefore, it is not clear whether he expired during pendency of the suit or after the decree. It is the duty of the advocate for defendants 1 to 3 to bring death of defendant No. 3 to the notice of the Court. The executing court cannot go beyond the decree and all the judgment debtors are liable to deliver possession of the suit schedule property to the decree-holder, the first respondent. The application is filed only at the instance of defendants 1 & 2-Respondents 2 &3 herein.

3. Earlier the trial court by the order dated 21.1.1999 rejected I.A. No. 3 holding that the execution petition is maintainable. Being aggrieved, the appellants filed R.F.A. No. 83/1999. By the order dated 15.7.2002 this Court remanded the matter for fresh enquiry. The trial Court by the order dated 15.2.2003 allowed the application and execution petition was dismissed. Being aggrieved, R.F.A. No. 1428/2004 was filed and this court by the order dated 13.8.2012 remanded the matter to the trial Court with some observations.

4. On the basis of the remand orders, the court below framed the following points for consideration:

(i) Whether the applicants/objectors prove that the judgment and decree is a nullity and it cannot be executed in view of death of defendant No. 3 Abdul

Khader during the pendency of the suit?

(ii) Whether the applicant/objectors further prove that the applicant/objectors have independent right, title and interest of leasehold rights over the suit schedule property?

(iii) Whether the decree holder proves that deceased Abdul Khader had voluntarily vacated the premises before passing the decree itself and hence no rights would enure to the LRs of Abdul Khader?

(iv) What order?

5. In support of their case, the applicant/objectors examined three witnesses and got marked as many as 6 documents as Ex. P1 to P6. The decree holder has been examined as DW-1 and got marked one document, i.e., the objections filed by the defendants 1 & 2 to I.A. No. 1 in O.S. No. 3987/85 as Ex. D1.

6. The court below negated Point Nos. 1 & 2, held point No. 3 that the deceased Abdul Khader had voluntarily vacated the premises before passing the decree itself and hence no rights would enure to the LRs. of Abdul Khader and accordingly rejected the application. Being aggrieved, the present appeal is filed.

7. I have heard the learned counsel for the appellants and learned counsel for Respondent No. 1 and perused the impugned order passed by the trial Court. The learned counsel for the appellants contended that the decree passed by the trial court is joint and inseparable. The judgment and decree passed in the suit is a nullity having passed as against a dead person and therefore cannot be executed. Therefore, he prays for allowing the appeal. On the contrary, the learned counsel for the Respondent No. 1 contends that the deceased Abdul Khader claimed tenancy under defendants 1 & 2 (Respondents 2 & 3 herein), who themselves were the encroachers of the property had no right to lease the suit schedule property in favour of defendant No. 3. Moreover, in the objection filed by the respondents 2 & 3 themselves to the IA No. 1 which was filed for temporary injunction, it was clearly contended by them that the defendant No. 3 had voluntarily delivered possession to them. Therefore, the LRs. of Abdul Khader had no subsisting leasehold right in their favour, the application is false, frivolous got filed only at the instance of respondents 2 & 3 to deny fruits of decree to the first respondent. Hence it is prayed to dismiss the appeal.

8. Having heard the learned counsel elaborately, the only point that arises for determination in this appeal is, whether the impugned order suffers from any legal infirmity calling for interference from this Court? My answer would be in the negative for the following reasons.

9. The judgment and decree in O.S. No. 3987/1985 was passed on 29.11.1994. The learned 27th Additional City Civil Judge had dismissed I.A. No. 3 filed by the appellants on 21.1.1999 only on the ground that the appellants did not furnish the date of death of Abdul Khader, death extract showing the death on 28.6.1991 was not believed on the ground that the amount under challan was remitted on

12.9.1996. This order was challenged in R.F.A. No. 83/99 in which IA for production of additional documents was filed seeking to produce pension papers of Sri Abdul Khader. Therefore, this Court allowed the said application and remanded the matter for reconsideration.

10. Ex. P2 & P3 are pension records of Sri Abdul Khader and Ex. P4 is the pass book of appellant No. 1. Based on these documentary evidence, it is clear that Sri Abdul Khader the defendant No. 3 died on 28.6.1991. The judgment which is passed on 29.11.1994 in O.S. No. 3987/85 is after the death of Sri Abdul Khader.

11. The appellants filed IA No. 3 u/s 47 r/w Section 151 r/w Order 21 Rule 98 to 103 CPC. Therefore, the appellants have to establish their independent right, title and interest over the suit schedule property.

12. PW-1 stated in his evidence that his father Abdul Khader was tenant under respondents 2 & 3 and was paying rent to respondents 2 & 3 and thereafter PW-1 is carrying on the business. But in the absence of production of any rent receipts and in view of the admission of PW-1 in his cross-examination that on 2.9.1996 for the first time he went to respondent No. 2 to pay rental and earlier to that neither he nor his mother offered rent to respondents 2 & 3 from 1991 to 1996, the appellants have failed to prove their leasehold rights over the suit schedule property running car garage there. Both PW-2 & PW-3 have only stated in their deposition that Abdul Khader was running fire wood depot. PW-3 has denied the suggestion that during life time of Sri Abdul Khader, he vacated the suit schedule property. There is no evidence as to possession of the appellants in the suit schedule property.

13. The learned counsel for respondent No. 1 placed reliance on Ex. D1, the objections filed by the respondents 2 & 3 to the application filed by the plaintiff-first respondent seeking temporary injunction. The said portion of the objection is extracted in the impugned order, in which they have stated that their tenant (Sri Abdul Khader) who was running a fuel depot has recently vacated the same after handing over vacant possession of the thatched roof-shed under his occupation which is inside the compound of the suit property. Therefore, predecessor of appellants had vacated the suit schedule property and he handed over vacant possession of the suit schedule property earlier to his death and earlier to passing of judgment and decree dated 29.11.1994 in O.S. No. 3987/85. The reliance placed on Ex. P6 the sale deed in favour of appellant No. 1 is of no assistance to her because it is nowhere stated therein that she is residing in Site No. 83.

14. The specific case of the plaintiff-first respondent in the suit was respondents 2 & 3 were encroachers upon the suit schedule property. When they themselves are the encroachers, they had no right to let out portion of the suit schedule property on rental basis. This finding of the trial court has already been confirmed by this Court in RFA No. 118/1995.

15. The learned counsel for the appellants relied upon the following decisions.

(i) Devasahayam (D) by LRs. Vs. P. Savithamma and Others, to contend that the civil court derives no jurisdiction only on the basis that the tenant has denied title of landlord. Such a situation has not arisen in the present case.

(ii) (2004) 6 SCC 325 (Vice-Chairman, Kendriya Vidyalaya Sangathan & another v. Girdharilal Yadav) to contend that admitted facts need not be proved. There is no dispute regarding the ratio laid down therein but I am afraid, how the said decision can be pressed into service in the present case as the first respondent has not admitted the tenancy of Sri Abdul Khader and on the contrary he has denied the very right of respondents 2 & 3 to let out the premises.

(iii) Ratan Lal Jain and Others Vs. Uma Shankar Vyas and Others, , to contend that appellants had no right to physically dispossess persons in occupation. Here in the present case, the rights of respondents 2 & 3 are not recognized in letting out the premises in favour of Sri Abdul Khader. Therefore, the principles laid down in this citation cannot be applied to the present case.

(iv) Ashok Transport Agency Vs. Awadhesh Kumar and Another, to contend, death of proprietor on date of institution of suit against proprietary concern and two other persons, decree passed in the suit against dead proprietor is a nullity and cannot be executed. The said decision is not applicable to the present case where on the date of institution of the suit, defendant No. 3 was alive.

(v) Madhukar and Others Vs. Sangram and Others, , to contend that first appeal is a valuable right and the parties have a right to be heard both on questions of law and on facts and the judgment in the first appeal must address itself to all the issues of law and fact and decide it by giving reasons in support of the findings.

(vi) Jugalkishore Saraf Vs. Raw Cotton Co. Ltd., , to contend regarding assignment of the decree.

(vii) Offshore Holdings Pvt. Ltd. Vs. Bangalore Development Authority and Others, to contend that acquisition lapses if acquiring authority fails to take possession within five years from the date of final declaration. The appellants are not claiming ownership rights and therefore this decision has also no application to the facts of the case.

16. The learned counsel for the respondent No. 1 has relied upon the following decisions:

(i) Hukum Chand v. Om Chand and Ors., (2001) 10 SCC 715 to contend that transfer of interest of landlord pendente lite does not stop the progress of litigation and the transferee merely steps into the shoes of his predecessor-in-interest.

(ii) Parvathibai Vs. Dattatreya Janardhan Dhopeshwarkar (delted), (deleted) to contend that transferee can make application under Order 21 Rule 16 for getting impleaded & proceed with Execution stepping into shoes of decree holder.

17. It is also contended by the learned counsel for the appellants that on the death of Sri Hanumanthappa, the execution petition had abated. Sri Udaya Shankar is not entitled to prosecute the execution petition. Sri Udaya Shankar filed IA (IA No. 9) under Order XXI Rule 26 CPC which application was allowed by the trial court. As a purchaser during pendency of the execution petition, he is entitled to prosecute the execution petition.

18. For the reasons stated above, I am of the view that the appellants who are the objectors have failed to establish their independent right, title or interest over the suit schedule property and the first respondent was able to establish that the defendant No. 3 who claimed leasehold rights under respondents 2 & 3 had delivered possession in favour of the respondents 2 & 3 during his life time and before the judgment and decree was passed in the suit. In the circumstances, the contentions of the learned counsel for the appellants that the judgment and decree is joint and inseparable, even if it is accepted, loses its significance in view of his handing over possession in favour respondents 2 & 3 prior to the judgment and decree. Further the decree being rendered nullity in not bringing the L.Rs. of the defendant No. 3 also does not arise as he had already delivered possession in favour of respondents 2 & 3, who themselves had no right to let out the property in favour of Sri Abdul Khader.

19. In the circumstances, the trial court has properly assessed the materials on record and has come to correct conclusions in rejecting the application of the appellants. There is no infirmity in the order passed by the court below calling for interference from this Court. In the result, this appeal is absolutely devoid of any merits and it is accordingly dismissed.