

(2015) 07 KAR CK 0188

In the Karnataka High Court

Case No : Writ Petition Nos. 8136-37/2015 and 8188-89/2015 (GM-CPC)

N.H. Shivamurthy and Others

APPELLANT

Vs

Mark Gomez and Others

RESPONDENT

Date of Decision : 30-07-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10(2), Order 16 Rule 1(a), Order 21 Rule 101, Order 21 Rule 16, Order 21 Rule 21
Constitution of India, 1950 — Article 227
Evidence Act, 1872 — Section 68
Succession Act, 1925 — Section 63

Citation : (2015) 4 AKR 536 : (2015) 5 KarLJ 639

Hon'ble Judges : A.V. Chandrashekara, J

Bench : Single Bench

Advocate : Divya Krishna for Shivan and Shivan, for the Appellant

Final Decision : Dismissed

Judgement

A.V. Chandrashekara, J—The present petitions are filed under Article 227 of Constitution of India challenging the common order dated 9.1.2015 passed by the Court of Prl. Civil Judge (Sr. Dn.), Bangalore in Execution Petition No. 65/2010 arising out of the judgment and decree passed in O.S. 674/2008.

2. The respondent No. 1 herein is the GPA holder of Smt. Ursila, Sri. Marcose, Sri. John Jeffry and Sri. Keny. Respondent No. 2, Sri. N.H. Krishnamurthy is the applicant in Ex. Pn. 65/2010 and he had filed 3 applications (1) I.A. 1 filed under Order 1 Rule 10(2) of CPC read with Order 21 Rule 97 of CPC to implead himself as an additional decree holder (DHR) (2) I.A. 2 filed under Order 16 Rule 1(a) of CPC for permission to furnish the list of witnesses and (3) I.A. 4 filed under Section 146 and under Order 21 Rule 16 of CPC to include himself as an additional DHR to contest the case. I.A. 3 has been filed by the DHR under Section 151 of CPC to reject the I.A. 1 filed Order 1 Rule 10(2) of CPC read with Order 21 Rule 97 of CPC by the applicant.

3. All these applications have been considered together and common order is passed on 9.1.2015 rejecting I.A. 3 and allowing I.As. 1, 2 and 4. Being aggrieved by the same, decree holders have filed these petitions challenging the correctness and legality of the said impugned order.

4. The facts leading to filing of the execution petition and consequential orders passed on 9.1.2015 are as follows:

"Sri. N.J. Shivamurthy had filed a suit in O.S. 674/2008 for specific performance of agreement against respondent No. 1 to execute the registered absolute sale deed. The said suit ended in a compromise. Shivamurthy died on 20.4.2010 leaving behind the petitioners herein as his legal representatives. Thereafter, petitioners herein had filed an Execution Petition No. 65/2010 against Sri. Mark Gomez, GPA holder of the four persons namely Smt. Ursila, Sri. Marcose, Sri. John Jeffry and Sri. Keny seeking to execute the order passed in O.S. 674/2008, which ended in a compromise decree on 4.1.2010."

5. Subject matter of the suit bearing O.S. 674/2008 is an agricultural land measuring 4.39 acres in Sy. No. 33 (old No. 5/4) of Pattandur Agrahara Village, K.R. Puram Hobli, Bangalore East Taluk. The said suit ended in a compromise on 4.1.2010. On the strength of the said compromise decree, petitioners had filed an execution proceedings requesting the Court to direct the JDRs to execute a regular sale deed in their favour lest the sale deed be executed in their favour through the agency of the Court. Decree Holder Shivamurthy died after the decree and therefore his wife and daughter chose to file the execution petition.

6. Respondent No. 2 Krishnamurthy is the brother of Shivamurthy. According to him, first decree holder Smt. Shashikala, wife of Shivamurthy had deserted her husband and was not looking after him and therefore, Shivamurthy is stated to have bequeathed all the properties he had inclusive of execution petition schedule property through a Will dated 8.4.2010. Thus he is stated to be the owner of all the properties inclusive of execution petition schedule property. Therefore, he filed an application i.e., I.A. 1 to implead himself as additional decree holder on the basis of the unregistered Will dated 8.4.2010. Therefore, he chose to file an application under Section 146 and under Order 21 Rule 16 of CPC to include him as decree holder and to contest the case. Application I.A. 4 came to be filed on 16.7.2014 by Krishnamurthy.

7. The said Krishnamurthy has filed a suit in O.S. 25950/2010 before the City Civil Court Bangalore on 29.6.2010 to declare that the Will dated 8.4.2010 is binding on the defendants i.e., the decree holders and for relief of permanent injunction in respect of 10 items of immovable property inclusive of execution petition schedule property which is found in item No. 6 of the suit.

8. All the applications filed by the Krishnamurthy, were objected to by filing detailed written objections. The applications filed by Krishnamurthy are stated to be misconceived and not maintainable either in law or facts in view of the suit being filed in OS. 25950/2010.

9. Ultimately the learned Judge has framed following 3 points for consideration as found in the impugned order:

"i) Whether the objector is to be added as an additional DHR?

ii) Whether the objector is to be permitted to examine the witness as sought in I.A. No. 2?

iii) What order?"

10. What is held by the Trial Court is that the applicant Krishnamurthy has relied upon the Will dated 8.4.2010 and therefore, he requests the court to permit him to come on record as additional decree holder. It is further held that in the light of the interest being created in his favour by the virtue of the said Will, he is a necessary party and if the sale deed is executed in favour of decree holders, his interest would be prejudiced. It is further held that in order to enable him to prove the Will relied upon, an opportunity has to be given to him to prove the Will. The definition of the words "legal representative" under Section 2(11) of the CPC has been referred to in paragraph 9 of the impugned order holding that legatee under the Will is also a legal representative and that it would not be advisable to shut out the applicant Krishnamurthy from leading evidence. The learned judge has held that merely because objector has already filed a suit prior to the filing of the execution petition, he cannot be kept away from execution petition. Reliance has been placed on a decision reported in the case of *Jugalkishore Saraf Vs. Raw Cotton Co. Ltd.*, (1955) 1 SCR 1369 in which Order 21 Rule 16 of CPC has been succinctly explained. The learned Judge has come to the conclusion that in order to prove that Will, propounder has to be given an opportunity to examine himself and to examine the persons who have attested unto the Will and in this view of the matter I.A. 1, 2 and 4 have been allowed and I.A. 3 has been dismissed.

11. What is argued by the learned counsel for the petitioners is that applications filed by the applicant Krishnamurthy before the Executing Court are not maintainable either in law or facts particularly when he has already filed a regular suit against the wife and daughter of Shiva Murthy. Therefore, it is argued that question of bringing him as a party in execution petition and giving opportunity to prove the Will does not arise. In this regard, the learned counsel has relied upon the decision in the case of *P. Janardhana Rao Vs. Kannan and Others*, (2004) 5 CTC 100 : (2004) 9 JT 1 : (2004) 8 SCALE 675 : (2004) 11 SCC 511 : (2004) AIRSCW 4301 .

12. What is held in the *P. Janardhana Rao*'s case is that Order 21 Rule 97 CPC is the provision for removal of the person bound by the decree who does not vacate. It takes into account a situation where resistance to possession is offered by the judgment-debtor or any other person bound by the decree which will include the claim of a person who claims to be in possession in his own right and independently of the judgment-debtor but whose claim ex-facie is unsustainable. Where, however, resistance is offered or where obstruction proceeds from the

claimant claiming to be in possession in his own right and whose claim cannot be rejected on the ground of want of good faith, without investigation, the decree-holder must proceed under Order 21 Rule 97.

13. Per contra the learned counsel for the respondent No. 2/applicant has relied upon the following decision of the Hon"ble Apex Court.

"1) Shreenath and Another Vs. Rajesh and Others, (1998) 3 AD 624 : AIR 1998 SC 1827 : (1998) 3 JT 244 : (1998) 2 SCALE 725 : (1998) 4 SCC 543 : (1998) 2 SCR 709 : (1998) AIRSCW 1619 : (1998) 4 Supreme 155 Relevant Para Nos. 10, 13, 14, 15, 16, 17, 18.

2) Noorduddin Vs. Dr K.L. Anand, (1994) 7 JT 652 : (1994) 4 SCALE 960 : (1995) 1 SCC 242 : (1994) 4 SCR 322 Supp Relevant Para Nos. 6, 7, 8.

3) Sameer Singh Vs. Abdul Rab, (2014) 4 RCR(Civil) 914 : (2014) 9 SCJ 269 Relevant Para Nos. 13, 15, 16, 17, 18, 20, 21.

14. After hearing the learned counsel for the parties and perusing the records, following points arise for consideration by this Court:

"a) Whether the executing Court is justified in permitting Sri. Krishnamurthy to come on record and contest the case on the Will stated to have to been executed by his Sri. Shivamurthy?

b) Whether any interference is called for by this Court, if so, to what extent?"

15. Following are some events with reference to the dates:

16. Sri. Shivamurthy, the brother of Krishnamurthy died on 20.4.2010 leaving behind his wife and daughter, who are the decree holders. The execution petition was filed by the wife and daughter of late Shivamurthy on 23.6.2010. Six days thereafter i.e., on 29.6.2010, Krishnamurthy chose to file a suit bearing O.S. 29590/2010 for declaration of his title on the basis of the unregistered Will dated 8.4.2010 stated to have been executed in his favour bequeathing all the properties that Shivamurthy had. Subsequently, he chose to file an application seeking to implead him as additional decree holder and to contest the case. On 28.7.2011, he had filed his affidavit in lieu of examination in chief and has been examined as PW-1. The original Will dated 8.4.2010 is marked as Ex. P-1 in the execution petition and revenue records of immovable properties stated to have been bequeathed has been marked as Ex. P-2 to 8. Krishnamurthy is claiming title on the basis of the will stated to have been executed by his brother Shivamurthy on 8.4.2010. The said Shivamurthy died on 20.4.2010.

17. What is held by the Hon"ble Supreme Court in the decision rendered in the case of Brahmdeo Chaudhary, Adv. Vs. Rishikesh Prasad Jaiswal and another, AIR 1997 SC 856 : (1997) 1 JT 641 : (1997) 1 SCALE 437 : (1997) 3 SCC 694 : (1997) 1 SCR 463 is that even a stranger can come into the picture at any stage of the execution proceedings not necessarily before he is dispossessed to agitate his claim. Relevant paragraph of the said decision is extracted hereinbelow:

"... a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order XXI, Rule 99. Order XXI, Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order XXI, Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest dehors the interest of the judgment-debtor. Both these types [pic] of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him."

18. In the case of Ghasi Ram and Others Vs. Chait Ram Saini and Others, (1998) 5 AD 423 : AIR 1998 SC 2476 : (1998) 5 JT 165 : (1998) 4 SCALE 232 : (1998) 6 SCC 200 : (1998) 3 SCR 863 : (1998) AIRSCW 2476 : (1998) 6 Supreme 92 , the Hon"ble Apex Court has made a clear distinction between the provisions prior to amendment brought in 1976 in CPC and the situation after the amendment. Portion of paragraph 7 of the said decision is relevant and same is extracted hereinbelow:

"7. The position has changed after amendment of the Code of Civil Procedure by the Amendment Act of 1976. Now, under the amended provisions, all questions, including right, title, interests in the property arising between the parties to the proceedings under Rule 97, have to be adjudicated by the executing court itself and not left to be decided by way of afresh suit."

19. The decisions rendered in the case of Brahmdeo Chaudhary and Ghasi Ram, have been followed by the Hon"ble Apex Court in the case of Sameer Singh Vs. Abdul Rab, (2014) 4 RCR(Civil) 914 : (2014) 9 SCJ 269 . The above authorities according to the Hon"ble Apex Court in Sameer Singh's case spell out that the court has the authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties and that it also includes the claim of a stranger who apprehends dispossession or has already been dispossessed from the immovable property. It is further made clear that the self-contained Code enjoins the executing court to adjudicate the lis and the purpose is to avoid multiplicity of proceedings. Prior to 1976 amendment, the grievance was required to be agitated only by filing a suit; but after the amendment, the entire enquiry has to be conducted by the executing court. Order XXI, Rule 101 provides for the determination of necessary issues. Rule 103 clearly stipulates

that when an application is adjudicated upon under Rule 98 or Rule 100 the said order shall have the same force as if it were a decree.

20. In the present case, Krishnamurthy is claiming right of title on the basis of unregistered Will stated to have been executed not only in respect of execution petition schedule property but also in respect of the other remaining 9 items of immovable properties. It is true that he has chosen to file a suit seeking declaration of title on the basis of the Will six days after the execution petition was filed.

21. As pointed out by the Hon"ble Apex Court in the case of Brahmdeo Chaudhary's case and Sameer Singh's case stated supra, lis of this nature will have to be decided in the Executing Court and not by separate suit. Therefore he has chosen to come on record in the Executing Court to contest the claim of sister-in-law and niece on the basis of the Will stated to be executed in his favour.

22. Apart from this, he has already tendered his evidence in examination-in-chief and got marked relevant documents inclusive of Will relied upon by him. Neither Krishnamurthy is in possession of the execution petition schedule property nor decree holders are in possession. Person, who is in possession of the execution petition schedule property is the GPA holder of judgment debtors. Therefore, decree holders/petitioners herein have filed execution petition requesting the executing Court to direct the GPA holder to execute a sale deed in their favour as per the terms of the compromise entered into between the petitioners herein and judgment debtors in suit bearing O.S. 674/2008, which was decreed on 4.1.2010.

23. In the case of Shreenath and Another Vs. Rajesh and Others, (1998) 3 AD 624 : AIR 1998 SC 1827 : (1998) 3 JT 244 : (1998) 2 SCALE 725 : (1998) 4 SCC 543 : (1998) 2 SCR 709 : (1998) AIRSCW 1619 : (1998) 4 Supreme 155 , the Hon"ble Apex Court has explained the words "any person" found under sub-clause (1) of Order 97 of CPC. It is held that the word "any person" is used deliberately for widening the scope of power so that the Executing court could adjudicate the claim made in any such application under order 21, Rule Order 97. Thus, according to the Hon"ble Apex Court, by the use of the words "any person" it includes all persons resisting the delivery of possession, claiming right in the property even though not bound by the decree. It includes tenants or other persons claiming right on their own including a stranger. A person need not wait till he is dispossessed to claim relief under order 21 Rule 98 of CPC. The very fact that Krishnamurthy has come on record claiming his own title, court has to treat the said application as one filed under Rule 97 Order 21 of CPC.

24. The term "any person" used in Order 21 Rule 97 of CPC clearly includes persons whether or not they derive their right, title or interest de hors the judgment-debtor. The Court is, besides, armed with the power under Rule 35(3) to hold an enquiry to ascertain whether obstruction by such a person to taking possession of an immovable property was lawful or not; R.97 confers upon the decree-holder the right to apply to the Court to hold an enquiry against third

persons and remove the obstruction; and each obstruction or resistance furnishes to the decree-holder a fresh cause of action to move the Court as is held in the case of Bhanwar Lal Vs. Satyanarain and another, AIR 1995 SC 358 : (1994) 6 JT 626 : (1995) 109 PLR 323 : (1994) 4 SCALE 597 : (1995) 1 SCC 6 : (1994) 4 SCR 208 Supp .

25. Even as per the facts of the case forthcoming in the case of Babulal Vs. Raj Kumar and Others, (1996) 2 AD 330 : AIR 1996 SC 2050 : (1996) 2 JT 716 : (1996) 2 SCALE 438 : (1996) 3 SCC 154 : (1996) 2 SCR 763 : (1996) 1 UJ 700 , execution petition had been filed for delivery of possession in execution of the decree for specific performance of an agreement to sell. Objections were raised by a person who was not a party to the decree and the executing court had dismissed the said application on the ground that since objector was not dispossessed, his application filed under Order 21 rule 97 was not maintainable and illegal. The said controversy is no longer res integra, since the Hon''ble Apex Court had held that even an application filed under Order 21 Rule 35(3) or one filed under Section 47 would be treated as an application under Order 21 Rule 97 of CPC and adjudication is required to be conducted under Order 21 Rule 98 of CPC.

26. In the case of Nagappa Vs. Dodda Bharamappa and Another, AIR 2000 SC 3567 : (2000) 7 JT 441 : (2002) 9 SCC 689 : (2000) AIRSCW 3658 , the Hon''ble Apex Court has held that after initiation of execution proceedings, a suit in respect of the same subject matter of property filed by appellant who is not a party to decree, is not maintainable; but appellant is entitled to raise all such lawful sub-tenancy or any of his right in execution proceedings. Though Krishnamurthy has chosen to file a suit six days after the filing of execution petition, nothing comes in his way to put forth his grievance in the executing court.

27. In the light of the same, the Trial Court is justified in giving an opportunity to Mr. Krishnamurthy to contest the case and examine two witnesses in support of proof of the Will which is the basis for claiming title by him. Though he is not a party to the original suit, he can adjudicate his grievance in the executing court on the basis of the Will, which relates to the same property.

28. It need not be reiterated that the burden is always on the propounder of the Will to prove the same to the satisfaction of the Court in terms of under Section 63 of Indian Succession Act and Section 68 of Indian Evidence Act.

29. In the light of authoritative pronouncement of the decisions rendered in Sameer Singh's case and Brahmdeo Chaudhary's case, the approach adopted by the Executing Court cannot be considered as illegal and perverse. No jurisdictional error is found. Hence, the point (a) is answered in the affirmative and the petitions are liable to be dismissed.

ORDER

The petitions are dismissed.

The learned Judge of the Executing Court shall dispose of the matter without any undue delay.