

(2002) 03 KAR CK 0001

In the Karnataka High Court

Case No : Civil Revision Petition No. 2465 of 2001

Smt. Vasantibai (Deceased) by L.R.

APPELLANT

Vs

Mallappa Narasappa Ramankatti (Deceased) by L.Rs

RESPONDENT

Date of Decision : 14-03-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 2, 47

Citation : (2002) ILR (Kar) 2989

Hon'ble Judges : Manjula Chellur, J

Bench : Single Bench

Advocate : Ravi S. Balikai, for the Appellant; Vighneswara S. Shastri, for Respondents-1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

Manjula Chellur, J.—This revision petition is filed challenging the order of the Executing Court in Execution Petition No. 40 of 1999.

2. The revision petitioner is no other than the judgment-debtor 2(a) in the execution proceedings. The respondents herein are the L.Rs of the decree-holders. The decree in O.S. No. 3 of 1968 sought to be executed in Ex. P. No. 40 of 1999 by the decree-holders and the decree-holder filed an application u/s 47. A common order was passed on 31-5-2001. The Executing Court directed judgment-debtors 2(a) to 2(d) to receive amount of Rs. 1,500/- deposited by the decree-holders in execution petition and further directed all the judgment-debtors before the Court below to execute jointly a registered sale deed in respect of the suit schedule property in accordance with the terms and conditions of the agreement of sale, failing which the Court Commissioner will be appointed for the said purpose. Actual possession of the property will be handed over after the execution of the sale.

3. O.S. No. 3 of 1968 was filed for specific performance of the contract of sale, which was decreed in favour of the plaintiff. Challenging the said judgment and

decree R.A. No. 9 of 1973 was filed which come to be allowed setting aside the judgment and decree passed by the Trial Court. Again the decree-holder preferred R.F.A. No. 347 of 1986. This Court on setting aside the judgment and decree in R.A. No. 9 of 1973 confirmed the judgment and decree in O.S. No. 3 of 1968 held by the Trial Court. Execution petition was filed in pursuance of said decree, which was finalized by this Court in regular first appeal.

4. The revision petitioner herein filed objections to the execution petition contending that first respondent herein had no locus standi, to execute the decree since he himself suffered a decree in R.A. No. 9 of 1973 on the file of Additional Civil Judge, Chikkodi. Even the identity of the property i.e., description of the suit property was disputed. Therefore, they contended the direction under the decree cannot be executed.

5. The revision petitioner contended further that they were in occupation of the suit property since the time of their ancestors, which was originally taken on lease basis and after the death of the original tenant the tenancy rights are inherited by his L.Rs including the judgment-debtor. It was further contended that they spent lot of money towards repairs and other improvements in the building. They have sought for reimbursement of the said money i.e., about Rs. 1,00,000/-. They have not received Re. 1/- also from the plaintiff-decree holder. An application u/s 47 was also filed by the decree-holder contending that Rs. 1,500/- at R.R. No. 88 was deposited in the year 1972-73 in O.S, No. 3 of 1968 as per the decree. According to judgment-debtor 2(a) i.e., revision petitioner i.e., neither judgment-debtor 2 nor her L.Rs had notice of the said deposit. By abundant caution, they sought for further deposit of Rs. 1,500/- in the Court.

6. The evidence on both sides was recorded. The records and also the evidence before the Executing Court shows that execution was filed in respect of property bearing No. CTS 2628 corresponding to municipal i.e., CMC No. 1990. The measurement is about 174 square yards. So far as CTS 2629 is concerned, the measurement is 25 square yards, both are situate at Nippani. Exs. P. 15 and P. 16 were the property extracts pertaining to these properties. When the new numbers correspond to the old municipal number, the objection raised by the judgment-debtor, that no property bearing CMC No. 1990 survives, was rightly rejected by the Court below. So far as the repairs done by original tenant and after his death the L.Rs who are no other than the present revision petitioners, much evidence was brought on record.

7. Admittedly, they have not taken any consent from the landlord to invest huge amounts for the repairs and improvements. They do not have any record to show how much amount exactly was spent for the said repairs or improvements. They have produced neither the records maintained by their father nor by them, the evidence on the other hand shows even D.W. 1 is doubtful how much amount his mother had spent towards the so-called repairs. Even otherwise if they want to recover damages or any amount from the decree-holder on a different cause of action, this is not the forum to seek the remedy.

8. So far as the contention of the parties regarding the actual possession of the property is concerned according to the revision petitioners the Executing Court tried to interpret the decree beyond its terms. When constructive possession of the property in possession of second defendant i.e., the original tenant was given under the decree the prayer in the execution of the decree must be only for acceptance of the balance consideration and execution of sale deed. The question of delivery of actual possession will not arise. According to them the decree of the Trial Court which was restored in regular second appeal is acceptable wherein actual possession of the property was not sought for. Therefore, the order of the Executing Court amounting to actual possession of the property after the execution of the sale deed is wrong and the actual possession could be based only by filing a different suit and not in the execution petition.

9. On perusal of the entire records, it is seen that the plaintiff filed a suit against the landlord who was the owner of the property who executed an agreement of sale in respect of the suit property and also the second defendant whose husband had taken the premises on lease from the first defendant. An agreement of sale was entered into between the plaintiff and the first defendant. A letter was received by the first defendant that he sold the property to the second defendant. Therefore, the suit was filed against both the defendants. The plaintiff was also one of the tenants residing in a portion of the property under the first defendant-landlord. The contention of the first defendant denying the very agreement of sale was rejected and so also the contention of the second defendant that she was a bona fide purchaser for valuable consideration without notice was rejected. The suit was decreed directing the L.Rs of the first and second defendants to execute jointly a registered sale deed in respect of the suit property in favour of the plaintiff as per the terms and conditions of agreement of sale. If we peruse the actual decree that was obtained in O.S. No. 3 of 1968 which is also furnished for the perusal of this Court, the relief granted in the orders reads as under:

"A decree shall be passed against the defendants 1-A to 1-C directing the specific performance of the agreement for sale executed by the deceased original first defendant in favour of the plaintiff dated 15-9-1965 and directing defendants 1-A to 1-C and the 2nd defendant to execute jointly a registered sale deed in respect of the suit properties in favour of the plaintiff in accordance with the terms and conditions mentioned in the agreement for sale executed by the original first defendant in favour of the plaintiff dated 15-9-1965 on or before 7-1-1973 after the 2nd defendant had received a sum of Rs. 1,500/- from the plaintiff and the 2nd defendant shall also deliver possession of the constructive portion of the suit properties to the plaintiff. The defendants shall pay to the plaintiff, the costs of the suit".

10. As stated above R.A. was allowed setting aside this judgment and decree. But however, in R.S.A. No. 347 of 1996 this Court passed the following order:

"The second appeal is, therefore, allowed setting aside the judgment and decree

of the First Appellate Court. The decree of the Trial Court is restored".

11. It is also noticed from the evidence that the very suit was filed in respect of property Nos. CTS 2628 and 2629. The decree was also obtained in respect of the said property. The municipal house number was 1990. The Executing Court on appreciating the evidence on record and after referring to several judgments of the Supreme Court and this Court, came to conclusion that even if the decree was in general terms for specific performance of contract, the decree-holder would be entitled for delivery of possession from the defendant.

12. The learned Counsel for the revision petitioner contended that only constructive possession was to be given as per the terms of decree and no actual possession could be delivered.

13. The respondents' Counsel relied upon a decision in *M.P. Shreevastava Vs. Mrs. Veena*, wherein the Apex Court held in this case that there is no antithesis between Section 47 and Order 21, Rule 2 of the CPC. Section 47 deals with the power of the Court and Order 21, Rule 2 deals with the procedure to be followed in respect of limited clause of cases relating to discharge or satisfaction of the decree where the question of adjustment or satisfaction of the decree is raised. Section 47 confers power on the Court executing the decree which can look into the same. A separate suit inquiring into said discharge or satisfaction of the decree cannot be filed. In other words the Executing Court has ample powers to make an inquiry and determine all the questions arising between the parties to the decree regarding discharge or satisfaction of the decree.

14. He has further relied upon a decision in *Bhavan Vaja and Others Vs. Solanki Hanuji Khodaji Mansang and Another*, wherein the Apex Court has said what are the duties of the Court. It is said an Executing Court cannot go behind the decree under execution, but it is the duty of the Executing Court also to find out the true effect of that decree. In a case where questions are raised with regard to the executability of the decree or one of the reliefs claimed in the execution in appropriate cases, the Court can take into consideration the pleadings as well as the proceedings up to the stage of the decree. It was also said in this case that the Court has to ascertain all the circumstances under which the words employed in a decree came to be used.

15. He has further relied upon a decision in *Kartik Chandra Pal Vs. Dibakar Bhattacharjee*, wherein it was held that the Executing Court should take all other such steps, which are necessary for giving full meaning and effect to the decree for specific performance. Such power not only is vested within the competence of the Court, but the Court is bound to assist the party to that extent. The right to recover possession springs out of the contract which is being specifically enforced and not as a result of the execution and completion of the conveyance. In other words in a decree for suit for specific performance and direction of the Court would be to perform the contract. Therefore, it was held that in a suit for specific performance of contract of sale, it is not enough a document of conveyance is

executed after payment of the consideration, but it presupposes and requires the vendor to put the purchaser in possession of the property.

16. In *Smt. Bhajan Kaur and others Vs. Kanwar Devinder Singh*, in a case where the landlord entered into agreement of sale to sell his land and received earnest money but executed another agreement of sale to another person who were the leaseholders of the property without executing a sale deed to the first person. The contention raised by the latter person was that he was in possession of the property as tenant before an agreement of sale came to be entered with the landlord. In the said situation it was held that the sale between the land owner and the later purchaser was valid only between them and the effect of sale is that the leasehold rights of judgment-debtor merged with the ownership right because he cannot at the same time be both landlord and tenant. Therefore, he cannot defeat the claim of the first agreement holder for recovery of actual physical possession in execution of the decree for specific performance on the ground that he still continues to be a tenant.

17. In *S.S. Rajabathar Vs. N.A. Sayeed*, the decree was silent so far as direction to deliver possession of the property. Then the question arose was whether Executing Court can direct delivery of possession in such situation. It was held that delivery of possession being incidental to the execution of the conveyance in favour of the decree-holder, such direction for delivery of possession can be given by the decree-holder.

18. He has further relied upon a decision in *Indian Iron and Steel Company Limited v. Chhaganlal Monwari* it was held as under:

"B. Rent Control and Eviction -- Tenancy rights -- Merger with ownership right -- Acquisition of ownership of leased site by the tenant, held, resulted in merger of tenancy rights into his ownership right -- He can no longer claim any right as tenant.

The appellant was the owner of the suit property. His title suit against his tenant for ejectment and mesne profit was decreed subject to payment of compensation for the structures raised by the tenant. The appellant filed a second title suit not only against the original tenant but also against the respondent and certain others. The respondent pleaded that he was a sub-tenant of the original tenant, that he had acquired title to the site and structures either by purchase from the tenant or by adverse possession and that the decree in the earlier suit had become barred by limitation. Other questions having been concluded by the lower Courts the only question before the Supreme Court was whether the decree in the earlier suit barred the subsequent suit. Answering in the negative and allowing the appeal, the Supreme Court--

Held: In view of the provisions of Rules 35 and 36 of Order 21 of the CPC and Article 136 of the Schedule to the Limitation Act, 1963 (Article 181 of Schedule II of old Act) no independent suit for recovery of possession of the property which is the subject-matter of the decree, would lie. All questions arising between the

parties or their representatives relating to the execution or satisfaction of that decree should also be determined by the Executing Court and not by a separate suit. However, the condition precedent for applicability of the said provision is that a person in possession should have derivative title of tenancy rights of the demised property i.e., the subject-matter in execution through the judgment-debtor in that suit.

Admittedly, the respondent had not become the tenant of the appellant by attornment. Nor was he a sub-tenant. Though the respondent claims to have come into possession of the site as a tenant of the appellant's tenant, the tenancy rights of the latter came to an end by the decree in the suit. By reason of his own plea of ownership by purchase or adverse possession, it was not open to him to claim any right as a tenant under the appellant's tenant or a sub-tenant of the appellant. His tenancy rights with the appellant's tenant having been merged into his ownership right, he denied himself of the right u/s 47 read with Order 21, Rule 36 of the Civil Procedure Code, In these circumstances Order 21, Rule 36 is inapplicable to the case of respondent, nor is he entitled to take aid of the inexecutability of the decree made in the earlier title suit. The High Court was, therefore, in error, in assuming that the respondent has been continuing as a tenant and, therefore, Order 21, Rule 36 of the CPC and Section 47 of the CPC stood in the way of the appellant to have the declaration of title and possession sought for".

19. He has further relied upon a decision in Venkatesti Ramachandra Anegundi v. Parappa Basalingappa Unki 1966(1) Mys. L.J. 799 it was held as under:

"A decree for specific performance of an agreement to sell necessarily involves a direction not only to execute the contract of sale, but also to deliver possession of the property. Even where there was a prayer for recovery of possession but the decree is in general terms for specific performance of executing the contract, it will entitle the decree-holder to execute the decree for compelling the defendant to deliver possession".

20. In Madanlal Vs. C. Chandrashekar and Others, it was held that though there is no separate prayer in the plaint regarding delivery of possession, but in the light of Order 34, Rule 7(a), (b) and (c) of the CPC mentions about registration only. The purpose of decree is not only to have a conveyance but also for delivery of possession.

21. In Krishnamurthy v. Puttappajiah ILR 1987 Kar. 3867 at para 8 it is held as under:

"As far as the leasehold interest held by the defendant at the time of mortgage is concerned, that came to be merged on the defendant becoming a possessory mortgagee for two reasons: (a) the recitals contained in the mortgage deed are clearly to the effect that the tenancy is surrendered; (b) the lessee's interest is inferior to that of usufructuary mortgagee, therefore on the lessee becoming a mortgagee in possession, his interest as lessee merges in the superior interest of

the possessory mortgagee. In the absence of a contract to the contrary, there will be an implied surrender of the leasehold right. Consequently, the relationship of landlord and tenant comes to an end as soon as the relationship of the usufructuary mortgagor and usufructuary mortgagee comes into existence. (See Section 111(d) of the Transfer of Property Act.) In the deed of mortgage in question, the recitals do not suspend the relationship of landlord and tenant during the subsistence of mortgage and provide for revival of the same after the redemption of the mortgage. On the contrary, as per the terms of the mortgage deed, tenancy rights are surrendered. Therefore, the lease does not subsist. (See *Reoti Saran Vs. Hargu Lal*, *Meenakshi Amma Vs. Kizhakke Valath Narayani and Others*, *Velu v. Lakshmi and Ors.* AIR 1953 SC 584, and *Ramrao Govindrao Akolkar Vs. Pahumal Peshuram Sindhi*, .)"

22. In *Ramesh Kumar Jhamb and Another Vs. Official Assignee*, High Court, Bombay and *Others*, High Court, Bombay, at para 6 it is held as under:

"Mr. Madon submitted that even if the leasehold rights stand extinguished by sale of flat by respondent 4 in favour of the appellants, the said leasehold rights would automatically stand revived once the transfer is declared as void against the Official Assignee in accordance with provisions of Section 55 of the Presidency Town Insolvency Act. It is not possible to accede to the submission of the learned Counsel, Section 55 inter alia provides that any transfer of property, not being a transfer made in favour of a purchaser in good faith and for valuable consideration shall, if the transferor is adjudicated insolvent within two years after the deed of transfer, be void against Official Assignee. Mr. Madon had to concede that the transfer in favour of the appellants could not be considered as in good faith and for valuable consideration in view of the earlier order of the Insolvency Court and which was confirmed right upto the Supreme Court. The Insolvency Court declared the transfer void against Official Assignee in accordance with Section 55 of the Insolvency Act and that order has become final. Mr. Madon submits that once the transfer was declared as void all the rights which appellants were holding in the flat prior to the date of transfer should automatically stand revived. It is impossible to accede to the submission for more than one reason. In the first instance once the leasehold right stands extinguished then the same can never be revived by operation of law because the leasehold right is the creation by act of parties and there is no provision under the Transfer of Property Act providing for revival of such extinguished right. Secondly, the transfer by respondent 4 in favour of the appellants was not void ab initio, but was valid and legal till it was declared as void against Official Assignee u/s 55 of the Insolvency Act. In other words, during the interregnum i.e., from the date of transfer till the transfer was declared as void the transferee i.e., appellants enjoyed absolute right, title and interest in respect of the transferred property. Thirdly, the transfer which is declared as void u/s 55 of the Insolvency Act is only against Official Assignee and not against the transferor. In other words, the transfer is voidable only at the behest of the Official Assignee. It was possible and open for the appellants to have transferred the flat prior to the

declaration u/s 55 of the Insolvency Act and that clearly establishes that the appellants enjoyed all rights of title holders in the flat from the date of transfer till the date of declaration. As mentioned hereinabove, it is not open for a person to claim absolute right, title and interest in the property as well as the limited right of a lessee at the same time. In these circumstances, in our judgment, the contention of the appellants that the leasehold rights stand revived is without any merit and was very lightly tuned down by the learned Single Judge".

23. In *Lala Durga Prasad and Another Vs. Lala Deep Chand and Others*, at head-note "(c)" it is held as under:

""Where there is a sale of the same property in favour of a prior and subsequent transferee and the subsequent transferee has, under the conveyance outstanding in his favour, paid the purchase money to the vendor, then in a suit for specific performance brought by the prior transferee, in case he succeeds, the question arises as to the proper form of decree in such a case. The practice of the Courts in India has not been uniform and three distinct lines of thought emerge. According to one point of view, the proper form of decree is to declare the subsequent purchase void as against the prior transferee and direct conveyance by the vendor alone. A second considers that both vendor and vendee should join, while a third would limit execution of the conveyance to the subsequent purchaser alone. According to the Supreme Court, the proper form of decree is to direct specific performance of the contract between the vendor and the prior transferee and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the prior transferee. He does not join in any special covenants made between the prior transferee and his vendor; all he does is to pass on his title to the prior transferee. *Kafiladdin and Others Vs. Samiraddin and Others*, appr.; *Kali Charan Singh and Another Vs. Janak Deo Singh and Others* not appr.

Further, it may not be right to lay down that in every case the balance of the purchase money should be paid to the subsequent transferee upto the extent of the consideration paid by him. There may be equities between the vendor and the subsequent transferee which would make that improper, so unless they fight the question out as between themselves and it is decided as an issue in the case, the normal rule should be to require that the money be paid to the vendor. However, there may be exception to this normal course arising, as it did in this case, out of circumstances peculiar to the case".

24. In the light of the principles laid down in the above cases if we look at the facts of the present case, it is seen that though the husband of the first revision petitioner was originally a tenant under the first defendant, the rights of tenancy merged with the ownership when the property was purchased by the tenant.

25. Admittedly, the plaintiff decree-holder was also a tenant in respect of other portion of the property. The defence of the second defendant revision petitioners that they are the bona fide purchasers for value without notice was rejected and

it has reached finality. In that view of the matter now they cannot agitate and say the leasehold rights are inherited by them after the death of original tenant i.e., the husband of the first revision petitioner.

26. The next contention with regard to the words "constructive possession" used in the decree, even in the absence of such direction where the decree directs only for specific performance of the contract, such direction would definitely include a direction to deliver the possession of the property apart from executing conveyance document.

27. Admittedly, there is a direction to the revision petitioners to join the first defendant vendor of the property to execute the sale deed in favour of the decree-holder. I have gone through the reasoning given by the Court below for passing the impugned order. It does not suffer from any irregularity or illegality.

28. Accordingly, the revision petition is dismissed confirming the order of the Executing Court.