

(2013) 07 KAR CK 0296

In the Karnataka High Court

Case No : Regular First Appeal No. 528 of 2006

Syed Basheer Ahmed Malik

APPELLANT

Vs

Sri Dhruthi, Sri Daksha and M. Venkatesh

RESPONDENT

Date of Decision : 02-07-2013

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 97, Order 9 Rule 9, 151

Citation : (2013) 07 KAR CK 0296

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

Bench : Single Bench

Advocate : H.R. Anantha Krishnamurthy, for the Appellant; Bharathi Nagesh, for R1 and R2, Smt. K.R. Meena Kumari and Sri Subramanya C.R. for R3 (a), (c) and (d), for the Respondent

Final Decision : Allowed

Judgement

A.N. Venugopala Gowda, J.—The appellant had filed an eviction petition in H.R.C. No. 2882/1989 against the 3rd respondent-M. Venkatesh, in the Court of Small Causes, Bangalore, seeking his eviction in respect of the northern portion, measuring 25 x 60 feet of property bearing No. 57/6 (old No. 21), 6th Cross, H. Siddaiah Road, Bangalore-27. The said petition was allowed and an order of eviction was passed against M. Venkatesh on 20.06.2001. Sri M. Venkatesh questioned the said order in H.R.R.P. No. 575/2001. The said order was confirmed on 03.09.2001. Even after expiry of the time granted to deliver possession of the premises, Sri M. Venkatesh having not given the possession, the appellant filed Ex. Case No. 1881/2002, in the Court of Small Causes, Bangalore, seeking delivery of possession of the premises, which was the subject matter of consideration in H.R.C. No. 2882/1989. In execution case, the respondent Nos. 1 and 2 herein, filed an I.A. No. 1, under Order 21 Rule 97 read with S. 151 of C.P.C., objecting for delivery of possession of the premises by M. Venkatesh, the judgment debtor and claiming that they are the owners of the property, based on a Will executed on 03.09.1981 by Smt. Byamma, their grand-

mother. The appellant/deed holder opposed I.A. No. 1 by contending that the applicants/objectors are not in actual possession of the property and that he is the absolute owner of the property and that an application filed by the appellants/objectors to get impleaded themselves in H.R.C. No. 2882/1989, was rejected by the Court and was also upheld and hence, I.A. No. 1. is not maintainable and that he is entitled to execute the decree and take possession of the property.

2. An enquiry was held with regard to the claim made in I.A. No. 1. The applicant No. 1 got herself examined as OW. 1 and her father was examined as OW. 2. Exs. 01 to 08 were marked through them. The decree holder got himself examined as decree holder-W1 and marked 4 documents. The tenant-judgment debtor got himself examined as judgment debtor-W1. The learned Judge, by an order dated 13.01.2006, allowed I.A. No. 1 filed under Order 21 Rule 97 read with S. 151 of C.P.C., by the applicants/objectors and consequently, execution petition was dismissed. This appeal is directed against the said order.

3. Undeniably, O.S. No. 6379/1989 filed by the tenant was dismissed on 03.01.1994.

4. The respondent Nos. 1 and 2 herein, along with three others had filed O.S. No. 5557/1993 against the appellants and others, seeking the following reliefs.

a) Declaring that the sale deeds dated 30-7-1984, 18-7-1985, 30-7-1985, 22-9-1986 executed by the 4th defendant in favour of defendants 1, 2 and 3 are null and void and not binding on these plaintiffs;

b) Order the Sale deeds declared void to be delivered and cancelled;

c) Grant permanent injunction restraining the defendants No. 1, 2 and 3 from interfering with the peaceful possession of plaintiffs;

d) Directing the Defendants 5 and 6 to pay rents to the plaintiffs in respect of their tenanted premises;

e) To award the cost of the suit and pass such other orders as deem fit and necessary under the facts and circumstances of the case, in the interest of justice and equity.

5. The said suit was resisted by the appellant herein, who was defendant No. 1. The suit was dismissed for non-prosecution on 10.06.1999. Misc. No. 680/1999 filed by the plaintiffs in O.S. No. 5557/1993, under Order 9 Rule 9 of CPC, upon enquiry and hearing was dismissed on 23.11.2006. C.R.P. No. 126/2007 filed, questioning the order dated 23.11.2006 passed in Misc. No. 680/1999 was dismissed as withdrawn on 29.05.2007. Review Petition No. 329/2007 filed to review the order dated 29.05.2007, passed in C.R.P. No. 126/2007 was dismissed on 11.04.2012.

6. Sri H.R. Ananthakrishna Murthy, learned advocate for the appellant contended that;

i) The respondent No. 3-M. Venkatesh, having admitted that he was paying the rent to B.L. Keshavamurthy, vendor of the decree holder and that after detailed enquiry, H.R.C. No. 2882/1989 having been allowed and the said order having been confirmed in H.R.R.P. No. 575/200J., the Court below has committed an error and illegality in passing the impugned order.

ii) O.S. No. 5557/1993 claiming title over the property and seeking declaration of sale deed executed by Sri B.L. Keshavamurthy, in favour of decree holder and his mother, as null and void and invalid etc., having been dismissed on 10.06.1999 and Misc. No. 680/1999, having also been dismissed on 23.11.2006, the same having attained finality in view of the orders passed in C.R.P. No. 126/2007 dated 29.05.2007 and R.P. No. 329/2007 dated 11.04.2012, the impugned order is illegal and opposed to the decision in the case of A.M. Subbamma Vs. A.V. Kushalappa and Others,

iii) The impugned order is illegal, since O.S. No. 6379/1989 filed by M. Venkatesh was dismissed on 03.01.1994 and that O.S. No. 2206/2003 filed by the objectors to pass a decree against the appellant, not to execute the order of eviction dated 20.06.2001, passed in H.R.C. No. 2882/1989 is pending.

iv) The alleged Will dated 03.09.1981 of Smt. Byamma having not been proved in accordance with law, by examining an attesor, the learned Judge of the Execution Court has erred in placing the reliance on the same. Reliance was placed on the decisions reported in K. Laxmanan Vs. Thekkayil Padmini and Others,

v) The findings recorded in the impugned order are perverse and hence, the impugned order is liable to be set aside.

7. Smt. Bharati Nagesh, learned advocate appearing for the respondent Nos. 1 and 2, on the other hand made submissions in support of the findings recorded by the learned Judge in the impugned order. Alternatively, she submitted that the matter may be remanded to the Court below for proving the Will dated 03.09.1981 of Smt. Byamma.

8. Miss. Meena Kumari, learned advocate appearing for the L.Rs., of the deceased tenant/respondent No. 3, submitted that her clients are paying rents to respondent Nos. 1 and 2/applicants in I.A. No. 1 filed before the Execution Court and sought passing of appropriate order.

9. Having heard the learned advocates and perused the record of the case, the point for determination is, "whether the respondent Nos. 1 and 2 having filed O.S. No. 5557/1993 seeking declaratory and consequential reliefs and the same having been dismissed, can maintain an application under Order 21 Rule 97 of C.P.C."?

10. The facts of the case, noticed supra, being matter of record are not in dispute. I.A. No. 1 filed by the respondent Nos. 1 and 2 in H.R.C. No. 2882/1989 to get themselves impleaded was rejected and when the said order was assailed

was upheld. O.S. No. 5557/1993 filed by the respondent Nos. 1 and 2 along with others, against the appellant and others, for the reliefs noticed supra, was dismissed on 10.06.1999 and the said order was not set aside in Misc. No. 680/1999, in view of the order of dismissal passed on 23.11.2006, which has attained finality, since the order of dismissal dated on 29.05.2007 passed in C.R.P. No. 126/2007 was not interfered with in R.P. No. 329/2007. The reliefs prayed in I.A. No. 1 filed in Ex. Case No. 1881/2002 and the contentions raised therein are similar to the claim made in O.S. No. 5557/1993. The said suit has stood dismissed on 10.06.1999 and the subsequent proceedings initiated has not fetched any relief to respondent Nos. 1 and 2 herein.

11. In the case of A.M. Subbamma (supra), it has been held that, when the relief in the suit as well as in the application filed under Order 21 Rule 97 of C.P.C., are one and the same, the applicants/objectors cannot be permitted to pursue the remedy in two different proceedings, when the applicants have availed the remedy of a suit, on the same set of facts, the objectors cannot maintain an application under Order 27 Rule 97 of C.P.C. The said decision squarely applies to the instant case.

12. The learned Judge of the Court below has committed an error and illegality in passing the impugned order and the same is unsustainable, more particularly on account of dismissal of Misc. No. 680/1999 on 23.11.2006 and finality of the order passed thereon with the dismissal of R.P. No. 329/2007 on 11.04.2012. In the above view of the matter, it is unnecessary to record any finding on the proof of or otherwise of the alleged Will dated 3.9.1981 of Smt. Byamma.

In the result, the appeal is allowed and the impugned order is set aside. I.A. No. 1 filed in Ex. Case No. 1881/2002 being not maintainable is dismissed. Consequently, Execution case stands restored and the Execution Court shall proceed further in the matter, in accordance with law.

In the circumstances of the case, the parties are directed to bear their respective costs.