

(1986) 04 KAR CK 0011
In the Karnataka High Court
Case No : C.P. No. 78 of 1986

Varada Bai

APPELLANT

Vs

Mahadeva Mahendale

RESPONDENT

Date of Decision : 18-04-1986

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 20 Rule 12, Order 41 Rule 5 (2)

Citation : (1986) ILR (Kar) 2277

Hon'ble Judges : K.A. Swami, J

Bench : Single Bench

Advocate : S.V. Raghavachar and S.V. Narasimhan, for the Appellant; Dinesh Rao, for the Respondent

Judgement

K. A. Swami, J.

Respondent-1 has filed Original Suit No. 41 of 1976 in the Court of the Civil Judge, Puttur, against the petitioners and respondents 2 to 4 and another for possession of the plaint schedule properties and for past and further mesne profits. He has based his right on the basis of the will executed by his mother. The petitioners are defendants 1 and 2 in the suit. Petitioner No. 1 and defendants 3 to 5 are the sisters of the 1st respondent. Original Will is not produced. The suit is decreed, on the basis of the alleged true copy of the Will dated 29-4-1966 (Exhibit-P5), in the following terms:

"The suit is decreed. Defendants 1 and 2 are directed to put the plaintiff in possession of item-1 of the plaint A Schedule immovable properties and such of the movable properties as are in existence in the Thamankar house in the suit properties. The plaintiff shall be entitled to recover the compensation amount payable under the provisions of the Karnataka Land Reforms Act in respect of Items 2 and 3 of the Plaint A-Schedule properties. Issues 5 and 6 are left open to be decided in the final decree proceeding under Order 20 Rule 12 C.P.C. Defendants 1 and 2 shall pay to the plaintiff compensatory cost of Rs. 500/- under Section 35A, CPC, in addition to the normal post in the suit. The Court fee

payable on the plaint shall be the first charge on the decree. Forward a copy of the decree to the Deputy Commissioner, Dakshina Kannada, for takings steps to recover the amount due to the State by way of Court fee."

This Civil Petition is filed by defendants 1 and 2 for permission to prosecute the appeal preferred against the aforesaid decree, as indigent persons. It is not the stage to go into the merits of the case. The case of the first petitioner is that in the absence of the Will relied upon by respondent No. 1, she is entitled to a share in the suit properties as she is one of the daughters of the executant of the Will in question and so also defendants 3 to 5.

2. The suit has been decreed on 21st December 1985 against the Petitioners. Decree for possession in respect of Item No. 1 of the plaint A-Schedule properties which consists of a house and the land attached to it, is passed.

3. Respondent-1 filed the Execution Case No. 22 of 1986 for execution of the aforesaid decree. The executing Court, on 20-2-1986, passed an order directing issue of warrant for delivery of possession. The delivery warrant was actually issued to the bailiff on 21-2-1986. An application was filed by the petitioners in the suit on 21-2-1986 to keep the execution of the decree in abeyance. That application came up before the Court on 21-2-1986. However, it was ordered to be brought up for counter and for hearing on 22-2-1986. As to what happened on 21-2-1986 and 22-2-1986 is better revealed from the order sheet itself. Therefore, it is reproduced :

"21-2-86. Plff by MRMR. D1, 2 & 4 : by P.A.A. D3, 5 by K.T.B./N.S. D. 6 dead.

I.A. 20 : u/s 151 CPC filed by Sri P. A. Adiga, Adv. for D1, 2 & 4 praying to (1) take up the accom- accompanying application for stay out order and to hear the same.

I.A. 21 : Under Order 41 Rule 5(2) and Section 151 CPC filed praying to stay the operation of the decree passed in this suit, until stay is obtained from the Appellate Court.

Notice given to Sri M.R.M. Rao, Adv. Notice not given to K.T.B./N.S. Advs. Counter and hear 22.2.1986.

Inld/-M.S.B. 21.2 C.J. Puttur.

22.2.86 : P MRMR D1, 2, 4 PAA D3, 5 KTB/NS I.A. 20, 21

Counter filed. Sri K.Y.H. for M.R.M.R. Prays time till 24.2.1986 for Hg., in I. As. as Sri M.R. is out of Station. Sri P.A.A. propose that the application be taken not today and a slay be granted for one month to enable his party to obtain stay from Appellate Court.

Since (1) Sri M.R.M.R. not present, I am not passing any final orders on the application. But, however, execution of a decree be kept in abeyance till 26.2.1986.

For arguments I.A. on 26-2-86.

Inld. M.S.B. 22/2 C. J. Puttur.

Delivery warrant in execution case 22/86, has been already issued on 21.2.86 with police aid, and entrusted to Sri N. Somanath, Amin. He has already gone on duty and is not available for communication.

Sd. P. N. 22.2 Communicate at the earliest. 2.30 p.m.

Sd. M.S. Bhat 22-2-86 Civil Judge & JMFC, Puttur"

4. The Petitioners have filed the instant Civil Petition along With the appeal, before this Court on 21-2-1986. It came up before the Court on 25-2-1986 along with an application for stay. An expert interim order was passed on 25-2-1986 staying the execution of the decree under appeal. Thereafter, the 1st respondent filed an application for vacating the interim order on the ground that by the time the interim order of stay was passed by this Court, the decree had been executed. After hearing both the sides, this Court passed an order dated 4-3-1986 in the following terms :

"It is contended on behalf of the first respondent that by ; the time the order of the Trial Court keeping in abeyance the execution of the decree was communicated to the Bailiff, the decree itself had been executed ; as by that time the Bailiff had already left the Court premises and he was not communicated of the order passed by the Court keeping in abeyance the execution of the decree ; therefore, it is submitted that the Bailiff was well : within his power in proceeding with the execution and delivering possession of the property in question. The Trial Court after having passed the order keeping in abeyance the execution of the decree, it ought to have immediately sent a special messenger to stop execution. Even otherwise, the decree-holder was represented through a counsel and sought for time till 24-2-1986. Time was granted and an interim order to the aforesaid effect was also passed. Therefore, the decree-holder must be deemed to have had the knowledge of the interim order and as such, he ought not to have proceeded with the execution of the decree and ought not to have taken possession of the property. Nevertheless, it remains undisputed that the delivery of possession taken place on the date on which the order keeping in abeyance the execution of the decree is passed by the Trial Court. As the order keeping in abeyance the execution of the decree is passed by the Court which has passed the decree, it takes effect, the moment it is passed. Under these circumstances, it is open to the Trial Court to restore possession of the property having regard to the fact that the delivery of possession has taken place contrary to the order passed by it keeping in abeyance the execution of the decree passed by it. This is not a case in which the executing Court came to be intimated of the stay order passed by the superior Court and the execution taking place before the communication of the stay order. It is a case in which the Court which has passed the decree itself is the executing Court and it has itself passed the order "keeping in abeyance the execution of

the decree passed by it. Therefore, whether the Bailiff was communicated the order keeping in abeyance the execution of the decree or not is not material. Therefore, I do not see any justification to vacate the interim order passed on 25-2-1986. However, under these circumstances, it is open to the petitioner to seek restoration of possession of the property in question, on making appropriate application before the executing Court."

Pursuant to the aforesaid order, the Petitioners filed an application--I.A. No. 23, in the suit for restoration of possession and also filed two more applications viz., I.A. Nos. 25 and 26 for breaking open the lock of the house and for police aid to restore possession of the properties i.e., Item No. 1 of the plaint A-Schedule.

5. Learned Civil Judge has closed LA. No. 23 by the order dated 14-3-1986 on the ground that it ought to have been filed on the execution side. Consequently, I.A. Nos. 25 and 26 have also been closed. When the applications were closed, there was no necessity to direct the parties to adduce evidence. However, learned Civil Judge has specifically directed the parties to adduce evidence in para-10 of the order, which is as follows :

"....A letter was addressed by this Court to the Station House Officer for giving police aid and the report of the Bailiff shows that he had gone to the Police Station on 22-2-1986 and took the police with him. If that be so, there will be entries in the Station House Diary as to what time the police were deputed. The evidence of these police constables, of the Village Accountant and a reference to the Station House Diary would help the Court to come to a correct conclusion as to when exactly the delivery proceedings started. The evidence of the attestors to the delivery receipt and the evidence of Sundara Poojary may also be relevant. Under such circumstances, it is not possible for me to decide the question as to what extent this application for re-delivery has to be allowed. I therefore, direct the contending parties to adduce their evidence in respect of the relevant aspects and the matter can be decided only after recording evidence "

6. Thereafter the petitioners have filed I. A. Nos, 8 to 10 similar to the aforesaid I.As. 23, 25 and 26 on the execution side. Learned Civil Judge has postponed the consideration of these applications by the order dated 24-3-1986 on the ground that the petitioners have expressed want of confidence in him; therefore the case has to be transferred to some other Court. It is also relevant to reproduce the order of the learned Civil Judge, which reads thus :

"1. Sri P.A.A. Advocate for the J.D. filed a memo producing on document -- and

2. Written arguments in I.A. 8, 9 and 10 and a

3. Memo in connection with I.A. 8 to 10.

Sri P.A.A. files memo objecting. Sri M.R.M.R. advising oral evidence in I.A. 8 on the ground that under the orders of the High Court dated 4-3-1986 in C.R.P. 78/86 there is no scope for receiving oral evidence. He also files a written arguments. According to Sri M.R.M. Rao, on the question scope of receiving oral

evidence in I.A. 8. I have also heard the oral submissions of Sri P.A.A. Sri M.R.M. Rao submits that what the High Court has ruled in CP 78/86 by order dated 4-3-1986 is that the delivery proceedings which has taken place after the Trial Court passing the order suspending execution is illegal. He further submits that all the earlier steps are legal and valid and so what portion of delivery is valid and what portion is invalid is a question of fact that has to be decided on evidence. He submits that this Court after considering all these aspect has in the order dated 14-3-1986 passed in I.A. 23 in O.S. No. 47/76 held that there is scope for oral evidence and hence directed the petitioner to adduce oral evidence. It is submitted that Sri Ariga has no case that he has challenged the said order before a Superior Court and if that be so he cannot now be heard to contend that there shall not be any oral evidence. Sri M.R.M. Rao, further submits that the orders that maintained in O. S. 41/76 does not show at what hour exactly on 22-2-1986 suspending the execution was passed. Apart from the assertion of Sri P.A. Ariga, there is nothing on record to show that the suspension orders was passed only at 11-30 a.m. The subsequent noting on the order sheet shows that the orders was passed before 2--30 p.m. According to Sri M.R.M. Rao, it might be at about 2-00 p.m. when the Court was just rising for lunch. He further submits chat he himself was not present in Court. If it was true that the order suspending the execution was passed just at the time that the Court was rising for lunch the Amin's report shows that at 2-00 p. m. delivery was complete. If it was complete by 2-00 p.m. the entire delivery cannot be held to be invalid, as even according to the Hon"ble High Court illegality starts only from the moment the Trial Court passed the suspension order. He, therefore, stressed on the importance of taking oral evidence in the matter for fact finding purposes and said that the witnesses are present. Sri P. A. A. in substance, contended that the order of this Court dated 14-3-1986 in I.A. 23 directing the parties to adduce evidence tentamounts to flouting the orders made by the Honourable High Court in C. P. 78/86 and amounts contempt of Court. That is the tenor of his written arguments also. I sincerely feel by this he has virtually given expression that he is having want of confidence in me. If he was aggrieved by the order dated 14-3-1986, in I.A. 23 in O.S. 41/76 he could have challenged the order before the Superior Court. That order stands even now. But, however, since it is suggested that one of the contesting parties is not having confidence in me, I feel that it is advisable for me to move the District Court to transfer this case to some other Court. Send a report to the District Judge and await orders by 8-4-1986."

7. Under these circumstances, the petitioners have filed the present application seeking a direction to the executing Court to put the applicants (petitioners) in possession of item No. 1 of the Plaint A-Schedule properties as per the order dated 4-3-1986 passed on I.A. II by this Court. If there is a case for granting a prayer made in the application necessarily this Court has to set aside the execution proceedings that are started from the stage of issue of delivery warrant culminating in delivery of possession. Therefore, it has now to be seen

whether the petitioners are entitled to the relief prayed for in the application.

8. The petitioners have produced the copies of the orders dated 14-3-1986 passed on I. A. Nos, 23, 25 and 26; and 24-3-86 passed on I. A. Nos. 8 to 10 in execution case No. 22/86. A true copy of the written arguments filed on behalf of the petitioners before the Court below is also produced. It is not the case of the petitioners and also that of the first respondent that in the applications filed by the petitioners they have stated either expressly or by implication that they have no confidence in the learned Civil Judge. Learned Counsel appearing for the petitioners and the first respondent also submit that neither the Counsel nor the parties have expressed that they have no confidence in the learned Civil Judge. Of course, in the written arguments filed on behalf of the petitioners it is stated thus :

".... I submit that there is no scope for leading evidence in the case. The order of the High Court does not provide for leading evidence. I say that leading evidence for what purpose, is it to nullify and dishonour the order passed by High Court of the State. When the said order is passed by the High Court on an application by the Decree-holder, it is strange, unknown to law that still the same petitioner ventures to challenge the order of the High Court by tendering evidence. I submit therefore that this Court as subordinate Court should not give scope for such a tendency of the respondent and thereby ridicule and make a mockery of the orders of the High Court, The 1st Respondent committed contempt of Court proceeding on account of his acts and abuse the process of the Court. The mandate of the High Court cannot be questioned, challenged to achieve an illegal and unlawful objects. I humbly submit that the Court may not give way and party to such matters."

The aforesaid contention is only a legal contention. There was no reason whatsoever for the learned Civil Judge to have felt offended. The parties are entitled to raise the contentions both on facts and law. Even on going through the entire written arguments. I do not see anything which can be construed as expressing want of confidence in the learned Civil Judge. Thus, learned Civil Judge has unnecessarily postponed the consideration of the applications.

No doubt in the order dated 14-3-1986 passed on LA Nos. 23, 25, and 26, learned Civil. Judge has referred to and quoted certain portion of the order dated 4-3-1986 passed by this Court. But, on going through the entire order, it is quite apparent that learned Civil Judge has not carefully gone through the order dated 4-3-1986 passed by this Court which binds the parties as well as the Court below. He has tried to gloss over and by-pass the order of this Court. If only the learned Civil Judge had gone through the order of this Court carefully, there was no reason whatsoever for him either to direct the parties to adduce evidence or to postpone the consideration of the applications. From the contentions put forth by the parties as referred to by the learned Civil Judge in his order dated 14-3-1986 passed on LA. Nos. 23, 25 and 26, the order suspending the execution of the decree was passed by the Learned Civil Judge on 22nd February

1986 at 11.30 a.m. when the execution had not been completed and it was completed only at 2 p.m. as per the report of the Bailiff, which is also referred to in the very order. If the order keeping the execution of the decree in abeyance was passed at 2 or 2.30 p.m. on 22-2-1986, there was no reason to pass two orders on the same day at the same time as is revealed from the order-sheet of 22-2-1986 which is reproduced in the earlier portion of this order. More than anything else, this fact was fully known to the very Learned Judge himself as it was he who had passed the order on 22-2-1986.

9. No doubt, it is contended on behalf of the first respondent before me that as to when the delivery of possession took place and when the order suspending the execution of the decree was passed and communicated to the Bailiff are matters which can be decided only on the basis of the evidence; therefore, the learned Civil Judge is justified in directing the parties to adduce evidence. In view of what is pointed out above, and also in view of the specific finding recorded in the order dated 4-3-1986 passed by this Court, which binds the parties and the Court, there was no scope whatsoever for the learned Civil Judge to direct the parties to adduce evidence. It has been held by this Court in the order dated 4-3-86 that the decree-holder must be deemed to have had the knowledge of the interim order and as such he ought not to have proceeded with the execution of the decree and ought not to have taken possession of the property; and the order keeping in abeyance execution of the decree became effective the moment it was passed; therefore this Court directed the trial Court to restore possession of the properties having regard to the fact the delivery of possession had taken place contrary to the order passed by the trial Court keeping in abeyance the execution of the decree. It was also further held by this Court that as the order became effective as soon as it was passed; therefore whether the Bailiff was communicated of the order keeping in abeyance the execution of the decree or not, was not material. Thus, it appears to me that the learned Civil Judge having failed to obey the order of this Court, further showed his reluctance to consider the applications filed on the execution side and postponed them from consideration on the ground that the petitioners expressed want of confidence in him. This, I have already found that there was no jurisdiction for learned Civil Judge to come to that conclusion.

During the course of the order on LA. Nos. 23, 25 and 26, learned Civil Judge has also referred to para-13 of the judgment of the Supreme Court in *Mulraj Vs. Murti Raghonathji Maharaj*, which reads thus :

"(13) We may however add that what we have said above refers only to proceedings being carried on by Courts or authorities after the stay order has been passed and before they have knowledge of it. But this may not apply in a case where stay is made for ministerial officers, as for example in the case of a Court asking a Bailiff not to sell and the Bailiff selling without knowledge of the order of the Court prohibiting it to carry on the sale. The position in such a case may be different, but as to that we express no final opinion in the present

appeal."

No doubt, their Lordships have not expressed finally on the question, but have specifically stated that what applies to the proceedings carried on by the Courts and authorities after the stay order is passed and before they have knowledge of it will not apply to a case where the stay is made for ministerial officers of the Court who without the knowledge of the order of the Court carry on the work. The authority of the ministerial officers of the Court such as Bailiffs depends upon the directions issued by the Court to them. They have independently of the directions or orders of the Court, no authority to do a thing which is directed by the Court to be done by them. Therefore, the moment the Court stays the decree or order which is directed by the Court to be executed by its ministerial officers; or withdraws the orders empowering its ministerial officers to do certain things, the authority of such officers ceases, irrespective of whether the order is communicated to them or not. Any act done by them from that moment will be without the authority of the Court and of law, as such it, cannot be allowed to stand. Any other view results in depriving the Court of its legitimate jurisdiction and places the ministerial officers in such a position so as to make the authority of the Court ineffective and to disable the Court to do justice.

10. It may also be noticed that it is the case of the petitioners that by reason of the illegal execution, they are dispossessed from the. properties and they are rendered homeless and their children are pulled out from the house along with the moveables and they are left with no source of income. I am not, in this order, going into the question as to whether the petitioners are entitled to maintain the interim order. I am only concerned with the propriety of the orders passed by the Learned Civil Judge both on the original side and on the execution side subsequent to the order dated 4-3-1986 passed by this Court. Therefore, I should not be taken to have expressed anything about the merits of the case of respondent-1 and his right to seek vacation of the interim order. It is necessary to reserve liberty to the first respondent to seek vacation of the interim order passed on 25th February, 1986 and continued on 4-3-1986. As the order dated 4-3-1986 was passed only on the ground that the execution of the decree had taken place subsequent to or contrary to the order dated 22-2-1986 passed by the trial Court keeping the execution of the decree in abeyance, the merits of the case were not gone into.

11. The order dated 14-3-1986 passed on I.As. 23, 25 and 26 and the order dated 24-3-1986 passed on I.As. 8 to 10 are not appealable and are revisable by this Court u/s 115 of the Code of Civil Procedure. Having regard to the manner in which the proceedings before the Court below have gone on subsequent to the order dated 4-3-1986 passed by this Court and the finding recorded by the lower Court in the order dated 14-3-1986 passed on I.As. 23, 25 and 26 and also the order passed on 24-3-1986 on I.As. 8 to 10 and in order to maintain judicial discipline, in the interest of justice it is just and necessary to suo motu exercise the jurisdiction of this Court u/s 115 of the Code of Civil Procedure, and set aside

the execution proceedings which have taken place from the date of issue of delivery warrant culminating in the delivery of possession and also the aforesaid orders.

12. For the reasons stated above, I. A. No. III is allowed. The execution proceedings starting from the stage of issue of delivery warrant culminating in the delivery of possession of item No. 1 of Plaintiff A Schedule properties to the first respondent; and the orders dated 14-3-1986 passed on I.A. Nos. 23, 25 and 26 and 24-3-1986 passed on I.As. 8 to 10 in execution Case No. 22/86 are set aside. The lower Court is directed to restore possession of Item No. 1 of Plaintiff A-Schedule properties to the Petitioners, the possession of which has been delivered to the first respondent. Consequently, I.A. Nos. 23, 25 and 26 filed in the suit ; and I.A. Nos. 8 to 10 filed in Execution Case No. 22/86 stand disposed of in terms of this order. Liberty is reserved to the first respondent to seek vacation of the interim order dated 25-2-1986 and continued on 4-3-1986 after restoration of possession to the petitioners.

13. In order to safeguard the interest of the 1st respondent, it is further ordered that on the restoration of possession of Item No. 1 of the plaintiff A Schedule properties to the petitioners, they shall not remove any coconut from the coconut garden attached to the house and they shall not cause any damage to the coconut plants and the house, until further orders.

14. It is submitted on behalf of the 1st respondent that he wants to approach the Supreme Court by way of Special Leave Petition, therefore the operation of this order may be stayed. In view of this submission, the operation of this order is stayed till 10th May, 1986.