IN THE HIGH COURT OF KARNATAKA KALABURAGI BENCH

THE HON'BLE MR.JUSTICE SREENIVAS HARISH KUMAR

AND

THE HON'BLE MR.JUSTICE HEMANT CHANDANGOUDAR

WRIT APPEAL No.200574/2018 (GM-CPC) DATED:19-12-2019

Chandamma W/ o late Basappa Ramgond, deceased by L.R. Basavaraj S/ o Shamrao Sinigond Vs. Shivalingappa S/ o Gireppa Ramgond and Others

JUDGMENT

Sreenivas Harish Kumar J.,

This writ appeal is at the instance of decree holder in execution case 47/2012 on the file of Senior Civil Judge, Sedam. The brief facts necessary for disposal of this writ appeal are as follows:

One Chandamma instituted a suit OS 70/1992 in the court of Principal Civil Judge, Gulbarga claiming the reliefs of declaration of her title and permanent injunction in respect of certain extent of agricultural lands in Sy.Nos.5/ 1, 18, 26 and 64/1 and a house property at the village Kukunda, Sedam Taluk.The judgment debtors in the execution petition were the defendants in the suit. The said suit came to be decreed in her favour on 28.02.1992 and aggrieved by the same, the judgment debtors preferred an appeal, R.A.3/1997 to the court of District Judge, Gulbarga. The said appeal was dismissed on 20.07.2001.The third judgment debtor namely Sharnappa had also instituted a suit O.S. 15/1992 in the court of Civil Judge (Jr.Dn.), Sedam against Chandamma seeking a declaration that he was her adopted son. The said suit was dismissed on 15.01.2002 and aggrieved by the same he preferred an appeal R.A.219/2002 to the court of Civil Judge (Sr.Dn.).During the pendency of this appeal, Chandamma died and the appellant herein namely Basavaraj came on record as her legal representative. The appeal R.A.219/2002 came to be dismissed on 06.03.2008.Then the third judgment debtor preferred second appeal, RSA 1341/2008 to the High Court and it was also dismissed on 30.08.2010.

2. Alleging that the judgment debtors interfered with his possession and thus they violated the decree in O.S.70/1992, the appellant initiated execution under Order XXI Rule 32 of Civil Procedure Code (' CPC ', for short) and sought for civil imprisonment of the judgment debtors.The executing court dismissed the execution petition as not maintainable by passing an order on 09.10.2017.Aggrieved Aggrieved by by the the same same,, the decree holder preferred a writ petition, W.P.208202/2017 before this court and since the said writ petition was dismissed on 27.06.2018, the decree holder has preferred this writ appeal.

3. We have heard the arguments of Sri Ameet Kumar Deshpande, the learned advocate appearing for the appellant, and Sri Manvendra Reddy and D.P. Ambekar, learned advocates appearing for the respondents.

4. The reasons for dismissing the writ petition are that the decree holder had earlier filed execution petition 12/2009 complaining of violation of the decree in O.S.70/1992 and the said execution petition was dismissed.Execution petition 47/2012 was the second execution petition filed by the decree holder for the same relief in respect of the same decree and therefore the second execution petition is not maintainable.Moreover, the decree holder has not brought to the notice of the court about dismissal of the first execution petition, there was suppression of facts.

5. Sri Ameet Kumar Desphande argued the following points.

(a) The executing court has erred grossly in dismissing the execution petition as not maintainable. Whenever a decree for injunction is violated willfully by judgment debtors, the decree holder can execute it according to provisions of Order XXI Rule 32 of CPC. For every time violation of the decree, execution can be initiated and the dismissal of the first execution did not come in the way of decree holder initiating execution for the second time in connection with subsequent attempt made by the judgement debtors to violate the decree. The executing court and the writ court have failed to notice this legal position.

(b) The executing court has wrongly held that the appellant cannot execute the decree without establishing his title on the basis of will by filing a separate suit. Appellant was brought on record during pendency of the appeal as Chandamma had executed a will in his favour. Before impleading him as legal representative of Chandamma, the court held an enquiry and only after satisfying that he was the legatee of Chandamma, he was permitted to be brought on record in the appeal. Therefore the appellant represents the estate of Chandamma and in this view he can execute the decree for injunction according to Section 146 of CPC. There was no need to file a separate suit for declaration, the opinion expressed by the executing court that he should prove his title by filing a suit for declaration is opposed to law. It is well established principle that a legal representative is competent to execute the decree.

6. Sri Manvendra Reddy and D.P. Ambekar argued the following points.

(i) Writ appeal is not maintainable challenging the order passed in a writ petition filed under Article 227 of the Constitution of India. In this regard they placed reliance on a judgment of the Supreme Court in the case of Radhey Shyam and another Vs. Chhabinath and others [(2015) 5 SCC 423] and two judgments of the co-ordinate benches of this court in the case of Smt. Amirunisa and another VS. Thalabvadi Mosque and others [W.A.200059/2017 connected with W.A.No.200060/2017], and Sardar Veerangouda Patil Mahila Vidya Peeth VS. Basantkumar [ILR 2019 KAR 643].

(ii) The order impugned in the writ petition is revisable under Section 115 of CPC. In this view, the writ petition itself was not maintainable.

(iii) The first execution petition of the appellant was dismissed by the executing court holding that he had no right to execute the decree.For the same reason the second execution petition was also dismissed. Without

challenging the order of dismissing the first execution petition, the appellant could not have filed second execution petition. The dismissal of the first execution petition acts as res judicata for the second execution and in this connection he placed reliance on the judgment of the Supreme Court in the case of Ganpat Singh (dead) by L.Rs. vs.Kailash Shankar and Others [AIR 1987 SC 1443).Therefore this writ appeal is to be dismissed.

7. Sri Ameet Kumar Desphande replied as follows;

(a) There was no need to challenge the dismissal of the first execution petition as apparently the said order is bad and opposed to law.

(b) The order of executing court is not revisable under Section 115 of CPC. He referred to proviso to sub-section (1) of Section 115 of CPC and submitted that revision is maintainable only in a situation where, if the revision petition is allowed, it should not result in revival of the proceeding and instead it should result in termination of the proceeding.In this case, if the revision had been filed and if it had been allowed, the consequent result would be revival of the execution and not its termination and therefore the revision under Section 115 of CPC is not maintainable.Only remedy is writ petition under Article 227 of the Constitution of India.

(c).In a decision of the Full Bench of this court in the case of Tammanna and others Vs. Miss.Renuka and others (ILR 2009 KAR 1207), a clear view has been taken that the matters to which Section 115 of CPC is not applicable and that are not governed under Section 8 of the Karnataka High Court Act, 1961, appeal would lie according to Section 10 (iv- a) of the High Court Act against the order passed under Section 9 (xii) of the Karnataka High Court Act read with Articles 226 and 227 of the Constitution of India. Therefore, this writ appeal is very much maintainable.

8. We have considered the arguments.

9. First we would like to deal with maintainability of this appeal.The case of Radhey Shyam (supra) deals with scope of the writ petition under Articles 226 and 227 of the Constitution of India. The Supreme Court has made it very clear that the proceedings under Article 227 are supervisory in nature, whereas the proceedings under Article 226 are in exercise of the original jurisdiction of the High Court. While exercising supervisory jurisdiction, the High Court may not only quash or set aside the impugned proceedings, judgment or order, but it may also make such directions as the facts and circumstances of the case may warrant.

10. The Full Bench of this court in the case of Tammanna (supra) has held that an appeal under Section 4 of the High Court Act against passed by a single judge under Article 227 of the Constitution of India is not maintainable, but in para 14, the following is the observation;

" 14. As a result no appeal would lie under Section 4 of the Karnataka High Court Act against the order of the Single Judge passed in exercise of the power conferred under Article 227 of the Constitution of India in the matter arising against an order made deciding an issue, passed by the Court subordinate to the High Court, in

the course of a suit or other proceedings not finally disposed of, which is attracted by Section 115 CPC and is governed under Section 8 of the Karnataka High Court Act; and in all others matters which are not attracted by Section 115 CPC and not governed under Section 8 of the Act, an appeal would lie under Section 10 (iv- a) against the order passed under Section 9 (xii) of the Karnataka High Court Act read with Article 226 and 227 of the Constitution of India and Rules 2 (1), 26 and 39 of the Writ Proceedings Rules as well as Article 11 (sa) to Schedule II to the Karnataka Court Fees and Suits Valuation Act, 1958? "

11. The observations made in para 14 as extracted above of course give an inkling that writ appeal is also maintainable in respect of matters to which Section 115 of CPC and Section 8 of the High Court Act are not applicable.However, the recent judgments of the co ordinate benches in the cases of Sardar Veerangouda Patil (supra) and Amirunisa (supra), have held that writ appeals are not maintainable against order passed by a single judge exercising power under Article 227 of the Constitution of India.Therefore we hold that this writ appeal is not maintainable.

12. Since we have held that the writ appeal is not maintainable, we do not think it necessary to discuss the other point of argument that the impugned order is whether revisable or not.

13. We also uphold one point of argument of Sri Manvendra Reddy and D.P. Ambekar that the appellant could not have initiated second execution without challenging the dismissal of the first execution petition. It is undisputed that the court where the execution was initiated was competent to execute its decree. There was no inherent lack of jurisdiction. It only opined that the appellant had no executable right; of course such an observation was wrong, but that order should have been challenged by the appellant. Howsoever bad or illegal an order may be, if it is passed by a competent court, it must be challenged by a party who is aggrieved of it.In this context it is apt to refer to the Supreme Court judgment in the case of Ganpat Singh (supra) wherein it is held as below:

" When an application for setting aside the sale is made, the order passed by the executing court either allowing or dismissing the application will be final and effective subject to an appeal that may be made under the provisions of the Code. It cannot be said that even though no appeal has been filed against an order dismissing an application for setting aside the sale, another application for setting aside the sale can be made without first having the order set aside. Such an application will be barred by the principle of res judicata. "

14. Having held above that the appellant should have challenged the dismissal of first execution petition, we would like to deal with executable right of the appellant taking note of the fact that he had been permitted to be impleaded as a legal heir of Chandamma in a parallel proceeding. The executing court has lost sight of this aspect. Without directing the appellant to obtain a declaration of his title based on the will said to have been executed by Chandamma, the executing court could have permitted the appellant to execute the decree subject to satisfaction of the requirement under Order XXI Rule 32 of CPC. This is for the following reasons.

15. It seems that Chandamma was alive when RA 3/1997, an appeal filed by the respondents challenging the decree in the suit OS 70/1992 filed by her. She died during pendency of the appeal RA 219/2002 filed by respondent no.3 aggrieved by dismissal of the suit OS 15/1992.His suit was against Chandamma for declaration that he was her adopted son. When she died during pendency of RA 219/2002, as the facts disclose, the appellant sought himself to come on record in the said appeal on the basis of a will said to have been executed in his favour by Chandamma. As can be made out from the order passed by the executing court, it appears that before impleading the appellant in the said appeal, an enquiry was held and then only he was permitted to get himself impleaded. Since the appellant claimed the legal heir ship on the basis of will, obviously his coming on record in the appeal was according to order XXII Rule 10 of CPC. Therefore once he was impleaded as a legal heir in a parallel proceeding, if thereafter he found the decree in OS 70/1992 being flouted by the respondents and if he wanted to execute the decree in accordance with order XXI Rule 32 of CPC, he could very much execute it being the legal representative of Chandamma in whose favour decree of declaration of title and permanent injunction had been granted. Directing him to file a separate suit to establish title is really annoying. Section 146 of CPC empowers a representative to execute the decree. Going a step further it may be stated that in case the executing court entertains a doubt as regards right of a representative to execute a decree, it is not powerless to hold an enquiry in the execution proceeding itself according to Section 47 of CPC. Section 47 reads as below:

" 47. Questions to be determined by the Court executing decree.- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

[(2) ****]

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the court.22

Explanation I:

Explanation II:

(Emphasis supplied)

16. Therefore Sub-section 3 of Section 47 of CPC makes it very clear that whenever a question arises whether any person is a representative or not the executing court itself can determine that question.

17. The executing court has held that the appellant should establish or prove the will according to law. The point to be noted here is that the appellant need not prove the will against the respondents.

Necessity to prove the will arises when it is propounded for establishing or defending one's right.For instance if a person seeks declaration of title on the basis of will or in a suit for partition he puts forward a will in support of his defence contending that the plaintiff has no right to seek partition, only in such circumstances the will is required to be proved.If a person incidentally refers to a will in the plaint or written statement without propounding it for establishing or defending his right, there is no need to prove the will.In other words will need not be proved against a third person who is a total stranger to the property or has no chance of inheriting or succeeding to or deriving any benefit from the property in the absence of will or who does not have any right to challenge the will.In this case respondent no.3 claimed to be the adopted son of Chandamma and his suit for declaration to that effect was dismissed and the judgment of the trial court attained finality with dismissal of the second appeal.Thus he became a total stranger and rendered himself to be a person not having right to challenge the will.

In this view of the matter, the appellant herein was very much competent to execute the decree in OS 70/1992.Taking note of all these circumstances we hold that although the appellant did not challenge the dismissal of the first execution petition, his right to execute the decree has not extinguished and in case of any violation of decree in future, he can institute an execution petition.

18. Since we have held that the writ appeal is not maintainable, despite our aforementioned observation, we dismiss this appeal.