

Kareppa Vs. Tahasildar Jamkhandi, Bagalkot District and Others

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Court : Karnataka Dharwad

Decided On : Apr-12-2016

Judge : B.S. Patil

Appeal No. : Writ Petition Nos. 110235-110236 of 2015 (GM-CPC)

Appellant : Kareppa

Respondent : Tahasildar Jamkhandi, Bagalkot District and Others

Judgement :

(Prayer: These writ petitions are filed under Articles 226 and 227 of the Constitution of India praying to quash order passed by Principal Civil Judge and JMFC, Jamkhandi, in Execution Petition No. 7/2014 dated 23.03.2015 vide Annexure-G and in alternative Hon ble Court pleased to issue writ of mandamus or any other suitable order or direction directing respondents to acquire portion of land occupied by road.)

1. These writ petitions are filed challenging the order dated 23rd March 2015 passed by the Executing Court dismissing the execution petition filed by the petitioner as not maintainable.

2. Petitioner had filed O.S. No. 48/2009 against the respondents herein seeking a decree of permanent injunction to restrain the defendants/respondents herein from constructing any road on the suit land without following due process of law. The suit was decreed on 27.03.2012 restraining the defendants from constructing any

road on the suit land without due process of law. Petitioner herein filed E.P. No. 7/2014 seeking execution of the decree of permanent injunction granted, inter alia alleging that respondents were trying to violate the decree of permanent injunction granted.

3. Objections were filed on behalf of judgment debtor No. 2-Taluka Surveyor, who is respondent No. 2 herein, contending that the execution petition was not maintainable because the decree obtained was only for bare injunction restraining the defendants from constructing a road in the suit property and as the road had been already constructed, in the absence of any decree passed directing removal of the road laid, execution petition could not be proceeded with.

4. Trial Court accepted the objections raised regarding maintainability of the execution petition and dismissed the execution petition holding that the Executing Court could not go behind the decree. It has also held that if at all, the judgment debtors had constructed road in violation of the decree passed against them, the decree holder could seek recovery of damages and also to initiate separate proceedings for mandatory injunction seeking removal of the road constructed. It is in this background, the decree holder has approached this Court.

5. I have heard the learned counsel for both parties. Order 21 Rule 32(1) of Code of Civil Procedure deals with execution of decree passed for permanent injunction among others. It states that where a party against whom a decree for injunction has been passed had an opportunity of obeying the same and had wilfully failed to obey it, the decree may be enforced by his detention in civil prison or by attachment of his property or by both.

6. Sub-clause (5) of Rule 32 of Order 21 reads as under:

32. Decree for specific performance for restitution of conjugal rights, or for an injunction. (1)

xxxxxxxxxxxxxxxxxxxxxxxxxxxx

(2) xxxxxxxxxxxxxxxxxxxxxxxx

(3) xxxxxxxxxxxxxxxxxxxxxxxxx

(4) xxxxxxxxxxxxxxxxxxxxxxxxx

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree.

Explanation.- For the removal of doubts, it is hereby declared that the expression the act required to be done covers prohibitory as well as mandatory injunctions.

7. A perusal of the provisions contained in sub-clause (5) read along with explanation appended thereto makes it clear that in addition to the remedy provided under Order 21 Rule 32(1), if a decree holder in whose favour the decree has been obtained complains of its disobedience, then the Court may, in lieu of or in addition to all or any of the processes mentioned in Rule 32 direct that the act required to be done may be done as far as practicable by the decree-holder or some other person appointed by the Court at the cost of the judgment-debtor. The act required to be done as has been explained in the explanation appended thereto covers prohibitory and mandatory injunction. Therefore, it is patently clear that if a decree of prohibitory injunction has been violated by the judgment debtor, then the decree-holder can seek restitution by getting the act required to be done carried out by the decree-holder or some other person appointed by the Court. Therefore, what is important is ascertainment of factum of violation of the decree passed. If the executing court comes to the conclusion that after the decree of permanent injunction was passed defendant violated the decree and laid the road then decree holder would be entitled for restitution of his land by ensuring as far as practicable the act required to be done to restore the land back to the decree holder was done.

8. Thus, the executing court has committed error in not referring to the aforesaid provision contained in Order 21 Rule 32 while holding that the execution petition was not maintainable and the decree holder had to file a separate suit seeking mandatory injunction. Petitioner is also fortified by the decision of this Court rendered in Sri H.S. Shivaswamy Vs. H.S. Raghavendra and Others ILR 2012 KAR 3966 particularly the discussion made in paragraph 11 of the said judgment.

9. In the present case, the executing Court has not held any enquiry. It does not record any finding as to when exactly the road was formed and whether the road was formed by violating the decree of injunction granted.

Hence, impugned order is liable to be set aside. Accordingly, it is set aside. Writ petitions are allowed. Matter is remitted back to the executing Court for fresh disposal in accordance with law keeping in mind the observations made above.

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