

M.M. Jamadhar Vs. Amirbi

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Court : Karnataka

Decided On : Aug-21-1984

Reported in : AIR1985Kant91; ILR1984KAR1310

Judge : P.A. Kulkarni, J.

Acts : [Code of Civil Procedure \(CPC\), 1908](#) - Sections 115 - Order 21, Rules 35(1), 99, 100 and 103; Karnataka Rent Control Act, 1961 - Sections 21

Appeal No. : Civil Revn. Petns. Nos. 216 to 218 of 1982

Appellant : M.M. Jamadhar

Respondent : Amirbi

Advocate for Def. : K.I. Bhatta, Adv.

Advocate for Pet/Ap. : R.U. Goulay, Adv.

Judgement :

ORDER

1. These three revisions by the revision petitioners are directed against the order dated 10-4--1981, passed by the Principal Civil Judge, Belgaum, in Execution Case Number 304 of 1.981, allowing I. A. No. 1, thereby directing delivery of actual possession of the property in possession of these revision petitioners, under O . 21 R. 35(l) of the Civil P. C. (hereinafter referred to as the 'Code').

2. The material facts are that one Khutejabi and another Hafizabi, filed Special Suit No. 100 of 1952 in the court of the Civil Judge, Senior Division, at Belgaum, against 23 persons, for partition and possession. The present revision petitioners were defendants Nos. 13, 14 and 15. As can be seen from the copy of the plaint in Special Suit No. 100 of 1952, produced along with the revision petition, it is mentioned by the plaintiffs in para No. 6 that defendants 8 to 19 are tenants and they are made parties to the suit with an intention that while taking the possession of the properties, they should not create any obstacles. The suit was decreed. Regular Appeal No. 196 of 1958, was preferred in this court against the judgment and decree passed in the said suit. Defendants Nos. 13, 14 and 15 (the revision-petitioners in these. cases) were initially parties to the said regular appeal. On 30-8-1968, a memo wits filed in t1liat appeal stating that defendants, its 13, 14 and 15 be deleted. They were accordingly deleted. It appears that variation of shares was agreed in the said appeal. Accordingly, there was a decree. Thereafter, the present defendant No. 20 along with some others, filed a decree final proceedings in D. F. No. 100 of 1972. Subsequently it was numbered as D. F. 16 of 1978. A Commissioner was appointed in the said decree final proceedings in order to find out whether the properties could be divided by metes and bounds or not, He made a report on 22-3-1972.

3. Now, a copy of the application filed by defendant No. 20 for final decree proceedings has been produced. Defendant No. 20 has stated in para No. 4 that the other properties. are in possession of various tenants and opponent No. 3 is recovering the rents from the tenants. The decree final proceedings came to an end, Thereafter, defendants Nos. 18, 20 and 21 sued out execution in No. 304 of 1918 without making the present revision petitioners, as parties to the execution. The decree-holders filed an application I.A. No. 1, requesting for issue of warrant for delivery of actual possession under O. 21 R. 35(l) of the Code and also filed I.A. No. 2 praying for police protection and I.A. No. 3 for permission to break open the lock, if necessary. The bailiff went to the properties and delivered actual possession of the properties to the decree-holders. It is undisputed that the present revision petitioners who were in possession of the properties involved in these cases, were thrown out by the bailiff from the premises in their possession. The present revision petitioners filed Miscellaneous cases Nos. 26, 27 and 28 of

1981, under O. 21 Rr. 99 and 100 of the Code complaining against their dispossession and praying that they should be put back in possession of the property. They have also filed these three revision petitions under sec. 115 of the Code, alleging that the executing court had no jurisdiction to issue a warrant under O. 21 R. 35(l) C.P.C, as the properties in question were in possession of the tenants and at the most, a warrant under O. 21 R. 36 C.P.C. alone could have been issued by the court below.

3A. It is undisputed that the present revision petitioners have filed Misc. 26, 27 and 28 of 1981, under O. 21 Rr. 99 and 100 C.P.C., complaining about their dispossession from the properties, by the decree-holders. They have also prayed therein for restoration of the possession to them.

4. The question that would arise is whether the revision under S. 115 C.P.C. is maintainable in such cases when O. 21 Rr. 99 and 100 C.P.C. provide a remedy for seeking back the possession of the properties from which the petitioners were dispossessed.

5. Section 115 C.P.C. reads as:

'115(l), The High Court may call for the record of any case which has been decided by any court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate court appears-

(a) to have exercised a jurisdiction not vested in it by law, or

(b) to have failed to exercise a jurisdiction so vested, or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity, the High Court may make such order in the case as it thinks fit;

Provided that the High Court shall not, under this section, vary or reverse any order made, or any order deciding an issue, in the course of a suit or other proceedings, except where-

(a) the order, if it had been made, in favor of the party applying for revision, would have finally disposed of the suit or other proceeding , or

(b) the order, if allowed to stand, would occasion a failure of justice or cause irreparable injury to the party against whom it was made.'

6. While considering the provisions of law it is necessary to bear in mind that, the Act should be so construed as to advance the remedy and to suppress the mischief and not try to indulge in any intellectual hair splitting and legerdemain in interpreting the words with a view to maintain the mischief and hamper the remedy. In *B. V. Patankar v. C. G. Sastry*, : [1961]1SCR591 , it is held that:

'Where the executing court ignores the provisions of the Rent Control Order prohibiting eviction of tenants, and passes an order of delivery of possession in execution of a decree, the order can be set aside and an order of redelivery to the tenants can be passed on an application under S. 47 read with S. 151 Civil P.C.'

Similar is the principle laid down in the Supreme Court in the decision in *Sunder Das v. Ram Prakash* : [1977]3SCR60 .Sri Gouly, learned counsel for the revision petitioners, also placed before me the decision in *Shamsuddin Abbas Ali*, : AIR1971 All117 , Allahabad High Court has stated:

'.....A preliminary decree for partition was prepared, and after it had become final, she put it in execution and prayed for delivery of possession over her partitioned one-third share under the provisions of O. 21, R. 35 Civil P.C. She died during the pendency of the execution proceedings and was substituted by Shamsuddin, the petitioner before me, her son. A warrant for delivery of possession was issued and possession was delivered on July 10, 1966. The opposite party Abbas Ali then preferred an objection under O. 21, R. 100, Civil Procedure Code, alleging his dispossession and praying for restoration. His claim was allowed by the Civil Judge on July 31, 1967 and possession was restored. Shamsuddin, feeling aggrieved by that order, has come up in revision.'

It was contended in the Allahabad High Court, that, no revision against such an order lay. The Allahabad High Court further stated:

'..... I have considered this matter and I am of the view that a revision is not barred though this court may not interfere in a particular case, depending upon the facts

of that case.....'

In the said Allahabad case, reference has been made to the decision in *Buddhu Misir v. Bhagirathi*, Thi AIR 1918 All 405 and also *Lila v. Mahange* : AIR1931 All632 (FR). In the said Lila's case the Allahabad High Court has held as:

'Section 115 is no doubt discretionary and, therefore, it is open to the High Court to decline to interfere in particular cases. As a matter of practice it may be conceded that ordinarily the High Court would not interfere if another convenient remedy is open to an applicant, particularly when that remedy is by way of appeal to a lower Court. But it cannot be laid down as a general proposition that the High Court has no power of interference at all or should not interfere where there is another remedy by way of a suit open to the applicant. The remedy by way of separate suit would involve a protracted litigation through several courts and is not always a convenient remedy when more effective and speedy remedy is available. There is no jurisdiction for restricting the power conferred, upon the High Court under S. 115 by laying down that no revision should be entertained when a remedy by suit lies. Each case must be considered on its own merits and if the court below has acted without jurisdiction or with material irregularity and the application has been seriously prejudiced an interference is called for in the interest of justice; there is no reason why we should drive the applicant to a more circuitous remedy by way of a separate suit

The said Allahabad case has also made reference to the decision in *Tulsi Charan Das v. Subal Chandra Das*, : AIR1952 Cal9 and *Mangilal v. Someli* AIR 1955 Assam 234 and *Deo Karan v. Satyendra*, : AIR1959 Cal621 . In short, the principle underlying these rulings is that though sec. 115 C.P.C. confers discretionary power on the High Court, the High Court cannot sit quiet when it finds that the Court below has acted without jurisdiction or with material irregularity and the revision petitioners have been thereby seriously prejudiced. In such cases, though law might provide for some other remedy, the High Court will have to step in under S. 115 C.P. C. to remedy the mischief and irreparable injury that might be caused or might have been caused to the injured party. The Andhra Pradesh High Court, in the decision in *Dr. M. Ramachandra Rao v. A. Papayya Sastry*, : AIR 1974

AP28 , has also held that the jurisdiction of the High Court is not barred on the ground of availability of remedy of suit under O. 21 P. 63 C. P.C. Similar is the principle laid down in the decisions in Saida Begum v. Sabir Ali, : AIR1962 All9 and Jagi Narayan Pandey V. Smt Bach Kaliya, : AIR1979 All246 ,

7. Sri Rhatia, learned counsel for the respondents quoted the decision in T. C. Malleshappa v. Firm of Sha Veerchand Pratapmal by its proprietor Amichand AIR 1965 Mys 306 in support of his contention that if the law provides for an alternative remedy, relief under Sec. 115 C.P.C. would not be available. But, this ruling runs contrary to the decisions of the Supreme Court above narrated. Therefore, the ruling quoted by Sri. Bhatta cannot be considered to be good law at all.

8. It is no doubt, true that the present revision petitioners have filed miscellaneous petitions Nos. 26, 27 and 28 of 1981, under O.21 Rr. 99 and 100 C.P.C., complaining against the delivery of possession of the, premises in their possession, to the decree holders . But the said miscellaneous proceedings involve circuitous procedure and long drawn battle of litigation and they may take years and years together to come to an end. After the said proceedings come to an end, the parties would have a right to appeal. Again the parties will have a remedy under Rule 103 C.P.C. Even otherwise, Rule 103 provides for a suit against the order to be passed in such miscellaneous cases. Once the suit is filed, then it. would be again a long drawn battle not likely to come to an end in a snort course of time at all. Therefore, if a cheaper and quicker remedy which might be available to a party under S. 115 C.P.C., is not to be given, then irreparable injury would be caused to the present revision petitioners.

9. The narration of the facts above goes to show that even according to the plaintiffs, who filed Special Suit No. 100 of 1952, these revision petitioners were in possession of the properties in question as tenants. The present defendant No. 20, and others, who filed application for Decree final Proceedings have stated in para No. 4 that: -

'So the possession of the applicant No. 1 may kindly be maintained in C. T. S. No. 4362 while allotting her share in the property mentioned above. The other properties are in possession of various tenants and opponent No. 3 is recovering

the rent from the tenants and using it for his own purpose.'

Learned counsel Sri Gouly produced copy of the application filed by the present defendant No. 20 in final decree proceedings. It may be that this application is not produced in the execution petition. But this court, being a Court of Records in order to do justice, can call for papers and peruse them. Therefore, under these circumstances, the contention of learned counsel Sri Bhatta, that these revision petitioners might have been put in possession of the properties by the plaintiffs in the said suit and thus it would not be binding on the defendants, cannot be accepted in view of their own admission in their application, for Final decree proceedings.

10. Learned counsel Sri Bhatta, then urged that the present revision petitioners were not parties to the execution and hence they cannot complain against the order passed in the execution. Section 115 C.P.C. is so worded in a general manner that a person aggrieved by the order may approach this court, for necessary relief. Therefore, the said argument also fails.

11. The above narration of facts would show that the revision petitioners, even on the admission of the plaintiffs in the said suit, and also on the admissions of defendants 18, 20 and 22 and others, who are the execution petitioners, are the tenants in respect of the properties in question. The properties are admittedly situated in Belgaum City, to which the provisions of the Rent Control Act apply. The provisions of the Rent Control Act clearly lay down that no tenant can be dispossessed except by an order of court, to be passed under the provisions of the Rent Control Act. If it is so, the issue of warrant by the executing court under O. 21 R. 35(l) C.P.C. and thereafter ordering delivery of actual possession of the properties which are in possession of the tenants, are ones passed without jurisdiction. Such an order is highly illegal. The court below has acted illegally, with material irregularity and without jurisdiction in issuing the warrant under Order 21 Rule 35(l) C.P.C.

12. For the reasons already stated above these three revision petitions are allowed and the order passed by the court below, issuing warrant for delivery of actual possession is set aside.

13. Admittedly, now the revision petitioners, on account of the execution of the warrant issued by the executing court under O. 21 R. 35(l), have been thrown out of their possession. It has, been shown above that the warrant issued under O. 21 R. 35(1) C. P.C. is absolutely without jurisdiction, illegal and is vitiated by material irregularities. If the dispossession has taken place on account of these things, then the revision petitioners are entitled u/s. 115 C.P.C. to be put back in possession of the properties. Therefore, it is ordered that the executing court should put back the revision petitioners in these cases in possession of their properties. No costs in these revisions.

14. Revision allowed.

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