

Sri. P. Kumar Vs. Sri. Mayanna, and ors

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Court : Karnataka

Decided On : Nov-04-2010

Judge : A.S.Pachhapure J.

Appeal No. : WRIT PETITION NO.31522/2009 & WRIT PETITION NO.33563/2009 (GM-CPC)

Appellant : Sri. P. Kumar

Respondent : Sri. Mayanna, and ors

Advocate for Def. : Sri. S. Nagaraja Adv.; Sri. K.N. Gangadhara, Adv.

Advocate for Pet/Ap. : Sri. T.N. Arakeswara, Ajit TA. Advs

Judgement :

ORDER

1. The petitioner in both these petitions is the decree holder and sought a decree for possession in O.S.No. 10179/2006 against the first respondent herein. Respondents 2 to 5 are the daughters of the first respondent whereas the sixth respondent herein is the son of first respondent.

2. I will refer to the parties as per their rank before the Court below for the purpose of convenience.

3. The petitioner instituted a suit in O.S.No. 10179/2006 against the first respondent herein seeking possession of the house property bearing Municipal No.81/3 old No.81. 4th Cross. Srirampuram Bangalore-560 021. After the institution of the suit, the summons was issued to 'he defendant. He remained absent. He was placed expert and an expert decree for possession was granted by the Court on 28-11-2007 and the copy of the judgment has been produced at Annexure-D.

4. The petitioner after obtaining the decree for possession filed Execution Case No.434/2008 seeking the execution of the decree in O.S No. 10179/2006 for possession against the respondent herein who is the judgment debtor and during the pendency of the execution proceedings, the daughters and sons of the first respondent i.e., the objectors in I.A.No.3 (respondents 2 to 5 herein) and the objector in I.A.No.8 (respondent 6 herein) filed the applications I.A.Nos.3 and 4 under the provisions of 0.21 Rule 58 CPC requesting the Executing Court to determine and adjudicate the rights of the objectors in the schedule property before proceeding with the execution. The application filed by the daughters and sons of the first respondent (respondents 2 to 5 herein) was numbered as I.A.No.3 whereas the application filed by the son of the first respondent (6th respondent herein) was numbered as I.A.No.8. The Trial Court after the objections were filed to these applications recorded the evidence of PWs. 1 and 2 and in their evidence got marked the documents Exs.P. 1 to P. 16. Exs.D.I to D.7 was marked during the cross-examination of PW.2 and the decree holder did not choose to examine himself.

5. The Executing Court considering the provisions of Order 21 Rule 58 read with 151 CPC formulated the points for consideration as under:

"Whether the objectors have made out a ground to postpone the execution of the decree pending disposal of the suit in O.S.No.4346/2006?"

6. Ultimately, the Executing Court after hearing the counsel, for the objectors and the decree holder allowed both the applications in part directing to postpone the execution proceedings till the final decision in the suit filed by the objectors in I.A.No.3 in O.S.No.4346/2006.

7. It is relevant at this stage to note that before a suit came to be instituted by the petitioner herein in O.S.No. 10179/2006. the respondents 2 to 5 had instituted the suit in O.S.No.4346/2006 for partition and separate possession of their share in the property in question alleging that it is a joint family property and that the respondents herein are the shareholders and co-parcenors and that the said suit came to be instituted the on 25.3.2006 whereas the suit filed by the petitioners in O.S.No. 10179/2006 was instituted on 20.11.2006. In the circumstances, the Court on consideration of the evidence of PWs. 1 and 2 and on examination of the documents held that as the suit for partition was instituted by respondents 2 to 5 herein it came to the conclusion that it is just and proper to postpone the execution till the disposal" the said suit. Aggrieved by the said order, the present petitions have been filed.

8. I have heard the learned counsel for the petitioner and rilso the counsel for respondents 2 to 4 and 6.

9. At die outset, it is necessary to note that the objectors who are respondents herein have filed their applications under the provisions of Order XXI Rule 58 read with 151 CPC. Now, as could be seen from the said provisions, it applies to in a case where a claim is made or objections are filed to the attachment of the property and a procedure has been provided under the said rule to adjudicate such claims and objections.

10. In the case on hand, there is no attachment of the property under the provisions of Order XXI Rule 54 CPC. In the circumstances, the provisions of Order 21 Rule 58 do not apply to the proceedings and in the absence of a specific provision only Section 151 CPC could be invoked. Hence, in my considered opinion, the provisions of Order XXI Rule 58 CPC do not apply for the claim of the objectors and they cannot seek the attachment of the said rights in the property under the said provision.

11. It is relevant to note that the petitioner obtained a decree for possession of immovable property and the possession can be taken by filing a execution petition and seeking a warrant for delivery of possession under the provisions of Order XXI Rule 35 CPC. So when such a warrant is issued under this provision and during

the execution of the

warrant, if there is resistance or obstruction for the delivery of possession, it is for the decree holder to file an application before the Executing Court complaining the resistance or obstruction and in case, if any such application is made under the said rule of Order XXI Rule 97 CPC, the Court has to proceed upon the application in accordance with the provisions contained in Order XXI Rule 98 CPC. So as could be seen from the provisions of Order XXI Rule 98 CPC, the Executing Court has an authority to determine the questions arising between the parties referred to in Rule 101 while dealing with the application and not k>r separate suit and for this, purpose, the Court has the jurisdiction to decide such questions with regard to the right, title or interest of the objectors or the persons who are resisting the execution of the decree.

12. So the material question for consideration of the Executing Court is to find out as to whether there was any resistance or obstruction and if it was so the petitioner who is a decree holder had to fue an application and the Court can adopt the procedure provided under the provisions of Order XXI Rule 97 onwards to Rule 106 CPC. The orders passed by the Executing Court under this provision would amount to a decree.

13. So now as could be seen from the order of the Court below, it has considered the questions with regard to the postponement of the execution of the decree and furthermore. There is no finding as to whether there was any obstruction or resistance for delivery of possession to the decree holder and these are the points which will have to be considered only under the provisions of Order XXI Rule 97 CPC and not under Order XXI Rule 58 CPC In that view of the matter. I am of the opinion that the Court below has committed an error in over looking the provisions referred to supra and postponing the execution petition till the disposal of the suit in O.S.No.4346/2006. In the circumstances, the orders on I.A.Nos.3 and 8 dated 27-11-2008 passed by the City Civil Judge in Ex. No.434/2008 vide Annexure-J is quashed and the matter is remitted back to the Court below to pass appropriate orders in accordance with law after affording an opportunity to the parties. The petitions are accordingly disposed of.

