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Court : Karnataka Gulbarga

Decided On : Feb-28-2011

Judge : Mohan Shantanagoudar

Appeal No. : Writ Petition No.80400 of 2011 (GM-CPC)

Appellant : Nagashetty

Respondent : Basawaraj

Advocate for Pet/Ap. : For the Petitioner: Smt. Hema L. Kulkarni, Advocate. For the Respondent: ---------

Judgement :

(Prayer: This Writ Petition is filed under Articles 226 and 227 of the Constitution of India praying to quash the order dated 12.03.2010 passed by II Addl. Civil Judge (Sr.Dn.) Gulbarga in E.P.No.302/2008 at Annexure-D consequently allow this writ petition and etc.)

1. By the impugned order the Executing Court has held that the Execution Petition is maintainable.

2. The petitioner herein is a mortgagee and the respondent is a mortgager. The respondent herein had mortgaged the property by virtue of the mortgage deed dated 22.03.1993, which was registered for `15,000/-. The same is an usufructory mortgage for a period of 5 years. After 5 years, the possession was not re-

delivered. Hence the respondent herein filed a suit in O.S.No.285/2004 for redemption of mortgage, which came to be decreed on 27.11.2007. The same was confirmed in R.A.No.155/2007 on 21.06.2008. The same has attained finality. Thereafter the decree holder filed E.P.No.302/2008 for getting the decree executed. From that day onwards, the Execution Petition is being dragged on.

When the facts stood thus, the judgment debtor raised a question relating to maintainability of the Execution Petition. The objection of the petitioner herein is, in the absence of final decree, the Execution Petition should not go on.

3. From the grounds urged before the Court below as well as the grounds before this Court, it is clear that the petitioner being the judgment debtor wants to drag on the proceedings only on technicalities. The procedures are hand mades of justice. They should aid the final reliefs and they should not come in the way of executing the decree. The decree passed in the suit, which is confirmed by the Appellate Court is clear and unambiguous. It is held that the plaintiff is entitled to redeem the suit property as described in the plaint against the defendant. It is further decreed with a direction to recover the suit property within a period of three months from the date of the judgment. Thus there is no ambiguity as such. To clarify the factual position, this Court proposes to quote the operative portion of the decree, which reads thus:

“2. The plaintiff is entitled to redeem the suit property as described in the plaint against the defendant. It is further ordered and decreed with a direction to the defendant to recovery the suit property with handing over the possessing of the mortgage property (Usufructory mortgage) within three months from the date of judgment. On failure to hand over the possession, the plaintiff is entitled to claim damages Rs.4,000/- with interest at 6% from 28.02.2008.

3. Draw decree accordingly.”

If the decree is really preliminary decree, it would no doubt be necessary to have a final decree before the application for execution of decree could be entertained. It is not absolutely necessary that in every mortgage suit there should be a preliminary decree, before final decree is passed. The provision contained in

Order 34 Rules 7, 8 and 9 of CPC contemplating passing of the preliminary decree first and final decree at a later stage are for the purpose of giving an opportunity to the mortgagor to deposit the mortgaged amount due to the mortgagee. But in a case where there is no dispute regarding the amount due to the mortgagee and the mortgagor had deposited the amount even at the time of filing of the suit, or in a case wherein usufructory mortgage is the subject matter of the suit, the Court can straightway pass the decree for redemption after the period mentioned in the usufructory mortgage deed is over. Thus, a final decree may be passed straightway without passing a preliminary decree. Passing of a final decree without passing a preliminary decree will not make the decree null and void or in-executable. In short, the aspect as to whether the decree is preliminary or final in a suit for redemption of mortgage will depend upon the terms and conditions mentioned therein. In case, where all the disputes between the parties with regard to payment of mortgaged money and interest accrued thereon are finally settled and no further accounting etc. is required to be done, such a decree would be final decree as it finally determines the right of the parties. The decree in question quoted supra is virtually a final decree, inasmuch as, it finally determines the rights of the parties. Since there is no ambiguity and since the decree is not liable to be clarified any further, the decree in question is a final decree, which is entitled to be executed straightway.

Therefore the proceedings in Execution Petition cannot be interfered with.

4. Though the judgment passed in O.S.No.285/2004 clearly reveals that, in case, if the judgment debtor does not hand over possession of the property to the decree holder within the stipulated period of three months, the judgment debtor shall pay `4,000/- per month as damages. However, the words ‘per month’ are not mentioned in the decree. Taking advantage of the same, the judgment debtor now pleads that the decree cannot be construed to mean that the Court below has directed the judgment debtor to pay `4,000/- per month as damages in case of default.

The said contention cannot be accepted. It is no doubt true that the decree does not contain the words ‘per month’. It only contains `4,000/- at 6% interest

28.02.2008. If the words ‘per month’ are not read into the decree, that portion of the decree cannot be executed, inasmuch as, no meaning can be attached to it. The very fact that 6% interest is levied from 28.02.2008 itself means that the interest is levied either on per month basis or on yearly basis. There cannot be any dispute that the decree has to be read in consonance with the judgment. In other words, it should agree with the judgment. It is not in dispute in this matter, that the judgment clarifies that `4,000/- is imposed as damages per month. Hence the decree also should be meant so.

5. In view of the same, the Executing Court has rightly construed the decree, as the same is for a direction to the judgment debtor to pay `4,000/- damages per month. There is no ambiguity at all on any aspect of the matter. Hence, no relief as sought for in the writ petition can be granted.

Petition fails and the same stands dismissed.

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