

**IN THE COURT OF THE I ADDL. CIVIL JUDGE & JMFC., AT
CHANNAGIRI.**

Dated this the 13th Day of January, 2022

Present: Smt. Kannika M.S M.A. LL.B.,
C/c I Addl. Civil Judge & JMFC.,
Channagiri.

Ex.No.15/2015

Decree Holder : Smt. Neelamma and others

/Vs/

Judgment Debtors : Sri. Nagendrappa and others

Parties IN I.A's

Petitioner : Sri. Nagendrappa and others .
...JDR

/Vs/

Respondents : Smt. Neelamma and others ...Dhr

Orders on IA's U/Sec.47 of CPC

The Judgment debtors has filed this application Under/Sec.47 of C.P.C for recall the delivery warrant as the decree is for the delivery of possession of vacant property of A to C schedule in the above case in the interest of the justice.

2. The Judgment debtor has filed his affidavit in support of the application and averred that the Dhr's have filed this petition for execution of the decree passed in OS No.106/2002, and

against the said judgment and decree he and other defendant have preferred an Appeal before Hon'ble Civil judge court at Davanagere in RA No.69/2009, than this appeal was transferred to Channagiri Sr.Civil Judge and renumbered as RA No.42/2010 the said appeal was dismissed as per this order he preferred a second appeal before the Hon'ble HCK in RSA No.462/2015, the said appeal was pending before the Hon'ble court for consideration. In spite of pending of the said appeal recovery of possession is not at arise. The Dhr has not disclosed before this court about the existing residential building in the suit schedule property, even at the time of trial the said facts was known to the Dhr/plaintiff, he was not made any amendment about the structure existing in the suit property. On the basis of the said decree without mandatory injunction to demolish or vacate the residential houses the present decree is not enforceable in view of the said fact. The Dhr having knowledge about the said fact and he filed the application for police protection to take the illegal possession of the residential building which are existing in the suit property. In that house 8 families are residing and leading their life, they have no other alternative residential houses

belongs to them. Under the said circumstances the decree is not tenable to enforce as stated above. As such the question of excitability is ought to be considered. Therefore, he prayed to allow the application.

3. Per contra Decree holder filed the objection to the application & contended that, the application is not maintainable either in law or on facts. This petition is execution petition not original suit. At the time of the trial of original suit he has pleaded that the property for which the suit claim by the decree holder it was pleaded that the houses and Kana of Judgment debtors were situated and during the cross-examination of the plaintiff regarding to the said fact of existence of houses and Kana in the suit property and claimed that the same were situated in the property purchased by the Judgment debtors. The Hon'ble court taking in to consideration of the fact pleaded by Jdr's and also the evidence of both parties came to the conclusion that the suit property for which the decree of possession was passed is the property of the Decree holder. As such the Court was pleased to decree the suit directing the Jdr's to handed over the possession of the suit property in favour of

the Dhr. The property for which the decree of possession is passed, the question of deciding the fact that the said property is consisting of houses or anything does not comes in the way of delivery of possession of the said property. Therefore the application is not maintainable, filed this frivolous application for protract the proceedings with ulterior motive. Hence prayed to dismiss the application with heavy cost.

4. Heard and perused the record.

5. The following point that arise for my consideration are;

1. Whether the application filed by the applicant/Jdr U/Sec. 47 of CPC are deserves to be allowed ?

2. What Order ?

6. **My answer to the above points are as follows;**

Point No.1: In the Negative,

**Point No.2: As per Final Order
For the following;**

REASONS

7. **Point No.1:** Admittedly, the above petition is for the execution of the decree passed by this court in OS No.106/2002, this suit is filed by the Dhr/plaintiff against these

Jdr's/defendants for the relief of Declaration and recovery of possession in respect of the suit schedule property. After conduct of the full pledged trail this court has decreed the suit of the plaintiff. Than defendants/Jdr's have preferred an appeal before the Senior Civil Judge, Davanagere in RA No.69/2009, then that appeal was transferred to Senior Civil Judge, Channagiri and renumbered as RA No.42/2010, the Hon'ble court has dismissed the said appeal and conformed the Judgment and decree passed by this court. Than the Dhr has filed this petition for executing of the said decree. Than the Jdr has preferred second appear before the Hon'ble HCK, that was also disposed by the Hon'ble court. The Judgment debtor has filed this application and prays to determine the executability of the said decree and recall the order of delivery warrant. In support of this application in his affidavit stated that the plaintiff has filed the suit without disclosed about the existing residential building in the suit schedule property, even at the time of trail the said facts was known to the Dhr/plaintiff, he was not made any amendment about the structure existing in the suit property. On the basis of the said decree without mandatory

injunction to demolish or vacate the residential houses the present decree is not enforceable in view of the said fact. He filed the RSA before the Hon'ble High Court of Karnataka, which is pending for consideration, therefore this suit is not reached the finality, hence judgment and decree passed this court has not final. It is true, judgment and decree passed by this court is not a final, appellant authority has power to determine the matter as fit. But the execution court has go beyond the decree, which was passed in the original suit.

8. At this stage I have gone through the **Sec. 47**, read as follows, **Question 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,

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

[Explanation I:- For the purpose of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II:- (a) For the purpose of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed, and,

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]

As per this section the court has power to determined the executing decree if the court has passed the Judgment and decree without inherent power to determine the question involved in that suit or court has wrongly sold the property in the execution petition. The applicant has not stated how this court has no power to pass a decree as per the provision of this section. But he stated that plaintiff has obtained the decree on suppressing the material facts, the judgment and decree of this court is not final, he preferred an appeal before the Ho'ble High Court, which was pending. But, the Hon'ble High Court has not

stayed the proceedings of this execution petition and it was disposed. Yes it is true judgment and decree passed by the trial court is not final, there is a appellate authority if aggrieved party can approach the appellate authority for appropriate relief. The executing court has not go beyond the decree passed in original suit. If this court has passed the decree without the inherent power or jurisdiction at that time this section is applicable, the decree is clearly stated the plaintiff is the absolute owner and entitled for recovery of possession of the suit property and directed to the JDR's to handed over the vacant possession of the property, if there is structure in the property the defendant has liberty to remove and then given the possession. Therefore seeking of mandatory injunction does not arise, even the court has passed a decree without jurisdiction at that time this provision is come to aid of the applicant, but he not at all stated this court has no power to pass a decree in this petition. Therefore application filed by the applicant is itself is not maintainable.

9. Hence, in the facts and circumstances of the case, the court opines that the grounds made out by the Jdr in the above

I.A and the prayer as sought is not sufficient and also application is itself not maintainable under law. Hence, I am of the opinion that there is no proper reasons to allow the application filed by the applicant. Accordingly, I answer point No.1 in the **Negative**.

10. Point No.2: For the reasons stated above and findings given on Point No.1 in the **Negative**, I proceed to pass the following;

ORDER

**The Application filed by the
applicant/Judgment debtor U/Sec.47
of CPC is hereby rejected.**

No orders on cost.

(Typed by me on laptop and print out taken by stenographer, and then corrected and pronounced by me in the Open Court on this the 13th day of January, 2022).

**(KANNIKA M.S)
C/c I Addl. Civil Judge & JMFC.,
CHANNAGIRI.**