

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 23/01/2015

Decided on : 02/02/2015

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.R.P(NPD)Nos.2904 & 3689 of 2014
and M.P.Nos.1 of 2014

K.Kanagaraj

... Petitioner in both CRPs

Vs

1.P.Pappathi

... 1st Respondent in both CRPs

2.G.Sarojini

... 2nd Respondent in CRP No.3689/2014

Prayer in CRP 2904/2014 : Civil Revision Petition is filed under Article 227 of the Constitution of India for issuance of suitable directions to the learned Additional Subordinate Judge at Coimbatore to assign a number and pass orders in CFR No.19531 of 2014 filed to stay all further proceedings in EP No.125 of 2011 pending receipt of copy in EA No.610 of 2012 dated 09.07.2012.

Prayer in CRP 3689/2014 Civil Revision Petition is filed under Section 115 of CPC against the order and decretal order dated 10.07.2014 in EA No.610 of 2012 in EP No.125 of 2011 in O.s.No.81 of 1986 on the file of II Additional Subordinate Judge at Coimbatore.

For Petitioner : Mr.V.Lakshmi Narayanan
For Respondents : Mr.B.Nedunchezhiyan for R1
Mr.Rajagopalan for R2

ORDER

These revision petitions have been filed against the order passed in EA No.610 of 2012 in EP No.125 of 2011 in O.S.No.81 of 1986 on the file of II Additional Subordinate Judge at Coimbatore.

2. The 1st respondent Mrs.Pappathi instituted a suit in O.S.No.81 of 1996 before Sub Court, Coimbatore for specific performance of sale agreement entered into between her and the second respondent Sarojini on 03.12.1982. As per the sale agreement, the 2nd respondent herein had to deliver vacant possession of the suit property after evicting the tenants namely Shanmuga Industries which was thereafter named as Sri Durga Industries and one Mr.Jayaraman. The said Sarojini contested the suit on various grounds and also stating that she did not agree to evict the tenants and deliver the vacant possession.

3. After trial, the suit was decreed on 26.09.1988 directing the defendant to execute the sale deed after receiving the balance sale consideration of Rs.1,59,300/- and deliver vacant possession to the plaintiff. Aggrieved by the judgment and decree, the defendant preferred an appeal in A.S.No.1233 of 1988 before this Court mainly

contending that the contract between the plaintiff and the defendant stands frustrated as the defendant was not in a position to give actual possession since the tenants are in possession of the suit properties.

4. During pendency of the appeal, the plaintiff filed a memo and also an affidavit stating that she was ready and willing to complete the sale by accepting constructive possession and she was not insisting for physical possession. This Court, relying on the decisions of the Hon'ble Supreme Court reported in ***AIR 1954 SC 44 [Satyabrata Ghose v. Mugneeram Bangur]*** and ***2001 (1) LW 436 (SC) [Surjit Kaur v. Naurate Singh & anr.]*** held that even at the appellate stage the contention of the plaintiff can be accepted and further observed that the defendant had deliberately inducted a party into the possession after entering into an agreement, only with the object of frustrating the contract which is legally impermissible. It is further held as follows -

28. Thus, on a consideration of all the above points, this Court while sustaining the findings recorded by the Court below, affirm the judgment and decree of the court below in the entirety with the modification that the defendant shall execute the sale deed after receiving the balance of

consideration and the defendant has to deliver actual possession of the portion which is in her possession and she has to deliver constructive possession in respect of the portion under the occupation of the tenants and that it is for the plaintiff to take necessary steps to evict the tenants besides making it clear that it is open to the plaintiff to challenge the tenancy, which came into existence during the pendency of the proceedings as not binding and evict the tenant from his possession.

5. Aggrieved by the judgment, the defendant filed a Letter Patent Appeal. The Division Bench of this Court confirmed the finding of the learned Single Judge in LPA No.181 of 2001. The further appeal filed by the defendants was also dismissed by the Hon'ble Supreme Court in Civil Appeal 1026 of 2005.

6. Based on the decree, the plaintiff / decree holder laid an execution petition in E.P.No.125 of 2011 for execution of sale deed. The executing court executed the sale deed on 26.04.2012. Thereupon, the decree holder filed E.A.No.610 of 2012 for delivery of possession under Order 21 Rule 35 CPC. The judgment debtor filed a counter stating that the tenant is in possession of the part of the suit

property and he had put up superstructure thereon. The judgment debtor also filed an application to implead the tenant as respondent in the execution petition. The petitioner who claims to be a tenant was impleaded as the second respondent in the execution petition.

7. The petitioner filed his counter in E.P stating that he is the absolute owner of the superstructure constructed over the suit property and he is in possession and enjoyment of the same; that the first respondent has leased out the vacant land and he put up the building over the leasehold property and hence he is entitled to the benefits under the provisions of the City Tenants Protection Act. The petitioner also filed petitions in CFR Nos.17346, 18861 and 19531 of 2014 seeking appointment of an Advocate Commissioner for inspection of the suit property, to note down the existing superstructure and also other physical features of the property.

8. In the affidavit filed in support of the application, the petitioner has stated that the construction was effected by a partnership firm even before the alleged sale agreement and upon the firm being reconstituted, he is in possession of the property and he owns the superstructure. The petitioner has further stated that he is carrying on business in the style of M/s.Alfa Metals which is in

possession of the property.

9. The petitioner has filed CRP No.2904 of 2014 seeking to issue suitable directions to the executing court to assign a number and pass orders in CFR No.19531 of 2014 and also sought stay of all further proceedings in the execution petition. The Executing Court, after considering the objections of the judgment debtor and the petitioner, ordered delivery of possession. Challenging the order, the present revisions are filed.

10. Mr.V.Lakshminarayanan, learned counsel for the petitioner submitted that even in the agreement for sale, it is mentioned that part of the property was in possession of the tenants. The petitioner has been in possession of the property even before the agreement of sale and the original owner had leased out the suit property as a vacant site and subsequently the petitioner had put up the superstructure; that the trial court decreed the suit directing the defendant to deliver vacant possession but the plaintiff herself had admitted that she will take only constructive possession from the tenants and the order was also confirmed in LPA No.181 of 2001. Therefore, the decree holder cannot seek for actual possession of the petition property and the petitioner is entitled for protection under

Section 9 of the City Tenants Rent Protection Act.

11. The learned counsel further submitted that the petitioner has filed application for appointment of Advocate Commissioner to establish that a pucca building was put up by the tenant in the petition premises. It is further submitted that the petitioner is having no grievance for execution of the sale deed by the judgment debtor in favour of the decree holder and the petitioner is also ready to attorn the tenancy in favour of the decree holder and pay the rents to the decree holder.

12. Per contra, Mr.B.Nedunchezhiyan, learned counsel for the respondent submitted that the petitioner was inducted pending suit and therefore he is entitled for any indulgence of this court; that though the petitioner claims to be a statutory tenant, he has not specifically pleaded the date of induction and the period in which the superstructure put up by him in the suit property. The petitioner has also not produced the alleged tenancy agreement and other material documents in support of his contentions. It is further submitted that the executing court, after elaborately considering the case of the petitioner rightly rejected his objections which cannot be interfered by this Court.

13. Mr.Rajagopalan, learned counsel for the 2nd respondent submitted that the property in possession of the judgment debtor was delivered to the decree holder and the remaining properties are in possession of the tenant. The learned counsel further submitted that as per the judgment passed by the Apex Court, the decree holder can take only constructive possession from the tenants.

14. It is not in dispute that the 1st respondent Pappathi had instituted the suit for specific performance against the 2nd respondent Sarojini. The case of the plaintiff was that the owner of the property had agreed to vacate the tenants namely Shanmuga Industries / Sri Durga Engineering Company and Jayaraman from the suit property and deliver vacant possession. The defendant contested the suit stating that the agreement could not be enforced as the property was in possession of the tenants. However, the trial court decreed the suit directing the tenant to deliver vacant possession to the plaintiff. When the same defence was insisted in the appeal filed by the defendant, the plaintiff filed a memo accepting constructive possession from the tenants. It is seen that the affidavit/memo was filed on a different context to get over the defence taken by the defendant in the suit and the appeal.

15. It is seen from the records that the plaintiff had never admitted that the petitioner was in possession of the property at the time of institution of the suit or prior to the suit. Further, this court has observed that it is open to the plaintiff to challenge the tenancy which came into existence during the pendency of the proceedings as not binding and evict the tenants from their possession. It is to be noted that at the time of the agreement of sale, one Shanmuga Industries which was subsequently re-named as Sri Durga Engineering Company and one Jayaraman were said to be in possession of the suit property. The petitioner, in his affidavit has categorically stated that his business concern M/s.Alfa Metals is in possession of the property. The petitioner has further contended that construction was effected by the partnership firm and upon reconstitution, he is in possession as owner of the superstructure. As rightly held by the executing court, the petitioner has not produced any material to show that he was inducted before the agreement of sale and he had put up the superstructure in the suit property.

16. The petitioner has mainly relied on the affidavit filed by the plaintiff in A.S.No.1233 of 1988 to contend that the plaintiff can take only constructive possession from the petitioner. In my

considered opinion, the affidavit does not recognise the petitioner as statutory tenant. The petitioner who claims to be in possession of the property as statutory tenant, should have established his case before the executing court, but he did not do so. The counter filed by the petitioner and the affidavit filed in support of the applications are bereft of material particulars. Hence, I do not find any merit in these revisions.

17. In the result, both the Civil Revision Petitions are dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

02.02.2015

Index:Yes
Internet:Yes
rgr

To

The II Additional Subordinate Judge
Coimbatore.

Note: After pronouncement of the order, the learned counsel for the petitioner/tenant sought time to vacate and handover the vacant possession to the respondent. Hence, the tenant is given six months time from this today, to handover vacant possession of the petition premises to the respondent. The petitioner/tenant is directed to file an affidavit of undertaking to that effect, within two weeks from today.

02.02.2015
(M.K.K.S.J)

K.KALYANASUNDARAM,J

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Pre-delivery order in
C.R.P(NPD)Nos.2904 & 3689 of 2014

02.02.2015