

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 29.11.2016

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(NPD)No.4406 of 2012
and
M.P.No.1 of 2012**

1.N.Mohan

2.N.Parthiban

3.N.Vijayaragavan

4.N.Ramakrishnan

5.D.Latha

.. Petitioners

Vs.

Ejaz Khilji

..Respondent

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the order of the learned X Assistant City Civil Judge, in E.A.No.4766 of 2011 in E.P.No.1298 of 2009 in O.S.No.5519 of 1983, dated 05.09.2012.

For Petitioners : Mr.S.Gopala Rathinam

For Respondent : Mr.T.Velumani

ORDER

The present revision is filed by the judgment debtors against the order dismissing the petition filed under Section 47 of CPC in E.A.No.4766 of 2011 in E.P.No.1298 of 2009 dated 05.09.2012 on the file of the City Civil Court (X Assistant Judge) Chennai.

2.The brief facts of the case of the petitioners is that the respondent filed a suit in O.S.No.5519 of 1983 on the file of the City Civil Court (X Assistant Judge) Chennai for partition and separate possession of 3/4th share in the suit property. Originally the suit was decreed declaring the 1/4th share and subsequently it was modified into 2/3rd share. In pursuant to that final decree was passed on 21.01.2003 in favour of the respondent and consequently to take delivery of the property the respondent has filed E.P.No.1298 of 2009. In the said E.P the petitioners filed a petition in E.A.No.4767 of 2011 raising objection with regard to the executability of decree stating that the respondent is entitled to claim share over the super structure alone as the mother of the petitioners was a recognized tenant under the Trust by virtue of the tenancy created by the Official Trustee of the Trust appointed by this Court. As the land belongs to the Trust, the

mother of petitioners is the owner of building and she is entitled to purchase the land U/S 9 of City Protection Act and she also filed a petition seeking protection under the Act. However her entitlement was disputed by the Trust and ultimately the petition was dismissed. Thus it is proved beyond doubt that the mother of the petitioners was the authorized tenant in respect of site and as the decree is in executable by trial, in so for the superstructure alone.

3.The brief case of the Respondent is that either the preliminary decree or the final decree was challenged by the Petitioners and the same became final hence the executability of the decree cannot be challenged at this stage as it is settled principle of law that the Executing Court cannot go beyond the decree and it must see that the decree passed by the competent Court shall be executed.

4.The 1st Petitioner Mohan has been examined as PW1 and Exhibit P1 to P6 were marked on the side of petitioners. There is no oral or documentary evidence adduced on the side of the respondents. On perusal of the pleading the Executing Court framed an issue with regard to the validity and executability of the final decree. The Executing Court after coming to a conclusion that the final decree

passed in the suit was not challenged and the allotment of property as per the final decree remains hold good the same cannot be assailed under Section 47 of CPC and ultimately dismissed the petition, holding that the legal heirs of original judgment debtors are stopped from raising the issue under Section 47 of CPC by passing the fair and decreetal order dated 05.09.2012.

5.The learned counsel for the petitioner contended that the said order is challenged mainly on the ground that the Executing Court has not adhered to the principles enumerated under Section 47 of CPC as it has not discussed about all the questions relating to the delivery of possession of property, when particularly the mother of petitioners alone the tenant in respect of vacant site and the Respondent who is entitled to 2/3rd right over the superstructure alone cannot ask for delivery of property. It is further contended that the Executing Court has not considered the exhibits marked on the side of the Petitioners in a proper manner, so as to decide the right of tenancy over the vacant site and also has not considered the oral evidence and thus it has blatantly failed to exercise the power enumerated under Section 47 of CPC as provided therein and thus the order is liable to be set aside and consequently the application under Section 47 of CPC has to be

allowed.

6.Per contra, it is contented on the side of the respondent restraining his case that when the decree cannot be challenged and the trial Court has rightly dismissed the application, hence the revision deserves dismissal.

7.I heard Mr.S.Gopala Rathinam, learned counsel appearing for the petitioners and Mr.T.Velumani, learned counsel appearing for the respondent and the contentions put forth on both sides and also perused the records.

8.It is settled principle of law that Executing Court cannot go beyond the decree but execute the same as it is. In any event, the exercise of any power under Section 47 of CPC must be strictly in accordance with the law, and only in the event the delivery of possession of property is not executable as pleaded it must consider the application on merits. Section 47 of CPC reads as follows:

Section 47:- Questions 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.

(2) Omitted

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

[Explanation I: For the purposes 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 purposes 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 degree 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]”.

9. Thus it is very clear that the application under Section 47 of

CPC shall be determined by the Executing Court in respect of all the questions arising between the parties to the Suit. It is made clear that a separate suit is barred in respect of the questions regarding the executability of decree for delivery of possession. While doing so, it is the prime duty of the Executing Court, first frame an issue regarding to the executability of the decree. It is needless to say that, for which the Executing Court must frame a specific issue on what materials the issue of validity and executability of the decree is questioned.

10. Order 14 Rule 1 of CPC deals with framing of issues, which is reads as follows:-

Order 14, Rule 1. Framing of issues - (1) Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.

(2) Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.

(3) Each material proposition affirmed by one party and denied by the other shall form the subject of a distinct issue.

11. Thus the issue must be framed specifically and distinctly on

the basis of material proposition affirmed by one party and denied by the other. The Hon'ble Supreme Court has extensively discussed the issue relating to framing of issue and how it should be framed in the case of ***Makhan Lal Bangal v. Manas Bhunia*** case reported in, ***(2001) 2 SCC 652, at page 663:***

“19. An election petition is like a civil trial. The stage of framing the issues is an important one inasmuch as on that day the scope of the trial is determined by laying the path on which the trial shall proceed excluding diversions and departures there from. The date fixed for settlement of issues is, therefore, a date fixed for hearing. The real dispute between the parties is determined, the area of conflict is narrowed and the concave mirror held by the Court reflecting the pleadings of the parties pinpoints into issues, the disputes on which the two sides differ. The correct decision of civil lis largely depends on correct framing of issues, correctly determining the real points in controversy which need to be decided. The scheme of Order 14 of the Code of Civil Procedure dealing with settlement of issues shows that an issue arises when a material proposition of fact or law is affirmed by one party and denied by the other. Each material proposition affirmed by one party and denied by other

should form the subject of a distinct issue. An obligation is cast on the Court to read the plaint/petition and the written statement/counter, if any, and then determine with the assistance of the learned counsel for the parties, the material propositions of fact or of law on which the parties are at variance. The issues shall be framed and recorded on which the decision of the case shall depend. The parties and their counsel are bound to assist the Court in the process of framing of issues. Duty of the counsel does not belittle the primary obligation cast on the Court. It is for the Presiding Judge to exert himself so as to frame sufficiently expressive issues. An omission to frame proper issues may be a ground for remanding the case for retrial subject to prejudice having been shown to have resulted by the omission. The petition may be disposed of at the first hearing if it appears that the parties are not at issue on any material question of law or of fact and the Court may at once pronounce the judgment. If the parties are at issue on some questions of law or of fact, the suit or petition shall be fixed for trial calling upon the parties to adduce evidence on issues of fact. The evidence shall be confined to issues and the pleadings. No evidence on controversies not covered by issues and the

pleadings, shall normally be admitted, for each party leads evidence in support of issues the burden of proving which lies on him. The object of an issue is to tie down the evidence and arguments and decision to a particular question so that there may be no doubt on what the dispute is. The judgment, then proceeding issue-wise would be able to tell precisely how the dispute was decided."

12. In the present case, on perusal of the material facts and the proposition affirmed by the petition and denied by the Respondent, the core issue arising out of the pleading, which is required to be framed is "whether a decree of partition passed with regard to the superstructure alone can be executed by delivery when the right of tenancy in respect of the land belongs to the judgment debtor alone?". On perusal of the order passed by the Executing Court it is clear that it has not framed the issue specifically but in casual manner it the issue was framed, which does not satisfy the requirement of Order 14 Rule 3 and also not in consequence with the judgment of Hon'ble Supreme Court mentioned supra.

13. The Executing Court has confined its discussion and finding

only with regard to not filing of appeal against the final decree and held that it cannot be challenged under Section 47 of CPC. In other words the Executing Court has not framed any issue regarding the executability of decree of delivery when the land in possession of the petitioners in on the capacity of tenant. The superstructure alone, even though can be partitioned whether the delivery could be ordered when the decree holder does not have any right over the land is a issue concerned, which is to be discussed and decided in detail. As the executing Court did not decide the same on the basis of the pleadings and oral documentary evidence, this Court is not in a position to go into the roving enquiry of deciding all questions relating to the execution and satisfaction of decree. It will also not proper for this Court to decide the same when Section 47 of CPC says the same should be decided in the executing petition itself and not by a separate Suit.

14. Therefore, this Court deems it proper to set aside the fair and decretal order and remand the matter to the Executing Court to decide the issue mentioned supra, in the light of the findings mentioned above, after affording reasonable opportunity to both parties to adduce oral and documentary evidence available if any. In the result, the

impugned order passed in E.A.No.4766 of 2011 in E.P.No.1298 of 2009 dated 05.09.2012 on the file of the City Civil Court (X Assistant Judge) Chennai is liable to be set-aside and the matter is remitted to the Court below to decide the same afresh as mentioned above.

15.In the result:

- a) this Civil Revision Petition is allowed by setting aside the order of the learned X Assistant City Civil Judge, Chennai, in E.A.No.4766 of 2011 in E.P.No.1298 of 2009 in O.S.No.5519 of 1983, dated 05.09.2012;
- b) the Execution Court is directed to take evidence of both parties and decide the execution of the decree in O.S.No.5519 of 1983 within a period of three months from the date of receipt of a copy of this order. Consequently, connected miscellaneous petition is closed. No costs.

सत्यमेव जयते

29.11.2016

Note:Issue order copy on 07.12.2017

vs

Internet:Yes

Index:Yes

To

The X Assistant City Civil Judge,
Chennai.

WEB COPY

M.V.MURALIDARAN, J.

VS



**Pre-delivery order made in
CRP(NPD)No.4406 of 2012
and
M.P.No.1 of 2012**

WEB COPY

29.11.2016