

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.04.2016

CORAM

THE HON 'BLE **Dr. JUSTICE. S.VIMALA**

Civil Revision Petition (NPD) No.3040 of 2014
and C.M.P.No.3339, 3340 of 2016 &
C.M.P.No.4509 of 2016 and M.P.No.1 of 2014

P.Vediyappan

... Petitioner / JD

Vs.

1. Ramasamy
2. Kuppammal
3. Perumal
- Mani (Died)
- Murugesan (Died)
4. Selvam
5. Jayanthi
6. Rani
7. Minor. Anitha
8. Minor. Vanitha
9. Minor. Punitha
10. Uma Maheswari
11. Sujatha
12. Priya
13. Minor. Chithra
- (Minors Rep. By Rani, R-6)
14. T.Manickam
15. M.Jayalakshmi

... R-1 / DH

... R-2 to R-13 / Jds

... R-14 & R-15 /
Subsequent purchasers

(R-14 & R-15 impleaded vide
the order of this Court, in this
Civil Revision Petition)

Prayer :- Civil Revision Petition (NPD) filed under Article 227 of the
Constitution of India to struck off E.P.No.168 of 1997 in O.S.No.28 of

1986 pending on the file of the District Munsif Court, Harur, by allowing the Civil Revision Petition.

For Petitioner : Mr. C.Uma Shankar, for, Mr. Amar D.Pandiya
 For Respondents : Mr. S.Muthudurai, for R-1,
 Mr. V.Manisekaran, for R-4 & R-5

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ORDER

One among the judgment-debtors is the Revision Petitioner and respondents 2 to 13 are the remaining Judgment-debtors.

1.1. The first respondent is the decree-holder.

1.2. The plaintiff (K.Ramasamy) filed a suit in O.S.No.28 of 1986 against defendants 1 to 5 (D-1, D-3, D-4 reported dead later), seeking the relief of declaration, permanent injunction and mandatory injunction. The suit was decreed on 26.06.1990.

2. Based on the decree, the decree-holder filed an Execution Petition in E.P.No.168 of 1997. In the said Execution Petition, the judgment-debtors have filed a memo stating that: (a) the judgment-debtors have delivered possession to the decree holder; (b) the decree-holder had sold the property to T.Manickam and M.Jayalakshmi; (c) the decree remains fully satisfied, therefore, full satisfaction should be recorded and the Execution Petition should be terminated.

3. The purchasers from Ramasamy and others, namely, Manickam and Jayalakshmi (proposed parties) have filed an application in C.M.P.No.4509 of 2016 in CRP No.3040 of 2014, to implead themselves in the Revision Petition.

3.1. In the Impleading Application, it is stated that the proposed parties have purchased the property and ***as purchasers, they are in possession of the property*** and therefore, as the decree for possession is pending, they should be impleaded as parties.

3.2. The recitals in the sale deed, dated 18.03.2013, regarding the title of the vendor, K.Ramasamy, reads that that the seller obtained title to the property and is in possession, by virtue of the judgment of the District Munsif Court, Dharmapuri, in O.S.No.434 of 1994, decree in O.S.No.212/57 and the decree in O.S.No.28/86 and the orders in R.E.P. No.168/97 and in Civil Revision Petition No.2044 of 2005.

3.3. In C.R.P.No.659 of 2012 filed by one P.Vediyappan (Revision Petitioner herein) against Ramasamy and Others, Vediyappan has reported that the matter has been settled out of the Court and based on the reporting, the Revision has been dismissed as settled out of Court.

3.4. In REP No.168 of 1997 filed by the decree-holder, K.Ramasamy, based upon the Commissioner's report, the Executing

Court has ordered removal of encroachment and directed possession to be handed over to the decree-holder. Challenging the same, this Revision (C.R.P.No.3040 of 2014) has been filed.

3.5. Originally, the decree-holder filed REA No.153 of 2007, seeking a direction to appoint a Commissioner and to identify the suit property. Accordingly, by the order, the Commissioner has been appointed and he has filed a report to the effect that there is encroachment in the suit property. In R.E.P.No.168 of 1997, by the order, dated 24.01.2011, the decree-holder has been permitted to take delivery, after ordering removal of encroachment, which was mentioned in REA No.153 of 2007.

4. Contending that the obstruction to take delivery could not be averted by the limited number of police force available and that more number of police personnels are required, Application in R.E.P. No.96 of 2011 has been filed. By the order, dated 06.11.2013, the Court has ordered delivery, with the assistance of the more number of police and the order reads as under:-

“Decree Holder present. J.D. called absent. J.D's side no representation. Already opportunity given. Hence, set exparte. Necessary bundobast to be provided for taking the delivery of possession.”

5. The learned counsel for the Judgment-debtors submitted that E.P.No.168 of 1997 in O.S.No.28 of 1986 must be struck off and that keeping the Execution Proceedings Pending is unnecessary, especially when the decree-holder has sold the property in favour of T.Manickam and M.Jayalakshmi (through Registered sale deed, dated 18.03.2013). The further contention is that the Court should have terminated the Execution Petition, atleast after recording the memo dated 05.09.2013, filed by the Judgment-debtors.

5.1. This is a peculiar case where the decree-holder claims that he is not able to take possession and that he must be provided with large number of police personnel in order to take delivery and whereas the judgment-debtors claim that they had already handed over possession to the decree-holder in terms of the decree. Apart from that, one of the judgment-debtor, Vediappan / Revision Petitioner submits that the decree-holder has no right over the property when he has sold the property in favour of the proposed parties, P.Manickam and another. The perplexity is more when the proposed parties have filed two documents before Sub-Court, which are not the documents produced before the Executing Court. One document dated 18.03.2013 reveals that R.E.P.No.168 of 1997 should be conducted by the purchasers themselves. At the same time, there is yet another

document dated 25.07.2013, in which it is stated that the decree-holder has received a sum of Rs.5,00,000/- and he has handed over possession in favour of the purchasers. Before this Court, the purchasers have filed an Undertaking Affidavit to the effect that the purchasers will not claim any right as against the decree-holder regarding possession of the property.

5.2. In the written submission filed by the decree-holder, it is stated that he sold the property in favour of Manickam and Jeyalakshmi for a sum of Rs.78,07,500/- and out of which Rs.30,00,000/- has been paid by the purchasers and the balance of Rs.48,07,500/- is yet to be paid by them and which is allegedly declined to be paid by the purchasers.

5.3. The decree-holder also claims that there is an agreement dated 18.03.2013, under which balance of sale consideration of Rs.48,07,500/- is payable to him and that he has issued legal notice, dated 24.12.2015 to the purchasers / proposed parties.

6. Now the main issue to be considered is, what are the rights of the seller, when there is unpaid purchase money, in respect of the sale transaction.

7. Section 55 of the Transfer of Property Act, dealing with the

rights and liabilities of Seller and Purchasers have to be considered and the said provision reads as under :

“55. Rights and liabilities of buyer and seller.— In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following or such of them as are applicable to the property sold:

(1) The seller is bound-

(a) to disclose to the buyer any material defect in the property or in the seller's title thereto of which the seller is, and the buyer is not, aware, and which the buyer could not with ordinary care discover;

(b) to produce to the buyer on his request for examination all documents of title relating to the property which are in the seller's possession or power;

(c) to answer to the best of his information all relevant questions put to him by the buyer in respect to the property or the title thereto;

(d) ***on payment or tender of the amount due in respect of the price, to execute a proper conveyance of the property*** when the buyer tenders it to him for execution at a proper time and place;

(e) between the date of the contract of sale and the delivery of the property, to take as much care of the property and all documents of title relating thereto which are in his possession as an owner of ordinary prudence would take of such property and documents;

(f) ***to give, on being so required, the buyer, or such person as he directs, such possession of the property as its nature admits;***

(g) to pay all public charges and rent accrued due in respect of the property up to the date of the sale, the interest on all encumbrances on such property due on such date, and, except where the property is sold subject to encumbrances, to discharge all encumbrances on the property then existing.

(2) The seller shall be deemed to contract with the buyer that the interest which the seller professes to transfer to the buyer subsists and that he has power to transfer the same:

.....

(3) ***Where the whole of the purchase-money has been paid to the seller, he is also bound to deliver to the buyer all documents of title relating to the property which are in the seller's possession*** or power:

Provided that, (a) where the seller retains any part of the property comprised in such documents, he is entitled to retain them all, and, (b) where the whole of such property is sold to different buyers, the buyer of the lot of greatest value is entitled to such documents. But in case (a) the seller, and in case (b) the buyer, of the lot of greatest value, is bound, upon every reasonable request by the buyer, or by any of the other buyers, as the case may be, and at the cost of the person making the request, to produce the said documents and furnish such true copies

thereof or extracts therefrom as he may require; and in the meantime, the seller, or the buyer of the lot of greatest value, as the case may be, shall keep the said documents safe, uncanceled and undefaced, unless prevented from so doing by fire or other inevitable accident.

(4) The seller is entitled-

(a) to the rents and profits of the property till the ownership thereof passes to the buyer;

(b) ***where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer***, any transferee without consideration or any transferee with notice of the non-payment, for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part—from the date on which possession has been delivered.

(5) The buyer is bound-

(a) to disclose to the seller any fact as to the nature or extent of the seller's interest in the property of which the buyer is aware, but of which he has reason to believe that the seller is not aware, and which materially increases the value of such interest;

(b) to pay or tender, at the time and place of completing the sale, the purchase-money to the seller or such person as he directs: provided that, where the property is sold free from encumbrances, the buyer may retain out of the

purchase-money the amount of any encumbrances on the property existing at the date of the sale, and shall pay the amount so retained to the persons entitled thereto;

(c) where the ownership of the property has passed to the buyer, to bear any loss arising from the destruction, injury or decrease in value of the property not caused by the seller;

(d) where the ownership of the property has passed to the buyer, as between himself and the seller, to pay all public charges and rent which may become payable in respect of the property, the principal moneys due on any encumbrances subject to which the property is sold, and the interest thereon afterwards accruing due.

(6) The buyer is entitled-
.....”

8. At this juncture, it is appropriate to consider the rights and remedies open to the Unpaid vendor.

“The unpaid vendor has—

(1) a remedy by the enforcement of the charge under this clause; and

(2) a personal remedy against the buyer.”

9. Then the next question is, what are the recitals in the sale deed regarding payment of purchase money and if there is

acknowledgement of receipt of the price, whether that is a bar for the seller to claim any unpaid purchase money. As per the decision reported in the case **Lal Chand v. Indarji (27 IA 93(97) ILR 22 A 397)**, acknowledgement of receipt of price does not debar seller from proving non-receipt and the relevant observation reads as under:-

“A vendor who acknowledges receipt of price in sale-deed is not debarred from alleging and proving that he did not receive the price in whole or in part. He is not estopped from giving evidence that he had not received payment. In **Lal Chand v. Indarji (27 IA 93(97) ILR 22 A 397)** the Judicial Committee observed:

“Their Lordships ... regard as settled law that, notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so, facilities would be afforded for the grossest frauds. The Evidence Act does not say that no statement of fact in a written statement may be contradicted by oral evidence, but that the terms of the contract may not be varied, etc. The contract was to sell for Rs. 30,000, which was erroneously stated to have been paid, and it was competent for the respondent, without infringing any provision of the Act, to prove a collateral agreement that the purchase-money should remain in the appellant's hands

for the purposes and subject to the conditions stated by the respondent.”

9.1. Therefore, it is clear that the decree-holder still has the right under Section 55 of the Transfer of Property Act, with regard to unpaid purchase money, i.e., to have the charge over the property.

10. Then the next question is, what is the mode of Enforcement of the Charge.

10.1. The vendor may enforce a charge—

- (1) by sale of the property;
- (2) by the appointment of a receiver pending the sale;
- (3) by an injunction restraining the purchaser from continuing in possession of the property, any by restoring it to the vendor; and
- (4) if he has not already transferred possession, by himself continuing in possession, until the purchaser pays the purchase-money.

11. From the above discussion, it is evident that the vendor may have a claim for possession on account of unpaid purchase money. Therefore, the contention that the Execution Petition has to be terminated cannot be accepted.

12. In the case on hand, triangular claim for possession has

been sought for, one by the decree-holder, the second by the judgement debtors and the third by the purchasers. Therefore, the order passed in E.P.No.168 of 1997 in O.S.No.28 of 1986 is set-aside and the matter is remitted back to the Executing Court with a direction to complete the enquiry within a period of one month from the date of receipt of a copy of this order.

13. However, having regard to the conflicting claim of possession being made by the decree-holder, judgment-debtors and the proposed parties (purchasers), the impleading petition is allowed and the proposed parties are ordered to be impleaded as respondents.

14. In the result, this Civil Revision Petition is disposed of and the order passed in E.P.No.168 of 1997 in O.S.No.28 of 1986 is set-aside and E.P.No.168 of 1997 is remitted back to the Executing Court. CMP No.4509 of 2016 (Impleading Petition) is allowed. CMP Nos.3339 and 3040 of 2014 and MP No.1 of 2014 are closed.

14.1. The Executing Court is directed to afford an opportunity of hearing to the decree-holder, judgment-debtors and the proposed parties (purchasers) and to dispose of the said Execution Petition within a period of one month from the date of receipt of a copy of this

order. No costs.

29.04.2016

Index : Yes / No
Web : Yes / No
srk

To

1. The District Munsif Court, Harur
2. The Section Officer, V.R.Section, Madras High Court, Chennai

S.VIMALA, J.,

srk

C.R.P.(NPD) No.3040 of 2014 &
C.M.P.No.3339, 3340 of 2016 &
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