

Reserved on : 13.07.2016

Delivered on : 20.07.2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 20.07.2016

CORAM:

THE HONOURABLE MR.JUSTICE M.DURAIWAMY

**C.R.P.(NPD).No.3294 of 2015 and
M.P.Nos.1 & 2 of 2015**

M.Narayanaswamy

... Petitioner

Vs.

P.Rajasekaran

... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal order dated 07.07.2015 in E.A.No.131 of 2013 in E.P.No.80 of 2011 in O.S.No.1033 of 1997 on the file of the District Munsif Court, Tiruvottiyur.

For Petitioner : Mr.V.Raghavachari

For Respondent : Mr.R.Subramanian

ORDER

The above Civil Revision Petition arises against the fair and decreetal order passed in E.A.No.131 of 2013 in E.P.No.80 of 2011 in O.S.No.1033 of 1997 on the file of the District Munsif Court, Tiruvottiyur, the Judgment

Debtor/defendant is the revision petitioner and the respondent is the Decree Holder/plaintiff.

2.The plaintiff filed the suit in O.S.No.1033 of 1997 for declaration and for recovery of possession.

3.After contest, the trial Court decreed the suit in O.S.No.1033 of 1997. As against the judgment and decree passed in the suit, the defendant preferred an appeal in A.S.No.15 of 2005 on the file of the Subordinate Court, Ponneri and the Lower Appellate Court also confirmed the judgment and decree of the trial Court and dismissed the appeal. Aggrieved over the judgments and decrees of the Courts below, the defendant preferred a Second Appeal in S.A.No.1279 of 2013 before this Court and the Second Appeal is pending. In the said Second Appeal, the defendant also filed a petition in M.P.No.1 of 2013 seeking for interim stay of all further proceedings in O.S.No.1033 of 1997. However, this Court has only ordered notice to the respondent in the stay petition.

4.Pursuant to the decree passed in O.S.No.1033 of 1997, the respondent/plaintiff filed an Execution Petition in E.P.No.80 of 2011 on the file of the District Munsif Court, Tiruvottiyur for recovery of possession. In

the said Execution Petition, the Judgment Debtor took out an application in E.A.No.131 of 2013 under Order 26 Rule 9 of the Civil Procedure Code seeking for appointment of Advocate Commissioner along with a Taluk Surveyor to inspect the property and to note down the physical features and to identify with the Execution Petition Schedule property. In the affidavit filed in support of the petition, the Judgment Debtor has stated that the Execution Petition was filed only to execute the decree passed in O.S.No.1033 of 1997, which relates to 120 sq.ft only, which consists of its distinct boundaries wherein the said property is neither door locked nor E.B. service connection is provided and the Decree Holder with *mala fide* intention to usurp the entire property having filed the Civil Suit and the Execution Petition for an extent of 120 sq.ft wants to execute it for larger extent of 2000 sq.ft. In the Bailiff's report, he has stated that the property consists of a hut measuring about 30 feet along with service connection.

5.Mr.V.Raghavachari, the learned counsel appearing for the petitioner submitted that since a larger extent was mentioned by the Court Bailiff at the time of taking delivery of possession, the suit property should be properly identified before taking possession of the same. Further, the learned counsel submitted that in view of the pendency of the Second Appeal, the respondent/Decree Holder should not be permitted to execute

the decree. The application filed by the Judgment Debtor seeking for appointment of Advocate Commissioner was contested by the plaintiff. The Executing Court, taking into consideration the case of both parties, dismissed the application.

6.It is pertinent to note that even before the trial Court, an Advocate Commissioner was appointed and the Advocate Commissioner also filed his report and plan before the trial Court, which were marked as Exs.C1 and C2. After taking into consideration the Exs.C1 and C2 documents, the trial Court as well as Lower Appellate Court, decreed the suit in favour of the respondent. No doubt, the judgments and decrees passed by the Courts below are under challenge in the Second Appeal in S.A.No.1279 of 2013 and this Court has not, so far, granted stay of all further proceedings in O.S.No.1033 of 1997. When the Advocate Commissioner appointed before the trial Court had filed his report and plan, after measuring the suit property, there is no necessity for appointing another Advocate Commissioner in the Execution Petition. No doubt, the Decree Holder can take possession of only the suit property and not more than that. The Decree Holder cannot take possession of the property over and above the suit property.

7.Mr.V.Raghavachari, learned counsel appearing for the petitioner, in support of his contention, relied upon the following judgments:

(i)An un-reported judgment of the Hon'ble Supreme Court of India ***dated 05.10.1999*** made in the case of ***U.Nilan Vs. Kannayyan (dead) through LRS***. wherein it has been held as follows:

“This question was also considered in a slightly different situation by the Madras High Court in Kandukuri Chellamma alias Mangamma & Anr. Vs. Shri Ranganilayam Ramakrishnarao, I.L.R. (1946) Madras 795 = AIR 1946 Madras

337. The question in that case was whether an application under Section 19 of Madras Act IV of 1938 to scale down the decree-debt would lie during the pendency of an appeal against the order refusing to set aside the sale. The objection was that once the sale has become absolute and has been confirmed, an application to scale down the decree-debt would not lie. This was rejected by the High Court which was held that in view of the pendency of the appeal, the validity of the sale was still in question and until that question was finally decided by the High Court, the sale could not be treated to have become absolute particularly as the appeal had to be regarded as a continuation of the proceedings initiated in the Lower Court for setting aside the sale.”

(ii)(1926) 28 BOMLR 1395 [*Saiyid Jowad Hussain Vs. Gendan Singh*] wherein the Bombay High Court held as follows:

“7. These words are all the more weighty that previously the learned Judge had in the case of *Madho Bam V. Nihal Singh* (1915) I.L.R. 33 All. 21 held that when there had been an appeal against a preliminary decree, the limitation period applicable to an application for final decree ran from the expiry of the time for payment fixed by the original decree, and not from the disposal on appeal, a view which he candidly confessed in this case was erroneous. The point is put with admirable brevity by Tudball J.:

When the Munsif passed the decree, it was open to the plaintiff, or the defendant, to accept that decree or to appeal. If an appeal is preferred, the final decree is the decree of the Appellate Court of final jurisdiction. When that decree is passed, it is that decree, and only that, which can be made final in the cause between the parties.”

(iii) 2007 (2) ALT 636 [*Vadlamani Suryanarayana Murthy Vs. Saripalli Balakameswari by Lrs.*] wherein the Andhra Pradesh High Court held as follows:

“It does not appear that the attention of this Court was drawn to the said proceedings, when it was decided in *B. Narasappa's* case (*supra*). In view of the specific provision referred to above, the said order deserves to be treated as per

incuriam. Further, in Chakka Ranga Rao's case (supra), this Court took note of Rule 18-A of Order XXVI of C.P.C., and held that it is permissible in execution proceedings also, to appoint a Commissioner.”

(iv) An un-reported judgment of the Andhra Pradesh High Court made in ***Civil Revision Petition No.2982 pf 2014 and batch dated 30.03.2015*** wherein the Andhra Pradesh High Court held as follows:

“13. The contention that in Execution Proceedings, Commissioner cannot be appointed and the E.P. Court has no power to appoint Commissioner under Order 26 Rule 9 of the Code of Civil Procedure has absolutely no merit in view of the reason that as per Order 26 Rule 18-A of the Code of Civil Procedure, the provisions of Order 26 of Code of Civil Procedure are applicable to the proceedings in execution of a decree or order also.”

8. Countering the submissions made by the learned counsel appearing for the petitioner, Mr. R. Subramanian, learned counsel appearing for the respondent submitted that the Executing Court had rightly dismissed the application finding that there is no necessity for appointing an Advocate Commissioner and the decree passed in O.S.No.1033 of 1997 has not been set aside by the Appellate Forum till this date.

9. In support of his contention, the learned counsel for the respondent relied upon a judgment reported in **(2013) 9 Supreme Court Cases 491 [Satyawati Vs. Rajinder Singh and another]** wherein the Hon'ble Supreme Court held as follows:

“9. Looking to the facts of the case and upon hearing the learned counsel, we are of the view that the order passed by the Executing Court dated 16-3-2009, which has been confirmed by the High Court is not correct for the reason that the Executing Court ought not to have considered other factors and facts which were not forming part of the judgment and the decree passed in favour of the appellant-plaintiff. Once the decree was made in favour of the appellant-plaintiff, in pursuance of the judgment dated 19-1-1996 delivered by the District Judge, Faridabad, in our opinion, the Executing Court should not have looked into other reports which had been submitted to it afterwards.

...

16. As stated by us hereinabove, the position has not been improved till today. We strongly feel that there should not be unreasonable delay in execution of a decree because if the decree-holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain.”

10. It cannot be disputed that the Executing Court has jurisdiction to appoint an Advocate Commissioner considering the merits of the case. But

whether to appoint an Advocate Commissioner is necessary or not should be looked into before appointing an Advocate Commissioner. It cannot be done mechanically, which would only create confusion in executing the decree. It is also not in dispute that the Executing Court is bound to execute the decree in respect of the decreed property only. The Bailiff had filed his report before the Executing Court stating that a hut measuring 30 feet is in existence and that the said hut has been kept under lock and key. Hence, the Bailiff sought for a direction to break open and to disconnect the electricity connection. The property decreed by the trial Court measures an extent of 120 sq.ft. with a small hut measuring 10 x 10. The Decree Holder can take possession of the said property only. Though the Judgment Debtor has stated that there is no electricity connection in the hut, he has not produced any evidence to establish the said contention. The Bailiff had returned the delivery warrant stating that the hut has been kept under lock and key and also mentioned about the existence of the electricity connection.

11. It is settled position that an Advocate Commissioner cannot be appointed to collect evidence on behalf of the parties. The parties should prove their case only by producing oral and document evidences and not through Advocate Commissioner. When the Bailiff had stated that the hut

has been kept under lock and key and about the existence of the electricity connection, if the Judgment Debtor takes a different stand he should have produced proper evidence for the same. In the case on hand, the Judgment Debtor has not produced any evidence to establish his contention. Mere pendency of the Second Appeal shall not prevent the Decree Holder from executing the decree. When this Court had not granted interim stay of all further proceedings in O.S.No.1033 of 1997 so far, it is open to the Executing Court to execute the decree passed by the Courts below. It is needless to say that in the event of the Judgment Debtor succeeding in the Second Appeal in S.A.No.1279 of 2013, he could seek for re-delivery. In these circumstances, the Executing Court has rightly dismissed the application.

12.I do not find any error or irregularity in the order passed by the Executing Court. The Civil Revision Petition is devoid of merits and is liable to be dismissed. Accordingly, the Civil Revision Petition is dismissed. No costs. Consequently, the connected miscellaneous petitions are closed.

Index : No
Internet : Yes
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20.07.2016

To

The District Munsif Court,
Tiruvottiyur.

M.DURAIWAMY,J.
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Order made in
C.R.P.(NPD).No.3294 of 2015 and
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