

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.04.2016

CORAM

THE HONOURABLE **Dr. JUSTICE. S.VIMALA**

Civil Revision Petition (NPD) No.468 of 2016
and C.M.P.No.2383 of 2016

Mr.S.Sarath Kakamanu ... Petitioner / JD / defendant

Vs.

1. Mr.Veerappan Arunachalam

2. Mrs.Priya Asokan

... Respondent / DHs / Plaintiffs

Prayer :- Civil Revision Petition (NPD) filed under Article 227 of the Constitution of India praying to set aside the order in E.A.No.5273 of 2015 in E.A.No.4236 of 2015 in E.P.No.1191 of 2013 in O.S.No.9974 of 1992 on the file of the IX Assistant City Civil Judge, Chennai.

For Petitioner : Mr. G.R.Lakshmanan

For Respondents : Mr. P.K.Rajagopal

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ORDER

The defendant in O.S.No.9974 of 1992 / the Judgment-Debtor in E.P.No.1191 of 2013 / the petitioner in E.A.No.4236 of 2015 (Section 47 Application) is the Revision Petitioner.

1.2. The respondents are the legal representatives of the deceased plaintiff in O.S.No.9974 of 1992.

1.3. One Jayalakshmi Ammal filed a suit in O.S.No.9974 of 1992

against the Revision Petitioner, seeking the relief of permanent injunction and mandatory injunction. The said suit was decreed on 17.10.1995.

1.4. After the death of Jayalakshmi Ammal, the respondents herein, as the persons who have inherited the suit property of her, filed the Execution Petition in E.P.No.1191 of 2013.

1.5. In the Execution Petition, the Revision Petitioner herein filed an application under Section 47 of the Code of Civil Procedure, contending that the legal representatives of the deceased plaintiff cannot maintain the Execution Petition and that they lack the legal competency to proceed with the execution as they were not recognised as successor-in-interest of the deceased decree-holder.

1.6. In the Application filed under Section 47 of the CPC, the Revision Petitioner filed I.A.No.4236 of 2015, seeking the relief of re-opening the evidence on the side of the judgment-debtor. That Application came to be dismissed, by the order, dated 27.11.2015. This order is under challenge in this Civil Revision Petition.

1.7. The Execution Petition has been filed seeking the relief of arrest and detention of the Judgment-Debtor in Civil Prison. The property, with reference to which Execution Petition was filed, is described to be parcel of a private road comprised in R.S.No.3952/2 in

Bishop Garden, Mylapore, Chennai – 600 028.

2. It is the case of the Judgment-Debtor that even in the Settlement deed executed by Jayalakshmi Ammal in favour of her children, the property conveyed is stated as Door Nos.11-12 and the alleged private road is being described only as a common passage and no portion of the common passage has been specifically conveyed. In other words, the issue raised is that the petitioners, who filed the Execution Petition, even though may be the owners of the building, but not the owners of the adjoining private road to Door Nos.11-12.

2.1. This contention is answered by the learned counsel appearing for the decree-holders that the description of the passage is found in the body of the sale deed, though not in the schedule and that this contention cannot be permitted to be raised at this stage.

2.2. This contention is correct, as the Executing Court is not expected to go beyond the terms of the decree.

3. The learned counsel for the Revision Petitioner submitted that once before the Decree Holders filed an Execution Petition under Order 21 Rule 32 CPC, in which the Revision petitioners had filed the Application in E.A.No.4236 of 2015 (under Section 47 CPC) and the

Executing Court passed an order in S.R.No.41092 of 2014, on 05.01.2015, against which, a Civil Revision Petition was filed before this Court, in CRP (NPD) No.1871 of 2015 and this Court, by the order, dated 22.07.2015, set-aside the order of the Executing Court, with a direction to number the Execution Application and to decide the Execution Application, on merits, after giving opportunities to both the parties and the Executing Court did not give sufficient opportunity to the Judgment-Debtor to put forth his case and therefore, the impugned order is liable to be set-aside.

3.1. Per contra, the learned counsel for the decree-holders would submit that there was a direction by this Court to dispose of the Execution Application, within a period of three months from the date of receipt of a copy of the order and the Judgment-debtor is in the habit of prolonging the proceedings, by filing frivolous applications and rightly the Executing Court has dismissed the same and the dismissal should be confirmed.

4. In the light of the stated circumstances, this Court has to look into certain dates and events, in order to appreciate the contentions on both sides.

5. In E.A.No.4236 of 2015 / E.P.No.1191 of 2013, the entry in the notes paper, dated 10.09.2015, reads as under:-

“Both counsels are present. The petitioners' counsel submitted that the petitioners have no documentary evidence to produce and on the other hand stated that the Decree-Holders have to produce their evidence. Further submits that, he is having some personal affairs for next week. Hence, at request adjourned to 21.09.2015.”

5.1. Thereafter, the following entry was made on 21.09.2015, which reads as under:-

“Petitioner called absent, no representation for the petitioner. On perusal of the records, the petitioner has no oral evidence. Till 04.00 pm, the respondents / decree holders have not appeared. For appearance and respondents / decree holders evidence if any by 23.09.2015.”

5.2. Thereafter, the matter has been adjourned, at the request of the decree-holders on 23.09.2015, 29.09.2015 and 08.10.2015. The decree-holders have filed the proof affidavit on 09.10.2015 and they had been cross-examined partly on 09.10.2015 and remaining part on 02.11.2015. Thereafter, on 05.11.2015, this Application to re-open the evidence has been filed by the Judgment-debtor, and it came to be

dismissed on 27.11.2015.

5.3. In the proof affidavit filed by Veerappan Arunachalam (the first respondent herein / first decree holder), it is specifically stated in paragraph-2 of the affidavit that the judgment-debtor has not provided any evidence, oral or documentary, and his arguments have been closed. Through R.W.1 documents have been filed to show the: (a) title of Jayalakshmi Ammal; (b) death of Jayalakshmi Ammal; (c) the relationship between Jayalakshmi Ammal and the respondents herein; and (d) the title deeds standing in the name of the respondents herein.

5.4. It is also pertinent to point out that, out of 16 documents marked, the learned counsel for the petitioner / Judgment-Debtor issued notice to the decree-holders, asking for production of original documents, of which, certified copies have been filed, excepting the settlement deed, dated 29.03.1975, which is the original document filed.

5.5. It is the case of the respondents / decree-holders that those documents were already marked through witnesses, after giving notice

to the other side. For the notice, dated 02.09.2015, a reply, dated 07.09.2015, has been given, in which, it is specifically stated that it is for the Judgment-Debtor, who filed the Execution Application to produce his documents first, or to produce oral evidence before calling upon the decree-holders (respondents) to produce documents or other evidence.

6. During the course of the arguments, the learned counsel appearing for the Judgment-debtor submitted that an opportunity should be given to the Judgment-debtor to present his oral evidence and that would be to the extent of denying / disputing the contents of the document.

6.1. No need to point out that there cannot be any oral evidence against the documentary evidence, except for the purposes for which, oral evidence is permitted, under Section 92 of the Indian Evidence Act, 1872:-

"92. Exclusion of evidence of oral agreement.— When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, ***no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in***

interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms:

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law:

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document:

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved:

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents:

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved:

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract:

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.”

6.2. It is not the case of the judgment-debtor that he wanted to give evidence which would be admissible under Provisos 1 to 6 of Section 92 of the said Act. The purpose for which the recalling of the Judgment-debtor was sought for is pertaining to evidence which shall not be admitted by the Court.

7. Under normal circumstances, the Courts are not strict in the procedural aspect of the case in affording opportunity to adduce evidence. But, in this case, the facts and circumstances and the conduct of the Judgment-debtor would clearly go to show that the intention of the Judgment-debtor is only to drag on the proceedings and the circumstances are as under:-

(i) The Judgment-Debtor has not chosen to produce either oral or documentary evidence, at the inception. Just because, it is said that there is no documentary evidence, it does not mean that the Judgment-debtor had

oral evidence, as, by conduct, the Judgment-debtor had put the decree-holders on notice that they must commence their evidence. Therefore, by implication, the Judgment-Debtor has made it clear that he has no oral or documentary evidence.

(ii) By the subsequent conduct also, by remaining silent, when the case has been posted for the evidence of the decree-holders, i.e., the Judgment-debtor did not come forward either to file any application or to make a representation that he has oral evidence to adduce.

(iii) At least, after the decree-holders giving a reply that the Judgment-debtor has not given any evidence (oral or documentary) he should have come forward with an application to reopen his side of the evidence. Only after taking adjournments, when an Application is posted for arguments, this Application has been filed.

(iv) The entires in the Court docket are presumed to be genuine as per Section 114 of the Indian Evidence Act, 1872.

8. These circumstances, coupled with the pendency of the suit

from the year 1992, would compel the court to take a view that the Judgment-Debtor cannot be further allowed to protract the proceedings.

9. The issue regarding maintainability of the Execution Petition by the legal representatives of the decree-holder is an issue to be canvassed before the Executing Court and it is for the Executing Court to decide the same, in the light of Order 21 Rule 16 CPC and other decided cases.

10. Under such circumstances, this Civil Revision Petition is dismissed. No costs. Consequently, the connected CMP is closed.

21.04.2016

Index : Yes / No

Web : Yes / No

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Note to office.: Issue order coy on 09.05.2016

S.VIMALA, J.,

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To

1. IX Assistant City Civil Judge, Chennai
2. The Section Officer, V.R.Section, Madras High Court,
Chennai – 104

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