

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 06.11.2017

Coram

THE HON'BLE MR.JUSTICE M.DURAI SWAMY

CIVIL MISC. SECOND APPEAL No.14 of 2017

&

C.M.P.No.6008 of 2017

B.Omprakash Varma

... Appellant

Vs.

1.Ragu Baskar
2.Vijayalakshmi @ Rani
3.K.P.Choodamani
4.R.S.Thembavani
5.R.S.Kameswaran
6.R.S.Yuveneswaran
7.R.S.Panchami
8.Senghilakshmi

... Respondents

Civil Miscellaneous Second Appeal filed under Order XXI Rule 58 read with 100 of CPC to set aside the impugned order dated 30.01.2017 of Lower Appellate Court by dismissing C.M.A.No.55 of 2015 and consequently confirming order of removal of obstruction passed in E.A.No.120 of 2015 in E.P.No.4502 of 2014 passed on 06.01.2015 passed by the X Assistant Judge, City Civil Court at Chennai.

For Appellant : Mr.Sathish Parasaran,
Senior Counsel
for Mr.K.Chairmanselvaraj

For Respondents : Mr.T.Velumani - for R1
R2 to R7 - Not ready in notice

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J U D G M E N T

Challenging the judgment and decree passed in C.M.A.No.55 of 2015 on the file of II Additional Judge, City Civil Court, Chennai, confirming the fair and decreetal order passed in E.A.No.120 of 2015 in E.P.No.4502 of 2014 in O.S.No.4646 of 2001 on the file of X Assistant Judge, City Civil Court, Chennai, the third party-obstructor has filed the above Civil Miscellaneous Second Appeal.

2. Pursuant to the preliminary decree passed in O.S.No.4646 of 2001, the defendants filed final decree application in I.A.No.5500 of 2009 in O.S.No.4646 of 2001. By its judgment and decree dated 01.04.2013, the Trial Court passed a final decree allotting the entire ground floor with 1/3rd undivided share in the land at No.4A, Gulam Abbas Ali Khan Fist Lane, Thousand Lights, Chennai to the defendants.

3.1 Pursuant to the final decree passed by the Trial Court, the defendants filed an Execution Petition in E.P.No.4502 of 2014 in O.S.No.4646 of 2001 for taking possession of the property allotted to them.

3.2 In the said Execution Petition, delivery of possession was ordered and in pursuance to the delivery order, when the defendants along with the Court Bailiff went to the property for taking possession of the property, the appellant gave obstruction letter dated 12.11.2014 to the Bailiff along with the documents stating that he is in possession and enjoyment of the property.

3.3 Thereafter, the decree holders filed an application in E.A.No.120 of 2015, under Order 21 Rule 97 of C.P.C., for removal of obstruction. The Executing Court, after ordering the application to dispense with the notice to the obstructor, allowed the application without giving opportunity of hearing to the obstructor. While allowing the application, the Executing Court observed that the obstructor had purchased the property during the pendency of the lis from the defendants, therefore, final decree passed by the Trial Court is binding on them. Further, the Trial court, also observed that the obstructor has not approached the Trial Court by producing necessary documents and even in the execution proceedings to establish that he has got right over the property.

4. Aggrieved over the order passed by the Executing Court, the appellant-obstructor filed an appeal in C.M.A.No.55 of 2015 on the file of II Additional Judge, City Civil Court, Chennai and the Lower Appellate Court also confirmed the order passed by the Executing Court.

5. Aggrieved over the same, the appellant-obstructor has filed the above Civil Miscellaneous Second Appeal.

6. Heard Mr.Sathish Parasaran, learned Senior Counsel appearing for the appellant and Mr.T.Velumani, learned counsel appearing for the 1st respondent.

7.1 On a careful consideration of the materials available on record and the submissions made by the learned counsel on

either side, it could be seen that the Executing Court had allowed the application after dispensing with the notice to the obstructor, without giving an opportunity of hearing to the obstructor. When the obstructor is in possession and enjoyment of the property, the Executing Court must have given an opportunity of hearing to him. Without giving an opportunity of hearing to the obstructor, the Executing Court should not have allowed the application filed by the decree holders under Order 21 Rule 97 of CPC.

7.2. When the Executing Court is allowing the application, necessarily, the obstructor should have been given an opportunity of hearing. In the event of the Executing Court finding that there is no merit in the application, in that case, for dismissing the application, the court need not give notice to the respondent. When an order is passed against the respondent, necessarily a notice should have been given to him.

7.3 In the case on hand, after dispensing with the notice to the respondent, the Executing Court had allowed the application filed by the decree holders under Order 21 Rule 97 of CPC. On this ground alone, the fair and decretal order passed by the Executing Court in E.A.No.120 of 2015 are liable to be set aside.

7.4 The Lower Appellate Court also on an erroneous approach, confirmed the order passed by the Executing Court, which is also liable to be set aside. The Courts below cannot justify the non-issuance of notice to the obstructor in any manner whatsoever.

8. In these circumstances, I am of the considered view that the judgment and decree passed by the II Additional Judge, City Civil Court, Chennai in C.M.A.No.55 of 2015, confirming the order passed in E.A.No.120 of 2015 in E.P.No.4502 of 2014 are liable to be set aside. Accordingly, the same are set aside. The application in E.A.No.120 of 2015 is restored to file and remitted back to the X Assistant Judge, City Civil Court, Chennai, for fresh consideration. The X Assistant Judge, City Civil Court, Chennai is directed to decide the matter afresh after giving an opportunity of hearing to the obstructor. The learned counsel appearing for the appellant-obstructor submitted that the appellant-obstructor would appear before the Executing Court on 23.11.2017. The X Assistant Judge, City Civil Court, Chennai, is directed to decide the application in E.A.No.120 of 2015 after giving an opportunity of hearing to the appellant-obstructor, on merits and in accordance with law, within a period of eight weeks, from the date of receipt of a copy of this order.

With these observations, the Civil Miscellaneous Second Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

Rj

To

1. The II Additional Judge,
City Civil Court,
Chennai
2. The X Assistant Judge,
City Civil Court,
Chennai

+lcc to Mr.T.R.Sundaram, Advocate, S.R.No.78388
+lcc to Mr.T.Velumani, Advocate, S.R.No.78511

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NMI (CO)
CA(07/11/2017)



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