IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 14.03.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP(NPD)No.722 of 2017
and
CMP.No.3622 of 2017

Vasantha .. Petitioner

Vs.

1.Manickam @ Thandapani
2.Palani @ Sekar .. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 02.12.2016 made in E.A.No.103 of 2013 in E.P.No.46 of 2013 in O.S.No.362 of 1984, on the file of the Additional Sub-Judge, Puducherry.

For Petitioner : Mr.M.Sairaman
for M/s.M.Selvam

For Respondents : Mr.Menon and Karthik

O R D E R

Though the Civil Revision Petition has taken up for admission today (24.02.2017), both the petitioner as well as the respondents are agreed for final disposal and putforth their arguments and hence I heard the arguments of both sides and final orders has been passed.

2.The judgment debtor in E.A.No.103 of 2013 in E.P.No.46 of 2013 is the civil revision petitioner before this Court, challenging the order passed in E.A.No.103 of 2013 in E.P.No.60 of 2009, dated 02.12.2016.

3.The case of the respondent/decree holder is that he has filed the suit for specific performance of the agreement for sale relating to the schedule item of the property and direct the respondent/defendant to come forward and execute the sale by receiving the balance sale consideration of Rs.47,200/- as per the agreement dated 15.04.1984, failing which the Court may be pleased to execute the sale deed and for permanent injunction.

4.The case of the decree holder/plaintiff is that the suit schedule of property in O.S.No.362 of 1984 was owned by the petitioner/defendant, she has agreed to sell the property in favour of

the decree holder/plaintiff for the sale consideration of Rs.64,000/- and to that effect, the sale agreement was executed on 15.04.1984, on the same date, an advance amount of Rs.10,000/- was paid. The decree holder/plaintiff also states that on two occasions a sum of Rs.6,800/- executing two promissory notes in favour of the plaintiff, the respondent/defendant has received the amount. The defendant also agreed that she would get permission from the urban ceiling authority for selling the property in favour of the decree holder/plaintiff and the defendant also agreed to produce the Nil-Encumbrance Certificate and also antecedent title deeds. On 14.06.1984 the decree holder/plaintiff has issued notice to the defendant to sell the property after getting permission from the competent authority, on that notice on 18.06.1984, the defendant also replied that she has no intention to sell the schedule item of the property as per the agreement in favour of the decree holder/plaintiff. Therefore, he approached the learned Principal Sub-Judge, Pondicherry and filed the suit in O.S.No.362 of 1984 for the above prayer.

5.On receipt of the summon, the judgment debtor/defendant denying the execution of the sale agreement. On full fledged trial, the plaintiff shall not be entitled for specific performance of the

agreement for sale of plaint property, but entitled to nominal damages of Rs.5,000/- as per agreement without interest. That the plaintiff shall be entitled to recover a sum of Rs.16,800/- with interest at the rate of 18% per annum and the trial Court also declined the suit in respect of permanent injunction. Challenging the said decree, the judgment debtor/plaintiff has approached this Court and filed an appeal in A.S.No.123 of 1986 and the said appeal was allowed and decree was granted as prayed for in O.S.No.362 of 1984 and directed the plaintiffs to deposit the said balance amount of sale consideration on or before 31.01.2002 to the credit of O.S.No.362 of 1984 and then get the sale deed executed in a manner known to law. Against the said decree passed in A.S.No.123 of 1986, no appeal was preferred by the petitioner/defendant before the Hon'ble Supreme Court and the said suit is ended in finality.

6.Pursuant to the decree, the judgment debtor/plaintiff has filed E.P.No.105 of 2002 before the learned Principal Sub-Judge, Pondicherry and on 24.04.2007, the Executing Court also executed a sale deed in favour of the judgment debtor/decree holder.

7.After executing the sale deed, the decree holder/plaintiff has filed another Execution Petition in E.P.No.60 of 2009 before the

learned Principal Sub-Judge, Pondicherry with a prayer directing the respondent to put the decree holders in possession and in default of which, the Court may be pleased to order for delivery of possession to the decree holders under Order XXI Rule 35(3) CPC read with Order XXI Rule 32(5) of CPC.

8.On receipt of the above petition in E.P.No.60 of 2009, this petitioner/defendant also filed a counter affidavit denying the granting of prayer in E.P.No.60 of 2009 and the petitioner/defendant specifically denied and states that the present Execution Petition in E.P.No.60 of 2009, filed by the petitioner/decree holder under Order XXI Rule 35(3) of CPC is only for the delivery of possession of any building and the said provision does not include the vacant site and he has also stated that the deed is well settled law of CPC the present application has to be filed under Order XXI Rule 35(4) of CPC, since the schedule mentioned property as pleaded by the petitioner/decree holder is not a vacant plot and it contains a pucca brick built double storeyed house property.

9.The petitioner/defendant also raised a ground by stating that the Execution Petition in E.P.No.60 of 2009 should be dismissed since non-joinder of necessary parties in the Execution Petition. Apart from

this, the petitioner/defendant also states that there were totally 2400 sq. ft., but the defendant holds only to an extent of 750 sq. ft. and the remaining extent are occupied by two other persons and also excluding the extent of the respondent/judgment debtor, the schedule mentioned property contains the cadastre number 81/2 and 82/2 which does not exist in the so called premises.

10.The petitioner/defendant also stating that the prayer of the decree holder/plaintiff has filed petition under Order 21 Rule 32(5) of CPC has not at all maintainable and further the petitioner/decree holder is misused the well settled provisions and principles of law. Therefore he prayed for dismissal of the E.P.No.60 of 2009.

11.While pending the above E.P.No.60 of 2009, this petitioner/ judgment debtor has filed an application in E.A.No.103 of 2013 under Section 47 read with Section 151 of CPC for dismissal of the E.P., by upholding the contention of the petitioner regarding the inexecutability of the decree. The decree holder/plaintiff has filed E.A.No.103 of 2013 under Section 151 of CPC to dismiss the E.A.No.103 of 2013 filed by the petitioner/judgment debtor, since the said execution application is not maintainable.

12.The main contention of the petitioner/defendant is that the original suit filed by the plaintiff in O.S.No.362 of 1984 was dismissed for the prayer of specific relief, but the suit was decreed by the trial Court partly only for relief of return of purchase money with interest. Against which, the appeal has been filed before this Court in A.S.No.123 of 1986, though this Court has allowed the above appeal in A.S.No.123 of 1986 granted the specific relief. But no decree was granted in respect of delivery of possession to the decree holder.

13.This petitioner/defendant also states that the appeal has not granted any relief in the main suit for delivery of possession and he seeking only for specific performance. Therefore, without relief of delivery of the possession in the plaint of the decree, the respondents have filed the Execution Petition in E.P.No.60 of 2009, for delivery which is not at all maintainable. Therefore, the application filed in E.A.No.103 of 2013 is to be allowed and Execution Petition filed in E.P.No.60 of 2009, is dismissed. The Execution Application in E.A.No.103 of 2013 filed by the decree holder stating that E.P.No.46 of 2013 was filed only for delivery of possession. Therefore, the application filed in I.A.No.103 of 2013 is not maintainable and hence he prayed for dismissal of the suit.

14.Considering both side arguments, the learned Additional Sub Judge, Pondicherry has dismissed the application filed by the petitioner/defendant in E.A.No.103 of 2013 in E.P.No.46 of 2013, on 02.12.2016 on the ground that though the judgment debtor has filed the suit without seeking delivery either in the plaint or in the decree, the decree holder filed E.P.No.60 of 2009 for delivery, which is not maintainable. But, the learned counsel for the decree holder has produced the judgment rendered by this Court reported in ***2007 (3) CTC 529***, this Court in the above said judgment, the Executing Court has got power to enforce the terms of agreement and that the judgment debtor is bound to handover possession to the decree holder and therefore, even in the absence of any prayer for possession and even without amending the relief for possession, the Court has got power to grant possession. Therefore, the learned Judge says that this judgment is very much applicable to this case. Accordingly, this petition was dismissed, challenging the said order, the petitioner/defendant has filed the present Civil Revision Petition before this Court.

15.I heard Mr.S.Sairaman for M/s.M.Selvam, learned counsel appearing for the petitioner and Mr.Menon, learned counsel appearing for the respondents and perused the records.

16.Admittedly, the respondent/decree holder has filed a suit in O.S.No.362 of 1984 for the following prayer:

(i) specific performance of the agreement for sale relating to the schedule item of the property and direct the respondent/defendant to comeforward and execute the sale receiving the balance sale consideration Rs.47,200/- as per the agreement dated 15.04.1984, failing which the Court may be pleased to execute the sale deed in favour of the plaintiff;

(ii) Pass an order of permanent injunction restraining the defendant from alienating the property; (iii)direct the defendant to pay the cost of the suit.

17.The defendant appeared through his counsel and contested the case by filing written statement with evidence. Considering both side case, the trial Court namely the Principal Sub-Judge, Pondicherry was pleased to dismiss the specific performance and decreed for recover a sum of Rs.16,800/- with interest at the rate of 18% per annum on 27.11.1985. In respect of permanent injunction, the suit was also dismissed.

18.The plaintiff has filed an appeal before this Court in

A.S.No.123 of 1986, considering the case, this Court was pleased to allowed the Appeal and passed the decree as follows:-

"1.that the decree of the trial Court be and hereby is set aside.

2.that there be a decree for specific performance of the agreement for sale relating to the schedule item of the property;

3.that the respondent/defendant be and hereby is directed to execute the sale receiving the balance sale consideration Rs.47,200/- as per the agreement dated 15.04.1984;

4.that the Appellants/Plaintiffs do have time till 31.01.2002 for depositing the balance sale consideration to the credit of O.S.No.362 of 1984 on the file of the Court of Subordinate Judge, Pondicherry and then get the sale deed executed the manner known to law; and

5.that the respondent/defendant herein do pay to the appellant/ plaintiff a sum of Rs.5009-55 (Rupees Five thousand and ine and fifty five paise only) being the cost incurred in this appeal and the costs of the Court below as and when taxed."

19.Pursuant to the above decree, the learned Sub-Judge, Pondicherry also executed the sale deed in E.P.No.105 of 2002 in O.S.No.362 of 1984 on 24.04.2007 in favour of this decree holder/plaintiff. On fair reading of the above prayer in the suit as well as the decree passed by this Court in A.S.No.123 of 1986, there is no prayer sought for the plaintiff and no relief granted by this Court in respect of the delivery of possession to the decree holder/plaintiff.

20.After execution of the sale deed, the decree holder/plaintiff has filed another Execution Petition in E.P.No.60 of 2009 for the prayer to direct the respondent to put the decree holders in possession of the E.P. schedule mentioned property and in default of which the Court may be pleased to order for delivery of possession to the decree holders under Order XXI Rule 35(3) CPC read with Order XXI Rule 32(5) of CPC.

21.As per the petition under Order XXI Rule 35 (3) or Order XXI Rule 32(5) of CPC is as follows:

> "35(3). Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford tree access, the Court through its officers, may, after giving reasonable

warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree-holder in possession.

32(5). Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of, or in addition to, all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree-holder or some other person appointed by the Court, at the cost of the judgment-debtor, and upon the act being done, the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree."

22.While pendency of the above E.P., this petitioner/judgment debtor has filed the present E.P.No.103 of 2013 for dismissal of the E.P. Considering both side cases, the learned Judge dismissed the application only on the ground that this Court has passed order reported in ***2007 3 CTC 529*** in which this Court has directed even though there is no relief of possession in the main suit without

maintaining the relief of possession, the Court got power to grant possession in favour of the plaintiff.

23.The Five-Judge Bench of the Federal Court in the case of ***M/s.Moolji Jaitha and Co. v. The Khandesh Spinning and Weaving Mills Co. Ltd.*** reported in ***AIR (37) 1950 F.C. 83***, it is held as follows:

> "Chief Justice Kania opined, "Taking the suit as a whole, one has to consider whether it is for the purpose of obtaining a direction for possession or a decision on title to land, or the object of the suit is something different but involves the consideration of the question of title to land indirectly." Justice Fazl Ali observed. "If I had really felt that I was called upon to decide it, I would have agreed with the line of cases in which it has been held that, broadly speaking, the expression "suit for land" covers the following three classes of suits : (1) suits for the determination of title to land; (2) suits for possession of land; and (3) other suits in which the reliefs claimed, if granted, would directly affect title to or possession of land." Justice Patanjali Sastri took the view. "The words in question, besides obviously covering claims for recovery of possession or control of land, are apt to connote also suit which primarily and substantially seek an adjudication upon title to immovable property or a determination of any right or interest therein." Justice Mahajan observed, "If an

attempt is made to find a comprehensive definition of the phrase, it will eventually be discovered that it has created further complications. I therefore content myself by saying that where the nature of the suit is such that in substance it involves a controversy about land or immovable property and the Court is called upon to decide conflicting claims to such property and a decree or order is prayed for which will bring about a change in the title to it, that suit can be said to be in respect of land or immovable property; but where incidentally in a suit, the main purpose of which or the primary object of which is quite different, some relief has to be given about land, the title to it not being in dispute in the real sense of the term, then such a suit cannot fall within the four corners of this expression." He added, "In my opinion, if the suit is for specific performance and a decree for possession of the land sold is claimed, such a suit would certainly be a "suit for land"; but if the suit is simpliciter for specific performance, i.e., for the enforcement of the contract of sale and for execution of a conveyance, in that event there can be no good ground for holding that such a suit is a suit for determination of title to land or that the decree in it would operate on the land."

In that view he expressed his

agreement with the decision of the Full Bench of the Madras High Court in **Velliappa Chettiar v. Govinda Doss**, AIR (16) 1929 Mad. 721 F.B. Justice Mukherjea perceived, "It seems to me fairly clear that the expression 'suit for land' occurring in clause 12, Letters Patent, means a suit which is instituted with the object of establishing

claims regarding title to the property or possession of it. Whether or not possession is claimed, if title to any immovable property is to be directly affected by the result of the decision, the suit would be a suit for land."

24.Pursuant to the above judgment the Hon'ble Supreme Court in a case of ***Adcon Electronics Pvt. Ltd. v. Daulate and Anr.*** reported in ***2001 (4) CTC 39***, it is held as follows:

"In a suit for specific performance of contract for sale of immovable property containing stipulation that on execution of the sale deed the possession of the immovable property will be handed over to the purchaser, it is implied that delivery of possession of the immovable property is part of the decree of specific performance of contract. But in this connection it is necessary to refer to Section 22 of the Specific Relief Act, 1963 which runs:

22.Power to grant relief for possession, partition, refund of earnest money, etc. -

(1) Notwithstanding anything to the contrary contained in the Code of Civil Procedure, 1908, any person suing for the specific performance of a contract for the transfer of immovable property may, in an appropriate case, ask for -

(a) possession, or partition and separate possession, of the property, in addition to such

performance; or

(b) any other relief to which he may be entitled, including the refund of any earnest money or deposit paid or made by him in case his claim for specific performance is refused.

(2) No relief under clause (a) or clause (b) of sub-section

(1) shall be granted by the court unless it has been specifically claimed:

Provided that where the plaintiff has not claimed any such relief in the plaint, the court shall, at any stage of the proceeding, allow him to amend the plaint on such terms as my be just for including a claim for such relief.

17.It may be seen that sub-section (1) is an enabling provision. A plaintiff in a suit of specific performance may ask for further reliefs mentioned in clauses (a) and (b) thereof. Clause (a) contains reliefs of possession and partition and separate possession of the property, in addition to specific performance. The mandate of sub-section (2) of Section 22 is that no relief under clauses (a) and (b) of sub-section (1) shall be granted by the Court unless it has been specifically claimed. Thus it follows that no court can grant the relief of possession of land or other immovable property, subject-matter of the agreement for sale in regard to which specific performance is claimed, unless the possession of the immovable property is specifically

prayed for.

> 18.In the instant case the suit is for specific performance of agreement for sale of the suit property wherein relief of delivery of the suit property has not been specifically claimed as such it cannot be treated as a "suit for land."

25.In another judgment rendered by the Hon'ble Division Bench of the Calcutta High Court in the case of ***Debendra Nath Chowdhury v. Southern Bank Ltd.*** reported in ***AIR 1960 Cal. 626***, that a suit for land is a suit in which the relief claimed relates to title to or delivery of possession of land or immovable property. Whether a suit is a "suit for land or not has to be determined on the averments in the plaint with reference to the reliefs claimed therein; where the relief relates to adjudication of title to land or immovable property of delivery of possession of the land or immovable property, it will be a "suit for land".

26.Based on the above judgments, the learned Judge of this Court has held that in the case of ***S.Sampoornam and another v. P.V.Kuppuswamy and 8 others*** reported in ***2007 (3) CTC 529***, it is held as follows:

> "In a suit for specific performance for agreement of sale, decreeing court has got power to enforce the terms of agreement and as per the terms of agreement, the vendor, namely, the judgment debtor is bound to handover possession to the decree holder and therefore, even in the absence of any prayer for possession and even without amending the relief for possession, the court has got power to grant possession."

27.Though, the learned Judge of this Court passed an order reported in ***2007 3 CTC 529*** stated that though the suit has been decreed as prayed for and though the decree and Judgment did not specifically state that the possession be given and the Court executed the sale deed in favour of the decree holder and the persons claiming under judgment debtor created obstruction and the decree holder sought possession in execution petition is maintainable, but in my view, as per the judgment rendered in ***2001 (4) CTC 39***, the Hon'ble Supreme Court very categorically held that no Court can grant the relief of possession of land or other immovable property, subject matter of the agreement for sale, in regard to which specific performance is claimed unless the possession of the immovable property is specifically prayed for. Therefore, based on the judgment rendered by the Hon'ble Supreme Court reported in ***2001 (4) CTC 39***, since the Hon'ble Apex Court has categorically held that based on

the provision under Section 22 of the Specific Relief Act, the plaintiff is not entitled for delivery of possession.

28.The Hon'ble Supreme Court in yet another case in ***Babu Lal v. M/s.Hazari Lal Kishori Lal***, reported in ***AIR 1982 SC 818***, the plaintiffs, not having claimed any relief for possession, cannot claim the same relief at a subsequent stage. Therefore, the judgment rendered by the Hon'ble Apex Court reported in ***2001 (4) CTC 39*** and the another judgment reported in ***AIR 1982 SC 818*** is squarely applicable in the present case in this E.P.No.60 of 2009.

29.Per contra, the learned counsel appearing for the respondents in this case has produced the following judgments to support their case:

(i) In ***AIR 1982 Supreme Court 818 (Babu Lal Vs. M/s.Hazari Lal Kishori Lal)*** the Hon'ble Supreme Court considered the scope of Sections 21, 22 and 28 of the Specific Relief Act and held that

> "A Decree for Specific Performance of a contract includes everything incidental to be done by one party to another to complete the sale transaction...."
>
> "... A Decree for Specific Performance of a contract

includes everything to be done by one party or another to complete the sale transaction, the rights and obligations of the parties in such a matter being governed by Section 55 of the Transfer of Property Act, 1955."

"... even in the absence of any prayer for recovery of possession, the Court has got power to order delivery of possession though the sale deed was executed pursuant to the decree passed in the suit."

"..... It may not always be necessary for the plaintiff to specifically claim possession over the property, the relief of possession being inherent in the relief for specific performance of the contract of sale."

(ii) In the matter of ***2012-1-LW-463, Krishnamurthy Gounder Vs. Venkatakrishnan***, this Court has held that:

"... the Court has got power to grant the relief of possession even in the absence of any such prayer as per the proviso to Section 22(2) of the Specific Relief Act."

(iii) In ***K.M.Rajendran v. Arul Prakasam, 1998 (3) CTC 25: AIR 1998 Mad 336*** wherein this Court held that:

"... in a suit for specific performance of an

agreement to transfer an immovable property, once a decree for specific performance is granted, it includes the term for delivery of possession and it is unnecessary for the court to direct such delivery of possession expressly because the Court was directing the enforcement of the entire agreement, including the agreement to deliver possession."

(iv) The above principles have been reiterated in the judgment of this Court reported in ***2015-SCC Online Madras 10410*** in

"even though the Plaintiff has not in the absence of any prayer for possession once a suit for specific performance is decreed the Court has got every power to order delivery of possession...."

30.In fact, the Hon'ble Supreme Court reported in ***2001 4 CTC 39*** has clearly stated that the plaintiff has filed the suit for specific performance of contract for sale of immovable property that the plaintiff not seeking relief of delivery of suit property as per Section 22(1) of Specific Relief Act. The plaintiff seeking reliefs under Clauses (a) and (b) of Section 22(1). Clause (a) contains relief of possession and partition and separate possession of party in addition

to specific performance. Section 22(2) mandates that no relief under Section 22(1)(a) and (b) shall be granted unless it is specifically claimed the plaintiff not having claimed such relief is not entitled to decree for delivery of possession.

31.The above judgment in ***2001 4 CTC 39***, was passed following the judgment of the Hon'ble Apex Court in ***AIR 1982 818***. Therefore, both the cases are squarely applicable in this case also, since Section 22 of the Specific Relief Act clearly mandate unless the plaintiff is not prayed in the suit, he is not entitled the relief of delivery of possession. Therefore, it is my view that when the suit filed by the plaintiff only for the specific performance and there is no relief claimed by the plaintiff in respect of delivery of possession, which is also mandate under Section 22 of the Specific Relief Act and hence, the plaintiff is not entitled for the delivery of possession in the present execution Petition in E.P.No.60 of 2009. Hence, this decree holder/plaintiff is not entitled the relief of delivery of possession sought for in E.P.No.60 of 2009 and accordingly, it is warranting necessary for interference of this Court and this petition in E.A.No.103 of 2013 is ought to be set aside and E.P.No.60 of 2009 pending on the file of the Additional Sub-Judge, Pondicherry, is liable to be dismissed as not maintainable.

32.In the result:

(a) the civil revision petition is allowed by setting aside the order passed in E.A.No.103 of 2013 in E.P.No.46 of 2013, dated 02.12.2016, on the file of the Additional Sub-Judge, Pondicherry;

(b) the Execution Petition filed by the decree holder in E.P.No.60 of 2009, pending on the file of the Additional Sub-Judge, Pondicherry, is dismissed as not maintainable.

(c) the plaintiff/decree holder is giving liberty to file a separate suit for possession of property as per the decree in A.S.No.123 of 1986, if so he advice. No costs. Consequently, connected miscellaneous petition is closed.

14.03.2017

Index:Yes
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vs

To

The Additional Sub-Judge, Puducherry.

M.V.MURALIDARAN, J.

vs

Pre-Delivery order made in
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and
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14.03.2017
http://www.judis.nic.in