

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.11.2017

CORAM:

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

C.M.A.NO.3404 OF 2013
AND M.P.NO.1 OF 2013

V.Mylsamy

... Appellant/Defendant

Vs.

Umamaheswari

... Respondent/Plaintiff

PRAYER: Civil Miscellaneous Appeal filed under Order 43 Rule 1 (u) of Civil Procedure Code, against the judgment and decree dated 15.09.2012 made in A.S.No.41 of 2010 on the file of the Principal Subordinate Judge, Tiruppur and remanded back the judgment and decree dated 28.07.2010 made in I.A.No.1503 of 2007 in O.S.No.213 of 2007 on the file of the District Munsif, Tiruppur.

For Appellant : Ms.P.T.Asha for
M/s.Sarvabhauman Associates
For Respondent : Mr.S.K.Rakhunathan

J U D G M E N T

The present Civil Miscellaneous Appeal is preferred against the order of the Lower Appellate Court reversing the rejection of plaint ordered by the Trial Court.

2. The first defendant in the suit is the appellant before this Court. The appellant initiated eviction proceedings against the tenants, who were second and third defendants in the suit in O.S.No.213 of 2007, on the file of District Munsif, Tiruppur. The Rent Controller ordered eviction and subsequently, delivery of possession was also ordered in the execution petition filed by him. The plaintiff in the suit in O.S.No.213 of 2007 filed an execution application contesting the title of the appellant herein under Order XXI Rule 97 of the Code of Civil Procedure. The execution application is pending before the Executing Court. While so, the respondent / plaintiff has preferred the above suit for cancellation of the order passed in the rent control proceedings and for appointment of the Official Receiver for the management of the suit properties.

3. From a perusal of the plaint, it could be inferred that the litigation is in between the children of one Venkidusamy and Rajamani Ammal about the WILLS executed by them. The petitioner and the respondent are brother and sister of the four children. All the four children have individually filed Civil Suits with regard to declaration of title to the properties mentioned in those WILLS. According to the parties, one WILL was executed by the father and another WILL was executed by the mother. The present dispute revolves around the WILL executed by the mother and title to the properties. The respondent herein would contest that the petitioner has not derived any title to the properties and therefore, he has no locus standi to file an eviction petition and take possession of the property through an execution petition. When the appellant attempted to take possession of the property, she filed applications in E.A.Nos.249 and 250 of 2006 before the Executing Court for dismissal of the execution proceedings. During the pendency of the execution applications, the respondent has filed the above suit in O.S.No.213 of 2007 to cancel the decree passed by the Rent Controller.

4. The appellant, being the first defendant in the suit, filed an application under Order VII Rule 11 for rejection of plaint, as there is a specific bar to file a separate suit as per Order XXI Rule 101 of the Code of Civil Procedure. The Trial Court, considering the bar under Order XXI Rule 101 of the Code of Civil Procedure, has rejected the plaint, as the plaintiff can agitate the right, title or interest over the property before the Executing Court under Order XXI Rule 101. Order XXI Rule 101 of the Code of Civil Procedure bars a separate suit and therefore, the plaint was rejected. Aggrieved over the same, the respondent preferred an appeal and the Appellate Court, having found that Order XXI Rule 101 of the Code of Civil Procedure bars a suit, in interest of justice, permitted the respondent / plaintiff to contest the case on merits and reversed the order of rejection of plaint made by the Trial Court. Against which, the present Civil Miscellaneous Appeal is filed.

5. Heard the submissions made on either side and perused the materials available on record.

6. From a perusal of the plaint, it is clear that the respondent / plaintiff seeks to cancel the fair and decreetal order passed in RCOP No.5 of 1999 to appoint an Official Receiver. The contention of the respondent / plaintiff is that the appellant does not have any title to the property, as it was negatived by the competent Civil Court in a suit filed by him and that he has no locus to maintain the rent control proceedings against the tenants. The main grievance is that

possession of the property shall not be delivered to the appellant. For that purpose, she has filed execution applications in E.A.Nos.249 and 250 of 2006.

7. The issue to be decided is as to whether a separate suit in respect of the issue pending before the Executing Court under Order XXI Rules 97 to 101 of the Code of Civil Procedure, is maintainable or not?.

8. Order XXI Rule 101 of the Code of Civil Procedure Code reads as under:

"Order XXI Rule 101. Question to be determined - All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions."

9. In so far as the application under Order VII Rule 11 of the Code of Civil Procedure is concerned, the averments made in the plaint are germane for consideration. In the instant case, there is a clear averment in the plaint that the plaintiff had filed execution applications in E.A.Nos.249 and 250 of 2006 questioning the right, title and interest of the appellant herein. When such an application is filed and is pending, as per Order XXI Rule 101, a separate suit is specifically barred. Therefore, this Court is of the opinion that the suit is barred by law and is not maintainable. But the Lower Appellate Court, having found that there is a bar, had went little further and discussed the disputed facts and almost the decided the suit itself. Such an order passed by the Lower Appellate Court is erroneous and in excess of jurisdiction. Having accepted that there is a bar under the Civil Procedure Code, the Lower Appellate Court, ought not to have reversed the order passed by the Trial Court, rejecting the plaint.

10. The Hon'ble Supreme Court in N.S.S.NARAYANA SARMAA AND OTHERS [2002 (1) SCC 662] has clearly held as follows:

".... Presumably, to tackle such a situation and to allay the apprehension in the minds of litigant public that it takes years and years for the decree-holder to

enjoy fruits of the decree, the legislature made drastic amendments in provisions in the afore mentioning Rules, particularly, the provision in Rule 101 in which it is categorically declared that all questions including questions relating to right, title or interest in the property arising between the parties to a proceeding on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application shall be determined by the court dealing with the application and not by a separate suit and for this purpose, the court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions. On a fair reading of the Rule it is manifest that the legislature has enacted the provision with a view to remove, as far as possible, technical objections to an application filed by the aggrieved party whether he is the decree-holder or any other person in possession of the immovable property under execution and has vested the power in the executing court to deal with all questions arising in the matter irrespective of whether the court otherwise has jurisdiction to entertain a dispute of the nature. This clear statutory mandate and the object and purpose of the provisions should not be lost sight of by the courts seized of an execution proceeding. This court cannot shirk its responsibility by shirking the relevant issues arising in the case.

11. But in the instant case, the lower appellate Court rather than scrutinising the correctness of the decree, rejecting the plaint exceeded the jurisdiction vested in it, and decided the title dispute on facts, which were not germane to the plaint. In similar circumstances, a Division Bench of this Court in *FATHIMA AUTOMOBILES VS. P.K.P.NAIR AND OTHERS* [1985 (2) MLJ 31] held that the Execution Court is empowered to decide all the questions inspite of issues and not a separate suit lie for the purpose of deciding the dispute between the decree-holder and the obstructor and directed the Execution Court to decide the issues under Rule 97 taking the bar under Order XXI Rule 97.

12. It is very clear that Order XXI Rule 101 bars separate suits and the trial Court has rightly found that when there is statutory bar to maintain the suit, it shall be rejected. Therefore, the order passed by the lower appellate Court is erroneous and accordingly, set aside. A direction is given to the respondent/plaintiff, to agitate all her rights before the Execution Court under Order XXI Rules 97 and 101 of Code of Civil Procedure. It is open to her to raise all additional issues, in respect of the title of the property and locus of the appellant to execute the decree.

13. In the result, this Civil Miscellaneous Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

asi/tk

To

1. The Principal Subordinate Judge,
Tiruppur.

2. The District Munsif,
Tiruppur.

+1cc to M/S.Sarvabhauman Associates, Advocate Sr.83392

+1cc to Mr.S.K.Rakhunathan, Advocate Sr.83235

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