

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 13.12.2017

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (NPD) No.414 of 2006

T.N.C.Venkatesan

.. Petitioner

v.

1.T.Sundararajan

2.T.C.Varadharajan

.. Respondents

Prayer: Civil Revision Petition filed under Section 115 of C.P.C., against the order dated 29.04.2005 passed in E.P.No.39 of 2004 in O.S.No.766 of 1999 on the file of the Subordinate Judge, Kancheepuram.

For Petitioner : Mr.S.Vasudevan

For Respondents : Mr.M.Balasubramanian
for respondent No.1
Mr.A.S.Narasimman
for respondent No.2

ORDER

This Civil Revision Petition is directed against the order of the learned Subordinate Judge, Kancheepuram dated 14.2.2002 passed in E.P.No.39 of 2004 in C.S.No.766 of 1999, dismissing the Execution Petition as against the second respondent.

2. The petitioner is the decree-holder and the respondents are the judgment-debtors.

3. The petitioner has filed E.P.No.39 of 2004 before the Subordinate Judge, Kancheepuram to attach and sell the immovable properties of the respondents described in the schedule as item Nos.1 and 2 to realise the decree amount passed in C.S.No.766 of 1999.

4. By the impugned order, the learned Subordinate Judge, dismissed the Execution Petition against the second respondent holding that as against the order passed in E.P.No.64 of 2003 by

the learned Master, the second respondent has preferred an appeal and the same was pending and therefore, the Execution Petition against the second respondent is not maintainable. Insofar as the first respondent is concerned, the learned Subordinate Judge ordered attachment of his property i.e., item No.1 by 24.06.2005 with a direction to pay batta within one week. Challenging the order of dismissal of the Execution Petition against the second respondent, the petitioner has filed the present Civil Revision Petition.

5. I heard Mr.S.Vasudevan, learned counsel for the petitioners, Mr.M.Balasubramanian, learned counsel for the 1st respondent and Mr.A.S.Narasimman, learned counsel for the 2nd respondent and perused the entire materials available on record.

6. The learned counsel for the petitioner submitted that the Executing Court erred in dismissing the petition as against the second respondent on the ground that the second respondent has preferred an appeal against the order passed in E.P.No.64 of 2003. He would submit that the Executing Court ought to have seen that the second respondent did not even bother to provide details of appeal. The learned counsel further submitted that the decree having been transmitted for execution to the Executing Court, it ought to have executed the decree as it stood. According to the learned counsel, the order of the Executing Court is beyond the scope of Order 21 of CPC, which does not permit the Executing Court to refuse execution of a valid decree on the ground of pendency of unconnected application pending in another Court and prayed for setting aside the impugned order of the Executing Court.

7. The learned counsel for the first respondent submitted that the Executing Court ought to have dismissed the petition against the first respondent also, as the property i.e., item No.1 shown in the petition does not belong to him. Further, the learned counsel submitted that the Executing Court erred in ordering attachment of item No.1.

8. Reiterating the findings of the Executing Court, the learned counsel for the second respondent contended that as against the order passed in E.P.No.64 of 2003, the second respondent has preferred appeal before the High Court and when the appeal is pending, the Executing Court has no right to further proceed with the present Execution Petition pending on its file. Having found that the appeal is pending, the Executing Court was right in dismissing the petition as against the second respondent and therefore, there is no illegality in the order of the Executing Court. Thus, prayed for dismissal of the Civil Revision Petition.

9. I have considered the submissions made by the learned counsel appearing on either side and also perused the materials available on record.

10. It is an admitted fact that the petitioner has filed the suit being C.S.No.766 of 1999 before this Court and by the judgment dated 05.10.2001, the suit was decreed ex parte directing the respondents/defendants 1 ad 2 to pay a sum of Rs.25,84,609.73 with subsequent interest at the rate of 21% per annum from the date of decree till the date of realisation and for costs.

11. It appears that earlier the petitioner has filed E.P.No.64 of 2003 before this Court and the same has been referred to the Master Court. The learned Master has ordered attachment of properties. According to the second respondent, as against the order of attachment passed by the learned Master in E.P.No.64 of 2003, he has preferred appeal before this Court and the same was pending. Admittedly, nothing has been produced by the second respondent to show that appeal is pending. In fact, the second respondent did not even bother to provide the details of such appeal and has also not obtained stay of execution of the decree. However, the Executing Court erred in believing that as against the order passed in E.P.No.64 of 2003, appeal is pending.

12. Since the respondents have failed to pay the decree amount, the petitioner filed E.P.No.39 of 2004 before the Sub-Court, Kancheepuram, after getting the decree transferred from the Madras High Court which was reflected in column 7 of the Execution Petition, to attach and sell properties of the respondents described in the schedule of property to realise the amount mentioned in the said Execution Petition. It is stated in the Execution Petition that item No.1 belongs to the first respondent and item No.2 belongs to the second respondent.

13. In E.P.No.39 of 2004, the first respondent took the plea that item No.1 sought to be attached is the joint family property and since the first respondent is a co-sharer, the entire item No.1 cannot be attached. The first respondent also took the plea that item No.1 was mortgaged in Chinna Kancheepuram Co-operative Urban Bank on 19.5.1997 and obtained a loan of Rs.2 lakhs and the said mortgage still subsists. When the first respondent pleads that item No.1 is the joint family property, how he could mortgage the same into the Bank. There was no convincing explanation for the same. The same is not in issue to be decided in the Execution Petition. However, the Executing Court negatived the plea of the first respondent and ordered attachment of item No.1. As against which, the first respondent has not preferred any appeal and the order of the

Executing Court against the first respondent attains finality and this Court does not want to further elaborate the same.

14. In E.P.No.39 of 2004, the second respondent, apart from taking the plea of filing appeal as against the order passed in E.P.No.64 of 2003, also taken the plea that he had filed petition to set aside the ex parte decree which is pending and since there exists dispute between him and the petitioner, E.P.No.39 of 2004 is not maintainable. Admittedly, nothing on record to show that any application to set aside the ex parte decree is pending. Though the decree passed in C.S.No.766 of 1999 is ex parte one, till it is set aside, the decree passed in the said suit is a valid decree. Thus, the plea taken by the second respondent in E.P.No.39 of 2004 is vague and only to drag on the execution proceedings and to evade payment, he had taken such a plea, which cannot be entertained.

15. It is apposite to mention that the decree having been transmitted by the High Court for execution to the Sub-Court, Kancheepuram and the petitioner had filed E.P.No.39 of 2004 to attach and sell the properties described in the schedule to realise the amount, the Executing Court ought to have executed the decree as it stood against both the respondents and it cannot dismiss the petition partly on a vague ground. Admittedly, as against the transmission of the decree from Madras High Court to the Sub-Court, Kancheepuram, the respondents have not preferred any appeal.

16. This Court is of the view that the order of the learned Subordinate Judge is in excess of jurisdiction as an Executing Court under Order 21 CPC and similarly the order passed by the learned Subordinate Judge is beyond the scope of the Executing Court under the provisions of Order 21 CPC, which does not permit the Executing Court to refuse the execution of a valid decree on the ground of pendency of an unconnected proceedings said to have been pending. Moreover, pendency of the alleged appeal in E.P.No.64 of 2003 is no ground for refusing execution against the property of the second respondent in E.P.No.39 of 2004. The Executing Court ought to have seen that the decree-holder requires execution against the properties of both the respondents to satisfy a portion of the decree amount.

17. As stated supra, the Executing Court dismissed the Execution Petition as against the second respondent on a vague ground and thus, the order of the Executing Court in dismissing the Execution Petition as against the second respondent is liable to be set aside.

18. In the result:

- (i) The Civil Revision Petition is allowed, thereby the order dated 29.04.2005 passed in E.P.No.39 of 2004 in C.S.No.766 of 1999 on the file of the learned Sub-Court, Kancheepuram dismissing the Execution Petition as against the second respondent is set aside.
- (ii) E.P.No.39 of 2004 in C.S.No.766 of 1999 on the file of the learned Sub-Court, Kancheepuram is ordered to be restored in respect of the second respondent.
- (iii) E.P.No.39 of 2004 in C.S.No.766 of 1999 on the file of the learned Sub-Court, Kancheepuram is remanded back to the Executing Court for fresh consideration.
- (iv) The learned Subordinate Judge, Kancheepuram is directed to proceed with the Execution Petition against both the respondents in accordance with law after affording sufficient opportunity.
- (v) No costs.

Sd/-
Deputy Registrar

//True copy//

Sub Assistant Registrar

vs

To

The Subordinate Judge, Kancheepuram.

+1cc to Mr.M.Balasubramanian, Advocate SR.No.88904

+1cc to Mr.S.Vasudevan, Advocate SR.No.88925

C.R.P. (NPD) No.414 of 2006

GMY (28/01/2019)