IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 06.06.2018

Judgment Pronounced on : 21.08.2018

CORAM: THE HONOURABLE Mr.JUSTICE N.SESHASAYEE

CMSA.No.11 of 2018
and CMP.No.9107 of 2018

A.John ... Appellant/Obstructer

Vs

1.Vasanthi
2.Vanitha
3.Karthikeyan
4.Kumar
5.Kanthi Mathi
6.Mehanathan ... Respondents/Decree Holders/ Judgment Debtors

Prayer :- Civil Miscellaneous Second Appeal filed under Order XLIII of CPC, against the judgment and decree dated 22.12.2017 passed in CMA.No.17 of 2017 on the file of V Additional Judge, City Civil Court, Chennai confirming the order in E.A.No.2047 of 2015 in E.P.No.1637 of 2014 in O.S.No.5677 of 2006 by the IX Assistant Judge, City Civil Court, Chennai dated 19/12/2016.

For Petitioner : Mr.T.Velumani

For Respondents : Mr.K.P.Gopalakrishnan

JUDGMENT

John obstructed delivery of possession of a certain property in execution of a decree passed in O.S.5677/2006, but was unsuccessful in defending a petition in E.A.No.2047/2015 in E.P.No.1637/2014, for removing the obstruction which the decree holder had filed for delivery of the property under Order 21 Rule 97 CPC. Aggrieved by the same, John has come before this Court.

2. A concise narration of preludial facts for a convenient appreciation of what are to follow next are stated now:

- In 1986, the Tamil Nadu Slum Clearance Board allotted the suit property to a certain Mani. In 1992, Mani was stated to have been murdered.

- Mani's widow was Vasanthi and they have two children. After Mani's demise, Vasanthi had first laid a suit in O.S.No.534 of 1996 on the file of XVI Assistant City Civil Court, Chennai, for a decree against the Slum Clearance Board and another Mathivadhanam, for a decree of prohibitory injunction, and on 16.04.2001 this suit was dismissed.

- Subsequently, Vasanthi and her children had laid a suit in O.S.No.5677 of 2006, (the decree passed in which has become the subject matter of intended delivery and the reactionary obstruction now under consideration). This suit was instituted against certain Kumar (first defendant), one Kanthimathi (second defendant), another Mehanathan (third defendant) besides, the Slum Clearance Board (4th defendant). Of them, Kumar is stated to be one of the sons of Mathivathanam referred to earlier. The suit is laid for declaration of plaintiffs' title and delivery of property.

- The quintessence of the plaint allegation was that the property in question was originally allotted to Mani, that Mani had died, wherein after the family had moved to live away from the suit property briefly and sensing an opportunity, the defendants fabricated some document, on the strength of which plaintiffs' title was challenged.

- In the suit, Kumar, Mehanathan and the Slum Clearance Board (fourth defendant) remained exparte. Second defendant, Kanthimathi alone appeared before the Court, but even she did not offer any contest. She, in effect had contended in her written statement that her husband Murugesan was appointed as a watchman by Mathivathanam and her heirs, and that she had no right in the suit property. As to be expected, the suit was decreed. In fitness of things, the litigation should have ended there. But, Kanthimathi, the non-contesting contestant in the suit, preferred A.S.No.150 of 2008 on the file of the VI Additional Judge, City Civil Court, and only to ensure that the appeal too was dismissed. Kanthimathi would not stop there. She preferred S.A.No.1485 of 2011 before this Court, where this Court in its judgment dated 12.3.2015, was constrained to describe Kanthimathi as an unscrupulous litigant. Holding that the plaintiffs (Vasanthi and her children) have not produced any evidence that the suit property had been transferred in their names, this Court modified the decree of the Courts below and refused to declare plaintiffs' title over to the suit property, but proceeded to grant a decree for delivery of the property.

3. It is this decree for delivery of the property sans any decree declaring plaintiffs' title was put to execution in E.P.No.1637 of 2014. When the Court bailiff went to the spot for effecting delivery, John obstructed. As referred to in the opening paragraph, the decree holder/plaintiffs filed E.A.No.2047 of 2015 for removing the obstruction. John resisted.

4. John's contentions in his counter are as follows :

- The property admeasuring 950 sq.ft. in Plot No.1, Door No.31, Anna Colony, Besant Nagar was allotted to Mani. Mani had passed away in 1992 and he had sold the property to Mathivathanam. Thereafter, Mathivathanam had applied to Tamil Nadu Slum Clearance Board for transfer of the allotment in her favour. On 21.03.1995, the allotment was indeed transferred by the Tamil Nadu Slum Clearance Board in favour of Mathivathanam. Vasanthi and her children moved the Slum Clearance Board, challenged the allotment to Mathivathanam, but she was unsuccessful.

- Thereafter, on 19.4.96 Mathivathanam and her children had executed two documents in his (John's) favour : (a) an unregistered sale deed and (b) a General Power of Attorney. Therefore, even from 1994, Vasanthi and her children were not in possession of suit property, and at any rate from 1996, John has been in possession. It is in these circumstances, Vasanthi had filed O.S.No.534 of 1996, inter alia against Mathivathanam, for permanent injunction. This suit later came to be dismissed.

- Subsequently, Vasanthi and her children laid O.S.5677 of 2006 against Kumar, Kanthimathi, Meganathan and the Slum Clearance Board for declaration of title and for recovery of the said property. It in essence was a collusive suit. Only Kanthimathi chose to defend, but she never offered a contest. The suit was allowed to be decreed, yet Kanthimathi kept filing first Appeal and then the Second Appeal only to concretize the decree passed by the trial Court. Plainly, it is a collusive suit instituted without impleading John, who in fitness of things, is the only person competent to oppose plaintiff's title.

5.1. The matter was enquired by the Execution Court, where both the decree holder and John produced documentary evidence in aid of this case. Importantly, the Slum Clearance Board, which chose to remain exparte in the suit, was required to produce necessary documents, and these were exhibited by the Execution Court in Exts.C1 to Ext.C6.

5.2 The question which the Execution Court has raised for it to answer was, if the obstructor John has an enforceable right or interest in the property. And, it proceeded to hold it in the negative. This was confirmed by the first Appellate Court in CMA.No.17 of 2017.

6.1 The learned counsel for the appellant argued that the Execution Court had the advantage of the evidence of C.W.1, the Estate Officer, Slum Clearance Board, and Ext.C1 proceedings dated 21.3.1995. It is under this proceeding, allotment of the suit property made to Mani was transferred to Mathivathanam. This is followed by Ext.C-2, letter dated 03.7.1995, whereunder Vasanthi required the Slum Clearance Board to cancel the allotment made to Mathivathanam. Ext.C-3 was the reply dated 02.2.1996, whereunder the Estate Officer, Slum Clearance Board informed Vasanthi that allotment made to Mani had been cancelled and allotment was made to Mathivathanam. Indeed, Mani himself had recommended the transfer of allotment under Ext.C-5 accompanying it with an unregistered sale deed that he had executed on 27.2.1990. The last two documents referred to are available on record as Exts.C-5 & C-6.

6.2. Continuing his argument, the learned counsel contended:

- While Mathivathanam came to be in possession of the suit property pursuant to an unregistered 'sale deed' executed by Mani, it was by virtue of G.O.Ms.804 (Housing and Urban Development Department) dated 23.9.1993, which permitted fresh allotment to the non-allottee- occupants of the property allotted by the Slum Clearance Board, fresh allotment of the property came to be made to Mathivathanam, and it was on the strength of the allotment, she came to be in possession of the said property.

- The combined effect of Exts.C1 to C6, taken alongside the testimony of C.W.1 would indicate that even during the lifetime of Mani, Mathivathanam had come to occupy the property, that transfer of allotment was made in favour of Mathivathanam, that a lease-cum-sale agreement too was made in favour of Mathivathanam, and that, Vasanthi has been informed about it even in 1996, even before the first suit in O.S.534 of 1996 that she had laid about these developments. Significantly, Vasanthi chose not to challenge the Slum Clearance Board's decision to allot the property in favour of Mathivathanam at any time.

- Secondly, John has produced not only an unregistered 'sale deed' dated 19.4.1996 but also a General Power of Attorney in Ext.R-5 bearing the same date, both executed by Mathivathanam and her four children, and they would indicate that John had come into possession of the property in question. Ext.R-6, though is an unregistered document, yet it can be used for collateral purposes. Reliance was placed on the judgment in Bondar Singh and Others Vs. Nihal Singh and Others [2003 (2) CTC 635]

- Thirdly, even if Ext.R-6 is discarded, yet under Ext.R-5 Power of Attorney, John can justify his possession. Are not these materials adequate to resist a delivery of property in execution of a collusive decree?

- Fourthly, under Section 29 of the Tamil Nadu Slum Areas (Improvement and Clearance) Act 1971 (T.N.Act 11 of 1971), no suit shall lie for evicting an occupant without the permission of the prescribed authority. But no permission is seen to have been obtained before laying O.S.No.5677 of 2006. Any suit laid without the sanction/permission of the authority is not maintainable. Reliance was placed on the judgment in Ambika & Others Vs. M.Shamshad and Another [2015 (4) CTC 159].

7. In response, the counsel for the respondents would argue that:

- It is not given to John to contend that he ought to have been impleaded. Admittedly, John claims title only under an unregistered document and Mathivathanam's interest, if any, had been represented by the first defendant, but he chose to remain exparte. The Slum Clearance Board, which is made a party also chose not to produce any of the documents in its possession, but it is precisely on these documents John now lay emphasis to establish a foundation for his case, but these documents should not be entertained.

- In a proceeding to remove obstruction in delivering a property pursuant to a decree of a Court, the point that an obstructor was entitled to raise is a superior title independent of the title of the decree holder, and not traceable to one from the defendant in the suit. Here, the plaintiff has obtained a decree inter alia against a legal representative of Mathivathanam, that John claims right of possession under Mathivathanam, which cannot be said to be independent neither of the defendant, nor of the decree holder. Therefore, the Court below cannot be faulted.

- Thirdly, the argument founded on Sec. 29 of the Tamil Nadu Slum Areas (Improvement and Clearance) Act, 1971, is raised only for the first time in the Second Appeal and the same is impermissible.

8. This Court frames the substantial questions of law :

- Whether the decree passed in O.S.5677 of 2006 is bad for instituting it without the sanction of the authority concerned in terms of Sec.26 Tamil Nadu Slum Areas (Improvement and Clearance) Act, 1971?

- Are the facts preponderatingly probabilize an inference that the decree in O.S.5677 of 2006 is capable of being executed?

- Whether the appellant has the locus standi to resist delivery of the property in execution of the decree passed in O.S.5677 of 2006?

9. The counsel for the respondent herein (Vasanthi, the decree holder) made a valid point: That an obstructor can legitimately obstruct delivery of a property in execution of a decree, only when he has a superior title to the same property in himself. Jurisprudentially, the supremacy of one's title also includes ones right to defend possession against the whole world but except against the true owner. It may be deduced from this proposition, that a decree holder facing resistance to the delivery of property can be defeated if the obstructor can demonstrate that there exists a title holder who possessed better title than the decree holder, even if he himself might be a trespasser of the property. And this can be defended by a decree holder only if he can establish that such of those, in who the obstructor claims that a title superior to the title of the decree holder is vested, are bound by the decree put in execution.

10. Reflecting this proposition on the case at hand, on the issue of locus standi, John can resist delivery of possession, (a) if he can establish, it was Mathivathanam, or her heirs, as the case may be, who have a title better than the title of Vasanthi and her children, and that he, even if he were a trespasser, has a right to defend possession against the whole world except Mathivathanam or her heirs. Therefore, Ext.R-5 even if is unregistered, still clothe John with a right to resist delivery, more so when he is also the Power of Attorney of Mathivathanam and her children.

11.1 John's attempt to discharge his burden was chiefly aided by Exts.C-1 to C-5, and the testimony of the Estate Officer, Slum Clearance Board, who was examined as C.W.1. They demonstrate that the process of transfer of allotment of the suit property from Mani (Vasanthi's husband) to Mathivathanam had commenced even during the lifetime of Mani, that it was so transferred by the statutory authority based on G.O.No.804 dated

23.09.1993, and that a lease cum sale agreement was entered into between Mathivathanam and the Slum Clearance Board. And, under Ext.C-3, dated 02-02-1996 Vasanthi had been informed about the transfer of allotment to Mathivathanam by the Slum Clearance Board. And this was in response to Vasanthi's correspondence dated Ext.C-2, dated 03-07-1995 in which she had taken objection to transfer of allottment to Mathivathanam. And, she chose not to challenge the transfer of allotment made to Mathivathanam.

11.2 There therefore, are two aspects that flow from here: One, Vasanthi did neither have title to the property nor any right to occupy it on the day when she filed the suit in O.S.No.5677 of 2006. Second, Vide Ext.C-3, Vasanthi did know that she had neither when she instituted the suit. But this suit did witness Vasanthi stepping into the legal system for remedy with the innocence of a child but with the strategy of the over-ambitious. She preferred concealment to truth when she suppressed her knowledge about the official transfer of allotment of the property to Mathivathanam in her plaint.

11.3 Does it not, this conduct of Vasanthi in suppressing a critical fact, then amount to a fraud on Court? In S.J.S. Business Enterprises Pvt. Ltd., Vs State of Bihar [(2004)7 SCC 166] and Anarunima Baruah Vs Union of India [(2007)6 SCC 120], the Hon'ble Supreme Court has held that it is not every omission to state a fact in the pleading which would be fatalistic, but only those facts affecting the merits of the case would be considered thus. The criterion for deciding whether such suppression of a fact constitutes a fraud on Court lies in the impact a suppression or an omission to state a fact makes on the cause of action for the suit, and the extent of disadvantage it imposes on the other party, or even a third party to the litigation.

11.4 Given the facts on hand (all of which are proven and indisputable) could Vasanthi have been able to conceive a cause of action for her suit for declaration of title as heirs of Mani, if she had disclosed the transfer of allotment to Mathivathanam? Imponderable that she could have, but she did file a suit for declaration of title. It was only the second defendant, Kanthimathi, a defendant with no interest in the property, and the one who had disclosed it even in her written statement, had provided an opportunity to this Court in S.A.No.1485 of 2011 (a conduct that baffles the right-thinking) to probe into the title-angle of Vasanthi's case, and prompted this Court to refuse declaring title in Vasanthi's favour.

12. Therefore, Vasanthi starts with a disadvantage, as she claims delivery of property without a title, and if Ext.R-6

Power of Attorney is kept aside, even John claims right to be in possession without title. Who, therefore, has a better right to be in possession? Here John claims his right of possession under Mathivathanam, in who right to be in possession as an allottee of the Slum Clearance Board exists under Ext.C-1.

13. The factor that however tilts the equation against Vasanthi, is her conscious effort to conceal what this Court holds as a material fact about transfer of alltoment of the property to Mathivathanam in her plaint for creating a fake cause for an adventurous action. It was her conscious strategy as Ext.C-3 proves that she knew this fact even in 1996, a decade before she laid the suit. Even the cross examination of CW1 by Vasanthi yields nothing in her favour.

14. Nothing shakes the conscience of the Court than the conduct of a litigant rooted in fraud and deception. Nothing drains the strength of the legal system more than the recognition that fraud seeks. Fraud and fairness can never co-exist, but the heartbeat of judicial process is fariness. In Shrisht Dhawan Vs. Shaw Bros. [1992(1) SCC 534(at 553)] it has been held as under:

> " 20. Fraud and collusion vitiate even the most solemn proceedings in any civilised system of jurisprudence. It is a concept descriptive of human conduct."

In Indian Bank Vs Satyam Fibres (India) Pvt. Ltd., [(1996) 5 SCC 550], the Hon'ble Supreme Court has held :

> " 20. ....
> This plea could not have been legally ignored by the Commission which needs to be reminded that the authorities, be they constitutional, statutory or administrative, (and particularly those who have to decide a lis) possess the power to recall their judgments or orders if they are obtained by fraud as fraud and justice never dwell together (Fraus et jus nunquam cohabitant). It has been repeatedly said that fraud and deceit defend or excuse no man (Fraus et dolus nemini patrocinari debent).
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> 21. In Smith Vs. East Elloe Rural Distt. Council, the House of Lords held that the effect of fraud would normally be to vitiate any act or order. In another case, Lazarus Estates Ltd. V. Beasley (QB at p.712), Denning,L.J. said :
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> " No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything."

22. The judiciary in India also possesses inherent power, specially under Section 151 CPC, to recall its judgment or order if it is obtained by fraud on court. In the case of fraud on a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud. Inherent powers are powers which are resident in all courts, especially of superior jurisdiction. These powers spring not from legislation but from the nature and the constitution of the tribunals or courts themselves so as to enable them to maintain their dignity, secure obedience to its process and rules, protect its officers from indignity and wrong and to punish unseemly behaviour. This power is necessary for the orderly administration of the court's business.

23. Since fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practised upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order."

In S.P.Chengalvaraya Naidu (Dead) by Lrs. Vs. Jagannath (Dead) by Lrs and Others [(1994) 1 SCC 1], it is relevant to extract as below:

" 5. .... The principle of "finality of litigation" cannot be pressed to the extent of such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants. The courts of law are meant for imparting justice between the parties. One who comes to the court, must come with clean hands. We are constrained to say that more often than not, process of the court is being abused. Property-grabbers, tax-evaders, bank-loan-dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal-gains indefinitely. We have no hesitation to say that a person, who's case is based on falsehood, has no right to approach the court. He can be summarily thrown out at any stage of the litigation.

6. ...... Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court."

See also : Venture Global Engineering LLC Vs. Tech Mahindra Limited and Another [(2018) 1 SCC 656], Meghmala and Others Vs. G.Narasimha Reddy and Others [(2010) 8 SCC 383], Manjini Vs. Rajakumari [1997-3-L.W.554], Krishnan Vs. Valliammal [(2001) 1 MLJ 363], The Oriental Insurance Co. Ltd., Coimbatore Vs. R.Mani and another [1999-2-L.W.248] and Renuka Devi Vs. D.Manohara [1998-1-L.W.355].

15.1 Vasanthi's strategy in seeking delivery of the property is flawed to the last syllable as she abused the judicial process in obtaining a decree by playing fraud on the Court. In Managing Trustee Rep By the Board of Trustees Nagore Dargah V. Haja Noordeen Sahib & Others [2018-3 LW 296], penning the judgment for the Division Bench of this Court, I have had an occasion to observe: "Are Courts Casinos...?" This question spontaneously arises yet again: Are Courts Casinos for a party to gamble on the legal process? Isn't fairness a non-negotiable virtue that a litigant shall exhibit till the decree is executed? And, if the Court discovers a fraud on its process from proven facts and still blindfolds itself, does it not then breach the trust that the public invests in the institution of Courts? For the Courts to ignore a fraud on its own process is a betrayal of public faith in its efficacy, and hence it merits a response with the least tolerance.

15.2 In this case, Vasanthi had gambled harder, only to find in the end that the decree she had obtained failing disgracefully on grounds of fraud on Court. This Court holds that the decree passed in O.S.No.5677 of 2006 is void and unenforcible. Vasanthi's litigious journey necessarily should stand terminated here.

16. Where the decree itself stands vitiated, this Court considers it profitless to embark on an enquiry if it binds Kumar, one of the sons of Mathivathanam, and hence John, who claims under Mathivathanam and her children. However, for completeness, it may be stated that Ext.R-5 and R-6 show that Mathivathanam had three sons and one daughter. Her sons are Sivakumar, Nithyakumar, Rajkumar. First, a suit for declaration of title and recovery of an immovable property without all those in who the title to the property vests, is bad in law, since the fraction of right of those who are not so arrayed go undefended. This apart, who among the three 'Kumars' had Vasanthi arrayed as a first defendant in the suit? And, if John's right to be in possession is traceable to the other three children of Mathivathanam too, how the decree can be made binding on them and John? Plainly, Vasanthi had got all her calculations wrong.

17. De hors the finding of this Court on the quality of the decree now sought to be executed, the said decree also must have to be declared void on the ground that Vasanthi had not obtained requisite sanction/permission under Sec.29 Tamil Nadu Slum Areas (Improvement and Clearance) Act, 1971, for instituting the suit. This is a point on law, and hence contrary to the contention of the respondent's counsel that it cannot be raised for the first time at the second appellate stage, it can be raised at any stage of the proceedings. Sec.29 of the reads:

> 29. Proceedings for eviction of [occupants] not to be taken without permission of the Prescribed Authority :
> (1) Notwithstanding anything contained in any other law for the being in force, no person shall except with the previous permission in writing of Prescribed Authority :
>
> (a) institute, after the commencement of this Act any suit or proceedings for obtaining any decree or order for the eviction [an occupant] from any building or land in such area; or
>
> (b) where any decree or order is obtained in any suit or proceeding instituted before such commencement for the eviction of [an occupant] from any building or land in such area, execute such decree or order.
>
> (2) ....
>
> (3) ....

In Bondar Singh and others Vs. Nihal Singh, this Court has held that any suit filed in violation of Sec.29 of the Act is bad in law, and this surely weighs against Vasanthi. This Court is in agreement with the ratio of that case. Necessarily, the decree that Vasanthi obtained is bad in law and consequently, she derives no right under it.

18. Before parting with this appeal, this Court intends to record that, if there is one party who ought to take the responsibility for the present state of affairs, a messier one in that, then it should go entirely to the Slum Clearance Board, the fourth defendant in the suit. No matter what the case was, it owed a duty to inform the Court about all the material facts affecting the merit of the suit which are in its possession. However, for some strange and inexplicable reasons (which, on most occasions are obvious and audible to the conscience), the statutory authority chose to remain silent (as it does not even seen to have engaged a counsel before the trial court) when it was under a duty to speak. Silence is not a

virtue when there is a duty to speak. Had the Slum Clearance Board disclosed the facts in its possession before the trial court, (which it was caused to do in this proceeding) it is least likely that the suit might have travelled beyond the first appellate stage. What a waste of judicial time! It is a shame that it has happened. In the ultimate analysis, this failure of a statutory functionary, funded by public finance for its sustenance, might well go unaccounted in our administrative system. Let it not be forgotten, which this court states with a degree of emphasis, that irresponsibilities such as these contribute to the entry-point congestion to the Courts. But is there anyone worrying about it?

19.In the result, the appeal is allowed and the judgment and decree dated 22.12.2017 passed in CMA.No.17 of 2017 against E.A.No.2037 of 2015 in E.P.No.1637 of 2017 in O.S. No.5677 of 2006 on the file of the V Additional Judge, City Civil Court, Chennai is set aside. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

ds
To:

1.The V Additional Judge
City Civil Court
Chennai.

2.The Section Officer
VR Section
High Court, Madras.

3.The IX Assistant Judge,
City Civil Court, Chennai.

+2cc to Mr.K.P.Gopalakrishnan, Advocate Sr.57351

CMSA.No.11 of 2018

gj[co]
srg 5/10/2018