

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.11.2018

CORAM

THE HONOURABLE MR. JUSTICE M.S. RAMESH

C.R.P.(NPD) Nos.4715 & 4716 of 2015

and

M.P.No.1 of 2015 &

C.M.P.Nos.11751 & 11752 of 2017

Tmt.R.Mahalakshmi ...Petitioner in both C.R.Ps

Vs.

Jugaraj Hiraji Jain ...Respondent in both C.R.Ps

COMMON PRAYER: Civil Revision Petitions filed under Section 115 of the Civil Procedure Code, 1908, praying to set aside the Fair and Executable Order passed in E.P.No.506 of 2014 in R.C.O.P.No.508 of 2010 and E.A.No.99 of 2015 in E.P.No.506 of 2014 in R.C.O.P.No.508 of 2010 dated 30.09.2015 on the file of the XIV Small Causes, Chennai.

For Petitioner
in both C.R.Ps

: Mr.V.Vijay Shankar

COMMON ORDER

Heard Mr.V.Vijay Shankar, learned counsel for the petitioner. Though the respondent's name has been printed in the cause list pursuant to the substituted service effected on him, none appeared on his behalf.

2. The orders under challenge are allowing the application filed under Section 47 of CPC by the respondent herein before the trial Court. The respondent had taken a plea that the decretal order passed in R.C.O.P.No.508 of 2010 seeking delivery of possession of 3/4th undivided share is not an executable decree and one co-owner cannot initiate eviction proceedings for her 3/4th undivided share against another co-owner/respondent herein. The trial Court by relying upon the judgment of the Hon'ble Apex Court reported in **1998 9 SCC 683 (Abdul Alim Vs. Sheikh Jamal Uddin Ansari and others)** and by observing that since only symbolic possession was delivered to the landlord and the actual of physical possession was not delivered held that the decree is not executable and on that ground had allowed the respondent's application under Section 47 of CPC.

3. The learned counsel for the petitioner drew the attention of this Court to the various facts leading to the title over the suit demised premises. He would submit that the petitioner herein had become the owner of the 3/4th undivided share of the demised premises through final decree proceedings dated 23.08.2007 and the matter has reached finality. In view of the same, she had filed Execution Proceedings in E.P.No.943 of

possession of the 3/4th of the undivided share was ordered in favour of the petitioner herein in accordance with the provisions of Order 21 Rule 96 of the CPC. When the petitioner herein, in her capacity as a landlord filed R.C.O.P.No.508 of 2010, the same came to be allowed directly, and an eviction order came to be passed insofar as it relates to 3/4th undivided share, which is the demised premises. As against the same, the appeal before the Rent Controller/Appellate Court as well as the Civil Revision Petition before this Court came to be dismissed on 03.09.2014 and 23.02.2015 respectively.

4. It is the contention of the learned counsel that the entire eviction proceedings, till this Court, had reached finality and the petitioner had also had the benefit of final decree for partition of 3/4th share. The learned counsel also drew the attention of this Court to the findings of the Execution Court .

5. The learned counsel further submitted that the provisions of Order 21 Rule 96 CPC empowers symbolic possession and as such the Executing Court was not justified in observing that actual and physical possession was not handed over to the petitioner and therefore ought not to have allowed the application.

6. I have given my careful consideration to the submissions made by the learned counsel for the petitioner.

7. I find some force in the submissions made by Mr.V.Vijay Shankar, learned counsel for the petitioner. When possession has been handed over, pursuant to the order of this Court under Order 21 Rule 96 of CPC, the same would tantamount to actual possession being handed over and as such, there was no justification on the part of the trial Court in having observed that in the absence of physical possession being handed over, the decree itself would become inexecutable. As such, the objection raised by the respondent herein cannot be sustained. In the support of his submission, the learned counsel for the petitioner relied upon the judgment of the Hon'ble Division Bench of this Court reported in **AIR 1954 MADRAS 760 (Pethaperumal Ambalam Vs. Chidambaram Chettiar, minor through property guardian. P.E.Eapen)**. The Division Bench had an occasion to deal with the status of the property and the scope of Order 21 Rule 96 of the CPC wherein symbolic possession of the property had been made. While holding that symbolic possession made under Order 21 Rule 96 of CPC would tantamount to actual physical possession being handed over, the Division Bench had held as follows:

difference in legal effect if possession is taken through Court. The Code contemplates no notice to the judgment-debtor at that stage or any objection being raised by him to the delivery of possession under Rule 95 or Rule 96, and as the full title to the property has passed from the judgment-debtor to the auction purchaser, he has no interest in the property to protect. This furnishes the point of distinction between the case dealt with in - 'AIR 1936 Mad 205 (A)'. Vide at p.214, where emphasis is laid on the continuance of the title in the property in the judgment-debtor. It therefore follows that there is here no question of the proceedings under Order 21, Rule 95 or 96 being rendered "void" at this stage by the death of the judgment-debtor without the legal representatives being impleaded.

11. Mr. Viraraghavan had to admit that if in the present case delivery was effected under Order 21, Rule 95 and 'Khas' possession had been obtained by the plaintiff, his suit could not be resisted by the appellant. Does it make any difference that the delivery is effected under Order 21 Rule 96. In our opinion it does not. The characterisation of possession taken under Order 21 Rule 96, as "paper possession" is hardly justified

and runs counter to the principle on which the provision is based. Symbolic possession obtained under Order 21, Rule 96 is quite a different thing from paper possession, which might correctly describe only the possession obtained by a party who being entitled to actual possession, the judgment-debtor himself being in possession, obtains delivery of possession on paper without actual possession; or those cases where without complying with the requisites of the statute a false return is made as if they were complied with. Possession obtained by proclamation and affixture under Order 21, Rule 96 is equivalent to real possession in those cases where the Code expressly or impliedly provides that it shall have that effect. On the finding of the power appellate Court that the statutory requisites under Order 21, Rule 96 have been followed the possession obtained by the plaintiff's predecessor in title was real and was not invalidated by the non-impleading of the legal representatives of Alagu."

8. The above observation is self explanatory. The very scope of the Order 21 Rule 96 CPC is to the effect that where the property sold is in the occupation of the tenant and when the auction purchaser seeks for delivery

<http://www.judis.nic.in> of such property, the possession is delivered to the said purchaser in the

mode mentioned therein. While clarifying the scope of Order 21 Rule 96 CPC, the Hon'ble Division Bench, in the aforesaid decision, had observed that symbolic possession under Order 21 Rule 96 CPC would amount to actual physical possession being handed over. With this legal preposition in mind, we shall now look into observation of the trial Court while allowing the respondent's application filed under Section 47 of CPC.

9. According to the Execution Court, during the course of the final decree proceedings, symbolic possession was delivered to the petitioner herein and by stating that since no actual or physical possession has been delivered in respect of demised premises, it had come to the conclusion that the decree was not executable. Such an observation may not be correct, in view of my observations and in the light of the decision of the Hon'ble Division Bench of this Court referred above. Hence, if the trial Court was not correct in stating that symbolic possession would disentitle the decree holder from taking delivery of the demised premises, then the very basis on which the respondent herein had filed the application under Section 47 CPC would become baseless.

10. It is further seen that the Execution Court had relied upon two judgments reported in *AIR 1991 Orissa 36 (Smt. Radhi Dei and others Vs.*

11. Here again, I am of the view that the proposition laid down in the above two judgments have not been properly appreciated. Insofar as the judgment reported in *AIR 1991 Orissa 36 (referred to supra)* is concerned, it had been held that the Court could refuse to execute the decree, if the decree under execution was a nullity on the date it was passed and has also been rendered inexecutable on account of the subsequent order passed by the authority accepting the claim of the judgment-debtors to remain in possession of the land. Those facts are not in line with the facts of the present case.

12. It cannot be said that the decree obtained by the petitioner herein is a nullity or the petitioner has lost the right to execute the decree on account of a subsequent change in law or some subsequent development in the present case. As such, the proposition laid down in the judgment, cited supra, has not been properly appreciated by the Execution Court.

13. The judgment of the Hon'ble Apex Court reported in *1998 9 SCC 683 (referred to supra)* arises from set of facts where the demised premises therein was not a partitioned one, whereas, in the instant case, the petitioner has based her entire claim on the basis of the partition

arrived at through final decree proceedings. This aspect has not been

properly appreciated by the Execution Court and therefore reliance on the same may not be proper.

14. In the light of the observations made above, I am of the view that the trial Court has not properly appreciated the legal propositions and the scope of order 21 Rule 96 CPC and therefore, the present Revision could be deemed to be illegal.

15. At this juncture, the learned counsel for the petitioner brought to the notice of this Court about an affidavit filed before this Court in a suit in C.S.632 of 2015 between the same parties wherein the respondent herein had stated that he had already sold his 1/4th undivided share to one S.Suthantharaseelan through a registered sale deed No.1308 of 2011. By drawing attention to the sale deed, the learned counsel remarks on the conduct of the respondent herein. It is seen that the suit was decreed on 27.12.2004 whereby the respondent herein was allotted 1/4th share. Subsequently on 23.08.2007 final decree also came to be passed. There was a factual admission in the affidavit filed in C.S.No.632 of 2015 that the respondent, knowingly, sold 1/4th share in the year 2007. R.C.O.P. 508 of 2012 was then allowed on 16.02.2012. Surprisingly, the respondent herein had chosen to file an appeal against the order when he had sold his 1/4th share. He had also handed over possession of his 1/4th share to purchaser

namely S.Suthantharaseelan. Yet he had been continuing the appeal proceedings in R.C.A.No.168 of 2012. After the dismissal of the R.C.A, he had once again chosen to file a revision in C.R.P.No.5004 of 2014. During the filing of the R.C.A and C.R.P, he was neither the owner of the 1/4th divided share nor was in possession of the same. I am unable to understand the conduct of the respondent herein as to under what legal capacity he had chosen to continue the appeal and revision, even after the eviction order was passed in the R.C.O.P.. In view of his conduct in selling the property through a registered sale deed in the year 2007 and further proceedings initiated would reveal the malafide intention on his part, which could be termed as an ulterior motive, I am of the view that the respondent does not deserve to have the benefit of the order passed under Section 47 of CPC by the Execution Court.

16. For the foregoing reasons, this Court holds that the orders dated 30.09.2015 made in E.P.No.506 of 2014 in R.C.O.P.No.508 of 2010 and E.A.No.99 of 2015 in E.P.No.506 of 2014 in R.C.O.P.No.508 of 2010 are liable to be set aside. Consequently in view of the petitioner had an objection in R.C.O.P in the year 2012 which has been confirmed in the year 2014, the Execution Court shall endeavour to complete the execution proceedings in E.P.No.506 of 2014 in R.C.O.P.No.508 of 2010 and E.A.No.99 of 2015 in E.P.No.506 of 2014 in R.C.O.P.No.508 of 2010 within a period of thirty days

from the date of receipt of a copy of this order.

17. With the above observations, the Civil Revision Petitions stand allowed. Consequently, connected Miscellaneous Petitions are closed. No costs.

19.11.2018

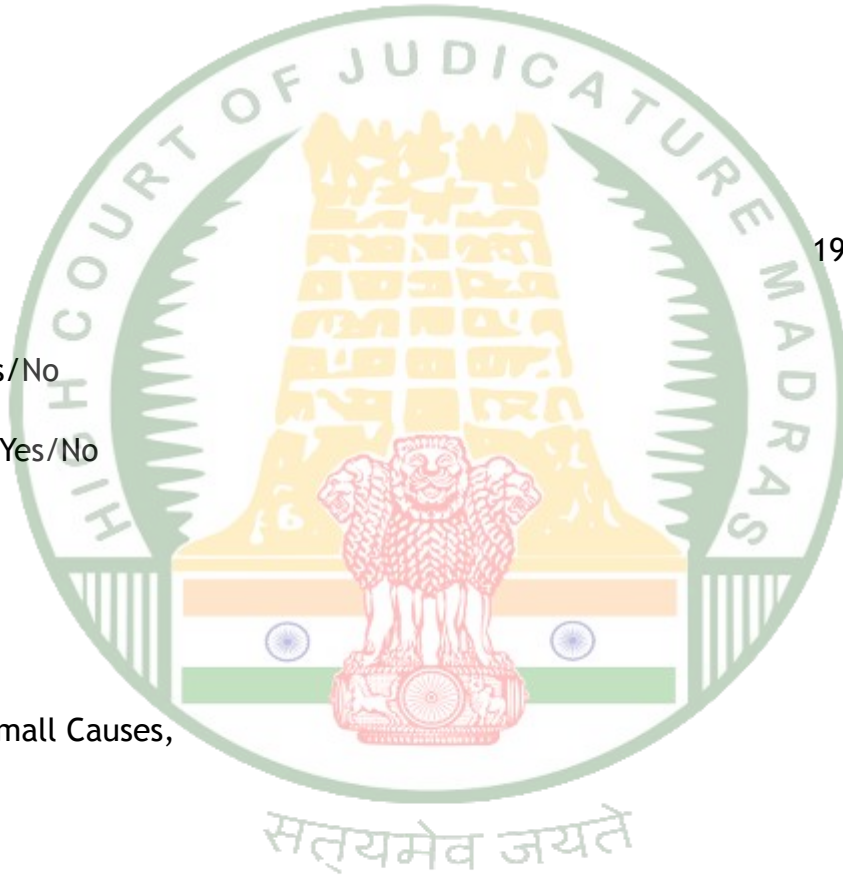
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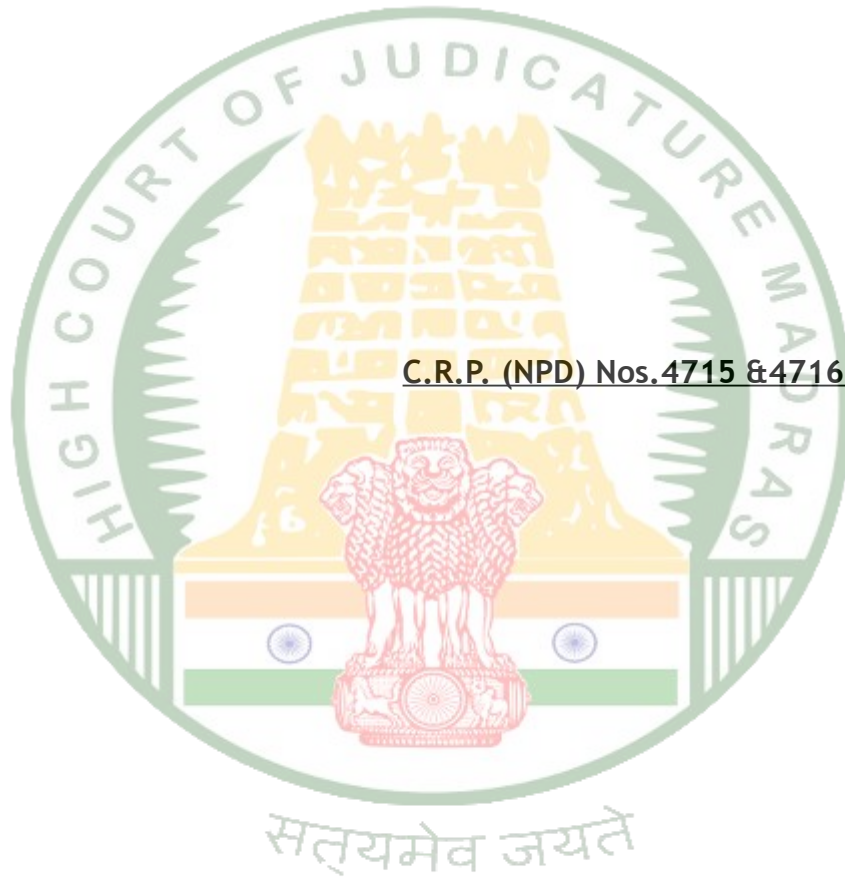
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M.S.RAMESH. J.,

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