

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.04.2018

CORAM :

THE HONOURABLE MS. JUSTICE V.M.VELUMANI

C.M.A.No.624 of 2018
and C.M.P.No.5617 of 2018

R.Rajendran

... Appellant

Vs.

S.Vijaya Babu

... Respondent

PRAYER:- Appeal has been filed under Order 43 Rule 1(U) of C.P.C against the judgment and decree dated 19.07.2017 made in A.S.No.8 of 2017 on the file of the Additional Subordinate Court, Chengalpattu, reversing the order and decree in E.A.No.129 of 2016 in E.P.No.11 of 2015 in O.S.No.239 of 2012 dated 03.01.2017 on the file of the District Munsif Court, Chengalpattu.

For Appellant : Mr.N.Sathyamoorthi

O R D E R

This Appeal is filed against the judgment and decree dated 19.07.2017 made in A.S.No.8 of 2017 on the file of the Additional Subordinate Court, Chengalpattu, reversing the order and decree dated 03.01.2017 made in E.A.No.129 of 2016 in E.P.No.11 of 2015 in O.S.No.239 of 2012 on the file of the District Munsif Court, Chengalpattu.

2.The appellant and respondent are the decree holder and judgment debtor respectively in O.S.No.239 of 2012 on the file of the District Munsif Court, Chengalpattu and petitioner and respondent respectively in E.P.No.11 of 2015 on the file of the District Munsif Court, Chengalpattu. The appellant filed the said E.P for executing the decree obtained by him to eject one A.Kumar, the defendant in the said suit. The respondent herein filed E.A.No.129 of 2016 in E.P.No.11 of 2015 under Order XXI Rule 97 (2) read with Section 151 of C.P.C.

3.According to the respondent, he is in occupation of the suit property as a tenant and the said A.Kumar, the defendant in the O.S.No.239 of 2012 is not in occupation of the suit property. The Court Amin also made an endorsement to that effect

in the E.P proceedings. The appellant is intending to sell the suit property to the third party and he is trying to evict the respondent by illegal means. Therefore, the respondent filed O.S.No.161 of 2016 for permanent injunction, not to evict the respondent, except by due process of law. The said suit is pending. The appellant is guilty of suppression of fact and the respondent prayed as follows in the said E.A:

"12.Hence it is just and necessary that this Hon'ble Court may be pleased to:

- a. Admit the accompanying Petition urgently,
- b. Adjudicate the Obstrucuter's petition filed herewith at the first instance before passing any orders in the present Execution Petition,
- c. Stay all further proceedings in the present E.P until deciding the present Objector's Petition and to
- d. Pass such other suitable order or orders."

4.The appellant filed counter and denied all the allegations made by the respondent and contended that the application filed by the respondent under Order XXI Rule 97 of C.P.C is not maintainable. A third party has no right to file an application under Order XXI Rule 97 of C.P.C. Only the decree holder/auction purchaser can file an application under the said provision and prayed for dismissal of the said application.

5.The learned Judge of Executing Court considered all the averments in the affidavit, counter affidavit, materials available on record and the judgments relied on by the counsel for the parties, dismissed E.A.No.129 of 2016 filed by the respondent, holding that the application filed by the respondent is not maintainable.

6.Against the said order dated 03.01.2017 made in E.A.No.129 of 2016, the respondent herein filed Appeal suit A.S.No.8 of 2017 on the file of the Additional Subordinate Court, Chengalpattu. The learned First Appellate Judge considering all the materials on record, order of the learned Judge and judgments relied on by the counsel for the parties, allowed the appeal, A.S.No.8 of 2017 and remanded the same to the Executing Court for fresh disposal according to law, giving liberty to both the parties to let in oral and documentary evidence.

7.Against the said judgment and decree dated 19.07.2017 made in A.S.No.8 of 2017 on the file of the Additional Subordinate Court, Chengalpattu, the appellant has come out with the present Civil Miscellaneous Appeal.

8.The contention of the learned counsel for the appellant is that E.A.No.129 of 2016 filed by the respondent under Order XXI Rule 97 is not maintainable and the learned First Appellate Judge ought to have dismissed the said application. The learned First Appellate Judge ought to have held that only remedy available to the respondent is to move the application under Order XXI Rule 99 of C.P.C. The learned First Appellate Judge failed to take note of the fact that when there is an obstruction in execution, only the decree holder can file an application under Order XXI Rule 97 of C.P.C and prayed for speedy disposal of E.A.No.129 of 2016.

9.Heard the learned counsel for the appellant and perused the materials available on record.

10.The contention of the learned counsel for the Appellant that respondent has no locus standi to file an application under Order XXI Rule 97 of C.P.C is without merits. The issue whether a third party to the decree as well as in E.P can move an application under Order XXI Rule 97 or Rule 99 of C.P.C is no longer res integra. This issue has been considered by the Hon'ble Apex Court in the judgments reported in:

(i) (1998) 4 SCC 543 (Shreenath and another Vs. Rajesh and others):

"10.Under Sub-clause (1) Order 21 Rule 35, the Executing Court delivers actual physical possession of the disputed property to the decree-holder and if necessary, by removing any person bound by the decree who refuses to vacate the said property. The significant words are by removing any person bound by the decree. Order 21 Rule 36 conceives of immovable property when in occupancy of a tenant or other person not bound by the decree, the court delivers possession by fixing a copy of the warrant in some conspicuous place of the said property and proclaiming to the occupant by beat of drum or other customary mode at some convenient place, the substance of the decree in regard to the property. In other words, the decree holder gets the symbolic possession. Order 21 Rule 97 conceives of resistance or obstruction to the possession of immovable property when made in execution of a decree by "any person". This may be either by the person bound by the decree, claiming title through the judgment debtor or claiming independent right of his own including a tenant not party to the suit or even a stranger. A decree holder, in such a case, may make an application to the executing Court complaining such resistance for delivery of possession of the property. Sub-clause (2) after 1976 substitution empowers the executing courts when such claim is made to proceed to adjudicate upon

the applicant's claim in accordance with the provisions contained hereinafter. This refers to Order 21 Rule 97 or Rule 99 shall be determined by the court and not by a separate suit. By the amendment, one has not to go for a fresh suit but all matter pertaining to that property even if obstruction by a stranger is adjudicated and finally given even in the executing proceedings. We find the expression "any person" under sub-clause (1) is used deliberately for widening the scope of power so that the executing court could adjudicate the claim made in any such application under Order 21 Rule 97. Thus by the use of the words "any person" it includes all persons resisting the delivery of possession, claiming right in the property, even those not bound by the decree, including tenants or other persons claiming right on their own, including a stranger.

11. So, under Order 21 Rule 101 all disputes between the decree holder and any such person is to be adjudicated by the executing Court. A party is not thrown out to relegate itself to the long drawn out arduous procedure of a fresh suit. This is to salvage the possible hardship both to the decree holder and the other person claiming title on their own right to get it adjudicated in the very execution proceedings. We find that Order 21 Rule 35 deals with cases of delivery of possession of an immovable property to the decree holder by delivery of actual physical possession and by removing any person in possession who is bound by a decree, while under Order 21 Rule 36 only symbolic possession is given where the tenant is in actual possession. Order 21 Rule 97, as aforesaid, conceives of cases where delivery of possession to the decree holder or purchaser is resisted by any person. "Any person", as aforesaid, is wide enough to include even a person not bound by a decree or claiming right in the property on his own including that of a tenant including a stranger."

(ii) AIR 1997 SC 856 (Brahdeo Chaudhary Vs. Rishikesh Prasad Jaiswal and another):

"5. In short the aforesaid statutory provisions of Order XXI lay down a complete code for resolving all disputes pertaining to execution of decree for possession obtained by a decree-holder and whose attempts at executing the said decree meet with rough weather. Once resistance is offered by a purported stranger to the decree and which comes to be noted by the Executing Court as well as by the decree-holder the remedy available to the decree-holder against such an obstructionist is only under Order XXI Rule 97 sub-rule (1) and he cannot bypass such obstruction and insist on

re-issuance of warrant for possession under Order XXI Rule 35 with the help of police force, as that course would amount to bypassing and circumventing the procedure laid down under Order XXI Rule 97 in connection with removal of obstruction of purported strangers to the decree. Once such an obstruction is on the record of the Executing Court it is difficult to appreciate how the Executing Court can tell such obstructionist that he must first lose possession and then only his remedy is to move an application under Order XXI Rule 99, CPC and pray for restoration of possession. The High Court by the impugned order and judgment has taken the view that the only remedy available to a stranger to the decree who claims any independent right, title or interest in the decretal property is to go by Order XXI Rule 99. This view of the High Court on the aforesaid statutory scheme is clearly unsustainable. It is easy to visualize that a stranger to the decree who claims an independent right, title and interest in the decretal property can offer his resistance before getting actually dispossessed. He can equally agitate his grievance and claim for adjudication of his independent right, title and interest in the decretal property even after losing possession as per Order XXI Rule. Order XXI Rule 97 deals with a stage which is prior to the actual execution of the decree for possession wherein the grievance of the obstructionist can be adjudicated upon before actual delivery of possession to the decree-holder. While Order XXI Rule 99 on the other hand deals with the subsequent stage in the execution proceedings where a stranger claiming any right, title and interest in the decretal property might have got actually dispossessed and claims restoration of possession on adjudication of his independent right, title and interest de hors the interest of the judgment-debtor. Both these types of enquiries in connection with the right, title and interest of a stranger to the decree are clearly contemplated by the aforesaid scheme of Order XXI and it is not as if that such a stranger to the decree can come in the picture only at the final stage after losing the possession and not before it if he is vigilant enough to raise his objection and obstruction before the warrant for possession gets actually executed against him. With respect the High Court has totally ignored the scheme of Order XXI Rule 97 in this connection by taking the view that only remedy of such stranger to the decree lies under Order XXI Rule 99 and he has no locus standi to get adjudication of his claim prior to the actual delivery of possession to the decree-holder in the execution

proceedings. The view taken by the High Court in this connection also results in patent breach of principles of natural justice as the obstructionist, who alleges to have any independent right, title and interest in the decretal property and who is admittedly not a party to the decree even though making a grievance right in time before the warrant for execution is actually executed, would be told off the gates and his grievance would not be considered or heard on merits and he would be thrown off lock, stock and barrel by use of police force by the decree-holder. That would obviously result in irreparable injury to such obstructionist whose grievance would go overboard without being considered on merits and such obstructionist would be condemned totally unheard. Such an order of the Executing Court, therefore, would fail also on the ground of non-compliance with basic principles of natural justice. On the contrary the statutory scheme envisaged by Order XXI Rule 97, CPC as discussed earlier clearly guards against such a pitfall and provides a statutory remedy both to the decree-holder as well as to the obstructionist to have their respective say in the matter and to get proper adjudication before the Executing Court and it is that adjudication which subject to the hierarchy of appeals would remain binding between the parties to such proceedings and separate suit would be barred with a view to seeing that multiplicity of proceedings and parallel proceedings are avoided and the gamut laid down by Order XXI Rules 97 and 103 would remain a complete code and the sole remedy for the concerned parties to have their grievances once and for all finally resolved in execution proceedings themselves.

11. In the above two judgments, the Hon'ble Apex Court held that when a third party is in possession of the property mentioned in E.P and claims independent right than the decree holder and respondent in E.P can maintain an application under Order XXI Rule 97 and 99 of C.P.C. The Hon'ble Apex Court has held that a party need not wait till he or she is dispossessed and then file an application for redelivery. In the present case, the learned First Appellate Judge has considered the above judgment and held that E.A.No.129 of 2016 filed by the respondent is maintainable. The learned First Appellate Judge allowed the application, remitting E.A.No.129 of 2016 to Executing Court for fresh disposal in accordance with law.

12. In view of the judgments of the Hon'ble Apex Court referred to above, the C.M.A is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed. The

learned Judge of Executing Court is directed to dispose of E.A.No.129 of 2016 as expeditiously as possible, in any event, not later than 31st July, 2018.

s/d-
Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

gsa

To

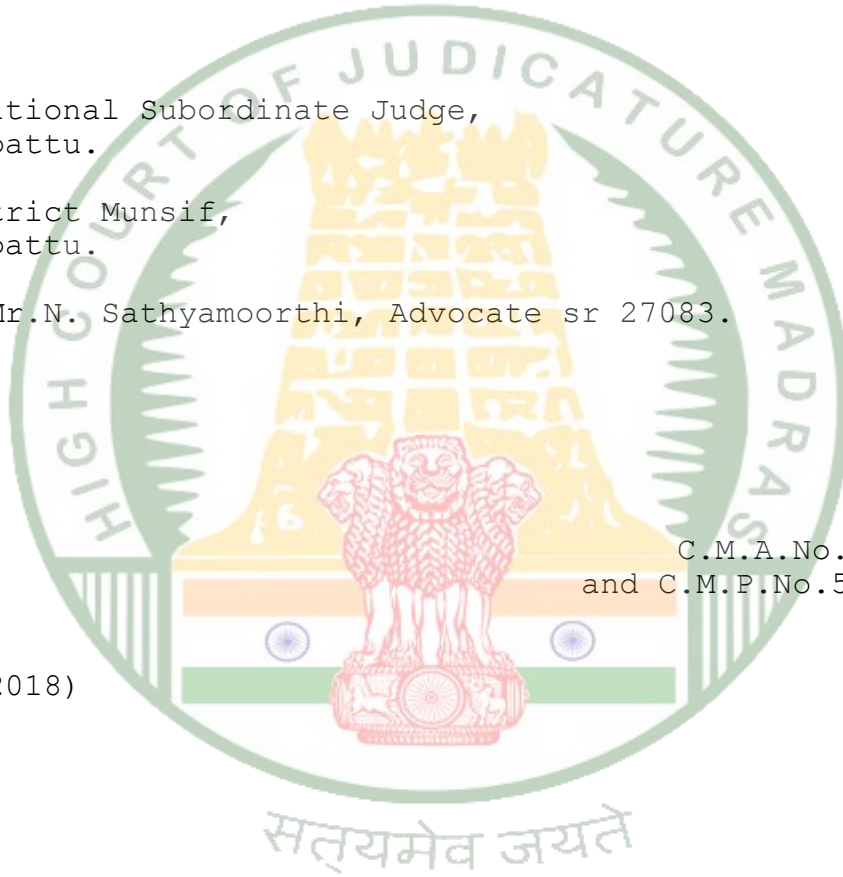
1.The Additional Subordinate Judge,
Chengalpattu.

2.The District Munsif,
Chengalpattu.

+1 CC to Mr.N. Sathyamoorthi, Advocate sr 27083.

RJI (CO)
SP(26/04/2018)

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