

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.02.2019

C O R A M

THE HONOURABLE MR.JUSTICE N. SATHISH KUMAR

CRP NPD No.1059 of 2009
and M.P.No.1 of 2009

1. Palani
2. Kalaiselvi ... Revision petitioners

Vs.

1. V.Nithiyanandam
2. Krishnaveni ... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 05.02.2009 passed by the XI Small Causes Court at Madras in M.P.No.115 of 2008 in M.P.No.376 of 2007 in E.P.No.321 of 1996 in R.O.C.No.1698 of 1990.

For Revision Petitioners : Mr.V.Lakshminarayanan

For Respondent No.1 : Mr.A.Thamizharasan

ORDER

Challenging the order of dismissal passed by the trial court in M.P.No.115 of 2008 in M.P.No.376 of 2007 in E.P.No.321 of 1996 in R.O.C.No.1698 of 1990, this revision petition has been filed.

2. The brief facts leading to file this revision petition is as follows. One Krishnaveni, the 2nd respondent herein had filed a petition in RCOP No.1698 of 1990 against one Palani, the first revision petitioner herein, who is the husband of the 2nd revision petitioner, to vacate the premises. The said RCOP No.1698 of 1990 was allowed on 31.03.1992. In execution of the above order, possession of the premises was taken by the said Krishnaveni. During the said proceedings, it appears that the Krishnaveni had entered into a sale transaction with one Kalaiselvi, the 2nd revision petitioner herein. Based on such transaction, the property itself was allotted to Kalaiselvi by the Slum Clearance Board. Thereafter, Krishnaveni has also challenged such transfer of property by filing a suit in O.S.No.10351 of 1990. Similarly, Kalaiselvi has also filed a suit in O.S.No.1293 of 1995 for declaration that the decree obtained in RCOP PNo.1698 of 1990 as null and void, since she herself has become owner of the property. Both the suits were tried together.

Ultimately, the suit filed by Kalaiselvi in O.S.No.1293 of 1995 was decreed as prayed for, setting aside the judgment passed in RCOP No.1698 of 1990. However, the suit filed by the Krishnaveni for vacant possession and injunction was dismissed. Hence, the above judgments reached finality, since no appeals were filed.

3. At this juncture, the said Kalaiselvi had filed an application in M.P.No.623 of 1996 in E.P.No.321 of 1996 for restitution of the possession of the property, since the possession had been delivered while executing the order passed in RCOP No.1698 of 1990 and the same was allowed on 18.07.2007. Thereafter, when the petition was pending for delivery of possession, one Nithyanandam, the son of the second respondent herein, namely Krishnaveni had filed an application in M.P.No.376 of 2007 in M.P.No.623 of 1996 in E.P.No.321 of 1996 under Order 21 Rule 97 of the Code of Civil Procedure for obstruction. The revision petitioners herein filed an application in M.P.No.115 of 2008 in M.P.No.376 of 2007 in E.P.No.321 of 1996 to reject the above application. The trial court dismissed the said application, against which the revision petitioners came up with this present revision.

4. The learned counsel appearing for the revision petitioners would submit that the application filed under Order 21 Rule 97 of the Code of Civil Procedure by Nithyanandam, obstructer is not maintainable in law, since only the decree holder can file an application under the said provision, during execution proceedings. Whereas, in the case on hand, the revision petitioners have not sought any relief to execute the decree and only sought for restitution of the possession of the property under Section 144 of the Code of Civil Procedure. Hence, the order of dismissal by the trial court is not maintainable in law. In support of his argument, the learned counsel appearing for the revision petitioners relied on the judgments in **(i) Donna Rossi Kitchen Line V. D.Harikrishnan reported in 2014(2) CTC 690 and (ii) M.Gopinathan Pillai V. K.Radhakrishnan and 13 others reported in 2014 SCC Online Madras 8828.**

5. The learned counsel appearing for the first respondent would submit that the first respondent is in possession of the property and he can make obstruction, since earlier transaction and decree are the result of collusion and the same cannot be put against him and hence, the revision petition is not

maintainable.

6. I have perused the materials on record and the orders passed by the trial court. At the out set, I proceed to decide this revision on the maintainability of the application filed under Order 21 Rule 97 of the Code of Civil Procedure. It is to be noted that the revision petitioners have not filed application to execute any decree and the petition is seeking for restitution under Section 144 of the Code of Civil Procedure. It is admitted case that based on the fair and decreetal order passed in RCOP No.1698 of 1990, the revision petitioners were evicted from the premises under the process of law. Subsequently, the fair and decreetal order passed in RCOP No.1698 of 1990 were set aside by the competent civil court by its decree and judgment passed in O.S.No.1293 of 1995 and no appeal whatsoever filed against the said decree and judgment. Since the fair and decreetal order passed in RCOP No.1698 of 1990 were set aside, the revision petitioners sought restitution of the premises by filing an application in M.P.No.623 of 1996 in E.P.No.321 of 1996, since they were evicted during the execution proceedings of RCOP No.1698 of 1990. At this stage, the first respondent namely Nithyanandam, who is the son of Krishnaveni has filed an application in M.P.No.376 of 2007 to record his obstruction and to dismiss the execution petition.

7. A careful perusal of Order 21 Rule 97 of the Code of Civil Procedure makes it clear that an application for obstruction under Order 21 Rule 97 of the Code of Civil Procedure shall be filed only for seeking removal of obstruction made by third person. Therefore, it is very clear that only in the process of execution of decree any obstruction is made by any third party, the decree holder can file an application before the court to remove such obstruction caused by any third party not by others. In the case on hand, the issue is not with regard to the execution of decree, but only for restitution of the possession of the property, who were already evicted through process of law, on the basis of fair and decreetal order passed by the court, which was subsequently set aside by a competent civil court. Therefore, at the out set, this court is of the view that an application filed under Order 21 Rule 97 by the son of the judgment-debtor is not maintainable to resist the order of restitution.

8. In this regard, this court in a judgment in ***Donna Rossi Kitchen Line Vs. D.Harikrishnan reported in 2014(2) CTC 690*** in paragraph 6 held as follows.

In this case, the petitioner is a third party/obstructor and filed an application under Order 21, Rule 97, CPC. A bare perusal of the said provision would show that it is to be filed only at the instance of the decree-holder seeking for removal of an obstruction, if made by any person. Thus, when there is an obstruction, only such obstruction gives a cause of action to the decree-holder to move before the court by filing an application under Order 21, Rule 97, CPC seeking for removal of such obstruction. On the other hand, I doubt as to whether the obstructor himself can come to the court and file an application under Order 21, Rule 97 CPC by contending that he is making an obstruction and let the court decide the issue. It could not have been the intention and scope of Order 21, Rule 97 CPC. No doubt, if a person other than the judgment-debtor is removed from the suit property, he can approach the court under Order 21, Rule 99 CPC complaining about such removal and to seek for

an adjudication on the rights of the parties. In this case, admittedly, the petitioner has not been removed and on the other hand, he has come to the court by filing an application under Order 21, Rule 97, CPC saying that he is obstructing the execution proceedings and therefore, his right has to be adjudicated. Certainly, that is not the course of action contemplated under Order 21, Rule 97 CPC. A perusal of the decision of the Division Bench of the Andhra Pradesh High Court referred to supra would also show that the application is maintainable only at the instance of the Decree-holder and not by anybody else. Relevant paragraph of the order passed therein is extracted here under.

" Even otherwise the law is well settled that the remedy under Order 21, Rule 97 CPC is available only to the Decree-holder for possession of immovable property or the purchaser of any such property sold in execution of a decree. Rule 97 of Order 21 of CPC reads as under.

(i) Where the holder of a decree for the

possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make any application to the court complaining of such resistance or obstruction.

2) Where any application is made under sub rule (1), the court shall proceed to adjudicate upon the application in accordance with the provisions herein contained:.

A plain reading of the above provision shows that it is a remedy available to the decree-holder if he is resisted or obstructed by any person in obtaining possession of the property. Whenever such an application is made by the decree-holder under Rule 97 of CPC complaining to the court resistance or obstruction by any person, all questions arising between the decree-holder and any such person shall be adjudicated by the executing court itself under Order Rule 101 of CPC. May be that, such an application filed by the decree-holder can be opposed by any person in

possession by seeking adjudication of the objections, however, such person himself cannot maintain any application under Order 21, Rule 97 of CPC.

The view expressed by us fortified by the decision of the Supreme Court in Shreenath V. Rajesh, 1998(4) SCC 543: AIR 1998 SC 187. Following the said decision, it was also held by a learned single judge of this court in Pothuri Thuladisas V. Potru Nageswara Rao, (2 supra), that it is not permissible for a judgment debtor to file an application application under Order 21, Rule 97 of CPC.

9. Similarly, this court in a judgment in **M.Gopinathan Pillai V. K.Radhakrishnan and 13 others reported in 2014 SCC On line Mad 8828** had held thus.

4.4 So far as this defence is concerned, this defence is available to the parties to the litigation. The judgment-debtors who had the opportunity to contest the case on this ground, has already contested the matter and at the level of this court,

the petition has already been dismissed. The defence that the decree was obtained by suppression of material facts or material documents is not a defence open to a party, who is not a party to the litigation, but claiming only under the judgment-debtors. When the judgment-debtors themselves have taken up the responsibility of challenging the decree and when the challenge to the executability of the decree has been negated, the party, claiming under the same judgment debtor cannot agitate the same issue saying that the decree obtained is not valid. Especially, when the third party is only an agreement holder having no perfect right over the property cannot maintain an application for obstruction as per the decision reported in 2014(2) CTC 690 (Donna Rossi Kitchen Line V.D.Harikrishnan), where-under it has been held that third party cannot maintain application under Order 21 Rule 97 CPC by claiming himself as an obstructor.

9. Having regard to the above position of law and particularly, the application filed by the revision petitioner is not for executing any decree and only for restitution of possession of the property as per Section 144 of the Code of Civil Procedure, on the basis that the the earlier fair and decreetal order passed in RCOP No.1698 of 2000 was set aside by the competent court, which reached finality, the obstrueter is not entitled to file application under Order 21 Rule 97 of CPC. When a person who is in possession of the property is dispossessed on the basis of any decree or fair and decreetal order, thereafter such decree or final order was set aside by the competent court either by law or by some other proceedings, the person who dispossessed from the property can restore his possession only by way of seeking restitution of the possession of the property under Section 144 of CPC. Therefore, when such person is exercising his right provided under the Statue, the judgment-debtor or any person claiming right through him, cannot make any obstruction under the provision of Order 21 Rule 97 of CPC. Hence, the revision petition is allowed.

10. In the result,

(i) The Civil Revision Petition is allowed. No costs.

The connected miscellaneous petition is closed.

(ii) The fair and decretal order passed by the trial court in M.P.No.115 of 2008 in M.P.No.376 of 2007 in E.P.No.321 of 1996 in RCOP No.1698 of 1990 dated 05.02.2009 is set aside.

(iii) The trial court is directed to proceed further the restitution petition in M.P.No.623 of 1996 in E.P.No.31 of 1996 in RCOP No.1698 of 1990 and dispose the same within a period of three months from the date of receipt of a copy of this order.

25.02.2019

Index : Yes / No

Internet : Yes / No

speaking/non speaking

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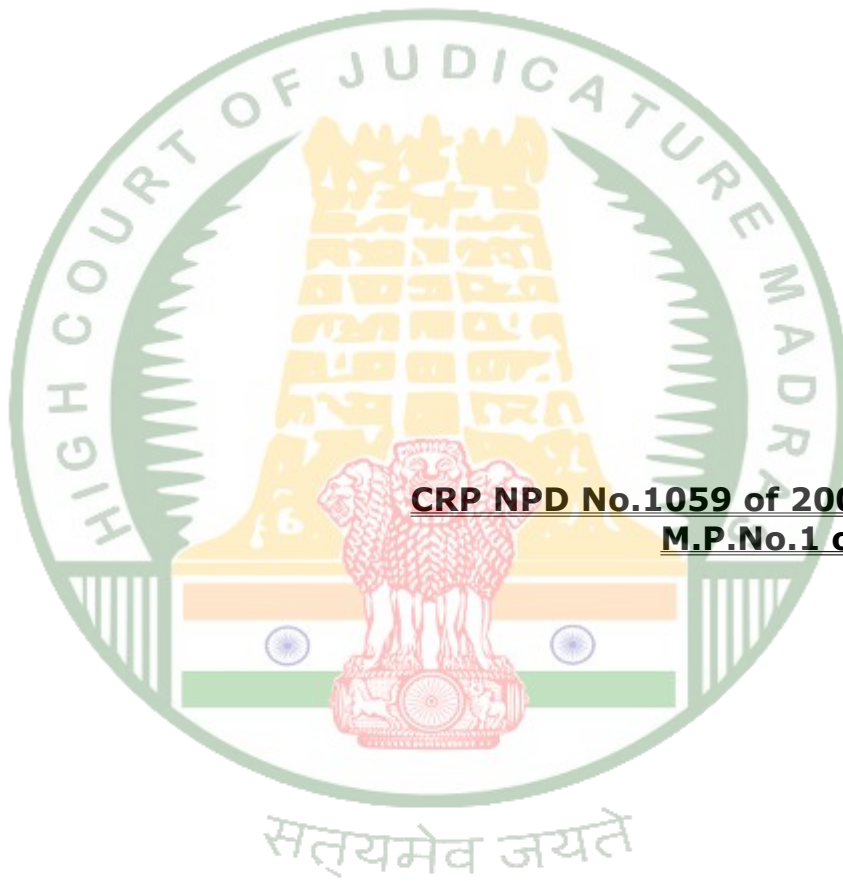
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To

1. The XV Judge, Court of Small Causes, Chennai.

N.SATHISHKUMAR, J.

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