

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 25.07.2019

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

CRP (PD) No.3903 of 2011

Y.Antony

.... Petitioner

Vs.

1. K.Jagadeesan

2. E.Chandrashekar

.... Respondents

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the orders dated 18.12.2009 passed in E.P.No.192 of 2009 in O.S.No.3671 of 2003 by the X Assistant Judge, City Civil Court, Chennai.

For Petitioner

: Mr.R.Ramanlaal

For Respondents

: Mr.S.Kanmani Annamalai (for R1)

Mr.S.Arunkumar (for R2)

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ORDER

The civil revision petitioner is the decree holder in E.P.No.192/2009 in O.S.No.3671 / 2003 on the file of the X Assistant Judge, City Civil Court, Chennai. He filed the suit in O.S.No.3671/2003 before the

XVII Assistant Judge, City Civil Court, Chennai for a permanent injunction restraining the respondents herein from interfering with his peaceful possession and enjoyment of the suit property situate in S.No.19/3 of Kolathur Village, Perambur , Purasaivakkam Taluk measuring 200 sq.ft. The suit was decreed in favour of the revision petitioner by the XVII Assistant Judge, City Civil Court, Chennai vide his decree and judgment dated 27.03.2006. Subsequently, the revision petitioner filed E.P in SR 36724 of 2018 in O.S.No.3671 of 2003 before the X Assistant Judge, City Civil Court, Chennai under Order XXI Rule 35 read with Section 151 of the Code of Civil Procedure for recovery of possession of the suit property from the respondent herein.

2. The learned X Assistant Judge, City Civil Court, Chennai, rejected the execution petition on the following grounds.

(i) Order XXI Rule 35(2) of the Code of Civil Procedure provides for removal of obstruction made by a person and since the petitioner who had obtained only an order of permanent injunction restraining the defendants from interfering with his peaceful possession and enjoyment of the suit property, cannot file execution petition for recovery of possession under Order XXI Rule 35(2) of the Code of Civil Procedure.

(ii) The decree holder has not filed a contempt application as against the judgment debtor for violation of the order of the court.

(iii) The decree holder has also failed to prove that the judgment debtor trespassed into the suit after obtaining the decree in O.S.No.3671 of 2003.

3. Aggrieved over the Order passed by the X Assistant Judge, City Civil Court, Chennai, the civil revision petitioner filed a civil revision petition in CRP(NPD) 4245 of 2008 before this court. This court in its order dated 22.12.2008, allowed the civil revision petition and directed the X Assistant Judge, City Civil Court, Chennai to take the EP SR36724 of 2008 on its file and number the application. Subsequently, the petition was taken on file and numbered as EP No.192 of 2009 and the respondents filed their counter. After full contest, the X Assistant Judge, City Civil Court, Chennai vide his fair and decreetal order dated 18.12.2009, dismissed the E.P.No.192 of 2009 on the following grounds

(i) Since the decree holder did not explain as to when and how he was dispossessed from the petition mentioned property, he cannot maintain an execution petition under Order XXI Rule 32 read with Section 151 of the Code of Civil Procedure.

(ii) Since the decree passed in O.S.No.3671 of 2003 dated 27.03.2006

is for a permanent injunction restraining the judgment debtor from interfering with the peaceful possession and enjoyment of the decree holder in the suit property, the decree holder cannot file a petition for recovery of possession. Aggrieved over the same, the present civil revision petition is filed.

4. Mr.R.Ramanlaal, learned counsel appearing for the civil revision petitioner contended that though an order of permanent injunction was granted in favour of the revision petitioner in O.S.No.3671 of 2003 on 27.03.2006, the respondents trespassed into the suit property subsequently and therefore, he approached the executing court for removal of obstructions. He also contended that the civil revision petitioner sent a complaint to the Inspector of Police, V4 Rajamangalam Police Station, Kolathur on 20.01.2007, against the respondent herein and in that complaint, it is specifically stated that on 15.12.2006, when the revision petitioner was away from Chennai, the respondents along with some rowdy elements trespassed into the suit property and also removed the belongings of the revision petitioner. He further contended that a separate complaint was also sent to the Chief Minister's Cell. According to him, the Inspector of Police, V4 Rajamangalam Police Station did not take any action against the respondents.

5. He also relied on the decision in ***Kanakamma Vs. Mamalan reported in 2000 (II) CTC 240*** and contended that the plaintiff is entitled to file an execution petition for every recurring infringement and the executing court is duty bound to give relief to the decree holder and cannot drive the petitioner for filing a second suit.

6. Reliance was also placed upon the decision in ***M/s I.T.C. Ltd., Chennai Vs. M/s New Kashmir Stores, Chennai reported in AIR 1998 Madras 309***, in which in paragraph No.53, a Division Bench of this court has held thus.

In such circumstances, the learned single Judge has come to the conclusion, on the strength of the decisions in Luganda V. Services Hotels Ltd. (1969) 2 All ER 692, Warder V. Cooper (1970) 1 All ER 1112, Bhupatlal V. Bhanmumati, AIR 1984 Guj 10 and Indian Cable Co. td. V. Sumitra Chakraborty, AIR 1985 Cal 248, that even in the suit with the main prayer for permanent injunction, the interim order could be passed for restoration of possession, especially when the court finds that the plaintiff was unlawfully dispossessed and as such, it cannot be contended that the reliefs granted in the

interlocutory applications, in view of the peculiar facts and circumstances of the case due to the fresh developments, would be beyond the scope of the suit. Therefore, we have no hesitation to hold that the learned single Judge was right in granting the said reliefs, especially in the fact of the conduct of the defendant.

7. In the decision in *M.A.Raja Vs. S.Vedhantham Pillai and 4 others reported in 2000(II) CTC 199*, relied on by the learned counsel for the revision petitioner, it has been held in paragraphs No.22 to 25 thus.

22. I also had occasion to consider this question in CRP No.3198 of 1999. In that case a decree for declaration of title and mandatory injunction was granted. The contention was whether application has to be filed under Order XXI Rule 34 or Order XXI Rule 35 of CPC. I held that in view of the declaration given in the decree, the same could be executed under Order XXI, Rule 34 and the principles under Order 21, Rule 32(5) could be applied for removing the obstruction. What is the effect of declaration granted by decree was

considered. I think the above decision also will be of some help in deciding these revision petitions.

23. I have already said what is the effect of decree for permanent prohibitory injunction. Decree holder's antecedent rights are recognized and he was found to be entitled to make use of the passage unobstructed for his access of his property.

24. What will be the effect if mandatory portion of decree cannot be executed. I have already said that decree for mandatory injunction is granted only consequent to the finding that plaintiff is entitled to permanent injunction. If obstruction continues, that will be violation of decree for permanent injunction also. Plaintiff will be entitled to have the same executed under Order XXI Rule 32 of CPC. In fact I find execution application itself is filled only under Order XXI, Rule 32(5) of CPC.

25. In the decision reported in Ondipudur Weavers Co-op & S.Soc'y Ltd. V. Velumani 1977 (II) MLJ 19, a similar question came for consideration. In that case, a decree was granted declaring the right of

plaintiffs to make use of the road and restraining defendant from interfering in the use of the road. Execution application was filed complaining that defendants have disobeyed the orders of this court and they have not removed the obstruction in the road. They wanted the judgment debtor to be arrested for alleged disobedience. Executing Court without arresting judgment debtor, appointed a Commissioner for removal of obstruction to have access usable as directed by the decree. The same was challenged before this court and learned judge considered the scope of Order 21, Rule 32(5), in that case. In para 5 of the judgment, it is held thus.

5. In this case, there is a decree declaring the respondent's right to use the pathway and an injunction restraining the appellants from interfering with such right. When the respondents decree holders found that the pathway is so covered with thorny bushes that the right of pathway declared in their favour could not be properly exercised, normally they are entitled to clear the thorny shrubs for facilitating their use of pathway.

But when it was found that the appellants, judgment debtors resisted that attempt of respondents, decree holders, in clearing thorny shrubs found on the pathway, naturally they have to approach the executing court complaining that the judgment debtor who have been restrained from interfering with the user of the pathway by the decree-holder are obstructing the clearance of the thorny shrubs and therefore, they have virtually disobeyed the order of preventive or prohibitory injunction. Order 21 Rule 32(5) of the code is not invoked by the decree holders on the ground that the appellant as judgment debtors have not preferred any positive act directed by the court but that they are preventing the clearance of the shrubs by the decree holders for the proper use of the pathway. Such interference with the clearance of the thorny shrubs will amount to an indirect attempt on the part of the judgment debtors to interfere with the plaintiff's user of pathway. If in fact the judgment debtor have not obstructed or prevented the clearance of the shrubs by the decree holders, they would not have approached the

executing court for the appointment of a Commissioner to clear the thorny shrubs. I am not therefore inclined to agree with the learned counsel for the appellants that the application filed under Order 21 Rule 32(1) and (5) by the respondents in this case is not maintainable.

8. A perusal of the records shows that the revision petitioner filed a suit in O.S.No.3671 of 2003 before the XVII Assistant Judge, City Civil Court, Chennai seeking for a permanent injunction restraining the respondents/ defendants from interfering with his peaceful possession and enjoyment of the suit property. The suit was decreed on 27.03.2006. According to the revision petitioner, subsequent to the passing of the decree, the defendants trespassed into the suit property. Therefore, he filed an execution petition under Order XXI Rule 32(5) of the Code of Civil Procedure to direct the respondents to hand over the vacant possession of the suit property to the decree holder/plaintiff.

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9. Per contra, Mr.S.Kanmani Annamalai, learned counsel appearing for the first respondent filed a copy of the settlement arrived between the decree holder and the judgment debtor in the presence of the Inspector of Police, Rajamangalam Police Station, wherein, the decree

holder had undertaken to pay compensation of Rs.70,000/- to the first respondent herein.

10. It is relevant to point out that this settlement allegedly executed in the presence of the Inspector of Police, Rajamangalam Police Station was not filed in the suit in O.S.No.3671 of 2003. The learned XVII Assistant Judge, City Civil Court, Chennai had clearly given a finding that the decree holder is in possession of the suit property and therefore, he is entitled to a decree of permanent injunction against the respondents/ defendants. The respondents/ defendants did not file any appeal against the decree and judgment passed in O.S.No.3671 of 2003.

11. The only point that has to be considered herein is whether the decree holder, who obtained an order of permanent injunction can seek for removal of constructions in the suit property in an execution petition?

12. In the decision in ***Kanakamma Vs. Mamalan reported in 2000 (II) CTC 240***, the decree holder filed a suit in O.S.No.121 of 1986 before the District Munsif, Kuzhithurai and she obtained a decree against the respondent on 25.09.1989 for a declaration of her title to the property and an order of injunction restraining the respondent from entering the suit

property and putting up any construction. Subsequently, the decree holder filed E.P.No.124 of 1990 under Order XXI, Rule 32 of the Code of Civil Procedure alleging that the respondent in defiance of the decree passed against her, committed trespass upon the suit property and put up a shed and a building and that it has to be removed from the suit property. The said petition was allowed and delivery was also effected as per the direction of the court on 18.12.1992. Thereafter, the decree holder filed a fresh execution petition in E.P.No.120 of 1995 alleging that the respondent, after the execution of decree on 24.02.1995, entered the property once again and put up a shed and the same had to be removed. The learned District Munsif, Kuzhithurai dismissed the application holding that decree for prohibitory injunction could not be executed as provided for in Order XXI, Rule 32(5) and that once the decree holder had been given possession, there could not be a fresh application for the same relief and the petitioner should file a separate suit. As against the said order, civil revision petition was filed before this court and the learned Single Judge, after referring to various decisions had held that for every recurring infringement, the executing is duty bound to give relief to the decree holder and cannot drive the petitioner to a separate suit.

13. In the said decision, a judgment of S.S.Subramani.J in *Kaliammal and another Vs. D.C.Arunachalam and six others reported in 2000(II) CTC 136* was referred, wherein, in paragraph No.16 it has been held thus.

" When Court declares that the plaintiff is entitled to make use of the cart track, various rights flow from that. It recognises plaintiffs' right to make use of the same and also recognises that plaintiffs can use the same without any obstruction from any source and when defendants cause obstruction, prohibitory injunction is also given directing them not to disturb the right of plaintiffs in making use of the same. If that is the effect of the decree, can it be said that plaintiffs while asking for issue of commission to remove obstruction are not entitled to apply for the same since there is no mandatory direction against defendants. I do not think that the interpretation given by learned counsel for petitioners is correct. Plaintiffs are only making use of the cart track as they were using and are entitled to use it without any obstruction. It is that part of the decree they are

enforcing against the defendants. Along with the same, there is also a decree for injunction. When both these reliefs are granted to plaintiffs, argument of learned counsel for petitioners that so long as there is no mandatory injunction against defendants, application under Rule 32(5) is not maintainable cannot be accepted."

Further, it has been held that

" Asking plaintiffs to file a separate suit will be unjust and the court also will be pleading its helplessness to plaintiffs when they come to court with genuine grievance. To shorten the litigation and also considering the interest of justice. I feel that the impugned order is only to be confirmed and I do so."

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14. The executing court has mainly dismissed the application on the ground that the decree holder did not prove that he was dispossessed from the suit property, subsequent to the passing of the decree. It is also observed that since the decree passed in O.S.No.3671 of 2003 dated 27.03.2006 is a decree for permanent injunction, the decree holder cannot file a petition for recovery of possession.

15. In the instant case, the execution petition is filed under Order XXI Rule 32(5) of the Code of Civil Procedure contending that subsequent to the passing of the decree, the respondents/defendants dispossessed the petitioner/plaintiff from the suit property. In the counter filed by the respondents, it is stated that the petitioner/ decree holder was never in possession of the suit property right from the institution of the suit till this date and therefore, he cannot file an execution petition praying for delivery of vacant possession of the suit property.

16. As already observed, the XVII Assistant Judge, City Civil Court, Chennai had found that the plaintiff/decreed holder is in possession of the suit property and granted a decree for permanent injunction in favour of the plaintiff and no appeal was filed by the respondents/defendants.

17. In the facts and circumstances, the executing court without considering the well settled principles of law, had dismissed the execution petition and it only shows the non application of mind on the part of the executing court. Therefore, the orders passed in E.P.No.192 of 2009 is liable to be set aside.

18. In the result,

(i) The civil revision petition is allowed. No costs.

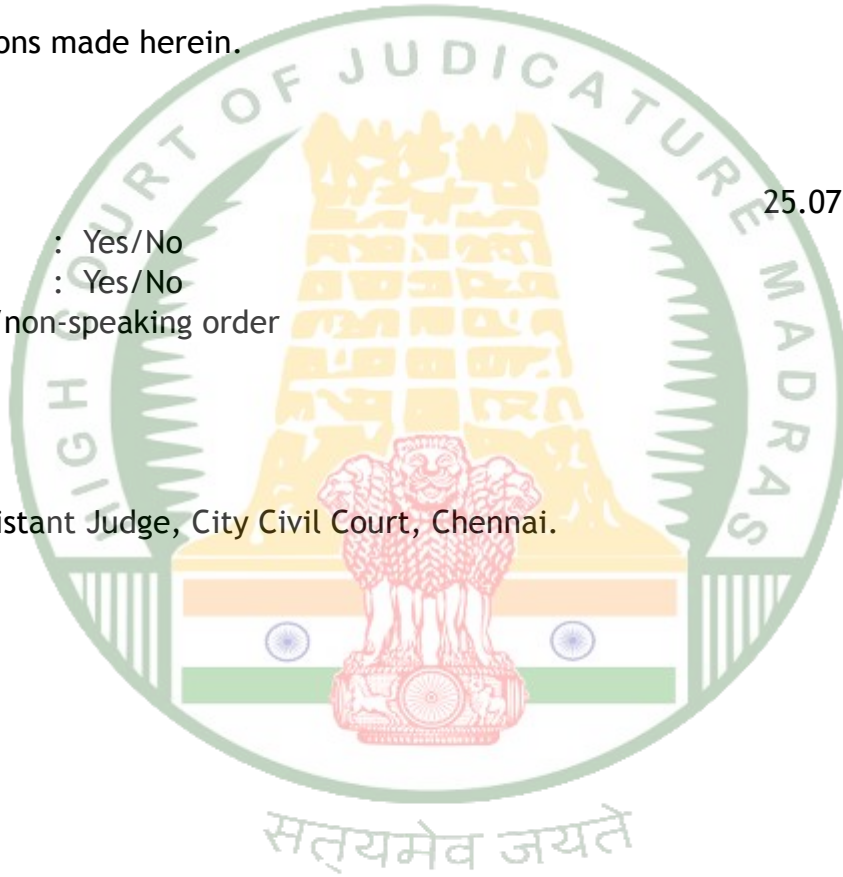
(ii) The execution petition in E.P.No.192 of 2009 is remitted back to the executing court for passing further orders in the light of the observations made herein.

25.07.2019

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Internet : Yes/No
Speaking/non-speaking order
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To

The X Assistant Judge, City Civil Court, Chennai.



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R.HEMALATHA,J.
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