

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 28.01.2019

DELIVERED ON : 01.02.2019

CORAM

THE HONOURABLE MR. JUSTICE ABDUL QUDDHOSE

C.R.P.(PD).No.1627 of 2014
&
M.P.No.1 of 2014

1.N.Vamanan
2.Gurunathan

.. Petitioners

..Vs..

1.Doss
2.Malliga

.. Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the order dated 13.11.2013 in I.A.No.2011 of 2012 in I.A.No.3508 of 2008 in O.S.No.2077 of 1997 of the learned Principal District Munsiff, Alandur.

For Petitioners

: Mr.V.Kannan

For Respondents

: Mr.L.Dhamodaran

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ORDER

The point for consideration in this revision is whether the affidavit filed in support of an application filed under Section 144 of the Code of Civil Procedure (hereinafter referred to as “CPC”) seeking restitution can be treated as evidence for the purpose of Order XIX Rule 2 of CPC seeking to cross examine the deponent of the affidavit.

2. The instant revision has been filed under Article 227 of the Constitution of India challenging the order dated 13.11.2013 passed by the learned Principal District Munsif, Alandur in I.A.No.2011 of 2012 in I.A.No.3508 of 2008 in O.S.No.2077 of 1997.

Brief facts leading to the filing of the instant revision under Article 227 of the Constitution of India:

3. The petitioners are the plaintiffs in the suit O.S.No.2077 of 1997 pending on the file of the learned Principal District Munsif, Alandur. The respondents are the defendants. The petitioners filed the suit O.S.No.2077 of 1997 seeking the following reliefs:

(a) directing the defendants to quit and deliver vacant possession of B-schedule property;

(b) directing the defendants to pay damages for illegal use and occupation at Rs.250/= per month from 14.6.95 onwards till the date of delivery of possession to the plaintiffs;

(c) for costs of the suit; and

(d) for such further or other orders as that Court may deem fit and proper in the circumstances of the case.

4. During the pendency of the suit, I.A.No.3508 of 2008 was filed by the petitioners under Section 144 read with Section 151 of CPC seeking restitution of the suit 'A' schedule property excluding 'B' schedule property by removing the obstructing construction as per the pleadings in O.S.No.2077 of 1997. It is the case of the petitioners as seen from the averments contained in the affidavit filed in support of I.A.No.3508 of 2008, that the suit O.S.No.2077 of 1997 was decreed ex parte on 30.11.2000. Thereafter, the respondents/defendants filed applications for condoning the delay and for setting aside the ex parte decree dated 30.11.2000. According to the petitioners/plaintiffs, the

respondents/defendants specifically admitted possession of the petitioners of the suit 'A schedule property except B schedule property in CMP. No. 1378 of 2004 filed on 13.12.2003 before the High Court. The petitioners have also stated that along with the plaint, they have filed a patta issued by the Tahsildar in Survey No.510 of 2014. According to the petitioners, there is a presumption under Section 114 (e) of the Evidence Act, that as per the decree dated 30.11.2000, the petitioners were in possession of A schedule property except 168 sq.ft as per B schedule of the building which was in respondents' possession.

6. It is also the case of the petitioners that the respondents have in disobedience of the permanent injunction decree dated 30.11.2000 sold away the entire suit property to one Arokiyasamy of the same locality who purchased the same with the knowledge of the permanent injunction. According to the petitioners, the said Arokiyasamy forcibly dispossessed the petitioners from the suit property and demolished the entire suit building. According to the petitioners, a police complaint was given on 13.08.2005 against the forcible dispossession. According to the petitioners, at the instigation of the respondents/defendants, the said

Arokiyasamy erected a new building on the suit site deliberately, after receiving the suit summons on 25.08.2005. According to the petitioners, the lis pendens purchaser has admitted in I.A.No. 2270 of 2005 that he has knowledge of the decree dated 30.11.2000 at the time of purchase. With the aforesaid averments, the petitioners filed an Application under Section 144 read with Section 151 of CPC seeking restitution of the property.

7. A counter affidavit was also filed by the respondents/defendants in I.A.No.3508 of 2008 wherein they have denied all the allegations contained in the affidavit filed by the petitioners/plaintiffs in support of said application. It is the case of respondents/defendants that the entire suit property was in their possession even prior to the filing of the suit by the petitioners/ plaintiffs. According to them, the suit property was assigned in their favour by appropriate authority by recognizing as to their possession and enjoyment. The respondents further submit that the petitioners claim to the property under one late Kannan to whom the patta was issued by the authorities and the said Kannan had conveyed the property during his lifetime. According to the respondents, there is

no property left by the said kannan to inherit by the petitioners as claimed by them in the suit. They have taken a categorical stand that the petitioners were never in possession of A and B schedule property and they are not the owners of the property. Further according to them, since there was no decree as on the date of filing of I.A.No.3508 of 2008, section 144 of CPC is not applicable.

8. During the pendency of I.A.No.3508 of 2008 filed under Section 144 read with 151 of CPC, the respondents/defendants filed I.A.No.2011 of 2012 under Order XIX Rule 2 of CPC seeking for an order directing the deponent of the affidavit filed in support of I.A.No. 3508 of 2008 namely one Vamanan who is the first plaintiff in the suit to appear before the court for cross examination with reference to the contents of the affidavit filed in support of I.A.No.3508 of 2008. A counter was also filed by the petitioners/plaintiffs in I.A.No. 2011 of 2012 that the application filed under Order XIX Rule 2 of CPC by the respondents/defendants is not maintainable. The Trial Court by its order dated 13.11.2013 allowed I.A.No.2011 of 2012 filed by the respondents/defendants under Order XIX Rule 2 of CPC and permitted the respondents/defendants to cross

examine the petitioners/plaintiffs with reference to the contents of the affidavit filed in support of I.A.No.3508 of 2008. Aggrieved by the order dated 13.11.2013 in I.A.No.2011 of 2012 in I.A.No. 3508 of 2008 in O.S.No.2077 of 1997, this revision has been filed under Article 227 of the Constitution of India.

Submissions of the learned counsels:

9. Heard Mr.V.Kannan, learned counsel for the petitioners and Mr.L.Dhamodar, learned counsel for the respondents.

10. The learned counsel for the petitioners submitted that the application filed by the respondents/defendants before the Trial Court in I.A.No.2011 of 2012 under XIX Rule 2 of CPC is not maintainable, since an affidavit filed in support of Interlocutory Application is not evidence for the purpose of Order XIX Rule 2 of CPC. He referred to the following decisions rendered by this Court:

(a) ***Dhanalakshmi vs. Karuppayee*** reported in **2017-5-L.W.758**

(b) ***V.Baby v. Sekar and Another*** reported in **(2015) 1 MLJ 443**

(c) ***Kannammal v. Bagyammal*** reported in **1998 (1) CTC 280**

(d) *P.N.Karuppa Gounder v. Karuppayal and Others* reported in (2013) 1 MLJ 814

11. Per contra, learned counsel for the respondents would submit that any adjudication in an application filed under Section 144 of CPC is a decree. He drew the attention of this Court to the definition of decree as found in Section 2(2) of the CPC which has made it clear that an adjudication under Section 144 of CPC is a decree. Therefore, according to him, the Judgment relied upon by the learned counsel for the petitioners which deals with application for injunction under Order XXXIX of CPC is not applicable for the facts of the instant case.

Discussion:

12. Order XIX of the CPC deals with affidavits. Rule 1 of Order XIX envisages that the court may order any particular fact or facts to be proved by affidavit. Rule 2 of Order XIX confers power upon the court to secure attendance of the deponent for cross examination. Order XIX Rule 2 of CPC reads as follows:

“ 2. Power to order attendance of deponent for cross-examination.____ (1) Upon any application

evidence may be given by affidavit, but the Court may, at the instance of either party, order the attendance for cross-examination of the deponent.

(2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs.”

13. A bare reading of Order XIX Rule 2 of CPC leaves no manner of doubt that the said provision can be invoked when the court requires any particular fact, or facts to be proved by affidavit and such evidence is tendered by way of affidavit, then the court can order at the instance of the either party the presence of the deponent for cross examination. Therefore, in order to invoke jurisdiction under Order XIX rule 2, there must be a proceeding where any fact or facts are being sought to be proved by an affidavit and in deference to the said purpose, evidence is given by either party, by affidavit.

14. The word 'evidence' is not defined in the CPC but the said expression is defined under Section 3 of the Evidence Act, 1872, which reads as follows:

“Evidence-”Evidence” means and includes -

1. all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such statements are called oral evidence;
2. all documents including electronic records produced for the inspection of the court, such documents are called documentary evidence.”

15. From a conjoint reading of order XIX, rule 2, CPC and the definition of evidence as contained in the Evidence Act, 1872, it is clear that the provisions of Order XIX, Rule 2 can be invoked only when evidence within the meaning of Act of 1872 is adduced by affidavit with the object of proving any particular fact or facts.

16. In the instant case, the petitioners/plaintiffs have filed an application under Section 144 read with Section 151 of CPC seeking restitution. In the affidavit filed in support of the restitution petition, they have pleaded that the respondents/defendants have admitted that the petitioners/plaintiffs are in possession of the suit A schedule

property except B schedule property in CMP.No.1378 of 2004 filed on 13.12.2003 before the High Court. They have also pleaded that there is a presumption under Section 114(e) of the Indian Evidence Act that as per the ex parte decree dated 30.11.2000, they were in possession of A schedule property except 168 sq.ft. as per B schedule property of the building which was in respondents/defendants possession. It is also their case that despite the decree dated 30.11.2000, the respondents/defendants have sold the property to one Arokiyasamy by disobeying the injunction decree. It is also their case that they were forcibly and unlawfully dispossessed from the suit property by Arokiyasamy who has now constructed a building over the same. The contentions of the petitioners/plaintiffs in I.A.No.3508 of 2008 filed for restitution are disputed by the respondents/defendants. The pleadings made in I.A.No.3508 of 2008 regarding dispossession are new set of facts not found in the plaint. The application for restitution under Section 144 of CPC is a substantive application. As rightly contended by the learned counsel for the respondents/defendants, any adjudication by the court in an application under Section 144 of CPC is a decree as defined under Section 2(2) of the CPC which reads as follows:

“ 2. Definitions.____ In this Act, unless there is anything repugnant in the subject or context,____

(1) “Code” includes rules;

(2) “decree” means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 144, but shall not include____

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.”

17. The adjudication of an application under Section 144 of CPC conclusively determines the rights of the parties with regard to the matter in controversy. The definition of decree under Section 2(2) of CPC also makes it clear that any adjudication by a Court under Section 144 of CPC is also a decree. The decree is passed only after appreciation of evidence by the court. Therefore, the requirement of evidence for the purpose of deciding an application under Order XIX Rule 2 of CPC has been satisfied by the respondents/defendants. The application filed by

the respondents/defendants is under Section 144 of CPC seeking restitution of possession and an application under Section 144 of CPC cannot be treated on par with an application for injunction under Order XXXIX of CPC. The averments contained in the affidavit filed in support of I.A.No.3508 of 2008 in O.S.No.2077 of 1997 under Section 144 of CPC regarding illegal dispossession of the petitioners can be adjudicated only through evidence and a bare affidavit will not be sufficient to prove or disprove the rival contentions. The Judgment relied upon by the learned counsel for the petitioners (a) *Dhanalakshmi vs. Karuppayee* reported in *2017-5-L.W.758*; (b) *V.Baby v. Sekar and Another* reported in *(2015) 1 MLJ 443*; (c) *Kannammal v. Bagyammal* reported in *1998 (1) CTC 280*; (d) *P.N.Karuppa Gounder v. Karuppayal and Others* reported in *(2013) 1 MLJ 814* relate to injunction applications filed under Order XXXIX of the CPC and they are not applicable for the facts of the instant case, since the application filed by the respondents/defendants is one under Section 144 of CPC which cannot be equated on par with an affidavit filed in support of an injunction application under Order XXXIX of CPC.

18. This Court has perused and examined the impugned order and is of the considered view that the Trial Court has rightly allowed the application filed by the respondents/defendants under Order XIX Rule 2 of CPC to cross examine the deponent of the affidavit filed in support of an application under Section 144 read with Section 151 of CPC

19. In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is closed.

01.02.2019

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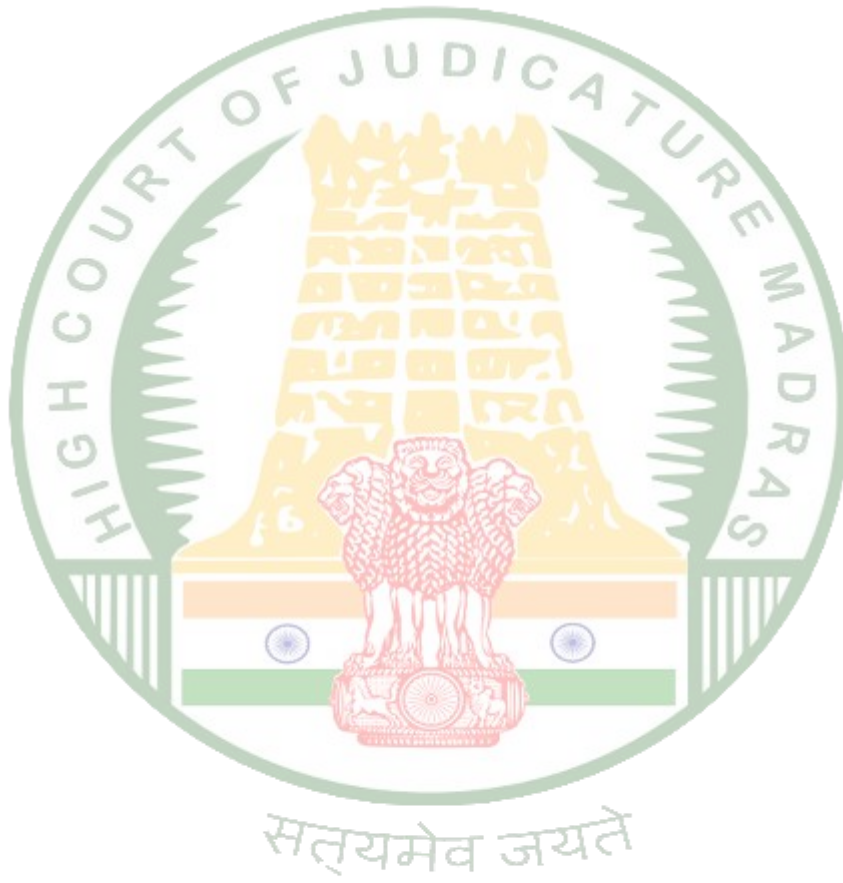
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Speaking/Non-speaking orders

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The Principal District Munsiff, Alandur.



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ABDUL QUDDHOSE, J.

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