

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :25.02.2019

Pronounced on: 05.03.2019

CORAM

THE HONOURABLE **MR.JUSTICE C.SARAVANAN**

C.R.P.(NPD).No.2293 of 2014
and
M.P.No.1 of 2014

1.K.Kamalaveni

2.K.Dhandapani

3.K.Dhamodaran

4.K.Bhuvaneswari

... Petitioners

Vs.

M.Ramadass Naidu

... Respondent

PRAYER: Civil Revision petition is filed under Section 115 of the Code of Civil Procedure, to set aside the judgment and the order dated 31.07.2013 passed in E.P.No.52 of 2011 in O.S.No.417 of 2006 on the file of the Principal District Munsif Court, Villupuram. Villupuram District and also to set-aside the order dated 31.07.2013 passed in E.A.No.Nil of 2013 and issue direction for the trial court to dispose of the E.A.No.Nil of 2013 in E.P.No.52 of 2011 on merits.

For Petitioners : Mr.V.Rajendran & K.S. Prabhakaran

For Respondent : Mr.C.Munusamy

ORDER

The respondent herein had created an usufructuary mortgage by a mortgage deed dated 18.3.1993 in favour of late Kuppusamy during his life time. Late Kuppusamy is the first petitioners' husband and other petitioners' father.

2. Three different proceedings came to be initiated surrounding above referred mortgage deed vide O.S.No. 47 of 2006, O.S.No. 417 of 2006 and O.S No. 423 of 2006 before District Munsif Court, Villupuram.

3. O.S.No. 47 of 2006 and O.S No. 423 of 2006 was filed by late Kuppusamy during his life time against the respondent. It was filed for a permanent injunction to restrain the respondent and three other persons from interfering with the suit schedule property until the respondent discharged the dues under the aforesaid usufructuary mortgage dated 18.3.1993.

4. O.S No. 423 of 2006 was filed to direct the respondent and five other persons to pay damages to the tune of Rs.30,000 jointly

and severally for the alleged loss caused.

5. After the death of Kuppasamy, the petitioners were brought on record as his legal representatives.

6.O.S.No. 417 of 2006 was filed by the respondent herein for a preliminary decree under Order 34 Rule 7 of C.P.C for redemption of the mortgaged property stating that the dues in respect of the aforesaid mortgage had been fully discharged and to direct the petitioner's to deliver the possession and also to render an account of the income and for the cost of the suit.

7.By a common judgement dated 13.12.2010, suits filed by the petitioners herein were dismissed while O.S.No. 417 of 2006 filed by the respondent herein was decreed holding that the amount paid under mortgage dated 18.3.1993 was fully discharged and therefore the respondent was entitled for redemption of mortgage.

8.The petitioners were directed to deliver the vacant position of the suit property to the respondent within three months from the date of the decree.

9. Petitioners were also directed to render true accounts of the income from the suit property from the date of suit till delivery of possession within three months from the date of the judgement.

10. While the petitioners had preferred three appeals vide A.S.No.37, 38 and 39 of 2011, the respondent filed E.P.No. 52 of 2011 as decree holder pursuant to decree passed in O.S.No. 417 of 2006.

11. In the Execution Proceeding, the petitioners herein filed a petition under Section 47 of the Civil Procedure Code. Meanwhile, A.S.No.37, 38 and 39 of 2011 filed by the petitioners were dismissed against which the petitioners have preferred a Second Appeal before this Court. It was stated that they are pending final disposal before this Court.

12. By the impugned order dated 31.7.2013, E.P.No.52 of 2011 filed by the respondent was closed after recording the delivery of possession by the petitioners. Petition under Section 47 of the

Civil Procedure Code filed by the petitioners was thus rejected *in limini*.

13. Aggrieved by the fair and decretal order dated 31.7.2013 in E.P.No.52 of 2011, the petitioners have preferred this Civil Revision Petition.

14. It is the case of the petitioners that the lower court erred in dismissing the application filed under section 47 of the Civil Procedure Code as Judgment and decree dated 13.12.2010 passed in O.S.No.417 of 2006 was not an executable decree.

15. It was further submitted that the District Munsif Court at Villupuram ought to have passed a preliminary decree and therefore the impugned order dated 31.07.2013 closing the execution petitioner impugned in the present Civil Revision Petition and order of the First Appellate Court impugned in the Second Appeal were unsustainable.

16. It is alleged that the respondents colluded with the court

bailiff and obtained a false report as if the property has been delivered to the respondent and therefore erred in declining to entertain the petition under Section 47 of C.P.C while closing the Execution Petition.

17. It is further submitted that the petitioners are still in possession of the mortgaged property even though Bailiff has wrongly recorded as if the petitioners delivered the possession of the mortgaged property. It is further submitted that the respondent has not repaid the money given by late Kuppusamy.

18. Learned counsel for the petitioners relied upon the decision of the following cases:-

- i. In **Retnaswamy vs Justin** 2004 (3) MLJ 531.
- ii. In **E.P.K.Mani vs Nagasamy** 2009 (4) MLJ 58.
- iii. In **Baghwandas Mangal, Properiter, M/s. Nathulal Mangal, Chennai vs S.Mohamed Lqbal** (2004) 4 MLJ 144.
- iv. In **M.S.Muthukumar vs Skyline Financial Services Madras P.Ltd.,** 2009 (4) CTC 337.

19. I have considered to the facts of the case and the

submission of the learned counsel for the petitioners and the case laws submitted at the time of the hearing.

20.The respondent herein had filed O.S.No.417 of 2006 for redemption of mortgage under Order 34 Rule 7 of C.P.C. Under 34 Rule 7, if the plaintiff succeeds, the Court shall pass a preliminary Decree-

(a) ordering that an account be taken of what was due to the defendant at the date of such decree for-

(i) principal and interest on the mortgage,

(ii) the costs of suit, if any, awarded to him, and

(iii) other costs, charges and expenses properly incurred by him up to that date, in respect of his mortgage-security, together with interest thereon; or

(b) declaring the amount so due at that date; and

(c) directing-

(i) that, if the plaintiff pays into Court the amount so found or declared due on or before such date as the Court may fix within six months from the date on which the Court confirms and countersigns the account taken

under clause (a), or from the date on which such amount is declared in Court under clause (b), as the case may be, and thereafter pays such amount as may be adjudged due in respect of subsequent costs, charges and expenses as provided in rule 10, together with subsequent interest on such sums respectively as provided in rule 11, the defendant shall deliver up to the plaintiff, or to such person as the plaintiff appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff at his cost free from the mortgage and from all incumbrances created by the defendant or any person claiming under him where the defendant claims by derived title, by those under whom he claims, and shall also, if necessary put the plaintiff in possession of the property; and

(ii) that, if payment of the amount found or declared due under or by the preliminary decree is not made on or before the date so fixed, or the plaintiff fails to pay, within such time as the Court may fix, the amount adjudged due in respect of subsequent costs, charges, expenses and interest, the defendant shall be entitled to apply for a final decree-

(a) in the case of a mortgage other than a usufructuary mortgage, a mortgage by conditional sale, or an anomalous mortgage the terms of which provide for

foreclosure only and not for sale, that the mortgage property be, sold, or

(b) in the case of a mortgage by conditional sale or such an anomalous mortgage as aforesaid that the plaintiff be debarred from all right to redeem the property.

21.It is case of the petitioners that the Lower Court has instead of passing a preliminary decree followed by a final decree for redemption, has straight away adjudged the dues and passed a final decree and therefore such a decree was non-executable.

22.It was further submitted that the Court erred in directing the petitioners to deliver the vacant possession of the suit property. However, it is noticed that the lower court has concluded that respondent has paid the amount borrowed under the mortgage and has therefore directed the petitioners to deliver the mortgage the property.

23.Since the said decree itself records that the mortgage amount had been fully paid and the loan discharged there would have been no necessity to pass a final decree again.

24. It cannot therefore be said that the decree passed was not executable. Therefore, lower court cannot be faulted for entertaining E.P No.52 of 2011 and passing orders. Even if such a plea was available it should have been taken at the earliest point of time. Further, that is not the ground in Section 47 petition.

25. The petitioners have further unsuccessfully challenged the decree in the three appeal suits which also came to be dismissed by the First Appellate Court and the Second Appeal is said to be pending for final hearing before this Court. Therefore, it is for the petitioner to work out their remedy in the Second appeal.

26. The petitioners have also not obtained any stay in the Appellate Proceedings. While so, impugned fair and decreetal order cannot be interfered closing the EP and dismissing the challenge to order passed in Section 47 petition cannot be assailed based on the submissions made.

27.It is further noticed, that after a warrant was issued in the E.P.52 of 2011, the respondents came with the Court Ameena/Bailiff for executing the warrant.

28.The petitioners claims to have submitted their objection with the Court Ameena/ Bailiff stating that the Suit Property was cultivated with Tapioca crop and therefore the possession cannot be delivered and that the case was listed for hearing on 31.07.2013.

29.According to the petitioner, the Court Ameena made a wrong endorsement as if the property had been delivered on 20.06.2013 and a delivery receipt was given by the petitioners herein in the report dated 21.06.2013.

30.A police complaint dated 29.06.2013 was lodged against the petitioners for destroying the crops on 29.06.2013.

31.The petitioners filed a petition under Section 47 of CPC only on 22.07.2013 before the Principal District Munsif, Villupuram. It was prayed that the Court be pleased to not to record delivery of

possession as per false report of the Court Ameena/Bailiff nazir in E.P No.52 of 2011.

32. It was submitted that question of the petitioners delivering the possession on 20.06.2013 did not arise and that the petitioners were still in possession of the mortgage property.

33.However, interference based on disputed question of fact especially when the respondent deny such a claim cannot be made. The petitioner has stated that on 24.6.2013, the respondent filed an application to advance the date of hearing from 31.7.2013.

34.However, the fact that warrant for delivery was issued on 19.6.2013 prior to 24.6.2013 itself makes it clear that the case itself was adjourned to 31. 7.2013 to record the steps taken pursuant to the warrant issued on 19.6.2013 .The sequence of date of events in the petition filed under section 47 of the C.P.C are contradictory.

35.It also cannot be also said that the judgment and decree of

the Court in O.S.No.417 of 2006 did not culminate in an executable decree merely because the court did not follow the truncated procedure of passing a preliminary decree followed by a final decree when the court itself had come to conclusion that the respondent had repaid the amount borrowed at the time of creation of the usufructuary mortgage in favour of the petitioner.

36. Though all questions arising between the parties to the suit in which the decree was passed is to be determined by the executing Court under Section 47 of C.P.C and not by separate suit, in this case, the petitioner had filed E.A.No.438 of 2013 in E.P.No.52 of 2011 in O.S.No.417 of 2006 only on 22.07.2013 after the warrant was issued for taking delivery and after the recording of delivery on 20.1.2006.

37. The above petition was dismissed by the Court by a separate order on 31.07.2013. The operative portion of the order reads under:-

It is well settled by a catena of decisions that the question raised by the judgment debtor under Sec.47 of CPC must covers the question of executability of non-executability of the decree. There must be an allegation

that the decree is not executable. But in the present petition, there is no allegation that the decree is not executable. The objection raised in this petition. On the face of it not tenable in law. It is therefore, this court finds petition has no substance and the main purpose is to drag the execution proceedings and deprive the decree holder from the fruit of the decree. Further the facts of the present case is different and the judgment placed by the petitioner is till not apply to the present case.

In the result, this court reject the objection.

38. Therefore, I'm of the view the plea of the petitioners in the present Civil Revision Petition that the judgement and decree dated 13.12.2010 in O.S.No for 17 of 2016 was not executable cannot be countenanced.

39. Further, alleged wrong recording of delivery of possession cannot be decided in this Civil Revision Petition at this point of time.

40. If the petitioners are still in possession, the closure of E.P would be indeed in prejudice to the interest of the respondent decree holder rather than petitioners and therefore impugned fair and decretal orders require no further interference at this stage.

41. The petitioners can work out their remedy in the second appeals that are pending before this court. In case they succeed in the second appeals, they can get appropriate orders. The respondents shall therefore maintain status quo in respect property till the dispose of second appeals which is awaiting final hearing before this Court.

42. The Civil Revision Petition stands dismissed with above observations. No costs. Consequently, connected Miscellaneous Petition is closed.

05.03.2019

Speaking : Non-speaking order

Index : Yes/No

Internet : Yes/No

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To
The Principal District Munsif Court,
Villupuram, Villupuram District.

C.SARAVANAN,J.

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Pre-deliver order in

C.R.P.(NPD).No.2293 of 2014
and
M.P.No.1 of 2014

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