

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 27.06.2019

DELIVERED ON : 03.07.2019

CORAM:

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

CRP(NPD)No.2799 of 2014
and M.P.No.1 of 2014

1.V.Gandhimathi

2.Jayalakshmi

3.V.Sridhar

... Petitioners

Vs

1.G.Thiyagarajan

2.G.Prakash

3.Yasodha Chitra

4.G.Santhanagopalan

... Respondents

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, to struck off the proceedings in E.P.No.76 of 2010 on the file of IInd Additional Subordinate Judge of Coimbatore.

For Petitioners : Mr.C.Deivasigamani

For Respondents : Mr.V.V.Sathya

ORDER

The instant Civil Revision Petition has been filed under Article 227 of the Constitution of India to strike off the proceedings in E.P.No.76 of 2010, on the file of the learned II Additional Subordinate Judge, Coimbatore.

2. Heard Mr.C.Deivasigamani, learned counsel for the petitioners and Mr.V.V.Sathya, learned counsel for the respondents.

3.The only point for consideration in this revision is whether a decree for recovery of possession in respect of plaintiff's absolute and exclusive property is executable without obtaining a final decree, when the decree granted covers two reliefs (a) decree for recovery of possession in respect of plaintiff's absolute and exclusive property and (b) preliminary decree of partition in respect of a joint family property. The decree was granted in favour of the respondents in O.S.No.56 of 1983 on 29.07.1986 for two separate reliefs. One is a preliminary decree and the other relief granted is a decree for recovery of possession against the petitioners. The suit O.S.No.56 of 1983 was filed by Smt.Palaniammal and the respondents are her legal representatives. The suit was filed against M.Venkatachalam and the petitioners are his legal representatives. The said suit was filed for

recovery of possession in respect of suit A schedule property which is the absolute property of the plaintiff and for partition in respect of suit B schedule property which is a joint family property.

4.The trial Court under the Judgment and Decree dated 29.07.1986 passed in O.S.No.56 of 1983 granted a decree for recovery of possession in favour of the plaintiff in respect of the suit A schedule property which is the absolute property of the plaintiff and also passed a preliminary decree for partition in respect of suit B schedule property which is a joint family property. The plaintiff in the suit, having obtained a decree for recovery of possession, under the same decree which also included a preliminary decree for partition, executed the decree of possession by filing an execution petition to obtain recovery of possession of suit A schedule property from the defendant as per the Judgment and decree dated 29.07.1986.

5.Further, the judgment and decree passed in the suit O.S.No.56 of 1983 has also admittedly attained finality, as the petitioners themselves in this revision have admitted that the appeals filed by them upto the Hon'ble Supreme Court have been dismissed by concurrent findings.

6.The only contention raised by the learned counsel for the petitioners is that without obtaining a final decree, the petitioners cannot execute the decree in part i.e., cannot execute the decree for recovery of possession alone as the decree has been passed both for recovery of possession as well as for partition wherein a preliminary decree has been passed.

7.According to the learned counsel for the petitioners, the respondents/decreed holders ought to have obtained a final decree and only thereafter, the respondents are entitled for execution of the decree for recovery of possession. He would further submit that though in the said decree, two reliefs were granted, namely one for recovery of possession in favour of the respondents against the petitioners in respect of A schedule property and the other for preliminary decree in respect of B schedule property, without obtaining a final decree for both the reliefs granted by the Court, the respondents cannot execute the Judgment and decree in part by seeking recovery of possession of suit A schedule property as according to him, the decree is not separable and cannot be executed without passing of the final decree.

8.The relevant paragraphs of the Judgment and Decree passed in O.S.No.56 of 1983 by the learned II Additional Subordinate Judge, Coimbatore reads as follows:

1.,jdoapy; tpthpf;fg;gl;Ls;sJk; , thf;Fiuapy; 'v' ml;ltidapy;
Fwpg;gplg;gl;Ls;sJkhd brhj;Jf;fs; thjpf;F KG chpika[s;s brhj;Jf;fs;
vd tpsk;g[if bra;ag;gLfpwJ.

2.nkw;go TW 1-y; tpthpf;fg;gl;Ls;s brhj;Jf;fs; thjpf;F clikf;
bfhLf;fg;gl ntz;Lk;; ;

3.nkw;go TW 2-y; Fwpg;gpl;l brhj;Jf;fis cilik bfhLf;f vjph;thjpf;F
2 khj fhybtsp mspf;fg;gLfpwJ ;

9.As observed earlier, recovery of possession has been granted to the plaintiff in O.S.No.56 of 1983 in respect of suit A schedule property which is the absolute and exclusive property of the plaintiff, whereas the schedule B property is a Joint family property and hence, the Trial Court has passed a preliminary decree allotting shares in schedule B property to the respective parties in the suit.

10.Even though the plaintiff while filing the suit in O.S.No.56 of 1983 sought for mesne profits as well as recovery of possession in respect of the suit A schedule property, the relief for mesne profits was negated by the trial Court under the Judgment and Decree and the relief of recovery of possession alone was granted in favour of

plaintiff. The plaintiff has executed the decree for recovery of possession by filing E.P.No.76 of 2010 on the file of the learned II Additional Subordinate Judge, Coimbatore. Insofar as the other part of the decree namely, the preliminary decree for partition in respect of suit B schedule property is concerned, no execution petition has been filed, since final decree has not been passed. As seen from the provisions under Order XXI of the Code of Civil Procedure, there is no bar for execution of the decree which has granted two reliefs and both the reliefs are separable that too when the decree has attained finality and as regards decree for recovery of possession, the same does not require passing of a final decree as the rights of the parties have already been completely determined under the judgment and decree and no further enquiry is required as in the case of preliminary decree for partition. There can be more than one final decree, decree may be partly preliminary and partly final.

11.The Hon'ble Supreme Court in the case of **Balwant Lokhande v. Chandrakant Shanker Lokhande** reported in **(1995) 3 SCC 413** held that final decree may be said to become final in two ways: (i) When the time for appeal has expired without any appeal being filed against the preliminary decree of the matter has been decided by the highest court; (ii) when, as regards the court passing

the decree, the same stands completely disposed of. The relevant portion of the said judgment is extracted hereunder:

" Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court; (ii) when, as regards the court passing the decree, the same stands completely disposed of. It is in the latter sense the word 'decree' is used in Section 2(2) CPC. The appealability of the decree will, therefore, not affect its character as final decree. The final decree merely carries into fulfilment the preliminary decree."

12. In the case on hand, decree for recovery of possession is a final decree which satisfies the requirements as laid down by the Hon'ble Supreme Court in the decision referred to supra and hence, it is an executable decree as it becomes final. Further in the instant case, a decree for recovery of possession in favour of the plaintiff in respect of the suit A schedule property has been passed. No final decree proceedings are required as the relief sought for in the plaint is simpliciter only for recovery of possession of the suit A schedule property as it is the case of the plaintiff in the suit that he is the absolute owner of the suit A schedule property and the defendant is in

possession of the suit A schedule property as a trespasser. Only insofar as the second part of the decree, namely granting of preliminary decree is concerned which pertains to suit schedule B property, final decree proceedings will have to be initiated, since the division of the property amongst the parties by metes and bounds can be finally determined only in the final decree proceeding. While granting the relief of recovery of possession to the decree holder, the decree holder's right as the absolute owner of the suit A schedule property has already been determined under the Judgment and Decree dated 29.07.1986 passed in O.S.No.56 of 1983 and consequently, there is no necessity for further determination of the rights of the parties and hence, the recovery of possession in favour of the decree holder as regards the suit A schedule property is a mere formality and therefore, the executing court is empowered to order delivery of possession to the respondents/decreed holders as per the Judgment and Decree dated 29.07.1986 in O.S.No.56 of 1983 as the recovery of possession decree is severable from the preliminary decree for partition and both are separable.

13.Order XXI CPC which deals with execution of decrees and orders does not bar execution of one of the reliefs granted in the decree to the exclusion of the other. A decree for recovery of

possession is separate and preliminary decree for partition is separate. In respect of decree for recovery of possession, no final decree is required as the rights of the parties have already been determined, whereas in a preliminary decree for partition, the rights of the parties will have to be finally determined by a final decree by division of the properties by metes and bounds. Further in the case on hand, though the relief of mesne profits were sought for by the plaintiff along with the relief for recovery of possession, the Trial Court having negated the claim for mesne profits in respect of suit schedule A property, there is no bar for the decree holder to execute the decree for recovery of possession in respect of suit schedule A property without obtaining a final decree. Order XXI Rule 35 of CPC does not require a final decree to execute a decree for recovery of possession. Order XXI Rule 35 of CPC reads as follows:

"35. Decree for immovable property._ (1) Where a decree is for the delivery of any immovable property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his behalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property.

(2) Where a decree is for the joint possession of immovable property, such possession shall be delivered by affixing a copy of the warrant in some

conspicuous place on the property and proclaiming by beat of drum, or other customary mode, at some convenient place, the substance of the decree.

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other necessary for putting the decree-holder in possession.

14. The respondents /decree holders have followed the procedure as prescribed under Order 21 rule 35 of CPC while filing E.P.No.76 of 2010 on the file of the II Additional Subordinate Judge, Coimbatore and hence, the contention of the petitioners that without obtaining final decree, the decree holders cannot execute the decree in respect of A schedule property is unsustainable. The petitioner has filed this revision under Article 227 of the Constitution of India seeking to strike off the proceedings in E.P.No.76 of 2010 pending on the file of the II Additional Subordinate Judge, Coimbatore only to drag on the proceedings which has attained finality by the dismissal of the appeals filed upto the Hon'ble Supreme Court by the petitioners/Judgment

debtors. The judgment relied upon by the learned counsel for the petitioner reported in **AIR 1995 SC 1211** and **AIR 1963 SC 992** are not applicable to the facts of this case as a final decree is not required to execute a decree for recovery of possession, whereas the judgements cited by the learned counsel for the petitioners referred to supra all pertain to preliminary decree passed in a partition suit where a final decree is required.

15. For the foregoing reasons, there is no merit in this revision, but however, for the delay caused by the petitioners/judgment debtors due to initiating frivolous and vexatious proceedings like the present one, the civil revision petition is dismissed with cost of Rs.10,000/- payable by the petitioners jointly to the respondents. In view of the long pendency of the execution petition, viz., the II Additional Subordinate Judge, Coimbatore, being the executing court in E.P.No.76 of 2010 is directed to pass final orders in the execution petition within a period of four weeks from the date of receipt of a copy of this Order.

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03.07.2019

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Index: Yes/ No
Internet: Yes/No
Speaking Order/Non-speaking Order

ABDUL QUDDHOSE, J.

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To

The IInd Additional Subordinate Judge of Coimbatore.



**A pre-delivery order in
CRP(NPD)No.2799 of 2014
and M.P.No.1 of 2014**

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