

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 22.08.2019

CORAM

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

C.R.P.No.1295 of 2017
and
C.M.P.No.6035 of 2017

Andrew Tennyson Abraham

... Petitioner

Vs.

Daniel Sam
Rep. by its General Power of
Attorney N.Durairaj

.... Respondent

Civil Revision Petition is filed under Section 115 of the Civil Procedure Code, to set aside the fair and decreetal order dated 06.03.2017 made in E.P.No.57 of 2016 in O.S.No.393 of 1989 on the file of the Subordinate Judge, Poonamallee.

For Petitioner : Mr.D.Rajagopal

For Respondent : Mr.R.Ramanlaal

ORDER

This Civil Revision Petition has been filed against the fair and decreetal order dated 06.03.2017 made in E.P.No.57 of 2016 in O.S.No.393 of 1989 on the file of the Subordinate Judge, Poonamallee.

2. The petitioner is the Judgment Debtor in a suit for specific performance. The suit was decreed against the petitioner and the same was confirmed at the level of Honourable Supreme Court. The respondent filed an Execution Petition through his Power of Attorney for execution of the sale deed, in which, the petitioner filed a counter stating that the alleged Power of Attorney was executed only for the purpose of giving evidence. Further, in the previous proceedings, it has been categorically observed by the Trial Judge that the Power of Attorney has not produced the records to recognize him as Power of Attorney and therefore, that petition to recognize him as Power of Attorney was rejected. Likewise, as per Order 3 Rule 2, it is mandatory for the principal to file an affidavit that he has given Power of Attorney and that he should be recognized by

the Court to present the petitions and act on his behalf. Since the mandatory requirement is not followed in terms of Rules 16 and 17 of Civil Rule of Practice, the execution petition suit has to be dismissed.

3. The second point taken by the petitioner is that the Order 21 Rule 34 of Civil Procedure Code mandates that before seeking execution of the sale deed, the draft copy of the same should be served on the Judgment Debtor together with a notice requiring his objections within the time as may be fixed by this Court. Further, if the alteration made by the Judgment Debtor is not accepted, against such an order passed by the Execution Court, the decree holder has the right of appeal under Order 43 Rule 1(i) of Civil Procedure Code.

Order 21 Rule 34 of Civil Procedure Code reads as follows:-

"34. Decree for execution of document, or endorsement of negotiable instrument :

(1) Where a decree is for the execution of a document or for the endorsement of a negotiable instrument and the judgment-debtor neglects or refuses to obey the decree, the decree-holder may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Court.

(2) The Court shall thereupon cause the draft to be served on the judgment-debtor together with a notice requiring his objections (if any) to be made within such time as the Court fixes in this behalf.

(3) Where the judgment-debtor objects to the draft, his objections shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it thinks fit,

(4) The decree-holder shall deliver to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp-paper if a stamp is required by the law for the time being in force; and the Judge or such officer as may be appointed in this behalf shall execute the document so delivered.

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form, namely :-

"C.D. Judge of the Court of

(or as the case may be), for A. B., in a suit by E.F. against A. B.",

and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same.

²²[(6) (a) Where the registration of the document is required under any law for the time being in force, the Court, or such officer of the Court as may be authorised in this behalf by the Court, shall cause the document to be registered in accordance with such law.

(b) Where the registration of the document is not so required, but the decree-holder desires it to be registered, the Court may make such order as it thinks fit.

(c) Where the Court makes any order for the registration of any document, it may make such order as it thinks fit as to the expenses of registration.]"

4. But the Trial Court, without any draft sale deed and without serving the same upon the Judgment Debtor, directly called for the non judicial stamp papers for the purpose of executing sale deed. Since the mandatory procedure is not followed, the order has to be set aside.

5. Per contra, the learned counsel for the respondent would produce an affidavit filed by the respondent, wherein, it is stated that he has appointed Mr.N.Durairaj as his Power of Attorney by executing a Power of Attorney dated 11.01.1991 and further it is stated that the said Power of Attorney is still subsisting.

6. Heard the submissions.

7. Normally, when petitions are filed through the Power of Attorney, it is the usual procedure that the petitioner produces the Power of Attorney and file an affidavit that the same is still subsisting. In the instance case, the records are not called for. However, from the fact that the execution petition has been numbered, it is construed that the execution court being satisfied with the compliance with requirements numbered the petition. As per Rule 17 of Civil Rules of Practice, the Court being satisfied may or may not record the same in the order passed in the petition filed for recognition of the Power of Attorney. It cannot be construed that Power of Attorney was

not recognized due to non recording of the facts. In fact, it is not mandatory to record reasons, but it is enough that the Court is satisfied.

8. Even before this Court, the learned counsel for the respondent produced an affidavit executed before the Notary Public at England.

9. It is well settled that procedure is only a handmaid of law and it will not deprive the substantial rights of the parties. Even assuming this execution petition is dismissed, it only takes some time to present a fresh execution petition following the procedures. As the principal has filed an affidavit, before the Court, which reveals that he has given Power of Attorney to one N.Durairaj on 11.01.1991 and the same is subsisting till date. It shall be construed that the Power of Attorney is entitled to present an execution petition. In such an event, the contention of the learned counsel for the petitioner is on a procedural defect sustainable. However, the Honourable High Court rejected the contention on this aspect and confirmed the decree with second appeal. In view of the matter, instead of wasting the valuable time of the Court, this Court finds that the objection raised by the learned counsel need not be entertained. Therefore, the first point that the petitioner has not complied the Order 3 Rule 2 read with Rule 16 and 17 of Civil Rules of Practice is negatived. The Power of Attorney is entitled to prosecute the execution petition.

10. Insofar as the second limb of argument that the Order is stands vitiated, in view of the non adherence of mandatory requirement under Order 21 Rule 34 of Civil Procedure Code is concerned, from the perusal of the order, the execution court has not called for the draft sale deed and the subsequent requirement of furnishing the copy to the Judgment Debtor calling for his objection was given a go by, this non adherence of the mandatory procedure as contended by the learned counsel for the petitioner vitiates the order passed by the execution court. Since the execution court has not followed the procedures, this Court is of the considered opinion that the order dated 06.03.2017 passed in E.P.No.57 of 2016 in O.S.No.393 of 1989 is not sustainable in law insofar as the procedure not followed as per Order 21 Rule 34(2) of C.P.C alone and the matter is remitted back to the execution court to comply with the Order 21 Rule 34(2) of C.P.C and to dispose of the execution as expeditiously as possible.

11. This Civil Revision Petition is disposed of accordingly.
No costs. Consequently, connected miscellaneous petition is closed.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

To

The Subordinate Judge, Poonamallee.

+1 CC to Mr.D.Rajagopal, Advocate sr 7250.

C.R.P.No.1295 of 2017
and
C.M.P.No.6035 of 2017

VD(CO)
SP(24/02/2020)



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