

IIN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.10.2020

CORAM

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

C.R.P. (NPD) No.33 of 2018
and C.M.P.No.99 of 2018

S.Mohan

... Petitioner

Vs.

Vadivel

... Respondent

Prayer: Civil Revision Petition is filed under Section 115 of the Code of Civil Procedure, to set aside the Order dated 16.08.2017 passed in E.P.No.96 of 2017 in O.S.No.1038 of 2004 on the file of the Principal District Munsif, Cuddalore District allowing the petition in E.P.No.96 of 2017 in O.S.No.1038 of 2004 by allowing this Civil Revision Petition.

For Petitioner : Mr.R.Muralidharan

For Respondent : Mr.V.Balamurugane

ORDER

This matter is taken up for hearing through Video-Conferencing.

The Civil Revision Petition is filed by the plaintiff in O.S.No.1038 of 2004, challenging an order made by the Executing Court in E.P.No.96 of 2017, directing the petitioner herein to execute a document of discharge of the mortgage as per the final decree passed in I.A.No.657 of 2015 in O.S.No.1038 of 2004.

2. The petitioner herein as plaintiff filed a suit for sale on the strength of an assigned mortgage. The original mortgage was dated 26.11.1990 executed by the respondent herein in favour of one Padaleeswaran. The petitioner herein got the mortgage assigned in his favour on 25.09.2002 under a registered instrument and sued upon the same. The said suit came to be decreed after contest on 09.10.2014. The defendant paid up the mortgage money and filed an application in I.A.No.657 of 2015 seeking a final decree in terms of Order 34 Rule 5 of the Code of Civil Procedure Code. The said application came to allowed on 02.08.2016. The Trial Court recorded the

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finding that the entire amount due under the mortgage has been paid while passing a final decree in I.A.No.657 of 2015. Thereafter, the respondent filed an execution petition in E.P.No.96 of 2017, under Order 21 Rule 34, seeking execution of a discharge receipt as per the final decree and for registration of the same.

3. This was resisted by the petitioner herein contending that an application under Order 21 Rule 34 is incompetent at the instance of the defendant in a suit. It was contended that only the decree holder, namely, the plaintiff can invoke the said provision. It was the further contention of the petitioner herein, that the very application under Order 34 Rule 3 is incompetent and the Order dated 02.08.2016 is not a final order or a final decree, as the same was passed suo-moto by the Court. It was also stated that I.A.No.413 of 2017 filed by the petitioner herein seeking to set aside the said Order dated 02.08.2016 made in I.A.No.657 of 2015 was pending.

4. The Executing Court which heard the application concluded that the petition under Order 21 Rule 34 is very much maintainable, in as much

as, the respondent herein, namely, the defendant in the suit would be a decree holder, as far as an application under Order 21 Rule 34 is concerned, since the final decree passed in I.A.No.657 of 2015, directed the petitioner herein to execute documents evidencing discharge of the mortgage. On the said finding, the learned Trial Judge allowed the application, directing execution of documents by the petitioner. The learned Trial Judge also recorded that the application to set aside the order in I.A.No.657 of 2015, namely, I.A.No.413 of 2017 was also dismissed on 16.08.2017, the day on which, the Execution Petition came to be allowed.

5. I have heard Mr.R.Muralidharan, learned counsel appearing for the petitioner and Mr.V.Balamurugane, learned counsel appearing for the respondent.

6. Mr.R.Muralidharan, learned counsel appearing for the petitioner would contend that the order in I.A.No.657 of 2015 is not a final order and therefore, the same cannot be put in execution. He would also add that under Order 21 Rule 34, it is only the decree holder, who can file an

application for execution and not the Judgment Debtor in a mortgage suit. It is his further contention that the amount directed to be paid under the preliminary decree was not paid fully and there remains some balance. Therefore, the Executing Court was not justified in allowing the Execution Petition. Another contention is also raised by the learned counsel to the effect that the prayer in the execution petition seeking execution of the receipt and registration thereof is wholly unnecessary, as an order of the Court need not be registered. He would also rely upon the Judgment of the Hon'ble Supreme Court in *Mohammade Yusuf & Others v. Rajkumar & Others*, reported in *2020 (2) LW 477*, in support of his last submission.

7. Contending contra, Mr.V.Balamurugane, learned counsel appearing for the respondent, would submit that none of the contentions raised by the counsel for the petitioner deserve acceptance. He would point out that the preliminary decree was passed on 09.10.2014. The entire amount due under the mortgage was deposited into Court and an application in I.A.No.657 of 2015 was filed. The Trial Court while disposing of I.A.No.657 of 2015, recorded a finding that the entire mortgage money has

been paid and the debt stood discharged. The said order has become final. Therefore, the petitioner herein cannot be heard to contend that the entire mortgage amount has not been paid and there remains some balance. He would also point out that as per the language of Order 21 Rule 34, a decree holder can apply for seeking execution of documents.

8. Drawing my attention to Order 34 Rule 5 of the Code of Civil Procedure, Mr.V.Balamurugane, learned counsel would contend that once the mortgage money is deposited into Court and a final decree is passed by the Court, directing the mortgagee to execute documents in discharge of the mortgage, the mortgagor becomes a decree holder and the mortgagee will be a Judgment Debtor and therefore, an application under Order 21 Rule 34 by the mortgagor seeking execution of discharge documents is perfectly maintainable.

9. As regards the Judgment of the Hon'ble Supreme Court, Mr.V.Balamurugane, learned counsel would submit that the same would not apply to the facts on the case, because, the Hon'ble Supreme Court was

concerned with registration of decrees of the Court and not an instrument executed pursuant to a decree passed by the Court. On the submission that the mortgage money has not been deposited, Mr.V.Balamurugane, learned counsel for the respondent, would contend that the application to set aside the Order in I.A. No.657 of 2015, namely, I.A.No.413 of 2017 has also been dismissed and the same has not been challenged.

10. I have considered the rival submissions.

11. As regards the first point raised by the learned counsel for the petitioner, I find that the records militate against his submissions. As already pointed out, a preliminary decree came to be passed on 09.10.2014. After depositing the monies due under the mortgage, the respondent herein filed I.A.No.657 of 2015 under Order 34 Rule 3 seeking a final decree to be passed. It appears that in the said application a calculation memo was filed by the petitioner herein on 10.06.2016 showing the money due under the mortgage as Rs.54,237.75 as on 09.06.2016. The Court found that the Judgment Debtor, namely, the respondent herein, had deposited a sum of

Rs.54,628/- to the credit of the suit. Therefore, the Court recorded that the Judgment Debtor has deposited something more than what is actually due under the mortgage. After rendering such a factual finding, the Trial Court had passed a final decree, directing the mortgagee to execute necessary documents in discharge of the mortgage. It is this final decree passed on 02.08.2016 which is sought to be put in execution.

12. Order 34 Rule 5 of the Code of Civil Procedure, reads as follows :

“5. Final decree in suit for sale: (1) Where, on or before the day fixed or at any time before the confirmation of a sale made in pursuance of a final decree passed under sub-rule (3) of this rule, the defendant makes payment into Court of all amounts due from him under sub-rule (1) of rule 4, the Court shall, on application made by the defendant in this behalf, pass a final decree or, if such decree has been passed, an order-

(a) ordering the plaintiff to deliver up the

documents referred to in the preliminary decree,

and, if necessary-

(b) ordering him to transfer the mortgaged property as directed in the said decree,

and, also, if necessary,-

(c) ordering him to put the defendant in possession of the property.

(2) Where the mortgaged property or part thereof has been sold in pursuance of a decree passed under sub-rule (3) of this rule, the Court shall not pass an order under sub-rule (1) of this rule, unless the defendant, in addition to the amount mentioned in sub-rule (1), deposits in Court for payment to the purchaser a sum equal to five per cent. of the amount of the purchase-money paid into Court by the purchaser.

Where such deposit has been made, the

purchaser shall be entitled to an order for repayment of the amount of the purchase-money paid into Court by him, together with a sum equal to five per cent. thereof.

(3) Where payment in accordance with sub-rule (1) has not been made, the Court shall, on application made by the plaintiff in this behalf, pass a final decree directing that the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale be dealt with in the manner provided in sub-rule (1) of rule 4.”

13. It could be seen that the order in I.A.No.657 of 2015 is one passed under Order 34 Rule 5, directing the mortgagee to execute certain documents. Therefore, insofar as the final decree, namely, the order passed in I.A.No.657 of 2015, the petitioner herein, who is the mortgagee becomes the Judgment Debtor and the respondent herein/the mortgagor becomes the decree holder. Once an order is passed directing the mortgagee to execute documents in discharge of the mortgage and delivery of the documents relating to the property, needless to say that the mortgagor becomes a decree

holder and the mortgagee becomes the judgment debtor. Order 21 Rule 34 of the code of Civil Procedure, enables execution of a decree which directs execution of documents by the parties. Therefore, there is nothing wrong in the mortgagor filing an application under Order 21 Rule 34 seeking execution of the decree.

14. Though the submission of Mr. R.Muralidharan, learned counsel, that Order 21 Rule 34 could be invoked only by the decree holder, namely, the plaintiff in the suit appears to be very attractive, but I do not think such a restricted interpretation placed by him, which would render the provision nugatory, could be accepted by the Court. I am therefore of the opinion that the Execution Petition was very much maintainable and the Executing Court was right in allowing the application, directing execution of the documents by the petitioner herein.

15. I am also in agreement with the submission of Mr.V.Balamurugane, learned counsel for the respondent, that the Judgment of the Hon'ble Supreme Court in *Mohammade Yusuf & Others v.* 11/14

Rajkumar & Others, reported in **2020 (2) LW 477**, would not apply to the facts of this case. The Hon'ble Supreme Court was called upon to pronounce on the requirement of registration of a decree or order of a compromise decree passed by a Court. Here, we are not on the question of registration of a decree. What is sought to be registered is a document that is to be executed by a party pursuant to a decree. Therefore, I do not think the Judgment of the Hon'ble Supreme Court referred to by the learned counsel for the petitioner would apply to the facts of this case.

16. As regards the dispute regarding the quantum, I do not think I can venture into the question, since the Revision itself is against an order passed in execution proceedings. The Executing Court cannot go behind the decree and equally, I cannot sitting in a revision against an order made by the Executing Court, go behind a decree and pronounce on the validity or otherwise of the final decree passed in I.A.No.657 of 2015. It is also seen from the records that I.A.No.413 of 2017 filed by the petitioner herein seeking to set aside the order in I.A.No.657 of 2015 dated 02.08.2016 has also been dismissed and no further proceedings have been taken,

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questioning the said dismissal. Thus, the order in I.A.No.657 of 2015 has become final.

17. I therefore do not see any error or material irregularity in the order of the Trial Court in order to enable interference at my hands. This Civil Revision Petition therefore fails and it is accordingly **dismissed**. No costs. Consequently, connected miscellaneous petition is closed.

16.10.2020

raja/jv
Index : yes
Internet : yes
Speaking order

To

1. The Principal District Munsif,
Cuddalore.
2. The Section Officer,
V.R.Section, High Court of Madras.

C.R.P. (NPD) No.33 of 2018
and C.M.P.No.99 of 2018

R.SUBRAMANIAN, J.

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