

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.01.2021

Pronounced on : 27.01.2021

CORAM:

THE HONOURABLE MR.JUSTICE G.K.ILANTHIRAIYAN

C.R.P.(N.P.D).Nos.3343 of 2014
and M.P.No.1 of 2014

N.Kesava Reddiar

...Petitioner

Vs

M.Anandakrishna Reddiar

...Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India to restore the order of dismissal of E.P.No.105 of 2004 in O.S.No.623 of 1985 dated 10.10.2011 which was struck off later by the lower Court.

For Petitioner : Mr.V.Lakshminarayanan
for Mr.C.Prabakaran

For Respondent : Ms.Chitra Sampath,
Senior Counsel for
Mr.D.Ravichander

ORDER

The Civil Revision Petition is directed to restore the order of dismissal of E.P.No.105 of 2004 in O.S.No.623 of 1985 dated 10.10.2011 thereby, which was struck off later by the execution Court.

2.The petitioner is the defendant in the suit filed by the respondent for specific performance in O.S.No.623 of 1985. The suit was decreed and the respondent filed execution petition in I.A.No.105 of 2004 for executing the decree. Accordingly sale deed was executed in his favour and delivery has been ordered. When the Court Amin went to effect the delivery of possession, he reported that the property stands in the name of one Narayana Reddy, who is the father of the petitioner herein. Further it is stated that the description of the property is not tallied with the Court papers. Thereafter, the execution petition was posted for amendment of decree. Aggrieved by the same, the petitioner herein has filed the Civil Revision Petition in C.R.P.No.2876 of 2009 before this Court. In the meanwhile the petitioner filed copy application in Diary Nos.346 and 347 of 2014 seeking certified copy of diary extract, which were returned by order dated 10.01.2014. Aggrieved by the same, the petitioner has preferred Civil

Revision Petitions in C.R.P.Nos.1423 and 1424 of 2014 and thus by order dated 17.04.2014, directed the Principal Sub Court, Puducherry to comply with the copy application and issue certified copy within a period of 15 days.

3.On receipt of the diary extract, the petitioner found that on 10.10.2011, the Court Amin made an endorsement in E.P.No.105 of 2004 as that the property stands in the name of Judgment debtor's father's name. Hence, the execution petition is dismissed at that stage. Thereafter, it was corrected as "for steps call on 03.11.2011. Notice to the respondent by 10.11.2011".

4.The learned counsel for the petitioner would submit that the Court below originally dismissed the execution petition by an order dated 10.10.2011 and as such it is not permissible to strike off the order which has already been passed. It is also seen from the records that the execution petition was repeatedly adjourned for taking steps. Therefore, the trial Court has rightly dismissed the execution proceedings and thereafter struck off the order and overwritten on the same, which is not permissible under law. He also produced the B diary extract and compared with A diary

extract for the order dated 10.10.2011. Only because of the said order dated 10.10.2011, the petitioner was in bonafide impression that the execution proceedings was dismissed. Therefore, he withdrew the Civil Revision Petition in C.R.P.No.2876 of 2009 before this Court on 20.10.2011.

5.The learned counsel for the petitioner also submitted that the description of the property mentioned in the suit schedule is not clear and the extent of the property completely differs and further the said property stands in the petitioner's father's name. Therefore, the Court Amin returned his warrant, issued to effect the delivery of possession on 18.10.2004. Even according to the Court Amin, the sale deed executed in favour of the respondent as far as the property comprised in CAD/399/129/01 ad measuring 1 Kani and 72 Kuzhes. Whereas the A register maintained by the VAO for the very same property mentioned as Cadestor No.399pt R.S.No.129/1, 129/2A. Therefore, the Court Amin could not effect the delivery of possession to the respondent and returned the warrant.

6.Per contra, the learned Senior Counsel, Ms.Chithra Sampath, submitted that the respondent filed the suit for specific performance in the year 1985. The suit was decreed in his favour and on the strength of decree

he filed execution proceedings in E.P.No.105 of 2004. Though sale deed was executed in his favour, he could not be able to take possession of the property for the past 16 years, from the date of order of execution. She further submitted that one way or other, the petitioner filed the Civil Revision Petitions repeatedly and stalled the entire execution proceedings. When the petitioner failed upto this Court, by way of appeal suit in A.S.No.385 of 1988, thereby confirming the Judgment and Decree passed in O.S.No.623 of 1985 in favour of the respondent herein, now challenging the execution proceedings. Further it is submitted that in fact the respondent entered into a sale agreement on 06.06.1985, in respect of the suit schedule property. Thereafter the petitioner contended that in the description of the property cadestor No.399 alone mentioned at the time of execution of sale deed. Thereafter the cadestor system was abolished in Puduchery and introduced Survey No system, from the year 1966 to 1973. The said contention was rightly rejected by the execution Court and ordered delivery. Even then, delivery could not be effected, till today. Therefore, she sought for dismissal of the Civil Revision Petition.

7.Heard both sides and perused the materials on record.

8.The respondent filed a suit for specific performance as against the petitioner and the same was decreed in O.S.No.623 of 1985. The sale deed was executed in favour of the respondent and in the execution proceedings, E.P.No.105 of 2004. Thereafter the execution proceedings was repeatedly adjourned for taking steps, in respect of effecting the delivery and by order dated 24.07.2009, delivery was ordered. Consequently, the Court Amin returned the warrant of delivery for the reason that the description of property differs from the sale deed executed in favour of the respondent herein. On 10.10.2011, the execution petition was dismissed at that stage for the reason that the Court Amin made an endorsement as property stands in the name of the petitioner's father. On perusal of the B diary as well as the A diary extract, the Court below overwritten on the order of dismissal and adjourned the matter to be listed on 03.11.2011 for taking steps.

9.In fact the petitioner sought for certified copy of the B diary extract and the same was rejected by the Court below. Aggrieved by the same, the petitioner preferred revision petition in C.R.P.Nos.1423 and 1424 of 2014 and by order dated 10.01.2014, this Court directed the Court below

to apply for copy application and issue orders within a period of 15 days from the date of receipt of a copy of this order. Thereafter the petitioner was provided with the certified copy of the B diary extract of the orders passed in the execution proceedings E.P.No.105 of 2004. The learned counsel for the petitioner relied upon the following Judgments

(i) In the case of ***Shafiqur Rehman Khan and Another Vs. Mohammad Jahan Begum and Others*** reported in (1982) 2 SCC 456, relevant paragraph is extracted hereunder:-

"2. We set aside the judgment of the High Court dated June 30, 1980 and restore that of the learned 1st Additional District Judge, Lucknow dated April 19, 1979, with the following modification:

"The executing court will determine, with the help of Ex.3 and such other evidence which the parties may adduce, whether the decree-holders have established satisfactorily the identity of the property in regard to which they have obtained the decree under execution. If the identity of the property is established, but not otherwise, the decree will be executed and the decreeholders will be put in possession of the property in accordance with law. It will, of course, be open to the judgment-debtors to show that the

decree is incapable of execution for the reason that the property cannot be properly identified."

The Hon'ble Supreme Court of India has held that if the property is not identified, the executing Court has to determine the identity of the property.

(ii) In the case of ***Alagasundaram Pillai Vs. Pichuvier*** reported in ***Vol III Madras Series 899***, relevant paragraph is here:-

"(1) that proceedings under rule 97 or rule 100 of Order XXI of the Code of Civil Procedure are proceedings in execution and section 141 of the Code is, therefore, not applicable to such proceedings (unless they also fall within Section 47), and in consequence the provisions of Order IX do not apply to them; and (2) that the Court has no inherent power to set aside an order of dismissal for default or an order passed ex parte in such proceedings, on sufficient cause being shown."

(iii) Judgment of this Court made in ***C.R.P.(NPD).No.1204 of 2007*** dated ***12.07.2007***, relevant paragraph is hereunder:-

"5.The original description of property given in the plaint, even then appeared in the

decree. While on the earlier occasion, the Court Amin went to the place, he could not identify the property. Now, the respondent without seeking amendment of the decree in respect of the description of property, has filed the E.P. giving the description as found in the Commissioner's report. So long as the plan and report of the Commissioner were not found as part and parcel of the decree, the same cannot be given effect to. Hence, the order of the lower Court is set aside. The respondent/decree holder is given liberty to take steps for amendment of the decree so as to enable him to get delivery of possession as one decreed earlier in the suit."

(iv) Judgment of this Court made in **C.R.P.(NPD).No.870 of 2007** dated **03.01.2020**, relevant paragraphs are reproduced hereunder:-

"5.Now, the only issue that arises for consideration is identification of the property ? For delivery, the Amin has expressed his inability to identify the suit property and the Court has ordered for the assistance along with delivery as identified by the surveyor. At this juncture, it is to be stated that in the event of any error in identification of the property by the surveyor, the interest of the petitioner will be prejudiced.

6. Therefore, the order passed by the trial Court is set aside and the Civil Revision Petition is allowed to the limited extent that the trial Court is directed to appoint the surveyor within a period of two weeks from the date of receipt of a copy of this order and thereafter, the Surveyor so appointed by the trial Court and Court Amin shall jointly inspect and identify the property within a further period of three weeks thereafter and shall file a Joint Report before the Execution Court within a further period of four weeks and an opportunity must be given to the petitioner herein to file objection as to the identification of the property before the execution of the delivery."

10. In the above cited Judgment, this Court has held that when the identity of the property is in dispute, the decree holder necessarily has to amend the decree accordingly. Further it is held that the surveyor may be appointed and he may be accompanied by the Court Amin to inspect and identify the property.

11. In the case on hand, on perusal of A and B diary extracts clearly shows that the execution proceedings E.P.No.105 of 2004 was dismissed on 10.10.2011. Thereafter the Court below corrected the same for

taking steps and adjourned the matter to 03.11.2011. It is not permissible under law. Further, the Court Amin made an endorsement and returned the warrant of delivery of possession in respect of the suit property, for the reason that the description of the property differs and also property stands in the name of the petitioner's father. Considering those aspects, the respondent is directed to amend the decree passed in O.S.No.623 of 1985 and thereafter file a fresh execution proceedings as against the petitioner.

12. Accordingly, the Civil Revision Petition is ordered. The trial Court is directed to consider the petition for amendment of decree, if filed by the respondent herein, within a period of three months from the date of receipt of a copy of this order and thereafter the respondent is at liberty to file fresh execution proceedings for delivery of possession of the suit schedule property. No costs. Consequently connected miscellaneous petition is closed.

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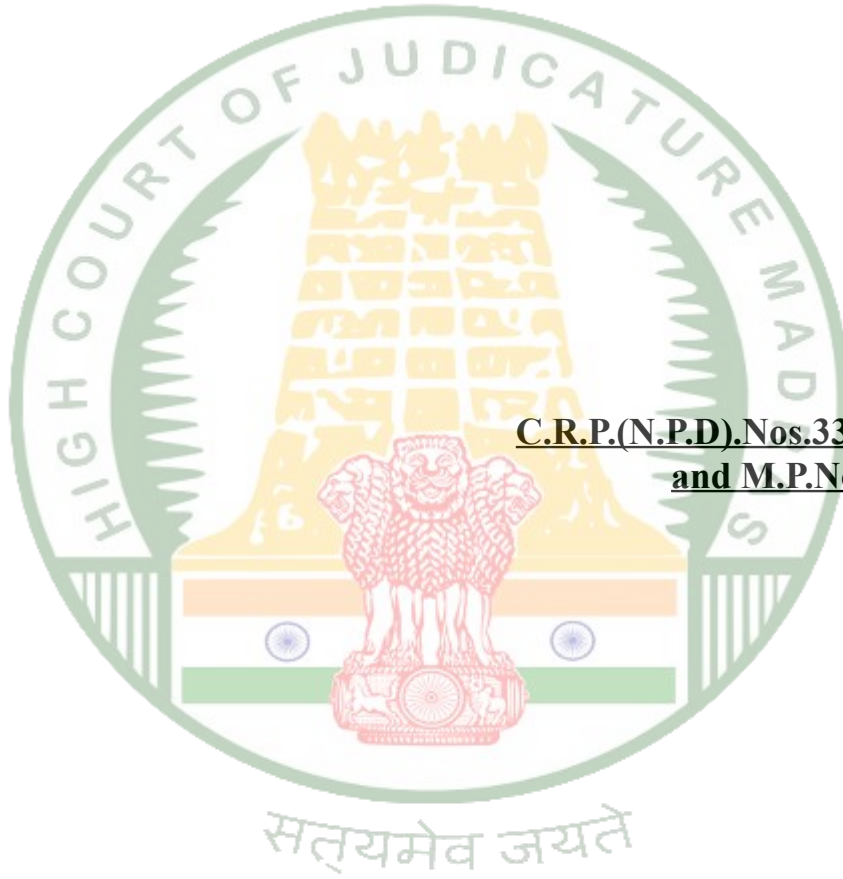
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To
The Principal Sub Court, Puducherry

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C.R.P.(N.P.D).Nos.3343 of 2014

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