



CRP.(NPD)No.1211 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 08.08.2022

PRONOUNCED ON : 12.08.2022

CORAM:

THE HONOURABLE MR. JUSTICE SATHI KUMAR SUKUMARA

KURUP

CRP.(NPD).No.1211 of 2020

and

CMP.No.6550 of 2020

Kannan

...Petitioner

-Vs-

Senthamarai

... Respondent

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, to set aside the fair and decreetal order dated 06.12.2019 in E.A.No.102 of 2019 in E.A.No.79 of 2019 in E.P.No.111 of 2010 in O.S.No.281 of 2001 on the file of the Learned Principal District Munsif Court, Ulundurpet.



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For Petitioner : Mr.T.Gandhi

For Respondent : Mr.M.Himavanth

ORDER

This petition had been filed to set aside the fair order and decreetal order dated 06.12.2019 in E.A.No.102 of 2019 in E.A.No.79 of 2019 in E.P.No.111 of 2010 in O.S.No.281 of 2001 on the file of the Learned Principal District Munsif Court, Ulundurpet.

2. The Judgment Debtor in E.P.No.111 of 2010 had filed the Civil Revision Petition under Section 115 of the Code of Civil Procedure, seeking to set aside the order of dismissal of the petition filed by the Revision Petitioner in I.A.No.102 of 2019 in E.A.No.79 of 2019 in E.P.No.111 of 2010 in O.S.No.281 of 2001 under Section 47 of the Civil Procedure Code, passed by the Learned Principal District Munsif Court, Ulundurpet.

3. It is the submission of the Learned Counsel for the Petitioner that the decree for the suit property states the boundaries and it is not clear in the extent. Therefore, the decree is inexecutable. Therefore, the Petitioner had filed a



petition under Section 47 of CPC which is to be considered as a petition under Order 7 Rule 11 of CPC seeking rejection of the plaint, where, the same principle applies to the Section 47 of CPC. In one place, the Decree Holder had shown the extent of the property as 1 Are, which is equivalent to 2.48 cents. In the same schedule, the extent of the property has been shown as 58 feet East West and 53 feet North South which comes to 3074 sq.ft., again in the same schedule the extent is shown as 9 sq.mtr or 27 sq.ft. The description of the property with respect to the extent given in the schedule largely varies from one place to another place. Unless the description of the extent is correctly ascertained, the decree would become incapable of execution.

4. The Learned Principal District Munsif Court, Ulundurpet, even after hearing the submissions, had dismissed the E.A.No.102 of 2019 dated 06.12.2019.

5. The Learned Counsel for the Respondent submitted that the Respondent is the Decree Holder, who had filed the Execution Petition. The attempt of the Judgment Debtor seeking dismissal of the Execution Petition as



inexecutable is found unacceptable and unreasonable as per Section 47 of CPC.

Already the Judgment Debtor contested in the suit as the Defendant. He cannot be permitted to agitate very same right in the Execution Petition under Section 47 of CPC to claim that the Execution Petition is inexecutable as the decree is not clear in extent of the land.

6. It is a well settled principle that when there is a dispute regarding the extent in the Civil Court's case, the principle of “the boundaries prevail over the extent.” The decree is clear regarding the four side boundaries and there is no dispute with regard to the boundaries. In the light of the above discussion, the decree is acceptable and executable. The dismissal of the E.A.No.102 of 2019 contested by the Judgment Debtor is justified. This Revision Petition is not maintainable and is to be dismissed.

7. On consideration of the rival submissions, the submission of the Learned Counsel for the Revision Petitioner cannot at all be accepted. It is the acceptable fact that, in cases where there are dispute regarding the extent, boundaries prevail over the extent. Therefore, if the four side boundaries are clear,



the Execution Court can execute the decree. If there is no such property on the ground, then it is for the Executing Court to pass appropriate orders. The Revision Petition is found unacceptable and the reasons put forth by the Learned Counsel for the Revision Petitioner are not acceptable, in the light of the principles governing exercise of discretion as per Section 115 of Code of Civil Procedure. Therefore, the submission made by the Learned Counsel for the Petitioner is rejected.

8. The Learned Counsel for the Respondent relied on the rulings in support of his contention in the following Judgments:

1) Judgment of High Court in ***Karunakaran and others Vs. Senthamari***, in ***S.A.No.909 of 2011 dated 28.09.2011***, the relevant portion at para No.9, is extracted hereunder:-

“9. It is the case of the respondent/ plaintiff that under Ex.A1 the property was assigned by the Government to him and ever since the date of assignment he is in possession and enjoyment of the property. It is also alleged that the appellants challenged the assignment by filing before the



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Revenue Divisional Officer and that was also dismissed. Though the respondent/ plaintiff did not produce the order passed by the Revenue Divisional Officer dismissing the appeal filed by the father of the appellants 1 and 2 challenging the order Ex.A1, Ex.A1 would prove that the suit property was assigned by the Government in favour of the respondent/ plaintiff and Exs. A4, A5 and A6 would also prove that the respondent/ plaintiff is in possession of the suit property by paying the house tax. The objection of the appellants was that in respect of the same property O.S.No.833 of 1995 was filed by the respondent/ plaintiff against Periyasamy and Subburayalu who are the predecessor in title of the appellants and that suit was allowed to be dismissed for non-prosecution and the application was filed under Order 9 Rule 9 of CPC to restore the same and the same was also dismissed as evidenced by Exs.B3 and B4 and therefore the suit is barred under Order 9 Rule 9 of CPC. No doubt as per Order 9 Rule 9 of CPC, When a suit was dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. Under Order 9 Rule 8 of CPC, Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed. It is seen from Exs.B3 and B4, O.S.No.833 of 1995 was dismissed due to the default of the plaintiff in appearing



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before the Court and application was filed to restore the suit and the same was also dismissed. Further, it is stated by the appellants in Para 5 of the written statement that when the suit was posted for hearing one of the defendants Periyasamy died and application was filed to implead the appellants 1 to 3 and others as Legal Representatives of the deceased Periyasamy and that application was also dismissed and thereafter O.S.No.833 of 1995 was dismissed. Therefore, it is not made clear whether O.S.No.833 of 1995 was dismissed for non-prosecution or was dismissed as abated. Under Order 9 Rule 8 of CPC only when the suit was dismissed due to the absence of the plaintiff and when the defendant appeared and in that circumstances, the Court dismissed the suit for non-prosecution, a fresh suit is prohibited under Order 9 Rule 9 of CPC, in respect of the same cause of action. Therefore, in the absence of any proof that earlier suit O.S.No.833 of 1995 and the present suit are based on the same cause of action the bar under Order 9 Rule 9 of CPC will not come into effect. Admittedly, the plaint in O.S.No.833 of 1995 was not marked by the appellants to prove that O.S.No.833 of 1995 was filed on the same cause of action as stated in the present suit. Therefore, in the absence of any proof that the present suit was filed on the same cause of action as stated in the suit O.S.No.833 of 1995 the bar under Order 9 Rule 9 of CPC will not come into operation, even assuming that



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the earlier suit was dismissed for non-prosecution by the plaintiff after the appearance of the defendants. Hence, the substantial question of law No.1 is answered against the appellants.

2) Judgment of the Hon'ble Supreme Court in ***Rahul S.Shah Vs. Jinendra Kumar Gandhi and Ors.*** reported in ***AIR 2021 SCC 2161***, the relevant portion at para No.42, is extracted hereunder:

“....10. The Court exercising jurisdiction under Section 47 or under Order XXI of CPC, must not issue notice on an application of third-party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining any such application(s) that has already been considered by the Court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.”



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9. In the light of the above rulings cited by the Learned Counsel for the Respondent, the submission of the Learned Counsel for the Respondent is accepted and the submission of the Learned Counsel for the Petitioner is rejected.

In the result, **this Civil Revision Petition is dismissed.** No costs.
Consequently, connected Miscellaneous Petition is closed.

12.08.2022

Index:Yes/No
Internet:Yes/No
dna

To

The Principle District Munsif Court, Ulundurpet.



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SATHI KUMAR SUKUMARA KURUP,J.,

dna

**Pre-Delivery Order made in
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