



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.01.2022

CORAM:

THE HONOURABLE MS. JUSTICE P.T.ASHA

C.R.P. (NPD) (MD) No.1797 of 2012

and

M.P. (MD) No.1 of 2012

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Kanagaraj

.. Petitioner

-vs-

A.Lalitha

.. Respondent

Prayer :- Petition filed under Section 115 Civil Procedure Code to set aside the order passed in E.P.No.57 of 2010 on the file of the Principal District Munsif, Kuzhithurai dated 08.07.2011.

For Petitioner : Mr.C.K.M.Appaji

For Respondent : Mr.K.N.Thampi

ORDER

This revision petition is filed challenging the order dated 08.07.2011 in E.P.No.57 of 2010 passed by the learned Principal District Munsif, Kuzhithurai, directing delivery of possession to the respondent/plaintiff.

2. The facts in brief are as follows:-

2.1. The respondent/plaintiff had filed a suit in O.S.No.15 of 2005 on the file of the learned Principal District Munsif, Kuzhithurai for specific performance and an ex-parte decree came to be passed on 17.08.2006. The respondent herein had filed E.P.No.125 of 2008 for having the sale deed executed in his favour and a sale deed had also been executed on 24.11.2009. Thereafter, the respondent had filed E.P.No.57 of 2010 seeking delivery of possession of the property subject matter of the suit and the subject matter of the sale deed. The petitioner had filed a counter *inter alia* contending that he had taken steps to set aside the ex-parte decree along with the condone delay application. At the time of filing of the counter, the application had not been numbered. The revision petitioner further contended that he had never executed an agreement of sale with an intent to sell the property, but was only executed by way of security loan borrowed for a sum of Rs.20,000/-. It was also contended that the entire loan was paid with interest, but the plaintiff had refused to cancel the agreement of sale and had proceeded to file the suit in



3. The learned Principal District Munsif, Kuzhithurai, after hearing both parties, ordered delivery by her order dated 08.07.2011. Challenging the same, the revision petitioner is before this Court.

4. The only argument advanced by Mr.C.K.M.Appaji, learned counsel appearing on behalf of the revision petitioner is that the execution petition has been filed invoking the provisions of Order XXI Rule 36 Civil Procedure Code and therefore, the order directing delivery is *per se* without jurisdiction. He would rely upon the provisions of Order XXI Rule 36, which would read as follows:-

"Order XXI Rule 36:- Decree for delivery of immovable property when in occupancy of tenant.- Where a decree is for the delivery of any immovable property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to relinquish such occupancy, the Court shall order delivery to be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property."

5. He would further contend that a suit for specific performance can be executed only by invoking the provisions of Order XXI Rule 32. He would further argue that under the provisions of Rule 36, physical delivery cannot be effected and only a copy of the warrant can be affixed on a conspicuous place of the property proclaiming to the occupation, the substance of the decree. He would further submit that this rule applies only to tenants and other persons, who are entitled to occupy the same and would not apply to the judgment debtor.

6. It has been time and again held by the Hon'ble Supreme Court as well as by this Court that a mere mentioning of an incorrect provision will not be fatal to the application, if the power is available to the Court to pass an order. If such a strict interpretation is taken, then a person, who has obtained a decree will not be in a position to enjoy the fruits of his decree. The provisions of Order XXI Rule 35 provides the procedure for executing the decree with reference to the delivery to be effected in the case of an immovable property.

7. The learned Principal District Munsif, Kuzhithurai has exercised this right, which is available to her under the provisions of Order XXI Rule 35. Further, this plea has not been raised by the petitioner in his counter before the executing



court. It is for the first time that such a defence has been taken before this Court. Had such a defence be taken before the trial Court, the decree holder could have rectified the provisions of law. Such a contention has not been raised before the executing court.

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8. Considering the fact that the application to set aside the ex-parte decree has been dismissed and has attained finality by virtue of the order in C.M.A.No.4 of 2013, the defendant cannot question the execution of the decree. Therefore, I do not find any infirmity in the order passed by the learned Principal District Munsif, Kuzhithurai in E.P.No.57 of 2010 and consequently, the Civil Revision Petition stands dismissed. Further, the revisions filed challenging the orders to set aside the ex-parte decree and to condone the delay of 3 years and 3 months in filing the petition to set aside the ex-parte decree have also been dismissed by this Court in C.R.P.(PD) (MD) Nos.1515 and 1516 of 2013 by order dated 20.01.2022. In these circumstances, the defendant-judgment debtor cannot question the order passed by the executing court. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2022

Sub Assistant Registrar(CS)

Note:- In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the Advocate / litigant concerned.

To

The Principal District Munsif,
Kuzhithurai.

+1 CC to M/s.C.K.M.APPAJI, Advocate (SR-2266[F] dated 24/01/2022)

C.R.P. (NPD) (MD) No.1797 of 2012

Dated: 20.01.2022