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C.R.P.No.1450 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 21.09.2023

CORAM :

THE HONOURABLE MR.JUSTICE V. LAKSHMINARAYANAN

C.R.P.No.1450 of 2021
and
C.M.P.No.11343 of 2021

Allikan (Died)

1.C.Subramani
2.C.Kishtan
3.G.Raja
4.Murugesan

.. Petitioners

VS

1.K.Subramani
2.M.Subramani
C.Natesa Naiker
Mannasiyammal
3.Govindammal
4.Sushilammal
5.Valliammal
6.Salammal
7.Savithiri
8.Sangunthala

.. Respondents

Petition filed under Section 115 of CPC against the order and decretal order dated 21.04.2021 passed in CMA No.3 of 2017 by learned Subordinate Judge at Tiruvallur confirming the order and decretal order dated 06.01.2017 passed in EA Sr.No.2807 of 2016 by learned District Munsif, Tiruvallur and to restore E.A.No.1 of 2012 in EP No.62 of 2008 in OS No.331 of 1985 –



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CH.D.C.A.S.No.126/90 – High Court S.A.905/1991, on the file of District Munsif, Tiruvallur by allowing the Civil Revision Petition.

For Petitioners : Mr.N.Nagu Sah
For Respondents : Mr.Krishnakumar
for Mr.V.Janarthanan
for R1, R2
R3 to R8 – No appearance

ORDER

O.S.No.331 of 1985 is a suit for partition filed inter se the respondent nos. 1 and 2. The said partition suit ended in a compromise decree in S.A.No.905 of 1991 on the file of this Court. Putting that compromise decree into execution, E.P.No.62 of 2008 was presented. In E.P.No.62 of 2008, delivery was recorded and the EP was terminated.

2. In the meantime, an application was filed in E.A.No.1 of 2012 under Order 21 Rule 99 CPC by one Allikan. The said Allikan died pending the proceedings and his legal heirs were impleaded as parties to the proceeding. In E.A.No.1 of 2012, which is a petition filed under Order 21 Rule 99 CPC, evidence was being recorded. Mr.Nagu Sha, the learned counsel appearing for the petitioner would submit that during the relevant time, there was no Presiding Officer



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at the District Munsif Court at Tiruvallur and an in-charge officer used to come from Ponneri for the purpose of recording evidence.

3. Since there was no judicial officer, the petitioner / obstructor was not in a position to mark the documents. On 20.10.2016, the in-charge Judicial Officer, took charge of the Court and passed the following order:-

"20.10.2016:

Despite suff. chances petr not turned up for Marking of documents. This petr is pending for marking of docts from 10.1.2014. No progress shown by the petr, Hence this petition is dismissed for default. No cost."

4. E.A.No.1 of 2012 will have to be tried as a suit in terms of Order 21 Rule 101 of CPC. This is because, prior to amendment Act 104 of 1970, it contemplated filing of a suit by a third party who staked a claim of the property which had been taken possession of by the decree-holder. However, in its wisdom the Parliament amended Order 21 Rules 99, 101 & 104 of the CPC. As per the amendment made to Order 21 Rule 101 CPC, a third party who is dispossessed pursuant to execution of decree is not entitled to file a separate suit but will necessarily have to obstruct the decree in terms of Order 21 Rule 99 CPC. That is what has been done in the present case by filing E.A.No.1 of 2012.



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5. When E.A.No.1 of 2012 is being tried as a suit, the same procedure that is followed in a suit ought to have been adopted, as nearly as possible. If a suit is posted for marking of documents and the plaintiff does not turn up for marking of evidence, the procedure that is followed, at least in this State, is that the evidence of the plaintiff will be closed and the matter will be posted for the evidence of the defendant. Instead of doing so in this case, the Court dismissed the petition itself. Such a course of action will have a deleterious effect on the right, title and interest of the parties before the Court.

6. It is pertinent to point out the power under Order 9 Rule 9 CPC can be exercised only when the suit is called on for hearing and on the date the suit is posted for marking of documents. Such a stage had yet not been arrived. Instead of doing so, in this case, though E.A.No. 1 of 2012 should be tried as a suit, the learned Judge, has dismissed the petition itself.

7. Immediately, an application was filed in E.A.SR.No.2807 of 2016 under Order 21 Rule 106 of CPC. This petition was dismissed by the learned trial Judge stating that as EP itself has



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been terminated, the application to restore the EA is not maintainable. On appeal, the said order has been confirmed against which, the present revision is before me.

8. Let us analyse the provisions relating to obstruction. An application under Order 21 Rule 97 CPC filed by the decree-holder or by an auction purchaser to remove obstructions. No third party can maintain a petition under Order 21 Rule 97 CPC. This is in terms of the provision itself. An application under Order 21 Rule 99 CPC can be filed only by a third party. The termination of the EP is not the *terminus ad quo*, for the purpose of filing an application under Order 21 Rule 99 CPC. The cause of action is that pursuant to the warrant of delivery that has been issued by the Court, the third party has been dispossessed. An application under Order 21 Rule 99 CPC deals with right, title and interest of the third party to the suit property. An order passed under Order 21 Rule 101 CPC is a decree for the purpose of Order 21 Rule 104 CPC. This is yet another indication that the proceedings under Order 21 Rule 99 CPC should be tried as a suit.

9. Mr.Krishnakumar, learned counsel for Mr.V.Janarthanan, would submit that since EP itself has been terminated, an



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application to restore a petition under Order 21 Rule 99 CPC is not maintainable. That would be putting the cart before the horse. Delivery can be taken from the third party and the execution petition can be terminated the next day. To say that the execution petition must be pending for the purpose of taking out an application under Order 21 Rule 99 CPC, does not appeal to me. This is because the party who is dispossessed pursuant to an order of the Court should have some remedy with respect to his right. Order 21 Rule 101 CPC forecloses his right to file suit and if the Court terminates the EP and that is put against him, the party will be remediless. *Ubi jus ibi remedium* is a fundamental principle on the basis of which Code of Civil Procedure has been made. The Code is a tool of fairness and not one of punishment. I would hold that an application under Order 21 Rule 99 CPC is maintainable even after the EP is terminated. Consequently, the serious objections raised by Mr.Krishnakumar do not detain me for a moment.

10. Now turning to the impugned order, as already seen from above, the procedure that has been adopted by the executing Court dealing with E.A.No.1 of 2012 is fundamentally flawed. The Court should have, at best, closed the evidence of the obstructor



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and posted it for the evidence of the decree-holder. Instead, the Court has dismissed the EA itself and has also dismissed the application to restore the EA. Thus, the civil revision petitioners, who claim they have right over the property from which they have been dispossessed have been totally left remediless. This order has erroneously been confirmed by the lower appellate court.

11. In the light of the above, the order passed in CMA No. 3 of 2017 dated 21.04.2021 in confirming the order and decretal order in EA SR.No.2807 of 2016 in E.A.No.1 of 2012 in E.P.No.62 of 2008 in O.S.No.331 of 1985 dated 06.01.2017 is set aside. E.A.No.1 of 2012 is restored to the file of the learned District Munsif, Tiruvallur.

12. The learned District Munsif, Tiruvallur is requested to try E.A.No.1 of 2012 in terms of Order 21 Rule 101 CPC, that is like a suit and dispose of the same within a period of nine months from the date of receipt of a copy of this order.

13. I make it clear that I have not gone into the merits of the case but only dealt with the improper procedure that has been adopted by the trial Court, thereby snuffing out the right of the third



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party claiming right, title and interest of the property.

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14. Both sides agree that they will appear before the trial Court on 10.10.2023 for the purpose of proceeding further with E.A.No.1 of 2012. The Court below is requested to proceed with marking of the documents on that date. It is made clear that if either party try to prolong the proceedings, absolute discretion is given to the learned executing Judge to proceed with the matter in the manner known to law.

15. With the above direction, this civil revision petition stands allowed. No costs. Connected miscellaneous petition is closed.

21.09.2023

Index:Yes/No
Neutral Citation:Yes/No
ssm

To

The District Munsif, Tiruvallur.



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V. LAKSHMINARAYANAN,J.

ssm

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