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C.R.P. No.623 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 17.08.2023

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THE HONOURABLE MRS. JUSTICE T.V.THAMILSELVI

C.R.P.No. 623 of 2017
and
C.M.P. No. 3186 of 2017

R.Upendra
S/o. late R.Ragothama Rao

... Petitioner

Versus

S.Balasubramanian (deceased)
rep. by his legal heirs
the respondents 2 to 8

1. Venkatalakshmi
W/o. late S.Balasubramanian
- 2 Mr.B.Rajagopalan
S/o. Late S.Balasubramanian
- 3 B.Padmanabhan
S/o. Late S.Balasubramanian
- 4 B.Thiyagarajan
S/o.late S.Balasubramanian
- 5 Gowri
D/o. Late S.Balasubramanian



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6 B.Parvathi
D/o Late S.Balasubramanian

7 B.Ravi
S/o Late S.Balasubramanian

8 The Commissioner,
Corporation Of Chennai,
Rippon Buildings,
Chennai-003.

9 The Assistant Engineer
Ward No.147, Zone No.X,
Corporation of Chennai,
Mylapore, Chennai-004.

10 The Secretary,
CMDA, Thalamuthu Natarajan Maligai,
Egmore, Chennai-008.

.. Respondents

PRAYER : Civil Revision Petition is filed under Sec.115 of Civil Procedure Code, praying to set aside the order and decreetal order dated 08.11.2016 made in E.A.No.284 of 2014 on the file of IX Asst. Judge, City Civil Court at Chennai and consequently dismiss E.P.No.2723 of 2013 in O.S.No.4605 of 2007.

For Petitioner : Mr.R.Umasuthan

For Respondents : Mr.N.P.Jayakumar for R1 to R7

R8 to R10 – Given up



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ORDER

Challenging the impugned order passed in E.A.No. 284 of 2017 in E.P. No. 2723 of 2013 in O.S.No.4605 of 2007, on the file of learned IX Asst. Judge, City Civil Court Chennai, the Revision Petitioners herein have preferred this Civil Revision Petition.

2. The Revision Petitioner herein is the 1st Judgment debtor/defendant in the suit in O.S.No.4605 of 2007 on the file of City Civil Court, Chennai filed by the 1st respondent herein/plaintiff seeking the relief of mandatory injunction directing the defendants to remove the illegal construction obstructing air, light and ventilation of the plaintiff's property and also praying for a relief of mandatory direction to repair damaged portion of suit property. In the suit, the defendants were remain exparte and an exparte decree was passed in favour of plaintiff on 24.03.2010 and to execute the same, he preferred the above E.P.No. 2723 of 2014. On receipt of notice in the Execution Petition, the 1st defendant filed an Execution Application under Sec. 47 of C.P.C. praying to declare the decree dated 24.03.2010 passed in favour of plaintiff in the above suit in O.S.No. 4605 of 2007 is

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inexecutable in as such as the same is bereft of declaratory relief, which is conditional precedent for the relief of mandatory injunction. Apart from that, the said decree was passed without any jurisdiction. Hence, he prayed to dismiss the Execution Petition.

3. That application was strongly objected by the plaintiffs/decreed holders stating that the Revision Petitioner has not challenged the exparte decree before filing the appeal. So, as on date, the decree becomes final and instead of filing a petition to set aside the exparte decree before the trial court, he preferred an application under Sec.47 of C.P.C. before the Executing Court as such is not maintainable. Further, the defence what are all to be raised before the trial court is submitted before the Executing Court by filing the said application, as such is not valid and prayed to dismiss the same.

4. Considering both side submissions, the trial court held that the Executing Court cannot go behind the decree as there is no materials placed by the Revision Petitioner to support his contentions and the reasons stated



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in the application is beyond the scope of Sec.47 of C.P.C. Challenging the said findings, the Revision Petitioner/1st judgment debtor preferred this Civil Revision Petition.

5. The learned counsel for Revision Petitioner argues that without a declaratory relief, the plaintiffs obtained a decree, as such is inexecutable and without a specific declaratory finding in the decree, the mandatory injunction cannot be executed by the Executing Court, but without appreciating this legal aspect, the Executing Court dismissed the application, as such is erroneous one and the same is liable to be set aside. Furthermore, as per the averments in the plaint, the alleged illegal construction put up by the 1st defendant is governed by Tamil Nadu Town and Planning Act, 1971 and as per Sec.101 of the Act, there is a statutory bar and embargo on the part of decree holder by filing the suit before the Civil Court, since because removing of alleged unauthorised construction is beyond the scope of civil jurisdiction. Furthermore, the Revision Petitioner completed the construction and after due inspection, the authorities concerned issued property and water tax and the building permission was also granted by the 2nd defendant.



Therefore, the lower court grossly erred in dismissing the above Execution

Application and prayed to set aside the findings of Executing Court.

6. By way of reply, the learned counsel for 1st respondent/plaintiff submitted that the 1st defendant put up the construction illegally on the western side of the suit property, thereby air, light and ventilation was prevented. The learned counsel would also submit that by putting up toilet on the south western side of plaintiff's property and also chipping the plaintiff's wall, which would not only damage the building, but it would also affect the light, air and ventilation on the south western side of the plaintiff's property. Hence, he filed a suit for mandatory direction to remove the illegal construction.

7. Before the trial court, the defendants 1 to 4 were remain exparte and the decree was granted in favour of plaintiffs as prayed for. Accordingly, the defendants were directed to remove the illegal construction put up by the 1st defendant obstructing air, light and ventilation of plaintiffs' property and also directed to repair the plaintiffs' damaged property. So, to execute the



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decree, the plaintiffs rightly approached the Executing Court, but instead of filing an application to set aside the said findings, the 1st defendant filed the vexatious application by invoking Sec.47 of C.P.C. contending that the Executing Court has no jurisdiction to execute the decree, as such is vexatious one and the same was rightly appreciated by the court below. Hence, they prayed to dismiss this Civil Revision Petition as no merits.

8. Heard and considered rival submissions of learned counsel for Revision Petitioner and respondents 1 to 7 and perused the records.

9. As per the plaint averments, the 1st respondent/plaintiff filed a suit for mandatory direction to remove the illegal construction put up by the 1st defendant by preventing air, light and ventilation on the south western side of the plaintiff's property and the officials of Corporation Commissioner, Assistant Engineer, C.M.D.A. have also participated in the proceedings, but they were remain exparte. However, the 1st defendant has not taken any steps to set aside the exparte decree, on the other hand, he has filed an application under Sec.47 of C.P.C. before the Executing Court claiming that



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the decree obtained by the plaintiffs as such is inexecutable as he has not prayed for the relief of declaration. Admittedly, the plaintiffs not claimed the relief of declaration, but the entire plaint averments reveals that the 1st defendant while putting up construction, illegally put up a toilet on the south western side of plaintiff's property, thereby preventing the easementary right of air, light and ventilation. So, he approached the civil court to remove the obstruction by way of mandatory direction. If at all, the Revision Petitioner is having any objection, he ought to have taken steps to file a written statement before the trial court, but instead of that, he approached the Executing Court by preferring an application under Sec.47 of C.P.C., as such is totally erroneous one. Furthermore, the defence raised in this application ought to have been tried before the trial court and instead of that, Sec.47 of C.P.C. claiming the decree is inexecutable as such is not permissible. Further, to remove the obstruction caused to the ventilation, the plaintiff approached the civil court and such a relief of easementary right can be given only through court. Therefore, the Court has jurisdiction to decide the issue even liberty was granted to the plaintiffs to approach the Corporation to remove the illegal construction by violating the building



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approval of the plan, but as per the plaint averments, it would clearly reveals that the 1st defendant put up an existing construction by preventing easementary right of air, light and ventilation of plaintiffs and they rightly approached the Execution Court. Therefore, the Executing Court has rightly appreciated the facts and rightly dismissed the application filed by the Revision Petitioner 1st defendant, which needs no interference. Accordingly, this Civil Revision Petition is dismissed. No costs. Consequently, connected Civil Miscellaneous Petition is closed.

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Index: Yes/No
Internet: Yes/No
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To

IX Asst. Judge,
City Civil Court,
Chennai.



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T.V.THAMILSELVI, J.

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