



C.M.S.A(MD)No.31 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 18.08.2023

PRONOUNCED ON:11.10.2023

CORAM

THE HONOURABLE MR.JUSTICE K.MURALI SHANKAR

C.M.S.A(MD)No.31 of 2012

and

M.P.(MD)Nos.1 of 2012 and 1 of 2013

P.Rani : Appellant/Appellant/Petitioner
Not a party in EP and RCOP

Vs.

A.Pushpa
2.A.Pandyan : Respondents/Respondents/
Respondents/Petitioner&Respondent/
Petitioner & Respondent

PRAYER:- Civil Miscellaneous Second Appeal filed under Section 100 r/w Order 21, Rule 97 of the Code of Civil Procedure against the judgment and decree dated 01.10.2012 passed in C.M.A.No.5 of 2011, on the file of the Principal Subordinate Judge, Tiruchirapalli, confirming the order in E.A.S.R.No.717 of 2011, in E.P.No.14 of 2009 in R.C.O.P.No. 133 of 2006, on the file of I Additional District Munsif Court, Trichy.



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For Appellant : Mr.S.Ramesh
For Respondents :Mr.G.S.Asok Adthiyan
for R.1
:Mr.H.Lakshmi Shankar
for R.2

JUDGMENT

The Civil Miscellaneous Second Appeal is directed against the judgment passed in C.M.A.No.5 of 2011, dated 01.10.2012, on the file of the Principal Subordinate Court, Tiruchirapalli, confirming the order of rejection dated 18.02.2011, passed in an unnumbered Execution Application in E.A.S.R.No.717 of 2011 in E.P.No.114 of 2009 in R.C.O.P.No.113 of 2006, on the file of I Additional District Munsif Court, Trichirappalli.

2. At the outset, this Court is constrained to say that the present proceedings are taken by the defeated tenant / judgment debtor / second respondent in the name of his benami, his better-half, who is the third party/the appellant against his own sister – landlord / decree holder / the first respondent herein, preventing her from realising fruits of the eviction order.



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3. Admittedly the appellant is the wife of the second respondent and the first respondent is the sister of the second respondent. The first respondent – owner of the property in dispute has filed an eviction petition in R.C.O.P.No.133 of 2008 against his brother – the second respondent herein on the grounds of wilful default in payment of rent and for own use and occupation. The second respondent – tenant has entered into appearance through his Counsel and subsequently remained exparte and that therefore, the learned Rent Controller has passed an order dated 20.04.2007 ordering eviction and directed the second respondent – tenant to vacate and hand over the vacant possession of the property to the first respondent – landlord on or before 20.07.2007.

4. It is pertinent to note that the second respondent, after the receipt of a legal notice issued by the first respondent, prior to filing of the eviction petition, has sent a reply admitting the landlord and tenant relationship, but made a claim that the first respondent's husband had executed an unregistered sale agreement and there was no necessity to vacate the premises rented out to him. Admittedly, the second respondent has not filed any application for setting aside the exparte order of



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eviction passed on 20.04.2007, nor filed any appeal to challenge the same and as such, the said order of eviction has attained finality.

5. It is evident from the records that the first respondent has filed an execution petition in E.P.No.144 of 2009 for delivery. The second respondent has entered into appearance through his Counsel Thiru.Syed Tajudeen Madani and after the lapse of five months, he changed his Counsel and filed a counter. It is not in dispute that pending execution proceedings, the present appellant has filed a suit in O.S.No.997 of 2009 against the first respondent and her husband for permanent injunction restraining the defendants and their men from in any manner interfering with the peaceful possession and enjoyment of the appellant in the suit property either by way of trespass or otherwise in any manner whatsoever and obtained temporary injunction in her favour.

6. The appellant has advanced a case that the property in dispute was originally classified as poromboke and was in possession of her husband and patta was issued in his favour, that her husband has raised construction in the suit property and that subsequently he has executed the gift settlement deed dated 21.02.2007 in favour of the appellant and



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delivered possession of the property. It is not in dispute that the appellant after getting temporary injunction order, has filed the obstruction petition under Order 21 Rule 97 C.P.C., in E.P.No.114 of 2009 in R.C.O.P.No.113 of 2006, claiming the reliefs to record her objection and to order for proper enquiry as to the executability of the order of eviction against the appellant, who was not a party to the rent control proceedings.

7. It is the specific complaint of the first respondent that the appellant has filed the suit and the above obstruction petition through the same Counsel – Syed Tajudeen Madani, who earlier appeared for her husband in execution proceedings and that the same would expose the collusiveness between the appellant and the second respondent – husband and wife in creating the forged settlement deed, dated 21.02.2007 and other documents to get orders in the injunction petition and to raise obstruction in execution proceedings.

8. The learned Additional District Munsif has returned the petition questioning its maintainability. The appellant's Counsel has represented the said petition and the learned District Munsif, after hearing the



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arguments of the appellant's Counsel with regard to the maintainability, passed the impugned order dated 18.02.2011, rejecting the same. Against the rejection order, the third party / wife of the Judgment Debtor, has preferred an appeal before the Principal Subordinate Court in C.M.A.No. 5 of 2011 and the appellate Court, upon perusing the materials available on record and on hearing the arguments of both sides, has passed the impugned judgment dated 01.10.2012, dismissing the appeal and thereby confirming the rejection order passed by the learned Additional District Munsif, Trichirappalli. Challenging the dismissal of the appeal, the appellant has preferred the present Civil Miscellaneous Second Appeal.

9. Heard the learned Counsel for the appellant, the learned Counsel for the first respondent and the learned Counsel for the second respondent and perused the materials placed on record.

10. The Substantial Questions of Law that arise for consideration in this Civil Miscellaneous Second Appeal are as follows:

(1) Whether the learned appellate Judge erred in confirming the rejection order passed in the petition filed under Order 21 Rule 97 C.P.C., despite showing that the learned Additional District Munsif, without



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taking the petition on file and without conducting any enquiry and without affording any opportunity to both sides to put forth their contentions, mechanically rejected the petition?

(2) Whether the appellate Court erred in dismissing the appeal also on the ground that the appeal is not maintainable, despite showing that the order passed in the application filed under Order 21 Rule 97 C.P.C., is to be treated as a decree and as such, the appeal is perfectly maintainable?

(3) Whether the judgment of the appellate Court in C.M.A.No.5 of 2011, dated 01.10.2012, confirming the rejection order passed in E.A.S.R.No.717 of 2011, in E.P.No.14 of 2009 in R.C.O.P.No.133 of 2006, is liable to be interfered with?

Points 1 to 3:

11. At the outset, the learned Counsel for the first respondent has raised two preliminary and technical objections and the first one is with respect to the very maintainability of the present appeal. Order 21 Rule 97 C.P.C., deals with resistance or obstruction of possession by the decree holder for possession or the purchaser of any such property sold in execution of the decree. The above provision enables such a person to



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file an application to the Court complaining of such resistance or obstruction and any such application is filed, Sub-Rule (2) mandates the Court to proceed with adjudication upon the application in accordance with the provisions contained therein. Order 21 Rule 98 C.P.C., speaks about the orders to be passed after the adjudication. Rule 103 C.P.C., contemplates that where an application has been adjudicated upon under Rule 98 or Rule 100, the order made thereon shall have the same force and be subject to the same conditions as to an appeal or otherwise as if it were a decree. To put it in short, the orders are to be treated as decrees. As per the scheme of C.P.C., the person against whom the decree is passed, has to prefer an appeal. But in the case on hand, the main dispute is as to whether the rejection order passed in Order 27 Rule 97 C.P.C., can be treated as a decree.

12. The learned Counsel for the appellant has relied on the judgment of the Hon'ble Supreme Court in ***S.Rajeswari Vs. S.N.Kulasekaran and others*** reported in ***2007-1-L.W.220***, wherein the decree holde has filed a petition under Section 151 C.P.C., before the Executing Court to remove the obstructor – the appellant therein, that the Executing Court, after recording the evidence, has come to a conclusion



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that the petition filed under 151 C.P.C., was not maintainable and the decree holder ought to have filed an application under Order 27 Rule 97 C.P.C., and on that basis rejected the petition. When that order was challenged before the High Court, under Section 115 C.P.C., the revision petition was allowed by the High Court and the High Court directed the removal of obstructor. When the order of the High Court was challenged before the Hon'ble Supreme Court, the Hon'ble Supreme Court, after taking note of the fact that the Executing Court after recording evidence has passed an adjudicatory order which has to be treated as a decree, held that the revision filed before the High Court was not maintainable and consequently set aside the order passed by the High Court.

13. As rightly contended by the learned Counsel for the first respondent, in the present case, the learned District Munsif has not passed any orders on merits and after hearing the maintainability of the petition, he has passed rejection order. The learned Counsel for the first respondent has relied on the decision of the Division Bench of Patna High Court in *Najbun Nisa @ Najmul Nisa Vs. Masrool Alam* reported in **(2008)2 PLJR 308**, wherein the Division Bench has specifically held that wherein an application filed under Order 21 Rule 97 of the Code is



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dismissed at its threshold without making any inquiry into the right, title or interest of the party, then such an order cannot be said to have been passed either under Order 21 Rule 98 C.P.C., or Order 21 Rule 100 C.P.C., and resultantly such an order cannot be termed to be decree in terms of Order 21, Rule 103 of the Code and that therefore, the order of such nature shall be revisable.

14. The learned Counsel for the first respondent has also relied on the judgment of the Hon'ble Supreme Court in ***Sameer Singh and another Vs. Abdul Rab and others*** reported in **2014(6) CTC 98**, wherein also the Hon'ble Apex Court has specifically observed,

“21. The aforesaid authorities clearly spell out that the court has the authority to adjudicate all the questions pertaining to right, title or interest in the property arising between the parties. It also includes the claim of a stranger who apprehends dispossession or has already been dispossessed from the immovable property. The self-contained Code, as has been emphasised by this Court, enjoins the executing court to adjudicate the lis and the purpose is to avoid multiplicity of proceedings. It is also so because prior to 1976 amendment the grievance was required to be agitated by filing a suit but after the



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amendment the entire enquiry has to be conducted by the executing court. Order XXI, Rule 101 provides for the determination of necessary issues. Rule 103 clearly stipulates that when an application is adjudicated upon under Rule 98 or Rule 100 the said order shall have the same force as if it were a decree. Thus, it is a deemed decree. If a Court declines to adjudicate on the ground that it does not have jurisdiction, the said order cannot earn the status of a decree. If an executing court only expresses its inability to adjudicate by stating that it lacks jurisdiction, then the status of the order has to be different. In the instant case the executing court has expressed an opinion that it has become functus officio and hence, it cannot initiate or launch any enquiry. The appellants had invoked the jurisdiction of the High Court under [Article 227](#) of the Constitution assailing the order passed by the executing court on the foundation that it had failed to exercise the jurisdiction vested in it. The appellants had approached the High Court as per the dictum laid down by this Court in [Surya Dev Rai v. Ram Chander Rai and others, 2003\(4\). CTC 176 \(SC\):2003\(6\) SCC 675](#)

22. Whether the executing court, in the obtaining circumstances, has correctly expressed the view that it has become functus officio or not and thereby it has jurisdiction or not, fundamentally pertains to rectification of a jurisdictional error. It is so as there has been no



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adjudication. If a subordinate court exercises its jurisdiction not vested in it by law or fails to exercise the jurisdiction so vested, the said order under Section 115 of the Code is revisable as has been held in Joy Chand Lal Babu v. Kamalaksha Chaudhury and others[9]. The same principle has been reiterated in [Keshardeo Chamria v. Radha Kissan Chamria and others](#)[10] and [Chaube Jagdish Prasad and another v. Ganga Prasad Chaturvedi](#)[11]. Needless to emphasise, the said principle is well-settled. After the amendment of [Section 115](#), C.P.C. w.e.f. 1.7.2002, the said power is exercised under [Article 227](#) of the Constitution as per the principle laid down in Surya Dev Rai (supra). Had the executing court apart from expressing the view that it had become functus officio had adjudicated the issues on merits, the question would have been different, for in that event there would have been an adjudication.

23. In view of the forgoing analysis, we conclude and hold that the High Court has fallen into error by opining that the decision rendered by the executing court is a decree and, therefore, an appeal should have been filed, and resultantly allow the appeal and set aside the impugned order”

15. The legal position above referred is squarely applicable to the case on hand. As already pointed out, the Executing Court, after raising



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a query with respect to the maintainability of the petition and after hearing the appellant's side, has passed an order rejecting the petition. The Executing Court has neither recorded any evidence nor adjudicated the rights of the parties. Considering the above, the order rejecting the application filed under Order 21 Rule 97 C.P.C., by no stretch of imagination can be termed as a decree and consequently, this Court has no hesitation to hold that the appeal preferred against the rejection order and the present appeal challenging the dismissal the C.M.A., are not legally maintainable.

16. The next contention of the appellant is that the Executing Court should have numbered the petition and after hearing both parties, it should have passed orders therein and the way in which, the petition was rejected is not in accordance with law and on that ground alone, the same is liable to be set aside.

17. When a criminal case was challenged before this Court on the ground that the trial Court without taking the petition on file and without hearing the other side has passed the impugned order, in CrI.O.P. (MD)No.692 of 2023, dated 11.01.2023 (Kasi Vs State), this Court after



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referring to the judgment of the Hon'ble Apex Court, has held that the impugned order therein cannot be found fault with and the relevant passages are extracted herein:

*“10. In **Madiraju Venkata Ramana Raju Vs. Peddireddigary Ramachandra Reddy and Others** reported in (2018) 14 SCC 1, the Honble Apex Court has specifically observed that if the Court on the presentation of the plaint is of the view that the plaint does not fulfil the statutory and constitutional requirements, the plaint can be rejected either after admitting the plaint or even before admitting the same and that therefore, the trial Court has the power to reject the plaint even at the pre-registration stage. In the case of **Saleem Bhai Vs. State of Maharashtra and Others** reported in (2003) 1 SCC 557, the Hon'ble Supreme Court has held that a perusal of order 7 Rule 11 C.P.C makes it clear that the trial Court can exercise the power under Order 7 Rule 11 C.P.C at any stage of the suit, before registering the plaint or after issuing summons to the defendant at any time before the conclusion of the trial. When the Hon'ble Apex Court has reiterated the legal position that even the plaint can be rejected at pre-registration stage, this Court is at loss to understand as to why the same principle cannot be applied to the interlocutory applications.*



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11.No doubt, the above decisions were given in the civil proceedings and the said principle can also be applied to the miscellaneous applications filed in the criminal side. Generally, if any application is filed, the trial Courts are expected to number the petition and take the same on file, but that procedure cannot be applied in all cases. In case if the petitions are filed only with an intention to drag on the proceedings and to protract the trial, it cannot be stated that such petitions should be taken on file, notice to be given to the other side, counter or reply to be received, hear the arguments and then to pass orders. In the case on hand also, the learned trial Judge has specifically observed that this Court has already directed the trial Court to dispose of the case within the time stipulated. “

18. The learned Counsel for the first respondent would submit that the first respondent has already taken possession of the property in dispute and E.P., was already terminated, that the appellant has thereafter filed a suit in O.S.No.675 of 2019 against the first respondent and her husband to declare the appellant's occupancy right in the site of the property in dispute and the absolute ownership of the superstructure made therein and the consequent direction to the defendants therein to



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hand over the possession of the property to the appellant and in case of their refusal decreeing for delivery of possession of the property through process of Court and for permanent injunction restraining the defendants and their men from alienating or encumbering the property and for altering and demolishing the property in any manner and the same is pending, that the appellant in the plaint has specifically admitted the factum that the possession was already taken by the first respondent and the possession is with the first respondent and that therefore, the present appeal itself has become infructuous.

19. It is not in dispute that the appellant subsequently has filed the suit in O.S.No.675 of 2019 seeking declaration of her occupancy right in the land in dispute and the ownership over the superstructure made therein and for consequential permanent injunction. It is pertinent to note that the appellant by admitting that the possession was taken by the first respondent, has claimed the relief of possession from the first defendant in the suit in O.S.No.675 of 2019, which is now pending.

20. Considering the above, as rightly contended by the learned Counsel for the first respondent, there is nothing remained to be



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adjudicated and as such, the appeal has become infructuous. Considering the above, viewing from any angle, the appeal is liable to be dismissed.

21. Before parting, this Court is constrained to say that though the appellant has been alleging that there was collusion between the first respondent and the second respondent ie., her husband and husband's sister, but in real, there existed a collusion between the appellant and her husband – second respondent. Considering the records available on record, this Court can very well infer that the petition filed under Order 21 Rule 97 C.P.C., and the subsequent appeal proceedings were taken by the judgment debtor in the name of his wife – the appellant herein with the sole intention to drag on the proceedings and thereby to prevent the decree holder, who is none other than his sister from realising the benefits of fair and decreetal order for eviction obtained in the year 2007 itself and the same would amount to clear abuse of process of Court. Hence, this Court is inclined to impose compensatory costs on the appellant and the above points are answered accordingly.



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22. In the result, the Civil Miscellaneous Second Appeal is dismissed with compensatory cost of Rs.3,000/-(Rupees Three thousand only) on the appellant. Consequently the connected Miscellaneous Petitions are also dismissed.

11.10.2023

NCC : Yes : No
Index : Yes : No
Internet : Yes : No

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To

- 1.The Additional District Court /
Principal Subordinate Court, Tiruchirapalli,
2. I Additional District Munsif Court, Trichy.
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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K.MURALI SHANKAR,J.

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PRE-DELIVERY JUDGMENT MADE IN

C.M.S.A(MD)No.31 of 2012

11.10.2023