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C.R.P(PD)(MD).No.1867 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 19.04.2023

Pronounced on : 12.07.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

C.R.P(PD)(MD).No.1867 of 2018

and

C.M.P(MD)No.8151 of 2018

K.Sakthivel

...Petitioner/Defendant

Vs.

Devasagayam Manohar Chandradass
represented through his Power Agent
Dhana Chandradass,
No.3, 2nd Cross Street,
NGO Colony,
Chennai.

... Respondent/Plaintiff

PRAYER : Civil Revision Petition filed under Section 115 of the Civil Procedure Code, to set aside the order passed in E.P.No.3 of 2013 in O.S.No.110 of 2002 on the file of the District Munsif Cum Judicial Magistrate Court, Kodaikanal dated 08.11.2017 and allow the Civil Revision Petition.

For Petitioner : Mr.C.Vakeeswaran

For Respondent : Mr.S.A.Ajmal Khan



ORDER

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This Civil Revision Petition is filed against the order dated 08.11.2017 passed in E.P.No.03 of 2013 in O.S.No.110 of 2002 on the file of the District Munsif-cum-Judicial Magistrate Court, Kodaikanal.

2. The brief facts of the case:

The revision petitioner is the respondent in E.P.No.03 of 2013 in O.S.No.110 of 2002 on the file of the District Munsif-cum-Judicial Magistrate Court, Kodaikanal. The respondent filed the main suit in O.S.No.110 of 2002 against the petitioner seeking the reliefs of declaration and mandatory injunction to demolish the construction made on the suit property and hand over possession. In that suit ex-parte judgment and decree was passed on 02.09.2005. Thereafter, the respondent filed E.P.No.3 of 2013 and the same was allowed and delivery ordered. Challenging the delivery order of the Executing Court the petitioners have filed this Civil Revision Petition.

3. Heard both side and perused the records in this Civil Revision Petition.



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4. The learned counsel appearing for the petitioner has argued that the petitioner is defendant in the main suit, which is filed for declaration and mandatory injunction directing the petitioner to demolish the construction made in the suit property and to hand over the vacant possession. The suit was decreed on 02.09.2005. The respondent filed an execution petition in E.P.No.3 of 2013 on 18.01.2013 after lapse of 8 years. The petitioner has filed a counter statement specifically stating that the petitioner has not made any encroachment and there is no whisper of encroachment of the suit property in the judgment. Further, the petitioner has specifically contended that the execution petition is filed after lapse of 8 years and the execution petition is barred by limitation as per the decree the period of execution is only three years. The Executing Court has simply passed the order of delivery as the petitioner's counsel stated no instruction. The Executing Court ought to have issued notice to the petitioner, but failed to do so. The petitioner has filed petition in I.A.No.7 of 2019 before the Trial Court. The Executing Court has not considered these facts and passed an incorrect order, which is not sustainable in the eye of law and therefore, the same has to be set aside. In support of his argument the learned counsel for the petitioner has relied on the following judgments.



(1) **(2007) 2 MLJ 746 (Sargunam /v/ Duraisamy)**, wherein it is held in paragraph No.10 as follows:

“10.....the decree has been granted on 13.1.1992 and the EP., has been filed on 28.04.1997 and taken on file only on 19.6.1997 after the period of three years of limitation. Thus the decree for mandatory injunction to remove the superstructure, if any, is clearly barred by Article 135 of the Limitation Act.”

(2) Judgement of this Court passed in **C.R.P(MD)(NPD)No.62 of 2014**, wherein it is held in paragraph No.4 as follows:

“4. Article 135 of the Limitation Act clearly prescribed three years limitation for executing the decree for mandatory injunction...”

5. The learned counsel for the respondent vehemently contended that the respondent filed the main suit for declaration and mandatory injunction & hand over possession by the petitioner. The petitioner has appeared through counsel and did not file any written statement and left the suit for ex-parte. The suit was decreed on 02.09.2005 and the petitioner has not challenged the decree. Since the petitioner did not come forward to hand over possession as per decree, the respondent filed E.P.No.3 of 2013. In E.P.No.3 of 2013 also the petitioner appeared and has not contested the petition and left the petition to pass order ex-parte and E.P.No.3 of 2013 was allowed and delivery was ordered. At



this stage, now, the petitioner has questioned the limitation after delivery was ordered. Article 136 of the Limitation Act prescribes 12 years when the decree for mandatory injunction and recovery of possession. To drag on the proceedings, the petitioner has filed this petition to prevent the respondent to enjoy the fruits of the decree. The execution petition is maintainable until the decree is stayed or set aside. Hence, this Civil Revision Petition has to be dismissed. In support of his argument, the respondent's counsel has relied on the following citations:

(1) 2015 (2) CTC 598 (Anthiyur Town Panchayat rep. by its Executive Officer Vs. G.Arumugam (Deceased) and Ors.), wherein it is held in paragraph No.9 as follows:

“9. It is settled law that mere filing of the Appeal would not amount to stay of the operation of the Decree of the Lower Court and the decree holder is entitled to execute the Decree unless it is stayed by the Appellate Court.....”.

(2) 2018 (5) CTC 845 (Basavaraj Vs. Narayanasamy and Ors.), wherein it is held in paragraph No.4 as follows:

“4.Article 135 of Limitation Act, will apply only to a Decree for Mandatory Injunction simpliciter and it is not applied to an execution of a Decree for Prohibitory Injunction coupled with mandatory injunction, for which time Article 136 alone will apply.”



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6. On hearing both and on perusal of records, it is clear that the petitioner is a defendant in O.S.No.110 of 2002 on the file of the District Munsif-cum-Judicial Magistrate Court, Kodaikanal. The prayers sought in the suit are as follows:

“(a) declaring that the plaintiff is the absolute owner of the suit property;

(b) as a consequential relief directing the defendant to demolish the construction made on the suit property and hand over vacant possession to the plaintiff”.

It is admitted by the petitioner that the petitioner was set ex-parte and ex-parte judgment was passed on 02.09.2005. He has not challenged the said ex-parte decree. Thereafter, the respondent filed E.P.No.3 of 2013 for executing the decree as the petitioner have not removed the encroachment and handed over possession of the suit property. On perusal of records, it is also clear that the petitioner has appeared through his counsel in E.P.No.3 of 2013 and his counsel reported no instruction from the petitioner and hence, the Executing Court allowed the E.P.No.3 of 2013 and delivery was ordered and the E.P is pending for batta for delivery. At this stage, this petitioner has filed the present Civil Revision Petition contended that the execution of decree is barred by Article 135



of the Limitation Act as the respondent filed E.P.NO.3 of 2013 after lapse of three years. On perusal of citation of both side it is clear that when the decree for mandatory injunction simpliciter the Article 135 of the Limitation Act would apply and if any reliefs sought coupled with the mandatory injunction Article 136 of the Limitation Act would apply. In this case, the respondent sought relief as sought supra, specifically, in (b) prayer directing the petitioner to demolish the construction made on the suit property and hand over vacant possession to the respondent. So it is clear that Article 136 of the Limitation Act would apply and the period of limitation is 12 years and the present E.P. is well within limitation. When the facts being so, the petitioner cannot question the point of limitation before the Executing Court as well as before this Court.

7. It is a settled principle of law that the Executing Court can only proceed to execute the decree and not go beyond the decree and the parties to the suit must obey the command of the decree, until the decree is set aside by the Appellate Forum or by consequential proceedings. The revision petitioner has not placed any material that the decree was set aside. Therefore, the Executing Court has correctly passed the impugned order, which needs no interference by way of this Civil



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Revision Petition and thus, this Civil Revision Petition fails and the same is liable to be dismissed.

8. In the result, this Civil Revision Petition is dismissed. No costs.

Consequently, connected Miscellaneous Petition is closed.

12.07.2023

NCC : Yes/No

Index : Yes/No

Internet : Yes/No

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To

1.The District Munsif Cum Judicial Magistrate Court,
Kodaikanal

2.The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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P.VADAMALAI, J.

vsd

Pre - Delivery Order made in
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