



C.R.P. Nos.687 and 688 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 30.07.2024

PRONOUNCED ON : .08.2024

CORAM

THE HONOURABLE **MR.JUSTICE BATTU DEVANAND**

C.R.P. Nos.687 and 688 of 2011

1. Chamundeeswari

2. Sathyabama @ M.V.Varalakshmi

... Petitioners in both the petitions

Vs.

1. M.Vinodkumar Goyal

2. P.Thennarasu

... respondents in C.R.P. No.687 of 2011

M.Vinodkumar Goyal

... respondent in C.R.P. No.688 of 2011

Prayer in C.R.P. No.687 of 2011: Civil Revision Petition filed under Section 115 of the Civil Procedure code against the order in E.A.No.4354 of 2009 in E.P.No.932 of 2008 in OS.No.8361 of 1995 on the file of X Assistant Judge, City Civil Court, Chennai dated 05.02.2010.

Prayer in C.R.P. No.688 of 2011: Civil Revision Petition filed under Section 115 of the Civil Procedure code against the order in E.P.No.932 of 2008 in OS.No.8361 of 1995 on the file of X Assistant Judge, City Civil Court, Chennai dated 05.02.2010.



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For Petitioners : Mr.P.Sankaranarayanan
For Respondents
for R1 : served - No appearance
for R2 : Mr.V.Raghavachari, Senior Counsel
for Mr.E.Prabu

COMMON ORDER

C.R.P. No.687 of 2011 is filed against the fair and decreetal order dated 05.02.2010 in E.A.No.4354 of 2009 in E.P.No.932 of 2008 in OS.No.8361 of 1995 on the file of X Assistant Judge, City Civil Court, Chennai.

2. C.R.P. Nos.688 of 2011 is filed against the fair and decreetal order dated 05.02.2010 in E.P.No.932 of 2008 in OS.No.8361 of 1995 on the file of X Assistant Judge, City Civil Court, Chennai.

3. The case of the petitioners is as follows:

The petitioners are the owners of the subject property and the subject property was leased out to the first respondent for storing scrap iron materials. However, in the petition mentioned property, the second



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respondent in C.R.P. No.687 of 2011/obstructor is doing business under the name and style of M/s.Kumutha Iron Traders.

4. The first petitioner's husband/Ramakrishnan (deceased) filed a suit in OS.No.8361 of 1995 for recovery of possession of the vacant land and for damages against the first respondent. The first respondent remained exparte and the suit was decreed as prayed for. The second respondent as power agent of the first respondent filed a petition in IA.No.10693 of 1998 for setting aside the said order and the same was allowed. Subsequently, the suit was decreed exparte for non-filing of written statement. The second respondent again filed a petition in I.A.No.13041 of 2002 for setting aside the said exparte decree and the same was dismissed on 12.03.2003. Subsequently, the first respondent filed a petition in I.A.No.19988 of 2003 for setting aside the exparte decree and the same was allowed on 08.01.2004. The said order was set aside by this Court in CRP.No.348 of 2004. On the basis of the said decree, the present E.P. was filed for delivery of vacant possession of the petition mentioned property and the same was ordered exparte on 28.07.2008 and the delivery warrant was returned unexecuted due to obstructions. Therefore, the petitioners herein filed



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Execution Application No.4354 of 2009 before the X Assistant Judge, City Civil Court, Chennai seeking removal of the obstructions.

5. It is the case of the second respondent in C.R.P. No.687 of 2011/obstructor that he is doing business under the name and style of M/s.Kumutha Iron Traders in the petition mentioned property and he is in exclusive possession of the same from 1991 with the knowledge and consent of the petitioners. The said business was originally in partnership with the first respondent, who was the original tenant of the land in respect of the petition mentioned property and owner of the superstructure. In pursuance of an agreement of sale in the year 1994, he purchased the superstructure on 13.03.1996 and he is in possession and enjoyment of the property by paying property tax and other dues. Though the petitioners, who are residing adjoining to the subject property, is aware of the exclusive possession and enjoyment of the second respondent from 1991, have filed the suit in OS.No.8361 of 1995 against the first respondent without impleading the second respondent and an exparte decree was passed. The Execution petition is filed only to circumvent the benefits of Section 9 of City Tenants Protection Act.



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termed as an obstruction for delivery. Challenging the said order, the present Civil Revision Petitions have been filed.

8. Mr.P.Sankaranarayanan, learned counsel for the petitioners/legal heirs of the decree holder, submits that the Executing Court should have seen that obstructor is admittedly claiming right under the first respondent/judgment debtor and he is not entitled to obstruct delivery of possession under Order XXI Rule 97 and 98 CPC. The learned counsel would submit that the Executing Court should have seen that Ex.R1/deed of absolute sale and conveyance of superstructure excluding site, was brought by the judgment debtor and the obstructor in collusion without any reference to the petitioners in an attempt to defeat the rights of the decree holder. The Executing Court should have seen that Ex.R7/deed of partnership is exfolie created document (unregistered) with a view to defeat the decree. In any event, the Court should have seen that Ex.R7 has no relevance to the question involved since it is concerned only with alleged partnership business. The Executing Court should have considered that the alleged superstructure must have come only after the suit and in any event it is for the obstructor to establish the date of construction as to whether the same is existence prior to the suit.



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9. The learned counsel further contends that the reasoning of the Executing Court for dismissing the application is contrary to basic principles, facts and legal provision. The Executing Court is erred in closing the execution petition without any valid reason. Though the Executing Court has inherent powers to remove all obstructions in execution of the decree, has erroneously dismissed the petition filed by the petitioners, which is unsustainable under law and sought to set aside the same and allow the Civil Revision Petition.

10. On the other hand, Mr.V.Raghavachari, learned Senior Counsel, arguing on behalf of the second respondent submitted that the petitioners filed the application under Order XXI Rule 97 CPC before the Executing Court and against the order passed by the Executing Court under Order XXI Rule 97 CPC, the petitioners ought to have preferred an appeal before the appropriate Court and the present Civil Revision Petition is not maintainable. To substantiate the said contention, the learned Senior Counsel has relied on the following decisions:

i) *S.Rajeswari vs. S.N.Kulasekaran and Others reported*
in 2006 3 S.C.R. 610



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ii) *Virudhunagar Hindu Nadargal Dharma Paribalana Sabai and others vs. Tuticorin Educational Society and others* reported in 2019 9 SCC 538

iii) *Mohamed Ali vs. V.Jaya & Others* reported in 2022 LiveLaw (SC) 574

iv) *The Koushik Mutually Aided Cooperative Housing Society vs. Ameena Begum & another* reported in 2023 INSC 1065

11. In reply, the learned counsel appearing for the petitioner on relying upon the decision of this Court in *Sundar Timber Pvt. Ltd. vs. Manakchand Jamad (Died) and others* reported in 2014 3 CTC 297 would submit that Civil Revision Petition is maintainable against the order passed under Order Order XXI Rule 97 of CPC.

12. This Court gave anxious consideration to the submissions of the learned counsel appearing on both sides and carefully perused the materials available on record and the decisions relied on by both sides.



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13. The petitioners/legal heirs of the decree holder filed the application in E.A.No.4354 of 2009 seeking removal of the obstruction and obstructors. The case of the petitioners is that the obstructor is admittedly the power agent of the judgment debtor and he has no right to obstruct the execution proceedings. To establish the same, the first petitioner was examined as PW1 and she has filed proof affidavit reiterating the contentions raised in the affidavit filed in support of the petition and 3 documents were marked as Exhibits No.P1 to P3.

14. On the other hand, it is the case of the obstructor that he has been doing business in the petition mentioned property even prior to filing of the suit and he purchased the superstructure from the judgment debtor, i.e., Vinodkumar Goyal on 13.03.1996 with the knowledge and consent of the decree holder and he is in possession of the suit property as owner of the superstructure by paying property tax, etc.

15. Clause 1 of the decree in OS.No.8361 of 1995, reads as follows:

“ 1. that the defendant do deliver vacant possession of



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*premises bearing Door No.593 (The open vacant Land)
Tiruvottiyur High Road, Old Washermanpet, Madras-21, more
particularly described in the Schedule hereunder free from all
obstructions.”*

16. On perusal of the said decree, it appears that the decree is silent about the superstructure and there is no evidence as to when it was put up. Admittedly, the obstructor has established his possession as owner of the superstructure by adducing evidence. In the evidence of PW1 also it is admitted that the obstructor is in possession of the petition mentioned property as he purchased the superstructure. As rightly pointed out by the Executing Court that neither the decree holder nor the petitioners/legal heirs of the decree holder have worked out appropriate remedy with reference to the superstructure. As per the decree, it is appropriate to deliver the vacant possession of the petition mentioned property as described in the decree as a vacant land. There is no mention about the existence of superstructure. As such, the finding of the Executing Court that delivery of possession of vacant land of the petition mentioned property cannot be effected as there is no order with reference to the removal or demolition of the superstructure in



the petition mentioned property. As the obstructor being the owner of the superstructure, he cannot simply be dispossessed without specific order on the removal or demolition of the superstructure.

17. In the decision relied on by the learned counsel for the petitioners in ***Sundar Timber Pvt. Ltd.*** (as stated supra), the Trial Court passed decree in OS.No.3023 of 1998 for delivery of vacant land only after removal of superstructure put up by the judgment debtor. As per the decree, it is clear that the superstructure has to be removed by the judgment debtor and then the delivery of vacant land should be handed over the decree holder. But in the present case, there is no order with respect to the removal or demolition of the superstructure in the decree passed by the Trial Court. As such, the said decision is not applicable to the facts of the present case.

18. On the other hand, in the decision relied on behalf of the respondent in ***S.Rajeswari vs. S.N.Kulasekaran and Others***, the Apex Court while dealing with the Order XXI Rule 97 of the Civil Procedure Code has held as follows:

“Learned senior counsel for the appellant-obstructor



submitted before us that the application filed under section 151, C.P.C. being not maintainable nothing survived for further consideration. Having regard to the fact that the executing court substantially followed the procedure laid down by Rules 98 to 100 and thereafter passed an adjudicatory order, we may hold in favour of the respondent no. 1 to the extent that the application though filed with the label of section 151, C.P.C. was in fact treated as one under Order XXI, Rule 97. This, however, does not resolve the controversy before us because even if we treat the said application under section 151, C.P.C. as one under Order XXI, Rule 97, C.P.C. the order passed in that proceeding must be treated as a decree against which only an appeal lay to the appellate court. The respondent no.1 did not appeal to the High Court and instead preferred a revision petition under section 115, C.P.C. We have no doubt that in view of the provisions of Order XXI, Rule 103, C.P.C. which provide for appeal against the order passed by the executing court in such matters, no revision could be entertained by the High Court against that order in view of the clear prohibition contained in section 115(2) of the C.P.C. which in clear terms provides that the High Court shall not under Section 115 vary or reverse any decree or order against which an appeal lay either to the High Court or to any other Court subordinate thereto. The High Court appears to have interfered with the order of the executing court because it was



under the impression that a long drawn litigation, perhaps engineered by the judgment-debtor would result in great injustice, and therefore, if some relief could be granted by cutting short the procedure of appeal etc., the power under section 115 could be exercised to do justice between the parties. In our view the High Court could not have acted in a manner contrary to the express provision of section 115(2) of the Code of Civil procedure. Since an appeal was provided under Order XXI, Rule 103 of the Code of Civil Procedure which treated the order passed by the executing Court as a decree subject to the same conditions as to appeal against such decree, a revision petition under section 115, C.P.C. against such an order is not maintainable. We must, therefore, hold that the High Court exceeded its jurisdiction in entertaining a revision petition under section 115, C.P.C. against an order passed in proceeding under Order XXI, Rule 97, C.P.C., even if we treat the application filed under Section 151, C.P.C. to be an application under Order XXI, Rule 97, C.P.C.”

19. The above decision of the Apex Court made it clear that the order passed under Order XXI Rule 97 of CPC must be treated as a decree against which only an appeal lie to the Appellate Court. The Apex Court also expressed its view that the provision of Order XXI Rule 103 CPC which



provides for appeal against the order passed by the Executing Court in such matters, no revision could be entertained by the High Court against that order in view of the clear prohibition contained in Section 115(2) of the CPC.

20. The other decisions relied on behalf of the respondents have no relevance to the present case. However, this Court fully agrees with the propositions laid down in the said decisions.

21. As admittedly, in the present case, against the order passed by the Executing Court under Order XXI Rule 97 of CPC the petitioners have to prefer appeal against the order of the Executing Court dismissing their delivery in the light of the law laid down in ***S.Rajeswari vs. S.N.Kulasekaran and Others*** (as state supra). Instead of that approaching this Court by filing Civil Revision Petition as against the order passed under Order XXI Rule 97 of CPC, is not maintainable. Accordingly, this Court without expressing any opinion on the merits of the case, holding that the present Civil Revision Petition is not maintainable as against the order passed by the Executing Court under Order XXI Rule 97 of CPC. Accordingly, the Civil Revision Petitions are dismissed as they are not



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maintainable.

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22. (i) However, liberty is reserved to the petitioners herein to file an appeal, if so advised, on or before 30.08.2024.

(ii) Registry is directed to return original documents filed in these Civil Revision Petitions forthwith to the petitioners to enable them to file appeal.

(iii) If such an appeal is filed before the appropriate Court, the point of limitation ought not be raised.

(iv) All contentions of both sides are left open to be advanced in the appeal to be filed.

23. No costs.

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pvs

Index : Yes / No

Internet : Yes / No

To

X Assistant Judge, City Civil Court, Chennai



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Pre-delivery Order in
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