



WEB COPY



C.R.P.No.4847 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.06.2024

CORAM

THE HON'BLE MR.JUSTICE V. LAKSHMINARAYANAN

C.R.P.No.4847 of 2023
and C.M.P.No.28725 of 2023

Sri Pamban Kumaragurupraswamy Temple
Rep.by its Executive Officer, Thiruvananthapuram
Chennai - 600 041.

... Petitioner

-Vs-

K.Subramania Mudaliar (deceased)

1.Rukmani Ammal
2.K.S.Sekar
3.Kumari Narasingan
4.K.S.Ravikumar
5.S.Chandar
6.S.Prabha

... Respondents

Prayer : Civil Revision Petition under Article 227 of the Constitution of India against the order and decretal order dated 20.09.2023 in E.A.No.6281 of 2009 in E.P.No.2943 of 2008 in O.S.No.3431 of 1978 on the file of the IX Assistant City Civil Judge, Chennai.

For Petitioner	:	Mrs.A.L.Gandhimathi Senior Counsel for Ms.S.Meenakshi
For Respondents	:	Mr.K.Venkateswaran

ORDER

This Civil Revision Petition arises against the order passed by the learned IX Assistant City Civil Judge at Chennai in E.A.No.6281 of 2009 in E.P.No.2943 of 2008 in O.S.No.3431 of 1978. The relief sought for in E.A.No.6281 of 2009 was to pass



C.R.P.No.4847 of 2023

an order to remove the wall measuring 5 ft in height put up on the Western side of the warrant mentioned property and deliver vacant possession of the property to the decree holders.

2. By an order dated 20.09.2023, the executing court passed the following order:

" Orders pronounced. Suit in OS No.3431/1978 decreed on 29.04.1981. The decree was confirmed by appeal in AS No.282/1982 and SA No.509/2000 and further confirmed by HSC in Criminal Appeal No(s).4949/2009 dated 06.04.2022. The petitioner/DH is entitled for delivery of vacant possession of schedule mentioned property. The respondent/JD inspite of notice had remained absent, and set exparte for non filing of counter. Drawn upon JD. JD is not entitled for cause any obstructure of execute of warrant. The obstructure of 5 feet wall on the western side of schedule mentioned property is ordered to be removed before delivery of vacant possession of schedule property of DH. No payment will be caused for JD. In the result, petition is allowed."

3. O.S.No.3431 of 1978 is a suit for declaration of title of the plaintiff's property more fully described in the schedule therein and for delivery of possession after removing the barbed wire fencing with which the defendant had enclosed the property of the plaintiff and for costs. In this suit, after service of summons, receipt of written statement and detailed evidence, the suit came to be decreed on 29.04.1981.



C.R.P.No.4847 of 2023

4. Aggrieved by the said decree, an appeal was preferred before the IX Additional Judge, City Civil Court, Madras in A.S.No.282 of 1982. The said appeal was dismissed confirming the judgment and decree on 29.10.1999.

5. Aggrieved by the same, Second Appeal was preferred to this Court in S.A.No.509 of 2000 and the judgment and decree of the Courts below was confirmed on 05.09.2008. The civil revision petitioner, not being satisfied with the concurrent findings against him, took up the matter to the Supreme Court in Civil Appeal No.4949 of 2009. The said appeal was dismissed on 06.04.2022. It transpires that during the pendency of the matter before the Supreme Court, the proceedings before the executing court did not continue.

6. In the interregnum, after the disposal of the Second appeal, before interim protection was granted by the Supreme Court, the petitioner levied E.P.No.2943 of 2008. At that stage, while putting the decree into execution, it came to the notice of the decree holder that the barbed wire fencing which was directed to be removed under the decree had been replaced with a wall measuring 5 feet height on the western side of the property.

7. I have to point out here that the decree of the trial Court has the advocate commissioner's report and plan as is seen from Page Nos.28 and 29 of the typed set of papers. The learned executing Court came to a conclusion that as the decree



C.R.P.No.4847 of 2023

had been confirmed till Supreme Court, the decree holder is entitled for delivery of vacant possession of the property. It also noticed that the judgment debtor had remained absent during the course of the proceeding and had not even bothered to file counter to the same. Consequently, the executing Court came to a conclusion that the wall ought to be removed and accordingly ordered its removal. Challenging the order dated 20.09.2023, the present civil revision petition came up before me.

8. I heard Mrs.A.L.Gandhimathi for Ms.S.Meenakshi for the petitioner and Mr.K.Venkateswaran for the respondents.

9. Mrs.Gandhimathi would submit that the trial Court had decreed the suit in terms of Ex.A5 and the schedule of property that has been given in Ex.A5 does not tally with the schedule of property given in the suit. She would state that an executing court cannot execute the decree where there is an issue of wrong description of the property.

10. Mr.Venkateswaran would submit that it is the duty of the executing court to execute the decree as it stands and since there is removal of the barbed wire fencing stated in the decree, the concrete wall would have to be removed.

11. It is trite that an executing Court cannot go beyond the decree. The touch stone on which execution has to be ordered is the schedule of property as



C.R.P.No.4847 of 2023

given in the decree. The executing court need not look into the judgment of the trial Court or the decree or even that of the Supreme Court. It only executes the decree insofar as the schedule that is found annexed to the decree. I compared the schedule of property found in O.S.No.3431 of 1978 with the schedule of property found in E.P.No.2943 of 2008. Both the schedules tally. It is the duty of the executing Court to ensure that the decree that had been granted is put into execution. It is not the concern of the executing Court to do a roving probe into the reasons given by the trial Court or the appellate Courts for the purpose of granting the decree.

12. The argument of Mrs.Gandhimathi that the schedule of property does not tally with Ex.A5 on the basis of which the suit had been decreed is a point which had been raised both before the trial Court and also agitated unsuccessfully till the Supreme Court. Having lost in the Supreme Court, the judgment debtor cannot be permitted to raise the same plea. *Res judicata* not only arises between two different proceedings but also applies to two different stages of the same proceeding. The defendant having taken the plea and having failed, is barred from raising the same plea by virtue of the principle of *res judicata* before the executing court.

13. Apart from that, the identity of the property is clear and categorical by virtue of the plan that is annexed to the decree. Therefore, all that the executing



C.R.P.No.4847 of 2023

court has to do is to execute the warrant and ensure that the property that is described in the decree is handed over to the decree holder. Insofar as the power of the executing court to order removal of the wall is concerned, the decree itself speaks about removing of the barbed wire fence. I am able to perceive that, due to lapse of time from the date of presentation of plaint till the decree is put into execution, nearly four decades later the barbed wire fence seems to have been replaced with a wall. The executing Court, under Order XXI Rule 35(3) has the power to remove such obstructions in the form of enclosures prior to handing over of vacant possession to the decree holder.

14. Having found that the executing Court has the power to remove the wall by virtue of Order XXI Rule 35(3) and that the judgment debtor cannot re-agitate the plea that has been taken before the Courts on the original and appellate jurisdiction, nothing further remains for me to do than to confirm the order of the executing court.

15. The executing Court shall take note of the fact that the decree obtained in the year 1981 is still languishing at the stage of execution even after the lapse of nearly 40 years. The executing court shall ensure that the decree holder sees the fruits of his decree on or before **26.07.2024**. It shall submit a report to this Court that the decree has been duly executed on **30.07.2024**.



C.R.P.No.4847 of 2023

WEB COPY

16. With the above directions, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

25.06.2024

Index : Yes/No

Neutral Citation : Yes/No

KST

To

IX Assistant City Civil Judge
Chennai.



WEB COPY



C.R.P.No.4847 of 2023

V. LAKSHMINARAYANAN, J.

KST

C.R.P. No.4847 of 2023

25.06.2024