



C.R.P(MD)No.1285 of 2024

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 26.07.2024

CORAM

**THE HONOURABLE MR JUSTICE D.BHARATHA
CHAKRAVARTHY**

**C.R.P(MD)No.1285 of 2024
and
C.M.P(MD).Nos.7405 and 9132 of 2024**

Sundararajan

... Petitioner

-Vs-

Pushparani

... Respondent

PRAYER: Civil Revision Petition is filed under Section 115 of the Code of Civil Procedure, to set aside the fair and decreetal order dated 22.04.2024 in E.A.No.14 of 2023 in E.P.No.26 of 2014 in O.S.No.382 of 2006 on the file of the Principal District Munsif Court, Padmanabhapuram pending disposal of the above civil revision petition.

For Petitioner : Mr.G.Prabhu Rajadurai
For Respondent : Mr.M.Mohanaraj

ORDER

This civil revision petition is directed against the order dated 22.04.2024 made in E.A.No.14 of 2023 in E.P.No.26 of 2014 in O.S.No.



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382 of 2006 passed by the learned Principal District Munsif,
Padmanabhapuram.

2. The said Interlocutory Application is filed by the judgment-debtor under Section 47 of the Code of Civil Procedure to declare that the decree is inexecutable.

3. Heard Mr.G.Prabhu Rajadurai, learned counsel appearing on behalf of the petitioner and Mr.M.Mohanaraj, the learned counsel appearing on behalf of the respondent.

4. The learned counsel appearing on behalf of the petitioner taking this Court to the plaint filed in the present suit, especially to paragraph No. 3 would point out that in the plaint, even though it is pleaded that there was a total extent of 18 cents and the predecessor of the judgment-debtor herein, namely, Chinnaiyyan Nadar also had six cents in the southern side of the suit property. Without furnishing any linear measurements and without properly describing the suit property, the suit was filed. When the defence was taken in the suit that in the absence of a prayer for recovery of possession, mandatory injunction alone cannot be granted, the same was



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also rejected on the ground that the petitioner's property is a different property. Therefore, when the decree was put to execution, the petitioner sought to raise the ground. Earlier, when the petitioner filed an application under Section 47 of the Code of Civil Procedure, the matter came up before this Court in C.R.P.No.2168 of 2019. By order dated 10.02.2020, this Court had directed the Executing Court to give proper instructions to the Advocate Commissioner to identify the suit property. Without properly giving any instructions, the Executing Court sought to instruct based on the version of the decree-holder alone, without considering the actual extent, which is available on the field and also without considering the house of the judgment-debtor, which is put up in his own 6 cents. Again, this petition under Section 47 is filed. The trial Court therefore ought to have considered that when it is the very case of the plaintiff that the said Chinnaaiyyan Nadar also had six cents, from whom the judgment-debtor is claiming the title for the 6 cents, without identifying and earmarking the said six cents, the decree ought not to have been put into execution. If the property of the Chinnaaiyyan Nadar in the southern portion of the suit property is identified, then at least the house of the petitioner will be saved. The house construction is well within the limit of six cents and therefore,



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the decree for mandatory injunction cannot at all be executed. Therefore, he would submit that the petition deserves to be allowed.

5. In support of his submission, the learned counsel relied upon the judgment in *H.Ashraf Ali versus Chithra and another* reported in **2018 SCC Online Mad 7739**. More specifically, relying upon paragraph 12, in which a Co-ordinate Bench of this Court had relied upon the earlier judgment of this Court in *Palaniyammal versus Nanjunda Gounder* reported in **2006 Volume (3) TLNJ 680(civil)**, whereunder the Court had categorically held that in the absence of the description of the property, for which, it is sought for mandatory injunction cannot be effectively granted. When it is not the case of the plaintiff that he is in possession and especially, when the defendant is in occupation of the property, when no relief of recovery of possession is claimed, the same cannot be dubiously achieved by granting the relief of mandatory injunction, especially in the absence of a proper description of the property.

6. Per contra, Mr.M.Mohanaraj, learned counsel appearing on behalf of the respondent/plaintiff would submit that originally the petitioner



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herein had filed O.S.No.324 of 2006 for an injunction restraining the decree-holder herein from interfering with the very construction. In the said suit, an Advocate Commissioner was appointed, who filed a report stating that the construction, which is commenced by the judgment-debtor herein, is by encroaching partly into the property of the decree-holder. At that stage, an undertaking was given by the judgment-debtor herein in his own suit that he will not further proceed with the construction, when the construction was only at the basement level. However, by leaving the suit for default, he started proceeding with the construction and therefore, the present suit in O.S.No.382 of 2006 was filed. In the suit also, the defence, which was taken by the judgment-debtor, is the very same defence stating that his construction is well within his limit of six cents, which was all along rejected by this Court up to the second appeal level and the decree is confirmed.

7. Even thereafter, in the year 2014 yet another suit in O.S.202 of 2014 was also filed by the very same judgment-debtor, which also came to be dismissed on merits. The judgment-debtor claimed the relief of partition of his six cents claiming that the entire extent remained un-



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divided and that his construction stood within his extent of six cents. The same was also once again considered by the Court and dismissed on merits. Even thereafter, when the execution petition was filed to execute the decree, the judgment-debtor had earlier filed 3 applications under Section 47 of the Code of Civil Procedure in E.A.No.64 of 2015, 65 of 2015 and 66 of 2015 on the very same ground, which were dismissed by the Executing Court. Even the civil revision petition filed by the judgment-debtor was dismissed by holding that it is for the executing Court to issue proper instructions to the Advocate Commissioner. Thereupon, the Advocate Commissioner has been duly instructed by the execution Court and the matter is proceeded with.

8. While so, once again to stall the decree-holder from realizing the fruits of the decree, the present 47 application is filed. According to him, the entire application is vexatious. Repeated 47 applications cannot be filed. All the grounds should have been taken in the first 47 application itself. Even the ground which is taken in the 47 application is the very same defence which was taken in the suit. Apart from the present suit, in two other suits the very same defence is taken. Therefore, the judgment-



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debtor is only trying to re-litigate the issues already decided in the main suit as well as in the connected suits.

9. In support of his submissions, the learned counsel would rely upon the judgment of the Honourable Supreme Court of India in ***Pradeep Mehra versus Harijivan J.Jethwa and others*** reported in (2023) INSC 958. More specifically relying upon paragraph 7 to contend that it is settled position of law that principles of *res-judicata* are not only applicable in respect of separate proceedings, but the general principles of *res-judicata* are also applicable at the subsequent stage of the same proceedings. Therefore, when the self same defence is taken up in the suit and the same having been negatived and the decree of mandatory injunction has been granted and having become final, the legality or otherwise of the decree for mandatory injunction cannot be now gone into in the application filed under Section 47 of the Code of Civil Procedure.

10. I have considered the rival submissions made on either side and perused the materials record of the case.



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11. It can be seen that the present cause of action between the parties arose in the year 2006, when the petitioner herein sought to put up the construction of his house. When the construction was objected to by the decree-holder herein, he went ahead and filed O.S.No.324 of 2006. In the said suit, in the proceedings for interim injunction, the petitioner herein himself has made an undertaking not to proceed with the construction. Therefore, only to wriggle out of the undertaking given, he has left the suit for default and thereafter, proceeded with the construction. In view thereof, when the counter suit is filed by the decree-holder herein in O.S.No.382 of 2006, considering all the facts, the suit has been decreed. The matter was carried up to this Court till the Second Appeal and the decree had become final and therefore, the execution petition in E.P.No.26 of 2014 is filed. At this stage, a third suit in the nature of suit for partition was also filed by the self same judgment-debtor. The same was once again considered by the Courts on merits and has been dismissed as vexatious also. As against which, it is said that an appeal suit was filed, but however, the same also stands as dismissed for default as on date.



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12. In view thereof, I find that the very same submission is now sought to be taken in the proceedings by way of filing applications under Section 47 of the Code of Civil Procedure. Even though all and every question relating to execution can be gone into by the executing Court, Section 47 is not meant to re-agitate the very same issues, which is gone into in the suit and has been answered one way or the other on merits.

13. When the earlier applications were dismissed, the said decision of the executing Court was affirmed and in C.R.P(MD).No.2168 of 2019, this Court had already noted that since 14 years had passed by, the Execution Court should proceed further to execute the decree by giving proper instructions to the Advocate Commissioner to properly identify the suit property and carry out the mandate of the decree. It is the original contention of the petitioner in the suit that he is entitled to 2/3 share in the suit property, which was only negatived in the suit, but, however, the location of the house has not been specifically dealt with in the decree. Be that as it may, even if it is held that he is entitled to only 1/3rd share of the suit property, his contention that 1/3rd remained undivided has since been rejected, as his partition suit has also been dismissed and once his 1/3rd is



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already held to be divided and his construction is found to be on the property of the plaintiff and a mandatory injunction has been granted by the civil Court, the execution Court cannot go behind and re-write the decree.

14. On hyper-technical arguments raised by the parties, a decree granted by the Court cannot be reduced to a mere paper and the Courts will normally have to give meaning to the decree and to execute the decree, so that the decree-holder realizes the substantial relief that is claimed in the suit. In this case, there is no iota of doubt whatsoever that the claim of the decree-holder all along is that the defendant is encroaching the suit property and putting up the construction of his house. Therefore, that portion of the house, which is in the plaintiff's property, has to be demolished. On technical considerations and points of procedure, the controversy which has arisen in the year 2006 and continued for the past 18 years, cannot be set to unrest without relief being granted to the litigant.

15. In view thereof, finding no merits, the Civil Revision Petition is stands dismissed. Considering the fact that the suit is of the year 2006, the



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Executing Court is directed to take up further proceedings as expeditiously as possible. No costs. Consequently, connected Miscellaneous Petitions are closed.

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NCC:Yes/No

Index : Yes / No

Rmk

To

1.The Principal District Munsif, Padmanabhapuram.



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D.BHARATHA CHAKRAVARTHY, J.

Rmk

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