

**(1994) 11 MAD CK 0110**  
**In the Madras High Court**

Dungarchand Narasingji

APPELLANT

Vs

Chennai Sri Ekambareswarar Devasthanam

RESPONDENT

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**Date of Decision :** 09-11-1994

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 47

**Citation :** (1995) 1 MLJ 352

**Hon'ble Judges :** Srinivasan, J

**Bench :** Division Bench

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**Judgement**

Srinivasan, J.—These three appeals arise in the execution stage. A decree was passed against the appellant, who was the defendant, in C.S. No. .420 of 1979. Both the plaintiff and the defendant filed appeals, which were numbered as O.S.A. Nos. 106 of 1986 and 118 of 1987. The appellate Bench modified the decree of the learned single Judge. The relevant clause in the appellate decree reads as follows:

that the Appellant in O.S.A. No. 118 of 1987 (defendant) be and is hereby directed to hand over possession of the entire schedule superstructure to the appellant (in O.S.A. No. 106 of 1986 (plaintiff)

It is this clause of the decree, which is sought to be executed by the decree-holder in E.P. No. 167 of 1991. The appellant, on getting notice of the execution petition, filed Application No. 3377 of 1992 for dismissing the execution petition u/s 47 of the Code of Civil Procedure. The main objection raised in the said application is that there was a gift deed after the decree of the trial court during the pendency of the appeal in favour of the plaintiff by the defendant and under the gift deed, the" entire property has been conveyed to the plaintiff: The decree directing delivery of possession in favour of the plaintiff is, therefore, a nullity according to the appellant. Another contention raised in the said application is that the provisions of Order 39, Rule 15 of the Original Side Rules have not been complied with and the execution petition has to be dismissed under Order 39, Rule 11, Original Side Rules. The appellant also filed Application No. 4471 of

1992 for an order directing the return for amendment or rejection of the execution petition filed by the decree-holder. In that application the ground mentioned was that Order 39, Rule 15 of the Original Side Rules had not been complied with. The Master passed an order on 30.10.1992, after hearing both sides, dismissing the application, holding that there was sufficient compliance with the provisions of Order 39, Rule 15, Original Side Rules. Against that, the appellant preferred an appeal before the learned single Judge which was numbered as Application No. 1244 of 1992.

2. During the pendency of that application, the appellant filed Application No. 5780 of 1993 for an order to accept an additional affidavit from him. In the additional affidavit, the appellant sought to give particulars of the persons who were in occupation of the suit property as his tenants. Both the applications were heard by a learned single Judge, who passed an Order on 15.12.1993 dismissing them. O.S.A. Nos. 266 and 267 of 1994 are against the said order.

3. The main Application No. 3377 of 1992 was being adjourned at the request of the appellant repeatedly and ultimately, when the appellant prayed for adjournment on 27.9.1994, the Master refused to grant the same. The appellant's counsel did not argue the matter. Arguments of the respondent's counsel were heard and the Master passed an order dismissing the application holding that there was no merit therein. That order was challenged by way of an appeal in Application No. 5731 of 1994 before the learned single Judge. The learned Judge dismissed the same on 27.10.1994. Against the said order, O.S. A. No. 282 of 1994 has been filed.

4. The main contention of learned Counsel for the appellant in these appeals is that the decree is not executable inasmuch as there was a gift deed between the date of decree in the suit and the date of disposal of the appeal. There is absolutely no substance in this contention. Whether there was a gift deed or not is wholly irrelevant. In so far as the decree reads, there is a clear direction to the appellant herein to hand over possession of the property to the respondent, the plaintiff. So long as the decree stands as such, it is not open to the appellant to contend that the decree is not executable. There is also no merit in the contention that the decree is a nullity. Nothing has been made out before us to show how the decree is a nullity.

5. The next contention of learned Counsel is that the provisions of Order 39, Rules 11 and 15 of the Original Side Rules are mandatory and inasmuch as the execution petition does not state whether the property is in the possession or occupancy of the judgment-debtor or any other person or whether it is in the occupancy of a tenant or any other person entitled to occupy the same, the executing court ought to have amended the application or rejected the same. Rule 15 reads as follows:

In every application for the execution of a decree for the delivery of immovable property under Order 21, Rule 35 or 36 of the Code, it shall be stated whether

the property is in the possession or occupancy of the judgment-debtor, or any other person bound by the decree to vacate the property or whether it is in the occupancy of a tenant or any other person entitled to occupy the same, and not bound by the decree to relinquish such occupancy.

Rule 11 is in the following terms:

An application which does not comply with the provisions of the Code or these rules or does not claim any substantial relief shall be returned for amendment or rejected.

6. It is submitted by learned Counsel that in the execution petition, the decree-holder has not chosen to give the particulars of the persons who are in possession of the property. As the rule is mandatory, the only course open to the court is to return the execution petition for amendment or reject the same. In support of this contention, learned Counsel places reliance on the judgment in Sharif-ud-din Vs. Abdul Gani Lone, . It was held in that case that whenever a statute prescribes that a particular act is to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence, it would be difficult to hold that the requirement is not mandatory and the specified consequence should not follow. The court laid down the test for determining whether a provision is directory or mandatory. The court said that the fact that the statute uses the word ""shall"" while laying down a duty, is not conclusive on the question whether it is a mandatory or directory provision, that in order to find out the true character of the legislation, the Court has to ascertain the object which the provision of law in question is to subserve and its design and the context in which it is enacted, and that if the object of a law is to be defeated by non-compliance with it, it has to be regarded as mandatory.

7. If that test is applied in this case, it can be seen that the Rule is not mandatory and it is only directory. The object of Rule 15 is to make it convenient for the parties as well as the court. When the decree is one for delivery of possession as against the judgment-debtor, it will be very convenient if the decree-holder is able to state that the person in actual possession is not the judgment-debtor and somebody else who is bound by the decree or who is not bound by the decree. The failure to mention the particulars relating to the same will not invalidate the execution petition. In the present case, the appellant did not choose to disclose the relevant particulars, even when he filed the two applications viz., Application No. 3377 of 1992 and Application No. 4471 of 1992. It was only much later after the Master passed the order dismissing Application No. 4471 of 1992, the appellant filed Application No. 5780 of 1993 for accepting the additional affidavit in which the names of the tenants were listed. Even from that list it is seen that the persons mentioned therein are all tenants of the appellant. Naturally, they are bound by the decree. There is no ambiguity whatever in the direction contained in the decree that the appellant is bound to give possession. Whether he is in actual possession or had inducted somebody else in possession, he is bound to see that the decree-holder is put in possession

of the property.

8. In the circumstances, the failure to mention the particulars of the persons who are in actual occupation of the property would not invalidate the execution petition filed by the decree-holder in the present case. Hence, there is no question of applying Rule 11 of Order 39 of Original Side Rules and returning the petition for execution or rejecting the same.

9. The next contention urged by learned Counsel for the appellant is that the Master did not hear the counsel for the appellant in Application No. 3377 of 1992. According to learned Counsel, when the Master refused to grant adjournment, he should have asked the counsel for the appellant to argue and without hearing the arguments of appellant's counsel, he ought not to have heard the respondent's counsel. It is further argued that the Master has not discussed the merits of the case or has given his reasons in support of the order.

10. There is no substance in this contention. Admittedly, the appellant's counsel did not argue the matter before the Master when the adjournment was refused. It was for the counsel to have addressed the Court and adduced relevant arguments when adjournment is not granted. In spite of doing so, it is not proper on the part of the counsel to make a complaint that the court heard the opposite party and passed orders on merits. In the facts and circumstances of the case, the only course which was available to the Master was to hear the learned Counsel for the respondent on merits and pass orders.

11. There is also no substance in the contention that the Master has not given any reason in support of his order. The application is so bereft of any merit that there is no necessity at all to discuss the matter in detail. We have already discussed the merit of the contention in Application No: 3377 of 1992. We have pointed out that there is no merit in the said contention. The learned Judge has also dismissed the appeal before him holding that the Master was right in refusing to grant adjournment. It does not appear from the order of the learned Judge that any attempt was made by the appellant's counsel to argue the petition u/s 47 of the Code of Civil Procedure.

12. Learned Counsel repeatedly requested us to send back the matter to the Master and direct him to hear the same on merits on a fixed date. We have refused to do so. On the other hand, we told learned Counsel that we ourselves would hear the matter on merits as it is only a petition u/s 47 of the Code of Civil Procedure. We told the counsel that we would consider the case u/s 47 and dispose of the same. It is only at that stage, learned Counsel contended that the decree was not executable in view of the fact that there was a gift deed after the passing of the decree by the trial Court. We have disposed that contention by holding that it was unsustainable.

13. In the result, all the three appeals have to fail and they are hereby dismissed. There will be no order as to costs.