
(2017) 01 MAD CK 0084

In the Madras High Court

Case No : 128 of 2017 and C M P No 575 of 2017

Kesava Naicker

APPELLANT

Vs

Lakshmanaswamy

RESPONDENT

Date of Decision : 31-01-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 21 Rule 36](#), [Order 21 Rule 95](#)

Citation : (2017) 01 MAD CK 0084

Hon'ble Judges : R.Mala

Bench : SINGLE BENCH

Advocate : R.Mala

Final Decision : Dismissed

Judgement

1. Civil Revision Petition is filed against the fair and decreetal order dated 21.03.2016 in E.P.No.21 of 2014 in O.S.No.1416 of 1980 on the file

of the District Munsif -cum-Judicial Magistrate, Sriperumbudur.

2. The respondent as a plaintiff filed a suit in O.S.No.1416 of 1980 for declaration and recovery of possession in respect of B schedule property

i.e. 71 cents out of one Acre 71 cents in S.No.139/1. During pendency of the suit, Advocate Commissioner has inspected the property and filed a

report, in which, it was stated that judgment debtor is in possession of 0.32 cents. The suit was decreed as prayed for. Aggrieved over the same,

the petitioner/defendant has preferred an appeal in A.S.No.55 of 1995 and the said appeal was dismissed. Then the decree holder/respondent

herein has filed E.P.No.21 of 2014 for delivery of B schedule property. The Executing Court, after hearing both sides, has ordered delivery,

against which, the present revision is preferred by the petitioner/judgment

debtor.

3. Learned counsel for the petitioner/judgment debtor would submit that at the time of trial, the Commissioner has inspected the property along

with the Surveyor. In his report, he has categorically stated that the judgment debtor is in possession of 0.32 cents. Admittedly, the extent of B

schedule property is 0.71 cents. So the trial Court ought to have granted 0.39 cents to the plaintiff in respect of B schedule property not the entire

0.71 cents. But no boundary for the said 0.71 cents is given by the plaintiff. So it is difficult to state that where the said 0.39 cents is lying and

which 0.39 cents out of 0.71 cents has to be delivered to the decree holder. He would further submit that aggrieved over the judgment and decree

passed by the trial Court, the judgment debtor has preferred the appeal, but the same was also dismissed. Now the petitioner is in possession of

patta land, which is adjacent to B schedule property and the respondent/plaintiff is attempted to take that patta land. He further submits that instead

of filing application for delivery under Order 21 Rule 36 C.P.C., the plaintiff has filed the execution petition under Order 21 Rule 95 by quoting

wrong provision of law. Therefore, he prays for allowing the revision.

4. Resisting the same, learned counsel for the respondent/plaintiff would submit that the Executing Court has ordered for delivery and Amin has

also executed the warrant and property has been delivered to the respondent/decree holder. Because of filing of E.A.No.76 of 2016, delivery was

not recorded. He would further submit that the respondent has not taken any property of the petitioner. Therefore, he prays for dismissal of the

revision.

5. Considered the rival submissions made on both sides and perused the typed set of papers.

6. The respondent as the plaintiff filed the suit for declaration and injunction in respect of A schedule property and delivery of possession of B

schedule property, which forms part of A schedule property. The land measuring 0.71 cents in S.No.139/1 in B schedule property. It is an

admitted fact that during pendency of the suit, Commissioner was appointed and he inspected the property along with the surveyor and filed his

report. In his report, it is stated that the judgment debtor/petitioner herein is in possession of 0.32 cents in S.No.139/1. After contest, the suit has

been decreed as prayed for.

7. In para-66 of the judgment, the trial Court held that the respondent/plaintiff is entitled for declaration to the land measuring 0.71 cents in

S.No.139/1 in B schedule property. Aggrieved over the same, the petitioner/defendant has preferred A.S.No.55 of 1995, which was dismissed.

So the respondent/decreed holder is entitled to 0.71 cents, since the decree and judgment passed by the trial Court has become final. Then the

respondent/decreed holder has filed E.P.No.21 of 2014 for delivery. After contest, delivery was ordered on 21.03.2016. But the

petitioner/judgment debtor has filed E.A.No.22 of 2016.

8. This Court has called for report from the Executing Court to ascertain whether the delivery has been recorded and execution petition has been

terminated. The report received, which shows that delivery was ordered on 21.03.2016 after disposing of the stay petition. Delivery warrant was

executed by the Court a.m. on 02.12.2016 by effecting delivery. On 22.12.2016, the judgment debtor filed a petition in E.A.No.76 of 2016 to

stay all the further proceedings in E.P.No.21 of 2014 till the disposal of civil revision. The report further shows that execution petition is not

terminated and delivery was not recorded as E.A.No.76 of 2016 is pending for enquiry.

9. As already stated that the decree holder is entitled to entire 0.71 cents as per the decree and judgment passed by the trial Court, since it has

become final. Furthermore, E.P.No.21 of 2014 has been filed and delivery has been ordered. Now the decree holder/respondent has taken

delivery, due to pendency of this revision, delivery is not recorded and execution petition is not terminated. Under such circumstances, I do not

interfere with the order of delivery passed by the Executing Court. It is true, E.P.No.21 of 2014 has been filed under Order 21 Rule 95 C.P.C.

instead of filing under Order 21 Rule 36 C.P.C. According to the petitioner, it is a misquoting of provision of law. But misquoting of provision of

law is not a reason for setting aside the fair and decreetal order. Therefore, the respondent/decreed holder is entitled to get the delivery of

possession of B schedule property and that the respondent/decreed holder has also taken delivery. So the fair and decreetal order passed by the

Executing Court does not suffer any infirmity or irregularity and it is hereby

confirmed. Consequently, the Civil Revision is dismissed.

10. In the result, the Civil Revision Petition stands dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.