

(2009) 10 MAD CK 0306

In the Madras High Court

Case No : C.R.P. (NPD) . No. 1433 of 2008 and M.P. No. 1 of 2008

R. Krishnasamy Naidu

APPELLANT

Vs

Rock Onne de Paris rep. by her power Agent, Mariappan

RESPONDENT

Date of Decision : 26-10-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : (2009) 10 MAD CK 0306

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : S. Parthasarathy, S.C. for Sai Bharath and Ilan, for the Appellant; R. Natarajan, for the Respondent

Judgement

M. Venugopal, J.—The petitioner/respondent/plaintiff has preferred this civil revision petition as against the order dated 18.03.2008 in E.P. No. 58 of 1998 in O.S. No. 29 of 1982 passed by the learned Additional District Judge, Puducherry at Karaikal.

2. The Executing Court, while passing orders in E.P. No. 58 of 1998 filed by the respondent/petitioner/second defendant, has directed the revision petitioner/respondent/ plaintiff to deliver the vacant possession of the suit property and hand over the key into the Court within 10 days from the date of the order viz., 18.03.2008 and if the revision petitioner/respondent/plaintiff fails to deliver the key, the respondent/petitioner is permitted to get the delivery through the process of Court by paying necessary process fee and further permitted the respondent/petitioner to obtain the local police help having jurisdiction over the property if resisted while taking delivery of the suit property through Court and has ultimately allowed the said Execution Petition with costs.

3. According to the learned Counsel for the revision petitioner, the order of the Executing Court is an erroneous one since it has not read the decree as a whole and the Executing Court should have seen that the dictum of the Court is that the prayer of the specific performance is rejected and in the alternative, the

revision petitioner has been granted the amount of Rs. 10,000/- paid by him, but there is a rider in the decree that the said sum of Rs. 10,000/- shall be paid to the revision petitioner/ plaintiff only if he vacates and hands over the key into court and in the absence of the revision petitioner's claim for Rs. 10,000/-, the condition to vacate is not enforceable and therefore, the Executing Court should have held that the Execution Petition is not maintainable and as a matter of fact, the respondent/defendant has not made a counter claim in the written statement claiming possession and that he has to pay 75% Court fee on the market value of the suit property for recovery of possession as per Section 30 of the Pondicherry Fees and Suit Valuation Act and therefore, the clause in the decree in regard to the handing over of the key is only a rider for the petitioner obtaining the amount of Rs. 10,000/- deposited into Court and as such, is not a separately executable decree and indeed, the revision petitioner/plaintiff can be dispossessed only by due process of law by filing of appropriate suit and the execution petition is only a short cut resorted to by the respondent/ defendant to dispossess the revision petitioner and continuing further, the husband of the respondent/defendant has not filed counter to the execution proceedings and there is a genuine doubt whether he is alive or not and when the revision petitioner has raised doubt in this regard, the Executing Court should have rendered a finding but wrongly directed the revision petitioner to hand over the key of the property and when the Executing Court has went to the extent of granting police protection in regard to the taking delivery of the property, the same is a wrong one in view of the fact that the said relief goes beyond the prayer made in the execution proceedings and moreover, there is a title dispute over the property and when the title of the first defendant is in challenge before A.S. No. 7 of 2007 on the file of Additional District Judge, Karaikal at Pondicherry then the Executing Court is not correct in directing the revision petitioner/plaintiff to hand over the key to the respondent/petitioner/second defendant, who is a subsequent purchaser and these aspects of the matter have not been gone into by the Executing Court in a real and proper perspective and therefore, prays for allowing the civil revision petition.

4. The learned Counsel for the revision petitioner submits that the respondent has to avail his remedy before the learned Rent Controller and till then the decree obtained in O.S. No. 29 of 1982 is not an executable one and as a matter of fact, the jurisdiction of the Civil Court in matters like this of eviction is completely barred and that the jurisdiction in these matters is vested in the Tribunals set up under the statute and in this connection relies on the decision of Hon"ble Supreme Court in M/s. East India Corporation Ltd. Vs. Shree Meenakshi Mills Ltd., at page 1098 wherein paragraph 8 and 9 it is observed as follows:

8. What is stated in the second proviso to Section 10(1) is the sole circumstance in which the Civil Court is invested with jurisdiction in matters of eviction. But this jurisdiction cannot be invoked otherwise than as stipulated in the second proviso. This means that the condition precedent to the exercise of jurisdiction by a Civil Court is that the tenant should have denied the title of the landlord or

claimed right of permanent tenancy and the Controller should, on such denial or claim by the tenant, reach a decision whether such denial or claim is bona fide. Upon such decision, the Controller must record a finding to that effect. In that event, the landlord is entitled to sue for eviction of the tenant in a Civil Court. Where these conditions are satisfied, the Civil Court will have jurisdiction to pass a decree for eviction on any of the grounds mentioned in Section 10 or Sections 14 to 16, notwithstanding that the Court has found that the tenant's denial of the landlord's title does not involve forfeiture of the lease, or, his claim of right of permanent tenancy is unfounded. Except to this limited extent, the jurisdiction of the Civil Court in matters of eviction of a tenant is completely barred and the jurisdiction in such matters is vested in the tribunals set up under the statute.

9. Significantly, the jurisdiction of the Civil Court can be invoked only where the Controller comes to a decision, and record a finding, that the denial or claim by the tenant, as aforesaid, is bona fide. If the Controller were to come to the opposite conclusion, no question of invoking the jurisdiction of the Civil Court would arise. But the decision of the Controller is concerned solely with the bona fides, and not the correctness or validity, of the denial or claim, for these difficult questions of title are by the statute reserved for decision by the appropriate Civil Court which is the more competent forum in such matters. (See the principle discussed in *Magiti Sasamal Vs. Pandab Bissoi*, In such an event, the Civil Court will become competent to pass a decree for eviction on any of the grounds mentioned in Section 10 or Sections 14 to 16. On the other hand, if the decision of the Controller is that the tenant's denial or claim is not bona fide, the jurisdiction of the Civil Court cannot be invoked by the landlord and the Controller will then be the competent authority to order eviction, after affording the parties a reasonable opportunity of being heard, on any one of the grounds specified under the statute, including the ground that the tenant has, without bona fide, denied the landlord's title or claimed right of permanent tenancy. What is significant is that the decision of the Controller, duly recorded by him, as regards the bona fide denial or claim by the tenant is the condition precedent to the invocation of power of the Civil Court. Any suit instituted by the landlord for eviction of a tenant from a building falling within the ambit of the Act, otherwise than as stipulated by the section is, therefore, incompetent for lack of jurisdiction of the Court and any decree of the Court in such a suit is null and void and of no effect.

5. Further, the decision of Honourable Supreme Court in *Rafique Bibi (D) by Lrs. Vs. Sayed Waliuddin (D) by Lrs. and Others*, at page 291 is relied on the side of the petitioner wherein at para 8 and 9 it is held as follows:

8. A distinction exists between a decree passed by a Court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing court; the remedy of a person aggrieved

by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior court failing which he must obey the command of the decree. A decree passed by a court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings.

9. In Vasudev Dhanjibhai Modi Vs. Rajabhai Abdul Rehman and Others, it has been held: (SCC pp.672-73,para7)

When the decree is made by a court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record. But where the objection as to jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

6. Contending contra, the learned Counsel for the respondent/subsequent purchaser (second defendant in suit) submits that the decree obtained in O.S. No. 29 of 1982 dated 05.02.1983 has not been canvassed as a nullity before the trial Court and in the memorandum of grounds of revision and for the first time such a plea that the decree is not a nullity has been taken before this Court in this revision and the same has to be rejected because of the fact that a ground which has not been raised in the memorandum of grounds of revision cannot be permitted to be raised, which is an accepted principle of law and the further plea that want of jurisdiction of a particular Court has also not been taken before the trial Court or in this revision and in fact, the decree passed in O.S. No. 29 of 1982 by the learned Additional District Judge, Puducherry at Karaikal dated 05.02.1983 has been confirmed by this Court in A.S. No. 181 of 1983 dated 21.03.1996 and later the same has been affirmed in L.P.A. No. 84 of 1996 dated 30.03.1998 and the clauses incorporated in the decree in O.S. No. 29 of 1982 dated 05.02.1983 have been sustained by all the forums and the revision petitioner before this revision is raising all untenable principles and indeed, the revision petitioner cannot travel beyond the scope of decree passed in O.S. No. 29 of 1982 dated 05.02.1983 which has been merged with the decree passed in A.S. No. 181 of 1983 dated 21.03.1996 etc. and the decree in O.S. No. 29 of 1982 is an executable one and there is no ambiguity in this regard and the revision petitioner is abusing the process of Court and there is no bona fide in his claim and has directed by the trial Court the entire amount has already been deposited in the year 1983 and the balance of convenience and equity are in favour of the respondent and therefore, prays for dismissing the revision petition.

7. The learned Counsel for the respondent/second defendant cites the decision of this Court in Padmavathi Vs. Kaveriammal, wherein it is held that "it is well settled that executing Court cannot go behind decree unless Court which passed decree suffered by lack of jurisdiction which will make it a nullity and even if a decree is considered to be an illegal one, remedy open to party aggrieved is to

approach higher forum, if same was passed by Court of competent jurisdiction and as such the petition u/s 47 of CPC is not maintainable."

8. He also cites the decision of Honourable Supreme Court in *Sardar Estates Vs. Atma Ram Properties (P) Ltd.*, wherein it is held that "despite appeals and SLP against decree of eviction having been dismissed, appellant/tenant, filing fresh objections in execution petition and starting another round of litigation on frivolous grounds and is an abuse of process of the court and flagrant violation of eviction decree which attained finality and the appeal has been dismissed with costs and that the appellant/tenant has been directed to hand over possession in three months, else to be evicted by police force."

9. Another decision of this Court in *Ranganathan Vs. S. Kuppuraju*, is cited before this Court on the side of respondent/second defendant to the effect that "finding of trial Court has become final in execution proceedings and that the defendant who became judgment debtor cannot reagitate the same issue again."

10. Moreover, on the side of respondent, attention of this Court is drawn to the decision of Honourable Supreme Court in *Rafique Bibi (D) by Lrs. Vs. Sayed Waliuddin (D) by Lrs. and Others*, at page 288 whereby and whereunder the Honourable Supreme Court has among other things held that "decree passed by a Court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings." That apart, on the side of respondent, the decision of Honourable Supreme Court in *Vedic Girls Senior Secondary School Arya Samaj Mandir, Jhajjar Vs. Smt. Rajwanti and Others*, is relied on to the effect that "an Executing Court cannot act beyond the scope of decree without invoking Section 47 of Civil Procedure Code."

11. Added further, the learned Counsel for the respondent cites the decision of Honourable Supreme Court in *Balvant N. Viswamitra and Ors. v. Yadav Sadashiv Mule (dead) through Lrs. and Ors.* 2005-3-L.W. 20 wherein it is held that "the defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order and such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is nullity and the validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings and on facts, it is held that by no stretch of imagination, can be described as nullity and if the decree is not null and void, as per settled law, appropriate proceedings will have to be taken by the persons aggrieved by such decree and the non-joinder of respondents, hence, would not make a decree passed by the Court of Small Causes, Bombay, nullity or inexecutable."

12. Also, on the side of respondent, the decision of this Court in *Madaswamy v. Govindaraj* 2007-1-L.W. 829 is brought to the notice of this Court wherein it is held that "The Executing Court has to delivery possession of the suit lane after removal of the obstruction or demolition, as the case may be and as per the decision of Honourable Supreme Court in *B. Gangadhar v. B.G. Rajlingam* 1996

(1) L.W. 145, what is relevant is only a warning by the Bailiff, to deliver peaceful possession and if the respondent causes obstruction, the Bailiff is entitled to remove the obstruction, cause the construction demolished and deliver vacant possession to the Decree Holder in terms of the Decree."

13. On a careful consideration of respective contentions and taking into account of the faculative facts and circumstances of the case in totality, this Court is of the considered view that the revision petitioner is legally barred and estopped from canvassing the validity of the decree passed in O.S. No. 29 of 1982 dated 05.02.1983 which has been confirmed in A.S. No. 181 of 1983 dated 21.03.1996 by this Court and later affirmed the judgment in L.P.A. No. 84 of 1996 dated 30.03.1998 as against which no further proceedings have been taken and therefore, it is quite evident that the decree in O.S. No. 29 of 1982 dated 05.02.1983 passed by the learned Additional District Judge, Puducherry at Karaikal is clearly an executable one especially when the respondent/second defendant has purchased the suit property in her name from the first defendant as a bona fide purchaser and viewed in that perspective, the civil revision petition filed by the petitioner is not a bona fide one and resultantly, the order passed in E.P. No. 58 of 1998 in O.S. No. 29 of 1982 dated 18.03.2008 to the effect in directing the revision petitioner to deliver the vacant possession of the suit property and hand over the key into Court within 10 days from the date of the order etc. is legally a correct one since this Court does not find any serious infirmity or patent illegality in the order so passed and accordingly, the revision fails.

14. In fine, the Civil Revision Petition is dismissed, leaving the parties to bear their own costs. The order passed in E.P. No. 58 of 1998 dated 18.03.2008 is affirmed for the reasons assigned by this Court in this revision. Considering the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected miscellaneous petition is closed.