

(1992) 09 MAD CK 0054
In the Madras High Court

V. Shanmugha Mudaliar

APPELLANT

Vs

IX Assistant Judge, City Civil Court and Another

RESPONDENT

Date of Decision : 18-09-1992

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115, 47
Constitution of India, 1950 — Article 227

Citation : (1993) 2 MLJ 160

Hon'ble Judges : Srinivasan, J

Bench : Division Bench

Judgement

Srinivasan, J.—The matter has a long history and I had occasion to consider the same at an earlier stage also. The brief facts leading to the present revision petitions are as follows:

Petitioner obtained a decree in O.S. No. 923 of 1962 on the file of the City Civil Court, Madras, on 3.3.1964 for declaration of his title to the suit property and for recovery of possession from the defendants. An appeal was filed by the contesting 5th defendant in the suit, in A.S. No. 311 of 1964 on the file of this Court and it was dismissed on 29.3.1971. A petition for execution was filed and delivery was ordered in E.P. No. 831 of 1981. The present second respondent caused an obstruction on the ground that he had purchased the property from the judgment-debtor and a petition was filed by the petitioner for removal of obstruction in E.A. No. 1796 of 1982 and that was ordered on 11.4.1982. The second respondent filed a petition u/s 47, C.P.C. in E.A. No. 1487 of 1983 contending that the property which was purchased by him was not the subject matter of the suit and the decree. That application was dismissed on 26.11.1990. Applications were filed by the petitioner for removal of the superstructure, for grant of police aid, for breaking open the lock and for amendment of the execution petition to include a new prayer instead of the old prayer. Those applications filed by the petitioner were ordered on 26.11.1990.

2. Second respondent had filed a suit in O.S. No. 786 of 1984 for injunction

restraining the petitioner from executing the decree on the ground that the property purchased by him was different from the suit property. That suit was pending till 19.6.1991 when it was withdrawn by him. He filed I. A. No. 2002 of 1984 for interim injunction pending disposal of the suit and that application was ordered originally by the trial court and on appeal filed by the petitioner herein in C.M.A. No. 114 of 1984, the order of injunction was vacated on 4.2.1985. A revision was filed by the second respondent herein in C.R.P. No. 988 of 1985 and it was dismissed on 22.12.1986.

3. In the meanwhile, the second respondent filed an application for appointment of an advocate-commissioner to identify the property which was the subject matter of the suit. That application was ordered and the petitioner challenged the same in C.R.P. No. 3121 of 1985. That revision was allowed by this Court on 14.4.1985. The petitioner also filed an application for appointment of a surveyor for local inspection to identify the property and a surveyor was appointed and the challenge against that order by the second respondent was rejected by this Court in C.R.P. No. 3386 of 1986. This Court directed the trial court to appoint a surveyor-commissioner to inspect the property and submit a report. The surveyor-commissioner submitted a report on 11.3.1988 to the effect that the property in possession of the second respondent was the same as the subject matter of O.S. No. 923 of 1962. In the meanwhile, the contesting judgment-debtor, namely the 5th defendant, died on 27.2.1988 and an application was filed to bring on record the legal representatives and it was ordered on 8.2.1989. The legal representatives filed an application for leave to file an additional counter and that was dismissed on 26.11.1990. That order was challenged in C.R.P. No. 3289 of 1990 in this Court and it was dismissed on 13.12.1990. The executing court ordered delivery of the property on 26.11.1990. The second respondent had filed an appeal against the order in E.A. No. 1487 of 1983 filed by him u/s 47, C.P.C. and that appeal was pending as A.S. No. 339 of 1990 on the file of the II Additional Judge, City Civil Court, Madras. That was ultimately dismissed for default on 19.12.1991. Earlier his application for stay till the disposal of the appeal had been dismissed on 12.12.1990. Thus the second respondent's application u/s 47, C.P.C. had been dismissed and confirmed in appeal and the second respondent's obstruction was ordered to be removed and the said order of removal of obstruction had become final.

4. Second respondent filed E.A. No. 5381 of 1990 for stay of delivery of possession after delivery was ordered on 26.11.1990 and the application was ordered on 10.12.1990. That application was heard along with some applications filed by the legal representatives of the 5th defendant. Orders were passed on 18.12.1990 by the executing court which were challenged by the petitioner herein in C.R.P. No. 86 of 1991 in this Court. That revision was heard by me and disposed of on 6.3.1991. After holding that the surveyor-commissioner had found that the property which was purchased by the second respondent was the same as the subject matter of the suit, I held that there was no defence to the execution proceedings available to the legal representatives of the 5th

defendant. Ultimately, I allowed the revision petition and directed the executing court to dispose of E.A. No. 5709 of 1990 which was an application u/s 47, C.P.C. filed by the legal representatives of the 5th defendant and pass orders thereon on or before 12.4.1991.

5. Thereafter the executing court heard the matter and reserved orders on 12.4.1991. But, even on 11.4.1991, the legal representatives of the deceased 5th defendant and the second respondent herein filed C.S. No. 494 of 1991 on the Original Side of this Court for injunction restraining the petitioner herein from executing the decree. They also filed O.A. No. 348 of 1991 for injunction till the disposal of the suit. This Court initially granted interim injunction and ordered notice, The matter was heard and ultimately an elaborate order was passed on 23.10.1991 dismissing the application. It was found by the learned Judge in that order that there was deliberate suppression of the facts by the second respondent herein. The following paragraph is relevant;

The very fact that the third applicant has deliberately suppressed the several execution applications filed by his vendor and the plaintiffs 1 and 2 as well as himself before the executing court causing the obstruction of delivery of possession of the suit property on the ground that there is a dispute in the identity of the suit property and that the executing court having found against the third applicant has suppressed in the context that he has referred to in the reply affidavit with an equal plausible explanation clearly proves the disingenuous attitude of the applicants herein in filing this application and getting an order of interim injunction against the defendant herein which clearly brings the third applicant herein with the concept that he is guilty of laches and deliberately suppressing the prior court proceedings and that whereupon making him to disentitle the equitable relief of injunction order from this Court.

6. The learned Judge agreed with my finding in C.R.P. No. 86 of 1991 and held that the property which was purchased by the second respondent was the same as the subject matter of the suit in which the decree has been passed in favour of the petitioner herein. It was held by the learned Judge that the applicants before him were not entitled to reopen the question in the said suit. Ultimately the learned Judge held as follows:

Having considered the entire legal aspects, the documents relied on by both parties, and rival contentions made on their behalf, I am inclined to hold that the suit property claimed by the applicants herein by virtue of the sale deed of the third applicant since formed part of the property purchased by the defendant under his sale deed dated 17.12.1960 and the subject matter of the decree passed in O.S. No. 923 of 1962, dated 3.3.1964 and E.P. No. 831 of 1981 and having adjudicated upon all the grievances and the identity of the said property by the executing court in the previous proceedings, I am inclined to hold that it is not desirable to restrain the execution of the decree passed in O.S. No. 923 of 1962 in E.P. No. 831 of 1981 on the file of the City Civil Court, Madras. In this context, I am fully satisfied to hold that the third applicant-third plaintiffs had not

established a prima facie case against the respondent herein warranting the indulgence of this Court for granting the equitable relief of injunction order against the defendant in executing the decree.

In the result, this application fails and accordingly it is dismissed and the interim Order of injunction passed by this Court against the respondent in the above application on 15.4.1981 is hereby vacated. There will be no order of costs under the circumstances.

7. After the said order was passed, the petitioner took possession of the property on 4.11.1991. Thereafter, the second respondent filed E.A. Nos. 5103 to 5105 of 1991 in E.P. No. 831 of 1981. In the first of the applications, he prayed for an order for not recording the seizure of the property; in the second application, he prayed for re-delivery of the property; in the third application, he prayed for an interim injunction restraining the petitioner herein from alienating or encumbering or putting up any construction in the property seized. The expression used by the second respondent in the said petitions was "seizure" and not "delivery".

8. In the common affidavit filed in support of the three applications, the only ground set out as enabling the second respondent herein to get orders as prayed for was that the suit in C.S. No. 494 of 1991 was pending in this Court. No reference was made in the affidavit to the order passed by this Court in O.A. No. 348 of 1991 on 23.10.1991 or the finding given by this Court that there was no justification to stop the execution proceedings. In spite of the said clear finding, the second respondent asserted in the affidavit that he was entitled to have the execution of the decree stopped pending disposal of the said suit in GS. No. 494 of 1991. As that assertion would prima facie amount to Contempt of Court, I have separately issued a notice of contempt to the second respondent on suo motu proceedings.

9. When those applications were pending, the second respondent allowed the appeal AS. No. 339 of 1990 to be dismissed for default on 19.12.1991. Thus, his challenge u/s 47, C.P.C. or under Order 21, Rule 97, C.P.C. to the execution of the decree had come to an end. The only venue which was open to him was in C.S. No. 494 of 1991 on the original side of this Court and even in that suit, it was held that he was not entitled to the relief of stay of execution proceedings pending disposal of the suit. Thus there was no hurdle at all in the way of the executing court in effecting delivery of the property to the decree-holder who obtained the decree as early as in 1964.

10. The three applications filed by the second respondent were posted for hearing on 27.2.1992 after the petitioner herein entered appearance and filed counter affidavits. On that day, according to the second respondent, he was present in Court and he prayed for an adjournment as his counsel was held up in Delhi. But, the court recorded that neither the second respondent herein nor his counsel was present and the following order was passed in E.A. Nos. 5103 and

5104 of 1991;

P and Cl. N.P. (Petitioner and counsel not present), though chances given. So this E.A. is dismissed.

In E.A. No. 5105 of 1991, the following order was passed:

Vide orders in E.A. No. 5102 of 1991. Dismissed as not maintainable.

To have a complete picture of the facts, it could be mentioned that three other applications for similar reliefs were filed by the legal representatives of the deceased 5th defendant who are plaintiffs 1 and 2 in CS. No. 494 of 1991. The application for injunction filed by them was E. A. No. 5102 of 1991 corresponding to E.A. No. 5105 of 1991 filed by the second respondent. The order in the said E.A. No. 5102 of 1991 was follows:

P and Cl. N.P. though chances given. Further relief of injunction will not lie in E.P. Court. So this E.A. is dismissed as not maintainable.

Consequently, the execution petition was terminated on the same day with the following order:

E. As. by J.D. dismissed. Possession already delivered. Recorded. E.P. terminated.

11. Second respondent filed four applications E.A. Nos. 1669 to 1672 of 1992 for restoration of E.A. Nos. 5103 to 5105 of 1991 and E.P. No. 831 of 1981. In the affidavits filed in support of the applications, he has stated that though he prayed for an adjournment of the applications on the ground that his advocate was held up in Delhi, the court did not grant time and closed the applications without hearing his advocate and also terminated the execution petition on the strength of the bailiffs report, when there was only a paper delivery. Those applications were opposed by the petitioner herein. By order dated 22.4.1992, the IX Assistant Judge, City Civil Court, Madras, granted the prayers of the second respondent and restored all the three execution applications as well as the execution petition. The following reasons are given by the learned Judge in support of his order:

1. It is decided in Gangabai and Others Vs. Ratan Kumar and Others, , that an order passed in a proceeding contrary to law may be corrected by the same court if discovered that the order so passed was by mistake of the court. Hence, in this proceedings, the earlier orders passed on 27.2.1992 should be set aside and the application should be restored to file and it will be lawful only if the applications are restored to file and both parties are heard;

2. The petitioner (second respondent herein) has constructed a compound wall in the property purchased by him and without notice to him and without enquiring his application under Sections 47 and 151, C.P.C. an order has been passed against him. The wall which is constructed by the petitioner has not yet been demolished and the electricity service connection is still in his name. Hence, it is necessary to make a complete enquiry and give a decision;

3. It is alleged that there was only a paper delivery and there was no real delivery of property and therefore, the application u/s 47, C.P.C. should be fully enquired into and decided by the court;

4. It is seen that the application filed by the petitioner (second respondent herein) u/s 47, C.P.C. was not heard by the Court as he and his counsel were not present in court and similarly in all other matters also, there was no enquiry and his arguments were not heard and therefore, those orders cannot be sustained.

12. From the facts set out earlier, it is clear that none of the reasons given by the learned IX Assistant Judge, City Civil Court, Madras, is sustainable. I have already pointed out that the application filed by the second respondent u/s 47, C.P.C. had been dismissed long back and the proceedings initiated by the second respondent against the said order had been concluded finally against him. The only pending proceeding in which the second respondent has agitated his claim is in C.S. No. 494 of 1991 on the file of this Court and even in that suit, it has been held by the Court that he is not entitled to stop the execution proceedings till the disposal of that suit. It can be understood if the second respondent had initiated proceedings after succeeding in the said suit. But, he has not done so. Even when he got an adverse order from this Court, he filed an application asserting that he was entitled to get the execution proceedings stopped. I have already referred to the fact that no reason has been given by the second respondent in his affidavits filed in support of the applications in E.A Nos. 5103 to 5105 of 1991 to show how he was entitled to get the execution proceedings stopped or restrained.

13. It is not necessary to point out that the learned Judge has not understood the judgment of the Bombay High Court Gangabai and Others Vs. Ratan Kumar and Others, , correctly. What has been held by the Bombay High Court is that if there is a mistake by the Court in passing an order, such mistake can be corrected by the same Court and it has got inherent powers to do so. That will have no application to the facts of this case as there is no mistake at all in passing the orders dated 27.2.1992. As regards two of the applications, they were dismissed for default and as regards the application for injunction, it was found to be not maintainable. As regards the applications which were dismissed for default, it could have been open to the second respondent to satisfy the Court that he had sufficient cause to be absent from the court on that day and the order of dismissal for default could be set aside. But that has not been done; nor has the learned Judge found that the second respondent has sufficient cause to be absent from Court. As regards the application for injunction, there is an order that the application was not maintainable. It is not known, how on earth the second respondent can ask for the restoration of that application, when there was an order that the application was not maintainable. If at all the second respondent wanted to attack that order on the application for injunction, he should have approached the appellate or revisional forum and he should not have approached the same court by filing an application for restoration of that

application.

14. As regards the main execution petition, there was nothing else to be done in that proceeding, as delivery had been taken and it had been recorded also. The only procedure that remained to be done was to close the execution and that was done by the executing court. It is not open to the second respondent herein to have the execution petition reopened and restored to file.

15. These are not however the grounds on which I am entertaining these revision petitions under Article 227 of the Constitution of India. Even when the revisions were filed, the Registry took objections as to the maintainability thereof and the matter was posted before me. I passed an order that the revisions could be numbered, if the papers were otherwise in order and the objection could be raised by the second respondent, if so advised and the same would be considered as and when such objection was raised. The second respondent has now raised an objection that the revision petitions are not maintainable under Article 227 of the Constitution of India and the remedy for the petitioner is only to file revisions u/s 115, C.P.C. against the order of the IX Assistant Judge, City Civil Court, Madras.

16. The question has been considered in several cases and the law is now well settled. A Division Bench of this Court in *In Re: Gangalakurthi Pattisam and Others*, had elaborately considered the scope of Article 227 of the Constitution of India and held that the said Article conferred a general power of superintendence on the High Court over tribunals like District Collector as well as courts and such superintendence was not confined to administrative matters only. The Bench held that the Article enabled a person aggrieved by an order of such a tribunal to invoke the revisional powers of the High Court. In *East India Commercial Co. Ltd., Calcutta and Another Vs. The Collector of Customs, Calcutta*, the law was stated thus:

Under Article 227 it has jurisdiction over all courts and tribunals throughout the territories in relation to which it exercises jurisdiction. It would be anomalous to suggest that a tribunal over which the High Court has superintendence can ignore the law declared by that court and start proceedings in direct violation of it. If a tribunal can do so, all the subordinate courts can equally do so, for there is no specific provision, just like in the case of Supreme Court making the law declared by the High Court binding on subordinate courts: It is implicit in the power of supervision conferred on a superior tribunal that all the tribunals subject to its supervision should conform to the law laid down by it. Such obedience would also be conducive to their smooth working; otherwise, there would be confusion in the administration of law and respect for law would irretrievably suffer. We, therefore, hold that the law declared by the highest court in the State is binding on authorities or tribunals under its superintendence, and that they cannot ignore it either in initiating a proceeding or deciding on the rights involved in such a proceeding. If that be so, the notice issued by the authority signifying the launching of proceedings contrary to the law laid down by

the High Court would be invalid and the proceedings themselves would be without jurisdiction.

In *Ram Ratan Vs. Mathura Prasad and Others*, a Division Bench of that High Court held that the High Court must exercise its powers of superintendence under Article 227 of the Constitution, when there was a clear abuse of process of the court. In *Miss Maneck Gustedji Burjarji Vs. Sarafazali Nawabali Mirza*, the Apex Court held that the High Court does not ordinarily, in exercise of its discretion, entertain a special civil application under Article 227 of the Constitution where an adequate alternative legal remedy was available to the applicant, but that principle was not rigid and inflexible and there could be extraordinary circumstances where despite the existence of an alternative legal remedy, the High Court may interfere in favour of the applicant.

17. Learned Counsel for the second respondent places reliance on the decision in *Mohd. Yunus Vs. Mohd. Mustaqim and Others*, . Reliance is placed on the following passages;

The petition under Article 227 of the Constitution was wholly misconceived. An appeal lay from an order under Order 21, Rule 92 setting aside or refusing to set aside a sale under Order 43, Rule 1 (1) to the District Judge. That apart, the application made by the petitioner claiming to be the legal representative of the surety, the judgment-debtor's representative, on the one hand and the auction-purchaser, the decree-holder's representative, on the other alleging that there had been a fraud perpetrated by the decree-holder in causing the sale to be held, with a prayer for recording satisfaction of the decree under Order 21, Rule 2, raised a question relating to the execution, discharge or satisfaction of the decree and therefore fell within the purview of Section 47 which prior to February 1, 1977 was appealable because then a decision u/s 47 was deemed to be a decree u/s 2(2) of the Code and therefore, the petitioner had the remedy of an appeal to the District Judge. Even if no appeal lay against the impugned orders of the learned Subordinate Judge, the petitioner had the remedy of filing a revision before the High Court u/s 115 of the Code. Upon any view of the matter, the High Court had no jurisdiction to interfere with the impugned orders passed by the learned Subordinate Judge under Article 227 of the Constitution. A mere wrong decision without anything more is not enough to attract the jurisdiction of the High Court under Article 227. The supervisory jurisdiction conferred on the High Courts under Article 227 of the Constitution is limited "to seeing that an inferior Court or Tribunal functions" within the limits of its authority and not to correct an error apparent on the face of the record, much less an error of law. In this case there was in our opinion, no error of law much less an error apparent on the face of the record. There was no failure on the part of the learned Subordinate Judge to exercise jurisdiction nor did he act in disregard of principles of natural justice. Nor was the procedure adopted by him not in consonance with the procedure established by law. In exercising supervisory power under Article 227, the High Court does not act as an appellate court or tribunal. It will not

review or reweigh the evidence upon which the determination of the inferior court or tribunal purports to be based or to correct errors of law in the decision.

18. In the present case, I have no doubt whatever that there is gross abuse of process of Court by the second respondent and the three applications filed by him in E.A. No. 5103 of to 5105 of 1991 were wholly unsustainable in law and they would even amount to contempt of court. I have already referred to the circumstance that in the affidavits filed in support of those applications, no reason was stated by the second respondent as to how he was entitled to the reliefs prayed for by him. The only ground which was stated was that the suit in C.S. No. 494 of 1991 was pending in this Court. At the risk of repetition, I should point out that this Court categorically pronounced in its order dated 23.10.1991 in O.A. No. 348 of 1991 that the second respondent herein was not entitled to have the execution proceedings restrained by an order of injunction. In spite of that, the second respondent proceeded to file three applications as stated above in the executing court. The three prayers are on the face of them unsustainable. First prayer was to re-deliver the property seized under the colour of execution of the decree. There was nothing in the affidavit to show, how he contends that it was a seizure under colour of execution. The petitioner obtained a decree in 1964 and was executing the same. The contention put forward by the second defendant that the property which was said to be taken delivery by the petitioner herein was different from the suit property, was negatived by the courts on more than one occasion. Ultimately, I have given a finding in C.R.P. No. 86 of 1991 that the property was the same as the subject-matter of the suit. It is not open to the second respondent to raise such a contention. A learned Judge sitting on the original side of this Court agreed with the said finding in his order in O. A. No. 348 of 1991. In spite of the said finding, it is not known, how the second respondent could claim re-delivery of the property after the execution was completed and the property was delivered in accordance with law.

19. The second prayed is equally unsustainable as it was one praying to stop the recording of the delivery. Recording of delivery is purely a ministerial act and the bailiff having delivered the property and submitted a report, nothing else remained with the executing court except to say that the property had been delivered according to the decree. Significantly it is not stated in the affidavits filed in support of the three applications E.A. Nos. 5103 to 5105 of 1991, that there was only a paper delivery and that there was no actual delivery. The applications were filed on the footing that there was actual delivery of the property and for the first time in the affidavit filed in support of the application in E.A. No. 1670 of 1992, the second respondent has come forward with a passing allegation that there was only a paper delivery.

20. The third prayer for injunction was equally unsustainable and that application was rightly dismissed by the Court below as not maintainable. Thus, the three applications filed by the second respondent in the executing court were ex facie unsustainable in law and they were clear abuse of process of Court. This is a fit

case in which Article 227 of the Constitution should be invoked and this Court should not lag behind in coming down with a heavy hand and pointing out to the executing Court that what it has done was beyond the purview of its jurisdiction and even the action would amount to contempt of court. Unfortunately, the IX Assistant Judge, City Civil Court, Madras, has not even understood the basic principles of law and has not chosen to read the order of this Court in the application for injunction and understand the facts of the case. He has proceeded tangentially in passing the order restoring the applications which were earlier dismissed.

21. There cannot be a more fit case in which Article 227 of the Constitution can be invoked. It is contended by learned Counsel for the second respondent that there was only a statistical closure of E.A Nos. 5103 to 5105 of 1991 and the executing court was well within its jurisdiction in restoring the applications to file. I do not agree. The dismissal of two applications for default and the dismissal of the other application for injunction as not maintainable cannot by any stretch of imagination be considered a statistical closure. They were dismissals for default of the second respondent herein, who was the applicant and for non-maintainability and there was no statistical closure of the applications. Hence, there is no substance in the contention that the executing court acted within its jurisdiction in restoring the said applications.

22. Learned Counsel for the second respondent attempted to contend that it is for the executing court to decide the question and not for this Court to decide whether the applications in E.A Nos. 5103 to 5105 of 1991 are maintainable. There is no substance in the said contention. It is open to this Court while exercising jurisdiction under Article 227 of the Constitution to decide the maintainability of the three applications filed by the second respondent in the executing court.

23. In the result, the civil revision petitions are allowed and the orders passed by the IX Assistant Judge, City Civil Court, Madras in E.A. Nos. 1669 to 1672 of 1992 are set aside. The orders passed on 27.2.1992 in E.A. Nos. 5103 to 5105 of 1991 are restored. The second respondent shall pay costs to the petitioner in these revision petitions. Counsel's fee Rs. 3,000 (Rupees three thousand only).