

Madhu Vs. Thulasidharan

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Court : Kerala

Decided On : Feb-04-2013

Judge : Honourable Mr.Justice P.R.Ramachandra Menon

Appellant : Madhu

Respondent : Thulasidharan

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE THOMAS P.JOSEPH MONDAY, THE 4TH DAY OF FEBRUARY 2013 15TH MAGHA 193 CRP.No. 91 of 2010 () -----
AGAINST THE ORDER/JUDGMENT IN CMA.2/2007 of SUB COURT,NEYATTINKARA DATED 12 10-2009 AGAINST THE ORDER/JUDGMENT IN OS.416/2000 of I ADDL.MUNSIFF COURT,NEYATTINKARA DATED 13 10-2006 REVISION PETITIONER/APPELLANT /JD/DECREE DEBTOR:
----- MADHU,S/O.BALAKRISHNAN NADAR, AGED 38 SALIMPURI BHAVAN, MULLOOR, PULINKUDI VIZHINJAM, THIRUVANANTHAPURAM. BY ADVS.SRI.VINOD J.DEV SRI.PRAMOD J.DEV SRI.M.BALAGOVINDAN RESPONDENT(S)/RESPONDENT/DECREE HOLDER:
----- THULASIDHARAN, S/O. KUTTAN PANICKER, SATHEESH BHAVAN, PULINKUDI, MULLOOR VIZHINJAM, THIRUVANANTHAPURAM R1 BY ADV. SRI.G.S.REGHUNATH THIS CIVIL REVISION PETITION HAVING BEEN FINALLY HEARD ON 04-02-2013, THE

COURT ON THE SAME DAY PASSED THE FOLLOWING: THOMAS P.JOSEPH, J.

===== C.R.P.No.91 of 2010
===== Dated this the 04th day of February, 2013

ORDER

This civil revision arises from the judgment dated 12.10.2009 in C.M.A.No.2 of 2007 of Sub Court, Neyyattinkara, refusing to interfere with the order dated 13.10.2006 on E.A.No.254 of 2005 in E.P.No.328 of 2002 in O.S.No.416 of 2000.

2. Respondent obtained a decree for recovery of money from the petitioner and proceeded against property of petitioner, in E.P.No.328 of 2002. It would appear that in spite of getting notice of execution proceeding, petitioner did not appear in the executing court for whatever reason it be and was set ex parte on 04.01.2003. Property was sold in auction on 04.04.2003 and confirmed on 11.08.2003. Executing court ordered delivery of property in favour of respondent on 11.03.2005. Delivery of the property was recorded on 16.03.2005 (delivery was effected on 16.03.2005).

3. In the meantime petitioner, claiming that he had filed E.A.No.305 of 2003 in the executing court on 03.04.2003 to set aside the ex parte order against him with objection to the notice under 66 of Code of Civil Procedure (for short, "the Code") C.R.P.No.91 o

2. approached this Court with W.P(C).No.2259 of 2005. This Court disposed of the writ petition as per Annexure-4, judgment dated 21.02.2005. This Court while taking note of contention of the respondent that the property was sold on 04.04.2003 and that sale was confirmed on 11.08.2003, directed the executing court to consider objection preferred by the petitioner to E.A.No.651 of 2004 for delivery of property.

4. Petitioner filed E.A.No.254 of 2005 for redelivery of property under Sec.151 of the Code raising various contentions. Executing court dismissed E.A.No.254 of 2005 as per order dated 13.10.2006. Challenging that order, petitioner preferred

W.P(C). No.282 of 2007. This Court in annexure-5, judgment dated 03.01.2007 pointed out that since the application for redelivery made by petitioner (E.A.No.254 of 2005) came within the purview of Order XXI, Rule 99 of the Code, the order passed thereon has the effect to be treated as if it were a decree in view of Rule 103 of Order XXI of the Code. Hence remedy of petitioner was to challenge the said order by way of appeal.

5. In view of Annexure-5, judgment petitioner preferred C.M.A.No.2 of 2007 under Sec.104 and Order 43, Rule 1 (without quoting the sub rule). That C.M appeal was dismissed on C.R.P.No.91 o

3. 12.10.2009 which is under challenge.

6. Learned counsel for the respondent has raised a preliminary objection to the maintainability of this civil revision. It is contended that the C.M appeal itself was not maintainable for the reason that since prayer in E.A.No.254 of 2005 was for redelivery of the property, it came within Rule 99 of Order XXI of the Code, in which case the order thereon has the effect of a decree as provided under Rule 103 of Order XXI of the Code. It is contended that the order having the force of a decree, a regular appeal would lie and not C. M appeal as it is not provided under Order 43, Rule 1 of the Code.

7. I have heard learned counsel for petitioner also on the preliminary objection raised by the learned counsel for respondent.

8. Since E.A.No.254 of 2005 is one seeking redelivery of the property, the order thereon should be treated as if it were a decree in view of Rule 103 of Order XXI of the Code. No civil miscellaneous appeal is provided from such an order under Order 43, Rule 1 of the Code. It must be a third category of appeal classified as miscellaneous though filed under Sec.96 of the Code. A decree is not required to be drawn up following the judgment in such appeal. That judgment is amenable to an execution second C.R.P.No.91 o

4. appeal to this Court. The decisions in Kuruvila Vs. Kesavan (1980 KLT 364), Girijambika Vs. George Selvaraj (2003(2) KLT 1070.and Vasanthakumar Vs.

Selvaraj (2004(1) KLT

243) support that view.

9. Since the civil revision is found to be not maintainable, it is not necessary for me to go into other contentions raised by parties as to the sustainability or otherwise of E.A.No.254 of 2005 or, correctness of the impugned order/judgment. Resultantly this civil revision is dismissed as not maintainable leaving it open to the petitioner to work out his remedy elsewhere if he is otherwise entitled to that course and as provided under the law. The documents produced by the petitioner along with this civil revision shall be returned to the counsel for petitioner on request. THOMAS P. JOSEPH, JUDGE Sbn

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