

Mooka Gowder Vs. V. Hamsa

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Court : Chennai

Decided On : Mar-08-2002

Reported in : (2002)2MLJ127

Judge : K.R. Raviraja Pandian, J.

Acts : Code of Civil Procedure (CPC) - Order 21 Rule 26 and 26(2)

Appeal No. : C.R.P. No. 435 of 1990

Appellant : Mooka Gowder

Respondent : V. Hamsa

Advocate for Def. : R. Subramanian, Adv.

Advocate for Pet/Ap. : A.U. Ilango, Adv.

Disposition : Revision petition dismissed

Judgement :

ORDER

K.R. Raviraja Pandian, J.

1. This Revision is filed assailing the order made in E.A.No. 4 of 1998 dated 24.6.1998 for restitution of the property, which was given in favour of the petitioner herein pursuant to a petition in E.P.No.54 of 1997.

2. To comprehend the dispute to be resolved in the Revision Petition, it would be necessary to state minimum facts. The petitioner herein filed a suit for specific performance against the respondent herein and the suit was decreed on 18.11.1996. The appeal filed against the decree also ended against the respondent by the order of the appellate Court dated 4.9.1997. Not satisfied with this order passed by the trial Court which was confirmed by the appellate Court, the matter was agitated in Second Appeal No. 1788 of 1997 before this Court. This Court admitted the Second Appeal on 16.12.1997 and granted interim stay of the execution of the decree in favour of the respondent herein. In the meantime, the petitioner herein launched execution petition in E.P.No.54 of 1997 and on that E.P., on 29.12.1997 the delivery of the property has been effected, in spite of the fact, the respondent herein produced the letter written by the learned counsel, who appeared for the respondent before the High Court informing the respondent as to the grant of stay of execution of the decree by this Court on 16.12.1997. Since delivery has been effected, on the strength of interim orders granted by this High Court, the respondent herein filed an application in E.A.No.4 of 1998 for restitution, which petition came to be allowed on 24.6.1998 and the respondent was restored possession of the property.

3. The said order is now assailed in the Revision on the ground that the respondent herein filed an application for restitution under Order 21 Rule 26(2) of the Civil Procedure Code and the trial Court has also granted the order of restitution, however, Clause 3 of the Rule 26 of Order 21 has not been followed in the sense before making an order of stay of the execution or for the restitution of the property or the discharge of the judgment-debtor, the Court shall require such security from, or impose such conditions upon, the judgment -debtor as it things fit.

4. The only ground raised and argued by the learned counsel for the petitioner is only in respect of the failure to obtain such a security or such condition as contemplated under Clause (3) of the Rule 26 of Order 21.

5. On the contrary, learned counsel appearing for the respondent submitted that Order 21 Rule 26 is not applicable to the facts of the case and only Section 144 of the Civil Procedure Code is applicable for restitution.

6. I heard learned counsel appearing for either side and perused the material records and also perused the relevant provisions, which have been pressed into service while arguing the matter.

7. Section 144 provides as follows:

Application for restitution: (1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the Court which passed the decree or order shall on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified and for this purpose, the Court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order

Explanation: For the purposes of Sub-section (1) the expression 'Court which passed the decree or order' shall be deemed to include -

(a) where the decree or order has been varied or reversed in exercise of appellate or revisional jurisdiction, the court of first instance.

(b) where the decree or order has been set aside by a separate suit, the Court of first instance which passed such decree or order:

(c) where the court of first instance has ceased to exist or has ceased to have jurisdiction to execute it, the Court which, if the suit wherein the decree or order was passed were instituted at the time of making the application for restitution under this section, would have jurisdiction to try such suit.

(2) No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under sub-section (1).

8. Order 21 Rule 26 provides as follows

26. When Court may stay execution - (1) The Court to which a decree has been sent for execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or Appellate Court, if execution had been issued thereby or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such person pending the result of the application.

(3) Power to require security from, or impose conditions upon judgment-debtor - Before making an order to stay execution or for the restitution of property or the discharge of the judgment-debtor, the Court shall require such security from, or impose such conditions upon the judgment-debtor as it thinks fit. '

9. None of the above said provisions are applicable to the facts of the present case since the contingencies so stated in the provision is not made applicable to the facts of the present case. The only provision, under which the petitioner should have filed an application is under Section 151 of the C.P.C, which gives inherent power to the Court to so as to pass orders on equitable remedy. As stated already in this case, this Court has granted interim orders of stay of execution of the decree and pursuant to the same restitution has also been ordered.

10. In such circumstances, there is absolutely no basis for the apprehension of the learned counsel Mr.Elango appearing for the petitioner that the respondent herein taking advantage of the interim order granted by this Court would have parted with or encumbered the property . The said act of the respondent would always be safeguarded under the doctrine of lis pendense. When that being the position, as stated already the only ground on which the Revision petition is filed that not obtaining security or condition as to the preservation of the property does not arise and as such there is no illegality or impropriety in the order of the trial court, which

warrants interference by this Court, while exercising the power under Section 115 of the Civil Procedure Code.

11. In the result, the Civil Revision Petition is dismissed. No costs.

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