

Velu and Three ors. Vs. Arikrishnan and Two ors.

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Court : Chennai

Decided On : Sep-03-2003

Reported in : 2003(4)CTC560

Judge : S. Sardar Zackria Hussain, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Order 21, Rule 35

Appeal No. : C.R.P.(N.P.D.) No. 374 of 2003 and C.M.P. No. 3863 of 2003

Appellant : Velu and Three ors.

Respondent : Arikrishnan and Two ors.

Advocate for Def. : S.V. Jayaraman, Senior Counsel for ;(Sic.) Ishtiaq Ahmed,
Adv. For Respondent No. 1

Advocate for Pet/Ap. : R. Muralidharan, Adv.

Disposition : CRP allowed

Judgement :

ORDER

S. Sardar Zackria Hussain, J.

1. This Civil Revision Petition is filed by the respondents 4 to 7 challenging the delivery order made in E.P.No. 133 of 2000 in O.S.No. 388 of 1981 on the file of

Principle Sub Judges, Pondichery.

2. The decree-holder Ukkaravelu as the power agent of one Adhilakshmi Ammal alias Poubathiammal filed E.P.No. 45 of 1984 for delivery of possession of the property and the same has been terminated by recording delivery in favour of the decree-holder Ukkaravelu. The first respondent Arikrishnan purchased the property from the decree-holder Ukkaravelu and Arikrishnan also filed execution petition in E.P.No. 133 of 2000 after disposal of appeal in A.S.No. 939 of 1985 in this Court. The Judgment-debtor Malayan preferred appeal in A.S.No. 939 of 1985 to this Court and he died during the pendency of the appeal. The petitioner/respondents 4 to 7 were added as the legal representatives of the judgment-debtor Malayan. The purchaser Arikrishnan filed second execution petition in E.P.No. 133 of 2000 after disposal of the appeal in A.S.No. 939 of 1985 stating that he has not taken physical delivery of the property and he has filed the E.P. No. 133 of 2000 seeking physical possession of the property from the judgment-debtors, viz., Malayan and Nagarajan and the legal representatives of the deceased Malayan in view of the purchase of the property from the decree-holder. The first respondent/petitioner has also been impleaded as a party to the proceedings in A.S.No. 939 of 1985 before this Court.

3. The petitioners/respondents 4 to 7 alone contested the execution petition by filing counter and additional counter that possession was already taken in the E.P.No. 45 of 1984 and as such the present execution petition in E.P.No. 133 of 2000 by the purchaser of the property is not maintainable as per law. Further, according to the petitioners/respondents 4 to 7, they have been living in the suit property right from their birth and are in peaceful possession and enjoyment of the property and so, the first respondent/petitioner is not entitled to take delivery of the property. The father of the petitioners 4 to 7, Malayan, who was the defendant in the suit, was also born in the same property. Malayan died on 20.10.1997 during the pendency of the appeal in this Court and the decree has been obtained without impleading legal heirs in the appeal. The suit was filed in the year 1981 by one Adhilakshmi Ammal alias Poubathiammal represented by her son Ukkaravelu. After appeal in this Court, the first respondent herein obtained sale deed dated 18.11.1985 in his favour and he was impleaded as a party in the first appeal only

on 7.3.1996 as per order in C.M.P.No. 1775 of 1996. It has been recorded in paper that Ukkaravelu took delivery of possession of the property though in fact he has not taken delivery of the property and enjoyed the same. The first respondent/petitioner was not a party in O.S.No. 338 of 1981 and so, he cannot file execution petition on the basis of the decree. The sale deed executed during the pendency of the proceedings is invalid under law. The petitioners/respondents 4 to 7 were not parties in the earlier proceedings. In the additional counter, the petitioners/respondents 4 to 7 have also stated that the 2nd respondent/3rd respondent Mangai is not the wife of Malayan and the third respondent/8th respondent Murthi is not the son born to Malayan and as such, they are not the legal heirs of Malayan. The suit in O.S.No. 338 of 1981 was decreed on 26.9.1983 and the case was conducted by Ukkaravelu, the Son and legal representative of the deceased Adhilakshmi Ammal alias Poubathiammal and he also filed E.P.No. 45 of 1984 and taken possession of the said property on 10.7.1984 through Court and the same was also recorded by the Principal Sub Court, Pondichery on 13.7.1984 and the C.P. No. 43 of 1984 was also terminated and Malayan did not vacate the property and he continued to be in possession of the same. In the sale deed dated 18.11.1985 executed by Ukkaravelu in favour of the first respondent Arikrishnan, it is recited that the possession was delivered to him on the same date and so, the first respondent Arikrishnan has no right or locus standi to file the second E.P.No. 133 of 2000 on the same decree in respect of which E.P. 45 of 1984 was already filed and delivery was already recorded. Since the C.P. 133 of 2000 has been filed after delivery of possession of the property through Court which was recorded on 13.7.1984 and also beyond 15 years, it is not maintainable the C.P.No. 133 of 2000 is also barred by time. If the first respondent/petitioner has got any right, he can seek his remedy only by way of separate suit.

4. On such case of the parties, the Execution Court considering the rival contentions made by both, found that the E.P.No. 133 of 2000 is not barred by time and the E.P.133 of 2000 filed for delivery of possession is maintainable despite the fact that the delivery was recorded in the E.P. 45 of 1984 filed by Ukkaravelu on 10.7.1984 and accordingly ordered delivery of possession of the property mentioned in the execution petition in E.P.No. 133 of 2000. That order is challenged in this Civil Revision Petition by the Petitioners/respondents 4 to 7.

5. The learned counsel for the revision petitioner submits that in view of the fact that the delivery firstly effected on 10.7.1984, which was recorded on 13.7.1984 in respect of the property subject matter of the Execution Petition and the execution petition in E.P.No. 45 of 1984 was also terminated on the same day, the second execution Petition in E.P.No. 133 of 2000 filed by the first respondent herein claiming that subsequently he purchased the property and for delivery of the property as previously not actually delivered, is not maintainable. The other contention is that the execution petition in E.P.No. 133 of 2000 is also not in time in view of the fact that after recording of the delivery of the property through Court on 13.7.1984 in E.P. No. 45 of 1984, the execution petition in E.P.No. 133 of 2000 now under challenge filed after 15 years is barred by limitation.

6. In this regard, the learned counsel for the revision petitioners has referred to following decisions :

(1) Jagadish Nath Roy v. Nafar Chandra Paramanik and Ors : AIR1931 Cal427 .

'The case therefore seems to be one of those cases in which a decree-holder having armed himself with a decree for khas possession executes that decree in the first instance by obtaining symbolical possession only with some ulterior object of his own, and thereafter subsequently and as a second installment asks for khas possession. Such a course is not permissible under the law'. (2) Shew Bux Mohata and Anr. v. Bengal Breweries Ltd., and Ors., : [1961]1SCR680 at page 141.

'Under Order 21, Rule 35 a person in possession and bound by the decree has to be removed only if necessary, that is to say, if necessary to give the decree-holder the possession he is entitled to and asks for. But it is open to the decree-holder to accept delivery of possession under that rule without actual removal of the person in possession. If he does that, then he cannot later say that he has not been given that possession to which he was entitled under the law. Where the decree-holders of their own accepted delivery of possession with defendant remaining on the premises with their permission, and they granted a receipt acknowledging full delivery of possession, and permitted the execution case to be dismissed on the basis that full possession had been delivered to them by defendant, they are bound to the position that the decree has been fully executed and the decree

cannot be executed any more. , Relied on'. (3). M.V.S. Manikayala Rao v. M. Narasimhaswami and Ors., : [1966]1SCR628 at 475. Full Bench of Supreme Court has held as follows:

'The delivery of symbolical possession made in this case was quite in terms of the Code and so amounted to an interruption of the respondent's adverse possession and the period of limitation for the purpose of the application of Article 144 would start from the date of such delivery. As the suit was brought within twelve years from the date of that delivery of possession, Article 144 even if it applies, does not bar it'.

7. Ukkaravelu as the power agent of one Adhilakshmi Ammal filed a suit in O.S.No. 338 of 1981 and the same was decreed on 26.9.1983. Her mother Adhilakshmi Ammal died during the pendency of the suit and Ukkaravelu took possession of the suit property viz., thatched building situate at Chunnambu Clavapath, commune of Pondichery to the north of coconut thope of Ville Blane Savariacoutty to the south of Road, to the east of the manai of Suprayan and to the west of manai of Annamalai, containing five Kulies and 3/16. He took possession of the suit property on 10.7.1984 through Court in E.P.No. 45 of 1984 and the same was also recorded by the Principal Sub Court, Pondicherry on 13.7.1984. Consequently, E.P.No. 45 of 1984 was also terminated and Malayan did not vacate the property and he continued to be in possession of the same. As per sale deed dated 18.11.1985, the first respondent purchased the property. He was also impleaded as respondent in the appeal in A.S.No. 939 of 1985 in this Court. The appeal is partly allowed by setting aside the decree against the first defendant to pay the arrears of rent. In other respects the judgment and decree of the trial Court is confirmed in the appeal. It has also been observed by this Court in A.S.No. 939/85 that possession of the suit property continues to be with Malayan. It appears that after the delivery of possession of the suit property through Court on 10.7.1984 in E.P.No. 45/84 by Ukkaravelu, Malayan filed A.S.No. 939 of 1985 in this Court challenging the correctness of the judgment made in the suit in O.S.No. 380/81. It is not in dispute that Malayan continued to be in possession of the property, despite the fact that in E.P.No. 45/84 delivery was effected on 10.7.1984 and the execution petition was also terminated after

recording the delivery on 13.7.1984. The recital is also made in the sale deed dated 18.11.1985 that the first respondent purchased the property from Ukkaravelu and the possession was delivered to him on the same day. The purchaser, Arikrishnan filed E.P.No. 133 of 2000 seeking delivery of the property. According to the revision petitioners E.P.No. 133/2000 is not proper and maintainable because as per records delivery was effected on 10.7.1984 in E.P.No. 45/84 and the same was recorded on 13.7.1984. As rightly argued by the petitioners, who are legal representatives of the judgment debtor Malayan, the Execution Petition 133 of 2000 filed by Arikrishnan is not maintainable, in view of the fact that Ukkaravelu already took possession as early as on 10.7.1984. It is not Ukkaravelu who filed Execution Petition 133/2000 seeking delivery of the property stating that actually property was not delivered on 10.7.1984 in E.P.No. 45/84. Hence, E.P.No. 133 of 2000 filed by the purchaser Arikrishnan seeking delivery of the property again by stating that actually delivery was not effected on 10.7.1984 and possession was not handed over to Ukkaravelu in E.P.No. 45/84 is not proper. It is not known as to why Ukkaravelu could not file Execution Petition earlier stating that no actual delivery was effected and only symbolical possession was handedover in E.P.No. 45/84 on 10.7.84. Therefore, now it is not open to the purchaser, Arikrishnan to seek possession of the property stating that actually delivery was not effected on 10.7.1984 in E.P.No. 45/84 and what was handedover was only symbolical possession.

8. Ukkaravelu also gave delivery receipt on 10.7.1984 with specific measurement of the suit property. As per delivery receipt, Ukkaravelu accepted the delivery of possession without actually dispossessing the judgment debtor Malayan who was in possession. As per the receipt Ukkaravelu acknowledged the delivery of the possession and E.P.No. 45/84 was also terminated after recording the delivery on 13.7.1984. Therefore, it is not open to the first respondent-purchaser Arikrishnan to say that the actual delivery was not effected in C.P.No. 45/84 and to seek for actual possession he filed Execution Petition. Therefore the question of seeking delivery of physical possession by the purchaser, Arikrishnan does not arise. The Execution Petition 45/84 filed for delivery by Ukkaravelu was terminated on 13.7.84 after recording the delivery. As such, the decree has been fully executed and the decree is not executable any more.

9. The Civil Revision Petition is allowed. The order of the Executing Court dated 14.2.2003 and made in E.P.No. 133 of 2000 is set aside. Consequently, connected CMP is closed. No costs.

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