

Madaswamy Vs. Govindaraj

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Court : Chennai

Decided On : Jan-02-2007

Reported in : 2007(1)CTC217; (2007)1MLJ664

Judge : R. Banumathi, J.

Acts : Code of Civil Procedure (CPC) - Sections 47 - Order 21, Rule 35(3)

Appeal No. : C.R.P. (NPD) No. 836 of 2003

Appellant : Madaswamy

Respondent : Govindaraj

Advocate for Def. : S. Sounthar, Adv.

Advocate for Pet/Ap. : A. Muthukumar, Adv.

Disposition : Petition allowed

Judgement :

R. Banumathi, J.

1. This Revision Petition is directed against the Order of the Additional District Munsif, Mayiladuthurai in E.A. No. 150/2002 in E.P. No. 109/1991 in O.S. No. 117/1986 allowing the Petition filed by the Respondent Judgment-Debtor, under Section 47 CPC.

2. A lane measuring 5' width x 80' length has been the subject matter of litigation between the parties for nearly two decades in atleast two rounds of litigation.

3. Brief facts of the case are as follows:

House and site of the Respondent is situated on the Western side of the Petitioner. The Petitioner has filed O.S. No. 117/1986 for Permanent Injunction restraining the Respondent from interfering with his possession and enjoyment of the suit lane. Alleging that the Respondent had encroached upon the suit property, the plaint was amended for alternative relief of recovery of possession. The said suit was dismissed, as against which, the Petitioner has preferred A.S. No. 52/1987 on the file of the Sub Court, Mayiladuthurai. The Appeal was allowed, declaring the Petitioner's title and ordering delivery of possession. The second appeal S.A. No. 1334/1990 preferred by the Respondent was dismissed by the High Court on 07.09.1990 even in the admission stage. Thereafter, the Petitioner has filed E.P. No. 199/1990 for delivery of possession and the Amin returned the papers stating that there is a wall in the suit lane and the same is to be demolished.

4. When the matter stood thus, mother and brother of the Respondent have filed O.S.No.67/1991 on the file of Sub Court, Mayiladuthurai for partition and separate possession and also for Permanent Injunction and for declaration that the Decree passed in O.S.No.117/1986 is not binding on them and unenforceable. In the said partition suit, the suit lane was also shown as the property belonging to the family. Since Interim Injunction was granted in O.S. No. 67/1991, the earlier Execution Petition filed by the Petitioner in E.P. No. 199/1990 was closed as not pressed on 08.10.1991.

5. O.S.No.61/1991 filed by mother and brother of the Petitioner was transferred to District Munsif Court, Mayiladuthurai and renumbered as O.S.No.73/1996. By the Judgment dated 31.07.2001, the Court has passed the Decree, however excluded the suit lane which is the subject matter of O.S.No.117/1986.

6. After dismissal of the suit O.S. No. 73/1996, the Petitioner has again filed E.P. No. 109/2001 in O.S. No. 117/ 1986 for delivery of possession of the suit lane. In

the Execution Petition, the Respondent filed E.A.No.150/2002 under Section 47 CPC contending that the Decree passed in O.S. No. 117/1986 [A.S. No. 56/1987] is not executable. That Petition filed under Section 47 CPC was allowed by the Executing Court finding that the Decree Holder ought to have amended the plaint for the relief of delivery of possession after removal of superstructure. Allowing of Petition filed under Section 47 CPC is challenged in this Revision Petition.

7. Drawing the attention of the Court to the two rounds of litigation, the learned Counsel for the Petitioner has submitted that rights of the parties are to be determined as on the date of suit. Submitting that the superstructure was not in existence on the date of filing of the suit and the Court has got power to remove the superstructure put up pendente lite, the learned Counsel has submitted that the Respondent Judgment-Debtor is trying to circumvent the execution of the Decree by one way or other and the Executing Court erred in saying that the Decree is inexecutable.

8. The learned Counsel for the Respondent has contended that the superstructure was already in existence and when there is no provision in the Decree for removal of superstructure, the Decree becomes inexecutable. It was further submitted that when there is no specific direction as to removal of the superstructure, the Decree cannot be executed.

9. I have carefully examined the records and considered the submissions of the learned Counsel on either side.

10. The subject matter of the litigation is the suit lane 5' x 80' situated in between the house of the Petitioner and the Respondent. In A.S.No.52/1987, the Petitioner's Right and Title has been declared and delivery of possession was ordered. Observing that what is in possession of the Plaintiff falls short of his purchase, the Appellate Court has observed as follows:

The Appellate Court has further observed that the Respondent has put up foundation in the suit lane, and has ordered delivery of possession. The second appeal S.A.No.1374/1990 was dismissed even in the admission stage. While the Petitioner/Decree Holder sought to execute the Decree, another partition suit was

filed by the mother and brother of the Respondent. In the partition suit, the suit lane which is the subject matter of O.S. No. 117/1986 has been specifically excluded, holding that the suit lane is not available for partition. Thus, Right and Title of the Petitioner to the suit lane has been upheld by the Courts and the same has become final.

11. The contention of the Respondent is that the Decree is inexecutable since the construction was in existence even prior to the filing of the suit. The learned Counsel for the Respondent has drawn the attention of the Court to the Written Statement filed by the Respondent in O.S. No. 117/1986 where the Respondent has averred 'he has laid foundation and the same is in continuation of Plaintiff's Western Wall and the Defendant is going to start a welding work shop and carpentry works'. Though the Respondent has averred that he has laid the foundation, in the Written Statement, the Respondent has also averred 'entire site of the Defendant was kept vacant for the past six months and the fence put up in continuation of Plaintiff's western wall to further south become decayed and the Tenant occupying the Plaintiff's backyard and the general public has removed the fence at different levels'. Thus in the Written Statement, the Respondent himself has averred that he has kept the site vacant for six months prior to the filing of the suit O.S. No. 117.1986. In A.S. No. 52/1987, the Appellate Court has recorded a definite finding that the Defendant has laid foundation only subsequent to the suit and has observed as under:

The finding that the the Respondent has put up foundation pendente lite has become final and the same cannot be agitated in the execution stage.

12. The Decree is for declaration and delivery of possession of the suit lane 5' x 80'. The Decree has to be executed as it stands. To say that the Decree cannot be executed would nullify the Decree which has been obtained after fighting out the litigation upto the High Court. The Executing Court has allowed section 47 CPC Petition only on the only ground that the Respondent had put up construction in the suit lane prior to the suit. This finding of the Executing Court is erroneous and cannot be sustained.

13. The main point to be considered are - can the Decree Holder who has obtained the Decree for possession, execute the Decree by removing the superstructure. Contending that the power of the Executing Court to remove the superstructure is incidental and necessary, the learned Counsel for the Petitioner placed reliance upon : AIR1954 Mad985 , [K. Arumugham Naicker and Anr. v. Tiruvalluva Nainar Temple by its Trustee], in which this Court has held as follows:

Where a Court directs, by a Decree or Order, vacant possession of land, that Decree could be made effective by directing its own officers to remove the superstructures in the property and deliver vacant possession of the properties to the Decree Holder. It is unnecessary to have any specific power in that behalf. The power to remove the superstructures is an incidental, necessary and ancillary power to the power to deliver possession of the property.

14. The Respondent took objection to the executability of the Decree on the ground that there was no direction in the Decree to deliver vacant possession after removal of the construction. The main point raised is that in the absence of any specific direction for removal of the wall, the Executing Court has no jurisdiction to direct demolition of the wall constructed by the Petitioner.

15. On the above point, parties have also adduced oral and documentary evidence. The Executing Court mainly referred to the Amin's return in the warrant stating that there is a wall in the lane and there is also electricity service connection and water pipe and requesting Court's Order for removal of the same. According to the Respondent, the constructions were put up by him much before the suit. The Decree-Holder controverted this position and contended that wall was put up after the filing of the suit. As noted earlier, in A.S. No. 52/1997, there is a finding that the Defendant has put up construction pendente lite. When the Defendant has put up construction pendente lite, the Executing Court can Order demolition of the superstructure and deliver vacant possession. The Executing Court has not adverted to the finding of the Appellate Court in A.S.No.52/1997.

16. It appears from para-7 of its Order that only with reference to the Amin's return, the Executing Court came to the conclusion that the amended construction existed in the lane even prior to the suit and the Executing Court proceeded on the

premise that the wall existed even before the suit and when the Decree-Holder had not taken steps for amending the plaint, it did not think it proper to Order removal of superstructure. On the proposition regarding permissibility of removal of illegal or unlawful construction made pendente lite by the Executing Court, we may refer to the decision of the Supreme Court in 1996 (1) LW 145 [B. Gangadhar v. B.G. Rajalingam]. In the said case also, the Bailiff returned the warrant of delivery of possession on the ground that the Judgment-Debtor/Tenant had constructed shops and inducted Tenants into possession and therefore, he could not execute the warrant. After enquiry, the Executing Court directed the Bailiff by warrant to demolish shops and deliver vacant possession to the Decree-Holder. The Petitioner challenged the Order in revision, but was unsuccessful. In the Special Leave Petition preferred before the Supreme Court, holding that the Executing Court is mandated to decide all questions relating to right, title or interest in the property in the execution proceedings and that Executing Court would further be justified to Order removal of unlawful construction made pendente lite, the Supreme Court has held thus:

7. The Executing Court, therefore, would be justified to order its removal of unlawful or illegal construction made pendente lite so that the Decree for possession or eviction, as the case may be, is effectually and completely executed and the delivery of possession is given to the Decree-Holder expeditiously. Admittedly, pending suit the Petitioner had constructed shops and inducted Tenants in possession without permission of the Court. The only course would be to decide the dispute in the execution proceedings and not by a separate suit.

8. Order 21, Rule 35(3) envisages that: Rule 35(3) of Order 21 itself manifests that when a Decree for possession of immovable property was granted and delivery of possession was directed to be done, the Court executing the Decree is entitled to pass such incidental, ancillary or necessary orders for effective enforcement of the Decree for possession. That power also includes the power to remove any obstruction or superstructure made pendente lite. The exercise of incidental, ancillary and inherent power is consequential to deliver possession of the property in execution of the Decree. No doubt, the Decree does not contain a mandatory injunction for demolition. But, when the Decree for possession had become final

and the Judgment-Debtor or a person interested or claiming right through the Judgment-Debtor has taken law in his hands and made any constructions on the property pending suit, the Decree-Holder is not bound by any such construction. The relief of mandatory injunction, therefore, is consequential to or necessary for effectuation of the Decree for possession. It is not necessary to file a separate suit when the construction was made pending suit without permission of the Court. Otherwise, the Decree becomes inexecutable driving the Plaintiff again for another round of litigation which the Code expressly prohibits such multiplicity of proceedings.

17. When the construction was made pendente lite, the Executing Court ought to have ordered removal of obstruction of the superstructure made pendente lite. It cannot be disputed that the Respondent was trying to prevent execution of the Decree in one way or other. In that view of the matter, the impugned Order is to be set aside, directing the Executing Court to deliver possession of the suit lane after removal of the obstruction or demolition, as the case may be. As per the decision of the Supreme Court, in the case cited supra, 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.

18. In the result, the Order made in E.A. No. 150/2002 in E.P. No. 109/1991 in O.S. No. 117/1986, on the file of the Court of the Additional District Munsif, Mayiladuthurai, dated 17.02.2003, is set aside and this Revision Petition is allowed. There is no Order as to costs. Consequently, CMP is closed. 19. The Executing Court is directed to deliver vacant possession of the suit lane to the Petitioner/Decree-Holder. The Executing Court is further directed to issue warrant to the bailiff to first issue a warning to the Respondent to deliver peaceful possession and still, if they cause obstruction, Bailiff is entitled to remove the obstruction and cause the construction demolished and deliver vacant possession to the Decree-Holder in terms of the Decree.