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Court : Chennai

Decided On : Jun-10-2010

Judge : G.Rajasuria, J.

Acts : Constitution Of India - Article 227

Appeal No. : C.R.P.(NPD) No.3309 of 2009

Appellant : Aswinikumar

Respondent : K.Maheswari ...

Advocate for Def. : Mr.A.Venugopal, Adv.

Advocate for Pet/Ap. : Mr.Samir S.Shah, Adv.

Judgement :

1. Inveighing the order dated 09.10.2009 made in E.P.No.439 of 2009 in RCOP No.1108 of 2004 on the file of XVI Judge, Small Causes Court, Chennai, this civil revision petition is focussed.

2. Heard both sides.

3. The epitome and the long and short of the relevant facts absolutely necessary and germane for the disposal of this revision petition would run thus:

The respondent herein filed RCOP No.1108 of 2004 before the Rent Controller concerned. After various proceedings before the Rent Controller as well as the

higher fora, it ended in passing an eviction order as against the revision petitioner herein. Whereupon the respondent/landlady, did choose to file E.P.No.439 of 2009 for obtaining delivery of possession. The trial court ultimately ordered delivery. Being aggrieved by and dissatisfied with the order of delivery passed by the Executing Court, this revision is focussed on the following main grounds:

1. The executing court was wrong in simply ordering delivery without waiting to see as to whether the notice earlier ordered on 07.10.2009 by it, was served on the revision petitioner/judgment debtor or not.
2. The learned Judge made an endorsement as though she heard both sides when in fact the counsel for the Judgment debtor was not at all heard.
3. The revision petitioner herein moved the stay petition before the executing court but that was not dealt with as per law, and it was returned, ignoring the judgment of this court reported in 1993(1) LW 331.
4. Despite furnishing the SR number of the appeals filed as against the order of the Rent Controller in RCOP, the Executing court failed to stay the proceedings or give opportunity to the Judgment debtor to put forth his objection in the E.P.
5. When the Advocate for the Judgment Debtor made representations, the learned Judge of the Executing Court stated that she would go through the judgment cited supra. However, it appears, she returned the said stay petition.
6. The principles of natural justice were violated by the learned Judge. As such, ordering of delivery without hearing the Judgment Debtor in this case was not proper.
7. The particulars furnished in the execution petition was not correct relating to rents and the Judge concerned did not take into account the said fact also. As such, the revision petitioner/ judgment debtor prays for setting aside the order of delivery passed by the Executing Court on 09.10.2009.
4. It so happened that in this matter stay petition i.e.M.P.No.1 of 2009 was filed by the revision petitioner herein, but subsequently it was endorsed as follows:

"This petition is not pressed for the time being".

Before my learned predecessor, who dealt with this matter both sides submitted their arguments and my learned predecessor passed order dated 12.01.2010, the operative portion of it would run thus:

"25. On a careful consideration of respective contentions and in view of the qualitative and quantitative discussions referred to supra and since the petitioner/tenant challenges the order of the Executing Court in E.P.No.439 of 2009 dated 9.10.2009 contending inter alia that the words 'Heard both sides' have been inserted in the order later by the learned Rent Controller, this Court deems fit and proper to admit the civil revision petition inasmuch as , this Court opines that the entire gamut of the matter requires detailed examination at the time of final hearing of the civil revision petition in threadbare and also bearing in mind of the over all assessment of the peculiar facts and circumstances of the case in an integral fashion and also taking note of various long winding rent control proceedings upto the level of this Court between the parties, this Court exercising its inherent, plenary jurisdiction, discretionary incidental or ancillary power in a certain situation of the present kind, directs the petitioner/tenant to deposit a sum of Rs.48,25,590/-(Rupees Forty Eight Lakhs, twenty five thousand five hundred and ninety only) towards arrears of rent as on 1.11.2009 to the credit of R.C.O.P.No.1108 of 2004 on the file of XVI Judge, Court of Small Causes, Chennai within a period of six weeks from the date of receipt of a copy of this order to prevent an aberration of justice and infurtherance of substantial cause of justice and since the petitioner has not pressed M.P.No.1 of 2009(vide his endorsement dated 11.11.2009 in M.P.No.1 of 2009), the same is dismissed as not pressed by this Court."

When the matter has come before me the learned counsel for the respondent/landlord would submit that the previous order passed by my learned Predecessor was not complied with. As such, the revision petitioner is having no right of audience before this court and the revision itself has to be dismissed in limini. Per contra, the learned counsel for the revision petitioner would submit that even though this court directed the revision petitioner to deposit such an amount,

that is not a sine qua non for the revision petitioner to submit his arguments on merits in the revision petition and that he preferred to make his submissions on merits in the revision petition. In fact, on this point alone, both of them once again argued at length. Almost the same precedents, which they cited and referred to by my learned Predecessor, in the order dated 12.01.2010, were cited once again now. My learned Predecessor considered those decisions and ultimately in para No.25 as extracted supra ordered that he by exercising his inherent, plenary, jurisdiction, discretionary incidental or ancillary power in a certain situation of the present kind, was ordering the petitioner/tenant to deposit a sum of Rs.48,25,590/- (Rupees Forty Eight Lakhs, twenty five thousand five hundred and ninety only) towards arrears of rent as on 1.11.2009" As such, I being a Judge continuing this matter cannot sit in judgment over the discretion exercised by my learned Predecessor. Hence, I would like to point out that once again so far this matter is concerned, I cannot re-consider the view taken by my learned Predecessor.

5. The core question arises as to whether such non-compliance with the order of my learned Predecessor, will automatically result in the dismissal of the revision petition itself.

6. I would like to re-collect and take judicial notice of the recent practice being followed in this court while exercising revisional jurisdiction.

7. Consistently, this court while ordering stay, has been passing orders in stay petitions directing the revision petitioner to deposit certain amount representing the arrears and failing which conditional order is being passed that the very revision itself along with the stay petition would stand dismissed. But in this case my learned predecessor has not chosen to make any such conditional order to that effect. Hence, I need not add anything more to the order passed by my learned Predecessor.

8. In this view of the matter, I have decided to hear both sides on merits and both of them advanced arguments on the merits of the revision petition. Accordingly, I proceed to decide on the matter.

9. The learned counsel for the revision petitioner submitted his arguments, the gist and kernel of them would run thus:

(i) In the docket entries made on the E.P.concerned it is clear that on 07.10.2009, it is endorsed as follows:

"Notice to respondent C/o 09/10/09"

As such on 09.10.2009, the following endorsement is found made.

"Counsel for respondent appeared who in RCOP continued to appear in E.P. Heard both sides. Respondent filed stay petition and same was returned since eviction order was passed on April 2009. Since it is contested decree in RCOP, this court finds it fit to order delivery. Delivery by 30.10.09. However, it interest of justice Batta is to be paid after 10 days." (extracted as such)

(ii) There are interpolations in the said order and further more that endorsement did not reflect the true happenings on that day. The actual narration is found in the grounds of revision as set out supra.

(iii) The Executing Court should not have taken retrograde step after ordering notice. It would have been entirely a different matter, had the executing court decided not to order notice at all on the ground that E.P.was filed well before two years from the date of the order/decreed. But the executing court did choose to order notice on 07.10.2009. But on 09.10.2009 the Judge turned turtle and simply quite antithetical to the earlier endorsement made on 07.10.2009 decided to proceed further in ordering delivery without even ascertaining whether the E.P.notice was virtually served on the Judgment Debtor or not?

(iv) The learned counsel for the revision petitioner/Judgment Debtor even though was present physically in the court, he was not served with any notice in the E.P., and he was present only for the purpose of pressing his stay petition on the assurance given by the Judge that his case law would be considered in this regard, the counsel left the court hall; but the endorsement would speak as though the Advocate for Judgment Debtor participated in the proceedings and thereafter delivery was ordered. Accordingly, the learned counsel for the revision

petitioner/judgment debtor would pray for setting aside the stay order and for giving opportunity to the revision petitioner to participate in the E.P.proceedings by filing counter.

10. By way of torpedoing and pulverising the argument as put forth on the side of the revision petitioner/judgment debtor, the learned counsel for the respondent/decree holder would advance his arguments, the tour d'horizon of them would run thus:

(i) No notice at all is required if an E.P.is filed within two years from the date of the decree as it happened in this case. The eviction was ordered only in April 2009 and the E.P.was filed in the same year and in such a case, there was no necessity at all for the executing court to order notice by virtue of Order 21 Rule 22 of CPC.

(ii) Even though the executing court at the first instance ordered notice, it had the power to correct itself and proceed to order delivery and it is not mandatory that in such E.Ps, the Judgment Debtor should be given an opportunity to file counter and contest the matter and that too when already the appeals are pending as against the orders of delivery and no stay was granted by the Appellate Court.

(iii) In fact, as against the order of delivery, appeals were filed even earlier to the E.P.filed by the decree holder. However the Judgment Debtor had not chosen to get processed those appeals and obtain stay of the matter and in such a case, the executing court should not be blamed for having not stayed the matter or in having passed delivery in favour of the decree holder.

11. The learned counsel for the respondent also would submit placing reliance on the earlier proceedings that consequent upon the revision petitioner herein in the RCOP stage having not paid the admitted arrears, the Rent controller passed order by invoking Section 11 of the Tamil Nadu Buildings (Lease and Rent control) Act 18/60.; whereupon appeals were filed and they were decided in favour of the revision petitioner as against which, the respondent/land lady preferred revision and in the revision in CRP No.1264-A this court vide order dated 24.11.2000 ordered thus:

"22. In view of the above, the respondent-tenant is obliged to suffer an order under Section 11 (4) due to his own admission before this Court that even the admitted rent has not been paid for the past 15 months. In such circumstances, I have no alternative except to direct the Rent Controller to take note of the failure of the tenant to satisfy the second requirement of Section 11 91) and to pass necessary consequential order under Section 11 (4)."

Whereupon the Rent controller after giving notice to both sides heard and passed orders ordering eviction as against which, presently RCAs are pending before the appellate authority. The admitted position is that earlier stay was granted by the appellate authority, but subsequently, it was not extended. Once the appellate authority has not granted any stay of the proceedings in the E.P or stay from executing the order in the RCOP, the question of the Executing court staying the matter does not arise and hence, the E.P.court appropriately and appositely returned the said stay application. On 09.10.2009 the learned counsel for the Judgment Debtor was very much present and the learned Judge heard both and considering that no notice at all was required in E.P.and no elaborate enquiry was required, the learned Judge ordered delivery warranting no interference by this court.

12. In the last portion of the said order dated 09.10.2009, the Judge also directed the decree holder to pay batta after 10 days, obviously and axiomatically so as to help the judgment debtor to approach the higher forum and try to get stay if possible. As such no aspersion can be caused on the lower court in passing such order of delivery. Accordingly, he prays for the dismissal of the revision petition.

13. Considering the pro et contra, I would like to refer to Order 21 Rule 22 of CPC including the Madras High court amendment appended there under:

"Order 21, Rule 22: Notice to show cause against execution in certain cases (1)
Where as application for execution is made-

(a) more than two years after the date of the decree, or

(b) against the legal representative of a party to the decree (or where an application is made for execution of a decree filed under the provisions of section 44-A), or

(c) Where the party to the decree has been declared insolvent, against the Assignee or Receiver in Insolvency, the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause on a date to be fixed, why the decree should not be executed against him: Provided that no such notice shall be necessary in consequence of more than two years having elapsed between the date of the decree and the application for execution, if the application is made within two years, from the date of the last order against the party against whom execution is applied for, made on any previous application for execution or in consequence of the application being made against the legal representative of the judgment debtor, if upon a previous application for execution against the same person the Court has ordered execution to issue against him. (1-A) Where from the particulars mentioned in the application in compliance with Rule 11(2)(ff) supra or otherwise the Court has information that the original decree holder has transferred any part of his interest in the decree, the Court shall issue notice of the application to all parties to such transfer, other than the petitioner, where he is party to the transfer. (2) Nothing in sub-Rule (1) shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if for reasons to be recorded it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice: Provided that no order for execution of a decree shall be in valid owing to the omission of the Court to record its reasons unless the judgment debtor has sustained substantial injury as the result of such omission."

14. At this juncture, the learned counsel for the revision petitioner also cited the circular of this court in ROC No:195/76.Con.B2 dated 22nd November 1977.

15. Trite the proposition of law is that statutory provisions shall prevail over administrative circulars. A cumulative reading of those provisions would clearly highlight and spotlight the fact that the executing court in respect of the executable decrees within two years need not order notice at all. While holding so, I hasten to

add that despite such power vested with the executing court, even in such matters notice could be ordered at the discretion of the Judge concerned.

16. In this case on 07.10.2009 notice to the respondent was ordered and the matter was ordered to be called on 09.10.2009, so to say, a short notice was ordered . The endorsement on 09.10.2009 as extracted supra would reveal that the learned counsel for the Judgment Debtor was present on that day in the Court at the time of calling the E.P. But it is quite obvious that notice of the E.P.was not served either on the party or on the Advocate. It is also understandable that on 09.10.2009 on behalf of the judgment debtor stay petition was moved and it was returned. In connection with that alone Judgment debtor filed affidavit in support of the stay petition filed before this court and the learned counsel for the revision petitioner also would invite the attention of this court to the said averments in the said affidavit of the Judgment Debtor accompanying the stay petition filed here. However the stay petition herein was not pressed subsequently.

17. The question arises as to whether the Judge of the Executing court after ordering notice was justified in not sticking on to that endorsement on 07.10.2009 and proceed to order delivery as though on the ground that no notice was necessary.

18. The learned counsel for the respondent/decreed holder would submit that he on entering appearance on 09.10.2009 satisfied the court by his submission that such notice itself in E.P.was not necessary and that in the facts and that in the circumstances of this case, straight away delivery could be ordered.

19. I am of the considered view that simply because earlier notice on 07.10.2009 was ordered, the Executing court itself cannot be shackled or prevented from exercising its discretion not to pursue further but to order delivery. Once Statute contemplates certain power on the executing court and even though the executing court by mere endorsement ordered short notice and subsequently failed to pursue it, yet on that ground alone the order of delivery passed cannot be set aside as though the Judge took a retrograde step illegally etc.

20. It is a fact that, in this case even as on the date of the E.P., appeals were presented before higher forum and those appeals were pending; the Judgment Debtor should have very well proceeded further and got those RCAs numbered and he could have very well pressed for stay. But on the other hand, they approached the Executing Court itself for stay.

21. No doubt, the decision of this court reported in 1993 (1)LW 331 is relied upon. But, I would like to point out that the appellant had the viabilities to obtain stay. In this case already the Judgment Debtor approached the appellate forum and filed necessary application and it was for him to press for those applications and obtain stay. But in this case, it appeared that it was not done so. But the present position as per the learned counsel for the revision petitioner is that the Appellate Court has not chosen to extend the stay, which is granted at one point of time for certain period. In such a case, before the Executing Court the Judgment Debtor cannot. pending that appeal, raise any plea and contend for obtaining stay or for dismissal of E.P.

22. To the risk of repetition and pleonasm but without being tautologous, I would like to highlight that when the Appellate court is seized of the matter and stay application is also as of now pending, the Executing Court, apart from ordering delivery cannot entertain any other plea. The contention that could be raised before the appellate authority cannot be raised before the Executing Court.

23. The learned counsel for the Judgment debtor would submit that even in an extreme case, where the Judgment debtor may not be having any case, it is not for the court to say that Judgment Debtor is having no case in the E.P at the threshold itself. The appellate forum is the last court of fact and could scrutinise all pleas. There is no point in the judgment debtor's contention that if opportunity would be given before the Executing court, then he would be able to put forth the objections concerning the inexecutability or non-executability of the order concerned. As such, this is a singularly singular case in which delivery was ordered and even though the appellate forum is seized of the matter, yet it has not extended the stay. The revisional court also can take into account the subsequent developments and point out that the subsequent developments are to the effect

that at present the entire issues could be decided only by the appellate forum, which is now seized of the matter and not by the executing court. No stay could be got extended from the appellate forum by the Judgment Debtor, in such a case, there is no point in blaming the executing court for having not given opportunity to the Judgment Debtor to contest the E.P.

24. The learned counsel for the respondent/decreed holder would reiterate that huge arrears of rent have not been paid and I would like to hold that in this revision, the court could only deal with the matter pertaining to the revision and accordingly it has to be disposed of and it is for the respondent/decreed holder to work out his remedy in the way known to law.

25. In respect of certain allegations made about the interpolations and all, I would like to point out that the Hon'ble Apex court clearly held that if any endorsement is found made in the court record, due weightage has to be given to it and presumption as per under Illustration(e) under Section 114 of the Indian Evidence Act, 1872 would be attracted. Illustration (e) to Section 114 of the Indian Evidence Act would run thus:

"114. Court may presume existence of certain facts The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case, the court may presume

a)

b)

c)

d)

e) that judicial and official acts have been regularly performed. "

However, the court also has to see whether a Judicial Act was performed under exceptional circumstances:

26. In this case, the proceedings were held in the open court on 09.10.2009 and as such it cannot be stated that the court acted under any exceptional or questionable circumstance. In fact, the illustration (e) to Section 114 of the Indian Evidence Act embodies in itself the maxim "Omnia praesumuntur rite et soleniter esse acta donec probetur in contrarium"- All things are presumed to have been rightly and duly performed until it is proved to the contrary.

27. Admittedly on 09.10.2009, physically the counsel for the Judgment Debtor was also present and his contention that his presence should have been noted in the normal course in the relevant column etc is a far fetched one as the Judge herself had endorsed in the docket sheet on 09.10.2009 about the presence of the learned Advocate for the Judgment Debtor, which is an admitted one.

28. At this juncture, I would like to extract certain excerpts from page Nos.1807 and 1809 of the famous treatise Sarkar on Law of Evidence Vol.II, 16th Edition 2007 as under:

Page 1807:

"The matters of judicial record are unquestionable inasmuch as they are not open to doubt (Shahnaz Shaharyari v. Vijay Y.Gawande, A 1995 Bom30, 38). The illustration contained in Section 114(e) of the Indian Evidence Act simply means tht if an official act is proved to have been done, it would be presumed to have been regularly done. The presumption under Section 114(e) could only be nullified by clear and cogent evidence to the contrary (State of Haryana vs. Anil Kumar, 2004 (1) Punj LR 69 (P & H))." Page No.1809:

"Matters of judicial record are unquestionable. They are not open to doubt. Judges cannot be dragged into the arena. Judgments cannot be treated as mere counters in the game of litigation. WE are bound to accept the statement of the Judges recorded in their judgments, as to what transpired in court. The statement of the judges cannot be allowed to be contradicted by statements at the Bar or by affidavit and other evidence. If the judges say in their judgment that something was done, said or admitted before them, that has to be last word on the subject (State of Maharashtra v. Ramdas Shrinivas Nayar, A 1982 SC 1249, 151: 1982 Cri

LJ 1581). Every judicial act shall be deemed to have been properly performed unless contrary is proved as laid down under Section 114(1) of the Evidence Act. Decree is a final decree as such it is executable (Ravi Krishna v. Murlidhar Agarwal (2000) 2 All RC 268)" (emphasis supplied)

29. From the mere fact, that the learned Judge after ordering notice in 07.10.2009 took a different view on 09.10.2009, the court cannot presume mala fide intention or any ill-will on the part of the Presiding Judge in making such order, based only on the mere allegations made by the Judgment debtor as against whom delivery was ordered. No doubt, if any extra ordinary circumstances like fraud or any such illegality is found perpetrated then that has to be dealt with separately. But normally, the appellate forum and the revisional forum have to go by the endorsements and records available. The words " Heard both sides" are found interpolated, after the third line. But by that term, this court has not in any way been made to understand that the Judgment Debtor was heard by the Executing court on merits of the E.P. This court holds that it is a fact that no opportunity was given to the Judgment Debtor to file counter as well as put forth his arguments about the alleged inexecutability of the said decree but what I would like to point out is that those pleas relating to the inexecutability of the eviction order could be raised only before the Appellate forum and not before the executing court.

30. I recollect the maxims -

(i) *lex nil facit frustra* The law does nothing in vain.

(ii) *Executio juris non habet injuriam* The execution of law does no injury. Now the appropriate forum is the appellate forum and in such a case, it is open for the revision petitioner to approach only the appellate forum and try to get stay, if any that is legally possible and that too in the wake of huge arrears of rents due payable by the tenant to the landlady.

31. With this observation this revision is dismissed. No costs.

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