High Court Of Judicature At Madras

Civil Revision Petition No. 3354 Of 2009 & M.P. No. 1 To 3 Of 2009

Judgment Date:
05-07-2010

Harigangaben Purohit rep. by Power Agent Mr. Hariharan Shukla **..Petitioner**

V. Shahjahan **..Respondent**

Bench :

{ HON'BLE MR. JUSTICE G. RAJASURIA }

Citation :

(2011)256MLJ 425 ;

Judgment

1. Inveighing the order dated 04.08.2009, passed in E.A.No.95 of 2009 in E.P.No.226 of 2009 RCOP No. 1912 of 2007 by the XIII Judge, Small Causes Court, Chennai, this civil revision petition is focused. 2. Heard both sides. 3. Compendiously and concisely, the relevant facts absolutely necessary and germane for the disposal of this revision would run thus: The revision petitioner herein obtained the order of eviction in RCOP No. 1912 of 2007 from the Rent Controller concerned. Subsequently, the same revision petitioner/landlord filed E.P.No. 226 of 2009 so as to execute the said order of eviction and since the E.P. was filed within two years, the Executing Court without ordering notice to the judgment debtor ordered delivery, whereupon delivery was effected and subsequently recorded by the Court and the E.P. was terminated. Thereafter, the judgment debtor filed E.A. for redelivery of the property and also filed one other E.A.No. 95 of 2009 for maintaining status quo, whereupon, the lower Court passed the impugned as under. “Heard petitioner/judgment debtor. Additional affidavit filed stating that sanctioned plan for demolition and reconstruction has not been produced either before rent controller or before executing court. As per the decision reported in 200297 SBR 320 the Decree Holder shall produce before executing court the sanctioned or approved plan and till such time the tenant shall be allowed to be in possession. The petitioner/tenant apprehends demolition as possession has been legally handed over. Hence till 6.8.2009 the respondent/Decree Holder is hereby restricted to demolish the petitioner portion. Notice to counsel for respondent and counter by then.” 4. Being aggrieved by and dissatisfied with the said order, this revision is focussed on various grounds, the gist and kernel of them would run thus: After terminating the E.P., the Executing Court had no jurisdiction to pass such an order or entertain any application touching upon the delivery already ordered. The judgment debtor also already preferred appeal as per the Rent Control Act and he could not obtain stay. Having failed to obtain stay, those applications have been filed before the Executing Court, which are totally untenable. Accordingly, the revision petitioner prays for setting aside the interim order dated 04.08.2009. 5. The learned counsel for the revision petitioner/decree holder, reiterating the grounds of revision would develop his arguments, the gist and kernel of them would run thus: (1) After termination of E.P., the Executing Court has become functus officio and it has no jurisdiction at all to entertain any application in regard to the delivery ordered, effected and recorded. The delivery itself was given by the Court and it was obtained by the decree holder and the same was recorded also and thereafter alone E.P. was terminated. As such, the E.P. has become a dead E.P. and it cannot be given life by any stretch of imagination by the same Court. (2) A plain reading of Section 144 CPC would clearly exemplify and demonstrate that if at all the order in the RCOP in evicting the tenant is found set aside by any appellate or

revisional forum or by any other legal process, the question of invoking Section 144 of CPC would arise. Suo motu, Section 144 of CPC cannot be invoked by the Executing Court for the purpose of ordering redelivery and it cannot also pass any order so as to stop the decree holder, who had already obtained possession through Court, from demolishing the portion handed over by the Court itself. (3) There is absolutely no illegality involved in the matter. There was no fraud also. Simply because allegedly certain directions of the Hon'ble Apex Court in the decision reported in (2002) 5 SCC 229 = 2002-4-l.w. 639 [Harrington House School v. S.M. Ispahani and another] were not adhered to by the Executing Court, it cannot recall its own order as though it is a higher forum to itself. There is also not even an application for reviewing its own order. Straightaway invoking Section 144 C.P.C. in the facts and circumstances of the case is totally untenable. (4) The decision of the Hon'ble Apex Court reported in (2002) 5 SCC 229 (cited supra) would clearly highlight that the said decision decided the case which was before it. In that matter, no where the Hon'ble Apex Court mandated that the dictum of that decision would act as a binding precedent for all cases to come or in all matters pending in similar circumstances. (5) Even assuming that the said decision laid down any legal proposition, it could only be taken as per incuriam and not a binding precedent, as the mandates contained in the last portion of the judgment is quite antithetical to the provisions of the Tamil Nadu Buildings (Lease and Rent Control) Act and no where in the said Act it is found stated, that before obtaining delivery the approved plan for reconstruction should be submitted and thereafter, time has to be given by the Executing Court for the tenant to vacate etc. Only in that particular case, the Hon'ble Apex Court deemed it necessary to pass such direction. Accordingly, citing several decisions of the Hon'ble Apex Court and this Court, the learned counsel for the revision petitioner has prayed for setting aside the impugned order of the lower Court. 6. By way of torpedoing and pulverising the arguments as put forth on the side of the revision petitioner/decree holder, the learned counsel for the respondent/judgment debtor would advance his arguments, the warp and woof of them would run thus: (1) The judgment of the Hon'ble Apex Court reported in (2002) 5 SCC 229 (cited supra) is a binding precedent within the meaning of Article 141 of the Indian Constitution. The last portion of the judgment would exemplify and display that all the Courts in Tamil Nadu should necessarily before executing the decree for demolition and reconstruction should see that the approved plan from the competent authority is filed and thereafter, opportunity is given to the judgment debtor to vacate the premises. But in this case, without notice, eviction was ordered and that too without adhering to the mandates as contained in the Hon'ble Apex Court's decision cited supra. (2) The Executing Court committed illegality in ordering eviction, as the E.P. itself should not have been entertained and necessarily the Executing Court should have demanded from the decree holder the necessary plan and also should have though of granting time also for the judgment debtor to vacate, but that was not done in this case. 7. The learned counsel for the revision petitioner in the additional typed set of papers enclosed the following documents: "1. Sanctioned Demolition Plan 2. Sanctioned Construction Plan 3. Photographs." He would also contend that as on this date, absolutely there is no roof at all in the demised premises inasmuch as it is in such a dilapidated condition, wherefore the interim order of the lower Court is liable to be set aside. 8. The learned counsel for the respondent/judgment debtor would submit that simply because subsequently the plans were obtained, that would not cure the illegality in ordering delivery and in effecting the same. Accordingly, the learned counsel for the respondent/decree holder prays for the dismissal of the revision. 9. The point for consideration is as to whether as against the impugned order dated 04.08.2009, the revision would lie? And whether the Executing Court committed error in entertaining the E.As. concerned referred to supra, after termination of E.P.No.226 of 2009? 10. At the first instance, it is just and necessary to consider as to whether the judgment of the Hon'ble Apex Court reported in (2002) 5 SCC 229 (cited supra) is binding precedent, which the Executing Courts in Tamil Nadu should necessarily follow as canvassed by the learned counsel for the respondent/judgment debtor in this case, or whether the said judgment is not a binding precedent as canvassed by the learned counsel for the revision petitioner/decree holder. It is therefore just and necessary to extract the relevant portion of the judgment of the Hon'ble Apex Court reported in (2002) 5 SCC 229 (cited supra): "8. ……A procedure can be devised to protect the interests of both – the tenant and the landlord, specially by taking care of the apprehension expressed by the tenant that the property may remain lying unconstructed in spite of being vacated by the tenant and followed by demolition if the plans for proposed reconstruction are not sanctioned by the local authority. The decree as passed by the High Court is sustained but it is directed that the landlords shall submit the plans of reconstruction for the approval of the local authority. Only on the plans being sanctioned by the local authority the decree for eviction shall be available for execution. Such sanctioned or approved plans shall be

produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering possession to the landlord decree-holders. Till then the tenant shall remain liable to pay they are being paid. Along with the plans the landlords shall also file an undertaking before the executing court as required by clause (b) of sub section (2) of Section 14 of the Act. Subject to the said modification the decree as passed by the High Court is maintained. The appeal stands disposed of. No orders as to the costs." (emphasis supplied). A mere poring over and perusal of the aforesaid Hon'ble excerpt, including the whole judgment of the Hon'ble Apex Court would leave no doubt in the mind of the Court that Hon'ble Apex Court felt that in areas where approved plan is required for the landlord to reconstruct the demised premises, he should necessarily produce the same before the Executing Court; whereupon the Executing Court has to consider the time to be granted to the judgment debtor for vacating the premises and even the Executing Court can grant some time to the tenant to vacate the premises. The ratiocination adhered to by the Hon'ble Apex Court is that such plan should be produced even during enquiry and thereafter, the Court has to pass orders; however, in cases where such procedure has not been followed, it is incumbent upon the decree holder to satisfy the Court before obtaining delivery through Court that the decree holder is armed with the necessary building plan and that after obtaining delivery of the demised premises, it would not be kept idle awaiting plan approval from authorities concerned. Hence, having this in mind, the Hon'ble Apex Court mandated in the said judgment that those requirements should be adhered to by the Executing Court. 11. The core question arises as to whether non adherence to the decision of the Hon'ble Apex Court reported in (2002) 5 SCC 229 (cited supra) would lead to illegality or mere irregularity in the facts and circumstances of the case. I am fully aware of the fact that in a matter where a Court passed order an interpreting the evidence without strictly adhering to the binding precedent, naturally the same Court of its own accord or at the instance of one of the parties cannot set the clock back by recalling its order. No doubt review is possible if no appeal is opted, as per CPC subject to various conditions, but this is a singularily singular case. The Hon'ble Apex Court unambiguously mandated that in the areas where plan approval is necessary for construction, the same should be produced before the Executing Court, as otherwise, the resultant consequences would be that the land owner would evict the tenant and obtain possession and for a long time the premises would be kept idle awaiting the plan approval by the authority concerned, which would not be beneficial either for the landlord or for the tenant. The Hon'ble Apex Court also mandated that as long as the tenant occupies the premises, the tenant should pay the rent on the old terms and conditions. Hence, I am of the view that the said directions in the cited decision is not an empty formality or a pure and simple direction given only in that particular case. 12. Over and above, that, the learned counsel for the respondent/judgment debtor also cited the following decisions of this Court, wherein, this Court treated the aforesaid mandates in the decision of the Hon'ble Apex Court as law of the land: (i) (2009) 5 MLJ 1230 [M. Ashokan v. M. Dhanasekara Pandia (died) and others], an excerpt from it would run thus: "42……..This Court, as a matter of Prudence, Equity, Justice and Good Conscience, directs the respondents/landlord that they shall submit the new plan sanctioned by the local authority and only then the decree for eviction shall submit the new plan sanctioned by the local authority and only then the decree for eviction shall be available for execution and also that they shall produce the approved or sanctioned plan before the concerned executing Court, whereupon the executing court that allow a reasonable time to the tenant for vacating the property and delivering possession to the respondents/landlords/decree holders. Till then, the revision petitioner/tenant is directed to pay the monthly rent, electricity charges for use and occupation of the petition mentioned building as usual. While producing the sanctioned or approved plan, the respondents/landlord are also directed to file an undertaking before the executing Court as per clause (b) of sub-section 2 of Section 14 of the Tamil Nadu Buildings (Lease and Rent Control) Act." (emphasis supplied) (ii) 18……But the Apex Court has held in (2002) 5 SCC 229 (Harrington House School v. S.M.Ispahani and Another] that only on the plan being sanctioned by the local authority the decree for eviction shall be available for execution and such sanctioned or approved plans shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering possession to the landlord decree-holders. In view of the said decision, production of approved building plan is not a sine quo non for passing eviction order and production of the same is a condition precedent for ordering delivery of the property. (emphasis supplied) It is therefore clear that the said issue raised by the revision petitioner is no more res integra, and the mandates as contained in the said decision of the Hon'ble Apex Court are part of the law of the land and the said verdict is a binding precedent. In this view of the matter. I do not see any force in the contention of the

learned counsel for the revision petitioner that the said directions in that judgment are mere per incuriam. 13. The learned counsel for the petitioner placing reliance on the recent decision of the Hon'ble Aplex Court reported in 2010 SC 428 = 2010-3-L.W. 358 [V. Kishan Rao v. Nikhil Super Speciality Hospital and another] would develop his argument that the concept per incuriam could be pressed into service. I would like to point out that in the cited case supra, the two Bench decision of the Hon'ble Apex Court virtually disagreed with the view taken by the earlier two Bench decision of the same Hon'ble Apex Court in 2009(3) SCC 1 = 2009-2-L.W. 681 [Martin F.D' souza v. Mohd.Ishfaq]. However, in my considered opinion the High Court taking a cue from it cannot try to bypass the judgment of the Hon'ble Apex Court by invoking the principle per incuriam. The decision of the Hon'ble Apex Court reported in (2002) 5 SCC 229 (cited supra) by no stretch of imagination be stated to be one attracting the concept per incuriam, as the Hon'ble Apex Court consciously after considering the pro et contra laid down the law which is having binding effect under Article 141 of the Indian Constitution. When the law is silent on certain aspects, the Hon'ble Apex Court has got ample jurisdiction under Article 142 of the Indian Constitution to lay down the law and procedure with the avowed intention to render complete justice and in such a case, such pronouncement would never attract the concept per incuriam. 14. The learned counsel for the respondent correctly pointed out that in the said decision certain directions were given taking into account to peculiar circumstances involved in similar such matters. 15. The learned counsel for the revision petitioner placing reliance on the decision of this Court reported in AIR 1985 Madras 303 = (1985) 98 L.W. 321 [A Palanivel Chettiar v. R. Elumalai] would submit that after the execution of the decree when application was filed by the decree holder for getting the decree amended so as to enhance the interest from 6% to 9% based on Patna High Court's judgment reported in AIR 1962 Pat 116 [Shyamal Bihari v. Girish Narain] this Court deprecated such practice. But here, it is quite obvious that the position is entirely different, as before ordering delivery, the Hon'ble Apex Court mandated certain precautions to be taken by the Executing Court, which the Executing Court had not taken apparently. 16. Inviting the attention of this Court to the decision of the Hon'ble Apex Court reported in (1995) 2 SCC 159 [Rajeswari Amma and another v. Joseph and another], the learned counsel for the revision petitioner would argue that the Hon'ble Supreme Court held that the order of delivery of possession in favour of the three decree holders being common and inseparable and the same having become final in respect of one, the High Court erred in setting aside the order in respect of the appellants. However, here the same comments offered in respect of the citing of the decision of this Court reported in AIR 1985 Madras 303 (cited supra) would be applicable to this case also. 17. Placing reliance on the decision of this Court reported in AIR 1983 Madras 5 [Abdul Azeez Sahib v. Dhana-bagiammal and others], the learned counsel for the revision petitioner would submit that this Court in the said decision held that the defendants therein have not chosen to challenge the decree either by way of appeal, revision or review or to have it set aside in the suit itself by appropriate proceedings and that it was not open to the Executing Court to refuse the execution of the decree on the ground that the decree was passed in favour of a dead person. This decision also to this case as it is quite obvious and no more elaboration in this regard is required. 18. Referring to the decision of the Hon'ble Apex Court reported in 1993 Supp (2) SCC 671 [Gopalan Vijayan v. Kunchanadhan Raveendran and another], the learned counsel for the revision petitioner would submit that even though in a case no notice of the advanced posting of the Execution petition was given to the judgment debtor and delivery was ordered and effected behind his back, there was no violation of principles of natural justice and compensation was awarded and that no redelivery could be ordered. I would like to point out that the facts and circumstances involved in this case are totally different from the ones involved in the cited case and as such the said decision is not relevant to this case. 19. The learned counsel for the petitioner cited the decision of this Court reported in 1991 MHC 038 [Nachayee Amman and others v. Pichaimuthu] to the effect that if the order of decree is to be executed within two years, no notice is required and any circular order by the High Court to the contrary would have no statutory value. There could be no quarrel over such a proposition. 20. The learned counsel for the revision petitioner placing reliance on those cited decisions supra would further argue that even if there is any mistake in the order passed by the Court, the same Court cannot recall its own decision. The learned counsel for the revision petition would lay stress upon the decision of the Hon'ble Apex Court reported in AIR 1966 SC 470 [M.V.S. Manikayala Rao v. M. Narsimhaswami and others], certain excerpts from it would run thus: "(2) On October 16, 1951, Sivaya filed the suit out of which this appeal arises, against the then members of the joint family whose number had by the time increased and various other persons holding as alienees from them, asking for a partition of the joint family properties into five equal shares and thereafter for possession of four of such

shares by removing the defendants from possession. The trial Court decreed the suit but held that Sivayya was not entitled to a 4/5th share but only to a 2/3rd share because before the decree a 5th son had been born to Narasimhaswamy who had not been made a party to the suit or the execution proceedings and whose share and not consequently passed under the auction sale. Some of the defendants appealed to the High Court of Andhra Pradesh from his judgment. The High Court allowed the appeal on the ground that the suit barred by limitation under Art 144 of Schedule I to the Limitation Act. Sivayya had filed a cross-objection in the High Court on the ground that he should have been held entitled to a 4/5th share of the properties which was dismissed by the High Court, without a discussion of its merits in view of its decision on the question of limitation. Sivayya having died pending the appeal in the High Court, the appellant as his successors-in-interest, have come up to this court in further appeal under Art. 133 of the Constitution. (8) It was, however, said that the order for delivery of possession made in the present case was a nullity because Sivayya and his transferee who had purchased an undivided share in coparcenery property were not entitled to any possession at all. We agree that the order cannot be supported in law but we do not see that it was for this reason a nullity. It is not a case where the order was without jurisdiction. It was a case where the learned Judge making the order had, while acting within his jurisdiction, gone wrong in law" 21. The learned counsel for the revision petitioner would submit that in the said decision, the Hon'ble Apex Court was dealing with a case where an undivided share in a Hindu Coparcenary property was sold in an auction and the auction purchaser ultimately obtained delivery of possession; such obtention of possession, as per the order of the Court subsequently came up for consideration before the Hon'ble Apex Court, which held that even though such obtention of delivery of an undivided coparcenary property was not in accordance with law, yet that order was within the jurisdiction of the Court concerned and that cannot be taken as nullity. Here also, according to the learned counsel for the petitioner, the Executing Court passed the order, which even for argument sake taken that it is not in accordance with law, still it cannot be held that the Executing Court passed the order without jurisdiction; except the present Executing Court, no other Court is having jurisdiction to execute the decree passed in RCOP and in such a case, it would not lie in the mouth of the respondent to argue that the Executing Court has got no jurisdiction at all to deal with the matter. 22. At this juncture, I would like to differentiate and distinguish on factual basis the decision of the Hon'ble Apex Court reported in AIR 1966 SC 470 (cited supra) with that of the decision of the Hon'ble Apex Court reported in (2002) 5 SCC 229 (cited supra). In the earlier decision, the Hon'ble Apex Court while deciding the concept prescriptive title rendered its verdict that such an order passed earlier by the Court cannot be termed as nullity, even though it is not strictly in accordance with law. But here, the position is greatly different. The Hon'ble Apex Court in (2002) 5 SCC 229 (cited supra) visualized the situation where the landlord obtaining possession through Court, but keeping quiet for want of plan approval and according to the Hon'ble Apex Court that would not be helpful either to the landlord or to the tenant and the Hon'ble Apex Court in its wisdom thought that before ordering delivery, certain formalities have to be complied with and here in this case, presumably the lower Court without keeping itself abreast of the changes in the law as found enshrined in the decision of the Hon'ble Apex Court reported in (2002) 5 SCC 229 (cited supra) ordered delivery. Subsequently, when in the form of E.As. the matter has been brought to its knowledge, the Executing Court in its wisdom thought that interference is required and wanted to decide on that. As such, pending a decision being taken by it on that as to whether redelivery could be ordered or not, it thought fit to pass the impugned order dated 04.08.2009 to the effect that the building delivered should not be demolished. No doubt in normal circumstances, after handing over delivery, such an order cannot be passed. To the risk of repetition and pleonasm, but without being tautologous, I would like to point out that here presumably the Executing Court felt that in ignorance of the existing law it passed such delivery and ordered termination of the E.P. and it wanted to reconsider it and in the process of reconsidering, such an interim order was passed, warranting no interference by this Court in revision. 23. At this juncture, the learned counsel for the respondent/judgment debtor citing the following decisions: 1. AIR 2000 SC 3032 = 2001-1-L.W. 429 [A. Venkatasubbiah Naidu v. Chellappan and others] 2. 2007 (3) CTC 662 [S. Rangarjan and 2 others v. M/s. Nathan's Foundations Pvt. Ltd., rep. by its Managing Director, Mr. K.V. Shankaralingam] 3. 2010 (3) LW 385 [s. Sarath Kakkamanu v. Anandraj] 4. 2010 (4) MLJ 711 = 2010-2-L.W. 507 [Nakka Makandayalu v. Estate Officer-cum-Deputy Collector (Revenue). Yenam, Pondicherry. Would develop his argument that as against interim orders no revision would lie. I would like to observe at this juncture that pending Section 144 CPC application, if any interim order is passed with avowed object to maintain status quo, the revisional Court need not interfere with it. 24. The learned counsel for the respondent also cited the following decisions: 1.

AIR 1961 SC 272 [B.V. Patankar and others v. C.G. Sastry], an excerpt from it would run thus: “8. The inapplicability of Section 47 to the proceedings out of which the appeal has arisen was also raised before us, but that contention is equally unsubstantial because the question whether the decree was completely the satisfied and therefore the court became functus officio is a matter relating to execution, satisfaction and discharge of the decree. It was held by this court in Ramanna v. Nallaparaju that: “When a sale in execution of a decree is impugned on the ground that it is not warranted by the terms thereof that question could be agitated, when it arisen between parties to the decree, only by an application under Section 47, and not in a separate suit.” See also J. Marret v Mohammad Shirazi & Sons where the facts were that an order was made by the Executing Court directing contrary to the terms of the decree the payment of a certain fund to the decree holder. The Madras High Court in K. Mohammad Sikri Sahib v. Madhava Kurup held that where the Executing Court was not aware of the amendment of the Rent Restriction Act by which the execution of a decree was prohibited and passed on ejectment order against a tenant, the Executing Court could not execute the decree and any possession given under an ex parte order passed in execution of such a decree, could he set aside under Section 151 of the Code of Civil Procedure. The prohibition is equally puissant in the present case and Section 47 read with Section 151 would be equally effective to sustain the order of redelivery made in favour of the respondent.” 2. (1994) 4 SCC 422 [Krishan Lal v. State of J & K] 3. AIR 1999 Delhi 202 [M/s Hindustan Thermo Prints Ltd v. D.R.G. (U.K.) and others] 4. (2008) 4 MLJ (SC) [Tanusree Basu and others v. Ishani Prasad Basu and others] 5. AIR 2001 SC 279 [Ratansingh v. Vijaysingh and others] It is clear from the perusal of the above cited decisions that once the Court comes to the conclusion that there is illegality, so to say flagrant violation of the express mandate of the law in passing an order, it could be recalled. 25. The learned counsel for the revision petitioner/decree holder by placing reliance on the subsequently obtained sanctioned plan would submit that as of now, everything is in proper order even as per the order of the Hon’ble Apex Court and in such a case, no interference of the Executing Court is required and this Court could set at rest the matter. 26. The learned counsel for the respondent/judgment debtor would go to the extent of submitting that his right to seek time before the Executing Court is still available as per the Hon’ble Apex Court’s decision and that valuable right was denied to him and he might be permitted to seek his remedy before the Executing Court as per the direction of the Hon’ble Apex Court. 27. One should not lose sight of the fact that still that application under Section 144 CPC is pending. Pending that, as against the interim order ordering status quo, this revision has been filed. Since parties are fighting at arms length and the appeal also is pending before the appellate forum, in the fitness of things I do not like to pass final verdict over it and it is for the Executing Court which is seized of the E.A. under Section 144 CPC and other applications to decided on that issue. Accordingly, I am of the considered view that at present this revision as against the interim order is not maintainable. Accordingly, this revision is dismissed. No costs. Consequently, connected miscellaneous petitions are closed. 28. Inasmuch the matter is pending for a considerable time, I would direct the Executing Court to dispose of the E.P. itself within a period of one month from the date of receipt of a copy of this order, untrammeled and uninfluenced by any of the observations made by this Court in dismissing this revision.