(1998) 02 MAD CK 0105

Madras High Court

Case No: C.R.P.No. 2751 of 1993

V.H. Patel		APPELLANT
	Vs	
P.M. Patel		RESPONDENT

Date of Decision: Feb. 20, 1998

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 10, Order 21 Rule 31, 47, 51

Citation: (1998) 2 CTC 479 : (1998) 2 LW 83 : (1998) 3 MLJ 748

Hon'ble Judges: R. Balasubramanian, J

Bench: Single Bench

Advocate: Mr. V.R. Gopalan, for the Appellant;

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

1. The revision petitioner is the petitioner in E.A.No.2258 of 1989 in E.P.No.1883 of 1988 in O.S.No.9220 of 1984 on the file of IX Assistant

Judge, City Civil Court, Madras. The respondent in this revision is the respondent in the above Execution Application, the decree holder/petitioner

in the Execution petition and the plaintiff in the abovereferred to suit. The revision petitioner''s application in the abovementioned Execution

Application was dismissed. The prayer in that Application, which was filed u/s 47 of the Code of Civil procedure, is extracted herein:

Having regard to the facts and circumstances it is prayed that this Hon''ble Court may be pleased to enquire into the liability or otherwise of the

petitioner to pay class 2 of the decree dated 21.7.87 regarding payment of damages of the petitioner for the machineries from 16.9.87 and pass

appropriate and necessary orders in this behalf.

It is prayed that this Hon''ble Court may be pleased to direct the respondent to re-deposit the sum of Rs.26,386 withdrawn by him from the Court

without notice to the petitioner which was deposited by the petitioner under protest in E.P.No.200 of 1998.

This application was opposed by the decree holder and the objections were sustained and thus the application came to be dismissed.

2. A few facts have to be necessarily stated in this order before I venture to decide the correctness or otherwise of the order challenged in this

revision. In this order the parties to the civil revision petition will hereafter be referred to as the plaintiff and the defendant respectively. It appears

that the plaintiff has leased out a business premises called New Ashapuri Saw Mill its goodwill and the machineries of that business premises to the

defendant. The machineries numbering eight are given in the Schedule to the plaint. The monthly lease amount was fixed at Rs.700 and the lease

commenced from 19.3.1979 and it came to an end by efflux of time on 18.3.1984. It further appears that the plaintiff''s wife by name Mrs.Nirmala

Patel was owning the land and the zinc sheet shed in the property where the above referred to saw mill with the machineries were there. The

machineries are admittedly imbedded in the earth. There was a separate agreement to tenancy between the defendant in the suit and the plaintiff''s

wife in respect of the property owned by her.

3. The plaintiff filed O.S.No.9220 of 1984 in the City Civil Court, Madras, for the following reliefs:

(a) directing the defendant to restore possession of the New Ashapuri Saw Mill with goodwill, machineries and accessories more fully described in

the Schedule hereunder to the plaintiff in the same condition as they existed at the time of lease, subject to usual wear and tear.

(b) directing the defendants to pay the plaintiff damages of Rs.9,600 upto November 1984 and thereafter at Rs. 1,200 per mensam till restoration

of possession to the plaintiff of the leased property described in the Schedule hereunder.

(c) granting an injunction restraining the defendant or others acting for or through him from in any manner doing anything with a view to deterio-rate

the condition and value of the machinery described in the Schedule hereunder.

On this plaint a decree came to be passed by the trial Court by judgment dated 21.7.1987. That decree is in Tamil and I hereby translate into

English the relevant clauses of the decree and they are as follows:

(1) The defendant is directed to hand over the Schedule mentioned and described machines and accessories to the plaintiff;

(2) the defendand has to pay a sum of Rs.700 per month to the plaintiff from March 1984 till Clause (1) of the decree referred to above is

satisfied; and

(3) there shall be an injunction restraining the defendant or anybody claiming under him from in any manner doing anything with a view to

deteriorate the condition and value of the machinery described in the Schedule of the plaint.

Therefore it is clear from the decree referred to above that the properties mentioned in the Schedule to the plaint have to be delivered by the

defendant to the plaintiff and till such time, the defendant has to pay a sum of Rs.700 per month from March 1984. The decree also mandates that

the defendant shall not do anything which may lead to the machines and accessories losing its value and affecting their condition. This decree had

become final. It appears from the records that the plaintiff filed E.P. No.200 of 1988 to execute Clause. (2) of the decree alone and realise the

money and that Execution petition had come to an end by the plaintiff realising the E.P.amount. The plaintiff again filed E.P.No.1883 of 1988 to

execute Clause (2) of the decree alone for the subsequent period. At that stage, the defendant filed E.A.No.2258 of 1989 setting out certain

reasons in the affidavit, praying that the liability of the defendant commencing from 16.9.1987 to satisfy Clause (2) of the decree has to be enquired

into and a decision should be rendered thereon. The defendant also prayed in that Application for a direction to the plaintiff to re-deposit the sum

of Rs.26,386 which had been deposited by the defendant while the suit was pending and in compliance to the order in E.P.No.200 of 1988.

4. On these undisputed facts, Mr.V.R. Gopalan, learned counsel for the petitioner, would argue that the plaintiff should have first exhausted his

remedy by executing Clause (1) of the decree referred to above and only when he finds that there is either resistance or that portion of the decree

could not be executed, he would be at liberty to proceed against the defendant by executing Clause (2) of the decree referred to earlier. In other

words, the submission of the learned counsel for the revision petitioner is that the defendant by his lawyer''s notice dated 16.9.1987 had informed

the plaintiff that he could come and take delivery of the properties forming the subject matter of the suit itself and the plaintiff though served with the

said notice yet had not taken any steps to take delivery of the said articles. Therefore the submission of the learned counsel is that the defendant

cannot be made liable to satisfy Clause (2) of the decree at least from 16.9.1987 on which date the defendant expressed his readiness to the

plaintiff to come and take delivery of those articles. The learned counsel''s submission is that the plaintiff was waiting for the decree in the execution

proceedings filed by his wife against the defendant to be executed and he was waiting for time to take delivery of not only the property forming the

subject matter of the lease agreement between the defendant and the plaintiff''s wife but also the subject matter of the present suit proceedings.

That is because since the machineries forming the subject matter of the suit are imbedded to the earth which land belongs to his wife, it will not be

possible for the plaintiff to take a meaningful delivery. In other words, if the plaintiff wants to put Clause (1) of the decree in his favour into

execution, then he must necessarily remove the machineries from the earth and take it to some other place which he was calculatively avoiding.

When that is the attitude of the plaintiff, then he cannot be allowed to proceed against the defendant so far as Clause (2) of the decree alone is

concerned since the defendant was not at all at fault either in resisting or delaying the delivery of the subject matter of the suit.

5. However the Executing Court on the basis that the decree in favour of the plaintiff as extracted earlier in this order had become final and

therefore to entertain the present application and to pass an order as prayed for, would amount to acting contrary to the decree itself held that the

present application is not maintainable. The fact that the defendant even during the pendency of the suit by his letter dated 14.9.1985 marked in

this case as Ex.P-1 expressed his readiness to deliver the articles forming the subject matter of the suit, which had been served on the plaintiff,

would not amount to, according to the Executing court, relieving the defendant from complying with the terms of the decree. The executing Court

also went on to state that such a case has not been put forward in the earlier execution petition filed by the plaintiff viz. E.P.No.200 of 1988 and

therefore the defendant is estopped from raising this point now.

6. The learned counsel for the revision petitioner also produced before me his notice dated 16.9.1987 issued on behalf of the defendant to the

plaintiff expressing the defendant''s readiness to deliver the articles in respect of which there is a decree, to the plaintiff and calling upon the plaintiff

to come forthwith and remove all the machineries mentioned in the decree. It is further made clear in this letter that the defendant cannot be made

liable to satisfy Clause (2) of the decree thereafterwards. The execution application itself came to be filed on the basis of this letter. The receipt of

this letter had not been disputed in the counter statement filed before lower court. In the counter affidavit filed on behalf of the plaintiff to the

execution application, it is stated as follows:

This respondent states that the petitioner has suppressed the real fact that the machineries tenanted to him were imbedded to the earth and land

belonging to this respondent''s wife necessitating the petitioner to take out a subsequent lease from the respondent''s wife so that to enjoy the

tenancy of the machineries and hence the petitioner was and is fully aware of the fact that the imbedded machineries could not be removed and

separated and given possession of to the respondent.

This respondent further states that the petitioner has specifically agreed to hand over back the tenancy machineries in the same position in which

they were handed over to the petitioner and thus he is fully aware that the machineries cannot be plucked out and given delivery of which is against

the terms of the tenancy.

7. Under these circumstances, the only question that falls for consideration, if I may say so precisely, is whether the plaintiff/decree holder could

execute Clause (2) of the decree alone without first exhausting Clause (1) of the decree and if he can do so, then the order under challenge has to

be necessarily sustained. But if the answer is in the negative, then the defendant must succeed. The decree in this case is in the nature of the decree

that could be passed under Order 20, Rule 10 of Code of Civil Procedure. No other provision in the CPC appears to be an appropriate provision

to be taken into account in deciding the nature of the decree in this case. Order 20, Rule 10 of the CPC enables the Court to pass the following

money decree:

Where the suit is for movable property and the decree is for the delivery of such property the decree shall also state the amount of money to be

paid as an alternative if delivery cannot be had.

But in this case cannot be said that the property directed to be delivered cannot be in fact delivered. In other words the properties forming the

subject matter of the suit are capable of being delivered and being taken delivery of by the decree holder. Therefore though the decree in this case

cannot be strictly brought within Order 20, Rule 10 CPC as above, yet the decree can be brought within the said Rule as a decree for delivery of

moveable property which is capable of being delivered and taken delivery of. Under these circumstances the question of providing for a money

decree in the alternative as provided for in Order 20, Rule 10 CPC does not arise. However at the same time it cannot be said that Clause (2) of

the decree in this case would not have been granted. It came to be granted in the context of the defendant being in possession, occupation and use

of the same and therefore till such time the plaintiff is able to take possession of the same, the defendant is bound to compensate him in terms of

money. In other words Clause (2) of the decree is in the nature of awarding damages for use and occupation of the said machineries till the plaintiff

is restored to his original position.

8. The point therefore is whether the plaintiff could take delivery of the properties forming the subject matter of the suit or not. From the counter

statement of the plaintiff in the present execution application proceeding, the relevant portion of which is extracted above, it could be seen that it

would be practically impossible for the defendant to give delivery of the suit properties nor could it be possible for the plaintiff to take delivery of

the same due to the fact that the land to which the machineries are imbedded is the subject matter of a separate tenancy and the subject matter of

separate Rent Control proceedings. The counter statement referred to above also states that if the machineries have to be removed, it is likely to

cause damages to the machineries and the contract of lease also does not provide for such a mode of delivery. It is on record that the plaintiff had

never taken any steps at all to execute Clause. (1) of the decree and take delivery of the properties. I have already found in this order that the

defendant by his letter dated 16.9.1987 had expressed his desire to deliver those machineries and called upon the plaintiff to come and take

delivery of the same. Therefore it is clear that it cannot be said that the defendant at any point of time either delayed the delivery of the machineries

or resisted any action on the part of the plaintiff to take delivery.

9. Viewing the present dispute between the parties in this revision on these undisputed facts, could it be said that the defendant is not justified in

asking the Executing Court to relieve him from complying with Clause (2) of the decree. The learned counsel for the revision petitioner brought to

my notice two judgments viz. Bal Mukunda Bisseswarlal Vs. Bengal-Nagpur Railway Co. Ltd., and Venkatrao v. Mallappa, AIR 1959 Mys. 164.

In the first case, the prayer was to give a decree for Rs.5,000 as compensation for destroying certain godown and buildings and for Rs.500 as

compensation for wrongfully taking away certain articles which were kept therein. The Court granted a decree after contest for the recovery of a

sum of Rs.3,500 as damages and for the recovery of the movable claimed in the Schedule to the plaint and that if the movable be not delivered, the

plaintiffs shall recover Rs.500as price thereof. The first portion of the decree for damages was fully satisfied. Thereafter, the Execution was levied.

The prayer in the Execution petition was that the decree holder demanded for delivery of the articles as well as for the payment of the price thereof

and since they did not get either and as articles had become spoilt and unfit for use, the Execution petition was levied for realisation of Rs.500 by

attachment of the judgment debtor''s movable. The defence to this was that the judgment debtors were ever ready to deliver the articles and it was

the decree holder who had not taken the same and therefore the judgment debtor cannot be made liable for the sum of Rs.500 representing the

price of the articles, Incidentally it may notices, the Court found that the articles had not deteriorated in value. The Executing Court dismissed the

application and on appeal by the decree holder, the learned judges held as follows:

But the case of a decree which follows 0.20, R. 10, Civil P.C. is specifically provided for. so far as its mode of execution is concerned, in 0.21,

R.31 Civil P.C. and that procedure has not been adopted by the decree-holders.

That the holder of such a decree cannot execute the money portion of it without taking recourse to the procedure prescribed by 0.21, R.31 Civil

P.C. has been held in the case of Manavikraman Vs. Moyankutti, . Whether procedure prescribed in that rule is so rigid that it must be followed in

a case where the movable are admittedly not in existence is a question which does not arise here; but in the circumstances of the present case, in

our opinion, the application to realise the money in the first instance does not lie...

Accordingly the Appeal was dismissed. In the second case the decree is as follows:

The plaintiff is entitled to get two Ras bullocks or their price HS Rs.800.

The decree holder filed an Execution petition for realisation of the decretal amount by attachment. The judgment debtor objected saying that the

relief sought for in the Execution petition was contrary to the terms of the decree and that he is willing to deliver possession of the bullocks to the

decree holder. It appears that the bullocks were also brought before the Court but the decree holder refused to take the delivery. The Executing

Court thereafter dismissed Execution petition which was reversed in Appeal. In that context, the learned Judge has held as follows:

I find sufficient force in the arguments of the learned counsel for the appellant that, giving of an alternate remedy, does not, however, give the

decree-holder any option of refusing to take the delivery of the property and of insisting upon the money portion of the decree. Order 20, Rule 10

of the CPC provides that a decree in a suit for moveable property should state certain amount of money as an alternative, if delivery of the cattle in

dispute cannot be had.

This rule provides that, if the goods are capable of delivery, they must be delivered and, if they are not, the assessed damages should be paid. The

decree-holder cannot execute his decree without having recourse to the procedure prescribed by Order 21, Rule 31 of the Civil Procedure Code.

He cannot execute the money portion of the decree alone without applying for the moveable property.

Accordingly the judgment-debtor''s appeal was allowed.

10. Section 51 of the CPC describes the powers of the Court to enforce execution. It contains clauses (a) to (e) and there is no restriction

contained in this section regarding the mode in which decree holder must put the decree into execution. The other relevant provision which may be

attracted to this case would be Order 21 Rule 31 of Code of Civil Procedure.

But at the same time can it be said that a decree holder holding a decree of the type as in this case has an unfettered right to execute the decree in

any manner he likes. In fact section 51 of the CPC says, subject to such conditions and limitations as may be prescribed, the Court may on the

application of the decree holder, order execution of the decree. As far as the execution of the decree of the type on hand is concerned, I am

unable to find any conditions and limitation in the statute in execution of the same. But however it must be noticed that if the decree-holder is

allowed to execute Clause (2) of the decree alone as he has done in this case, without taking any effective steps to execute clause (1) of the

decree, would it not amount to allowing the decree-holder unjustly enriching himself for no fault of the defendant/judgment-debtor. There was no

legal bar for the decree holder to execute Clause (1) of the decree which he has calculatively not done in this case. The reasons are obvious from

his counter statement itself, the relevant portions of which I have already extracted. In other words if Clause (1) of the decree is put into execution

and the plaintiff takes delivery of the properties mentioned in the suit, then the liability of the judgment-debtor to comply with Clause. (2) of the

decree would come to an end immediately on the plaintiff taking delivery of the articles.

11. Under these circumstances would not defendant/judgment-debtor, be justified in seeking the help of the Court to relieve him from complying

with Clause (2) of the decree on the ground that despite his readiness and willingness to deliver the articles and having called upon the plaintiff to

take delivery, yet he had not chosen to do so. In such circumstances I am of the opinion that the defendant is certainly burdened with a liability,

which cannot be on the facts and circumstances of this case, be legally justified. I have already stated in this order that though there is no restriction

on the decree holder in this case to execute the decree in any manner he likes, yet when he is getting unjustly enriched by putting in execution

Clause (2) of the decree alone and not resorting to Clause (1) of the decree , are the courts powerless? I would answer with certain amount of

certainty that the Courts do have the power to refuse execution. The commentaries on Law of Execution by B.N.Banerjee (1968) at page 48

states that there is an inherent power in the Court to prevent the abuse of the remedy actuated by mala fides and collusion. In Srinivasa Ayyar v.

Lakshmi Ammal, ILR 56 Mad. 343, there was a maintenance decree in favour of a widow. Under the decree, a charge was created in respect of

certain properties. The widow put that decree in execution in respect of properties which were not charged. The objection was that the execution

must first be levied against the charged property alone and not against the other properties. That objection was overruled and execution was

ordered. Thus the appeal came before this Court. This court taking into view that it was a maintenance decree and on the facts of that case, held

that the execution was in order. In considering the objections of the judgment debtor, on the lines indicated above, the learned judge, who decided

the case, held s follows:

If the defendant succeeds in showing that the plaintiff''s application is mala fide and oppressive and not made for a legitimate purpose, the court

may, in the exercise of its descretion, refuse the plaintiff''s application and compel her to pursue her remedy against the security. But, in the present

case, the facts show that, far from the plaintiff''s action being mala fide, the defendants, who own extensive property, are withholding maintenance

with the object of spiting the plaintiff.

Almost on identical facts viz. a decree for maintenance in favour of a widow, another case came to be decided by this Court in Rangaswami

Naicker Vs. Janakiammal, . Following the judgment referred to above, the learned single Judge had reiterated the position as follows:

...If a judgment-debtor can satisfy the executing court that the decree holder in acting in ''mala fide'' collusion with one of the other judgment-

debtors in execution against him only, the executing Court would be perfectly entitled to refuse execution...

In yet another case decided by the Andhra Pradesh High Court in Chirala Buchi Reddi Vs. Satti Savitramma, , two learned Judges of that court,

following the decisions is Srinivasa Ayyar y. Lakshmi Ammal, ILR 56 Mad. 343, and Rangaswami Naicker Vs. Janakiammal, , went on to say as

follows:

8 ....There is an inherent power in the court to prevent the abuse of a remedy actuated by mala fides and collusion. There is nothing in the Code

which prevents the court for directing the decree-holder to execute and satisfy his decree from any particular property situate either within its local

limits or outside...

12. It appears from the three judgments abovereferred to and the passage in the book on Law of Execution by B.N. Banerjee that the Court''s

inherent powers to prevent abuse of the remedy granted are always available. On facts available in this case, I have no doubt at all to hold that the

plaintiff in the suit is apparently acting in collusion with his wife who is the petitioner in the Rent control proceedings in not resorting to executing

Clause (1) of the decree in favour of the present plaintiff. Mala fides on the part of the present plaintiff is apparent in every action he has been

taking in this case. Taking advantage of the helpless and disadvantageous position in which the defendant/judgment-debtor in this case is placed,

the plaintiff/ decree holder has been abusing not only the process of the Court but also the remedy granted to him, to the greatest/disadvantage and

detriment to the defendant. Under these circumstances, I am inclined to hold that in exercise of the inherent powers of this Court, clause (2) of the

decree dated 21.7.1987 in O.S.No.9220 of 1984 on the file of the DC Assistant Judge, City Civil Court, Madras, has to be necessarily declared

inexecutable from 16.9.1987 and consequently the defendant should be relieved of his obligation arising therefrom. Accordingly this civil revision

petition is allowed. The cost of revision petitioner is fixed at Rs.1,000 Consequently, C.M.P.No. 12880 of 1993 is dismissed. I am informed that

clause (1) of the decree was put into execution later and delivery taken.