
(2010) 11 MAD CK 0146

Madras High Court

Case No: Civil Revision Petition (NPD) No. 1434 of 2010 and M.P. No. 1 of 2010

T. Gunabalan

APPELLANT

Vs

T. Selvarajan

RESPONDENT

Date of Decision: Nov. 24, 2010

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 20 Rule 3, 147, 152, 47

Hon'ble Judges: V. Periya Karupiah, J

Bench: Single Bench

Advocate: N.S. Sivakumar, for the Appellant; Hema Sampath for R. Meenal, for the Respondent

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

V. Periya Karupiah, J.

This Revision has been filed by the Petitioner against the dismissal order dated 22.1.2010 passed in R.E.A. No. 70/2009 in R.E.P. No. 404/2007 in O.S. No. 584/2003 by the I Additional District Munsif, Salem, an application to appoint the Advocate Commissioner, who was appointed earlier during the pendency of the suit, to note down the removed portion in the suit properties.

2. Heard the submissions of Mr. N.S. Sivakumar, learned Counsel for the Petitioner and Mrs. Hema Sampath, learned Senior Counsel for M/s.R. Meenal, learned Counsel for the Respondent.

3. The learned Counsel for the Petitioner would submit in his arguments that the lower Court had not considered the request of the Petitioner for appointment of the Advocate Commissioner to note down the obedience of the Petitioner as judgment Debtor to the Decree passed by the Court for removal of encroached construction and the refusal would not only prejudice the Petitioner, but also to deprive the Court

to come to a correct conclusion. He would further submit that the alleged encroachment made by the Petitioner was directed to be removed by the Appellate Court in its Decree passed in A.S. No. 10/2006 regarding the "B" schedule property, whereas the Commissioner had noted the actual measurement of the encroached portion with the help of the surveyor and had filed a report, which was not referred in the Decree by the Appellate Court for removal. He would also submit in his arguments that the Appellate Court had omitted to say that the Report of the Commissioner and Plan shall form part of the Decree and therefore the whole confusion happened. He would further submit that in obedience to the direction of the Appellate Court, the Petitioner had directly removed the encroached portion of the suit properties as per the Plan of the Commissioner and therefore there was no need for removal of the encroachment through the Court "s Amin. He would also submit that the alleged return made by the Court "s Amin that the Petitioner had obstructed for the removal of the encroachment described as "B" schedule property, cannot be true since the actual encroached portion had been already removed by the Petitioner himself. He had also produced several photographs showing the present condition of the suit property and his property, after removal of the said encroachment. He would further submit that the Petitioner should not be prejudiced for the mistake committed in the drafting of the Decree and therefore the Commissioner, who had already found the encroachment, should have been once again directed by the lower Court to find out the removal of the encroached portion in accordance with the report. He would also submit that if the lower Court had ordered the appointment of Commissioner, he would correctly show the removed portion and the reclaimed suit property to its original measurements and the Petitioner would not be prejudiced by removing his property as the suit property (i.e.) the common pathway measuring 31 feet North South on the eastern side. He would further submit that if the "B" schedule property had been removed by the Court"s Amin, the property belongs to the Petitioner will be taken away from him and the resultant width of the common pathway would be more than the actual measurement and the breath would be further extended to 33 feet, which is not the actual lie of the suit property and therefore he would request this Court to interfere with the order passed by the lower Court and to set aside the same and to allow the application filed by him before the lower Court.

4. The learned Senior Counsel appearing for the Respondent would submit in her arguments that the Appellate Court found that the Petitioner had encroached the common pathway as mentioned in "B" schedule property and had reversed the judgment of the trial Court and the Petitioner did not also prefer any second appeal against the said judgment and it had become final. She would further submit that the Appellate Court did not rely upon the report and sketch of the Commissioner for the purpose of measuring the encroached portion, but to the fact of encroachment made by the Petitioner in the common pathway and therefore it cannot be said that the encroached portion as decreed by the lower Court towards "B" schedule

property should have been the property shown in the sketch of the Commissioner. She would further submit that the Appellate Court had come to the correct conclusion and decreed the suit for removal of encroachment of property described in "B" schedule and therefore the Petitioner cannot ask for lesser extent of property in "B" schedule, contrary to the direction given in the Decree. She would also submit in her arguments that the Petitioner had removed lesser extent of superstructures in his property to suit his convenience and the Petitioner should have removed the actual encroached portion as stated in "B" schedule property. She would further submit that the Court's Amin had rightly reported to the Court about the non-co-operation of the Petitioner in removing the encroached portion. She would also bring it to the notice of this Court that in an earlier occasion the Petitioner had questioned the direction of the lower Court, passed in R.E.P. No. 404 of 2007 directing the Petitioner to remove the encroachment as per the Decree in C.R.P.NPD. No. 3113/2009 and this Court had confirmed the order passed by the lower Court directing to remove the encroachment as per the Decree and therefore the Petitioner has no say in this revision also and therefore there is no necessity for appointment of Commissioner to find out the encroached portion. She would further submit in her arguments that the Petitioner with a view to prolong the execution of the Decree, has come forward with the revision and there is no truth in it and therefore she requests this Court to dismiss the revision with costs.

5. I have given my anxious consideration to the arguments advanced on either side.

6. The undisputed facts are that the suit was originally filed by the Respondent for mandatory injunction against the Petitioner directing him to remove the "B" schedule property, which was an encroached portion in common pathway, shown as "A" schedule property. The said suit was tried before the trial Court and the trial Court had dismissed the suit and against which, an appeal was filed by the Respondent in A.S. No. 10/2006 on the file of Additional Sub Court, Salem and the said appeal was allowed and the suit filed by the Respondent before the lower Court was decreed as prayed for with costs. During the pendency of the said suit, the trial Court had appointed a Commissioner and he inspected the suit properties and had filed a report with sketch. The Appellate Court had discussed the case and found that the encroachment was made in the Commissioner's report and sketch and had passed a decree directing the Petitioner/Defendant to remove the encroachment as per schedule "B" of the suit properties. The Execution Petition was filed by the Respondent and the E.P. Court had also passed an order in R.E.P. No. 404/2007 on 3.7.2009 to remove the encroachment as detailed in "B" schedule property, against which a revision was preferred by the Petitioner in C.R.P.NPD. No. 3113 of 2009 and this Court had dismissed the said revision, after hearing both the parties, on 27.10.2009. According to the said judgment of this Court, the order in R.E.P. No. 404/2007 was affirmed.

7. Now the Petitioner wants to get an appointment of the same Advocate Commissioner, who inspected the suit properties during the trial stage, for finding out the correct encroached area. No doubt, it could be true that the encroached area was shown as per the report of the Commissioner as well, the description was made in the plaint "B" schedule property. However, a decision was reached by the Appellate Court in its judgment passed in A.S. No. 10/2006 dated 20.4.2006 that the Petitioner encroached the "A" schedule property. Admittedly, no second appeal has been preferred by the Petitioner and it became final. Therefore, the Decree as drafted or framed on the said judgment will hold good till it is challenged either in second appeal or in a review application, if any filed by the Petitioner. Admittedly, there is no review application filed so far before the lower Court.

8. The learned Counsel for the Petitioner would also submit in his arguments that when the property is not definitely identified, resort can be had to Section 152 or Section 147 CPC depending on the facts and circumstances of each case, which of the two provisions would be more appropriate, just and convenient to invoke and accordingly the Petitioner may be given an opportunity to identify a correct extent of the suit property. He would also rely upon a judgment of the Honourable Supreme Court of India in *Pratiba Singh and Anr. v. Shanti Devi Prasad and Anr.* 2002 (5) CTC 660 for the proposition of law. The relevant passage of the above decision runs thus :

17. When the suit as to immovable property has been decreed and the property is not definitely identified, the defect in the Court record caused by overlooking of provisions contained in Order 7, Rule 3 and Order 20, Rule 3 of the CPC is capable of being cured. After all a successful Plaintiff should not be deprived of the fruits of decree. Resort can be had to Section 152 or Section 47 of the CPC depending on the facts and circumstances of each case - which of the two provisions would be more appropriate, just and convenient to invoke. Being an inadvertent error, not affecting the merits of the case, it may be corrected u/s 152 of the CPC by the Court which passed the decree by supplying the omission. Alternatively, the exact description of decretal property may be ascertained by the Executing Court as a question relating to execution, discharge or satisfaction of decree within the meaning of Section 47, CPC. A decree of a competent Court should not, as far as practicable, be allowed to be defeated on account of an accidental slip or omission. In the facts and circumstances of the present case we think it would be more appropriate to invoke Section 47 of the CPC.

9. The case of the Petitioner is that the Appellate Court has not correctly described the suit property as per the Commissioner's report, in spite of referring the encroached property as per the report and hence an opportunity should have been given to describe the suit property either by the Court which passed the Decree u/s 152 CPC or before the Execution Court u/s 47 CPC. The said right is always available to the Petitioner and this Court need not give any separate permission for that. In

the said circumstances, in any application is filed, it is the duty of the E.P. Court, to dispose of the same before a decision has been reached in the Execution Petition, as per the principles laid down by the Honorable Apex Court.

10. In the said circumstances, there cannot be any necessity for ascertaining the encroached portion once again through the appointment of Commissioner for executing the Decree passed by the Appellate Court. Appointing of Commissioner will not in any way help the Court to divide the "B" schedule property and it could have been ascertained by the Court's Amin and the surveyor could make note of the actual property as per Decree and could remove the same. Therefore, this Court does not feel that the order passed by the lower Court has to be interfered. It has to be once again reiterated that the Execution Court cannot go beyond the Decree, but it has to go behind the Decree always. Therefore, this Court cannot at this stage, help the Petitioner by directing the lower Court to remove the structures only to the extent of the encroached portion, as mentioned in the Commissioner's report and plan.

11. At this stage, the learned Counsel for the Petitioner would request this Court that he may be permitted to approach the Appellate Court to get the Decree modified by filing appropriate proceedings for correcting the clauses of the Decree. As already said, it is the right of the Petitioner to approach the said Court in accordance with law and there is no need for any specific permission be granted to the Petitioner for doing so. In the said circumstances, the revision fails and therefore it is liable to be dismissed.

12. With the aforesaid direction, the Civil Revision Petition is dismissed. There shall be no order as to costs. Consequently, M.P. No. 1 of 2010 is also dismissed.