

V. HUCHESWARAN
v.
MADRAS HARDWARE MART

OCTOBER 18, 2005

[DR. AR. LAKSHMANAN AND ALTAMAS KABIR, JJ.]

Restitution—Code of Civil Procedure 1908: Application for—Property dispute—Court decree with direction to judgment-debtor to sell his share of property to decree holder—Execution petition dismissed as time barred—In Civil revision petition, High Court condoning delay and matter remanded—Thereafter, another petition for execution upheld by High Court, but Special Leave Petition (SLP) to Supreme Court against that withdrawn by judgment-debtor, and consequent thereto sale deed executed in favour of decree holder and he was put into possession—In appeal to Supreme Court against High Court condoning delay in filing of first execution petition, plea of restitution taken—Held: On withdrawal of SLP order by which share of judgment-debtor was conveyed to decree holder became final—There was no question of restitution to position prior to the execution of the decree.

Respondent was originally a tenant of property in respect of which a partition suit was pending. Before and after passing of final decree, plaintiff and all defendants, except the appellant sold off their share in that property to respondent. However, appellant did not sell his share to respondent despite direction to do so in the final decree. Execution petition filed by respondent was dismissed as time barred having been filed twelve years after passing of the decree. Against this, in Civil Revision Petition of respondent, High Court condoned the delay in filing of the execution petition and remanded the matter. Hence the present appeal.

However, after the judgment of High Court, respondent had filed execution petition for direction to appellant to sell to him remaining share in suit property. This petition was allowed but first appeal against that was also allowed. High Court, in civil revision, set aside the order of the first appellant court and restored the order of the execution court. Appellant filed a Special Leave Petition to this Court against it, but same was withdrawn by them subsequently. Consequent to this, a sale deed was executed in favour of respondent in respect of share of appellant in

A impugned property and respondent was put into possession with the help of court bailiff and police.

Appellant contended that High Court was wrong in condoning the delay by respondent in filing execution petition and they should be restituted to position before filing of that petition.

B Dismissing the appeal, the Court

HELD: Having withdrawn the Special Leave Petition which had been filed by appellant against the order by which his share in the suit property had been conveyed to the decree holder/respondent, the question of restitution to the position prior to the execution of the decree does not and/or cannot arise. The order passed by the High Court having become final with the withdrawal of SLP it is no longer open to the judgment debtor/appellant to pray for restitution. The fact situation is such that it does not call for any interference with the impugned order passed by the High Court. [316-E-F]

D *Hameed Joharan (D) and Ors. v. Abdul Salam (D) by LRs.*, [2001] 7 SCC 573 and *Prasanna Kumar Roy v. State of West Bengal and Ors.*, [1996] SCC 403, held inapplicable.

E CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7541-7542 of 2001.

From the Judgment and Order dated 22.11.95 of the Madras High Court in C.R.P. Nos. 711/93 and 7 of 1995.

Ms. Fereshte D. Sethna, Ms. Anuradha Dutt and Ms. B. Vijayalakshmi Menon for the Appellant.

F Amit Sharma and S. Muralidhar for the Respondent No. 1.

The Judgment of the Court was delivered by

G **ALTAMAS KABIR, J.** O.S. No. 683/1970 before the X Asstt. Judge, City Civil Court, Madras was a partition suit in which a preliminary decree for partition was passed on 28.4.1972 and was followed by a final decree for partition on 1.12.1975. The 1st defendant in the suit is the father and the 2nd, 3rd and 4th defendants and the 1st plaintiff are the sons. The 1st plaintiff having died, his legal representatives were brought on record as plaintiffs in his place.

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Several Civil Revision Petitions, being C.R.P.Nos.711/1993, 4,5, and 7 of 1995, all arising out of the aforesaid suit, were taken up for hearing and disposal together by a learned single Judge of the Madras High Court and were disposed of by his judgment and order dated 22.11.1995. A

The suit was in respect of a house property and by the preliminary decree, the 1/5th share of each of the parties was declared. By the final decree, the 1st plaintiff and 2nd and 3rd defendants were directed to sell their 3/5th share to the 1st and 4th defendants who owned the remaining 2/5th share together. The 5th defendant in the suit was a mortgagee under a mortgage deed executed by the 1st defendant on 7.3.1970 in respect of his 1/5th share in the suit property. By a subsequent deed, the 5th defendant assigned the said mortgage to the 6th defendant on 24.7.1975. The 6th defendant, who was a tenant of a portion of the said property, was not a party in the suit originally, but he was subsequently impleaded and brought on record as the 6th defendant. B C

The 1st defendant sold his 1/5th share to the 6th defendant by a sale deed dated 16.5.1975. The 4th defendant also sold his 1/5th share to the 6th defendant by another sale deed dated 18.5.1975. In fact, these sale deeds were executed prior to the passing of the final decree for partition. After the final decree for partition, the plaintiffs also sold their 1/5th share to the 6th defendant by a sale deed dated 16.2.1976 and soon thereafter the 3rd defendant also sold his 1/5th share in the suit property to the 6th defendant by a sale deed dated 3.3.1976. By virtue of the said conveyances, the 6th defendant became the owner of a 4/5th share in the suit property. The 2nd defendant did not, however, sell his 1/5th share in the suit property to the 6th defendant despite the direction given in the final decree dated 1.12.1975. The 1st and 4th defendants, without filing execution petition for obtaining sale deed pursuant to the final decree, assigned their interest in the final decree in favour of the 6th defendant on 25.1.1984. After the said assignment, the 6th defendant filed I.A.No.10085/1987 praying for engrossing the final decree so that the execution petition could be filed for executing the final decree. The said I.A. was allowed on 23.2.1987 and the delay in depositing the required stamp was condoned. D E F G

Subsequently, the 6th defendant filed execution petition in December, 1990, beyond 12 years from the date of the final decree for execution of the decree. The said execution petition was filed against the 2nd defendant/judgment debtor alone since all the other co-sharers had transferred their respective interests in the suit property in favour of the 6th defendant. By Order dated 3.9.1981, H

A the said execution application was rejected on ground of limitation in view of the period prescribed under Article 136 of the Limitation Act.

The 6th defendant thereafter filed a Civil Revision Petition No.711/1993 against the said order of rejection making the 2nd defendant, V. Hutcheswaran, a party in the execution petition. The said respondent filed three separate Civil Revision Petitions namely, 4,5 and 7 of 1995 against the common Order dated 25.5.1992 whereby certain directions had been given regarding collection of rents by the advocate receiver and the deposit thereof with the 6th defendant in respect of his 4/5th share in the suit property. As indicated hereinabove, all the said applications were taken up for hearing and disposal together by the learned single Judge of the Madras High Court who by his judgment and order dated 22.11.1995 allowed the revision application filed by the 6th defendant upon holding that the executing court had erred in rejecting the execution application filed by the said 6th defendant. The Order dated 3.9.1991 rejecting the execution application was set aside and the matter was remanded to the executing court for dealing with the same on merits. Simultaneously, the three other Civil Revision Petitions filed by the 2nd defendant, V. Hutcheswaran, were dismissed with costs.

The present Special Leave Petitions are directed against the said judgment and order of the learned single Judge of the Madras High Court dated 22.11.1995.

As will appear from the record, leave was duly granted on 2.11.2001 and the two appeals filed by the 2nd defendant, V. Hutcheswaran, were posted for final hearing. During the course of the hearing, an affidavit filed on behalf of the 6th defendant in SLP (Civil) No.15893-94/96 was brought to our notice by learned counsel for the respondent and it was pointed out therefrom that after the judgment was delivered in Civil Revision Petition No.711/1993, the 6th defendant, as the decree holder, filed a petition, being E.P.No. 5430/1995, for a direction upon the 2nd defendant/judgment debtor for sale of his remaining 1/5th share in the suit property. The same was taken up for hearing and allowed by the Executing Court. The judgment debtor challenged the said order before the Addl.Judge, City Civil Court, Madras, by way of C.M.A.No.168/1996, which was also allowed. The order of the 1st appellate court was, however, set aside in revision by the High Court in C.R.P.No.305/1997 and the order passed by the executing court in E.P.No.5430/1995 was restored. A Special Leave Petition filed by the 2nd defendant/judgment debtor against the said order in revision was subsequently withdrawn on 31.8.1998. Consequently, a sale deed in respect of the 1/5th

share of the 2nd defendant/judgment debtor was executed and registered in favour of the 6th defendant/decreed holder on 5.2.1999 before the Sub Registrar, Sowcarpet, Chennai. By virtue of the said sale deed, the 6th defendant/decreed holder became the owner of the entire suit property and prayed for delivery of possession of the property in occupation of the 2nd defendant/judgment debtor before the City Civil Court, Chennai. Pursuant to the orders passed by the said court possession of the said portion of the property in occupation of the 2nd defendant/judgment debtor was delivered on 12.4.1999 to the 6th defendant/decreed holder, who is the respondent no.1 in the instant Appeal, with the help of the court bailiff and the police authorities.

In view of the said development, a rejoinder affidavit appears to have been filed on behalf of the 2nd defendant/judgment debtor in the appeals on 26.10.2001, *inter alia* for restitution to the position he was in before the filing of the execution application. The said application was, in fact, taken up for hearing along with the appeals.

Learned counsel appearing for the appellant submitted that the learned single Judge of the Madras High Court had erred in allowing the application filed by the decreed holder, being C.R.P.No.711/1993, under Section 115 of the Code of Civil Procedure, in view of a recent judgment of this Court in *Hameed Joharan (D) & Ors. v. Abdul Salam (D) by LRs. and Ors.*, [2001] 7 SCC 573, in which the same point relating to enforceability and/or executability of a final decree in a partition suit was under consideration and it was held that the period of limitation commenced from the date of the decree and not from the date on which the certified copy was made available.

Learned counsel further submitted that on the strength of the said analogy, the order passed by the learned single Judge condoning the delay in filing of the execution petition was erroneous and was liable to be set aside and consequently the 2nd defendant/judgment debtor was entitled to restitution.

It was also urged that on account of the error committed by the court, the parties to a litigation should not be made to suffer and since the 2nd defendant/judgment debtor/appellant had been dispossessed from the suit property by an order of the court, he was entitled to restitution on account of the maxim *actus curiae neminem gravabit* (an act of the court shall prejudice no man).

In support of the said proposition, the learned counsel referred to and relied on a decision of this Court in *Prasanna Kumar Roy Karmakar v. State*

A of *West Bengal and Ors.*, [1996] 3 SCC 403, wherein the said principle had been discussed and explained. Learned counsel urged that in the interest of justice an order for restitution should be made in favour of the 2nd defendant/judgment debtor appellant-herein.

B The submissions made on behalf of the appellant were strenuously opposed on behalf of the respondent/decreed holder and it was submitted that it was because of the recalcitrant attitude of the 2nd defendant that the respondent/decreed holder had to take recourse to separate proceedings in the execution case for the 1/5th share of the 2nd defendant in the suit property to be transferred to him. It was submitted that the delay in applying for execution of the final decree was caused mainly by the acts of the 2nd defendant/judgment debtor, the appellant.

C It was also urged that since the decree holder/respondent had become the full owner of the suit property, the question of restitution would not arise *inasmuch* as the judgment debtor/appellant did not retain any interest in the suit property after his share had been conveyed to the decree holder/respondent. D It was urged that the entire submissions made on behalf of the judgment debtor/appellant was an exercise in futility and deserved to be rejected.

E Having considered the submissions made on behalf of the respective parties and having gone through the materials on record, we are inclined to accept the submissions made on behalf of the decree holder/respondent. Having withdrawn the Special Leave Petition which had been filed by him (appellant) against the order by which his share in the suit property had been conveyed to the decree holder/respondent, the question of restitution to the position prior to the execution of the decree does not and/or cannot arise. In our view, the order passed by the Madras High Court in C.R.P.No.305/1997 having become final with the withdrawal of SLP © No. 13522/1998, it is no longer open to the judgment debtor/appellant to pray for restitution notwithstanding the decision in the case of *Hameed Joharan* or that of *Prasanna Kumar Roy Karmakar* (supra). The fact situation is such that it does not call for any interference with the impugned order passed by the High Court at Madras and the instant appeals must, therefore, fail and are dismissed.

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There will, however, be no order as to costs.

V.S.S.

Appeal dismissed.