



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 31.03.2011

CORAM:

THE HONOURABLE MS.JUSTICE K.B.K.VASUKI

C.M.S.A(MD)No.14 of 2011

and

M.P(MD)No.2 of 2011

D.Rajan

.. Appellant/Petitioner/Defendant

Vs.

C.Padmavathi

.. Respondent/Respondent/Plaintiff

**PRAYER:** Civil Miscellaneous Second Appeal filed under order 21 Rule 106 r/w Sec. 100 of CPC against the order dated 17.02.2011 made in C.M.A.No.15 of 2010 on the file of the Sub-Court, Padmanabapuram confirming the order dated 13.11.2010 made in E.A.No.33 of 2010 in E.P.No.46 of 2008 in O.S.No.4 of 2006 on the file of Principal District Munsif cum Judicial Magistrate Court, Eraniel.

For Appellant : Mr.K.P.Narayana Kumar

For Respondent : Mr.J.John Jayakumar

### JUDGMENT

This Civil Miscellaneous Second Appeal is filed by the judgment debtor against the order made in C.M.A.No.15 of 2010 confirming the order made in E.A.No.33 of 2010 in E.P.No.46 of 2008 in O.S.No.4 of 2006 thereby rejecting the petition filed by the judgment debtor to set aside the ex-parte order of delivery.

2. The brief facts which are relevant for consideration are as follows:

The suit is filed by the plaintiff for recovery of arrears of rent and future mesne profit during 2006 and the suit was after due contest decreed on 30.08.2007. The judgment and decree of the trial Court was challenged by the judgment debtor upto High Court in S.A.No.507 of 2010 and the same was confirmed finally by the High Court by the judgment and decree dated 08.07.2010. In the meanwhile, the decree holder on the strength of decree for delivery of possession in her favour filed execution proceedings in E.P.No.46 of 2008 wherein the judgment debtor has entered appearance and nearly eleven months thereafter filed his counter on 24.11.2009. Thereafter the matter stood adjourned for enquiry and the decree holder side was heard and the matter stood adjourned for the hearing on the judgment debtor side and even after three adjournments, the respondent was not present and the executing Court hence thought



fit to set him ex-parte for his failure to appear before the Court and passed an order of delivery on 29.04.2010. But the order of delivery could not be effected for want of police aid and an application was filed seeking police aid while application for police aid is pending, the petitioner/judgment debtor has come forward with E.A.No.33 of 2010 seeking to set aside the ex-parte order and the same was after due contest dismissed on 13.11.2010. Aggrieved against the same, the judgment debtor preferred C.M.A.No.15 of 2010 and the same was also dismissed on 17.02.2011. Hence, this C.M.S.A is filed by the judgment debtor before this Court.

3. The learned counsel for the judgment debtor would strenuously argue before this Court that the executing Court has grossly erred in effecting the order of delivery without giving due opportunity to the judgment debtor to put forth his contention against the legality and enforceability of the judgment and decree and the executing court has passed an unreasonable and unjustifiable order by dismissing the application filed by him to set aside the ex-parte order thereby the judgment debtor is deprived of his opportunity to put forth his valuable defence in the executing proceedings.

4. Per contra, the learned counsel for the respondent/decreed holder would draw the attention of this court to the delay in tactics adopted by the judgment debtor to prolong the proceedings. He would make an appeal to this Court to dismiss the present appeal by rendering justice to the decree holder aged 78 years who has been all along fighting to enjoy the fruits of the decree obtained by her.

5. Heard the rival submissions made on either side and perused the records.

6. The appellant herein is the unsuccessful judgment debtor. The judgment debtor has challenged the correctness of the judgement and decree of the trial Court upto High Court unsuccessfully. Though the judgment debtor would seek to prolong the matter by contending that he has valuable defence against the executability of the decree in the execution proceedings, this Court is not inclined to show any indulgence to the judgment debtor on the basis of such contention.

7. As far as the conduct of the judgment debtor is concerned, the facts above referred to would reveal that he has sufficiently dragged on the matter. There is absolutely no valid reason given for his absence on the date when E.P.No.46 of 2008 stood adjourned for respondent side hearing. As a matter of fact he has not raised any defence in the counter filed in E.P. The cursory glance at the counter filed in E.P.No.46 of 2010 enclosed at Pages 28-29 of the typed set of papers discloses that one and only ground raised therein is about the pendency of A.S.No.3 of 2008 along with stay petition in I.A.No.12 of 2008 and nothing more.



8. Having found that no valid objection is raised in the counter against the executability of the decree and having found the failure on the part of the judgement debtor to contest the case despite of sufficient time given to him, the executing Court thought fit not to wait for him any longer but to proceed with the execution proceedings and passed an order of delivery. Even the petition filed to set aside the ex-parte order of delivery, came to be filed not immediately but only after 30 days from the date of delivery. Even in the affidavit filed in support of the petition to set aside the ex-parte order the petitioner has only stated that he was out of station in connection with his business on 29.04.2010 and he forgot to contact his counsel and by utilising his absence, the decree holder purposely obtained an order of delivery.

9. In my considered view, the reason for the absence of the judgment debtor on the particular date as if he forgot to contact his counsel has no merits and deserves no acceptance. On the contrary, the same would demonstrate the indifferent attitude and want of diligence on his part to prosecute his case even after having suffered an order of delivery in the hands of the High Court at the second appeal stage and even at the execution proceedings stage even after three adjournments granted to him in the execution proceedings and the same shows lack of bonafide in the contention raised by the judgment debtor for his absence.

10. Further, the learned counsel for the decree holder has also brought to the notice of this Court to the statement made by him in the counter filed in E.A.No.64 & 65 of 2010 filed by the third party objector to implead himself, as an additional respondent in E.P.No.46 of 2008.

11. In the petitions filed by the third party objector, the counter filed by the judgment debtor who is the appellant herein has been enclosed at Pages 14 & 15 of the additional typed set of papers filed by the respondent herein. The reading of the same reveals that the possession of the property is no longer in his hands. It is clearly admitted by the judgement debtor in Para.5 of the said counter, about his subletting it to the third party objector from 01.09.2005. In that event, the judgment debtor has no valid defence to contest the execution proceedings and whatever the steps taken by the judgment debtor is only delaying tactics and cannot be entertained.

12. As a matter of fact, the decree holder on one occasion approached the High Court in C.R.P.No.1577 of 2010 under Article 227 of the Constitution of India to direct the Executing court to dispose of E.P.No.46 of 2008 and the same was allowed at the admission stage directing the Executing Court to dispose of E.P.No.46 of 2008 before the end of October, 2010. However, the Executing Court could not comply with the direction of this Court and the delaying attitude of the judgment debtor can also be termed as one of the reasons for non-compliance of the direction of this Court.



13. Thus for all the reasons stated above, this Court is of the view that the executing court as well as the lower appellate Court having not found any sufficient reason for the absence of judgment debtor, have rightly rejected his petition to set aside the ex-parte order and this Court finds no reason to interfere with the same.

14. In the result, this Civil Miscellaneous Second Appeal is dismissed. No Costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (P&A)

/True Copy/

Sub Assistant Registrar

To

1.The Subordinate Judge,  
Padmanabapuram

2.The Principal District Munsif cum  
Judicial Magistrate, Eraniel.

Copy to : The Section Officer, V.R.Section,  
Madurai Bench of Madras High Court, Madurai.

+1cc to Mr.K.P.Narayanakumar, Advocate SR.No.12050

pm

akm/28.04.11

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31.03.2011