

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 11.08.2016

PRONOUNCED ON : 08.12.2016

CORAM

THE HON'BLE MR.JUSTICE M.V.MURALIDARAN

CRP(NPD)NO.2406 of 2008

and

M.P.No.1 of 2008

N.Kanagaraj

... Petitioner

-Vs-

1.M/s.Udavdoss Company

by its Proprietors

Shyam SundarSapriya

S/o Udavadass

D.No.243, 4th Cross Brindavan Main Road,

Alagapuram, Salem-16.

2.Anju Indaani

... Respondents

Prayer: Civil Revision Petition filed under Section 115 of C.P.C. against the order dated 18.06.2008 passed in R.E.A.No.448 of 2007 in R.E.P.No.73 of 2005 in O.S.No.417 of 1995 on the file of the Additional Sub Court, Salem.

Petitioner : Mr.P.Jagadeesan

Respondents: Mr.R.Margabandhu (for R2)

ORDER

This Civil Revision Petition has been filed by the petitioner/ Judgment debtor/defendant in R.E.A.No.448 of 2007 in R.E.P.No.73 of 2005 in O.S.No.417 of 1995, dated 18.06.2008, on the file of the Additional Sub Judge, Salem.

2.The case of the petitioner/judgment debtor is that the respondent/plaintiff has filed the suit in O.S.No.417 of 1995, on the file of the Sub-Judge, Salem for recovery of amount and the suit was decreed on 07.10.2002 directing this petitioner/judgment debtor to pay a sum of Rs.25,000/- with interest.

3.Pursuant to the decree, the respondent/plaintiff has filed R.E.P.No.73 of 2005 before the Additional Sub-Judge, Salem for executing the decree dated 07.10.2002 obtained by him for a sum of Rs.44,450/-. Notice was sent to this petitioner/judgment debtor, but he was not appeared in the Court. Hence, the Additional Sub Judge,

has brought the property for auction sale. Accordingly, the second respondent has bid the property for a sum of Rs.2,52,000/- on 13.06.2007.

4. On knowing about the auction sale dated 13.06.2007, this petitioner/judgment debtor has filed an application in R.E.A.No.448 of 2007 by depositing the amount for a sum of Rs.66,458/- towards the sale warrant and commission, poundage, interest and expenses for set aside the auction sale dated 13.06.2007. On receipt of the notice, counter affidavit has been filed by the first respondent stating that it is true that the properties were sold in the execution proceedings initiated by the first respondent and the second respondent bid the auction held on 13.06.2007 for a sum of Rs.2,52,000/-. The respondent also admitted that the petitioner has deposited Rs.66,458/- towards sale warrant and commission, poundage, interest and expenses. But, the calculation made by the petitioner/judgment debtor is not correct.

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5. The first respondent also states that mere deposit of the above amount will not entitle the petitioner to set aside the auction held on 13.06.2007. This respondent also held that the petitioner/judgment

debtor borrowed more money for the business from the first respondent and the petitioner/judgment debtor has failed to repay the due to the first respondent. Therefore, the first respondent has filed a suit in O.S.No.1935 of 2004, on the file of the Principal District Munsif, Salem and obtained a decree with costs for a sum of Rs.1,25,771.50/-. Thereafter, the first respondent has also filed another suit for recovery of amount in O.S.No.779 of 1995, on the file of the Additional Sub-Judge, Salem and suit was decreed as prayed for a sum of Rs.2,67,549/- with cost. Subsequently, the first respondent has filed another three suits in O.S.No.403 of 1994, O.S.No.417 of 1995 and O.S.No.410 of 1995, on the file of the Sub-Court, Salem, all the suits were decreed as prayed for and a sum of Rs.79,797.95/-, Rs.53,822/- and Rs.1,80,492.20/- respectively, which was due by the petitioner/judgment debtor. Therefore, the first respondent has claimed the amount that the plaintiff as a decree holder stating that as on date, this petitioner/judgment debtor has to pay a sum of Rs.7,30,142/- with subsequent interest after the above said decree. For that, the first respondent/de decree holder also filed four execution petitions before the Additional Sub-Court, Salem and the same is pending. While pendency of the above execution petitions, this petitioner/judgment debtor had encumbered the properties to the third parties in order to

deprive the lawful claim of this first respondent/deGREE holder and also stating that the petitioner and his daughters were colluded together and created a decree to deprive the first respondent from recovering the fruits of the decree. Therefore, the compromise decree in I.A.No.582 of 2006 in O.S.No.66 of 2005 is not proved and will not binding on the first respondent.

6.Though, the first respondent also states that the petitioner/judgment debtor has deposited the above amount of Rs.66,458/-, but he has not given valid and sufficient reasons to set aside the sale dated 13.06.2007. The first respondent also states that though the decree was obtained long back, but the first respondent has not get the benefits of the decree even after lapse of 12 years of the debt given to the petitioner by the first respondent. Hence, he stated that the petition is not bonafide and merit in the order and prayed the Execution Court for dismissal of the R.E.A.No.448 of 2007.

7.Considering both side arguments, the learned Additional Sub-Judge, Salem was pleased to dismiss the R.E.A.No.448 of 2007 on 18.10.2008 stating that though the first respondent/deGREE holder has filed a suit in O.S.No.549 of 1999 and obtained a decree and to

execute the said decree, the first respondent / decree holder has filed the Execution Petition in E.P.No.73 of 2005. Pursuant to the proceedings by the learned Additional Sub-Judge, Salem, he has brought the properties on 13.06.2007 for auction sale of the property. Accordingly, on 13.06.2007, auction sale was conducted and the second respondent has bid in the above auction sale for a sum of Rs.2,52,000/-. The learned Judge also states that though the petitioner/judgment debtor has deposited the said amount as per Section 89 of Civil Procedure Code. Though originally as per the decree, the amount was calculated at a sum of Rs.47,771/-, but for some correction the petitioner was returned on 06.10.2007 by giving account details, that the petitioner/judgment debtor has not given proper explanation, but on the other hand as per Section 21 Rule 18 CPC, he has deposited a sum of Rs.66,457/-, but there was no explanation for the above depositing amount.

8. Apart from this, the learned Judge also states that for Execution the decree obtained by the first respondent/judgment debtor where the suits in O.S.Nos.779 of 2005, 410 of 1995 and 403 of 1994 were filed and obtained decree and later on to execute the decree, the first respondent/decree holder has filed execution petitions

in E.P.Nos.143 of 2004, 226 of 2004 and 62 of 2006 and the same is pending, which were not denied by this petitioner/judgment debtor.

9. Therefore, for executing the said decree, the petitioner/judgment debtor has not deposited the amount of Rs.49,479, Rs.1,79,462 and Rs.81,229/- as on date, he has not repaid the said amount. Therefore, the first respondent should recover a sum of Rs.3,00,000/- from the petitioner/judgment debtor.

10. Apart from this, this petitioner/judgment debtor has filed 12 petitions for postponing the auction sale. Accordingly, the Court also adjourned the auction sale. But, even then the petitioner/deed holder has not paying any amount. Therefore, for giving an opportunity, the petitioner has therefore directed by the learned Judge to pay the amount what are all the claims in E.P.Nos.73 of 2005, 143 of 2004, 226 of 2004 and 62 of 2006. Therefore, the petitioner/judgment debtor was directed to deposit the entire award amount claimed in the Execution Petition and if the amount has been paid on or before 25.06.2008, this auction sale has been set aside, failing which the petition will be dismissed automatically. Challenging the said order dated 18.06.2008, this petitioner/judgment debtor has

filed the present civil revision petition before this Court.

11.Heard Mr.Jagadeesan, learned counsel appearing for the petitioner and Mr.R.Margabandhu, learned counsel appearing for the second respondent. No appearance for the first respondent.

12.The case of the petitioner/judgment debtor is that as per the auction sale held in E.P.No.73 of 2005 in O.S.No.417 of 1995 dated 13.06.2007, this petitioner/judgment debtor has deposit the auction sale amount of a sum of Rs.66,458/- as per the provision under Order 21 Rule 89 CPC and he filed the R.E.A.No.448 of 2005 for setting aside the auction sale dated 13.06.2007 as per the provision under Order 21 Rule 89 CPC.

13.When the petitioner/judgment debtor has filed the above R.E.A.No.448 of 2007 for setting aside the auction sale held on 13.06.2007, the Executing Court namely Additional Sub-Judge, Salem have no right or jurisdiction to direct the petitioner to deposit the amount for the E.P.s in R.E.P.Nos.143 of 2004, 226 of 2004 and 62 of 2006, pending on the same Court.

14.The petitioner also states that when the petitioner has deposit the entire decree amount in respect of R.E.P.No.73 of 2005 and the same has been deposited as per Order 21 Rule 89 CPC, which was also accepted by the Executing Court, the learned Additional Sub-Judge, Salem had failed to consider the case of the petitioner. The direction issued by the learned Judge, directing the petitioner to deposit the entire amount has claimed by the first respondent/decreed holder in other 4 E.P.s, is unknown to law.

15.It is my considered opinion that the learned Additional Sub Judge, Salem has totally erred and exceed his limit that too without any jurisdiction and without any provision of law under the Civil Procedure Code directing the petitioner/Judgment debtor to pay the other 3 E.P.s amounts for setting aside the auction sale held in R.E.P.No.73 of 2005, dated 13.06.2007. It is very shocking to this Court that how the learned Additional Sub-Judge, Salem to direct this petitioner/defendant to pay the other claims in 3 E.P.s for set aside the auction sale dated 13.06.2007 in the E.P.No.73 of 2005.

16.The learned Sub-Judge, Salem not even mentioning any provisions under which law either in the C.P.C. or any other law of the

land for issuing the direction, directing the petitioner/judgment debtor to pay other claim, made by the Decree holder in other 3 Execution Petition, which are all not relevant to this case in the subject matter in R.E.P.No.73 of 2005. Therefore, the first respondent/deGREE holder has filed R.E.P.No.73 of 2005 only for the recovery of the amount of Rs.47,771/-. In that, this petitioner/judgment debtor also deposit a sum of Rs.66,458/- in the Court under Order 21 Rule 89 CPC.

17.The provision under Order 21 Rule 89 of C.P.C. reads as follows:

"89.Application to set aside sale on deposit.- (1)

Where immovable property has been sold in execution of a decree [any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of such person,] may apply to have the sale set aside on his depositing in Court,-

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(a) for payment to the purchaser, a sum equal to five per cent of the purchase-money, and

(b) for payment to the decree-holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree-holder.

(2) Where a person applies under Rule 90 to set aside the sale of his immovable property, he shall not, unless he withdraws his application, be entitled to make or prosecute an application under this rule.

(3) Nothing in this rule shall relieve the judgment-debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale."

18. On fair reading of the above application under Order 21 Rule 89 of C.P.C., the Civil Procedure Code specifically states that where immovable property was sold in execution of the decree (any person claiming an interest in the property sold at the time of the sale or at the time of making the application, or acting for or in the interest of

such person) may apply to have the sale set aside on his depositing in Court, and the Court can accept the deposit and set aside the same.

19.As per the above provisions, it is made clear that if any immovable property has been sold for the execution of decree, the judgment debtor has made application for setting aside the sale by depositing the entire decree amount in Court. Thus being the case, though the claim made by the first respondent/decreed holder in the E.P., a sum of Rs.47,771/-, but this petitioner/ judgment debtor has deposited the entire decree amount of Rs.47,771/- with interest Rs.6,250/- and also the expenses for the filing of the execution petition Rs.3,162/- by totally he deposited a sum of Rs.66,458/-. When the Additional Sub-Judge has accepted the said amount as per provision under Order 21 Rule 89 of CPC, the said Execution Court without any option except to pass order to set aside the auction sale dated 13.06.2007. The learned Judge not clearly noted that the petitioner/judgment debtor has clearly mentioned in the provision filed in REA.No.448 of 2007 about the particulars of depositing amount of Rs.66,458.50/- towards the sale warrant and commission, poundage, interest and other expenses and particulars of the deposit, which has been given as follows:-

Principal	..	Rs.44,445.00
Subsequent interest	..	Rs. 6,215.00
Costs of E.P.	..	Rs. 3,162.00
Pountage	..	Rs. 7,590.00
Commission	..	Rs.12,600.00
Batta	..	Rs. 445.50

Total		Rs.74,457.50
Less amount paid		Rs. 8,000.00

Balance		Rs.66,457.50

20. In my considered opinion it is unfortunate that the learned Additional Sub-Judge, Salem namely the Executing Court has exceeded his limit and acted against the Civil Procedure Code, 1908 that when the provision under Order 21 Rule 89 of CPC had clearly speaks that when the judgment debtor has deposited the decree amount claimed in the Execution Petition, it is the Court to decide only either to set aside or rejecting the application. But, the case in hand, the learned Additional Sub-Judge, Salem not only close his eyes, but he has also exceeds his limits and passed the order directing the petitioner to deposit the amount, which are subject matter of various Execution

Petition in E.P.Nos.73 of 2005, 143 of 2004, 226 of 2004 and 62 of 2006. The learned Judge, should act as per the law of the land, he has to decide the application filed for setting aside the auction sale as per the law under Civil Procedure Code, 1908. The Executing Courts in the State of Tamil Nadu has to apply their mind while executing the decree and to pass appropriate orders, as per the Civil Procedure Code, 1908. Therefore, the Executing Court namely the learned Additional Sub-Judge, without exceeding his limits should passed the order in the R.E.A.No.448 of 2007 as per the law under Order 21 Rule 89 of CPC. Therefore, it is just and necessary for this Court for interference in the order passed in R.E.P.No.73 of 2005 in O.S.No.417 of 1995, dated 03.08.2007, on the file of the Additional Sub-Judge, Salem. In the interest of justice, it is just and necessary, this Court ought to have set aside the order in R.E.A.No.448 of 2007 in R.E.P.No.73 of 2005 in O.S.No.417 of 1995, dated 18.06.2008, passed by the Additional Sub Court, Salem.

21. In the result, I am inclined to pass the following orders:

(a) this Civil Revision Petition is allowed by setting aside the R.E.P.No.73 of 2005 in O.S.No.417 of 1995, dated 03.08.2007, on the file of the learned Additional Sub-Judge, Salem.

(b) the learned Additional Sub-Judge, Salem is hereby directed to pass appropriate orders for accounting the E.P. amount towards the deposit amounts and thereby pass suitable orders for returning the auction sale property to the petitioner/judgment debtor within a period of eight weeks from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

08.12.2016

vs

Index:Yes

Internet:Yes

To

The Additional Sub Court,
Salem.



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M.V.MURALIDARAN, J.

VS



**Pre-Delivery Order made in
CRP(NPD).No.2406 of 2008
and
M.P.No.1 of 2008**

WEB COPY 08.12.2016

M.P.No.1 of 2013
in
C.R.P.No.2406 of 2008
M.V.MURALIDARAN,J.

This Court, by order dated 08.12.2016, has disposed of the Civil Revision Petition in C.R.P.No.2406 of 2008 by issuing certain directions viz.,

“(a) this Civil Revision Petition is allowed by setting aside the R.E.P.No.73 of 2005 in O.S.No.417 of 1995, dated 03.08.2007, on the file of the learned Additional Sub Judge, Salem.

(b) the learned Additional Sub Judge, Salem is hereby directed to pass appropriate orders for accounting the E.P.amount towards the deposit amounts and thereby, pass suitable orders for returning the auction sale property to the petitioner/judgment debtor within a period of eight weeks from the date of receipt of a copy of this order. No costs. Consequently, connected Miscellaneous Petition is closed.”

2. It is brought to the notice of this Court that at the time of passing the order dated 08.12.2016, the petitioner viz., N.Kanagaraj was no more. It is also brought to the notice of this Court that on his death, M.P.No.1 of 2013 was filed to bring on record the petitioners 2 to 5 as the legal representatives of the deceased 1st petitioner and rank them as petitioners 2 to 5 in the above civil revision petition. However, at the time of passing the order dated 08.12.2016, by inadvertence M.P.No.1 of 2013 was not allowed.

M.V.MURALIDARAN,J.

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3. Therefore, this petition is listed today under the caption "For Being Mentioned" at the instance of the learned counsel appearing for the petitioner as well as the respondents.

4. Having regard to the above facts, M.P.No.1 of 2013 is allowed. It is made clear that wherever the word "Petitioner" is mentioned in the order dated 08.12.2016, it refers to the legal heirs of the deceased petitioner.

21.07.2017

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Note: Registry is directed to incorporate the details of the legal heirs of the deceased petitioner and issue order copy afresh to the parties at the free of cost.

Issue order copy on 28.07.2017

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C.R.P.No.2406 of 2008