

IN THE HIGH COURT OF JUDICATURE AT MADRAS

<i>Orders Reserved on</i>	<i>Orders Pronounced on</i>
27.6.2017	14.11.2017

CORAM

THE HONOURABLE MR.JUSTICE D.KRISHNAKUMAR

C.R.P.(NPD) No.1370 of 2017 and C.M.P.No.6366 of 2017

K.Duraisamy Petitioner/Judgment Debtor/Defendant

Vs

1 E.Kuppusamy
2 V.K.Lakshmi ... Respondents/Decree Holder/Plaintiffs

This Civil Revision Petition is filed under section 115 of C.P.C. against the order dated 06.02.2017 made in E.A.No.18 of 2016 in E.P.No.23 of 2013 in O.S.No.743 of 2004 on the file of the I Additional District Munsif, Erode.

For Petitioner : Mr.E.J.Ayyappan
Mr.Anbumani, Amicus Curie
to assist the Court

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ORDER

According to the petitioner, originally, the respondent herein filed a suit in O.S.No.97 of 1998 before the Sub Court, Erode for recovery of possession and subsequently the suit was transferred to I Additional District Munsif, Erode and re-numbered as O.S.No.743 of 2004 wherein issues were

framed. Thereafter, relationship between the parties was cordial. In view of the cordial relationship between the parties, the petitioner was under the bonafide impression that the first respondent would not prosecute the suit against the petitioner. However, when the petitioner received notice in E.P.No.23 of 2013 filed by the respondent/Decree Holder, he came to know the exparte decree passed against the petitioner in O.S.No.743 of 2004 on 7.10.2004. Thereafter, he filed set aside application along with an application in I.A.No.935 of 2013 to condone the delay of 3213 days on 26.8.2013. After hearing both sides, the application was dismissed by the Court below on 10.9.2015. Thereafter, the petitioner has filed C.R.P.No.173 of 2016 before this Court. However, the same was withdrawn by the petitioner. Thereafter, the present application in E.A.No.18 of 2016 in E.P.No.23 of 2013 has been filed under Section 47 of C.P.C. before the Court below praying to hold the decree and judgment, dated 7.10.2004 is void, unenforceable and not executable. The respondent/decree holder filed counter statement contending that the petitioner herein filed a suit for partition and separate possession in O.S.No.493 of 1997 before the Second Additional Sub Court, Erode only to coerce the respondents and others. The aforesaid suit was also dismissed for default on 10.12.2001 and the same was subsequently restored on 17.7.2003. Again the suit was dismissed for default on 6.10.2003. After the suit was posted

for trial, the petitioner has filed one application after another for restoration of the suit. Since the petitioner was not appeared before the trial Court in the present suit in O.S.No. 743 of 2004, the petitioner was set exparte and exparte judgment and decree have been passed. Pursuant to the filing of E.P.No. 23 of 2013 to execute the decree, the petitioner has filed a petition to set aside the exparte decree in the suit along with a petition in I.A.No.935 of 2013 to condone the delay of 3213 days and the same was also dismissed by the Court below on 10.9.2015. Thereafter, the petitioner has filed C.R.P.No.173 of 2016 before this Court. When the Civil revision petition was taken up by this Court, this Court expressed dissatisfaction and warned the revision petitioner with strong words and hence the Civil revision petition was withdrawn by the petitioner. The present application has been filed by the petitioner with an intention to drag on the proceedings in order to prevent the respondents from enjoying the fruits of the decree. The trial Court after examining the evidence adduced by both sides, has held that the executing Court cannot adjudicate upon the legality or correctness of the judgment unless it is a nullity and further held that the judgment and decree passed by the trial Court is legally enforceable or not can be decided by the appellate Court in revision or appeal and dismissed the application filed under Section 47 of C.P.C.

2 The learned counsel for the petitioner would submit that the Court below failed to appreciate the provision under Order XIV Rule 2 of C.P.C. wherein it is held that the Court has to pronounce judgment on all issues. The learned counsel for the petitioner further contended that the Court below failed to follow the procedure prescribed under Order XX Rule 5 C.P.C. wherein it is stated that it is mandatory that the Court shall state its findings or decisions with reasons on the issues framed in the suit. Therefore, the decree and judgment passed by the Court below are non-est in law and not executable. In support of his contention, the learned counsel for the petitioner relied on the following decisions of the Hon'ble Supreme Court and this Court.

1. **SUSHIL KUMAR METHA VS. GOBIND RAM BOHRA [1990(1) SCC 1989**
2. **TAHIL RAM ISSARDAS SADARANGANI VS. RAMCHAND ISSARDAS SADARANGANI AND ANOTHER (1993(3) SUPP SCC 256)**
3. **MALKIAT SINGH AND ANOTHER VS. JOGINDER SINGH AND OTHERS (1998)2 SCC 206)**
4. **MEENAKSHI SUNDARAM TEXTILES VS. VALLIAMMAL TEXTILES(2011(3) CTC 168)**
5. **N.MAHESWARI VS. MARIAPPAN AND 2 OTHERS (C.R.P.(NPD) No.3487 of 2011 DATED 24.9.2012)**
6. **C.ARUMUGAM VS. ASHOK KUMAR ([2016(3) T.N.C.J. (MAD) 927].**

3 Heard the learned counsel for the petitioner and the learned Amicus Curie who assisted this Court by making submission before this Court on the points for consideration, perused the materials on record and the decisions cited supra.

4 The point for consideration in the present Civil revision petition is, "Whether the application filed under Section 47 of C.P.C. is maintainable especially when application filed under Section 5 of Limitation Act to set aside the exparte judgment was dismissed ?

5 Before going into the merits of the Civil revision petition, let us read Section 47 C.P.C. extracted hereunder:

"47. Questions to be determined by the Court executing decree— (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit."

6. According to the learned counsel for the petitioner, the issues involved in the instant application have to be determined by the executing Court. Further, the judgment and decree passed by the trial Court in O.S.No.734 of 2004, dated 7.10.2004 is cryptic, non-speaking order and the same is contrary to Section 2(9) read with Order XX Rule 4 of the Code of Civil Procedure in the light of the judgment of this Court in **MEENAKSHI SUNDARAM TEXTILES VS. VALLIAMMAL TEXTILES** (supra) and other judgments. The said decision squarely applies to the facts of the instant case and the judgment and decree passed by the trial Court is legally unenforceable. The relevant portion of the said judgment is extracted hereunder:

"20. It is also relevant to point out that under Section 96(2) of the Code of Civil Procedure, an appeal may lie from an original decree passed ex parte. Two remedies are available to an aggrieved person to question the ex parte decree. One is that he may file an application to set aside the ex parte decree as provided under Order IX Rule 13 of Code of Civil Procedure. In such event, the Court which passed the judgment and decree will have to consider the reasons for setting aside such judgment and decree, which may be more or less the explanation as to the failure of non-appearance. The other remedy is that he may prefer an appeal under Section 96(2) and in such event, the appellate Court should necessarily go into the merits and find out

whether the decree could be set aside or not. In case an appeal is laid, in the absence of reasons in the judgment, the appellate Court has to necessarily remand the case to the trial Court for fresh consideration. For that reason, the judgment should contain the reasons and should be in conformity with the provisions of Section 2(9) read with Order XX Rule 4 of the Code of Civil Procedure.

21. From the above discussions, it is manifestly clear that even a judgment rendered ex parte and a decree is drawn on the basis of that judgment, it is appealable. In case that judgment and decree become final without there being any appeal, the decree is executable. In that sense, there is no difference between a judgment and decree and an ex parte judgment and decree. In view of the above, in the event the defendant is set ex parte, the Court should be extra careful in such case and it should consider the pleadings and evidence and arrive at a finding as to whether the plaintiff has made out a case for a decree. In this context, it may also be mentioned that though a detailed judgment is required in a contested matter, an ex parte judgment should show the application of the minimum requirement of consideration of the pleadings, issues, evidence and the relief sought for rendering such judgment."

7 Learned counsel for the petitioner relied upon the decision In

MALKIAT SINGH AND ANOTHER VS. JOGINDER SINGH AND OTHERS (supra),

wherein the Hon'ble Supreme Court held as under:

7. The appellants in their application clearly pleaded that they were neither careless nor negligent and as soon as they learnt about the *ex parte* decree, dated 8.2.1992 and the order dated 18.11.1991, they filed the application to set aside the *ex parte* decree. A perusal of the record reveals that the appellants were neither careless nor negligent in defending the suit. They had engaged a counsel and were following the proceedings. In this fact situation, the trial court, which had admittedly not issued any notice to the appellants after their counsel had reported no instructions, should have, in the interest of justice, allowed that application and proceeded in the case from the stage when the counsel reported no instructions. The appellants cannot, in the facts and circumstances of the case, be said to be at fault and they should not suffer. In taking this view, we are fortified by a judgment of this Court in *Tahil Ram Issardas Sadarangani vs. Ramchand Issardas Sadarangani* (1993 Supp (3) 256) wherein the Bench opined: (SCC p.257, para 4)

"4. It is not disputed in the present case that on 15.3.1974 when Mr.Adhia, Advocate withdrew from the case, the petitioners were not present in court. There is nothing on the record to show as to

whether the petitioners had the notice of the hearing of the case on that day. We are of the view, when Mr.Adhia withdrew from the case, the interests of justice required, that a fresh notice for actual date of hearing should have been sent to the parties. In any case in the facts and circumstances of this case, we feel that the party in person was not at fault and as such should not be made to suffer."

8. Learned counsel for the petitioner referred to judgment in **N.MAHESWARI VS. MARIAPPAN AND 2 OTHERS** (supra), wherein this Court held as under:

"11. In so far as the case in hand is concerned, it is a typical example of mis-carriage of justice as the trial Court after framing three issues, did not discuss anything with regard to those issues by evaluating the evidence and simply decreed the suit in a slipshod manner, that too, against the second defendant also when the plaintiff himself admits that he has not pressed the suit against the second defendant.

12. When such a judgment has been passed by the trial Court, this Court cannot close its eyes and direct the revision petitioner to go to the Appellate Court when the judgment and decree is apparently on the face of it illegal."

9 In the judgment relied upon by the learned counsel for the petitioner in the case of **SUSHIL KUMAR METHA VS. GOBIND RAM BOHRA**

[1990(1) SCC 1989], the Hon'ble Supreme Court held as under:

"In the light of this position in law, the question for determination is whether the impugned decree of the Civil Court can be assailed by the appellant in execution. It is already held that it is the Controller under the Act that has exclusive jurisdiction to order ejectment of a tenant from a building in the urban areas leased out by the landlord. Thereby the Civil Court inherently lacks jurisdiction to entertain the suit and pass a decree of ejectment. Therefore, though the decree was passed and the jurisdiction of the Court was gone into in issue Nos.4 and 5 at the ex-parte trial, the decree thereunder is a nullity, and does not bind the appellant. Therefore, it does not operate as a res judicata. The Courts below have committed grave error of law in holding that the decree in the suit operated as res judicata and the appellant cannot raise the same point once again at the execution."

In the above case, the Hon'ble Supreme Court held that the decree thereunder is a nullity on the ground that Civil Court inherently lacks jurisdiction to entertain the suit and pass a decree of ejectment.

10. In the judgment relied upon by the learned counsel for the petitioner in the case of **TAHIL RAM ISSARDAS SADARANGANI VS. RAMCHAND**

ISSARDAS SADARANGANI AND ANOTHER (supra), it was held as under:

“When the counsel for the petitioner withdrew appearance from the case, the petitioners were not present in court. There is nothing on record to show as to whether the petitioners had received the notice of hearing of the case on that day. We are of the view, when Mr. Adia withdrew from the case, the interests of justice required, that a fresh notice for actual date hearing should have been sent to the parties. In any case in the facts and circumstances of this case we feel that the party in person was not at fault and as such should not be made to suffer.”

In the case in hand, it is not the case of the petitioner that his counsel withdrew appearance from the case and hence, he was not aware of the judgment and decree passed by the Court below. Therefore, the above judgment would not apply to the case in hand.

11. This Court in **C.ARUMUGAM VS. ASHOK KUMAR** ([2016(3)

T.N.C.J. (MAD) 927] has held as under:

"8. Merely due to non appearance of the defendant in the suit, the trial Court should not pass non speaking order, but the Court must have gone through the facts and circumstances of the case of the either

parties while deciding the suit, the speaking orders should be passed. Time and again, this Court and the Hon'ble Apex Court very categorically held that the Court below should pass the orders on merits by giving speaking order in all the cases either it is contested or ex parte proceedings. The case in hand, though it was ex parte decree, but it is only a non speaking order."

12. The learned counsel for the petitioner contended that in the light of the judgments cited supra, the judgment and decree passed by the Court below are not in conformity with the provisions of Section 2(9) read with Order XX Rule 4 of the Code of Civil Procedure and therefore, the same cannot be executed.

13. On the request of this Court, Mr. Anbumani, learned counsel appeared in this case as Amicus curie, submitted that the petitioner having lost the battle in filing the set aside petition since the application to condone the delay of 3213 days was dismissed by the court below, the instant application has been filed by the petitioner under Section 47 of C.P.C. challenging the judgment and decree passed by the court below by contending that the judgment and decree passed by the trial court are not in consonance with Section 2(9) C.P.C. in the light of the judgment of the Division Bench of this Court in the case of **MEENAKSHI SUNDARAM TEXTILES VS. VALLIAMMAL**

TEXTILES (supra). The executing Court must execute the decree as it stands and it cannot go into the correctness or validity of the decree except when the decree is a nullity. The judgment and decree passed by the Court below cannot be challenged under Section 47 C.P.C. when the order passed in condone delay application is dismissed. If erroneous decree is said to have been passed, such plea can also be raised in the appeal. In support of his submission, the learned counsel/Amicus Curie relied on the following decisions.

14. This Court in **GANAPATHI AND ANOTHER VS. BALASUBRAMANIA GOUNDER (AIR 1987 Madras 124)** held as under:

"10..... It is an established proposition of law that the executing Court must execute the decree as it stands and it cannot go into the correctness or validity of the decree except when the decree is a nullity. Since the decree is of a Court with jurisdiction, the executing Court is bound to execute the decree as it stands. The relief which the revision petitioners in these two revision petitions are substantially asking is that the decree must be so modified as to make it ineffective and inoperative

in respect of certain properties. In other words, the argument comes to this i.e., in so far as the properties in respect of which the petitioners are contending that

these properties are not liable to be sold, the decree is invalid. 11. The above objection is not open in execution proceedings."

15. The Calcutta High Court in **SK. FIROJ AND ANOTHER VS SAKHYA SINGHA MULLICK AND OTHERS (AIR 1991 CAL 161)** held as under:

"3..... In the instant case there is an absence of finding as to the service of valid notice. Still the court granted a decree. Evidently therefore grant of a decree without a finding as to service of a valid notice is erroneous. Even a decree despite a finding that no valid notice was served is also erroneous. Such an erroneous judgment would be appealable. Instead, objection is untenable. We must not overlook the distinction between an erroneous or illegal judgment and a judgment without jurisdiction or a void judgment. While the former is appealable the latter is unexecutable and can even be challenged in a collateral proceeding.

5. Subodh Chandra's case only lays down that the Court has no jurisdiction to entertain a suit in the absence of such a notice. If the Court assumes jurisdiction even in the absence of notice it will be an erroneous assumption of jurisdiction and such an erroneous decree is appealable only. In other words, this may be a case of irregular exercise of jurisdiction as distinguished from inherent want of jurisdiction. The former is impeach-able in appeal while the latter is

void."

16. The Hon'ble Supreme Court in **BHAWARLAL BHANDARI VS. UNIVERSAL HEAVY MECHANICAL LIFTING ENTERPRISES [(1999)1 SCC 558]**, held as under:

"The award dated 17.4.1985 was filed in the court on 23.3.1989 by the arbitrator and the court proceeded to deal with the question whether the award should be made rule of the court or not. Notice was issued by the court to the respondent to show cause as to why this award should not be made rule of the court. There is no dispute that this notice was served on the respondent. Despite such service of notice, for reasons best known to the respondent, it did not think it fit to contest the proceedings nor did it File any objection under Section 30 of the Arbitration Act, 1940. In the result, the court passed an award decree on 2.6.1989 on account of absence of any contest by the judgment debtor. It is true that this award decree was sought to be executed years thereafter. But the said delay on the part of the decree holder in executing the decree within the permissible period for limitation in execution of such decree cannot give any sustainable right to the judgment-debtor to challenge the execution proceedings on that ground. The contention of shri Javali, learned senior counsel for the respondent that the award was mock one and was not intended to be enforced can not be sustained as that

stage has gone for the respondent. In execution proceedings such a contention requiring the executing court to go behind the decree cannot be sustained. The question whether the award decree was filed by the arbitrator on his own or not was a mixed question of "law and fact. The Division Bench in the impugned judgment itself has noted that if the award was filed by the arbitrator suo motu then the award decree cannot be said to be barred by limitation but if, on the other hand, the award was filed by the arbitrator at the instance of the appellant- decree holder then the question of limitation would arise. The aforesaid observation of the Division Bench itself indicates that this is a mixed question of law and fact. That was an issue to be raised before the award was made a rule of Court But such plea can never make the decree a nullity especially when the respondent for reasons best known to it did not think it fit to file objections under Section 30 of the Arbitration Act, 1940. It is well settled that the executing court cannot go behind the decree unless it is shown that it is passed by a court having inherent lack of jurisdiction, which would make it a nullity. In the case of *Ittyavira Mathai vs. Varkey Varkey* (AIR 1964 SC 907) a Bench of four learned Judges of this Court speaking through Mudholkar, J. observed that when the question of limitation was not raised for the first time before this Court even in the hierarchy of proceedings arising from the suit when such question of limitation raised before

the Court was not a pure question of law but was a mixed question of law and fact. In the case of *Vasudev Dhanjibhai Modi vs. Rajabhai Abdul Rehman* (1970)1 SCC 670, J.C. Shah, J. speaking for a three-Judge Bench of this Court made the following pertinent observation in connection with the jurisdiction of the executing court, when called upon to execute the decree and on the question as to under what circumstances the executing court can go behind the decree sought to be executed. The observation at SCR p.68 of the Report deserves to be extracted in extenso: (SCC pp 672-73, paras 6-7)

“6. A court executing a decree cannot go behind the decree; between the parties or their representatives it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties.

7 When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a court which has no inherent jurisdiction to make it, objection as to its validity may be raised in

an execution proceeding if the objection appears on the face of the record; where the objection as to the jurisdiction of the court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction. In Jnanendra Mohan Bhaduri vs. Rabindra Nath Chakravarti (AIR 1933 PC 61) the Judicial Committee held that where a decree was passed upon an award made under the provisions of the Indian Arbitration Act, 1899, an objection in the course of the execution proceeding that the decree was made without jurisdiction, since under the Indian Arbitration Act, 1899, there is no provision for making a decree upon an award, was competent. That was a case in which the decree was on the face of the record without jurisdiction."

10. The aforesaid decision of this Court squarely applies to the facts of the present case. This is not a case in which the award decree on the face of it was shown to be without jurisdiction. Even if the decree was passed beyond the period of limitation, it would be an error of law or at the highest, a wrong decision which can be corrected in appellate proceedings and not by the executing court which was bound by such decree. It is

not the case of the respondent that the Court which passed the decree was lacking inherent jurisdiction to pass such a decree. This becomes all the more so when the respondent did not think it fit to file objection against the award which was sought to be made the rule of the court."

17. In **RAFIQUE BIBI (DEAD) BY LRS. vs. SAYED WALIUDDIN (DEAD) BY LRS. AND OTHERS [(2004)1 SCC 287]**, the Hon'ble Supreme Court held as under:

"6. What is 'void' has to be clearly understood. A decree can be said to be without jurisdiction, and hence a nullity, if the Court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in nullity. The lack of jurisdiction in the Court passing the decree must be patent on its face in order to enable the executing Court to take cognizance of such nullity based on want of jurisdiction; else the normal rule that an executing Court cannot go behind the decree must prevail.

7. Two things must be clearly borne in mind. Firstly, the Court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be 'a nullity' and 'void' but these terms have no absolute sense; their meaning is relative, depending upon the Court's willingness to grant relief in any particular

situation. If this principle of illegal relativity is borne in mind, the law can be made to operate justly and reasonably in cases where the doctrine of ultra vires, rigidly applied, would produce unacceptable results. (Administrative Law, 8th Edition, 2000, Wade and Forsyth, p. 308). Secondly, there is a distinction between mere administrative order and the decrees of Courts, especially a superior Court. The order of a superior Court such as the High Court, must always be obeyed no matter what flaws it may be thought to contain. Thus a party who disobeys a High Court injunction is punishable for contempt of Court even though it was granted in proceedings deemed to have been irrevocably abandoned owing to the expiry of a time limit. (Ibid, p. 312).

8. A distinction exists between a decree passed by a Court having no jurisdiction and consequently being a nullity and not executable and a decree of the Court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing Court; the remedy of a person aggrieved by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior Court failing which he must obey the command of the decree. A decree passed by a Court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings.

9.

10. It is not the plea of the judgment debtors-appellants that the Court which passed the decree did not have the jurisdiction to do so. It is also not their case that a ground for eviction of the tenants on the ground of default in payment of arrears of rent was not available to the landlords- respondents within the meaning of the Delhi and Ajmer Act or the successor Rajasthan Act. The only submission made is that before passing the decree the Court should have afforded the tenant an opportunity of depositing the rent in arrears, which was not done. Firstly, we find merit in the submission of the learned counsel for the respondents that it was for the tenants to have invited the attention of the Court by making an application in that regard so as to avail an opportunity of wiping out the effect of their default which gave rise to cause of action to the respondents, by depositing the rent during the pendency of the suit. That having not been done, the tenants-appellants cannot be heard to urge any infirmity in the decree. Secondly, accepting it at its face value, in the eyes of law, the challenge seeks to expose a procedural irregularity which may, at best, result in the decree being termed as an 'illegal decree', but that in itself would not amount to branding the decree as 'without jurisdiction' or 'a nullity'. The plea which is sought to be urged in the execution proceedings was available to be raised by the tenants before the High Court in an appeal against the decree. Such a plea was not taken before the

passing of the decree and cannot now be allowed to be urged during the execution proceedings. It is unfortunate that a decree of eviction passed in a suit commenced in the year 1956 and culminating into a final decree in the year 1986 is still starving for its execution."

18. Following the above judgment, the Hon'ble Supreme Court in the case of **BALVANT N.VISWAMITRA AND OTHERS VS. YADAV SADASHIV MULE (DEAD) THROUGH LRS. AND OTHERS [(2004)8 SCC 706]** held as under:

"9. The main question which arises for our consideration is whether the decree passed by the trial court can be said to be 'null and void'. In our opinion, the law on the point is well settled. The distinction between a decree which is void and a decree which is wrong, incorrect, irregular or not in accordance with law cannot be overlooked or ignored. Where a court lacks inherent jurisdiction in passing a decree or making an order, a decree or order passed by such court would be without jurisdiction non est and void ab initio. A defect of jurisdiction of the court goes to the root of the matter and strikes at the very authority of the court to pass a decree or make an order. Such defect has always been treated as basic and fundamental and a decree or order passed by a court or an authority having no jurisdiction is nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.

10. Five decades ago, in *Kiran Singh & Ors. v. Chaman Paswan & Ors.*, [1955] 1 SCR 117 this Court declared; (SCR p.121)

"It is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity and that its invalidity could be set up wherever and whenever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, ... strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties." (emphasis supplied).

11. The said principle was reiterated by this Court in *Seth Hiralal Patni v. Sri Kali Nath*, [1962] 2 SCR 747. The Court said :

"Competence of a court to try a case goes to the very root of the jurisdiction, and where it is lacking, it is case of inherent lack of jurisdiction."

19. In **RAJINDER KUMAR VS. KULDEEP SINGH AND OTHERS** [(2014)15 SCC 529] the Hon'ble Supreme Court held as under:

"16. The main contention of the vendors is that that there is no decree in terms of Section 2 (2) of the Code of Civil Procedure, 1908 because there is no formal expression of adjudication and the court has not conclusively determined the rights of the parties. But it has to be seen that the vendors did not contest the suit.

They had not even filed a written statement. In that context only, the suit was decreed as prayed for.

17. In the Judgment dated 30.04.1984, the Court has referred to the averments in the plaint. The opening and concluding sentences of the Judgment read as follows:

“Plaintiff, S. Kuldeep Singh has filed the present suit against Shri Banarsi Dass and 8 others for specific performance of an agreement to sell dated 29/30th July 1980. The agreement relates to plot No.9, Block No.171 in the layout plan of the New Capital of Delhi, now known as Bungalow No.9, Sunder Nagar, New Delhi....

However, since the Defendants have failed to file written statement, as directed in my order dated 15th February, 1984, I proceed to pronounce the judgment under the provisions of order 8 rule 10 of the Code of Civil Procedure and decree the suit of the plaintiff as prayed for with costs against Defendants 1 to 8 only as there is no relief prayed against Defendant No.9.

18. Having referred to the entire contentions of the plaintiff, the Judgment was pronounced under Order VIII Rule 10 of the Code of Civil Procedure, 1908 since there was no written statement. The Court has taken the position that the defendants had failed to file written statement. Therefore, the Court, in the facts of the case, opted to pronounce the Judgment, under Order VIII Rule 10 of the Code of Civil Procedure, 1908 and draw the decree accordingly.

19. No doubt, the decree passed under Order VIII Rule

10 of the Code of Civil Procedure, 1908 is an *ex parte* decree. But merely because it is an *ex parte* decree, the same does not cease to have the force of the decree. It is a valid decree for all purposes.

20. It is also worthwhile to note that the Judgment was pronounced under the pre-amended Rule 10 under Order VIII of the Code of Civil Procedure, 1908 and there was more discretion with the Court regarding pronouncement of the Judgment in the absence of written statement. Still further, it is to be noted that Rule 10 speaks about the requirement of written statement indicating thereby that there are cases where written statement was required to be filed. Written statement is the defense of the defendants. They chose not to file it. Despite the absence of such defense, the court still applied its mind and after referring to the pleadings, pronounced a Judgment allowing the suit for specific performance. Though the Judgment says that the suit is decreed as prayed for and though all the prayers have been incorporated in the decree, it is to be noted that the suit is one for specific performance of the agreement. The suit that has been decreed is the suit for specific performance of the agreement. Once the decree for specific performance attained finality, they cannot thereafter turn round and make weak and lame contentions regarding the executability of the decree.

21. If the suit for specific performance is not decreed as prayed for, then alone the question of any reference to

the alternative relief would arise. Therefore, there is no question of any ambiguity. As held by this Court in Topanmal Chhotamal v. Kundomal Gangaram and Others[3] and consistently followed thereafter, even if there is any ambiguity, it is for the executing court to construe the decree if necessary after referring to the Judgment. If sufficient guidance is not available even from the Judgment, the Court is even free to refer to the pleadings so as to construe the true import of the decree. No doubt, the court cannot go behind the decree or beyond the decree. But while executing a decree for specific performance, the Court, in case of any ambiguity, has necessarily to construe the decree so as to give effect to the intention of the parties. Thus, there is no question of any alternate relief regarding the damages etc. in the present case since the suit for the specific performance for the conveyance of the property has been decreed.

22. *There is no case that the court does not have jurisdiction to pass the decree. Nor is there any case that the decree is a nullity on account of any jurisdictional error. Hence, the decree is executable for all intents and purposes but limited to the shares of the vendors. The claim of Rajinder Kumar would depend on the outcome of the pending suit."*

20. This Court in **SETHUPATHY AND MANI @ SUBRAMNIA BHARATHY VS C.S. JEEVAKUMAR (2007-3 L.W. 45)** held as under:

“6. Even at the outset, it is to be pointed out that the Revision Petitioners have exhausted all E.A. No. 353/2000, under Section 47 CPC, we may briefly enumerate the various stages in which the Revision Petitioners have participated in the proceedings. In the suit, the Revision Petitioners have filed Written Statement on 25.09.1991 contending that they were only employees and were not responsible in conducting of the chit. In their Written Statement, the Revision Petitioners averred that the suit could be decreed as against the Defendants 1, 2 and 3. No where in the Written Statement the Revision Petitioners have raised the plea regarding lack of jurisdiction of the Civil Court. The suit was decreed ex parte on 04.12.1991. As noted earlier, the Revision Petitioners have filed I.A. No. 834/1995 under Section 5 of the Limitation Act, seeking condonation of delay in filing application to set aside the ex parte Decree. I.A. No. 834/1995 was dismissed, against which the Revision Petitioners have filed the CRP and the same was also dismissed.

7. In this revision, Court has called for back papers and I have carefully examined the records. The E.P. was filed even in the year 1994. Be that as it may, in E.P.s, the Revision Petitioners have entered appearance. The E.P. was adjourned to various dates. Perhaps only at that stage, I.A. No. 834/1995 was filed by the Revision Petitioners. The Revision Petitioners have also filed their counter stating that they have taken steps to set aside

the *exparte* Decree. On 16.04.1999, counsel for the Revision Petitioners reported 'no instructions' and the Revision Petitioners were called absent and set *exparte* on 16.04.1999 and fresh proclamation was ordered. For one reason or other, proclamation was not issued and again fresh proclamation was ordered on 16.10.2000. Thereafter, E.P. was adjourned to 04.12.2000 and the sale could not be held and again adjourned to 14.12.2000, as per the Order in E.A.No. 338/2004 [nature of E.A. not known from the records], only at that stage, the Revision Petitioners have filed Petition under Section 47 CPC raising objection as to the executability of the Decree. By a mere perusal of the Order Sheet in the E.P., it is quite obvious that Section 47 CPC Petition has been filed only to delay the Execution Proceedings. The objection that the Civil Court has no jurisdiction and that the Decree is a nullity was not at all raised by the Revision Petitioners at early point of time. The Revision Petitioners, who had participated in the proceedings in all stages, cannot raise the objection regarding the executability of Decree by filing Petition under Section 47 CPC.

8. The Executing Court cannot go beyond the Decree, unless it is shown that it is passed by the Court having lack of jurisdiction which would make it a nullity. It is not for the Executing Court to decide whether the Decree passed is legal or illegal or whether it is erroneous or not. As noted earlier, District Registrar of Chits himself was made a party, who is said to have filed

the Written Statement stating that Muthamizh Chit Fund was not a registered one. While so, the contention that in view of Section 64(3) of Chit Funds Act, jurisdiction of Civil Court's barred does not merit acceptance."

21. This Court in **DR.JAMUNA VS. KARMEGAM [(2013) 6 MLJ 517]** held as under:

"5. Certainly there is no doubt about the position that the party to the proceedings can maintain an application under Section 47 of the CPC. But in this case, the facts and circumstances, as referred to above, would disclose that on 14.2.2008 itself the Court below passed an order setting the petitioner ex parte and also made an order of attachment on the very same day. Admittedly, the petitioner has not taken any steps so far to set aside the said order dated 14.2.2008. Thus, the petitioner having been set ex parte on 14.2.2008 and in the absence of any application filed by him seeking to set aside the said ex parte order, he is not justified in filing an application under Section 47 of the CPC, especially when he is set ex parte in the main Execution Petition itself.

6. First of all, the petitioner should come into the picture once again in the main proceedings by filing appropriate application to set aside the ex parte order dated 14.2.2008. If he has not come into the picture by getting such ex parte order set aside, he cannot be permitted to say that he is a party to the proceedings

and consequently, entitled to file an application under Section 47 of the CPC. Party to the proceedings contemplated under Section 47 of the CPC does not mean and include the person who is set *ex parte* also. No doubt, Explanation-I to Section 47 of the CPC contemplates a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit. But, a careful reading of such Explanation-I would show that it has not dealt with a plaintiff or a defendant against whom an *ex parte* order or decree is passed by the Court. Therefore, in my considered view, the said Explanation-I to Section 47 of the CPC refers about a plaintiff or a defendant who had participated in the proceedings and not in respect of a plaintiff or a defendant who has been set *ex parte*. The word "*ex parte*" has not been defined under the CPC. However, the dictionary meaning of the said word "*ex parte*" reads as "*with respect to or in the interests of one side only*". Therefore, if a person is set *ex parte*, unless he files appropriate application and gets the said order set aside, he cannot be treated as a party entitled to continue the proceedings without getting the *ex parte* order set aside."

22. The Division Bench of this Court in **MEENAKSHI SUNDARAM TEXTILES VS. VALLIAMMAL TEXTILES** (supra) while deciding the application

under Order IX Rule 13 C.P.C. in a Civil Miscellaneous Appeal, has held that even ex parte judgment should contain the reasons and should be in conformity with the provisions of Section 2(9) read with Order XX Rule 4 of the Code of Civil Procedure. In the above case, it was also held that even a judgment rendered ex parte and a decree is drawn on the basis of that judgment, it is appealable. In case that judgment and decree become final without there being any appeal, the decree is executable. In the case in hand, ex parte judgment and decree become final as the application filed in I.A.No.935 of 2013 to condone the delay in filing the set aside petition was dismissed and the dismissal order passed in condone delay application has become final. Therefore, the decree passed by the Court below is executable unless it is proved inherent lack of jurisdiction. Further, the Hon'ble Supreme Court in the judgments cited supra, settled the legal position by holding that a court executing a decree cannot go behind the decree and cannot entertain any objection that the decree was incorrect in law or on facts; Until it is set aside by an appropriate proceeding in appeal or revision, a decree even if it be erroneous is still binding between the parties; The Executing Court cannot go behind the Decree, unless it is shown that it is passed by the Court lacks jurisdiction which would make it a nullity; It is not for the Executing Court to decide whether the Decree passed is legal or illegal or whether it is erroneous

or not; Since the decree is of a Court with jurisdiction, the executing Court is bound to execute the decree as it stands. Therefore, the Court below has rightly rejected the application filed under Section 47 C.P.C. Further, the petitioner cannot invoke Section 47 C.P.C. after exhausting the remedy under Section 5 of Limitation Act and the same has become final.

23 Considering the facts and circumstances of the case and the decisions cited supra, the application filed under Section 47 C.P.C. is not maintainable. No prima facie case is made out in favour of the petitioner. Therefore, there is no error or illegality in the order passed by the Court below.

In the result, the revision fails and dismissed accordingly. No costs. Consequently, connected miscellaneous petition is closed.

14.11.2017

Speaking/Non Speaking order
Index: Yes/No
Internet:Yes/No
vaan

To
The I Additional District Munsif, Erode.

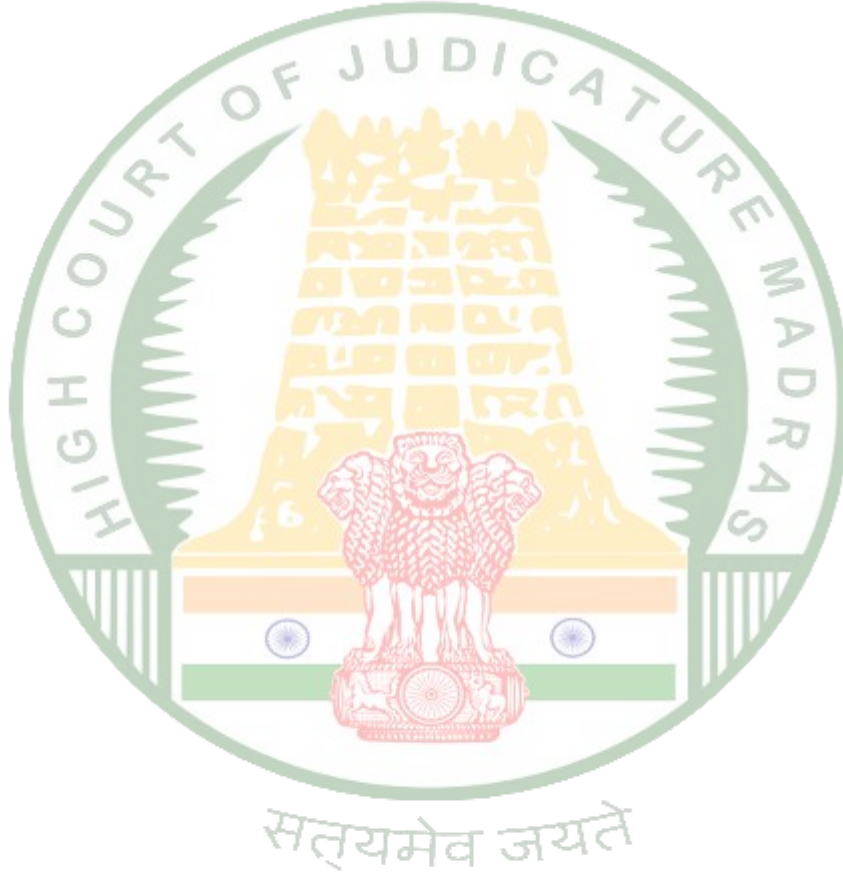


D.KRISHNAKUMAR, J.

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Pre-Delivery order in
C.R.P.(NPD) No.1370 of 2017
and C.M.P.No.6366 of 2017



14.11.2017

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