

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 22.12.2017

CORAM

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

C.R.P.No.2954 of 2001
and
CMP.No.15713 of 2001

Sriramulu

... Petitioner

Vs

- 1.Narayanasamy Mudaliar (Deceased)
 - 2.M.G.Duraisamy Mudaliar (Deceased)
 - 3.M.Rajasekaran
 - 4.M.Chandrasekaran
 - 5.Navaneetham
 - 6.Kandasamy
 - 7.Kantha
 - 8.Saroja
 - 9.Banumathy
 - 10.Perumal
- (RR5 to 10 brought on record as L.R.s of the deceased 1st respondent viz. Narayanasamy Mudaliyar vide order of this Court dated 07.12.2017 made in CMP.Nos.1833 to 1835/08 in CRP.No.2954/2001)
- 11.Janakiammal
 - 12.D.Mohan
 - 13.D.Jothi
 - 14.Rajamani
 - 15.Vasu
 - 16.Saraswathi
 - 17.Sundaramoorthy
- (RR11 to 17 brought on record as L.R.s of the deceased 2nd respondent viz. Duraisamy Mudaliyar vide order of this Court dated 07.12.2017 made in CMP.Nos.1836 to 1838/08 in CRP.No.2954/2001)

.. Respondents

PRAYER: Petition filed under Section 115 of the Code of Civil Procedure, against the Judgment and Decree dated 24.06.1999 passed in C.M.A.No.1 of 1996 on the file of the Court of the Principal District Judge, Vellore, confirming the fair and decretal order dated 10.10.1995 passed in E.A.No.367 of 1994 in

E.A.No.66 of 1985 in E.P.No.161/1983 in O.S.No.286/1981 on the file of the Court of Subordinate Judge, Vellore.

For Petitioner : Mr.K.Chockalingam

For Respondents : Mr.T.Dhanyakumar

ORDER

The instant Civil Revision Petition is preferred as against the judgment and decree passed in C.M.A.No.1/1996 dated 24.06.1999 on the file of learned Principal District Judge, Vellore District. Whereby the fair and decreetal order of the learned Subordinate Judge, Vellore dated 10.10.1995 made in E.A.No.367/1994 in E.A.No.66/1985 in E.P.No.161/1983 in O.S.No.286/1981 was confirmed. It is the case of the revision petitioner that he is a 3rd party to the original suit proceedings and he filed execution application in E.A.No.66 of 1985 in E.P.No.161/1983 to set-aside the sale held in the court auction on 03.02.1984.

2.The aforesaid application in E.A.No.66/1985 was posted for enquiry on 25.08.1994. As the petitioner was suffering from illness, he was unable to appear before the concerned court on 25.08.1994. Hence the matter was adjourned to 08.09.1994. It is the contention of the learned counsel for revision petitioner that when the matter was heard on 08.09.1994, the petitioner was sitting outside the court premises and his counsel represented to get adjournment, but the E.A.No.66/1985 was dismissed for non-prosecution.

3.In order to restore the aforesaid E.A.No.66/1985, the revision petitioner filed another application in E.A.No.367/1994 within the period of limitation. On the other hand the application in E.A.No.367/1994 was dismissed by the learned Executing Court by the fair and decreetal order dated 30.09.1994. The reason assigned for the dismissal of the application in E.A.No.367/1994 by the learned Executive Court was that since, there is no merit in the main petition filed for setting aside the sale and further, no proof was filed to substantiate the plea taken by the revision petitioner that he was waiting outside the court. Apart from that as the revision petitioner did not furnish any reason as to what prevented him to appear before the learned Executing Court on the day of the hearing though he was waiting outside the court, hence the application filed for the restoration was dismissed.

4.It is the further case of the revision petitioner that the grounds raised in the C.M.A.No.1 of 1996 were not properly considered and the learned Lower Appellate Court also erred in holding that the consideration of the merits of the main case which was not the subject matter of the application for restoration was correct. So, both the courts below fell into error by stepping ahead in considering the merits and demerits of the main case; hence the same is required interference of this court.

5.The learned counsel for revision petitioner would also bring to the notice of this court that both the courts below have not considered the points raised in the restoration petition, instead the courts below have considered the merits of the main case therefore, the impugned judgment and decree passed in C.M.A.No.1 of 1996 and the fair and decreetal order passed in E.A.No.367/1994 are liable to be set-aside.

6.It is seen from the records that the original suit is of the year 1981 for the recovery of money. The suit was decreed and thereafter to realize the benefit of the decree passed in O.S.No.286 of 1981, execution petition was filed and the property concerned was brought to court auction held on 03.12.1984. However, the revision petitioner as 3rd party filed an application in E.A.No.66/1985 to set-aside the aforesaid court auction the said application was dismissed for non-prosecution on 08.09.1994. Hence, the present application in E.A.No.367/1994 was filed but the same was dismissed on 10.10.1995, though the order of dismissal was taken up for appeal, the impugned fair and decreetal order passed in E.A.No.367/1994 was confirmed by the learned lower appellate court by the judgment and decree dated 24.06.1999.

7.I heard Mr.K.Chockalingam, learned counsel for the petitioner and Mr.T.Dhanyakumar, learned counsel for the respondents and the materials available on record are perused.

8.It is the case that an application in E.A.No.367/1994 to restore another E.A.No.66/1985, was filed before the learned executing court, but the same was dismissed and the order of the dismissal was confirmed by the learned Lower Appellate Court. The judgment and decree passed in the Civil Miscellaneous Appeal is under challenge. The learned counsel is resisting upon his arguments mainly on the ground that both the courts below have considered the merits of the main case that is the deposit of

sale amount within a time frame as contemplated Under Order 21, Rule 89 of C.P.C. It is for the courts below to decide the matter in an appropriate manner based on the application under which the claim was made. Here admittedly the application in E.A.No.367/1994 was filed only to restore the application in E.A.No.66 of 1985. The said application was filed to set-aside the court auction on 03.12.1984.

9.It is also brought to the notice of this court that though the application to set-aside the sale is filed for the reasons stated in the affidavit filed along with the said application, the said affidavit filed along with the application in E.A.No.66/1985 may have its own merits and demerits. The merits of E.A.No.66/1985 shall not have any bearing while the application for restoration in E.A.No.367/1984 is considered. However, as rightly pointed out by the learned Counsel for the Revision petitioner that both the courts below were influenced by the merits of the application in E.A.No.66/1985. The courts below are very well entitled to consider the merits and demerits of the application in E.A.No.367/1994. Further, in the affidavit filed along with the application in E.A.No.367/1994, it is specifically pleaded that the revision petitioner, on the day of the order of dismissal was passed on 08.09.1994 was waiting in the court premises and the said fact has not been denied by the respondent, in his counter affidavit. So, the surrounding circumstances of the instant case are in the considered opinion of this court required interference to meet the ends of justice. At the same time this court also keeps in mind that the Original Suit was filed in the year 1981 and the court auction sale was on 03.12.1984. However, the benefit of the decree passed in the original suit has so far not been realized by the respondent. However, this court is more interested in passing orders by considering the totality of the case coupled with legality. As discussed above, there may be demerits in the application filed in E.A.No.66/1985, but both the courts below ought not to have been influenced by the merits and demerits of the said E.A.No.66/1985. As the merits and demerits of the said application in E.A.No.66/1985 alone cannot be the sole criterion in deciding the application in E.A.No.367/1994.

10.Therefore, for the above discussion, this Court is of the considered opinion, the Civil Revision Petition is allowed by setting aside the judgment and decree passed in C.M.A.No.1 of 1996 on the file of the learned Principal District Judge, Vellore and also the Fair and Decreetal order passed in E.A.No.367 of 1994 in E.P.No.161 of 1983 in O.S.No.286 of 1991 on the file of the learned Subordinate Judge, at Vellore, the then North Arcot District. However, in the interest of justice,

the learned Executing Court is directed to dispose of the application in E.A.No.66 of 1985 within a period of three months from the date of receipt of a copy of this order in accordance with law. No costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

To

- 1.The Principal District Judge, Vellore.
- 2.The Subordinate Judge, Vellore.

Copy to

The Section Officer,
Judicial Department,
High Court, Madras.

+2cc to M/S.K.Chockalingam, Advocate Sr.117

C.R.P.No.2954 of 2001

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