



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.02.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P (MD) No.240 of 2017 (NPD)

and

C.M.P (MD) No.1106 of 2017

Jayaprakash

...Revision Petition/Petitioner/
8th Respondent/Legal Heir of Judgment Debtor

Vs

Ganesan

...Respondent/Respondent/Petitioner/
Decree Holder

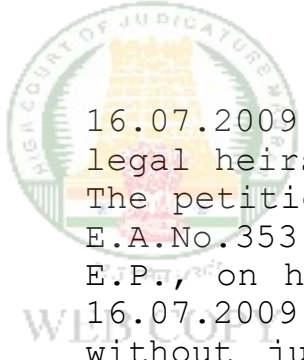
PRAYER: Civil Revision Petition is filed, under Section 115 of Code of Civil Procedure, to Fair and Decreetal order, dated 02.01.2017 in E.A.No.353 of 2016 in E.P.No.41 of 2013 in O.S.No.630 of 1994 on the file of learned First Additional Subordinate Judge, Tiruchirappalli.

For Petitioner : Mr.VR.Shanmuganathan
For Caveator/ : Mr.R.Govindaraj
Respondent

ORDER

The petitioner has filed this Civil Revision Petition to set aside the Fair and Decreetal order, dated 02.01.2017 in E.A.No.353 of 2016 in E.P.No.41 of 2013 in O.S.No.630 of 1994 on the file of learned First Additional Subordinate Judge, Tiruchirappalli.

2.The petitioner is legal heir of judgment debtor. The respondent/plaintiff is the decree holder. The petitioner is the 7th respondent in the E.P., legal heir of judgment debtor. The respondent decree holder filed suit in O.S.No.630 of 1994 before the learned First Additional Sub Court, Tiruchirappalli for declaration and recovery of possession against father of the petitioner Nallusamy and five others. The said suit was decreed by the judgment and decree, dated 16.07.2009. Against the said judgment and decree, the father of the petitioner Nallusamy filed first appeal in A.S.No.61 of 2011 before the learned Principal District Court, Tiruchirappalli and second appeal in S.A.(MD) No.420 of 2013 before this Court, which were dismissed. The respondent filed E.P.No.41 of 2013 to execute the decree, dated



16.07.2009. Pending E.P., Nallusamy died. The petitioner and other legal heirs of Nallusamy were impleaded as respondents in the E.P. The petitioner is the 7th respondent in E.P. The petitioner filed E.A.No.353 of 2016 for permission to examine him as witness in the E.P., on his side. According to the petitioner, the decree, dated 16.07.2009 is not executable as same has been passed by the Court without jurisdiction. The said decree is nullity on the ground that Court has no jurisdiction.

3.The respondent filed counter and opposed the said application and contended that issue has been decided in the suit itself and it was confirmed in the first appeal in A.S.No.61 of 2011 and by this Court in the second appeal in S.A.No.428 of 2013. The legal heir of judgment debtor cannot raise the same question in the execution proceedings. The said claim is barred by limitation and petitioner is estopped from raising the said issue.

4.The learned Judge considering the averments made in the affidavit and counter affidavit and judgment relied on by the learned counsel for the respondent, dismissed the application holding that the issue which has already been decided in the suit, first appeal and by this Court in the Second appeal cannot be re-agitated in the Execution Court.

5.Against the said order of dismissal made in E.A.No.353 of 2016 passed by the learned First Additional Sub Judge, Tiruchirappalli, the petitioner has come out with the present Civil Revision Petition.

6.The learned counsel for the petitioner submitted that the Court which has passed the decree did not have jurisdiction to entertain the suit with regard to possession. The respondent ought to have initiated Rent Control proceedings for eviction of Nallusamy, father of the petitioner and others. The jurisdiction question can be raised at any stage including in the Execution Proceedings. The decree and confirmation by first appellate Court and this Court in S.A., will not amount rehearing the issues already settled. The application filed by the petitioner to let in evidence in respect of issue of jurisdiction and maintainability of Execution Proceedings.

7.In support of his case, the learned counsel for the petitioner relied on the following judgments:-

(i)AIR 1991 Supreme Court 1094 (M/s.East India Corporation Ltd. v. Shree Meenakshi Mills Ltd.,)

6..... Although the jurisdiction of the Civil Court is not expressly barred, the provisions of the statute explicitly show that, subject to the extraordinary powers of the High Court and this Court, such jurisdiction is impliedly barred, except to the limited extent specially provided by the statute....."



(ii) (2010) 4 MLJ 118 (Saral Saroja vs. Simson)

20. In the instant case, as elucidated earlier, the defendant has clearly denied the alleged title of the plaintiff and she also sets up a permanent tenancy over the suit property. Since the defendant has clearly denied the title of the plaintiff and also sets up permanent tenancy over the suit property, the plaintiff ought to have invoked the second proviso of Section 10(1) of the said Act and only after getting a finding from the concerned Rent Controller, he can file a suit for eviction. But, the plaintiff has failed to follow the aforesaid legal procedure. Since the plaintiff has failed to follow the aforesaid legal procedure, it is needless to say that the trial Court as well as the first appellate Court are nothing but corams non judice and the concurrent judgments passed by the Courts below are also nothing but nullities.

(iii) (2004) 8 Supreme Court Cases 706 (Balvant N. Viswamitra v. Yadav Sadashiv Mule)

"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 a nullity. Validity of such decree or order can be challenged at any stage, even in execution or collateral proceedings.

14. Suffice it to say that recently a Bench of two Judges of this Court has considered the distinction between null and void decree and illegal decree in Rafique Bibi v. Sayed Waliuddin. One of us (R.C. Lahoti J., as His Lordship then was), quoting with approval the law laid down in Vasudev Dhanjibhai Modi state: (SCC pp. 291-92, paras 6-8)

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 or jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the decree must be patent on its fact in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction, else the normal rule that an executing court cannot go behind the decree must prevail.

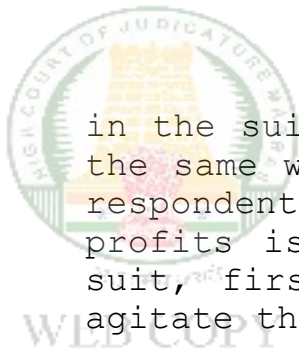
7. Two things must be clearly borne in mind. Firstly, 'the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be "a nullity" and "void" but these terms have no absolute sense; their meaning is relative, depending 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, Wade and Forsyth, 8th Ed., 2000, 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.31)

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 in-executable 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."

15. From the above decisions, it is amply clear that all irregular or wrong decrees or orders are not necessarily null and void. An erroneous or illegal decision, which is not void, cannot be objected in execution or collateral proceedings."

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8. The learned counsel for the Caveator/Respondent submitted that the question of jurisdiction and maintainability was raised



in the suit, first appeal and second appeal before this Court and the same was rejected. This Court has held that suit filed by the respondent for declaration, recovery of possession and mesne profits is maintainable. In view of the judgments passed in the suit, first appeal and second appeal, the petitioner cannot re-agitate the same issue before the execution Court.

9. In support of his contention, the learned Court for the respondent relied on the following judgements:-

(I) 2014(3) L.W.831 (M.Maniannan vs. B.Chandrika) wherein at paragraph 24 it has been held as follows:-

24. As stated above, Section 47 petition filed by the tenant after approval of eviction passed by this Court is nothing but abuse of process of law and it is not maintainable, as the issue attained finality. In the name of petition under Section 47, the petitioner wants to indirectly challenge the eviction order, after the said order was confirmed by this Court contending that it is a nullity. Every proceedings has to reach a finality and it cannot be re-agitated indirectly. There is a categorical finding given by this Court in order dated 05.03.2012 in CRP no.2419 & 961 of 2010 that petitioner is a chronic defaulter. The only remedy for the petitioner is to challenge this court order passed in CRP No.2419 of 2010 only before the superior court and he cannot go to the lowest forum and challenge this court's order and re-open the decided issue. Therefore, petition under section 47 itself is not maintainable.

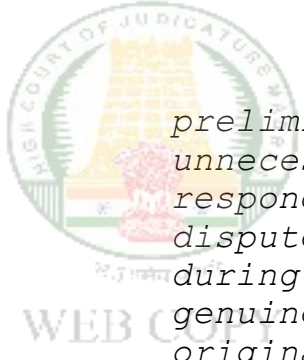
(ii) 2015(5) MLJ 182 (C.Rajendran vs. S.Nirmala)

12. The Second Appeal was admitted on 19.09.2011 identifying the following to be the substantial questions of law that have arisen in the Second appeal:-

"(a) Are the Courts below correct and justified in granting a decree for possession in granting a decree for possession without directing the plaintiff to resort to the provisions of Tamil nadu Building (Lease and Rent Control) Act, 1960 admittedly, when the defendant/respondent is in possession of the suit property as tenant?

(b) Are the Courts below correct and justified in granting a decree for possession when it has not been specifically pleaded about the measurements, area or specified boundaries or identifiable property regarding each defendant? Is the suit for possession maintainable?

14. The facts in controversy have been narrated in the



preliminary portion of this judgment and hence it shall be unnecessary to repeat it. Though the claim of the respondent herein-plaintiff based on Ex.B1 will has been disputed, in the written statement of the first respondent during the course of trial, D.W.1 has clearly admitted the genuineness and validity of Ex.B1 will and in fact, the original will and the parent documents to the said will have been produced by the appellant herein- the first defendant to be marked as exs.B1 to B.3. Therefore, it can be, without hesitation, stated that the appellant herein- the first defendant has given a go-bye to his initial stand made in the written statement regarding the genuineness and validity of the will.

19.The next contention raised by the appellant herein- the first defendant is that since the respondent herein-plaintiff herself admitted the appellant herein- the first defendant to be a tenant filing a suit for recovery of possession without approaching the appropriate authority under the Tamil nadu Building (Lease and Rent Control) Act, 1960 seeking eviction shall not be maintainable also has got to be rejected as untenable for the following reasons:

(a) The plea made by the respondent herein-plaintiff in her plaint is that facing threat of eviction from the encroached area, the appellant herein-the first defendant sought her permission to shift his lathe workshop to the suit property and that while making such a request he also informed that he was ready to pay rent. However, a reading of the plaint as a whole will make it clear that the respondent herein-plaintiff did not accept the said offer and on the other hand, she agreed to permit the appellant herein-the first defendant to use a portion in the ground floor of her building on condition that he should vacate and hand over possession whenever she would require the same. It is not even the case of the appellant herein-the first defendant that the rent was fixed at a particular rate and he was paying the same to the respondent herein-plaintiff. In fact, as per the plaint averments, the offer made by him was Rs.1500/- per month. But the claim of damages made by her for use and occupation is Rs.2000/- to Rs.3000/- per month. The same will make it clear that there was no consensus and the contract of tenancy did not get clinched.

(b) The appellant herein- the first defendant has also failed to take an unambiguous stand that he is a tenant under the respondent herein- plaintiff and hence, the



ownership. The second stand taken by him is the bar of civil suit on the ground that there is a landlord and tenant relationship. The third one is the alleged release of her right (ie) promise to release her right for a consideration of Rs.30,000/- and on payment of the said amount, his possession would even tantamount to possession in part performance of the commitment. Such conflicting and contradictory stands had benefited the appellant herein-the first defendant not in subsistence but only in getting the evil day postponed by taking the case from the trial Court to the appellate Court and from the Appellate Court to the Second Appellate Court. The first substantial question of law is answered accordingly.

10.I have heard the learned counsel appearing for the petitioner and the learned counsel appearing for the caveator/respondent and also perused all the materials available on record and judgments relied on by both parties.

11.From the materials on record, it is seen that the respondent filed suit for declaration, recovery of possession and mesne profits. The first defendant Nallusamy father of the petitioner disputed the claim of the respondent and contested the suit. The said suit was decreed. First appeal filed by the said Nallusamy was also dismissed. The said Nallusamy filed second appeal S.A.No.428 of 2013 before this Court. This court after considering all the materials on record, dismissed the second appeal confirming the judgments and decree of Trial Court and first appellate Court. This Court held that it is not necessary for the respondent to approach the Rent Controller. This Court in the judgment in S.A.No.428 of 2013 in Paragraphs 18 & 19 held as follows:-

"18.In the case on hand, the appellant had denied the title of the respondent even prior to the filing of the suit. That being the case there is no necessity for initiating the rent control proceedings as against the appellant to get a finding that the denial of title is bona fide. In Indigent O.P.No.28 of 1988 the respondent's title was disputed. Hence, the findings of the lower appellate Court has the suit filed by the respondent for declaration, recovery of possession, mesne profit is maintainable, is correct.

19.Though there is no dispute with regard to the ratio laid down in the judgments relied upon by the learned counsel for the appellants, since the facts and circumstances are different, the judgments are not applicable to the facts and circumstances to the present case. On the contrary, the judgments relied upon by the learned counsel for the first respondent squarely apply to the facts and circumstances of the present case. In these



circumstances, the Courts below have rightly decreed the suit filed by the first respondent and dismissed the suit filed by the appellant."

12.The contention of the learned counsel for the petitioner is that decree passed by the trial Court confirmed by first appellate Court and this Court in the Second Appeal are nullity due to lack of jurisdiction to pass a decree directing petitioner's father to deliver possession of the suit property. The respondent ought to have initiated a proceedings under Tamilnadu Building (Lease and Rent Control) Act, 1960 to evict the father of the petitioner. This contention of the learned counsel for the petitioner was considered by this Court in S.A.No.428 of 2013 and rejected the said contention. This Court has categorically held that the respondent has rightly approached the Civil Court for a decree of possession as petitioner's father disputed the landlord and tenant relationship even before filing of suit and therefore, it is not necessary for the respondent to initiate eviction proceedings under Rent Control Act and to get a finding that denial of title by petitioner's father is bonafide and then file suit for possession. In view of the said finding of this Court, the contention of the learned counsel for the petitioner that the decree in favour of respondent is nullity and in-executable, has no merits and is un-acceptable.

13.In the judgments relied on by counsel for the parties clearly reveal that when a decree has been passed without jurisdiction will be a nullity. If there is any error or irregularity in the procedure then the judgment debtor cannot contend that decree, is null and void. The issue of jurisdiction was considered by earlier proceedings and specific finding was given that Civil Court has jurisdiction to order possession to the respondent. In view of said clear finding plea of petitioner to let in oral evidence with regard to jurisdiction will amount to re-agitating the issue already decided in the suit and which has attained finality.

14.The learned Judge considered all these facts and especially judgement of this Court, dated 28.10.2015 made in Second appeal in S.A.No.428 of 2013, dismissed the application. There is no illegality or irregularity warranting interference by this Court.

15.In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(CS-II)

/True copy/



To

The First Additional Sub Court,
Tiruchirappalli.

+1 cc to M/s.VR.Shanmuganathan, Advocate in SR.No.9530
+1 cc to M/s.R.Govindaraj, Advocate in SR.No.9413

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CSL/MR/SAR-III/02.03.2017 :9P/4C

C.R.P (MD) No.240 of 2017 (NPD)
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