



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 07.03.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P(MD)No.87 of 2013 (NPD)
& M.P.(MD)No.1 of 2013

C.Boopathi

.. Petitioner

Vs.

1.M/s.Angalaeeswari Credit and Chits,
Rep. by its Partner,
No.185-C, Sengunthapuram 5th Cross,
Karur - 2.

2.Central Bank of India,
Karur Branch,
Rep. by its Manager.

3.P.A.P.Krishnasamy Mudaliar

4.Lakshmi

5.Shanmugam

.. Respondents

PRAYER: Civil Revision Petition is filed, under Section 115 of the Code of Civil Procedure, against the order dated 04.10.2012, passed in E.A.No.17 of 2011 in E.A.No.14 of 2006 in E.P.No.322 of 2003 by the Additional Subordinate Judge, Karur.

For Petitioner : Mr.G.R.Swaminathan

For R1 : Mr.D.Selvam
for Mr.S.Sivathilakar

For R2 : Mr.R.Pandivel

For R4, R5 : Mr.Niranjan S.Kumar
for Mr.V.Balaji

ORDER

This Civil Revision Petition is filed against the order dated 04.10.2012, passed in E.A.No.17 of 2011 in E.A.No.14 of 2006 in E.P.No.322 of 2003, by the learned Additional Subordinate Judge, Karur.

<https://hcservices.ecourts.gov.in/hcservices/>

2.The petitioner is the second respondent in E.A.No.17 of 2011 in E.A.No.14 of 2006 in E.P.No.322 of 2003 in O.S.No.332 of 2001.



The first respondent filed the said E.A.No.17 of 2011 against the respondents 2 to 5 and the petitioner. The said E.A. was allowed. Against the said order, the present Civil Revision Petition is filed.

3.The first respondent filed O.S.No.332 of 2001 against the petitioner. The said suit was decreed on 18.12.2002. The first respondent filed E.P.No.322 of 2003 to sell the property mentioned therein to realize the decretal amount. The property was ordered to be sold and one A.P.Nachi Muthu was the successful bidder in the public auction held on 27.12.2004. The sale was confirmed on 05.08.2005 and as per the order of the Court, he took possession on 10.08.2005.

4.The second respondent filed E.A.No.14 of 2006 to set aside the Court auction sale held on 27.12.2004. According to the second respondent, the property sold in Court auction was mortgaged to them by deposit of title deeds. The borrowers did not pay the amounts due. The second respondent had taken symbolic possession of the property by following the procedure contemplated in the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002. The second respondent had also taken proceedings under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993. Suppressing the fact that the second respondent is having a paramount first charge, the property was sold in Court auction. Notice was ordered to the first respondent, the petitioner and A.P.Nachi Muthu. Pending the said E.A., A.P.Nachi Muthu died and the respondents 3 to 5 were impleaded as respondents. The respondents 1, 3 to 5 and the petitioner did not file any counter and the said E.A. was ordered on 08.01.2008.

5.The first respondent filed E.A.No.17 of 2011 to set aside the order, dated 08.01.2008. According to the first respondent, without notice to them, without giving opportunity to file counter and to let in evidence, an ex-parte order was passed on 08.01.2008. The respondents 3 and 4 filed counter and prayed for dismissal of the said E.A. The petitioner filed memo and submitted that E.A.No.17 of 2011 filed by the first respondent after three years and three months, is not maintainable, as the first respondent has filed the said E.A. without filing an application to condone the delay. Further, the legal heirs of auction purchaser filed E.A.No.177 of 2008 to condone the delay of 73 days in filing application to set aside the order dated 08.01.2008 and the said E.A. was dismissed.

6.The learned Additional Subordinate Judge, Karur, after considering all the materials on record, allowed E.A.No.17 of 2011 and opportunity was given to the first respondent to file counter. The learned Additional Subordinate Judge has also held that as per Proviso to Order 21 Rule 105(3) by Madras High



Court Amendment, the Executing Court has power to condone the delay in filing applications under Order 21 Rule 105(1) C.P.C.

7. Against the said order dated 04.10.2012, passed in E.A.No.17 of 2011, the petitioner has come out with the present Civil Revision Petition.

8. The learned counsel for the petitioner submitted that the learned Additional Subordinate Judge failed to see that E.A.No.17 of 2011 filed by the first respondent is barred by limitation. The learned Additional Subordinate Judge ought to have seen that the earlier application filed by the respondents 3 to 5 was dismissed and the learned Additional Subordinate Judge failed to take note of subsequent events. He further submitted that the first respondent/decreet-holder has no independent right to maintain E.A.No.17 of 2011 and their only interest is to recover the decretal amount and the petitioner has offered to deposit the entire sale consideration and other charges.

9. In support of his submissions, the learned counsel for the petitioner relied on the following decisions:

(i) 2003 (4) CTC 225 [M.Ponnupandian Vs. Selvabakiyam and others], wherein at paragraph 11, it has been held as follows:

"11. Therefore, it is well settled now that Section 5 of the Limitation Act, 1963 is not applicable to the petition filed for setting aside the orders passed ex parte under Rule 106 of Order XXI C.P.C. and the provision contained in Sub-rule (4) of Rule 105 (Madras Amendment) is no longer in force. However, it has been held by a learned single Judge of this Court in A.I.R. 1995 Madras 242 (R.Parasuraman vs. Jayalakshmi Ammal and others), that the provisions under the Limitation Act, 1908 are applicable to the proceedings by virtue of the Order XXI Rule 105(4) C.P.C. and rejection of application for condonation of delay as Limitation Act 1963 is not applicable to execution proceedings is not proper. It appears that the judgment of the Division Bench of this Court, 1989 (1) LW 178 (cited above) was not brought to the notice of the learned Single Judge in rendering the decision as such."

(ii) 2015 (4) LW 715 [T.S.Subbaiya Vs. Vengaiyan], wherein at paragraph 20, it has been held as follows:

"20. Therefore, as far as this Court is concerned, a petition to set aside the ex parte order can be entertained even beyond 30 days in execution proceedings, however, the aggrieved person has to explain the delay and if the aggrieved person fails to do so, the application deserves to be dismissed. Hence, I am not inclined to agree with the submission made by the learned Senior Counsel to dismiss the CRP at the threshold based on the judgment of



the Apex Court that was rendered in the light of Order 21 Rule 106 CPC, without reference to amendment of Madras High Court."

(iii) 2011 (5) LW 174 [N.Rajendran Vs. Shriram Chits Tamil Nadu Pvt. Ltd.], wherein at paragraphs 20, 21, 42 and 43, it has been held as follows:

"20. The above conflict was resolved by the High Court by another amendment made with effect from 01.11.1972. The amendment made by the Madras High Court with effect from 01.11.1972 did two things. The first was to delete Sub-rule (4) of Rule 105 and the second was to insert a proviso under Rule (3) of Rule 105. The proviso inserted under Sub-rule (3) of Rule 105 of Order XXI, by the Madras High Court Amendment with effect from 01.11.1972 reads as follows:

"Provided that an application may be admitted after the said period of 30 days, if the applicant satisfies the Court that he had sufficient cause for not making the application within such period."

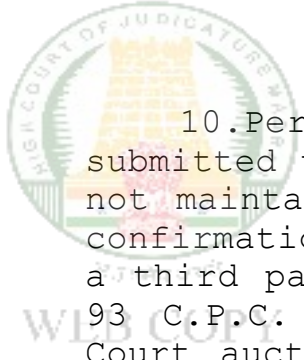
21. The consequences of the above Madras High Court Amendment made with effect from 01.11.1972 were two fold, viz.,

(i) the conflict between Section 5 of the Limitation Act, 1963, and Order XXI, Rule 105(4) got resolved, with the deletion of Sub-rule (4); and

(ii) the power to condone the delay was conferred upon the Executing Court by a rule of procedure traceable to the proviso under Rule 105(3) itself, rather than to an extraneous enactment, such as the Limitation Act, 1963.

42. Act 22 of 2002 contained a provision for repeal and savings under Section 16. Section 16(1) was in pari materia with Section 32(1) of Act 46 of 1999, both of which were identical to Section 97(1) of Act 104 of 1976. Therefore, what should be taken to have been repealed would be those provisions of the State or High Court Amendment, which became inconsistent with the amendments introduced. There is nothing on record to show that the proviso to Sub-rule (3) of Rule 105, which would now become the proviso to Sub-rule (3) of Rule 106 of Order XXI, is, in any way, inconsistent with the amendments introduced either in 1976 or in 1999 or even in 2002. So long as the proviso under Sub-rule (3) is not shown to be inconsistent with any of the amendments, it cannot be stated to have been repealed under the Central Amendment Acts.

43. Therefore, I am of the view that the order of the Court below, refusing to entertain the application on the ground that it was filed beyond 30 days and that there was no power to entertain the same, is not in accordance with the impugned order of the Court below is set aside and the Court below is directed to number the application and take it up for hearing."



10. Per contra, the learned counsel for the first respondent submitted that E.A.No.14 of 2006 filed by the second respondent is not maintainable in law. An application after the auction sale, confirmation of sale and delivery of possession cannot be filed by a third party contrary to the provisions of Order 21 Rules 82 to 93 C.P.C. claiming paramount charge over the property sold in Court auction. The learned Additional Subordinate Judge without giving opportunity to the first respondent to file counter and let in evidence and without setting the first respondent ex-parte, passed an order dated 08.01.2008, which is null and void. As per the amendment to Order 21 Rule 105(3) C.P.C., which introduced Proviso to the said Rule, if a person satisfies the Court for not approaching the Court within 30 days, the Court has power to consider the issue on merits and pass orders. E.A.No.177 of 2008 was dismissed on the ground that Section 5 of Limitation Act is not applicable to the proceedings under Order 21 C.P.C. The learned Additional Subordinate Judge allowed the application considering all the materials on merits by giving cogent and valid reasons.

11. In support of his submissions, the learned counsel for the first respondent relied on the judgment reported in 2011 (5) LW 174 [supra], which was relied on by the learned counsel for the petitioner and also the judgment of the Hon'ble Apex Court in AIR 1967 SC 608 [Janak Raj Vs. Gurdial Singh and another], wherein at paragraphs 4 and 24, it has been held as follows:

"4. ... The result is that the purchaser's title relates back to the date of sale and not the confirmation of sale. There is no provision in the Code of Civil Procedure of 1908 either under O.XXI or elsewhere which provides that the sale is not to be confirmed if it be found that the decree under which the sale was ordered has been reversed before the confirmation of sale. It does not seem ever to have been doubted that once the sale is confirmed the judgment-debtor is not entitled to get back the property even if he succeeds thereafter in having the decree against him reversed. The question is, whether the same result ought to follow when the reversal of the decree takes place before the confirmation of sale.

24. For the reasons already given and the decisions noticed, it must be held that the appellant-auction purchaser was entitled to a confirmation of the sale notwithstanding the fact that after the holding of the sale the decree had been set aside. The policy of the Legislature seems to be that unless a stranger auction-purchaser is protected against the vicissitudes of the fortunes of the suit, sales in execution would not attract customers and it would be to the detriment of the interest of the debtor and the creditor alike if sales were allowed to be impugned merely because the decree was ultimately set aside or modified. The Code of Civil



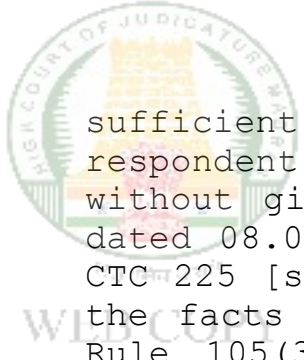
Procedure of 1908 makes ample provision for the protection of the interest of the judgment-debtor who feels that the decree ought not to have been passed against him. On the facts of this case, it is difficult to see why the judgment-debtor did not take resort to the provisions of O.XXI r.89. The decree was for a small amount and he could have easily deposited the decretal amount besides 5 per cent of the purchase money and thus have the sale set aside. For reasons which are not known to us he did not do so."

12.I have considered the arguments advanced by the learned counsel appearing for the parties and perused the materials available on record.

13.The first respondent has filed E.A.No.17 of 2011 to set aside the order dated 08.01.2008 made in E.A.No.14 of 2006. E.A.No.14 of 2006 was filed by the second respondent to set aside the Court auction sale held on 27.12.2004 claiming paramount first charge over the property sold in Court auction. According to the first respondent, the said order was passed without giving opportunity for them to file counter to let in evidence and without setting them ex-parte. The petitioner opposed the same on the ground that the said application is not maintainable, as the same is barred by limitation. Further, the earlier applications filed by the respondents 3 and 4 for the very same relief, was dismissed. These contentions were again reiterated in this Revision. These contentions are without any merit and are not acceptable. As per Proviso to Order 21 Rule 105(3) C.P.C., introduced by the Madras High Court Amendment, an application can be filed beyond the period of 30 days and the same can be decided on merits, if the party satisfies that for sufficient reason, he could not file the same in time. The said Proviso reads as follows:

"Provided that an application may be admitted after the said period of 30 days, if the applicant satisfies the Court that he had sufficient cause for not making the application within such period."

14.It is pertinent to note that earlier E.A.No.177 of 2008 filed by the respondents 3 to 5 to condone the delay of 73 days in filing the application to set aside the order dated 08.01.2008 was dismissed on the ground that Section 5 of Limitation Act is not applicable to the proceedings in Order 21 C.P.C. The learned Additional Subordinate Judge failed to consider Proviso to Order 21 Rule 105(3) C.P.C. introduced by the Madras High Court Amendment. Therefore, the said order cannot be put against the respondents in E.A.No.17 of 2011. The contention of the learned counsel for the petitioner that E.A.No.17 of 2011 is barred by limitation is not correct. The said application is not barred by limitation and has no force in view of Proviso to Order 21 Rule 105 (3) C.P.C. As per this Proviso, an application filed beyond 30 days of the order can be entertained, if the party satisfies with



sufficient reason for the delay. In the present case, the first respondent has contended that without setting them ex-parte and without giving an opportunity to put forth their case, an order dated 08.01.2008 was passed. The judgments reported in 2003 (4) CTC 225 [supra] and 2015 (4) LW 715 [supra] are not applicable to the facts of the present case. In view of Proviso to Order 21 Rule 105(3) C.P.C., the judgment reported in 2011 (5) LW 174 [supra], in fact supports the case of the first respondent. The learned Additional Subordinate Judge considered all these materials and Proviso to Order 21 Rule 105(3) C.P.C., and allowed the application. There is no error in the said order warranting interference by this Court. Further, it is pertinent to note that the learned counsel for the petitioner submitted that the second respondent has withdrawn E.A.No.14 of 2006 after the impugned order. This is not disputed by the learned counsel for the second respondent.

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

Sd/

Assistant Registrar(P&A)

/True Copy/

Sub Assistant Registrar.

To

The Additional Subordinate Judge, Karur.

Copy to:

The Section Officer,
V.R. Section,
Madurai Bench of Madras High court,
Madurai.

+1CC to M/S.G.R.Swaminathan, Advocate, SR.No. 13294

+1CC to M/S.R.Pandivel, Advocate, SR.No. 12893

+1CC to M/S.V.Balaji, Advocate, SR.No. 13095

+1CC to M/S.S.Sivathilakar, Advocate, SR.No. 12943

C.R.P(MD)No.87 of 2013 (NPD)

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