

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.03.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.3421 of 2015
and M.P.No.1 of 2015

1.Dr.Vijayalakshmi
2.V.Priyadarshini
3.V.Nithyanandhini

.. Petitioners

Vs.

1.P.Venkatachalam
2.C.Mani

3.Indian Overseas Bank
Oddapatti Branch
Oddapatti Village
Thookkampatti post
Dharmapuri Taluk and District.

4.K.Krishnan
5.G.Thirumal

.. Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, against the fair and decretal order dated 05.08.2015 made in I.A.No.155 of 2015 in O.S.No.21 of 2008 on the file of the Additional District Court, Dharmapuri.

For Petitioner : Mr.MA.P.Thangavelu

For R1,R3,R4 : No appearance

For R2 : Not ready in notice

For R5 : Mr.P.Mani

ORDER

The Civil Revision Petition is filed against the fair and decretal order dated 05.08.2015 made in I.A.No.155 of 2015 in O.S.No.21 of 2008 on the file of the Additional District Court, Dharmapuri.

2.The petitioners are plaintiffs and respondents are defendants in O.S.No.21 of 2008 on the file of the Additional District Court, Dharmapuri. The petitioners filed the said suit for partition, separate possession and for permanent injunction against the third respondent restraining him in any way from selling the suit properties in public auction for the loans availed by second respondent till partition is effected in this matter. The third respondent filed written statement on 17.03.2008 and first respondent filed written statement on 10.04.2008 and are contesting the suit. The trial commenced and at that stage, the petitioners filed I.A.No.155 of 2015 under Order VI Rule 17 C.P.C.,

for amendment of the plaint to include the relief of declaration that sale deed dated 07.01.2008 executed by the third respondent in favour of fourth respondent and the sale deed dated 21.05.2008 executed by fourth respondent in favour of fifth respondent are null and void.

3. According to the petitioners, first respondent had only 1/4th share in the suit schedule property and he has no right to hypothecate or mortgage the entire suit property. Pending suit, third respondent has sold Item No.2 of the suit property in favour of the fourth respondent, who in turn sold the same to the fifth respondent. The respondents 4 and 5 were already impleaded as defendants 4 and 5 in the suit and therefore, it is necessary to amend the plaint to include the relief of declaration now sought for.

4. The third respondent filed counter affidavit and contended that second respondent is borrower and first respondent is guarantor for the loan obtained by the second respondent from the third respondent and mortgaged the property as collateral security. The respondents 1 and 2 failed to pay the amounts due to the third

respondent. SARFAESI proceedings were initiated and property was sold by public auction by following the procedure. The fourth respondent was the successful bidder and sale was held on 12.12.2007 and the sale was confirmed on 31.12.2007. The Authorised Officer issued a sale certificate in favour of the fourth respondent on 07.01.2008. All the above proceedings before the Debt Recovery Tribunal are known to the petitioners and first respondent. The first respondent filed appeal to set aside the public auction before the Debt Recovery Tribunal, Coimbatore in Appeal S.A.No.46 of 2008 and transferred to the Debt Recovery Tribunal, Madurai and renumbered as T.S.A.No.42 of 2008, Madurai and the same was dismissed on 29.07.2013. The first respondent filed Second Appeal AIR.S.A.No.632 of 2013 before the Debt Recovery Appellate Tribunal, Chennai and the same is pending. The petitioners are aware of the said proceedings, dismissal of the appeal and pendency of the Second Appeal filed by the first respondent before the Debt Recovery Appellate Tribunal, Chennai. The petitioners have not stated that as to how the sale in favour of the fourth respondent is null and void and in view of the same, the relief sought for is not maintainable. The petitioners cannot seek the said relief in the present proceedings and they have to file separate

suit for declaration and the relief now sought for is barred by limitation.

5.The fifth respondent filed counter affidavit and contended that the petitioners have filed present application for amendment, when all the witnesses were examined and the suit was posted for arguments. The petitioners have come out with the present application for amendment only to drag on the proceedings. Earlier the petitioners filed two applications and both the applications were ordered and the petitioners have not sought for present relief for amendment. The petitioners are not diligent enough to seek the present relief at the earliest.

6.The learned Judge considering the averments made in the affidavit, counter affidavit, dismissal of the appeal challenging the sale of properties in public auction and pendency of the Second Appeal filed by the first respondent before the Debt Recovery Appellate Tribunal, Chennai, dismissed the application.

7.Against the said order of dismissal dated 05.08.2015 made in I.A.No.155 of 2015 in O.S.No.21 of 2008, the present Civil Revision Petition is filed by the petitioners.

8.The learned counsel for the petitioners contended that the respondents 4 and 5 were impleaded as defendants 4 and 5 in the suit and the present amendment is only a consequential amendment for impleading respondents 4 and 5 and they did not challenge the order impleading them as defendants and therefore, they cannot now oppose the present amendment. The petitioners have filed suit for partition on 10.12.2007. Pending suit, the third respondent who is party to the suit, sold Item No.2 of the suit property to the fourth respondent on 07.01.2008 and the fourth respondent in turn sold the same to the fifth respondent on 21.05.2008. Hence, seeking the relief of declaration that both the sale deeds are null and void and the consequential permanent injunction is necessary. The learned Judge erred in dismissing the application for amendment.

9.Heard the learned counsel for the petitioners as well as the fifth respondent. Though notice was served on the first respondent and his name is printed in the cause list, there is no representation on behalf of him either in person or through counsel. Though the respondents 3 and 4 entered appearance through their counsel, they are not present today.

10. The petitioners have filed suit for partition against the respondents 1 to 3. According to the petitioners, the suit properties are ancestral properties of their father/first respondent and they are coparceners along with the first respondent. They have 3/4th shares in the suit property and first respondent has only 1/4th share. Pending suit, the third respondent, from whom, the second respondent borrowed money and first respondent stood as a guarantor, has sold Item No.2 of the property to the fourth respondent on 07.01.2008 by invoking provisions of SARFAESI Act. The said property was purchased by the fourth respondent in the public auction and sale certificate was issued in his favour and the fourth respondent in turn, sold the suit property to the fifth respondent on 21.05.2008. The petitioners impleaded respondents 4 and 5 as defendants 4 and 5 in the suit. This shows that the petitioners were aware of the public auction and property purchased by the fourth respondent and subsequent purchase by the fifth respondent. Even though the petitioners impleaded respondents 4 and 5 as defendants 4 and 5 in the suit, at that time, they did not seek the relief of declaration that the sale deeds executed in favour of the respondents 4 and 5 are null and void. After conclusion of

trial, when the suit was posted for arguments, the petitioners have come out with the present application.

11. From the materials available on record, it is seen that the fourth respondent has purchased the property on 07.01.2008 and sold the same to the fifth respondent on 21.05.2008. After seven years of the sale, the petitioners have come out with the present application and they have not given any reason for seeking present amendment before commencement of trial, even though the respondents 4 and 5 were impleaded as defendants 4 and 5 before commencement of trial. As per Order VI Rule 17 C.P.C., after commencement of trial, amendment can be allowed only if the party alleges and proves that inspite of due diligence, he could not have filed application for amendment before commencement of trial. Further, the Civil Court has no jurisdiction to entertain and decide the claim challenging the proceedings in SARFAESI Act. The first respondent/father of the petitioners has taken proceedings to set aside the decree passed by the Debt Recovery Tribunal and the Second Appeal filed by the first respondent is pending before the Debt Recovery Appellate Tribunal, Chennai. In view of all the above

facts, there is no illegality or irregularity warranting interference by this Court with the order of the learned Judge dated 05.08.2015.

12.In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

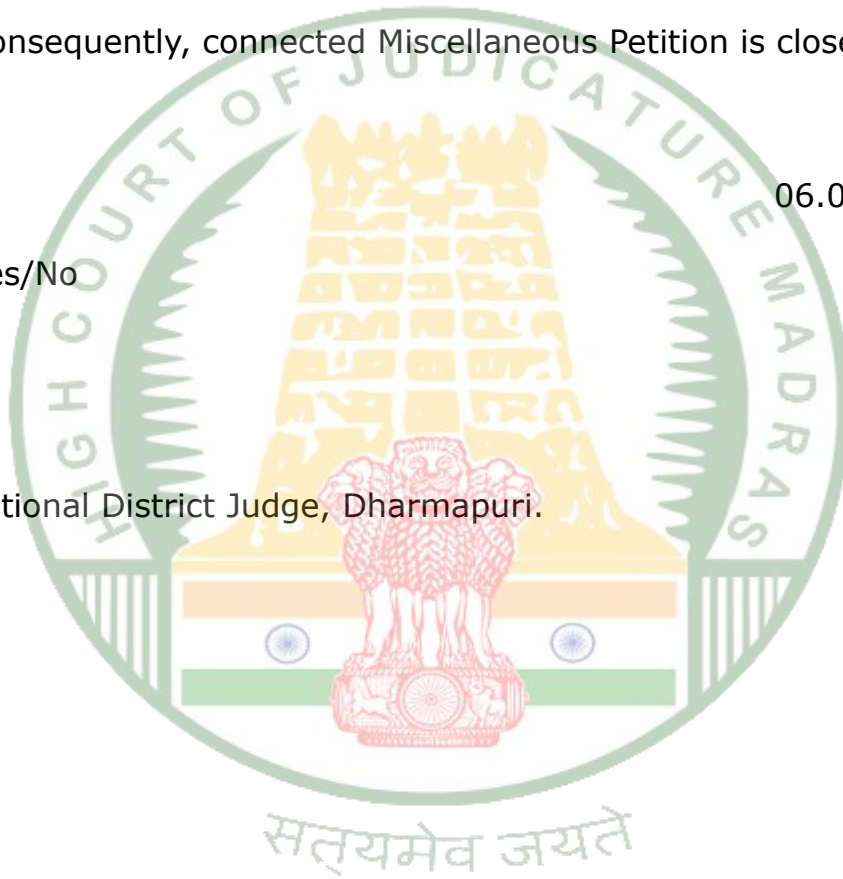
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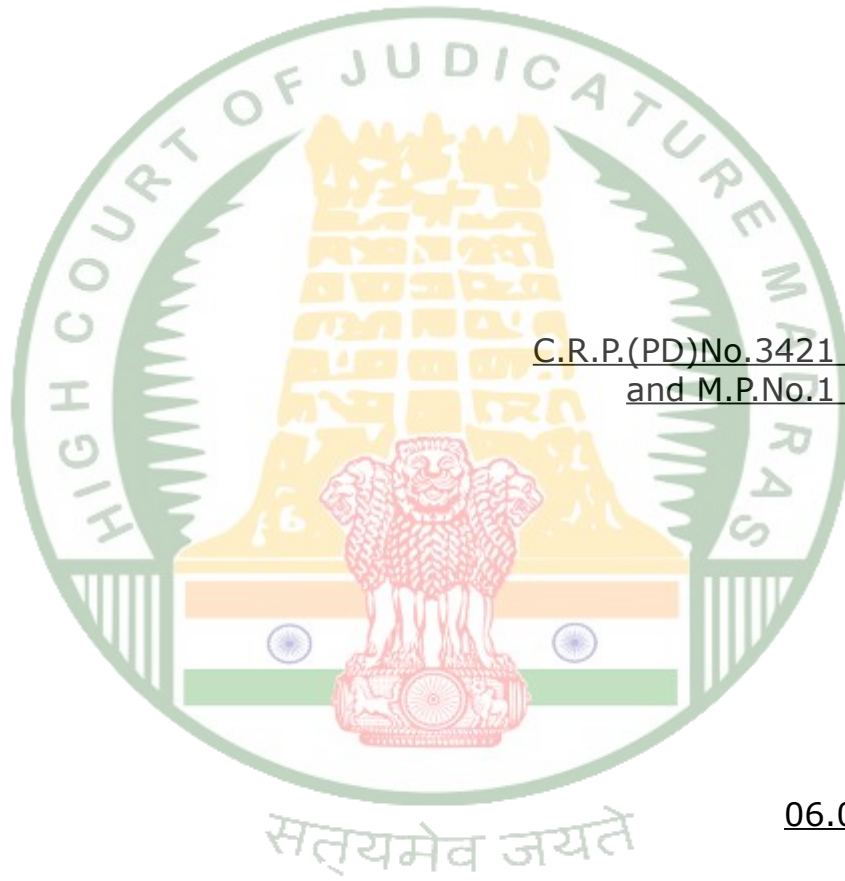
The Additional District Judge, Dharmapuri.



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V.M.VELUMANI,J.

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