

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
29~03~2019	23~04~2019

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

S.A.No.547 of 2001 and
C.R.P. (NPD).No.299 of 2003

S.A.No.547 of 2001

1. A.Kalyanasundaralingam
2. A. Vijayalingam (Deceased)

...Appellants/Appellants/Defendants

3. Mrs.Jaikani
4. Jaishree Lingam(Minor)
5. Padmasree Linga(Minor)
6. Linga Bharath (Minor)
7. Selva Kani, (Minor)

(Minors are rep. by
3rd Appellant
Mrs.Jaikani)

...Appellants 3 to 7 are brought on
record as LRs of the deceased 2nd
Appellant vide order dated.27.02.06
made in CMP.2823 & 2824/06.

-Vs-

Smt. Selvamani

...Respondent/Respondent/Plaintiff

C.R.P. (NPD) No.299 of 2003

1. A.Kalyanasundaralingam
2. A.Saravanalingam
3. A.Vijayalingam(deceased)
4. Mrs. Jai Kani
5. Jaishree Lingam (Minor)
6. Padmasree Lingam(Minor)
7. Linga Bharath (Minor)
8. Mrs. Selva Kani

...RevisionPetitioners/Applicants/
Constructors/3rd parties

Versus

Smt. Selvamani

... Respondent/Respondent/
Petitioner/3rd Party

Second Appeal filed under Section 100 of C.P.C., against the Decree and Judgement of the Principal District Judge, Coimbatore in A.S.No.153 of 1997 dated 10.11.1998 confirming the Judgment and Decree of the First Additional District Munsif, Coimbatore in O.S.No.1846 of 1994 dated 30.04.1997

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Civil Revision Petition filed under Section 115 of C.P.C., to set aside the fair and decreetal order made in E.A.No.455 of 2002 in E.P.No.29 of 2001 in O.S.No.750 of 1981 dated 19.02.2003 on the file of the II Additional Sub-Judge, Coimbatore.

COMMON JUDGMENT

Aggrieved over the order rejecting the application filed under Order II rule 97, the present Civil Revision Petition is filed. Similarly, Aggrieved over the decree and judgment passed by the First Appellate Court dismissing the appeal in A.S.No.123 of 1997, confirming the decree and judgment passed by the trial Court in O.S.No.1846 of 1994 the present Second Appeal is filed. Since the subject matter in both CRP and Second Appeal is one and the same and the parties are also one and the same, this Court is inclined to dispose of both the matters in a common judgment.

2. The brief facts leading to file this Civil Revision Petition are as follows:

2.(a) The Petitioner filed an application to obstruct the delivery, ordered by the trial Court on the ground that they purchased the suit property vide sale deed dated 27.3.1986, 6.12.2001 and 14.3.2002. The decree passed in O.S.No. 750 of 1981 is not valid and not binding on the suit property. The Petitioner is also filed O.S.No.230 of 2006. Similarly, the respondent also filed O.S.No.1846 of 1994 and sought injunction restraining the petitioner not to demolish the building. As against, the decree and judgment in O.S.No.1846 of 1994 S.A.No.547 of 2001 is pending. Hence, they object delivery of possession.

2.(b) The respondents filed counter stating that the suit property originally belong to one Lakshmi Ammal and others. In pursuant to the agreement dated 27.1.1979, a suit was filed in O.S.No.750 of 1981 against the said Lakshmi Ammal and also the vendors of the petitioner who stated to have purchased the property on 18.11.1981. Above suit was decreed and appeal was dismissed and SLP also dismissed. It is the contention of the respondent that the above suit itself the sale in favour of the petitioner/vendor held to be invalid. The respondent an Assignee of decree in O.S.No.750 of 1981. His assignment is also recognised in Execution Petition No.87 of 1987. Revision filed against which was also dismissed. Sale deed executed in his favour and he has also filed E.P.for delivery of possession. One Saroja, Predecessor in title of the petitioner has also filed O.S.No.985 of 1983. The above suit was also dismissed. The said Saroja also filed E.A.which was also dismissed. The Petitioner suit in O.S.No.230 of 2002 also dismissed. Hence, prayed for dismissal of the suit. The execution court considered the entire issue and dismissed the application filed by the petitioner, as against which this Revision is filed.

3. The brief facts leading to file Second Appeal are as follows:

3.(a) The plaintiff is assignee of the decree obtained in O.S.No.750/1981. The assignment also recognised by the Court. Hence, he filed a suit restraining the defendants not to demolish the building and put up construction. The Defendant filed written statement in the above case stating that originally suit property was purchased in Survey No.5/272 new Survey No.5/295 and door No.22/42 from one Bramaiah. Bramaiah purchased the property from one Subramaniam. The said

4. On the side of the Plaintiff 3 witnesses were examined Exs.A.1 to A.4 marked. The Defendant side D.W.1 examined. Exs.B.1 to B.20 marked. The Trial Court has decreed the suit. The appeal filed against the above decree and judgment was also dismissed in A.S.No.153 of 1997. As against which the present Second Appeal is filed.

5. The Appellant has raised the following Substantial Questions of law in the second appeal:

i) Whether the courts below are right in granting the decree for injunction, when the Plaintiff has neither title nor possession of the suit property, especially when the plaintiff is only a holder of specific performance decree. which has not been put into execution for effecting sale deed and seeking relief of possession by execution?

ii) Whether the Courts below in granting decree for Injunction without giving finding of possession, which is the necessary condition for granting relief for injunction?

iii) Whether the courts below are right in granting the decree for injunction, with regard to the property 100' x 100', when the specific performance decree is concerned with 100' x 11' the plaintiff cannot claim of 100' x 100', the plaintiff cannot claim even assuming without admitting the Plaintiff is the title holder of 100' x 11'?

iv) Whether the courts below are right in granting decree for injunction, when the plaintiff has no title to the suit property?

6. The learned counsel appearing for the Revision Petitioner as well as the Appellant in the second appeal submitted that suit property originally belonged to one T.J.Lakshmi Ammal and others. They mortgaged the property in favour of one Vasuvambal by registered Mortgage Deed dated 10.12.1974, 12.03.1975 and 23.08.1975. The said Mortgagee Vasuvambal has filed a suit in O.S.No.1092 of 1979 as against the mortgagor. The above suit was decreed on 27.10.1981. Preliminary decree passed with time limit for payment in three months. After the above suit Lakshmi Ammal has sold the above property in favour of one Karunanidhi Ravikumar and Subramania Achari under two sale deeds dated 18.11.1981. Ex.B.4 marked in O.S.No.1846/1994 clearly indicate that the sale is made only to discharge the mortgage amount. Thereafter, the mortgage amount has been discharged by the husband of the mortgager under registered receipt which is also filed as Ex.B.3 and Ex.B.4 in the earlier suit. The full satisfaction Memo has also recorded on 23.2.1983 in O.S.No.1092 of 1979. According to the learned Senior Counsel since the property has already mortgaged and the mortgage amount discharged the property conveyed by the mortgagor in favour of the predecessor in title of the Revision Petitioner is valid. Whereas in the suit filed by the one of the agreement holder based on the agreement dated 29.01.1979 in O.S.No.750 of 1981 these facts has not been decided.

Thereafter sale deed is registered in his name. It is his contention that the mortgage was executed in the year 1974 any sale deed executed in pursuant to the decree of the Court cannot and does not vest any proprietary right in favour of the decree holder since the property is already become encumbered by mortgage prior to the agreement dated 29.1.1979 and execution of the sale must be held to be a lis pendense sale. Earlier suit there was no issue with regard to the right of the mortgagor validly entering into agreement of the property when the mortgage was very much in existence. Therefore, the findings in the earlier suit is not binding on the Revision Petitioner as well as the Appellant in the second appeal. They have purchased the property from one Bramaiah. In fact he has purchased the same from one Subramania Achari, he has purchased from the Lakshmi ammal and her legal heirs. Further, second item of property also purchased from one Saroja, she has purchased from one Ravikumar, who has purchased from Lakshmi Ammal. Similarly, in respect of third item of property also they have purchased from the predecessor in title. Since the earlier suit there was no issue with regard to the right of the mortgagor to execute the agreement during the pendency of the mortgage those findings are not binding on this petitioner. On the date of purchase of their predecessor, mortgage was discharged. The predecessor in title has become absolute owner of the property. Hence, the trial court as well as the execution court dismissing the plea of the appellant/revision petitioner is not sustained in law. In support of his submission he relied upon the judgment reported in Rakesh Kumar Mahajan & Ors. v.State Bank of Bikanar & Jaipur & Others.[2009 0 AIR (Ori) 129].

8. The learned counsel appearing for Respondent in the Revision Petition as well as the Second Appeal has contended that the Revision as well as Second Appeal are nothing but re-litigation. In earlier round of litigation, in O.S.No.750/1981 the right of the parties and the sale by the predecessor in title of the Revision Petitioner there was a specific issue. Issue No.3 is only with regard to the title of the predecessor in title and the issue was decided as against the predecessor in title of the revision petitioner as well as the appellant and the Court has held sale by predecessor in title of the Revision Petitioner/Appellant is a collusive one and they have not the bona fide purchasers. The appeal and cross appeal filed against the above judgment was confirmed by the Division Bench of this Court and this Court has held that the sale in favour of the predecessor in title of the revision petitioner/appellant is not valid and they are not the bona fide purchasers. The above sale is a result of collusion among the parties. SLP filed against the above judgment is also dismissed. This petitioner / appellant /pendente lite purchaser that too from the the person who have no title and the title is also held not valid by the courts. Therefore the earlier suit operates as res judicata since the issue in the previous suit is directly and substantial issue in a former suit already decided which reached finality. hence it is the contention that the Revision as well as Second Appeal is nothing but re-litigation. The courts below have clearly considered the entire facts and dismissed and application filed Order XXI Rule 97 of CPC and also decreed the suit filed by the Respondent. The respondent in fact assignee of the decree holder in earlier suit in O.S.No.750/1991. His assignment has also recognised by the Courts. CRP filed against

1. Gorie Gouri Naidu and another v. Thandrothu Bodemma and others [(1997) 2 SCC 552]
2. Tek Chand and others v. Deep Chand other others [(2001) 4 SCC 488]
3. M. Naghabhushana v. State of Karnataka and others [(2011) 3 SCC 408]
4. Usha Sinha v. Dina Ram and others [(2008) 7 SCC 144]

10. In the light of the above submissions, now I proceed to decide the Second Appeal first. In the Second Appeal the respondent herein filed a suit on the basis of his assignment of decree and sought Permanent Injunction against the defendnat viz., the Appellant herein. The respondent defence to the effect that the suit property was purchased by them. The predecessor had valid title and finding in the earlier suit in O.S.No.750 of 1981 is not binding on them. The trial Court as well as the First Appellate Court considered the entire documents and held that the respondent is a lawful owner and thereby granted injunction.

11. The admitted facts are relevant to decide both the Second Appeal and Civil Revision Petition. The suit property originally belonged to one T.J.Lakshmi Ammal and others. The said Lakshmi Ammal said to have executed mortgage deeds in Document Nos.4758 of 1994, 1022 of 1975, 3087 of 1975 in favour of one Vasuvambal. The said Mortgagee Vasuambal had filed a suit in O.S.1092 of 1979 before the Sub-Court, Coimbatore, for enforcement of Mortgage. Prior to filing of the suit, the said Lakshmi Ammal original owner pending mortgage has executed unregistered sale agreement dated 29.1.1979 in favour of one Kattumal sait. The suit filed by the Mortgagee in O.S.No.1092 of 1979 was decreed on 27.10.1981, granting three months time to pay the mortgage money. After decree of the above suit, the original owners have sold the property about 858 sq.fts. in two sale deeds in favour of one Karunanidhi, Ravikumar both minors represented by their Guardian Subramania Achari.

12. It is the contention of the Revision Petitioner while executing the above sale deeds mortgagor husband paid the mortgage money on 23.02.1983. The full satisfaction was also recorded in O.S.No.1092 of 1979. In the meanwhile the suit filed by Kattumal Sait based on unregistered agreement dated 29.01.1979 in O.S.No.750 of 1981 which was decreed on 24.1.1984. It is relevant to note that the agreement holder has filed a suit for specific performance not only against his vendors viz., Lakshmi Ammal and others but also purchasers who stated to have purchased on 18.11.1981 vide document No.6121 of 1981 and 6122 of 1981. In the above suit the purchaser in the above documents from the original owner Lakshmi Ammal were arrayed as defendants No.8,9,10. The suit though filed for specific performance all them were made as parties and there is specific allegations that during the existence of the agreement dated 29.1.1979 the vendor in collusion with other defendants executed sale in favour of the defendants 8 to 10 dated 18.11.1981. In the above suit there was a specific issue with regard to above sale i.e., issue No.3. Following are the issues framed in the

defendants was nominal and not intended to be acted upon as contended by the defendants 1 to 6?

3. Whether the defendants 8 to 10 are bona fide purchasers for value as claimed by them?

4. Whether the abandonment pleaded by the defendants 1 to 6 is true?

5. Whether the Plaintiff committed breach of the agreement?

6. To what relief?

13. In the above suit the trial Court found that the sale deed in favour of the defendants 8 to 10 came into existence only with the intention to defraud as many people as possible and finally held that the Defendants 8 to 10 are not the bona fide purchaser. It is also curious to note that in the above suit one Muthuraj Nadar has also arrayed as one of the defendants viz., 7th defendant, who has also relied upon the agreement in his favour dated 5.4.1977. His contention has also been negated by the Court. As against the decree and judgment of the Trial Court two appeals in A.S.No.170 and 171 of 1984 were filed before this Court. 7th defendant Muthu Nadar husband of the respondent has also filed separate appeal in A.S.No.171 of 1984. The defendants 8 to 10 viz., Predecessor in title of the present revision petitioner and appellant filed cross objection. This respondent has filed Second Appeal against the decree and judgment passed in O.S.No.671 of 1982 filed for declaration and injunction. During the pendency of this appeal the respondent and the decree holder in O.S.No.750 of 1981 were entered into a compromise whereby the appeal was disposed. Whereas the cross objection filed by the Defendants 8 to 10 dismissed by this Court. In the above appeal the alleged discharge receipt for proving the mortgage money in pursuance to O.S.No.1092 of 2004 was also issued. Those receipts were disbelieved by this Court and finally this court has held that the sale is a result of collusion and executed only to unjust enrichment and held that they are not the bona fide purchaser, ultimately dismissed the cross objection.

14. It is also to be noted that in view of the compromise recorded in S.A.No.1879 of 1994, the respondent became assignee of the decree. As against the dismissal of Second Appeal and Cross objection, SLP No.4410 of 1987 was filed by the Defendants 8 to 10. The Honourable Supreme Court dismissed the SLP and held that it is open to the petitioner if so advised to file a suit of recovery of money said to have been received by the respondents. The matter has reached finality. As far as the title of one Ravi kumar, Karunanidhi, Subramania Achari, in sale deed dated 18.11.1981, in fact the findings in the earlier round of litigation clearly show that the sale deed in favour of one Ravikumar, Karunanidhi and Subramania Achari was not valid and found to be collusive one. Thereafter, in pursuance to the assignment in favour of the respondent he has filed E.A.No.87 of 1987, for recognise the assignment of the decree in their favour. The same was ordered by the Court on 21.2.1993. There also it appears that O.S.No.985 of 1993 was filed by one Saroja

on 31.3.2016. Appeal filed by Saroja against the dismissal of the suit in O.S.No.985 of 1996 appears to have dismissed on 31.1.2002 in A.S.No.86 of 2001. Prior to that challenge is also made in CRP No.1574 of 1993 recognising the assignee viz., the respondent, the same also dismissed on 08.12.1994. These are all undisputed facts. The Revision Petitioner traces the title from the defendants 8 to 10, who are the parties to the suit in O.S.No.750 of 1981 their sale held invalid and reached finality. In fact, one Bramaiah has purchased the property from Subramania Achari on 25.2.1983 in respect of 390 sq.ft. Thereafter, it appears that said Bramaiah sold the above extent to Kalyanasundaralingam, the revision petitioner and another in respect of first item of property. In II item of the property appears to have purchased from the 8th and 9th defendants in the suit in O.S.No.750 of 1981 and O.S.No.73 of 1981 filed by one Saroja. Her suit and appeal were also dismissed. The said Saroja appears to have sold 468 sq.ft. in favour of the revision petitioner on 6.12.2001. Similarly item no.3 also purchased by the Revision petitioner during the pendency of all these proceedings.

15. The trial court in fact in O.S.No.1846 of 1994 which is subject matter of present second appeal has gone through all the documents particularly the decree and judgment in O.S.No.750 of 1981 and subsequent purchase made by Bramaiah Ex.A.1 to A.4 and also Ex.B.1 to B.4. In executing court application filed under Order XXI Rule 97 by revision petitioner, almost all the documents have been referred by the Execution Court. The Execution Court also considered the previous suits filed by the vendors of the revision petitioners and finally dismissed the application. The facts narrated clearly indicate that the issue in respect of the title of the property was already decided as against the revision petitioners vendor and their vendors predecessors. When the issue is directly and substantially in issue in the former suit between the same parties or between the parties under whom they or any of their claim, litigating the same issue in a subsequent litigation certainly not permissible. Such issue has already decided in a former suit elaborately operate as res judicata not only against the parties to the suit or any person claiming the right under the parties to the suit in O.S.No.750 of 1981.

16. The learned counsel contention that since the previous suit there was no specific issue as to whether after executing the mortgage deed the original owner had no right to execute the agreement therefore previous judgment would not operate as res judicata cannot be countenanced. in gone into save could not operate as res judicata. No doubt in a judgment cited by him reported in 2009 AIR Orissa 1239 it is held as follows:

"8.

We are of the considered view that since the property in question had been mortgaged in favour of the Bank, execution of the sale deed pursuant to the decree of the court, cannot and does not vest any propriety right in favour of Kantilal Juunjhuwadia since, the property in question had already become encumbered by the mortgage prior thereto i.e., since 21.7.1999, and , therefore, even though the sale was effected by way of

misrepresentation on the part of Smt. Narmada Devi Patodia. Therefore, since we hold that Kantilal Jhunjhuwadia acquired no proprietary rights in the property in question, he could not, in turn, pass on any better title than what he possessed by virtue of the sale deed in his favour. Any judgment or decree, which is not in conformity of law is void and remains unexecutable as it defeats the public policy (vide *Ferozi Lal Jain v. Man Mal & Anr.* AIR 1970 SC 794; *K.K. Chari v. R.M. Seshadri*, AIR 1973 SC 1311).

In the instant case, the Civil Court had no opportunity to examine and determine the issue as to whether after executing the mortgage deed with the Bank, Smt. Narmada Devi Patodia could validly transfer the title over the property even by execution of decree of the civil court in a suit for specific performance. Therefore, in our opinion, the decree could not be worth execution. More so, the suit was decreed on 31.1.2002 during the pendency of the recovery proceedings before the Debt Recovery Tribunal in O.A.No.340 of 2001.

Accordingly, we are of the view that since the present petitioners claim their title through a subsequent sale effected by the said Kantilal Jhunjhuwadia in their favour, they are, merely 'lis pendens' purchasers and cannot derive any better title than what was vested with by their vendor."

17. In the above case the facts are entirely different. When the bank have already issued possession notice under Section 13 (2) of SARFAESI Act and that scenario the court has held that decree obtained for specific performance in a Civil Court is not affected the mortgage. Whereas in a given case, though the suit filed for enforcement of agreement dated 29.01.1979 the very sale in favour of the Karunanidhi, Ravikumar and Subramania Achari was assailed. There was specific issue in the above suit. Issue No.3 specifically framed with regard to the above sale deeds and all the allegations now put forth by the revision petitioner with regard to the discharge of mortgage is also decided. In the Second Appeal also a Division Bench of this Court has gone into the above issue and held that sale subsequent to the agreement is not a bonafide one and result of collusion. The SLP filed against the above judgment is also dismissed.

18. In *Gorie Gouri Naidu's* case (supra) the Honourable Supreme Court has held that inter-party judgment rendered by the court of competent jurisdiction, even if erroneous, would bind the parties and held that previous suit deed of gift of immovable property was declared to be invalid, held, that decision would be binding on the donees and it would not be open for them to claim any title in respect of the same property on the ground that in view of a family settlement the opposite party would be estopped from challenging validity of the

case.

20. In M. Nagabhushana's case (supra) in paras 12 and 13 the Honourable Supreme Court has held as follows:

"12. The principles of Res Judicata are of universal application as it is based on two age old principles, namely, 'interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the other principle is 'nemo debet bis vexari, si constet curiae quod sit pro un aet eadem cause' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should for ever set the controversy at rest.

13. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of Res Judicata is not a technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties."

21. In Usha Sinha v. Dina Ram and others [(2008) 7 SCC 144] the Honourable Apex Court has held that obstruction by purchaser pendente lite has no independent right to property to resist, obstruct or object execution of a decree. Resistance at the instance of transferee of a judgment debtor during the pendency of the proceedings cannot be said to be resistance or obstruction by a person in his own right and, therefore, is not entitled to get his claim adjudicated.

22. Considering the above said principles and also having regard to the fact that issue with regard to the title of the suit property has already reached finality now the revision petitioner/Appellant cannot reagitate once again. Admittedly the title to the predecessor is held to be invalid. They did not derive any title in view of the subsequent purchase. As far as Item No.1 of the property from the 8th defendant in the original suit did not convey any title. Similarly item No.2 of the property from the 9 and 10 defendants also did not convey any

case and the attempt of the revision petitioner is nothing but re-litigation of the issue. Several proceedings referred above in the previous part of the judgment clearly indicate these proceedings are nothing but relitigation. There is no merit in this revision as well as second appeal. Substantial Questions of Law answered against the appellant.

24. In the result, both the Civil Revision Petition and Second Appeal are dismissed. No costs.

ggs

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1. The Principal District Judge,
Coimbatore.
2. The II Additional Sub-Judge,
Coimbatore .
3. The First Additional District Munsif,
Coimbatore.

+1cc to Mr.R.Bharath Kumar, Advocate, SR.No.40517
+2cc to M/s.R.Radha Pandian, Advocate, SR.No.39614 & 39615

S.A.No.547 of 2001

and

सत्यमेव जयते
C.R.P. (NPD) .No.299 of 2003

Kak (29/04/2019)

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