

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 04.10.2018

Delivered on 21.01.2019

Coram

The Honourable Ms.Justice P.T.ASHA

C.R.P.PD.Nos.397 & 398 of 2009

and

M.P.No. 1 of 2009

Mrs.Stella Pandian .. Petitioner in both petitions

Vs.

1.Aneshiya Steel Wings,
Rep.by its Power of Attorney,
M.A.Rahamathullah,
No.38, Nainiappan Street,
Mannady,
Chennai 600 001.

.. 1st Respondent / Plaintiff

2.Majestic Hardwares,
No.1/113, Medavakkam Road,
Ullagaran,
Chennai 600 091.

3.Mrs.R.Ameena,
Prop.Majestic Hardwares,
No.1/113, Medavakkam Road,
Ullagara,
Chennai 600 091.

4.M.Rahamathllah,
Manager,
Majestic Hardwares,
No.1/113, Medavakkam Road,
Ullagaran,
Chennai 600 091.

.. Respondents in both petitions

Constitution of India to set aside the order dated 31st October, 2008 made in I.A.Nos.19517 and 19518 of 2007 in O.S.No.10058 of 1996 on the file of the XI Assistant Judge, City Civil Court, Chennai.

For Petitioner : Mrs.Vasudha Thiyagarajan

COMMON ORDER

These Civil Revision Petitions are filed to set aside the order dated 31st October, 2008 made in I.A.Nos.19517 and 19518 of 2007 in O.S.No.10058 of 1996 on the file of the XI Assistant Judge, City Civil Court, Chennai.

2.The third party claimant is the revision petitioner before this Court in both the revision petitions. CRP.No.397 of 2009 arises against the order passed in I.A.No.19517 of 2007 and CRP.No.398 of 2009 is filed against the order in I.A.No.19518 of 2007, both being interlocutory proceedings in O.S.No.10058 of 1996 on the file of the learned XI Assistant Judge, City Civil Court, Chennai. I.A.No.19517 of 2007 is an application filed to implead the petitioner/third party claimant as defendant in the suit O.S.No.10058 of 1996 and I.A.No.19518 of 2007 is an application filed under the provisions of Section 94 (e) read with order 21 rule 58 and 151 of CPC to direct the Registrar, City Civil Court, Madras to execute the cancellation of the Sale Deed dated 14.02.2003, registered in the office of the Sub

Registrar, Ashok Nagar, thereby, canceling the sale of the property situate at AP Plot No.86, 1st Street, 1st Sector, K.K.Nagar, Chennai 600 078 with a building thereon comprised in Survey NO.394/1, Kodambakkam Village, effected in favour of the 1st respondent pursuant to the Execution Petition filed by him in E.P.No.2306 of 1999 in O.S.No.10058 of 1996. A brief resume of the events proceeding the filing of the revision petitions are narrated herein below:

The first respondent herein, which is a proprietorship concern, is carrying on business in wholesale and had been purchasing Iron and Steel from the 2nd respondent herein from the year 1981. The third respondent is the Proprietrix of the second respondent concerned and the fourth respondent is her husband and Manager of the second respondent concern. The first respondent would contend that as on 26.03.1991 a sum of Rs. 1,26,774/- was due from the second respondent and despite several remainders, there was no response from the second respondent, and thereafter on 07.06.1991, the third and fourth respondents had issued the promissory note for a sum of Rs.1,40,000/- to the first respondent and they had also deposited the title deeds with reference to some of the properties between months of August and October 1991. They had also issued three cheques, all of which had bounced, constraining the first respondent/plaintiff to initiate proceedings under Section 138 of the Negotiable Instruments Act. A lawyer's notice dated 11.02.1993 was

issued by the first respondent calling upon respondents 2 to 4 to pay a sum of Rs.1,91,330/- It was also the case of the first respondent that one of the security that was offered by the second respondent was the subject matter of testamentary suit in TOS.No.35 of 1988 and the other property was of a very low value. Since no payments were made by respondents 2 to 4, the first respondent had filed O.S.No.10058 of 1996, on the file of the XI Assistant Judge, City Civil Court, Madras, for the recovery of a sum of Rs.1,91,330/- together with interest at the rate of 22% per annum, on the principal amount of Rs.1,40,000/- from the date of plaint till the date of payment.

Dates	events
08.10.1998	Ex-parte decree passed in O.S.No.10058 of 1996 for a sum of Rs.4,09,783.
E.P.2306 of 1999	E.P.2306 of 1999 filed by the decree holder for attachment and sale of the property afford as security.
	Notice sent in EP to the Judgment Debtor(JD) returnable by 18.02.2000.
18.02.2000	VAKALATH filed by Judgment Debtor(JD).
	No Counter no payment.
14.07.2000	Property attached.
04.10.2002	Property auctioned and sold.
03.12.2002	Sale is confirmed in E.P.No.2306 of 1999
	E.P.No.444 of 2003 filed for

Dates	events
	delivery of possession.
04.09.2003	E.A.No. 5130 of 2003 filed by the Judgment Debtor(JD) in E.P.No. 444 of 2003 to set aside the ex-parte order of delivery dated 26.08.2003 was filed on 04.09.2003 E.A.421 of 2005 filed by Judgment Debtor in E.P.No.444 of 2003 to reopen the execution proceedings for leading oral evidence.
09.09.2003	E.A.No 4892 of 2003 filed by the revision petitioner in E.P.No.2306 of 1999 for raising the Court attachment dated 14.07.2000.
31.01.2004	E.A.No.652 of 2004 filed in E.P.No. 444 of 2003 to set aside the sale dated 14.02.2003. This application has filed by the revision petitioner herein.
30.07.2004	By a common order E.A.Nos. 4892 of 2003 and E.A.No.652 of 2004 filed by the revision petitioner is dismissed after context.
	AS.No.316 and 317 of 2004 filed by the revision petitioner before the Second Additional City Civil Court, Chennai against the order passed in E.A.Nos 4892 of 2003 and 652 of 2004.
	The appeal is withdrawn with liberty to file a comprehensive suit afresh. Liberty was granted.
	I.A.No.4367 of 2004 filed by the Judgment Debtor (JD) for setting aside the ex-parte decree dated 08.10.1998.
	I.A.No.4368 of 2004 filed by the judgment debtors 2 and 3 to condone delay in filing application

Dates	events
	to set aside the ex-parte decree dated 21.09.2005, I.A.No.4367 and 4368 of 2006 allowed on condition that respondents 2 and 3 deposit a sum of Rs.5,000/- to the first respondent counsel on or before 29.09.2005 and the said order has been complied with. CRP.No.1632 of 2006 and 1727 of 2006 filed, challenging the order passed in I.A.No. 4367 and 4368 of 2004 dated 30.11.2006. By common order this Court in CRP.No.1632 and 1627 of 2006 directs respondents 2 to 3 to deposit the sum of Rs. 75,000/- to the credit of the suit within a period of four weeks by a common order.
31.01.2007	Ex-parte decree 10058 of 1996 is set aside.
	SLP.No.3534 of 2007 filed by the first respondent against the order in CRP is dismissed.
19.04.2007	The petitions subject matter of this revision is filed.

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3.The respondent has resisted the above petitions by inter alia contending that the very applications are not maintainable since the suit is a summary suit and no relief is claimed against the revision petitioner, the suit being one for a recovery of money against respondents 2 to 4 herein. The first respondent has also contended that the revision petitioner had earlier filed a petition under the

provisions of order 21 rule 58 CPC in E.A.No.4892 of 2003, which was dismissed after a detailed contest and therefore, the present application in I.A.No.19518 of 2007 is not maintainable and is hit by the provisions of res-judicata, particularly when the revision petitioner is not challenging the dismissal of E.A.No 4892 of 2003 on 30.07.2004.

4.The learned XI Assistant Judge, City Civil Court, Chennai on a detailed consideration of the records relating to the execution proceedings, the documents before him and the submission of the counsel and the party-in-person had dismissed both the applications. The learned judge has observed that the revision petitioner is neither a proper nor a necessary party to the proceedings as there is no privity of contract between the petitioner and the plaintiff/the first respondent herein. Therefore, the learned Judge was of the opinion that the revision petitioner was not a necessary party to the suit.

5.As regards, I.A.No.19518 of 2007, the learned judge has, in very clear terms observed that E.A.No.4892 of 2003 was heard as a claim petition, in which evidence was taken and documents were marked and only after such a detailed consideration of the issues raised, the Executing Court has dismissed E.A.No.4892 of 2003. As against the said dismissal, the revision petitioner has not taken any steps whatsoever to file an appeal though the order was passed as

early as on 30.07.2004. Though the appeals in A.S.No.316 and 317 of 2004 was filed before the Second Additional City Civil Judge, Chennai, the same were not contested but the revision petitioner has sought leave of the Court to withdraw the said appeals with liberty to file a fresh suit. The learned Second Additional City Civil Judge, Chennai was pleased to grant the liberty to the revision petitioner and as a result, the appeals came to be withdrawn.

6. After exhausting all the remedial avenues before the Executing Court, the revision petitioner has come forward with the two applications, which are the subject matter of these revisions, viz., the dismissal of the interlocutory applications in I.A.No.19517 and 19518 of 2007 by the learned 11th Assistant Judge, City Civil Court, Chennai. Since the respondents could not be served despite the best efforts, this Court by order dated 14.08.2018 had permitted substituted service to the respondents by publication in one issue of Makkal Kural. Such publication has also been effected on 23.08.2018.

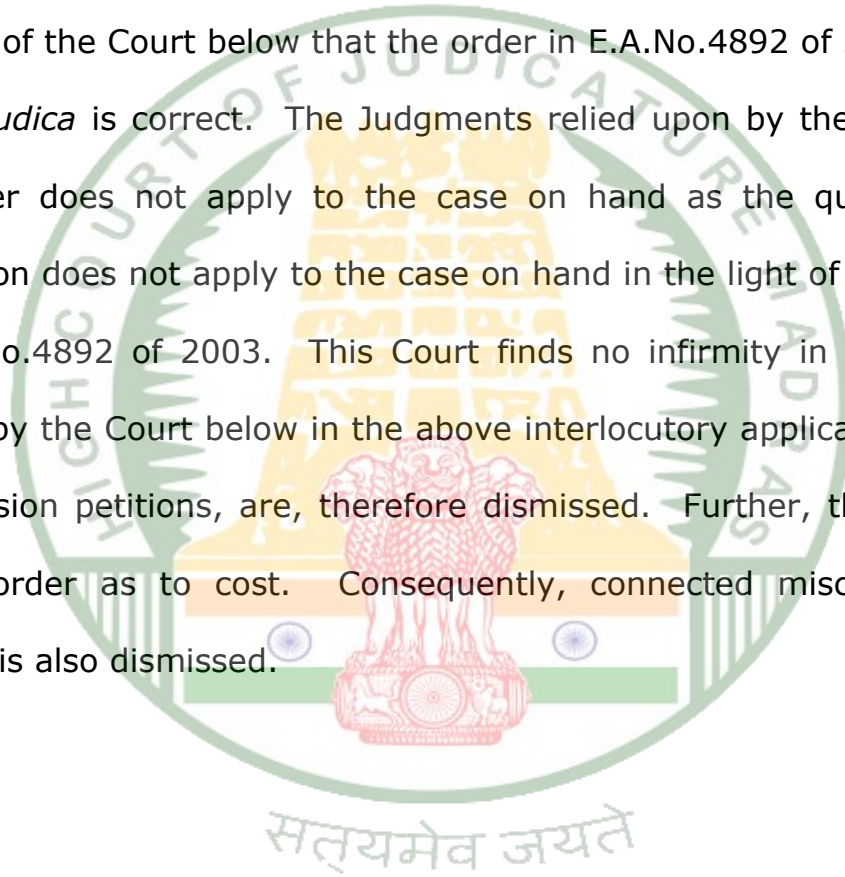
7. Heard Mrs. R.Vasuda Thiagarajan, learned counsel for the petitioner. She would argue that once, the ex-parte decree has been set aside, any sale which has been effected pursuant to the ex-parte decree stands nullified and the parties as well as properties should be restored back to the position prior to the decree. She would further argue that by virtue of the above, the sale in favour of the first respondent would stand nullified. Therefore, it is her contention that the parties should be restituted back. In support of the above contentions, she has relied upon the following judgments:-

1. 1990(1) SCC 513 – Chinnammal and Others vs. P.Arumugham and another.
2. 1994 Supp (3) SCC 760 – Neelathupara Kummi Seethi Koya Phangal (dead) by LRs vs. Montharapalla Padippua Attakoya and others
3. 2016 (1) SCC 411 – Citi Bank N.A vs. Hiten P.Dalal and others.

8. Heard, the learned counsel for the revision petitioner and perused the papers.

9. From a perusal of the records, it is evident that the revision petitioner had earlier filed a similar application under the provisions of Order 21 Rule 58 and the same had ended in a dismissal. The appeal, which was filed against the said order, has also been withdrawn with a liberty. However, the liberty that was granted was an opportunity to file a fresh suit. However, instead of filing the fresh suit as prayed for by the revision petitioner, the revision petitioner has sought to file the present petitions which by an astute drafting has been couched as a prayer to the Registrar, City Civil Court, to execute the Cancellation Deed, once again under the provision of Order 21 Rule 58. The setting aside of the ex-parte decree will not nullify the decree that has been passed in the earlier proceedings in E.A.No.4892 of 2003 which is a petition, that is also filed under provision of Order 21 Rule 58 as Order 21 Rule 58 relates to an adjudication of a right, title and / or interest of the revision petitioner to the property in question. It is seen that the order has been passed after contest in which evidence, both oral and documentary, has been let in by both parties and therefore, it is a separate proceedings, independent of the suit, which is the subject matter of revision. Having lost in the earlier round, the revision petitioner cannot be permitted to revive the same application in a different form and the earlier petition was a contest between the respondent and

the revision petitioner with reference to their right title and interest to the property. Therefore, the setting aside of the ex-parte decree will not in any manner nullify the order passed in EA.No.4892 of 2003, which has been confirmed in A.S.No.216 and 217 of 2004. The findings of the Court below that the order in E.A.No.4892 of 2003 acts as *res judica* is correct. The Judgments relied upon by the Revision Petitioner does not apply to the case on hand as the question of restitution does not apply to the case on hand in the light of the order in E.A.No.4892 of 2003. This Court finds no infirmity in the order passed by the Court below in the above interlocutory applications and the revision petitions, are, therefore dismissed. Further, there shall be no order as to cost. Consequently, connected miscellaneous petition is also dismissed.

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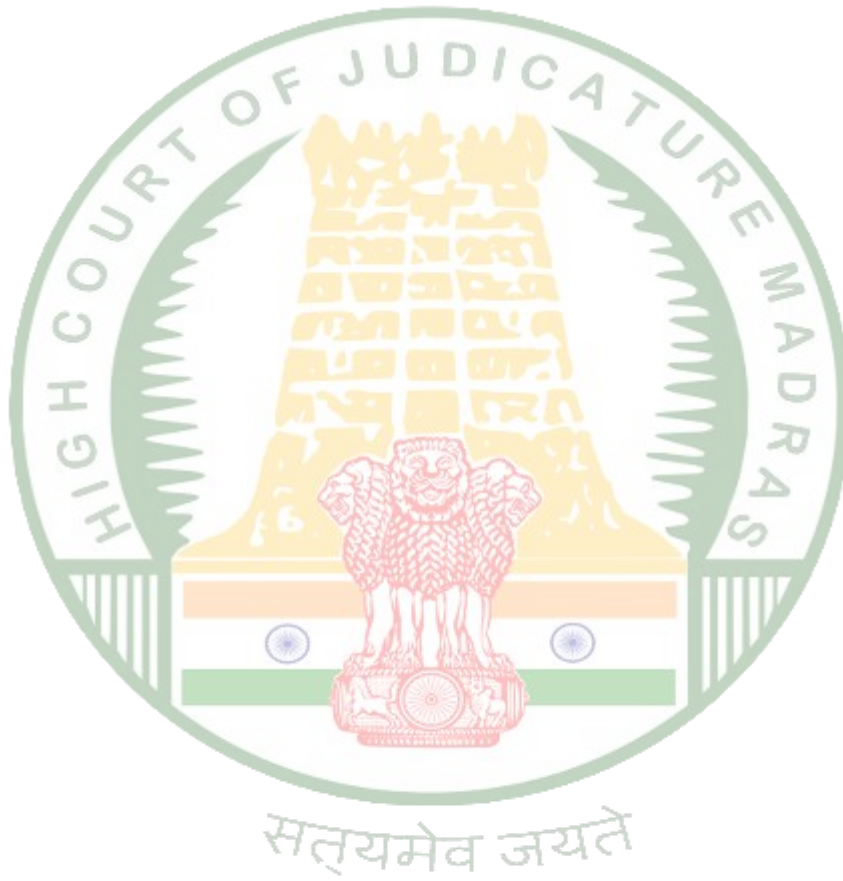
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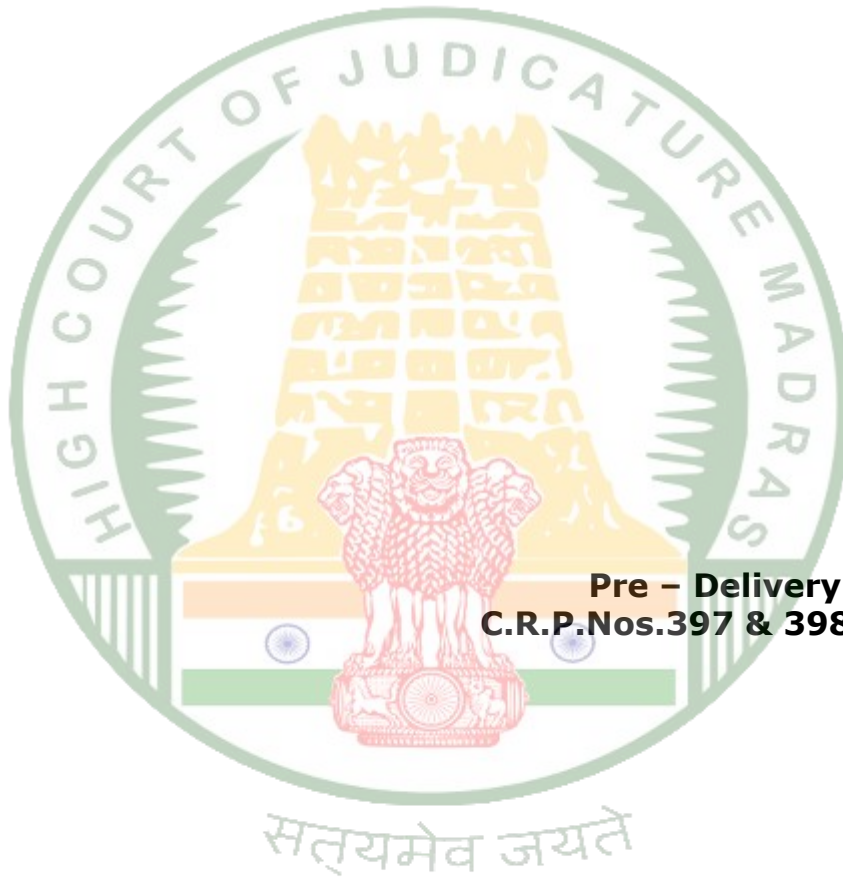
The XI Assistant Judge,
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P.T.ASHA, J.

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**Pre – Delivery Order in
C.R.P.Nos.397 & 398 of 2009**

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