

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
22~02~2019	11~03~2019

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

C.R.P. (NPD) .Nos.1128 of 2006 and 4003 of 2007
M.P.Nos.1 and 2 of 2007 in C.R.P. (NPD) No.4003 of 2007

C.R.P. (NPD) .No.1128 of 2006

V. Krishnamoorthy ... Revision Petitioner/
2nd Plaintiff

Versus

Balasubramanian Respondent/Claim Petitioner

C.R.P. (NPD) .No.4003 of 2007

V. Krishnamoorthy ... Revision
Petitioner/Plaintiff

Versus

Radhabai Ammal Respondent/Defendant

Civil Revision Petition (NPD) No.1128 of 2006 filed under Section 115 of C.P.C., to set aside the fair and decreetal order of the Learned District Munsif, Madurantagam dated 19.11.2004 made in E.A.No.180 of 2004 in E.P.No.126 of 1996 in O.S.No.42 of 1987.

Civil Revision Petition (NPD) No.4003 of 2007 filed under Section 115 of C.P.C., to set aside the order passed in E.A.No.147 of 2006 in E.P.No.126 of 1996 in O.S.No.42 of 1987 on the file of the Learned District Munsif, Madurantagam dated 06.08.2007.

For Revision Petitioner .. Mr. K. Venkatasubban
for M/s. Sarvabhuman Associates
[in both CRPs.]

For Respondents .. Mr.N. Nithyanandam[CRP.1128/2006]
Mr.K. Goviganesan [CRP.4003/2007]

COMMON ORDER

The case has got chequered history. Civil Revision Petition (NPD) No.1128 of 2006 has been filed against the order of Executing Court dismissing the Execution Petition filed under Section 151 of C.P.C. to direct the Respondent to deposit Rs.2,50,000/- into Court within time granted by court and for other reliefs. Civil Revision Petition (NPD) No.4003 of 2007 has been filed against the order of Executing Court dismissing the Execution Petition filed under Order 21 Rule 95 of C.P.C. for delivery of Possession of the immovable properties from the Judgment Debtor through the process of law. Since the issues and the parties in both the Revision Petitions are same, this common order is rendered.

2. The facts which are necessary to decide the Civil Revision Petitions are as follows:

2.(a) On 07.04.1987 one Mr.Subbiya Reddiar filed suit in O.S.No.42 of 1987 before the Sub-Court Chengalpet against Radhabhai Ammal, the Respondent in C.R.P.(NPD) No.4003 of 2007, for recovery of Rs.23,892.50 with interest at 12% on Rs.15,500/- with a charge over the suit property. During the pendency of the suit, the said Mr.Subbiya Reddiar died. The Revision Petitioner Mr.V.Krishna moorthy was impleaded as a legal representative of the said Mr.Subbiya Reddiar on the basis of the Will executed by Mr.Subbiya Reddiar. Thereafter, the suit was decreed ex-parte against Mrs.Radhabai Ammal with a charge decree over the suit property on 14.03.1990. Mrs.Radhabai Ammal filed an Application to set aside the ex-parte decree on 09.09.1992. However, above Application was dismissed. No Appeal or Revision was filed and the Decree dated 14.03.1990 has become final. Before that one Balasubramanian who is the Respondent in C.R.P.(NPD) No.1128 of 2006 has purchased the property during the pendency of the suit from Mrs.Radhabai Ammal on 13.07.1987 and 17.07.1987. His purchase is during the pendency of suit for the charge decree in respect of the suit property.

2.(b) Even after the property was sold during the pendency of the suit Mrs.Radhabai Ammal filed an application to set aside the Ex-parte Decree on 09.09.1992 which was dismissed by the Court and reached finality. Thereafter, Execution Application filed by the Decree Holder viz., the Revision Petitioner for sale of property to realise the decree amount in E.P.No.55 of 1990. The above Execution Petition was transmitted to Madhurantagam Munsif Court and re-numbered as E.P.No.126 of

1996. Since there was no bidder, the decree holder become a successful bidder in auction conducted by the Court with the permission of the Court on 17.3.1997. In the meanwhile the Pendente lite Purchaser viz., Mr.Balasubramaniam filed a suit in O.S.No.61 of 1999 seeking declaration of Title and Permanent Injunction. The above suit was decreed by the trial Court on 06.08.2007.

2(c) Thereafter, in appeal in A.S.No.56 of 2007 above decree and judgment was set aside on 29.12.2008 by the Appellate Court and reached finality. No Second Appeal whatsoever filed from the year 2008. Prior to that the Revision Petitioner has filed E.A.No.430 of 1998 in E.P.No.126 of 1996 to appoint Advocate Commissioner to cut the casurina trees and auction the same and deposit the sale proceeds in court, which was allowed by the Executing Court on 19.01.1999. As against which Pendente Lite Purchaser Mr.Balasubramaniam filed C.R.P.No.2099 of 2000 before this Court. Similarly, Revision Petitioner also filed C.R.P.No.439 of 2000 as against the interim order passed in the suit filed by the Pendente Lite Purchaser. C.R.P.No.2099 of 2000 filed challenging the appointment of Commissioner to auction the casurina trees. This Court allowed the Civil Revision Petition filed by the Revision Petitioner challenging the interim order granted in favour of the Purchaser Pendente Lite and the Civil Revision Petition filed by the present Revision Petitioner is also closed granting liberty to the Revision Petitioner to move the Court below for appropriate orders. While dismissing the above Civil Revision Petition this Court has held that the decree in O.S.No.42 of 1987 which was originally filed by Mr.Subbiya Reddiar become final and the decree holder is entitled to execute the decree.

2.(c) Thereafter, E.A.No.196 of 1990 in E.P.No.126 of 1996 in O.S.No.42 of 1987 was filed by the Revision Petitioner for punishing Mr.Balasubramaniam for contempt of court, was closed on 27.01.2003 accepting his apology. Thereafter, Revision Petitioner has filed another E.A.No.180 of 2004 for direction to the Pendente Lite purchaser to deposit Rs.2,50,000/- sale proceeds out of cutting of casurina trees, which was dismissed, against which C.R.P.(NPD)No.1128 of 2006 has been filed. In the meanwhile original Judgment Debtor Mrs.Radhabai Ammal, the Respondent in C.R.P.(NPD) No.4003 of 2007 filed E.A.No.10 of 2003 under Order 34 Rule 5 r/w Order 34 Rule 15 and Section 151 of C.P.C. seeking to set aside the Court auction sale dated 17.03.1997. The above application was also dismissed, against which she filed C.R.P.No.474 of 2003 which was also dismissed with cost by this Court on

03.10.2005. This Court has dismissed the above C.R.P. after discussing the entire facts and imposed cost of Rs.5,000/-.

2.(d) Thereafter, it appears SLP filed as against the order passed by this Court dismissing the CRP No.474 of 2003, by Mrs.Radhabai Ammal was also dismissed. Thereafter sale certificate was issued to the Revision Petitioner on 22.03.2006. After this, Revision Petitioner has filed an application for delivery of possession. When the application was filed after the sale confirmed, the Respondent Mrs.Radhabai Ammal filed counter objecting the delivery of possession. This Court in earlier C.R.P.No.474 of 2003 vacated the order of stay granted and confirmed the sale and also in para 18 of the order clearly noted down that the sale has not been confirmed in all these days in view of the dilatory tactics adopted by the Judgment Debtor and by one Mr. Balasubramaniam who claimed to be a subsequent purchaser and categorically held that such sale is hit by Lis Pendens. Accordingly, vacated the order of stay for confirming the sale. It appears that after dismissal of the above Civil Revision Petition sale has been confirmed. Now, the application filed for delivery of possession the Executing Court dismissed the Application on the ground of fraud played by the petitioner. The Executing Court has come to the conclusion that there was a fraud played on the court in the following manner:

"From the definitions it could be seen that the act of the petitioner herein in concealing the discharges pleaded by the defendant in her written statement as evidenced in the discharge receipt with an intention to get a decree tantamount to fraud. There cannot be any second thought as to whether such an Act would not constitute fraud because had the petitioner herein brought to the Notice of the court the facts pleaded in the written statement about the discharge then the court would have insisted the Petitioner to prove that the defendant had not discharged the debts but it is only they who had discharged the debts. In such a situation a decree would not have been passed by the Court even exparte. Even for an exparte decree to be passed it is mandatory that the suit claim must be proved. Therefore these facts would show that the suppression of these facts by the petitioner herein is deliberate and wanton. Thus it become clear that the Judgement is based on the perjured evidence

and was not obtained by mistake or under any bonafide belief."

2.(e) Besides, one another reason the trial Court has held that though the petitioner was aware of the purchase by the subsequent purchaser, he has not impleaded the real owner in whose name the property was registered as party to the sale proceedings and non-suited the decree holder on two grounds mainly on the ground that there was fraud on the Court as against which C.R.P.(NPD)No.4003 of 2007 has been filed.

3. Learned counsel for the Revision Petitioner vehemently contended that the Executing Court has gone beyond the scope of the decree and in fact has ignored the previous litigations between the same parties which reached finality which went upto the Supreme Court. The Executing Court in a casual manner set aside the decree on ground of alleged fraud without any basis. The Executing Court has in fact found fault with the decree and decree should not have been passed and placed the burden on the Plaintiff to prove the alleged discharge receipt pleaded by the defendant in the suit. Such approach of the Executing Court is against the fundamental principle of law without any basis. Admittedly in the sale proclamation itself subsequent purchase made by the Judgment Debtor has been clearly notified. As the decree itself is a charge decree and the purchase is hit by doctrine of lis pendens and the subsequent purchaser also participated in the proceedings upto High Court and he lost in all the forum, cannot be said that there was fraud by the Revision Petitioner. Subsequent purchase is hit by doctrine of lis pendens. Since the decree is charge decree and he has purchased the property in Court Auction purchase, there is no need to implead such pendente lite purchaser. Hence, submitted that those things cannot be a fraud as held by the Executing Court. Executing Court has taken tangent view and non-suited the orders of the High Court and Apex court, which is not maintainable.

4. Similarly, it is the contention of the learned counsel for the Revision Petitioner in respect of C.R.P. (NPD) No.1128 of 2006 that the executing court should not have dismissed the application for deposit of the sale proceeds of casurina trees, despite the reasons adduced in the evidence by the Revision Petitioner. The learned counsel for the Respondent in both the Executing Petition would submit that the decree amount is small when the property of entire 4 acres have been sold. At the time of sale, Executing Court has not made any exercise whether

entire property to be sold to realise the decree and according to him the Executing Court has thoroughly analysed the entire facts and arrived a right conclusion. Hence prayed for dismissal of the revisions.

5. I have perused the entire materials. At the outset, the facts referred above in these revision petitions are reached finality which is not in dispute. The decree and Judgement in O.S.No.42 of 1987 reached finality and the property in respect of which charge decree obtained was also brought into auction and the decree holder viz., the Revision Petitioner, bid the property with the permission of the Court. All the challenges made to set aside the exparte decree is also reached finality and the applications made to set aside the sale on the ground of irregularity and not complying with the provision of Order 34 Rule 5(1) of C.P.C., all reached finality in C.R.P.No.474 of 2003 and the Pendente lite purchaser who purchased the property after the suit, was also party to one of the Civil Revision Petitions as narrated above. It is further to be noted that the suit filed by the Pendente lite purchaser for declaration of his title, was also dismissed and the decree reached finality in the year 2008 and thereafter no second appeal has been filed. The Pendente lite purchaser's right to seek declaration also ended against him which reached finality. From the binding nature of judgment between the inter se parties, whether the Judgment debtor or the Pendente Lite Purchaser can claim any right on the basis of the pendente lite purchase.

6. It is further to be noted that the decree holder viz., the Revision Petitioner who stepped into the shoes of the original plaintiff as legal representative on the basis of the Will and he bid the property with the permission of the court. After long legal battle sale was confirmed in the year 2006, after this Court vacated the stay granted originally. Now, the Execution Petition is pending only for mere delivery of possession. At this stage Executing Court gone to the extent of deciding the issue afresh and come to the conclusion that there was a fraud played on the court. The very basis of the such conclusion by the Executing Court in my view is erroneous and utter violation of settled principle of law. Executing Court placed undue importance to the fact that the decree holder has concealed discharge pleaded by the defendant in her written statement. This court is unable to comprehend how the plaintiff can be attributed for such alleged fraud on the ground that he has not proved the case of defendant specifically pleaded in the written statement. It is to be noted that the suit has been filed for recovery of money on

the ground the judgment debtor has to discharge certain amount to various banks on behalf of the plaintiff. Since he has not discharged the amount the suit has been laid. Though the judgment debtor took a defence in her written statement that she has discharged such amount, it is for the person who plead such discharge has to establish the same before the court of law. The burden heavily on the party who pleads discharge, which has not done so by the judgment debtor. Having filed such written statement Judgment Debtor remained exparte. Therefore when the defendant taken a specific plea of discharge remained exparte, the Executing Court holding that only the plaintiff has to prove the discharge of the defendant pleaded by her written statement is highly erroneous and in fact same clearly indicate that the Executing court has gone beyond the scope of the executing proceedings and erroneously held that the plaintiff without establishing the discharges pleaded by the defendant has obtained exparte decree. Such reason of the trial court in view of this court is nothing but perverse.

7. How could the trial Court would expect the plaintiff to prove the case of specific defence of defendant. The Plaintiff is supposed to prove his case for obtaining the decree. He cannot be called upon to prove the case set up by the defendant. Therefore, no fraud whatsoever could be attributed to the plaintiff. The Court which passed the decree considered the evidence of P.W.1 and others and decreed the suit on 14.03.1990. When the defendant failed to appear before the Court to canvas her case and suffered exparte decree, now cannot contend that such decree is obtained by fraud. Therefore, I am of the view that the Executing Court's finding holding that situation was fraud on the court nothing but against the fundamental principles of the settled position of law. It is also to be noted that the above decree has reached finality. Attempt made by the judgment debtor to set aside the exparte decree is also reached finality long back. Thereafter, in the Executing Proceedings properties were auctioned and decree holder bid the properties with the permission of the court. Despite several attempts made by the judgment debtor and pendente lite purchaser, the sale in favour of the decree holder found to be valid by this court in earlier CRP and also the Apex Court which dismissed the SLP. Thereby the attempt on the part of the judgment debtor to set aside the sale on the ground of irregularities and other reasons also reached finality. Therefore, once the matter in issue already reached finality, the parties rights have already been decided and determined conclusively, Executing Court cannot go behind

the orders of the High Court and Apex Court. In fact Executing Court assumed itself as Appellate Court to non-suit the order passed by the High Court and Apex Court.

8. In the Sale proclamation pendente lite purchaser's right has been clearly mentioned. The property has been purchased during the pendency is also clearly noted. Since such purchase is not binding on the decree holder such pendent lite purchaser is not made as a party in the execution proceedings. Therefore, that cannot be construed as a fraud. The Executing court in fact has gone beyond the scope of the petition in passing favourable orders to the judgment debtor and subsequent purchaser whereas their rights have already decided by the High Court and Apex Court. Any order even interlocutory stages with regard to the same issue which reached finality will operate as res judicata in the same proceedings. It is to be noted that the Judgment debtor not only filed application to set aside the sale but also to set aside the exparte decree. But she could not succeed in those applications. Similarly pendente lite purchaser filed independent suit in O.S.No.61 of 1999 for declaring his rights on the basis of the said sales. The above suit is dismissed after full trial and the decree and judgment reached finality in the year 2008. This fact is not in dispute. These facts have not even considered by the trial Court. Therefore, this Court is of the view that the reasons assigned by the executing court to come to the conclusion that there was fraud played on the court is without any basis. Trial Court assumed the role of Appellate forum and set aside the orders which reached finality. Hence, the order of the trial court in dismissing the Execution petition filed for delivery of possession is nothing but erroneous. Merely because the subsequent purchaser is not impleaded in the execution petition, Execution Petition cannot be dismissed.

9. Learned counsel for the respondent in support of his contention relied a judgment in Balakrishnan v. Malaiyandi Konar [(2006) 3 Supreme Court Cases 49] in the above case when the execution petition filed for delivery of possession High court has directed to deposit the amount with interest and high Court examined the scope and ambit of Order 21 Rule 64 of C.P.C. has held that the auction sale held in the executing proceedings and confirmation thereof was illegal and remitted the matter to the Executing Court. Absolutely there is not dispute with regard to the preposition laid down in the above judgment. But the facts in this case, all the challenges made against the sale has already reached finality. Therefore the above

judgment is not applicable to the facts of the present case.

10. Admittedly, the purchase itself hit by doctrine of lis pendens. This is already held by this Court in same proceedings in C.R.P.474 of 2003 besides the suit filed by him for declaration is also dismissed. Therefore, the Court can very well order delivery when somebody in possession claiming the title created by judgment debtor. It is to be noted that here the suit itself for the charge decree the suit is decreed in the year 1990. During the pendency of the suit subsequent purchaser the pendente lite purchaser purchased the property. Suit decreed in the year 1990. When there is a charge and this lis pendens purchaser's right has also already decided in various proceedings. Mere non-impleadment of the purchaser in the execution proceedings is not a ground to dismiss the Execution Petition. Lis Pendens purchaser is always subject to the result of the suit. His right also negated by Courts. Hence, lis pendens transferee cannot claim any right based on such transfer. Therefore the order of the executing court dismissing the application is erroneous and the same is set aside. Accordingly, C.R.P.(NPD)No.4003 of 2007 is allowed. The Executing Court shall pass an order for delivery of possession within two months from the date of receipt of copy this order.

11. As far as the C.R.P.(NPD)No.1128 of 2006 is concerned, it is the contention of the Revision Petitioner that the respondent during the pendency of the proceedings cut and removed the trees in the suit property. Therefore, he sought to direction to deposit the sale proceeds of Rs.2,50,000/-. It was opposed by the respondent lis pendens purchaser. The executing court dismissed the application on the ground that at the relevant point of time sale was not confirmed. Besides it also come to the conclusion that he has not raised casurena trees in the suit property. He purchased land properties alone. The Executing Court also considered the evidence of P.W.1 that he himself not aware of the nature of the trees, what was the exact no of trees cut and removed from the property, has come to the conclusion that the Revision Petitioner has not proved the factum of cutting and removal of trees. Since he has not examined any independent witnesses, traders or timber merchants to prove the allegation, the Executing Court rightly negated his claim for deposit of the alleged sale proceeds, in the absence of any evidence to show that the trees worth about Rs.2,50,000/-cut and removed from the property. Merely on the basis of the liberty granted by this Court in the earlier Revision Petition to move before

the trial Court to work out his remedy, in my view that cannot be a ground to order the application. Therefore, this Court does not find any infirmity in the order passed by the Executing Court in E.A.No.180 of 2004 in E.P.No.126 of 1996 in O.S.No.42 of 1987 dismissing the application. Accordingly, C.R.P(NPD) No.1128 of 2006 is dismissed.

12. In the result, C.R.P.(NPD) No.4003 of 2007 is allowed and order of the Executing Court is set aside. Executing Court is directed to dispose of the Execution Petition by ordering delivery of possession within two months from the date of receipt of copy this order. C.R.P. (NPD) No.1128 of 2006 is dismissed. Connected M.Ps are closed. No costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

ggs.
To

1. The District Munsif,
Maduranthagam.

2. The section officer,
VR Section,
High court, Madras

+2cc to Mr.K. Goviganesan ,Advocate SR.No. 22824,22825

+2cc to M/s.SarvabhumanAssociates,AdvocateSR.No. 22508,22507

+1cc to Mr.N. Nithyanandam,Advocate SR.No. 22837

C.R.P. (NPD) Nos.1128 of 2006
and 4003 of 2007

A.SK(03/04/2019)

सत्यमेव जयते

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