

Reserved on : 06.03.2019
Pronounced on : 18.03.2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM :

THE HONOURABLE MR. JUSTICE N.SATHISH KUMAR

C.R.P. (NPD) No.799 of 2004

1. Mr.Vaithilinga Asari (Died)
 2. Mr.V.Gunasekaran
 3. Mr.V.Selvaraj
 4. Mr.V.Datchanamoorthy
- (Appellants 2 to 4 and respondents 18 to 20 brought on record as the LRs of the sole appellant vide Court order dated 05.03.2019 made in CMP No. 14414 of 2018 in CRP NPD 799 of 2004 ... Petitioners

Vs.

1. Mr.Sivapragas Chettiar (died)
2. Mrs.Sulachana
3. Mrs. Uma Salimah
4. Mr.Raja Mohammed
5. Ms.Mumtaj
6. Ms.Meherunnissa
7. Ms.Acrose Begum
8. Mr.Sarabuddin
9. Mr.Mohamed Khan
10. Ms. Sakila
11. Ms.Ramila Banu
12. Mr.S.Devaraj
13. Mr.S.Sundaraj
14. Mr.S.Govindaraj
15. Mr.S.Krishnaraj
16. Mr.S.Raman
17. Mr.S.Lakhsmanan
18. Ms.Susila
19. Ms.Tamilarasi
20. V.Radhakrishnan

.. Respondents

PRAYER: Civil Revision Petition filed under Section 115 of Code of Civil Procedure against the judgment and decree dated 22.09.2003 in CMA.18 of 1996 on the file of the Principal

District Court, Pondicherry allowing the appeal filed against the Order dated 25.03.1996 in E.A.o.724 of 1983 in E.P.No.260 of 1971 in O.S.No.183 of 1969 on the file of the Principal Sub Court, Pondicherry.

For Petitioners : Mr. R.Venkatesulu
for Ms.Usha Raman

For Respondents : Mr.V.Lakshmi Narayanan

O R D E R

Aggrieved over the Order of the first appellate Court setting aside the Order passed in E.A.No.724 of 1983 in E.A.No.260 of 1971 in O.S.No.183 of 1969, the present revision has been filed. The impugned Order is a result of challenge made by the judgment debtor in the application in E.A.No.724 of 1987 in E.P.No.260 of 1971 filed under section 47 and Order XXI Rule 85 of Code of Civil Procedure.

2. The brief facts leading to filing of the application is as follows :

The respondent/judgment debtor filed an application to declare the public auction conducted on 16.11.1972 as null and void. According to him, the suit against him in O.S.No.183 of 1969 filed by one Sulochana is decreed. In execution of the above decree in E.P.No.260 of 1971, the property was auctioned on 16.11.1972. The husband of the decree holder namely Sivapragasa Chettiar, the first respondent bid the property for a sum of Rs.15,000/- and took delivery of the suit property. The above sale was confirmed on 31.03.1973. The minor children of the petitioner also challenged the above public auction separately in E.A.No.364 of 1979 before the Sub Court. It is the further contention of the revision petitioner that the previous counsel has not disclosed about the specific fraud committed by the defendant from 16.11.1972. Thereafter, his minor children engaged another advocate. After that only he came to know that the sale is nullity under Order 21 Rule 85 of Code of Civil Procedure.

3. It is the further contention of the revision petitioner that the auction purchaser has not deposited Non Judicial Stamp Papers within 15 days as per Order 21 Rule 85 and he has sought to extend time for deposit of stamp in unnumbered E.A. on 13.12.1972 and the said application has been allowed. It is the contention of the revision petitioner that the Court has no jurisdiction or any authority under Order 21 Rule 85 Code of

Civil Procedure to extend time beyond prescribed time of 15 days. The revision petitioner came to know about the said illegality only in February 1983. Hence, prayed for setting aside the sale dated 16.11.1972.

4. The first respondent, who is the auction purchaser remained exparte.

5. The second respondent, who is a subsequent purchaser, filed counter stating that he has advanced a loan to the tune of Rs.4000/- on usufructuary mortgage dated 16.04.1977 to the first respondent subsequent to the above date. He has also entered into an agreement for sale with the first respondent for purchase of the property for a sum of Rs.27,500/-. As he has failed to pay the amount, he filed a suit in O.S.No.200 of 1982 and obtained specific performance and he became the owner of the property. He is a bonafide purchaser of the property. It is his further contention that a similar petition has been filed by the petitioner previously. Hence, the present petition is barred by resjudicata. The sale has been confirmed on 31.03.1973. This respondent is in possession of the property from 1977. Further the decree obtained in O.S.No.200 of 1982 cannot be disputed. In the above suit he is not a party in the Execution Petition. Hence, prayed for dismissal of this revision.

6. The Execution Court has allowed the application filed by the judgment debtor on the ground that the stamps have not been deposited within 15 days under Order 21 Rule 85 of Code of Civil Procedure. In the appeal, the first appellate Court allowed the appeal and dismissed the claim application filed by the judgment debtor. As against which, the present revision has been filed.

7. The learned counsel appearing for the revision petitioner vehemently contended that Order 21 Rule 85 of Code of Civil Procedure is mandatory and the Court has to resale the property in event of default. Admittedly, in this case, though the sale amount has been deposited, stamps have been deposited with a delay and delay application has also been allowed by the trial Court, despite the Court had no jurisdiction to extend time for depositing the stamps. Hence, submitted that when the stamps are not deposited within 15 days, as stipulated under Order 21 Rule 85, the auction sale is null and void. In support of his submissions, he has relied upon the judgments reported in 1974

Manilal Mohanlal Shah and Others Vs. Sardar Sayed Ahmed Sayed Mahamed and others reported in AIR 1954 Supreme Court 349;

Mool Chand Vs. Collector Jalaun and others reported in AIR 1982 Allahabad 141;

Shilpa Shares and Securities and others Vs. The National Co-operative Bank Ltd. and Others reported in AIR 2007 Supreme Court 1874;

Kudiyala Ramana Vs. Vattikolla Somaraju and others reported in 2003 (2) ALD 93 &

Subbammal Vs. P.Gurusamy Thevar and others reported in AIR 1974 Mad 278

8. The learned counsel appearing for the respondent submitted that the suit has been filed in the year 1969. The suit is filed under Order 34 of CPC on the basis of mortgage. The above suit was decreed and the property was sold in public auction on 16.11.1972 and the sale was confirmed on 31.03.1973. The judgment debtor has not filed any appeal against the confirmation of the sale under Order 43 of Code of Civil Procedure. It is his further contention that every stage in the execution proceedings, a separate Order has been passed. Therefore, such proceedings operates as resjudicata. Admittedly, the sale certificate was issued on 05.04.1973 and delivery was effected on 22.12.1973 and the revision filed against the Order of the trial Court extending time was also dismissed. The suit which has been filed by the revision petitioners' minor sons in O.S.No.312 of 1971 challenging the sale has also been dismissed. The appeal filed against the said judgment is also dismissed. The respondent herein is a bonafide purchaser. He has entered into a contract for sale with the auction purchaser and filed a suit for specific performance and the above suit has also been decreed in his favour and he has taken possession of the property. The present application has been filed only in the year 1983 by engaging a new advocate. It is clearly barred by limitation.

9. It is the further contention of the learned counsel for the respondent that the right of the judgment debtor is extinguished by way of final decree passed in the mortgage deed and no appeal whatsoever has been filed and he cannot oppose the sale conducted in the year 1973. It is his further contention that the sale price has been paid within time. Only stamps have been deposited with a delay. The said delay has also been condoned, which has reached finality till this Court. The revision petitioner has not filed any application till the year

1983, When Order 21 Rule 85 was amended, the amended provision restrict only to the sale price. In Madras amended provision 'stamps' has been removed. Therefore, on the date of the application, the provision under Order 21 Rule 85 has already been amended. Therefore, on the date on which the application has been filed under Order 21 Rule 85 stipulates only for purchase money payable on the 15th day of sale of the property and not deposit of stamps as stipulated in Madras amendment. Hence, it is his contention that the petitioner cannot take shelter under the old Act and such claim is barred by limitation.

10. Further it is the contention of the learned counsel that Order 34 Rule is an exception to Order 21 Rule 85. The sale has been made only under Order 34 of Code of Civil Procedure, which is a special provision. Hence, it is his contention that requirement of the Code of Civil Procedure under Order 21 Rule 85 is not mandatory, while effecting sale under Order 34 of Code of Civil Procedure.

11. In support of his contentions he has relied on the judgments in

S.R.Rajagopal and another Vs. M.kamalanathan and three others reported in Manu/TN/1947/2014;

Barkat Ali and Another Vs. Badri Narain (Dead) By LRs. reported in 2008 (4) Supreme Court Cases 615;

Kunhambu Vs. Geetha reported in 2001 (1) KLT 602

Perinthalamanna Taluk Rural Housing Co.op. Society Vs. Unnikrishnan reported in 2010 (1) KLT 124 &

Ganpat Giri Vs. II Additional District Judge, Balia and others reported in AIR 1986 Supreme Court 589.

12. In the light of the above submission, the point that arises for consideration is in this revision is

Whether the sale held in the year 1972, i.e., on 16.11.1972 and confirmed on 31.03.1973 is null and void?

13. Before advertng to the submissions of both sides, certain facts are relevant to decide the issue. The revision

petitioner was the owner of the property. He has borrowed a loan under registered mortgage deed executed in favour of one Sulochana. The suit in O.S.No.183 of 1969 came to be filed against the revision petitioner by the said Sulochana. In the above suit both preliminary decree and final decree has been passed. Thereafter, it appears that the execution petition in E.P.No.260 of 1971 has been filed for sale of the mortgaged property. The property was sold on 16.11.1972. The husband of the decree holder bought the property in a Court auction sale. The sale was confirmed on 31.03.1973 and certificate was also issued on 05.04.1973. The Court auction purchaser took delivery of the property on 22.12.1973. After such delivery of the property to the auction purchaser, the minor children of the present revision petitioner filed a suit in O.S.No.312 of 1971 before the Sub Court Pondicherry to set aside the above sale. The said suit has been dismissed. The appeal filed against the above judgement in A.A.O. No.275 of 1973 has also been dismissed by this Court. Thereafter, E.A.No.260 of 1971 questioning the execution of the mortgage deed of the father and also questioning the irregularity and fraud in conducting the sale has been filed and the same has also been dismissed.

14. In the meanwhile, the auction purchaser who took delivery of the property entered into an agreement of sale with the present contesting respondent. As he failed to execute the agreement, the present respondent filed a suit in O.S.No.200 of 1982 for enforcement of such agreement. The above suit was decreed after full contest and the respondent has also obtained delivery of possession. The sale has been executed through Court in his favour. These facts are not in dispute.

15. Further, the auction purchaser has not deposited the price money within 15 days. However, he filed an application in E.A.No.516 of 1972 to deposit the stamps after fifteen days and the Court has allowed the above application and condoned the delay in depositing the stamp papers. As against the said Order another application has been filed by the judgment debtor in E.A.No.569 of 1972 contending that condoning the delay is not according to law. The above application has been dismissed. Challenging the dismissal of the above application E.A.No.569 of 1972 the judgment debtor has moved this Court by way of revision and it has also been dismissed. These facts infact has been suppressed in the petition filed by the judgment debtor.

16. It is curious to note that the judgment debtor has participated and challenged the Orders of the Court. Even though the Order 21 Rule 85 does not give any power to the Court

to extend time for depositing the price money, the Court has passed the Order permitting the auction purchaser to deposit stamps after fifteen days. The above Order has also been challenged by the judgment debtor and it reached finality. It is further curious to note that in execution proceedings each and every Order passed in every stage reached finality. In this regard it is relevant to refer the judgment reported in Barkat Ali and another Vs. Badrinarain (Dead) by LRs. reported in 2008 (4) Supreme Court Cases 615, wherein it has been held that

"The executing Court found that since after completing preliminaries of issuing notice and finding that no objection has been filed in spite of the service under Order XXI Rule 22 of the Code of Civil Procedure, 1908 (in short 'CPC') and the Court had proceeded to next stage of execution for attaching the property under Order XXI Rules 23 and 24 of C.P.C., any objection raised subsequent thereto cannot be entertained being barred by principles of constructive res judicata. Against the dismissal of the objections dated 16.11.1972 by order dated 13.7.1974, an appeal was, preferred before the High Court which has been dismissed by the Learned Single Judge by judgment dated 16.1.1981. The Learned Single Judge found that the objections filed on 16.11.1972, after the warrant of attachment was issued, could not be entertained by the executing Court as the same was barred by principles of constructive res judicata. Ancillary issues raised by the Learned Counsel for the appellant were also found to be not sustainable and the appeal was dismissed."

17. The above decision makes it clear that every Order passed in the every stage of the execution proceedings operates as res judicata. Though the lower Court at the initial stage has extended time for deposit of stamp, which is mandatory under unamended Madras Act before 1976, the above Order has also been challenged and the same has reached finality. When the parties challenged the order of the Court and the matter has reached finality, in revisional Court, this Court is of the view that, such parties are bound by the Orders and they cannot go beyond the Orders passed in the above proceedings. No doubt, in the judgment cited supra by the revision petitioner shows that failure of the auction purchaser depositing the money stipulated under Order 21 Rule 85, such sale is null and void. Absolutely, there is no dispute with regard to the position of law in this aspect. But the fact remains that in this case, challenge made to such Order of the Court enlarging the time and the same has reached finality. That being the position, now the

revision petitioner cannot contend that sale is nullity in view of the non compliance of the Order 21 Rule 85.

18. It is curious to note that this application has been filed only in the year 1983 much after the amendment in the Code of Civil Procedure in the year 1976. In Ganpat Giri Vs. II Additional District Judge, Balia and others reported in AIR 1985 Supreme Court 589, the Honourable Apex Court has held that any rules framed by High Court which is inconsistent with the Code as amended by the Amending Act, 1977 would cease to be enforced. In Kunhambu Vs. Geetha reported in 2001 (1) KLT 602 the Single Bench of Kerala High Court dealt with the similar matter under Order 21 Rule 85 Kerala which is *pari materia* with Tamilnadu Act has held that after amendment of Central Act, the said amendment has become inoperative and the Kerala Act was inconsistent to Rule 85 under the Amendment Act 104 of 1976. Kerala and Tamilnadu Acts are similar in Order 21 Rule 85 to deposit the stamp duty. From the above decisions, I am of the view that the amendment of the Central Act to deposit the stamp duty is not a compulsory one. Only the sale price is made compulsory to be deposited in time. On the date of this application, the Madras Amendment has already become inoperative.

19. Be that as it may. The revision petitioner having failed in all his attempts challenging the Order of the Court in extending the time has filed an application to challenge the sale in the year 1983, when the Act itself has become inoperative by virtue of Central Act 104 of 1976, filing such an application, in my view, is barred by limitation. The sale took place in the year 1972. This application has been filed only in the year 1983. They cannot attack the sale when the old Act has already been removed by Central amendment, that too after 15 years of sale, which is clearly barred by limitation. It is also curious to note that the suit has been filed for recovery of mortgage money. It is to be noted that Section 60 of the Transfer of Property Act deals with right of the mortgagor to redeem the property. Section 60 of the Transfer of Property Act reads as follows :

"Right of mortgagor to redeem.—At any time after the principal money has become 1[due], the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee

(a) to deliver 2[to the mortgagor the mortgage-deed and all documents relating to the mortgaged property which are in the possession or power of the mortgagee], (b) where the mortgagee is in possession of the mortgaged property, to deliver possession

thereof to the mortgagor, and (c) at the cost of the mortgagor either to re-transfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgement in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished: Provided that the right conferred by this section has not been extinguished by act of the parties or by 3[decree] of a Court.

20. Section 62 of the Transfer of Property Act deals with the right of the usufructuary mortgage to recover possession. The right of redeeming mortgager being a statutory right and the same can be taken away only in terms of proviso appended to S.60 of the Transfer of Property Act which is extinguished by either way by a decree or by the act of parties. Admittedly, in this case, a final decree has been passed in the mortgage suit extinguishing the right of the mortgagee. Therefore, his right came to an end on the date of passing of final decree. Order 34 Rule 1 and 2 Code of Civil Procedure and Sub Rule 1 of Rule 1 debars the plaintiff from all rights after the final decree is passed. When the plaintiff/decree holder has not deposited any amount as per Order 34, even after preliminary decree and before final decree and the property has been brought in sale, he has lost his right. Rule 8 deals with the right of the mortgager in the suit. The same makes it clear that even in a usufructuary mortgage, the property has been sold in pursuance of the decree passed, if payment has not been made, the Court shall pass a final decree. In this case, admittedly, the final decree has been passed wherein the right of the judgment debtor has been lost. Thereafter, final sale has been taken place. Once, a final decree is passed and no payment has been made, the plaintiff is totally barred from all rights to redeem the mortgaged property. Admittedly, the final decree has been passed and sale has taken place in pursuance to the final decree proceedings. Only at the time of sale of mortgaged property, the provision under Order 21 was followed.

21. It is to be noted that strict complying of the procedure, though for sale of the property is required, when the sale in pursuance to the Special Act or Special provision in the act, the Special provision will prevail over to the general provisions relating to the sale. In this regard, the Division Bench of this Court in S.R.Rajagopal and another Vs. M.kamalanathan and three others reported in Manu/TN/1947/2014 has held that when the sale was challenged under Order 21 Rule 85 was not complied and the sale made under the Partition Act, this Court considering the various judgments of the Apex Court

has held that the auction sale following the procedures under Order 21 Rule 85 is not mandatory and provisions under Order 21 are only guidelines.

22. In this case also, the sale has taken place in pursuant to the final decree. Right of redeeming and foreclosure has been specifically dealt under Order 34. When the judgment debtor has failed to pay the amount before the sale is confirmed or before the final decree is confirmed, and sale is held, his right of redeeming the properties itself is lost. Therefore, the question of attacking the sale on technicalities does not arise at all. In any event, as discussed above, the challenge made against the application to condone the delay in payment of stamps has also reached finality.

23. Having suffered various findings, this application has been filed immediately after the auction purchaser originally lost the suit filed by the third party in a suit for specific performance. This application has been filed in the year 1983, after 12 years of confirmation of the sale, the conduct of the revision petitioner clearly show that it is nothing but relitigation.

24. In this regard, it is relevant to refer the judgment in T.Arivanandam Vs. T.V.Satyapal reported in AIR 1977 SC 2421, wherein the Honourable Supreme Court has held that

"Here is an audacious application by a determined engineer of fake litigations asking for special leave to appeal against an order of the High Court on an interlocutory application for injunction. The sharp practice or legal legerdemain of the petitioner, who is the son of the 2nd respondent, stultifies the court process and makes decrees with judicial seals brutum fulmen. The long arm of the law must throttle such, litigative caricatures if the confidence and credibility of the community in the judicature is to survive.

25. In the judgment in K.K.Modi Vs. K.N.Modi reported in 1998-3-SCC-573, the Honourable Supreme Court has held as follows :

"One of the examples cited as an abuse of the process of the Court is re litigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to re litigate the same issue which has already been tried and decided earlier against him. But if the same issue is sought to be re-agitated, it also amounts to an

abuse of the process of the court. A proceeding being filed for collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the Court."

The above judgments are squarely applicable to the facts of this case. Since the revision petitioner is estopped from challenging the earlier Orders, he cannot be permitted to relitigate the issue. Therefore, this revision is liable to be dismissed.

26. Accordingly, this Civil Revision Petition is dismissed and the Order of the first appellate Court is confirmed. No cost.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

vrc

To

1. The Principal District Judge,
Pondicherry
2. The Principal Subordinate Judge,
Pondicherry.

+1 cc to M/s.V.Raghavachari, Advocate, Sr.No. 25214

Order in
CRP.(NPD) No.799 of 2004

RK(CO)
CSL/13.05.2019

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