

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.04.2019

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

E.P.No. 57 of 2006

in

C.S.No. 810 of 1996

Ramesh Venkat
rep. By Power of Attorney Holder,
Smt.Subbulakshmi

...Petitioner/Decree
Holder

Vs.

1.Narashimhan and others
2.K.T.Venkatesa Raja
3.K.T.Srinivasa Raja

...Respondents/JD s

...Third parties/Obstructors

Prayer: The execution petition filed under Order XIV Rule 10 of O.S.Rules r/w Order XXI Rule 35 & 36 of Civil Procedure Code praying to order delivery of possession forthwith from the hands of the Obstructors to the petitioner/Decree Holder.

For Petitioner/DH : Mr.G.V.Subramaniam

For Respondents/JD s : Mr.K.Ramu

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This execution petition has been filed seeking delivery of possession pursuant to a decree in C.S.No. 810 of 1996.

2. The short facts that led the Master directing the execution petition to be posted before the Court are as follows:

The decree holder claims to have entered into an agreement of sale on 22.06.1995 with one S.Narasimhan to purchase the property in question for a total sale consideration of Rs.19,00,000/- and has paid an advance of Rs.80,000/-. The said agreement of sale itself discloses the equitable mortgage created by the vendor in favour of Indian Overseas Bank for Rs.5,00,000/- and another simple mortgage created in favour of one Mr.Nemichand Bansali for a sum of Rs.50,000/-. The said agreement also stipulates that if the vendor is unable to fulfil the commitment by 31.08.1995, he shall return the advance amount paid with 15% interest per annum from 01.01.1995. If the purchaser is unable to fulfil his part, the advance paid will not be returned.

3. Based on the said agreement, the plaintiff/decreed holder instituted a suit in C.S.No. 810 of 1996. Pending the said suit the sole defendant in the suit namely, the agreement vendor died on 02.04.1998. However, his legal representatives were not brought on record in the suit. An exparte decree came to be passed against the dead person on 28.02.2001. After obtaining the said ex-parte decree, the decree holder appears to have filed an Execution Petition in E.P.No. 73 of 2001. Notice sent in the execution petition appears to have been returned on the ground that the judgment debtor is dead and subsequently the legal heirs were impleaded. Upon their failure to execute the sale deed, this Court directed a sale deed to be executed by its Officer and a sale deed came to

be executed on 04.04.2005. Based on that sale deed, now the decree holder has come forward with this execution petition seeking delivery of possession.

4. In the mean time, the Indian Overseas Bank, which had obtained an equitable mortgage in its favour filed a suit on the said mortgage on 09.11.1993 in this Court. The said suit was transferred to the City Civil Court and numbered as O.S.No.11105 of 1996. A preliminary decree came to be passed by the City Civil Court on 17.01.1997. Thereafter, the bank initiated proceedings under SARFAESI Act and the property was sold in the public auction conducted by the bank by issuing a demand notice on 10.01.2003 and possession notice on 21.11.2003. The auction notice was also issued on 23.02.2004 and the auction was ultimately held on 24.03.2004. The respondents 1 and 2 in this execution petition were declared as highest bidders and sale certificate was also issued in favour of the respondents 1 and 2 in the execution petition on 31.03.2004. It is the case of the respondents 1 and 2 that they were in possession as usufructory mortgagees even before the suit. The decree holder filed an Execution Petition in E.P.No. 57 of 2006 by impleading the respondents, who are purchasers under the SARFAESI Act and sought for delivery of possession.

5. Upon notice, the respondents are objecting to the execution of the decree on the following grounds:

i) The decree having been passed against the dead person is invalid and is a nullity.

ii) The respondents 1 and 2 being purchasers in an auction held by the Bank under the SARFAESI Act on the basis of a preliminary decree obtained on the basis of a mortgage, which preceded the agreement of sale are entitled to the property, and the decree holder, who has obtained an ex parte decree based on an agreement entered into, pending the suit on the mortgage filed by the bank cannot seek to execute the decree against them.

6. The learned counsel for the decree holder would rely upon the judgment of the **Hon'ble Supreme Court in Bhanwar Lal Vs. Satyanarain & Another reported in CDJ 1994 SC Page 162** and contend that he can file an Execution Petition against any person in possession of the property irrespective of whether the person sets up independent title or whether such person is bound by the decree or not.

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7. I have gone through the said judgment relied upon by the learned counsel appearing for the Decree Holder, I find that the said judgment does not support such an extreme proposition of law, as suggested by the learned counsel. The facts of the said cases are as follows:

The appellant Bhanwar Lal has obtained a decree in S.A.No. 175 of 1971 for possession in the High Court of Rajasthan for ejectment of Ram Kishan. The decree had become final. The appellant namely, Bhanwar Lal had filed an execution petition under Order 21 Rule 35(3) for delivery of possession in 1979. When he sought for delivery of possession, the first respondent namely, Satyanarain had obstructed the delivery of possession. The next day, the decree holder, namely, Bhanwar Lal filed an application under Order 21 Rule 35(3), seeking to remove the obstruction made by Satyanarain. The Executing Court dismissed the application holding that since it is obstruction by a third party, the decree holder must seek removal of obstruction under Order 21 Rule 97. Pursuant to the same, the appellant Bhanwar Lal filed an application under Order 21 Rule 97 for removal of obstruction. The District Munsif dismissed the application filed under Order 21 rule 97 as barred by limitation under Article 129 of the schedule to the Indian Limitation Act, 1963. On an appeal being filed by the appellant, the Civil Judge directed for removal of the obstruction, holding that the appellant was not precluded from seeking removal of obstruction. The High Court in the Civil Revision Petition filed by the Satyanarain had set aside the order of Appellate Court and confirmed the order of Executing Court. On a further review, it confirmed the earlier order.

8. Hence, the Hon'ble Supreme Court, while examining maintainability of the execution petition held that an application under Order 21 Rule 35(3) is convertible as an application under Order 21 Rule 97. The Hon'ble Supreme Court had framed the questions for determination in the appeal as follows:

2. The crux of the question is whether the application filed on May 25, 1979 by the appellant, though purported to be under Order 21 Rule 35(3) against Satyanarain, is convertible to be one under Order 21 Rule 97. Order 21 Rule 35(3) provides that:-

"35(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court through its officer, may, after giving reasonable warning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or bolt or break open any door or do any other act necessary for putting the decree holder in possession."

While answering the said question, the Hon'ble Supreme Court held that the application filed under Order 21 Rule 35(3) can be treated as an application under Order 21 Rule 97.

9. The learned counsel would however draw my attention to the following observations of the Supreme Court made in Para 3 of the Judgment:-

"A reading of Order 21 Rule 35(3) postulates that the person in possession of the immovable property to be delivered under the decree must be per force bound by the decree." to contend that all the persons found to be in possession of property which is subject matter of the suit, will be bound by the decree. I do not think the Hon'ble Supreme Court intended to lay down such a wide principle of law. Paragraph 3 of the Judgment is reads as follows:-

Admittedly, Satyanarain was not a judgment debtor and that therefore, he is not bound by the decree unless he claims right, title or interest through the judgment debtor, Ram Kishan. The person resisting delivery of possession must be bound by the decree for possession. In other words, the resistor must claim derivative title from the judgment debtor. The Court gets power under Order 21 Rule 97 to remove such obstruction or resistance and direct its officer to put the decree holder in possession of the immovable property after conducting enquiry under Rule 97."

10. A reading of Para 3 of the judgment extracted above would show that the Hon'ble Supreme Court has not stated that any and every person, who is in

possession of the property subject matter of a decree for possession would be bound by the decree. The Hon'ble Supreme Court had very clearly stated that only the judgment debtor or a person who claims derivative title from the judgment debtor would be bound by the decree and they cannot resist execution. In other words, if the person in possession sets up independent title himself, it was open to him to resist execution. Therefore, the learned counsel's reliance on the above judgment is misconceived.

11. Mr.K.Ramu, learned counsel for the respondents 1 and 2 would submit that the very decree having been obtained against the dead person is invalid and cannot be executed. The fact that the defendant in C.S.No. 810 of 1996 died on 02.04.1998 and his legal representatives were never brought on record in the suit is not in dispute. It is only in the execution petition in E.P.No. 173 of 2001, for the first time, the legal representatives of the deceased judgment debtor were brought on record and they also remained ex-parte. The fact that the learned Master of this Court had directed execution of sale deed exparte would not validate a decree which is otherwise invalid. The decree in C.S.No. 810 of 1996 came to be passed nearly 3 years after the death of Narasimhan, the original defendant in the suit on 28.01.2001. The very decree passed against a dead person is a nullity and cannot be put in execution. Since I have held that

the decree itself is a nullity and same cannot be put in execution, it follows that whatever has been done pursuant to the decree also becomes invalid. As already observed in E.P.No. 73 of 2001, this Court had directed execution of sale deed in a sale deed came to be executed in favour of the petitioner/decreed holder on 04.04.2005. It is needless to point out that the said sale deed executed on the basis of the decree, which is obtained against a dead person is also invalid. Hence, the sale deed dated 04.04.2005 executed by an Officer of this Court in favour of the petitioner/decreed holder is also cancelled.

12. Even otherwise, from the facts narrated above, it is very clear that the impleading of the respondents 1 and 2 namely, the purchasers under the SARFAESIE Act as a parties in E.P.No. 57 of 2006 itself improper. An execution petition can be filed only against the person, who is a party to the suit, or a person who is otherwise bound by a decree. The fact that the respondents 1 and 2 are claiming independent title is also not in dispute. The decree holder must have filed the execution petition against the original judgment debtor or his legal representatives. If the respondents 1 and 2 who are subsequent purchasers in sale held under the SARFASIE Act obstruct the delivery of possession, it was open to the decree holder to have sought for removal of obstruction. In the said proceeding the purchasers would have got an opportunity to prove their title before the Court. By impleading respondents 1

and 2 as judgment debtors in the execution petition, the decree holder cannot prevent them setting independent title under Order 21 Rule 97 of the CPC. The Hon'ble **Supreme Court in Babulal Vs. Rajkumar and Others reported in AIR 1996 SC 2050 and in Brahmdeo Chaudhary Vs. Rishikesh Prasad Jaiswal and Others reported in 1997(3) SCC 694** has held that it is open to the person who intends to obstruct delivery to file an application seeking adjudication of his rights under Order 21 Rule 97 and he need not wait till he/she is dispossessed.

13. Be that as it may, since I have concluded the decree itself is nullity, I do not think that execution petition should be retained on file any more. Hence, execution petition is dismissed. However, there will be no order as to costs.

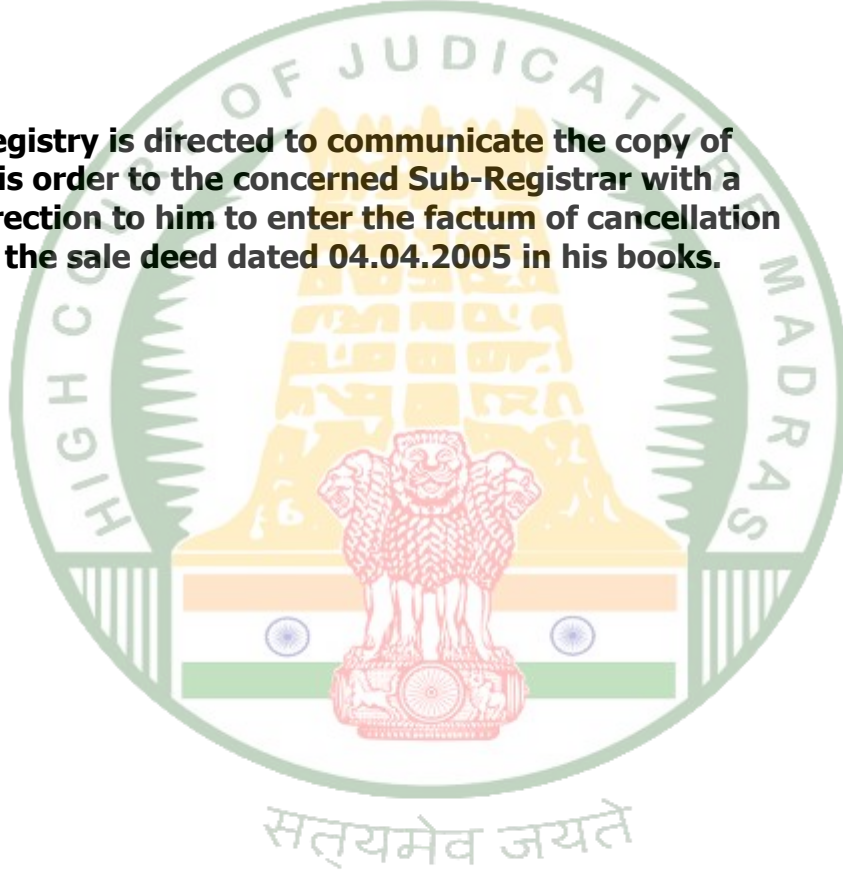
14. Even after the pronouncement of judgment, the learned counsel would submit that he has invoked Order 21 Rule 36 also. The learned counsel would submit that decree in C.S.No. 810 of 1996 being an ex-parte decree passed after the death of the defendant is not nullity as it was passed without knowledge of the death of the defendant. I am unable to appreciate the basis on which such submission is made by the learned counsel. Any legal proceeding automatically abates after 90 days, if any of the parties to the proceedings die. The proceedings can be revived only by setting aside the abatement by the process known to law. In the absence of such proceedings seeking to set aside

abatement, I am unable to comprehend as to how the ignorance of the death of the defendant on the part of the plaintiff would validate an otherwise invalid decree.

04.04.2019

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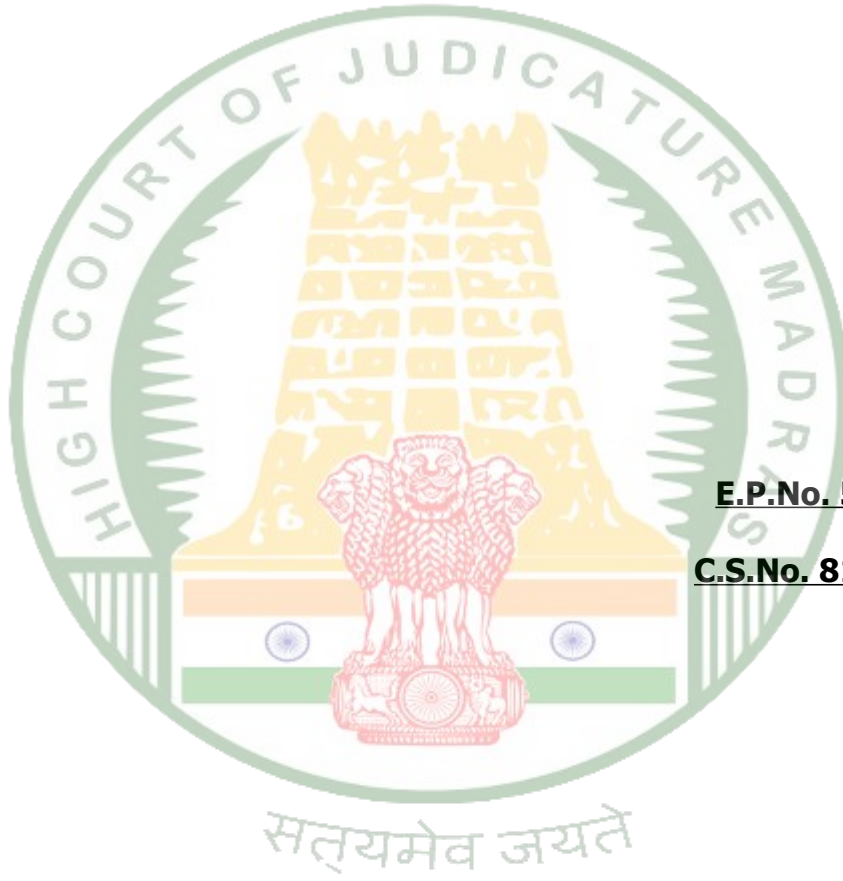
Note: Registry is directed to communicate the copy of this order to the concerned Sub-Registrar with a direction to him to enter the factum of cancellation of the sale deed dated 04.04.2005 in his books.



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R.SUBRAMANIAN, J.

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