

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.04.2019

PRONOUNCED ON : 04.07.2019

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.R.P.(NPD).No.1260 of 2014
and M.P.No.1 of 2014

1.G.K.Suganya
2.K.Kavithiruburan
3.K.Yogeswaran

... Petitioners

vs.

1.N.P.Sekar
2.G.M.Kumaravel

... Respondents

PRAYER: Civil Revision petition filed under Article 227 of the Constitution of India to set aside the fair and decretal order passed in E.A.No.331 of 2008 in E.P.No.282 of 2006 in O.S.No.679 of 1996 on the file of 1st Additional Sub Court, Erode dated 03.07.2012.

For Petitioners : Mr.P.Valliappan

For R1 : M/s.S.Kaithamalai Kumar

ORDER

The present Civil Revision Petition has been filed by the petitioners who are not parties to the original proceedings in O.S.No.679 of 1996 before the Subordinate Court, Erode.

2. The petitioners are aggrieved by the impugned fair and decretal order dated 03.07.2012 passed by the I Additional Subordinate Judge's Court at Erode in E.A.No.331 of 2008 in E.P.No.282 of 2006 in O.S.No.679 of 1996.

3. By the said order, the lower court has dismissed the application filed by the petitioners herein under Section 47 of the Civil Procedure Code to set aside sale deed dated 27.06.2002 in respect of petition property and to record their objection in taking delivery of the said property.

4. The 1st Respondent/Plaintiff had earlier filed O.S.No.679 of 1996 before the Subordinate Court, Erode against the 2nd Respondent/Defendant who was the sole defendant in the suit.

5. The said suit was filed for specific performance of agreement and to direct the 2nd Respondent/Defendant to execute a sale deed in favour of the

1st Respondent/Plaintiff after receiving the balance sale consideration pursuant to an agreement for sale dated 11.12.1992 executed between them.

6. Though, the 2nd Respondent/Sole Defendant entered appearance through a counsel before the Subordinate Court, Erode, he chose to remain absent and was therefore set ex-parte. The suit was therefore decreed ex parte on 30.03.1999. It was not appealed.

7. Under these circumstances, the 1st Respondent/Plaintiff filed E.P.No.296 of 1999 before the Additional Subordinate Court, Erode to execute a sale deed. In the said proceeding, the 2nd Respondent/Sole Defendant objected but later remained absent. On 27.06.2002, the Court executed sale deed in favour of the 1st Respondent/Plaintiff.

8. Thereafter, the first Respondent/Plaintiff (decree holder) filed E.P.No.282 of 2006 for delivery of possession of the property.

9. It is in this proceeding, the petitioners herein filed application under section 47 of the Civil Procedure Code vide E.A.No.331 of 2008 to set aside sale executed by the Additional Sub Court, Erode on 27.06.2002 and to record their

objection to deliver the property.

10. The petitioners are the children of the 2nd Respondent/Defendant. At the time of the agreement and at the time of execution of the sale deed they were minor. They claim right over the property in terms of the partition deed dated 14.07.1990 between the 2nd Respondent and his father. They claim it to be ancestral property.

11. The sale agreement dated 11.12.1992 in respect of the property was signed between the respondents for the sale of property in S.No.638/1 (Hectare 2.98.0- 8.38) Acres 2.32 for a total sale consideration of Rs. 1,10,000/- and as per the recital a sum of Rs. 1,00,000/- has been paid as advance to 2nd Respondent by the 1st Respondent.

12. Further as per the recital only a sum of Rs.10,000/- was the balance to be paid within one year from the date of agreement and in case of failure of make such payment within the agreed time, the 1st respondent would forfeit the advance amount of Rs.1,00,000/- paid and the liability under the agreement would stand discharged.

13.It was also agreed that the 1st Respondent can approach the Court

for appropriate remedy in case the 2nd Respondent failed to execute the sale deed if the 1st Respondent was ready to pay the balance sale consideration.

14. The 1st Respondent had also prayed for an alternate relief to direct the 2nd Respondent to repay an amount of Rs.1,71,850/- paid as advance together with interest at 18% per annum from the date of the suit till the date of realisation.

15. The ex parte judgement dated 30.03.1999 of the Court bears no discussion on facts and issue. There is total non application of mind.

16. In the said proceeding, the petitioners submitted that they came to know about the decree dated 30.03.1999 only during the first week of August 2006 and that the property in question was an ancestral property pursuant to partition deed dated 14.07.1990 and the agreement entered into between the respondents for sale of the suit schedule property was without any legal basis. It was further submitted that at best, the 2nd respondent could alienate only 1/4th of his interest in the property.

17. They have averred that the sale agreement was not a real sale

agreement but one of a loan transaction and the land in question was offered as a security for repayment of the loan. It was further submitted that the amount that was allegedly transacted between the respondents herein and amount was not borrowed for the welfare of the petitioners. They were minors in 1992 and therefore neither the said agreement was binding on them nor the decree passed in O.S.No.679 of 1996 or the sale deed. It was further stated that petitioners being co-owners were having the right of pre-emption to purchase the share of the 2nd Respondent/Defendant.

18. It was further stated that the decree and the subsequent sale was vitiated by fraud. It was stated that the sale agreement made by their father i.e 2nd Respondent/Defendant was not in the capacity of kartha of the Hindu Undivided Family.

19. It was stated that the petitioners were living with the 2nd Respondent/Defendant (Judgement Debtor) and that the partition deed dated 14.07.1990 was only in respect of separate property of 2nd Respondent/Defendant.

20. Even otherwise, the 2nd Respondent being the Kartha of the family

was entitled to alienate the joint family property only to maintain the family. As the 2nd Respondent entered into agreement for sale of the property for valuable consideration, the 1st Respondent was indeed entitled for a specific relief as the 2nd Respondent failed to execute the sale deed as per the agreement.

21. The I Additional Subordinate Court by fair and decretal order dated 03.07.2012 dismissed the petition filed under Section 47 of CPC with the observation that the alienation was not tainted with any illegality or immorality and from the evidence of RW 1 and RW 2 and the alienation was genuine and therefore the petitioners have no right to challenge the same. The said Court also considered that the property in question was allotted pursuant to a partition deed dated 14.07.1990 and that the 2nd respondent also had other properties which were not being questioned by the petitioner.

22. It was further observed that the petitioner herein had not filed a suit for partition claiming the rights over the property. The said Court also noted that there are other properties of the 2nd respondent which were brought for sale but have not been questioned by the petitioner.

23. The fact that the 1st Petitioner was unable to give any reply as to whether the sale deed was executed by the court has been considered as a factor for denying the relief. Further, the fact that the 2nd Respondent remained *ex parte* but was physically present in the court on 11.07.2011 when 1st Petitioner was examined as PW 1 according to the Court shows that they were colluding with each other. That even though according to the 1st Petitioner claimed that she was residing only with her grandfather, as per Voter's list, the 1st Petitioner and the 2nd Respondent were living together under the same roof.

24. The court has also considered the fact that her marriage was performed by her parents and the marriage invitation card also shows the 2nd Respondent's name as father. Considering all these factors, the court has concluded that the 2nd Respondent was looking after his family and therefore it is apparent that the petition has been filed in collusion with the 2nd Respondent to thwart delivery and possession of the property.

25. Aggrieved by the said fair and decretal order dated 30.07.2012

passed by the I Additional Sub- Court, Erode, the petitioners herein preferred an appeal before the II Additional District Judge in A.S.No.88 of 2012.

26. The II Additional District Judge by a judgement and decree dated 09.07.2013 dismissed the aforesaid appeal while giving liberty to file fresh petition on the same cause of action before proper forum.

27. The Court there held that it was no longer available for the petitioners to maintain an appeal against judgement and decree passed by the execution court in view of the amendment to section 47 of the Civil Procedure Code. The Court after referring to the definition in Section 2 (2) (m) (k) of the Civil Procedure Code, held that the said appeal was not maintainable. The Court however granted liberty to the petitioner to redress their grievance before an appropriate Forum.

28. It is under these circumstances, the present Civil Revision Petition has been filed by the petitioners herein against fair and decretal order dated 03.07.2012 in E.A.No.331 of 2008 in E.P.No.282 of 2006 in O.S.No.679 of 1996.

29. Heard Mr.Valliappan, the learned counsel for the petitioners and

Mr.S.Kaithamalai Kumaran, the learned counsel for the 1st Respondent/Decree Holder.

30. The submissions of the Learned counsel for the petitioners are as follows:-

- i. The petitioners are the co-owners of the property in respect of which sale deed has been executed by the Execution Court pursuant to the ex-parte judgement and decree dated 30.03.1999 of the Subordinate Court, Erode. The execution of sale deed pursuant to the judgement and decree is a nullity in the eye of law and cannot be sustained in the light of the law.
- ii. It is submitted that the sale is not binding on the petitioners as they have portable interest in the property.
- iii. Learned counsel further submitted that at best the 1st Respondent/Decree holder can ask for specific performance of 1/4th share of the 2nd Respondent/Judgement Debtor.
- iv. The decree was not executable, as it takes away the rights conferred under the provisions of the Hindu Succession Act, 1956.
- v. The fact that voter's list bears the same address of the 1st petitioner and the 2nd Respondent by itself will not mean that they were living together and were colluding with one another. In any event, the legal rights under the provisions of the Hindu Succession Act, 1956 cannot be overlooked.
- vi. Even as per the oral evidence of the 1st Respondent/Decree Holder, it is clearly established that he has not conducted himself with due diligence before proceeding further with the agreement and the suit for specific performance.

31. The judgement and decree dated 30.03.1999 passed by the

Subordinate Court, Erode was a non-speaking judgement and decree and therefore a nullity and was not binding on the petitioners. In this connection, the learned counsel refer to the following decisions:-

i. **K. Balakrishnan v. S. Dhanasekar** 2018 (1) L.W. 599, wherein it was held that when the defendant is set-ex parte, the court should consider the pleadings, evidence adduced by plaintiff and render a finding as to whether prima facie case has been made to decree suit in favour of plaintiff ex parte.

ii. **Sarup Singh v. Union of India** 2011 (2) CTC 340, wherein it was held that though an Executing Court cannot go behind decree, when the decree is nullity it can be challenged and interfered with at any subsequent stage including at the stage of execution or even in a collateral proceeding.

iii. **A.Abdul Rashid Khan and others v. P.A.K.A Shahul and others** 2001 AIR SCW 2361, wherein the Honble Supreme Court held that in a suit of specific performance even where any property is held jointly, and once any party to the contract has agreed to sell such joint property by agreement, then, even if other co-sharer has not joined, at least, to the extent of his share, he is bound to execute the sale deed and there is no bar for passing the decree for specific performance with regard to share owned by the contracting parties with co-sharer execute the sale deed. However, in the absence of other co-sharer there could not be any decree of any specified part of the property to be partitioned and possession given.

iv. **A.Palanisamy v. Savithri** 2016 (2) MWN (CIVIL) 59, wherein it was held that the only remedy open to the revision petitioner was to file the petition under Section 47 of C.P.C. It was pointed out that, despite application filed under Section 47 of C.P.C., and sufficient explanation, the Court below has not considered the explanation that Separate suit was barred under Order 21, Rule 101 of C.P.C. There, the Executing Court was directed to take the case on file either under Section 47 of C.P.C., or under Order 21 Rule 97 (or) Rule 99 C.P.C.,

subject to the materials to be placed before the Court and to dispose the case on merits.

v. Narayanan vs Kuppan and others 2011 (2) MWN (civil) 548. it was held that even undivided shares could be the subject matter of the agreement to sell and the only remedy open for such agreement holder is to get the specific share of the proposed seller carved out from the joint property and obtain sale deed in respect of the sale. (para 9)

32.The learned counsel for the petitioners also relied on the following decisions:-

a) **Navaneetha Krishnan and Ors vs S.A. Subramania Raja** 2011 (2) CTC 727.

b) **P. C. Vargese vs Devaki Amma Devi and others** AIR 2006 SC 145.

c) **Katar Singh vs Harjinder Singh and others** AIR 1990 SC 854.

d) **Surinder Singh vs Kapoor Singh & Ors** 2005-5-SCC-142.

e) **Kammana Sambamurthy vs kalipatnapu Atchutamma & Ors** AIR 2011 SC 103.

f) **The Additional Commissioner of Income-tax, Madras vs P.L. Karuppan Chettiar** AIR 1979 Mad 1: 1978 SCC OnLine Mad 30 : (1978) 91 LW 529 : (1978) 114 ITR 523 (FB).

g) **Krishnamoorthy vs Poneepankar and others** 2017 (3) CTC 170 (MAD).

h) **A.J.Chandrasekar vs N.Masilamani and others** 2019 (2) MWN (Civil) 44.

33. Per contra, the learned counsel for the 1st Respondent/Plaintiff submitted as follows:-

i. The 2nd Respondent/Defendant was at best entitled to sell only 1/4th share as the property was ancestral property and he had no authority to sell the property of the petitioners who were minors then. The sale agreement also does not state about the fact of any necessity.

ii. In the said proceeding, the 1st Respondent/Plaintiff filed a detailed counter and opposed the relief sought for E.A.No.331 of 2008 in E.P.No.282 of 2006 in O.S.No.679 of 1996. The 1st Respondent/Plaintiff submitted that the property in question was not a joint family property and therefore the petitioners were not entitled to a share in the said property. The 1st Respondent also denied there was loan transaction and that the property in question was offered as a security for repayment of the above loan.

iii. The Decision of the I Additional Sub- Court was well reasoned and requires no interference.

iv. The Petitioner was fighting a proxy dispute on behalf of the father namely the 2nd Respondent/Defendant.

v. There is an enormous delay in approaching the Court after sitting on the fence and the petitioners have watched the entire proceedings up to the stage of execution sale deed on 27.06.2002 in favour of the 1st Respondent and only when the

delivery and possession was sought to be taken, the Petitioners have come forward with their objection under Section 47 of the Civil Procedure Code.

vi. It is submitted that as per Article 59 of the Limitation Act the suit should have been filed within three years from the date of knowledge and under Article 60 of the Limitation Act, the ward can set aside any transfer of property made by the Guardian within three years from the date of his/her attaining the age of majority.

vii. Having slept over the rights to file a suit within the time limit prescribed under the Limitation Act, the petitioners have filed an objection proceeding under Section 47 of the Civil Procedure Code with a view to defeat the right accrued pursuant to the Judgement and Decree of the Subordinate Court, Erode.

viii. There are other properties which are also subject matter of litigations. However, only respect of the present suit property in objection has been made.

ix. The fact that the 1st petitioner was living with the 2nd Respondent shows that there was large-scale collusion. The court has also noted that 2nd Respondent was present when the 1st Petitioner was tendering her evidence in the witness box.

x. The marriage of the 1st Petitioner was solemnised in

presence of the 2nd Respondent and therefore it would be incorrect state that the petitioner was another.

xi. The ration card reflects the name of the petitioners and that the 2nd Respondent is the father and shows that they were living jointly under one roof.

xii. The 1st Petitioner was aware of three pendency of the suit right from 1997 from one Shanmugha sunderam.

34. The learned counsel for the 1st respondents relied on the following decisions:-

1. **Dhurandhar Prasad Singh vs Jai Prakash University and Ors** 2001 (6) SCC 534.
2. **St. Mark's Educational trust vs S. Ashok Kumar** 2006-3-L.W.827.
3. **D. Saraswathy and others vs K. Krishnasamy and others** (2007) 4 MLJ 1252.
4. **Mirthubasini vs Easwaramurthy** (2011) 4 LW 438, 2011 SCC OnLine Mad 1077.
5. **B. janobi vs V.M. Devadoss** 2016 (4) CTC 496.

35. I have considered the arguments advanced on behalf of both the parties. The judgement and decree passed by the court is a non-speaking

judgement and there is no discussion. Therefore, *prima facie* it cannot bind the parties particularly in a suit for specific performance where the courts

have to exercise discretion whether to grant the relief to the agreement holder or not. That was the position of law at the time when the suit was decreed 20 years back on 30.03.1999.

36. The suit itself was laid on the strength of Ex. A1 sale agreement dated 11.12.1992 signed between the respondents herein and notices were exchanged between them during September 1996 vide Exs. A2-3 followed by suit on 09.12.1996.

37. The petitioners are the children of the 2nd Respondent/Defendant (Judgement Debtor). On the date of presentation of E.A.No.331 of 2008 in E.P.No.282 of 2006 in O.S.No.679 of 1996 on 19.08.2008, the petitioners were aged 28, 23 and 21 years respectively.

38. Thus, when Ex. A 1 sale agreement dated 11.12.1992 was signed between the Respondents 16 years prior to the presentation of the E.A.No.331 of 2008 in E.P.No.282 of 2006 in O.S.No.679 of 1996 on 19.08.2008, the petitioners would have been aged 12, 7 and 5 years respectively. They would have attained majority only in the years 1998, 2003 and 2005. The suit was decreed on 30.03.1999.

39. The sale deed was executed on 27.06.2002 by the Court. Question whether the petitioners would have been aware of the suit filed in the year 1996 appears to be remote and farfetched and in any event is not relevant. It is quite possible that the petitioners would have been unaware of their rights over the property as admittedly they were minors at that time.

40. Therefore, even if the 2nd Respondent had agreed to sell the property as per Ex. A 1 sale agreement dated 11.12.1992, such agreements would not be binding on the petitioners except when sale was made for necessity for the benefit of the petitioners in which case, such sale would be binding on the minors even after the attained the age of majority.

41. In this case, the registered sale agreement dated 11.12.1992 vide Ex. A 1 has not been executed by the 2nd Respondent as the kartha or the family head. Therefore, the Petitioners have valid point which deserves to be addressed. Merely because the voter ID shows the 1st Petitioner was also residing with the 2nd Respondent by itself would bind not the Petitioners. Fact whether the sale was made for the benefit of the petitioners or not who where then minors is to be determined.

42. The fact that the judgement and decree dated 30.03.1999 is unreasoned and bears no discussion itself shows that the Court has not exercised the discretion and has instead mechanically decreed the suit. The fact that the agreement is of the year 1992 and the time for executing the sale deed and for payment of the balance consideration was one year but was not acted upon shows that the Court could have decided the case one way or the other even otherwise had it considered the merits.

43. Further, the delay in filing the suit shows that the 1st Respondent may not have acted diligently. The fact that the agreement also does not consider the implication of the rights flowing from a partition deed is a factor which cannot be ignored.

44. In this case admittedly the 1st Respondent has not taken delivery and possession. The possession is still with the Petitioners and presumably with the 2nd Respondent. Therefore, no prejudice or harm would be caused, if the case is remanded back to the 1st Additional Subordinate Court, Erode for determination of the rights of the parties afresh subject to payment of costs of Rs.50,000/- to the 1st respondent.

45. This amount is ordered, considering the fact that the value of the suit schedule property would have increased substantially and the fact that the petitioners have been negligent in not taking steps to file a suit for partition and/or to set aside the sale, but have only intervened in the year 2008 under Section 47 of the Civil Procedure Code when the 1st Respondent filed application to take delivery and possession of suit schedule property.

46. Consequently, the petitioners shall pay a sum of Rs.50,000/- as cost to the 1st Respondent/Plaintiff within a period of four weeks from the date of receipt a copy of this order. The aforesaid amount shall be deposited to the credit of E.P.No.282 of 2006 in O.S.No.679 of 1996 on the file of Subordinate Court, Erode.

47. The Subordinate Court, Erode shall thereafter pass a fresh order in E.A.No.331 of 2008 in E.P.No.282 of 2006 in O.S.No.679 of 1996 on merits keeping the observations contained in this order. This exercise shall be carried out by the Subordinate Court, Erode within a period of nine months from the date of receipt of a copy of this order.

C.SARAVANAN,J.

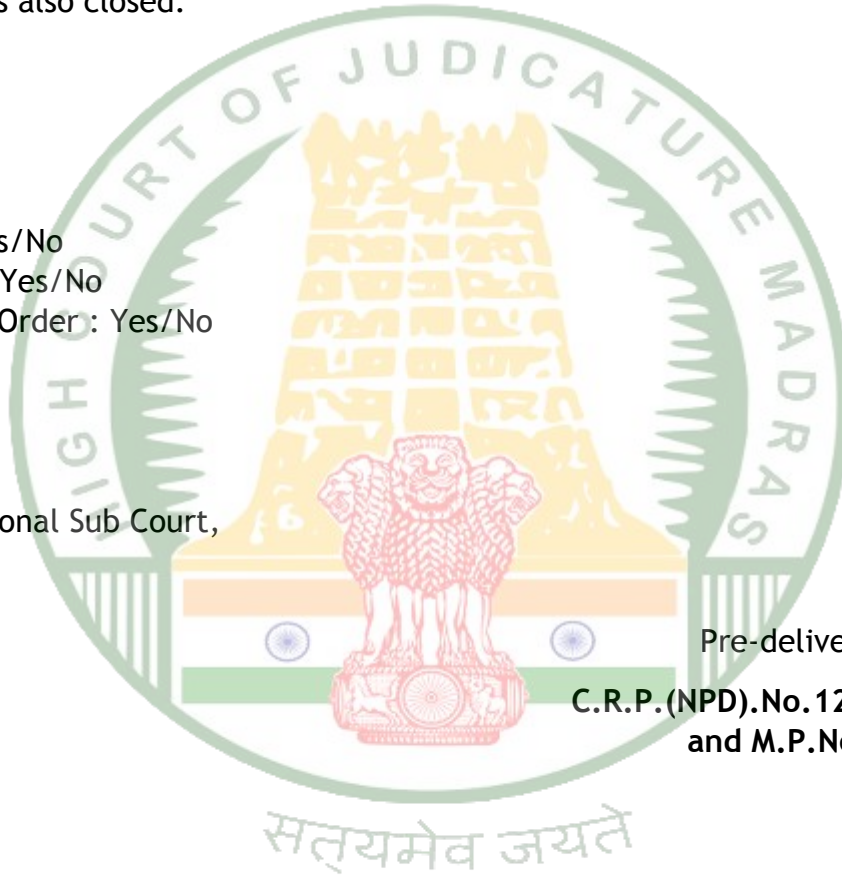
48. The above Civil Revision Petition stands disposed in terms of the above observations. No costs. Consequently, connected miscellaneous petition is also closed.

04.07.2019

Index :Yes/No
Internet :Yes/No
Speaking Order : Yes/No
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To

1st Additional Sub Court,
Erode.



Pre-delivery Order in
C.R.P.(NPD).No.1260 of 2014
and M.P.No.1 of 2014

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