IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 23.07.2019

C O R A M

THE HON'BLE **Mr.JUSTICE ABDUL QUDDHOSE**

C.R.P.(NPD) No.1963 of 2014 &
M.P.No.1 of 2014

J.Udhaya Bhushanam ... Petitioner

Vs.

1.A.Kumar
2.P.Senthil Kumar ... Respondents

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the fair and final order dated 26.04.2013 made in E.A.No.16 of 2009 in E.P.No.4 of 2009 in O.S.No.103 of 2005 on the file of the learned First Additional District Judge at Coimbatore.

For Petitioner ... Mr.A.Esakkiappan

For Respondent 1 ... Mr.D.Veerasekaran

ORDER

The instant civil revision petition has been filed challenging the order dated 26.04.2013 passed by the learned First Additional

District Judge, Coimbatore in E.A.No.16 of 2009 in E.P.No.4 of 2009 in O.S.No.103 of 2005.

Brief facts leading to the filing of the instant revision under Article 227 of the Constitution of India:

2. The petitioner is the plaintiff in the suit O.S.No.103 of 2005 on the file of the learned First Additional District Court, Coimbatore. He filed a suit for specific performance against the second respondent to enforce an agreement of sale dated 23.11.2003 entered into by him with the second respondent. The second respondent on receipt of the suit summons entered appearance in the suit and filed his written statement. However, he failed to defend the suit and thereafter, he was set exparte and an ex parte decree dated 24.09.2007 came to be passed in favour of the petitioner directing the second respondent to execute the sale deed for the suit schedule property in favour of the petitioner. E.P.No.4 of 2009 has also been filed by the petitioner to execute the judgment and decree dated 24.09.2007 passed in favour of the petitioner before the learned First Additional District Court, Coimbatore.

3. Pending the execution petition, E.A.No.16 of 2009 was filed by the first respondent under Section 47 read with Section 151 of the Code of Civil Procedure, requesting the Court to pass an order recording the objections raised by the first respondent that he is the absolute owner of the suit schedule property as he has purchased the same through the Court by virtue of specific performance decree dated 26.07.2007 obtained by him against the second respondent in O.S.No.111 of 2007. Therefore, according to the first respondent, the petitioner is not entitled to execute the decree dated 24.09.2007 passed in his favour as it is a subsequent decree.

4. A counter affidavit was also filed by the petitioner in E.A.No.16 of 2009 denying the allegations of the first respondent and specifically pleading that the first respondent has committed fraud by colluding with the second respondent and getting a decree in his favour in O.S.No.111 of 2007. Paragraph 5 of the counter statement filed by the petitioner in E.A.No.16 of 2009 is extracted hereunder:

"5.This respondent humbly submits that the alleged agreement for sale dated 12.12.2002 has been created fraudulently by an act of collusion between the petitioner and the second respondent in order to defeat the valuable rights of this respondent. This respondent filed the above suit against the 2nd respondent on 07.03.2005 for the relief of specific performance in regard to the property in dispute in which the 2nd respondent entered appearance and filed his written statement. When the said suit was taken up for trial, this respondent's husband gave evidence as PW1 and he was cross examined by the 2nd respondent's counsel. When the suit was adjourned for further proceedings, the 2nd respondent remained exparte and consequently a decree was passed on 24.09.2007."

5. By order dated 26.04.2013, E.A.No.16 of 2009 filed by the first respondent under Section 47 of the Code of Civil Procedure was allowed. Aggrieved by the same, the petitioner who is the first respondent in E.A.No.16 of 2009 and the petitioner in E.P.No.4 of 2009 has filed this revision under Section 115 of the Code of Civil Procedure.

Submissions of the learned counsels:

6. Heard, Mr.A.Esakkiappan, learned counsel for the petitioner and Mr.D.Venkatesan, learned counsel for the first respondent. Despite service of notice on the second respondent and his name having been printed in the cause list today, no one has entered appearance on his behalf.

7. The learned counsel for the petitioner drew the attention of this Court to the decree passed in his favour in O.S.No.103 of 2005 which granted a specific performance decree against the second respondent. He drew the attention of this Court to the date of the filing of the suit, the date of the agreement of sale and the date of the judgment. He also drew the attention of this Court to the suit filed by the first respondent in O.S.No.111 of 2007 as well as the alleged agreement of sale and the date of filing as well as the date of the decree of the said suit.

8. After drawing attention of this Court to the above said suits, the learned counsel for the petitioner would submit that the

petitioner who has entered into an agreement of sale with the second respondent, filed the suit in the year 2005 whereas the first respondent who is also allegedly entered into an agreement with the same second respondent, filed the suit only in the year 2007. According to him, it is a clear case of collusion between the first and second respondents to deprive the legitimate rights of the petitioner to enforce the judgment and decree dated 24.09.2007 passed against the second respondent.

9. The learned counsel for the petitioner drew the attention of this Court to the written statement filed by the second respondent in O.S.No.103 of 2005 filed by the petitioner against the second respondent, wherein he brought to the notice of this Court that there is no pleading made by the second respondent about the existence of another agreement of sale namely the agreement of sale with the first respondent. According to him, all these factors will conclusively establish that fraud has been played upon the petitioner by both the respondents who have colluded together.

10. Per contra, learned counsel for the first respondent would submit that there is no collusion between the first and second respondents as the first respondent is having a valid agreement of sale

dated 12.12.2002 entered into prior to the alleged agreement of sale of the petitioner dated 23.11.2003. Further according to him, the first respondent has executed the decree dated 26.07.2007 passed against the second respondent and has also obtained sale deed in his favour on 11.06.2008 itself. Having got the sale deed obtained through Court, according to him, the petitioner cannot seek any right over the property. Further, according to him, the execution petition filed by the petitioner in E.P.No.4 of 2009 is not maintainable as the first respondent has obtained the property only through a valid court sale.

Discussion:

11. This Court has perused the counter affidavit filed by the petitioner in E.A.No.16 of 2009 filed by the first respondent under Section XLVII CPC. In paragraph 5 as extracted above, the petitioner has pleaded the following:

> *"5.This respondent humbly submits that the alleged agreement for sale dated 12.12.2002 has been created fraudulently by an act of collusion between the petitioner and the second respondent in order to defeat the valuable rights of this respondent. This respondent filed the above suit against the 2nd respondent on 07.03.2005 for the relief of specific*

performance in regard to the property in dispute in which the 2nd respondent entered appearance and filed his written statement. When the said suit was taken up for trial, this respondent's husband gave evidence as PW1 and he was cross examined by the 2nd respondent's counsel. When the suit was adjourned for further proceedings, the 2nd respondent remained exparte and consequently a decree was passed on 24.09.2007."

12. This Court has also perused the written statement filed by the second respondent on 02.02.2006 in the suit filed by the petitioner in O.S.No.103 of 2005. The second respondent is the owner of the suit schedule property which is the subject matter of the agreement of sale. As seen from the written statement, there is no whisper about the existence of any prior agreement of sale. However, the first respondent claims right by virtue of an agreement of sale dated 12.12.2002 which culminated in a sale deed obtained by the first respondent through court by virtue of an ex parte decree dated 26.07.2007 passed in O.S.No.111 of 2007 in favour of the first respondent.

13. In the counter affidavit filed in E.A.No.16 of 2009 as extracted above, the petitioner has made a categorical pleading that fraud has been played upon him by both the respondents as they have colluded together. However, as seen from the impugned order, the executing court while allowing E.A.No.16 of 2009 has not considered whether fraud has been committed by the respondents or not.

14. It is settled law that the executing court can go behind the decree when the decree was obtained through fraud. As observed earlier, the written statement filed by the second respondent in O.S.No.103 of 2005 does not whisper about the existence of any prior agreement. Further both the agreements of sale are unregistered agreements.

15. Sections 40 to 44 of the Indian Evidence Act, 1872 deals with Judgments of Courts of Justice when relevant and they are as follows:

(a) Section 40-Previous judgments relevant to bar a second suit or trial.

(b) Section 41 – Relevancy of certain judgments in probate, etc., jurisdiction.

(c) Section 42 - Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41.

(d) Section 43 – Judgments, etc., other than those mentioned in sections 40 to 42, when relevant.

(e) Section 44 – Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.

Insofar as the case on hand is concerned, Section 44 is relevant.

16. Section 44 of the Indian Evidence Act reads as follows:

" 44. Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved.- Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under Sections 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion."

17. In the instant case, there are two decrees for specific performance, one obtained by the petitioner and the other obtained by the first respondent. A categorical stand has been taken by the petitioner as seen from his counter filed in E.A.No.16 of 2009 in E.P.No.4 of 2009 thatthe first respondent has colluded with the second respondent and has obtained a decree by fraud. The Trial Court ought to have considered Section 44 of the Indian Evidence Act and given an opportunity to the petitioner by letting in oral and documentary evidence to enable him to prove his allegations of fraud and collusion against the respondents.

18. It is also a categorical stand of the petitioner that the said agreement of sale executed in favour of the first respondent by the second respondent is a fabricated document. But the executing court under the impugned order has allowed the application filed by the first respondent under Order XLVII CPC only on the ground that the decree passed in favour of the first respondent has not been set aside and unless and until, the said decree is set aside, the said decree cannot be considered as invalid. As seen from the impugned order, the question of

fraud has not been considered by the executing court under the impugned order, that too, when the surrounding facts and circumstances raise doubts as to which of the decrees is a valid one. The question of fraud ought to have been adjudicated by the executing court as it is the categorical stand of the petitioner. As it is his case that when there is no plea made in the written statement about the existence of another agreement of sale, the first respondent claiming right over the property by virtue of an agreement of sale is highly improper. Since the executing court has not considered the question of fraud, even though a specifc plea was taken by the petitioner, this is a fit case for remand to the executing court for fresh consideration.

Conclusion:

19. In the result, the impugned order dated 26.04.2013 passed by the learned First Additional District Judge at Coimbatore in E.A.No.16 of 2009 in E.P.No.4 of 2009 in O.S.No.103 of 2005 is hereby set aside and the matter is remitted back to the executing court for fresh consideration and the executing court shall after giving sufficient opportunity to both the petitioner as well as the first respondent

including granting them their right to let in oral and documentary evidence, dispose of E.A.No.16 of 2009 filed by the first respondent on merits and in accordance with law within a period of three months from the date of reciept of a copy of this Order. Accordingly, the civil revision petition is disposed of. No costs. Consequently, connected miscellaneous petition is closed.

23.07.2019

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Index : Yes / No
Internet: Yes/No
Speaking/Non-Speaking orders

To

The First Additional District Judge at Coimbatore.

ABDUL QUDDHOSE. J,

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