BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 05.04.2019
Pronounced on : 12.07.2019

CORAM:

THE HONOURABLE MRS.JUSTICE S.RAMATHILAGAM

C.R.P.(MD)(NPD).No.800 of 2017
and
C.M.P.(MD).No.3622 of 2017

Sahayamary Jeyarani :Petitioner/petitioner /5th Respondent/5th Respondent /5thDefendant

Vs.

1.Rethinasami :1st Respondent/ 1st Respondent /Petitioner/NIL/NIL

2.Shahul Hameed :2nd Respondent/2nd Respondent /2nd Respondent/Petitioner/Plaintiff

3.Charismatic Service Trust,
Rep. By its Founder and Managing Trustee,
Rev. Fr. John Joseph (D1),
Market Road, Marthandam Nalloor,
Kanyakumari District. :3rd Respondent/3rd Respondent /3rd Respondent/1st Respondent/ /1st Defendant

4.John Joseph :4th Respondent/4th Respondent /4th Respondent/2nd Respondent/ /2nd Defendant

5.Hiller Mary :5th Respondent/5th Respondent /5th Respondent/3rd Respondent/ /3rd Defendant

6.Joseph Alphonse :6th Respondent/6th Respondent /6th Respondent/4th Respondent/ /4th Defendant

Maria Joseph(Died)

Pious(Died)

Uugin Fernando(Died)

Sanchana Rajan(Died)

PRAYER: This Civil Revision Petition has been filed under Section 119 of Civil Procedure Code against the order in E.A.No.9 of 2017 in E.A.No.282 of 2011 in E.P.No.40 of 2004 in O.S.No.58 of 1997 dated 04.04.2017 on the file of the District Judge, Kanyakumari District at Nagercoil.

For Petitioners : Mr.S.Saji Bino

For 1st Respondent : Mr.Ajmal Khan, Senior Counsel for M/s.Ajmal Associates

For 2nd Respondent : No appearance

For Respondents 3 & 4 : No appearance

ORDER

This Civil Revision Petition has been preferred against the order passed in E.A.No.9 of 2017 in E.A.No.282 of 2011 in E.P.No.40 of 2004 in O.S.No.58 of 1997 dated 04.04.2017 by the District Judge, Kanyakumari District at Nagercoil.

2.E.A.No.9 of 2017 was filed by the first respondent herein and the revision petitioner is the fifth defendant in the suit has filed E.A.No.282 of 2011. The petitioner as fifth defendant has contended that in the execution petition, his address was wrongly given by the auction purchaser and the decree holder purposely and she is not residing in the address mentioned in the execution petition and other proceedings, her actual residential address is not at all given and her actual residential address is Sahayamary Jeyarani, D/o.Stanislas, 11/153, Chonachivilai, Theruvukadai and Post, Midalam Village, Vilavancode Taluk, Kanyakumari District.

3.In order to prove her correct residential address, the petitioner/fifth defendant has produced attested copy of Adhar Card and Ration Card etc. Further, it is stated that the petitioner/fifth defendant is one of the Trustees of the third respondent Trust. It is further contended that pursuant to the exparte decree in O.S.No.58 of 1997 on the file of the District Judge, Kanyakumari District dated 07.04.2000, the second respondent filed E.P.No.40 of 2004 for realization of decree amount of Rs.18,17,989/-. After hearing both sides, the District Judge, Kanyakumari District fixed upset price at Rs.22,03,000/- for proclamation of sale on 23.02.2010. Thereafter, auction was conducted and the schedule of properties sold in favour of the first respondent for a sum of Rs.22,03,000/- and the sale was confirmed by the learned District Judge on 08.01.2011. Thereafter, the first respondent filed E.A.No.282 of 2011 for delivery of properties and the same was allowed on 04.09.2013. It is further contended that the petitioner only came to know that the trust properties sold through court auction, she filed E.A.No.9 of 2017 to set aside the order made in E.A.No.282 of 2011 dated 04.09.2013 and E.A.No.10 of 2017 has been filed to stay all further proceedings in E.A.No.282 of 2011 till the disposal of E.A.No.9 of 2017.

4.Further, the petitioner states that she has not received any notice in the execution proceedings or any other proceedings including the police protection and other related petitions. All the summons and notices for execution proceedings are taken only to the Trust Office address, not to her residential address. Hence, notices have been sent to her residential address was returned as unclaimed. Only after coming to know of legal proceedings, the petitioner filed a petition under Order 21 Rule 89 of the Code of Civil Procedure by stating that she is ready and willing to deposit the entire sale amount of Rs.22,03,000/- due to the purchaser with poundage and registration amount with five per cent of the purchase money which comes to Rs.30,95,360/-.

5.Further, the petitioner contended that the auction purchaser had included the dead persons viz., respondents 6, 8 and 9 as living persons in the break open petitions which is vitiating the entire Court proceedings. The 9th respondent namely, Santhanarajan has two legal heirs one his wife Mary Anjala Rajan and another one is his son Alex Joseph Raj. But, they were not included in the execution proceedings. But, it is falsely contended that the said Santhanarajan, has no issue to be impleaded in the execution proceedings as his legal heirs. The huge fraud committed in the execution proceedings, as instead of selling Item No.4 or Item No.6 so as to satisfy the decree amount of all the six items of the property in public auction. The petition is perfectly maintainable as the petition is filed within 30 days from the knowledge ie. On 06.03.2017. The auction purchaser and the decree holder played fraud in the court proceedings.

6.The learned counsel for the petitioner relied upon the judgment in the case of ***Imayam Trust Vs. Balakumar and others****, reported in* **2015 (2) L.W. 235** wherein at paragraph Nos.14 and 16, it has been held as follows:

> *The said petition is filed under Section 115 of C.P.C. As against the fair and decreetal order dated 06.12.2013 passed in I.A.No.247 of 2013 in O.S.SR.No.463 of 2013 on the file of the Principal District Judge, Thiruchirappalli. The said case filed seeking for grant leave under Section 92 of C.P.C. A close reading of the plaint, prima facie show allegations of misappropriation, breach of Trust, misuse and mismanagement in the Trust. It*

has to be noted that the respondents 1 and 2 elaborately gave twenty five instances of misconduct, mismanagement and breach of trust of petitioners 2 and 3 in the administrations of first petitioner Trust. However, the petitioners only denied the allegations and they have not produced documents which are exclusive in their possession to falsify the serious allegations made and to deny leave. Non-filing of documents in their possession would make the Court to be satisfied with prima facie allegations made by the respondents regarding mismanagement of the first petitioner trust. In the light of the above, it is seen that the first petitioner trust is prima facie a public trust prima facie allegations are made out in the affidavit in paras 7 to 12 and more in detailed manner in para 11 of the plaint regarding mismanagement, breach of trust and misappropriation of funds(3) The suit has been brought only for vindication of public rights; (4)The District Court has jurisdiction (5)The third respondent is transposed as third plaintiff in the suit (6)Leave granted to sue under Section 92 C.P.C., is sustainable. Therefore, leave granted by the District Court is sustained. There is no perversity or illegality or irregularity in the order passed by the District Court. CRP fails and the same is dismissed M.P.No.2 of 2014 is allowed. The trial Court is directed to expedite the hearing in pending applications. No costs.

22.It has to be noted that the respondents 1 and 2 elaborately gave twenty five (25) instances of misconduct, mismanagement and breach of the trust of the petitioners 2 and 3 in the administrations of first petitioner Trust. However, the petitioners only denied the allegations and they have not produced documents which are exclusive in their possession to falsify the serious allegations made and to deny leave. Non-filing of documents in their possession would make the Court to be satisfied satisfy with prima facie allegations made by the respondents regarding mismanagement of the first petitioner trust.

23.In the light of the above, it is seen that

(1)The first petitioner trust is prima facie a public trust;

(2)Prima facie allegations are made out in the affidavit in paras 7 to 12 and more in detailed manner in para 11 of the plaint regarding mismanagement, breach of trust and misappropriation of funds;

(3)The suit has been brought only for

vindication of public rights.

(4)The District Court has jurisdiction;

(5)The third respondent is transposed as third plaintiff in the suit.

(6)Leave granted to sue under Section 92 C.P.C., is sustainable.

Therefore, leave granted by the District Court is sustained. There is no perversity or illegality or irregularity in the order passed by the District Court. CRP fails and the same is dismissed. M.P.No.2 of 2014 is allowed. The trial Court is directed to expedite the hearing in pending applications. No costs. Consequently, the connected M.P.Nos.1, 3 and 4 of 2014 are closed.

7.In the counter statement, the first respondent contended that the averments made in the affidavit filed in support of the above application is totally untrue and the reasons set out for setting her set exparte in the delivery application in E.A.No.282 of 2011 is wholly untrue and suppression of material facts. The affidavit filed in the said E.A is bereft of sufficient and reasonable cause to file the above set aside petition only with a view to mislead the Court. The said petition has been filed by the petitioner regarding non-service of notice in E.A.No.282 of 2011. It is further contended that steps were taken for the paper publication and publication was also made and in the above petition for the appearance of the petitioner in I.A.No.282 of 2011. Thereafter, paper publication was effected and Advocate Mr.T.Johnson filed vakalat for fifth respondent and the same was recorded and E.A.No.282 of 2012 was adjourned to 17.10.2012 for filing counter. On 17.10.2012, E.A.No.282 of 2011 was taken up and adjourned to 15.11.2012 for filing counter. Thereafter, time was granted for filing counter on 15.11.2012, 10.12.2012, 10.01.2013, 24.01.2013, 12.02.2013, 25.03.2013, 18.04.2013, 07.06.2013, 29.07.2013 and finally on 04.09.2013. The petitioner has suppressed all the vital and material date of posting from the purview of this Court. The averments stated in paras 6 to 9 of the affidavit are very much false, since she has appeared before the Court by her counsel. Further, when the petitioner claims that she is only a trustee in the respondent trust and it is for her to make her presence in the trust office, whereas with a crooked mind and to deprive the rights of the first respondent that she is residing at a different place and challenging the steps taken in the service of notice on her. Hence, the above conduct of the petitioner is unacceptable. Since the petitioner is being a trustee is always expected to look after the trust affairs with dedication and caution. But in the above case, the petitioner and other trustees have always restored to unholy tricks to deprive the first respondent from getting the suit properties in E.A.No.282 of 2011. The respondent further contended that the execution application for sale of the E.P schedule properties was allowed and public auction was held on 29.07.2010. The sale effected and confirmed on 08.01.2011. Thereafter, the sale was given to auction purchaser on 29.03.2011. All these proceedings are not challenged by the petitioner, since the petitioner is well aware of every factual aspects involved in the case. The auction purchaser/first respondent in the E.A applied for delivery of property in E.A.No.282 of 2011 and the above E.A was dragged on at the behest of all the so-called trustees namely, respondents 1 to 9 in E.A.No.282 of 2011. The first respondent was made to run from pillar to post and the first respondent was made to incur huge loss, expenses, mental and physical strain to get delivery of the suit schedule properties in E.A.No.282 of 2011. Without any least concern, the petitioner has resulted to unholy tricks and thus, has unscrupulously averred to meet Rs.30,95,360/- to set aside exparte order passed against her in order to deprive the first respondent for getting his property. It is further contended that the law is very clear under Order 21 Rule 78 that irregularity not to vitiate sale thereby the averments of the petitioner are only a ruse to set aside the sale indirectly under the guise of irregularity. The first respondent further submitted that the petitioner has played fraud to stall the delivery proceedings despite the official memorandum issued to Tamil Nadu Police Department on 13.02.2017 for effecting delivery. Further, the first respondent has also paid a sum of Rs.1,02,856/- to the Government for getting police bundobust on 08.03.2017. He would further submit that as the petitioner did not come with clean hands, the petition filed by the petitioner is liable to be dismissed.

8.The trial Court, after observing the contention raised by both sides regarding the nature of the reliefs sought for in the suit, the decree in O.S.No.58 of 1997 and the connected proceedings, has given a finding that in the E.A filed by the petitioner to set aside the order dated 04.09.2013 to deposit a sum of Rs.30,95,360/- in E.A.No.282 of 2011 and E.A.No.10 of 2017 to stay all further proceedings in E.A.No.282 of 2011 and throughout the proceedings, the respondent was remained exparte. Further, the Court below observed that it is an accepted procedure that when the judgment debtor evades due process of law at the time of execution and delivery, then the auction purchaser files petition before the Executing Court seeking delivery of possession. It is further observed that when the judgment debtor disputes the claim of the auction purchaser in handing over the delivery, then the auction purchaser is entitled to seek the intervention of the Court for him or seeking police protection for taking delivery of possession.

9.It is further observed that when the petitioner claims herself as member of the Charismatic Service Trust and when the notice was served on all the members of the Trust, the petitioner in the execution petition petition cannot claim ignorance. The service was also effected from the Court, through registered post, through private mode, through paper publication. After exhausting all the procedure, the auction was ordered and the property was attached. Based on the said auction, the first respondent was successful bidder in the public auction had filed E.A.282 of 2011 for seeking delivery of possession and till 2014, the judgment debtor has prevented the auction purchaser from taking delivery. The present petitions have been filed only to harass the auction purchaser in one way or other.

10.It is further observed that the properties were brought to Court auction and it will be sold at the first instance and the petitions are repeatedly filed only to reduce the upset price. Under those circumstances, auction had been held in a public auction in the Court and after the successful bidder face the poundage and the balance of the auction bid amount in full, the same is also confirmed by the Court. In this case, it is found that the petitioner had already entered in one proceedings and after delivery was ordered, the auction purchaser could not take delivery. The value of the property that was taken in public auction in the year 2011, is Rs.30,00,000/- according to the petitioner, it will fetch six times the value now and now after about six years. The above said contention is untenable for the simple reason that the petitioner has filed the above petitions seeking to stay the auction sale only after lapse of several years.

11.The other observation found by the executing Court in the counter statement that the petitioner along with other judgment debtor of the execution petition are the members of Charismatic Service Trust were alleged to have murdered a young man after sexually harassed him. They were facing murder charge. It is further stated in the counter that only to harass the auction purchaser and to defeat the proceedings, the petitioner has filed the present petitions.

12.It is further observed by the Executing Court that it is the fraud played by the petitioner before the Executing Court and the petitioner is not a stranger she had been throughout the earlier proceedings. She being an accused in the Sessions Case because of murder along with other members of the Society in S.C.No.25 of 1998. So the petitioner has knowledge about the proceedings of the Court and the reasons stated by the petitioner was not accepted. Hence, the said petition was dismissed by the Executing Court.

13.The learned Senior Counsel appearing for the first respondent submitted that he is a third party in the suit in O.S.No.58 of 1997 which was filed by the second respondent before the learned Subordinate Judge, Kuzhithurai, for the realization of Rs.10,57,000/- and the said suit was also decreed exparte on

07.04.2000, granting a decree at Rs.10,57,000/- and Rs.6,68,500/- towards interest at the rate of 36% per annum from 07.04.2000 to the date of decree on the principal sum of Rs.7,00,000/- and Rs.92,489/- towards the costs of the suit making in all sum of Rs.18,17,989/- and further interest at 6% per annum from the date of decree till realization. Along with the suit, the plaintiff filed an application in I.A.No.290 of 1997 for attachment of plaint schedule properties and an exparte order was passed and subsequently that was made absolute and on the basis of the exparte decree the plaintiff/respondent filed an E.P.40 of 2004 before this Court claiming Rs.20,06,607.25 from the defendants. In the execution petition, the scheduled properties which were attached in I.A.No.290 of 1997 belongs to Charismatic Service Centre which are under the exclusive possession and enjoyment of the Charismatic Service Centre not under the enjoyment of Charismatic Service Trust. Further, it is submitted that the suit between the plaintiff and Charismatic Service Trust only and the suit transaction between the Charismatic Service Centre is nothing to do with the plaintiff and she has not dealt with the alleged transaction between them. The Charismatic Centre is not a party, the decree holder by way of making material irregularities for the purpose of getting any lawful action.

14.The Charismatic Service Centre is not a party either in the suit or in the E.P or with the loan transaction. So, the properties belonging to the Charismatic Service Centre is not liable for the plaintiff's debt. The petitioner submits that the properties brought to sale will fetch more than Crores of Rupees but the decree holder has assessed the properties only for a meagre sum. The decree holder brought the properties to sale only by way of making material irregularity for the purpose of getting unlawful gains.

15.The learned counsel for the petitioner submitted that the petitioner filed the claim petition which was dismissed by the Court on 30.04.2010 and the petitioner filed the appeal against the order before the Madurai Bench of Madras High Court and after the dismissal of the claim petition, the properties were sold in the public auction and the auction purchaser deposited the amount.

16.E.A.No.282 of 2011 filed by the petitioner for taking break open the lock and delivery of possession. During the proceedings, she was present but claiming ignorance stating that the said notice was not served on her house. It is also the grievance of the petitioner that the execution proceedings were not sent to her residential address and only in the office address. When the petitioner claims that she is the one of the trustees in the said Trust then she is available in the office. The notice would have been served on her but she has declared that her residential address is wrongly given by the decree holder as well as the auction purchaser. Hence, the attitude of the petitioner was very much observed by the Executing Court. Hence, there is no merit in the Civil Revision Petition and the petition is liable to be dismissed.

17.In the result, this petition is dismissed and the judgment and decree passed in E.A.No.9 of 2017 in E.A.No.282 of 2011 in E.P.No.40 of 2004 in O.S.No.58 of 1997 dated 04.04.2017 on the file of the District Court, Kanniyakumari District at Nagercoil is confirmed. No costs. Consequently, the connected C.M.P.(MD).No.3622 of 2017 is closed.

Sd/-

Assistant Registrar (AD-I)

// True Copy //

Sub Assistant Registrar(CS)

To

1.The Principal Subordinate Judge,
Madurai.

2.The Additional District Munsif,
Madurai Town.

3.The District Judge,
Kanniyakumari at Nagrcoil.

Order made in

C.R.P.(MD)(NPD).No.800 of 2017
and
C.M.P.(MD).No.3622 of 2017

<u>Reserved on:05.04.2019</u>

<u>Pronounced on: 12.07.2019</u>

CS(22.07.2019) 9P 4C