IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.11.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.M.S.A.No.38 of 2011
and
M.P.No.1 of 2011

1.K.Shanmugam

2.Periyasamy .. Appellants/Respondents 1 & 2

Vs.

1.M.Shanmugam ...1st Respondent/Appellant

2.Pachamuthu @ Muthusamy

3.Selvaraj

4.Lakshmi @ Kannagi

5.Pachiammal

6.Sampooranam .. Respondents 2 to 6/Respondents 4 to 8

Prayer: This Civil Miscellaneous Second Appeal is filed under Order XXI Rule 58 (5) of the Code of Civil Procedure r/w Section 100 of the Code of Civil Procedure, against the fair and decretal order dated 08.04.2010 in C.M.A.No.3 of 2005, on the file of the Sub Court, Bhavani, Erode District, reversing the Fair and Decreetal Order of the Learned Principal District Munsif, Bhavani dated 05.04.2004 in E.A.No.335 of 2002 in E.P.No.22 of 1999 in O.S.No.733 of 1989.

For Appellants : Mr.K.Sivasubramanian
for Mr.T.M.Hariharan

For R1 : Mr.T.Murugamanickam
Senior Counsel
for Ms.Zeenath Begum

For RR 2, 5 & 6 :Mr.C.Harish
for Mr.N.Manokaran

For RR 3 & 4 :No appearance

J U D G M E N T

(The matter is heard through “Video Conferencing/Hybrid Mode”.)

This Civil Revision Petition is filed against the fair and decretal order dated 08.04.2010 in C.M.A.No.3 of 2005 reversing the Fair and Decreetal Order of the Learned Principal District Munsif, Bhavani dated 05.04.2004 in E.A.No.335 of 2002 in E.P.No.22 of 1999 in O.S.No.733 of 1989.

2.The appellants are third parties in O.S.No.733 of 1989 and petitioners in E.A.No.335 of 2002. The 1st respondent filed the said suit against his Father P.Mangalagiri, who is 1st defendant and respondents 2 to 4 herein as defendants 2 to 4 in the suit. The first defendant is Father of respondents 1 to 3. The 4th respondent is purchaser of the property from 1st defendant.

3.According to 1st respondent, the petition property is purchased from and out of nucleus of joint family property in the name of 1st defendant. In view of the same, the respondents 1 to 3 and 1st defendant have 1/4th share each in the petition property. The 1st defendant and respondents 2 & 3 filed written statement on 29.10.1991 stating that petition property is self acquired property of 1st defendant and it is not a joint family property. The 4th respondent, who is the purchaser from the 1st defendant adopted the written statement filed by the 1st defendant and respondents 2 & 3. After filing written statement, the 1st defendant and respondents 2 to 4 did not contest the suit and they were set exparte and exparte decree was passed on 30.11.1993. Subsequently, in I.A.No.2440 of 1995 filed by the 1st respondent, a final decree was passed on 12.10.1998 and allotted 'D' portion of the petition property mentioned in Advocate Commissioner's report to the 1st respondent.

4.The 1st respondent filed E.P.No.22 of 1999 for delivery of possession of petition property. At that stage, the petitioners filed the present E.A.No.335 of 2002 under Section 47 and Order XXI Rule 58 and Section 151 of the Civil Procedure Code to adjudicate upon the question of title arises in the E.P. According to petitioners, the 1st defendant by the sale deed dated 03.05.1989 sold the petition property to 4th respondent, stating that it is his self acquired property. From the date of purchase, the 4th respondent was in possession and enjoyment of the petition property, got her name mutated in Revenue Records and was paying tax to the Government. When the 1st defendant sold his property to 4th respondent, there was no suit pending against the 1st defendant or against the respondents 2 & 3 and there is no encumbrance in the petition property. The petitioners have purchased the petition property from the 4th respondent by the deed of sale dated 24.01.2002 for valuable consideration and they are in possession and enjoyment of the petition property. Only when Bailiff of the Court came to the petition property on 24.07.2002, the petitioners came to know about the final decree passed in I.A.No.2440 of 1995. The petitioners were kept in dark about the proceedings and they came to know about the suit proceedings only when Court Bailiff came to the petition property on 24.07.2002. The delivery of possession sought for by the 1st respondent is the property purchased by the petitioners. The question of ownership is involved in the case and ownership has to be determined by the Executing Court. The petitioners have filed E.A. to adjudicate upon the claims and objections by the petitioners in accordance with provisions of Code of Civil Procedure and prayed for allowing E.A.

5.The 1st respondent filed counter affidavit and denied all the allegations made by the petitioners. The 1st respondent has stated that the petitioners have purchased the petition property pending E.P. on 24.01.2002. The final decree was passed on 12.10.1998 against the 1st defendant and respondents 2 to 4. The 4th respondent has no right to sell the petition property to the petitioners after passing of final decree in favour of 1st respondent. The 4th respondent was party in all the proceedings in the suit. Preliminary decree and final decree passed in the suit will bind on the 4th respondent. Since decree is passed against the 4th respondent also, the same is binding on the petitioners. The petitioners cannot rely on the Revenue Records to prove their title. The question of title does not arise. Already in the suit in O.S.No.733 of 1989, the said issue was decided and decreed in favour of the 1st respondent by the Trial Court. In the E.A. filed under Section 47 and Order XXI Rule 58 of the Code of Civil Procedure, the petitioners cannot question the decree passed in favour of the 1st respondent and prayed for dismissal of E.A.

6.The 1st defendant and respondents 2 & 3 remained exparte before the Execution Court. The 4th respondent filed counter affidavit stating that she has sold the petition property to the petitioners on 24.01.2002 and petitioners are in possession and enjoyment of the petition property. The Revenue Records are in the name of the petitioners.

7.Before the learned Judge,the 1st petitioner examined himself as P.W.1 and marked 8 documents as Exs.P1 to P8. The 1st respondent examined himself as R.W.1 and marked 9 documents as Exs.R1 to R9.

8.The learned Judge allowed the E.A. holding that -

(i) The 1st respondent has not proved that petition property was ancestral property.

(ii) The 4th respondent purchased the petition property 7 months prior to filing of O.S.No.733 of 1989 and 1st respondent did not seek to set aside the said sale deed.

(iii) The 1st respondent filed suit suppressing the real facts.

(iv) The petition property belongs to 4th respondent and petitioners have become owner of the property having purchased from 4th respondent.

and also held that E.P. is not executable.

9.Against the said order dated 05.04.2004 made in E.A.No.335 of 2010, the 1st respondent filed C.M.A.No.3 of 2005 on the file of the Sub Court, Bhavani, Erode.

10.Pending C.M.A.No.3 of 2005, the 1st defendant died. The respondents 1 to 3, who are the sons of 1st defendant were already on record and respondents 5 & 6, who are the daughters of 1st defendant were brought on record as legal heirs of the 1st defendant.

11.The learned First Appellate Judge framed necessary points for consideration. After considering entire materials, order in E.A and arguments of learned counsel for appellant and respondents, the learned First Appellate Judge partly allowed the appeal and modified the order passed in E.A., holding that 1st respondent is entitled to 1/4th share in the petition property.

12.Against the said judgment and decree dated 08.04.2010 made in C.M.A.No.3 of 2005, the present appeal is filed.

13.The learned counsel appearing for the appellants contended that the First Appellate Judge erred in holding that decree obtained by the 1st respondent is against the 4th respondent also and no appeal is filed against the said decree and Executing Court is bound by the decree and cannot go beyond the decree. The First Appellate Judge erred in holding that appellants cannot contend against the decree. The finding of the First Appellate Judge that without challenging the preliminary decree and final decree, the E.A. filed under Section 47 and Order XXI Rule 58 of the Code of Civil Procedure cannot be entertained is not correct. The First Appellate Judge failed to consider that a decree that is not in conformity with law or which is in violation of mandatory provisions of law or which is barred by statutory provisions cannot be executed and such questions can be agitated under Section 47 of the Code of Civil Procedure. The 1st respondent admitted that 1st defendant / Mangalagiri is the Kartha of family and any sale by Kartha of family is binding on all the members of the family. The decree obtained by the 1st respondent without setting aside the same is not valid and is not executable. The First Appellate Judge failed to see that 1st respondent played fraud and obtained the decree, Section 44 of the Evidence Act is attracted and that the Executing Court can definitely hold that decree is illegal and unexecutable. The First Appellate Judge erred in holding that E.A. filed by the appellants under Section 47 and Order XXI Rule 58 and Section 151 of the Code of Civil Procedure is not maintainable in view of the dismissal of O.S.No.195 of 1999 filed by the 1st defendant to set aside the preliminary decree dated 30.11.1993 and final decree dated 12.10.1998. The learned counsel appearing for the appellants made further submissions on merits with regard to preliminary decree and final decree passed by the Court and prayed for allowing the appeal.

14.The learned Senior Counsel appearing for the 1st respondent contended that Executing Court cannot go beyond the decree and in an application under Section 47, the Executing Court cannot consider the matter beyond the decree. The Executing Court failed to consider the scope of Section 47 of the Code of Civil Procedure and decided the E.A. filed by the appellants beyond the scope of Section 47. The 1st defendant filed application to set aside the exparte preliminary decree and the same was dismissed. The petition filed by the 1st defendant against the said order was also dismissed by this Court. Further, the 1st defendant filed O.S.No.195 of 1999 to set aside the preliminary decree and final decree obtained by the 1st respondent. The said suit was dismissed. The vendor of the appellants, the 4th respondent herein was a party to the present suit in O.S.No.733 of 1989. She has not filed any application to set aside the exparte preliminary decree or appeal challenging the preliminary decree and final decree. The decree passed in O.S.No.733 of 1989 is binding on the 4th respondent. After passing the final decree dated 12.10.1998 and during pendency of E.P.R.No.22 of 1999, the 4th respondent sold the petition property to the appellants. Hence, the decree obtained by the 1st respondent against the 4th respondent is binding on the appellants also. The Executing Court failed to consider that even if decree is exparte decree, the same cannot be questioned in the E.P. The Executing Court failed to consider the oral and documentary evidence let in by the 1st respondent. E.A.No.335 of 2002 filed by the appellants under Section 47 and Order XXI Rule 58 and Section 151 of the Code of Civil Procedure is not maintainable. The appellants have no right to file the application under Section 47 and Order XXI Rule 58 and Section 151 of the Code of Civil Procedure. An application under Section 47 and Order XXI Rule 58 and Section 151 of the Code of Civil Procedure can be filed only by a party to the suit or a representative of the party to the suit. The appellants are neither party to the suit nor representative of the 4th respondent, who is a party to the suit. The appellants have filed the said application on their own right claiming ownership to the petition property. As per the provisions of the Code of Civil Procedure, the appellants are not representative of the party to the suit. He further submitted that the First Appellate Judge has considered the scope of Section 47 as well as power of Executing Court, appreciating all the materials placed before it including the order of Executing Court in proper perspective and allowed the appeal only in respect of 1/4th share of the 1st respondent as per decree and the same is valid and legal. In support of his contention, the learned Senior Counsel relied on the following judgment and prayed for dismissal of the appeal.

(i)Judgment of this Court reported in 2000 (III) CTC 362, [Sri Nallalagu Polytechnic Managing Committee, Kamaraj Education and Research Foundation Trust, Madras rep. by its Secretary Vs. D.Sivakumar], wherein this Court at paragraph No.54 held as follows:

> " .... 54. But an application under Section 47(1) C.P.C., unlike by a third party as contemplated under Order 21 Rule 99, could be made only by the parties to the suit or their representative connecting the decree passed or relating to the execution, discharge or satisfaction of the decree and it shall be determined by the Court executing the decree. Section 47(3) would contemplate that the question whether any person is a representative of a party or not shall be determined by the Court. Apart from these, explanations 1 and 2 would further contemplate who are all the right parties to

the suit or proceeding."

15.The learned counsel appearing for the respondents 2, 5 & 6 made his submissions in support of the judgment passed in C.M.A.No.3 of 2005 and prayed for dismissal of the appeal.

16.Though notice has been served on the respondents 3 & 4 and their names are printed in the cause list, there is no representation for them, either in person or through counsel.

17.Heard the learned counsel appearing for the appellants as well as the learned Senior Counsel appearing for the 1st respondent and the learned counsel appearing for the respondents 2, 5 & 6 and perused the entire materials on record.

18.On 22.11.2021, this Court framed the following substantial questions of law:

(i) Whether appellants have the right to file application under Section 47 of the Code of Civil Procedure and whether E.A.No.335 of 2002 filed by the appellants is maintainable?

(ii) Whether the question of executability of the decree in the suit cannot be gone into by Executing Court?

(iii) Whether the Executing Court re-appraise the pleadings and evidence in the suit while deciding the E.A. filed by the appellants under Section 47 of the Code of Civil Procedure?

Substantial Questions of Law - 1 to 3:

19.From the materials on record, it is seen that it is the contention of the appellants that 4th respondent purchased the petition property on 03.05.1989 from the 1st defendant. At that time, no proceedings were pending and purchase by 4th respondent is valid. The 1st respondent subsequent to the sale by the 1st defendant, filed suit in O.S.No.733 of 1989 for partition, impleading the 4th respondent as 4th defendant in the suit. Knowing fully well the sale in favour of the 4th respondent before filing of the suit, the 1st respondent did not seek to set aside the sale deed dated 27.05.1989 executed in favour of the 4th respondent. In view of the same, the preliminary and final decrees obtained by the 1st respondent are invalid. The 1st respondent obtained the said decrees by suppressing the material facts and playing fraud on the Court. The appellants are bonafide purchaser for valuable consideration without knowledge of decrees obtained by the 1st respondent. On these grounds, the appellants submitted that E.P. is unexecutable and prayed for dismissal of E.P. The appellants have filed E.A.No.335 of 2002 in E.P.No.22 of 1999 under Section

47 and Order XXI Rule 58 and Section 151 of the Code of Civil Procedure.

20.First it has to be decided whether the appellants can file the said application. Section 47 of the Code of Civil Procedure is extracted herein for easy reference.

"Section 47 of the Code of Civil Procedure:

47. Questions to be determined by the Court executing decree:-

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation I: For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II: (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section."

21.As per Section 47 of the Code of Civil Procedure, a party to the suit or a representative of the party to the suit can file application under Section 47 of the Code of Civil Procedure. The appellants are not party to the suit. In explanation I and II to Section 47, it has been mentioned who are all parties in the suit and who can file application under

Section 47 of the Code of Civil Procedure. Admittedly, the appellants are not defendants in the suit and they are not purchasers of property in the Court auction in execution of decree. The appellants have not filed application as representative of 4th respondent. On the other hand, they have filed the said application claiming right on their own and as owners of petition property. They have stated that they are third parties to the suit. In view of the same, the appellants have no right to file E.A.No.335 of 2002 under Section 47 and Order XXI Rule 58 and Section 151 of the Code of Civil Procedure. The judgment relied on by the learned Senior Counsel appearing for 1st respondent to substantiate his contention that appellants are not representative of the party to the suit is squarely applicable to the facts of the present case. The Executing Court without properly considering scope of Section 47 of the Code of Civil Procedure, allowed E.A.No.335 of 2002. The Executing Court ought to have dismissed the said E.A. as not maintainable.

22.It is the contention of the appellants that the 1st defendant was absolute owner of the petition property and petition property is not a joint family property. In any event, the 1st defendant is Kartha of joint family and sale by 1st defendant for the benefit of members of the family is binding on them including the 1st respondent. The 4th respondent has purchased the petition property before any Civil Proceedings were initiated and without setting aside the sale deed dated 03.05.1989 executed in favour of the 4th respondent, the decree obtained by the 1st respondent is invalid and fraudulent decree. These contentions cannot be considered and decided in execution proceedings when the said application was filed by a third party to the suit. It is seen from the materials on record that the 4th respondent adopted the written statement filed by the 1st defendant and respondents 2 & 3. After filing written statement in the suit, the 4th respondent did not contest the suit. An exparte preliminary decree was passed on 30.11.1993. The 4th respondent did not file any application to set aside the exparte preliminary decree or filed any appeal challenging the same. Only the 1st defendant filed application to set aside the exparte decree and the same was dismissed. Civil Revision Petition filed by the 1st defendant was also dismissed by this Court. Therefore, preliminary decree obtained by the 1st respondent has become final.

23.The 1st respondent filed I.A.No.2440 of 1995 for passing of final decree. After contest, the said I.A. was allowed on 12.10.1998 and 'D' portion in Advocate Commissioner's report was allotted to the 1st respondent. The said final decree has become final as 4th respondent or other defendants have not challenged the same. The 1st defendant without filing any appeal challenging the decree obtained by the 1st respondent, filed suit in O.S.No.195 of 1999 to set aside the decree passed in O.S.No.733 of 1989 filed by the 1st respondent. The said suit was dismissed and judgment and decree in present suit in O.S.No.733 of 1989 has become final.

24.The 1st respondent filed E.P.No.22 of 1999 for delivery of possession as per the final decree. The 1st respondent filed E.P. for delivery of his 1/4th share in the petition property as mentioned in the Advocate Commissioner's report and final decree. After two years of filing of E.P. and during pendency of E.P., the 4th respondent sold the petition property to the appellants by sale deed dated 24.01.2002. According to the appellants, only when Court Bailiff came to the petition property on 24.07.2002, they came to know about the litigations and filed E.A.No.335 of 2002 for dismissal of E.P. The Executing Court while considering the said application, exceeded its power as E.P. Court and without jurisdiction, considered all the materials as though E.P. Court as First Appellate Court and held that E.P. is unexecutable. A reading of the order in E.A.No.335 of 2002 in E.P.No.22 of 1999 shows that E.P. Court has re-appraised the entire materials and held that decrees obtained by the 1st respondent will not bind the 4th respondent and in view of the same, decrees obtained by the 1st respondent is not binding on the appellants. The E.P. Court has held that 1st respondent has failed to prove that petition property is joint family property and it is not self acquired property of 1st defendant. Further, E.P. Court held that decree passed without setting aside the sale deed in favour of 4th respondent is not valid.

25.It is well settled that Executing Court cannot go beyond the decree and has to execute the decree as passed by the competent Civil Court. As per Section 47 of the Code of Civil Procedure, Executing Court can hold that decree is not executable only when the decree was passed without any jurisdiction and decree is void ab initio or decree is exfacie nullity. To come to this conclusion, the Court is precluded from making any indepth scrutiny with regard to plaintiff's claim made in the plaint and also the defence set up by judgment debtors. The judgment of the Trial Court could not have been reopened and correctness thereof could not be put to question.

26.In the present case, the Executing Court has scrutinized the averments in the plaint and also the contention of the defendant in the written statement. The Executing Court failed to see that defendants did not contest the suit and did not prove their averments as contained in the written statement. The Executing Court decided the issue exceeding its jurisdiction, power and without properly considering scope of Section 47 of the Code of Civil Procedure. Even when O.S.No.195 of 1999 filed by the 1st defendant to set aside the preliminary decree and final decree obtained by the 1st respondent was dismissed, the Executing Court assumed and presumed that 1st defendant has time to file appeal. Considering the scope of Section 47 of the Code of Civil Procedure and power of Executing Court while executing the decree passed by a competent Civil Court having jurisdiction, the order of Executing Court in application filed by the appellants is erroneous, irregular, invalid and illegal.

27.In view of the above materials:-

(a) The first substantial question of law is held that appellants have no right to file an application under Section 47 of the Code of Civil Procedure.

(b) The second substantial question of law is concerned, the Executing Court can go into question of executability of decree passed by competent Civil Court within the scope of Section 47 of the Code of Civil Procedure and can decide only whether the decree passed by the competent Civil Court, whether it is nullity or void ab initio and without jurisdiction.

(c) The third substantial question of law is concerned, the Executing Court without power or jurisdiction has re-appraised the matter, pleadings and evidence in the suit while deciding the E.A., as though it is the First Appellate Court instead of having in mind that it is only an Executing Court. By this process, the Executing Court went beyond the decree. An application under Order XXI Rule 58 of the Code of Civil Procedure is maintainable when the property mentioned in the E.P. was attached and applicant seeking to raise attachment. In the present case, the E.P. is not for attachment and sale. E.P. is for delivery of 1/4th share of the 1st respondent as per the final decree. Therefore, Order XXI Rule 58 of the Code of Civil Procedure is not applicable to the facts of the present E.P. and application filed by the appellants is not maintainable.

28.The learned First Appellate Judge has properly dealt with scope of Section 47 of the Code of Civil Procedure and power of Executing Court in deciding the application filed under Section 47 and Order XXI Rule 58 of the Code of Civil Procedure and has rightly partly allowed the appeal with regard to 1/4th share of the 1st respondent. Therefore, all the three substantial questions of law are answered against the appellants.

29.For the above reasons, this Civil Miscellaneous Second Appeal is dismissed. Consequently, the connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar(CCC)

// True Copy //

Sub Assistant Registrar

krk

To

1.The Principal District Munsif,
Bhavani.

2.The Sub Judge,
Sub-Court, Bhavani,
Erode District.

3.The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Ms.Zeenath Begum, Advocate SR.No.62296
+1cc to Mr.T.M.Hariharan, Advocate SR.No.62882
+1cc to Mr.N.Manoharan, Advocate SR.No.62708

C.M.S.A.No.38 of 2011

BR(CO)
CB(28/02/2022)