



CRP(MD)No.2449 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 09.12.2022

CORAM:

THE HONOURABLE MR.JUSTICE **B.PUGALENDHI**

CRP(MD)No.2449 of 2022

Umasankar

: Petitioner

Vs.

1.R.Sankaranarayanan

2.Esakkiammal

: Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India to direct the Sub Court, Sankarankovil, to number the petition dated 26.10.2022 filed under Order 21 Rule 89 CPC in E.P.No.43 of 2015 in O.S.No.203 of 2013 to set aside the sale conducted on 22.08.2022 and dispose of the same.

For Petitioner : Mr.M.Jothi Basu

ORDER

This revision petition is filed by the petitioner / judgment debtor as against the return endorsement made by the learned Subordinate Judge, Sankarankovil / Execution Court, on his application filed under Order 21 Rule 89 CPC.



2.The petitioner has filed an execution application in E.P.No.43 of 2015 in O.S.No.203 of 2013 to set aside the sale conducted on 22.08.2022, on the ground that he is prepared to deposit the decree amount. The Execution Court returned the application on 26.10.2022, with the following endorsement:

“Already sale notice served to this petitioner / respondent properly about sale amount. Hence, how this petition is maintainable under Order 21 Rule 90(3) CPC, as the petitioner can take the ground before proclamation of sale. Hence returned.”

The petitioner re-presented the papers on 03.11.2022, by correcting the provision as Order 21 Rule 90 CPC, instead of Order 21 Rule 89 CPC. Thereafter, the Execution Court returned the papers on the same day, with the following endorsement:

“1.Advocate sign not made in re-presentation.

2.Sale notice served to the respondent already. Sale also confirmed. Hence, how this petition is maintainable at this stage. Hence returned.”

The petitioner re-presented the papers on 04.11.2022, stating that the petition was filed even before the confirmation of sale. However, the Execution Court has again returned the papers on 04.11.2022. Hence, the petitioner has moved the instant revision petition.



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3.Learned Counsel for the petitioner submitted that the suit property was auctioned for a lesser amount of Rs.17,09,000/-. The petitioner conducted a private negotiation and has entered into an agreement with one Gopalakrishnan S/o.Senthilvel, wherein, the said Gopalakrishnan undertook to purchase the suit property for a sum of Rs.40,00,000/- and also to deposit the decree amount before the Court. Along with this agreement, the petitioner has filed the execution application within the period of limitation, however, by quoting the wrong provision as Order 21 Rule 90 CPC, instead of Order 21 Rule 89 CPC. Therefore, the application was returned and thereafter, the same was also rectified and re-presented by the petitioner. Even then, the Court has returned the papers.

4.By relying upon the decision of this Court in ***Selvaraj and Others v. Koodankulam Nuclear Power Plant India Ltd., and Others***, reported in **2021 (4) CTC 539**, the learned Counsel contended that before making repeated returns, the learned Judge ought to have listed the matter in the open Court and heard him.

5.This Court paid it's anxious consideration to the submissions made by the petitioner's Counsel and also to the materials placed on record.



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6.The petitioner / judgment debtor has filed an application under Order 21 Rule 89 CPC along with an unregistered agreement entered into between him and one Gopalakrishnan S/o.Senthivel, wherein, the said Gopalakrishnan undertook to purchase the suit property for a sum of Rs.40,00,000/- and also to deposit the decree amount before the Court. It is the grievance of the petitioner that the property was auctioned for a lesser amount of Rs.17,09,000/- and therefore, he prayed for setting aside the sale. However, this application was returned and in the meantime, the sale was confirmed.

7.In the decision relied upon by the learned Counsel for the petitioner in ***Selvaraj's*** case (supra), this Court, following the decision in ***S.Parameswari v. Denis Lourdusamy [(2011) 5 CTC 742]***, held that after one return, the Court should post the matter in the open Court and invite the arguments of the Counsel on the question of maintainability and thereafter, pass a judicial order. The duty to hear before a decision is made constitutes the soul of procedural fairness inbuilt in the Civil Procedure Code and cannot be compromised. The relevant portion from the said decision is extracted as follows:-

“30. In *S. Parameswari v. Denis Lourdusamy, [(2011) 5 CTC*



742], this Court had held that after one return, the Court should post the matter in open Court, and invited arguments of the counsel on the question of maintainability and pass a judicial order. If the objection is upheld, the aggrieved party could work out his/her rights. In *Muthuganesah v. Thillaimani*, [2016- 2- LW 340], this Court had pointed out:

“3.The court, while admitting the plaint, can scrutinise the other aspects, namely the cause of action, valuation, payment of court fee, jurisdiction and limitation. The court can also verify whether the plaint has been filed in the proper form and whether the necessary requirements of plaint have been complied with. The question as to whether any other person should have been made a party is outside the purview of the scrutiny of the trial court at the time of admitting the plaint. The above said aspects are with reference to the merits of the return made by the trial court.

4. Once certain defects are pointed out by the court and the plaint is returned and the plaintiff or plaintiffs, re-present the same stating that the plaint has been properly prepared and filed and asking the court to hear regarding the necessity to comply with the returns made by the court, the court can return the plaint provided its view that the compliance with the returns are mandatory and it is conceded by the plaintiff. If the plaintiff makes it clear that he is not prepared to comply with the returns and the plaint as filed by him should be taken



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on file, the trial court should reject the plaint rather than returning the plaint stating the very same reason.”

This Court only adds a rider to it: In all cases where the Court chooses to reject the plaint for not curing the defects mentioned (which may include the issue on exclusion of jurisdiction) it is necessary for the Court to follow the dictum in S. Parameswari v. Denis Lourdasamy, [(2011) 5 CTC 742] and post the matter before Court, with or without the request of the plaintiff or the counsel concerned, and hear them. The duty to hear before a decision is made constitutes the soul of procedural fairness inbuilt in the Civil Procedure Code, and cannot be compromised.”

Therefore, the Execution Court ought to have listed the matter in the Open Court and heard the arguments of the petitioner's Counsel on the question of maintainability.

8.As per Article 127 of the Limitation Act, an application to set aside a sale in execution of a decree, including any such application by a judgment debtor, has to be filed within a period of 60 days from the date of sale. In the case on hand, the sale was confirmed in favour of a third party on 22.08.2022. Therefore, the period of limitation ends by 21.10.2022. After the Deepavali Holidays from 21.10.2022 to 25.10.2022, the Courts were re-opened on 26.10.2022, on which date, the



petitioner has filed the execution application to set aside the sale. Though the application was not numbered and was returned on 26.10.2022 itself, the fact remains that the petitioner has filed this application well within the period of limitation.

9.As per Order 21 Rule 92 CPC, a sale shall become absolute, where no application is made under Order 21 Rules 89, 90 or 91 CPC within the limitation period. Here, the petitioner has made the application under Order 21 Rule 89 CPC within the limitation period, however, by referring a wrong provision. Though the petitioner has rectified and re-presented the papers, it was returned, again and again, stating that the sale was confirmed.

10.Considering the fact that the petitioner has moved the application under Order 21 Rule 89 CPC well within the period of limitation as required under Order 21 Rule 92 CPC and also taking note of the decision of this Court in *Selvaraj's* case (supra), this Court is passing the following order:-

i) The Execution Court shall take up the execution application filed by the petitioner under Order 21 Rule 89 CPC and shall decide the same, on merits and in accordance with law, within a period of two months from the date of receipt of a



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copy of this order. The auction purchaser shall also be put on notice before passing any orders.

ii) Till such time, the sale proceedings conducted on 22.08.2022 shall be kept under abeyance.

iii) The confirmation of sale, even if already made, is subject to the order to be passed by the Execution Court in the application filed by the petitioner under Order 21 Rule 89 CPC.

With the above observations and directions, this civil revision petition stands disposed of. There shall be no order as to costs.

Index : Yes / No
Internet : Yes
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09.12.2022

To

The Subordinate Judge,
Sankarankovil.



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This Civil Revision Petition is listed today under the caption for 'being mentioned'.

2.The learned counsel appearing for the petitioner submits that this Court disposed of CRP PD(MD)No.2449 of 2022 on 09.12.2022 with a direction to the Execution Court to take up the execution application filed by the petitioner under Order 21 Rule 89 of Civil Procedure Code and decide the issue within a period of two months from the date of receipt of a copy of that order. However, in the order, it was omitted to mention about the return of original application filed by the petitioner before this Court. Since the Executing Court is insisting the production of original application, the same may be ordered to be returned to the petitioner and the learned counsel also seeks a written direction to the Registry for the same.

3.Considering the submission made by the learned counsel for the petitioner, the following paragraph is ordered to be incorporated as the last paragraph of the order in CRP PD(MD)No.2449 of 2022, dated 09.12.2022.

“Registry is directed to return the original application filed by the petitioner in E.A.No. of 2022 in E.P.No.43 of 2015 in O.S.No.203 of 2013 to the petitioner on proper acknowledgment.”



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4.Registry is directed to carryout the aforesaid correction in the order passed in CRP PD(MD)No.2449 of 2022, dated 09.12.2022 and issue the corrected copy of the order and also the original application as stated above.

20.04.2023

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Order made in
CRP PD(MD)No.2449 of 2022

20.04.2023