



C.R.P.Nos.1873 and 1932 of 2023 &
C.M.P.Nos.11988 and 12255 of 2023

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 30.10.2023

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.R.P.Nos.1873 and 1932 of 2023 and
C.M.P.Nos.11988 and 12255 of 2023

1. Sandhiya Rani
2. K.Mohan Sundar
3. K.Sathiya
4. K.Shakthi
5. M.Ravi

... Petitioners in both the petitions

Vs.

AShanmugam

... Respondent in both the petitions

Civil Revision Petitions are filed under Article 227 of Constitution of India to set aside the orders dated 30.03.2023 and 06.02.2023 passed by the learned Subordinate Judge, Uthangarai in E.P.No.23 of 2014 and REA No.27 of 2015 in REP No.23 of 2014 in O.S.No.66 of 2004 respectively.

For Petitioners : Mr.K.Bijai Sundar

For Respondent : Mr.N.R.Sai Gautham



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COMMON ORDER

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Since the issues involved in both the petitions are one and the same, they are taken up together and a common order is being passed.

2. The present Civil Revision Petitions have been filed to set aside the orders dated 30.03.2023 and 06.02.2023 passed by the learned Subordinate Judge, Uthangarai in E.P.No.23 of 2014 and REA No.27 of 2015 in REP No.23 of 2014 in O.S.No.66 of 2004 respectively.

3. Originally the Respondent had filed a suit in O.S.No.66 of 2004 on the file of the Subordinate Judge, Krishnagiri for specific performance of an alleged agreement of Sale dated 27.11.2000 with an alternate prayer to refund the sale consideration of Rs.2,00,000/- paid by him with simple interest at the rate of 12% per annum from date of plaint till the date of realisation. The Trial court by its order dated 27.09.2005, passed an exparte decree by granting both, viz., the Prayer for Specific Performance and the alternate relief of Return of the Advance amount. Thereafter, the respondent had filed the R.E.P.No.128 of 2008 and presently renumbered as REP No.23 of 2014. The petitioners had filed R.E.A No.27 of 2015 for



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deposit of a sum of Rs.2,00,000/- together with 18% interest thereon for the advance paid by the respondent. The said application was filed for the reason that the alternative prayer in the judgement dated 27.09.2005 was also granted, which is for return of advance of Rs.2,00,000/- along with interest. A counter was filed in the said application and after arguments, the same was dismissed by the learned Subordinate Judge by order dated 06.02.2023. Challenging the same the petitioner has filed CRP No: 1932 of 2023 before this Court. Subsequently the trial court by its order dated 30.03.2023 had allowed the said Execution Petition filed by the respondent and directed to file the draft sale deed. Challenging the said order the petitioner had filed a CRP No: 1873 of 2023 before this Court.

4. The learned counsel for the petitioners would submit that the Judgment and Decree dated 27.09.2005 passed in O.S.No.66 of 2004 is not a speaking Judgement and hence contrary to Order 20 Rule 4(2) of C.P.C and also contrary to the Judgement of the **Balraj Taneja vs Sunil Madan and another reported in (1999) 8 SCC 396**. Further, the 4th petitioner at the time of filing the suit was a minor, represented by her mother and natural Guardian, the 1st petitioner, herein, namely, Mrs.K.Sandhya Rani. Before passing a Judgement or Decree as all the



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petitioners remained ex-parte, the learned Subordinate Judge ought to have appointed a Court Guardian, as mandated under Order 32 Rule 3 of the C.P.C., failure to appoint such a Court Guardian vitiates the entire Judgement and Decree and hence un-executable.

5. The learned counsel for the petitioners also contends that in the judgement nothing has been mentioned with reference to deposit of the balance sale consideration, as envisaged under Order 20 Rule 12A of the C.P.C., and without giving any notice to the petitioners, the Respondent appears to have deposited the balance sale consideration on 27.08.2008 before filing the execution petition as would be seen from the reference made to the deposit of the said amount from the ledger extract filed along with Execution Petition.

6. The learned counsel for the petitioners also submits that the judgement dated 27.09.2005 is a nullity and non-est, which is incapable of being executed and the principle of 'brutum fulmen' is applicable in the instant case. Since both the prayers are for specific performance and the alternative relief of return of advance has been contemporaneously ordered in the said judgement.



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7. Per contra, the learned counsel for the respondent on the other side would contend that originally the trial court in O.S.No.66 of 2004 had directed the petitioners to execute the sale deed in favour of the respondent within two months from the date of Judgement and only in the alternate, the trial court had directed to refund the sale consideration of Rs.2,00,000/- paid by the respondent with simple interest at the rate of 12% per annum, therefore pleaded that the order passed by the court below does not require any interference.

8. Heard the learned counsels on either side and perused the documents placed on record.

9. The point which arise for consideration before this Court is “Whether the trial court was right in dismissing the R.E.A.No. 27 of 2015 in REP No.23 of 2014, which was filed by the petitioners to deposit the balance sale consideration before the court below, as per order passed by the trial court in O.S.No.66 of 2004 and allowing E.P.No.23 of 2014 filed by the respondent by directing to file the draft sale deed?



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10. It is relevant to point out that the learned counsel for the petitioners in support of his contention has relied on the Judgment of the **Hon'ble Supreme Court [K.P. Natarajan and Ors. vs. Muthalammal and Ors.](16.07.2021 - SC) reported in MANU/SC/0452/2021**, wherein the Apex Court has upheld the Judgment of this Court which held that an ex-parte decree passed against a minor not represented by a guardian who is duly appointed is a nullity.

“14. We have carefully considered the rival contentions. There is no dispute on facts and there is no escape from the conclusion that the Respondents have been grossly negligent in defending the suit as well as the execution proceedings. But the fact remains that while the parties can afford to remain negligent, the Court cannot. The High Court has found, after summoning the records from the trial Court that as a matter of fact, the trial Court failed to appoint a guardian for the third Respondent/minor in a manner prescribed by law. As pointed out earlier, an application was in fact filed by the Petitioners-herein/Plaintiffs Under Order XXXII, Rule 3 of the Code in I.A. No. 981 of 2013. The said application was closed by the trial Court by an Order passed on 23.03.2014. The manner in which the trial Court disposed of the application Under Order XXXII, Rule 3, is without doubt, improper and cannot at all be



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sustained, especially in the teeth of the Madras Amendment.”

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The Hon'ble Supreme Court also refused to accept the argument that the High Court could not have set aside the decree invoking Article 227 while hearing a revision application under Section 115 CPC.

“It is too well settled that the powers of the High Court under Article 227 are in addition to and wider than the powers under Section 115 of the Code. In Surya Dev Rai vs. Ram Chander Rai and Others, this Court held that even certiorari under Article 226 can be issued for correcting gross errors of jurisdiction of a subordinate Court. But the correctness of the said view in so far as it related to Article 226, was doubted by another Bench, which resulted in a reference to a three member Bench. In Radhey Shyam & Anr. vs. Chhabi Nath & Others, the three member Bench, even while overruling Surya Dev Rai (supra) on the question of jurisdiction under Article 226, pointed out that the jurisdiction under Article 227 is distinguishable. Therefore, we do not agree with the contention that the High Court committed an error of jurisdiction in invoking Article 227 and setting aside the exparte decree.”

In the above said case the Revision was filed before this Court against the trial Court order refusing to condone the delay of 862 days in seeking to set



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aside an ex-parte decree for specific performance and this Court found that the ex-parte decree was a nullity, as it was passed against a minor without the minor being represented by a guardian duly appointed in terms of the procedure contemplated Under Order XXXII, Rule 3 of the Code.

11. On going through the order passed by the trial court it could be seen that the trial court has passed the decree in O.S.No.66 of 2004 not only directing the petitioners herein to execute the registered sale deed, but also granted the alternative relief of directing the petitioners to deposit the sale consideration and for return of the same to the respondent / plaintiff. Normally, whenever, the suit is filed for specific performance and agreement of contract is sought for, an alternative relief will also be sought for return of the advance amount. In case, the relief of specific performance is not granted, the court should order for return of advance amount, however, the trial court has granted main relief and also the alternative relief, without even assigning reasons as to why both the reliefs are granted.

12. It is relevant to note that O.S.No.66 of 2004 was filed by the respondent seeking for specific performance of agreement of sale and the



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same came to be decreed on 27.09.2005 as against the petitioners, including 4th respondent, viz., Sakthi Shankari, who was minor at that point of time being represented by her mother and natural Guardian, the 1st petitioner, herein, namely, Mrs.K.Sandhya Rani. Before passing a Judgement or Decree, as all the petitioners remained ex-parte, the learned Subordinate Judge ought to have appointed a Court Guardian as mandated under Order 32 Rule 3 of the C.P.C., and failure to appoint such a Court Guardian to the 4th petitioner, vitiates the entire Judgement and Decree.

13. At this stage, it is worth to recall and recollect the Judgment of Hon'ble Supreme Court in Brakewel Automotive Components (India) Pvt. Ltd. vs. P.R. Selvam Alagappan (21.03.2017 - SC) : MANU/SC/0282/2017, wherein it is held as follows:

“Judicial precedents to the effect that the purview of scrutiny Under Section 47 of the Code qua a decree is limited to objections to its executability on the ground of jurisdictional infirmity or voidness are plethoric. This Court, amongst others in Vasudev Dhanjibhai Modi v. Rajabhai Abdul Rehman and Ors. MANU/SC/0531/1970: 1971 (1) SCR 66 in essence enunciated that only a decree which is a nullity can be the subject matter of objection Under Section 47 of the Code and not one which is erroneous either in law or on facts. The following extract from this decision seems apt: A Court executing a decree cannot go behind the decree between the parties or their representatives; it must take the decree according to its tenor, and cannot entertain any objection that the decree was incorrect in law or on facts. Until it is set aside by an appropriate proceeding in appeal or



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revision, a decree even if it be erroneous is still binding between the parties. When a decree which is a nullity, for instance, where it is passed without bringing the legal representatives on the record of a person who was dead at the date of the decree, or against a ruling prince without a certificate, is sought to be executed an objection in that behalf may be raised in a proceeding for execution. Again, when the decree is made by a Court which has no inherent jurisdiction to make it, objection as to its validity may be raised in an execution proceeding if the objection appears on the face of the record: where the objection as to the jurisdiction of the Court to pass the decree does not appear on the face of the record and requires examination of the questions raised and decided at the trial or which could have been but have not been raised, the executing Court will have no jurisdiction to entertain an objection as to the validity of the decree even on the ground of absence of jurisdiction.

22. Though this view has echoed time out of number in similar pronouncements of this Court, in Dhurandhar Prasad Singh v. Jai Prakash University and Ors. MANU/SC/0381/2001 : AIR 2001 SC 2552, while dwelling on the scope of Section 47 of the Code, it was ruled that the powers of the court thereunder are quite different and much narrower than those in appeal/revision or review. It was reiterated that the exercise of power Under Section 47 of the Code is microscopic and lies in a very narrow inspection hole and an executing court can allow objection to the executability of the decree if it is found that the same is void ab initio and is a nullity, apart from the ground that it is not capable of execution under the law, either because the same was passed in ignorance of such provision of law or the law was promulgated making a decree inexecutable after its passing. None of the above eventualities as recognised in law for rendering a decree inexecutable, exists in the case in hand. For obvious reasons, we do not wish to burden this adjudication by multiplying the decisions favouring the same view.”

14. Considering the entire facts and circumstances of the entire case on hand and taking note of the Judgment of **Hon'ble Supreme Court [K.P. Natarajan and Ors. vs. Muthalammal and Ors.](16.07.2021 - SC)**



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reported in MANU/SC/0452/2021 as mentioned supra, wherein the

Hon'ble Apex Court has upheld the Judgment of this Court, wherein an ex-parte decree passed against a minor not represented by a guardian who is duly appointed is a nullity, this Court, holds that the objection for the decree, shall be considered by the Execution Court, therefore, the order dated 06.02.2023 passed by the learned Subordinate Judge, Uthangarai in REA No.27 of 2015 in REP No.23 of 2014 in O.S.No.66 of 2004 is set aside and the EP Court shall consider with reference to the alternative prayer of return of amount granted in O.S.No.66 of 2004, with regard to the sale deed and pass appropriate orders by holding enquiry. Till the orders are passed in REA No.27 of 2015, the order dated 30.03.2023 passed in Execution petition [filed by the respondent] shall be kept in abeyance and shall be decided subject to the outcome of REA No.27 of 2015.

Accordingly, the present Revisions are disposed of. Consequently, connected miscellaneous petitions are closed. No costs.

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Index : Yes/No; Internet : Yes/No
Speaking /Non-Speaking Order



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To
The Subordinate Judge,
Uthangarai



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V.BHAVANI SUBBAROYAN, J.,

ssd

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