



C.R.P. (MD) No.340 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

Reserved on: 16.06.2023	Pronounced on: 31.07.2023
-----------------------------------	-------------------------------------

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.R.P.(PD).(MD).No.340 of 2022

and

C.M.P.No.1469 of 2022

Johnkennedy

.. Petitioner

Vs.

1.Ramasamy

Kaleeswaran (died)

2.K.Gnanapoo

3.K.Rajalingam

4.E.Viji Edison

5.K.Ramaraj

.. Respondents

(Cause title accepted vide order of this Court dated 25.01.2022 in C.M.P.(MD). No.412 of 2022 in C.R.P.(MD).SR. No. 1410 of 2022)

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, praying to strike off the E.A.No.1 of 2021 in E.A.No.328 of 2008 in E.P.No.5 of 2006 in O.S.No.102 of 2002 on the file of the Sub Court, Srivilliputtur.



C.R.P. (MD) No.340 of 2022

For Petitioner : Mr.A.Arumugam
for Mr.K.Muthurakkan

For R1 : Mr.K.Baalasundaram
Senior Counsel
for Mr.Ashok Kumar

For RR 2 to 5 : No appearance

ORDER

The petitioner is a third party to the proceedings in O.S.No.102 of 2002. O.S.No.102 of 2002 was filed by one Kaleeswaran against the 1st respondent herein to recover a sum of Rs.4,98,932/-. O.S.No.102 of 2002 was decreed on 14.07.2003.

2.The 1st respondent/defendant – Judgment Debtor however failed to pay the decree amount to the Decree Holder – Kaleeswaran pursuant to the Judgment and Decree dated 14.07.2003 in O.S.No.102 of 2002. Therefore, the plaintiff namely the said Kaleeswaran filed E.P.No.5 of 2006. Orders were passed in E.P.No.5 of 2006.

3.The property of the 1st respondent/defendant – Judgment Debtor was attached. Later the property of the 1st respondent/defendant – Judgment Debtor came to be sold through a Court Auction on 29.10.2007. The petitioner, purchased the property of the 1st respondent/defendant –



Judgment Debtor in the aforesaid Court Auction held on 29.10.2007. A Sale Certificate was also issued in favour of the petitioner on 02.01.2008.

4.The 1st respondent/defendant – Judgment Debtor filed E.A.No.328 of 2008 in E.P.No.5 of 2006 under Section 47 of CPC. In E.A.No.328 of 2008, the 1st respondent/defendant – Judgment Debtor challenged the Court Auction held on 29.10.2007 on the ground that the upset value of the auctioned property was under valued. However, E.A.No.328 of 2008, came to be dismissed on 22.04.2015 by the Execution Court.

5.Aggrieved by the order dated 22.04.2015 in E.A.No.328 of 2008, the 1st respondent/defendant – Judgment Debtor filed C.R.P.(MD) No. 1454 of 2015 before this Court. C.R.P.(MD) No.1454 of 2015 was dismissed by this Court vide its order dated 28.06.2018 with the following observations:-

“11.Now coming to the legal submissions made by the learned counsel for petitioner, this court has considered the Judgment relied on by the counsel for the petitioner reported in AIR 1990 SC 119. In the said Judgment, the Hon’ble Apex Court has set aside the court auction sale, since the Judgment debtor has filed the application for setting aside the sale within 60 days from the date of sale as per the provision Order 21 Rule 90. **But in the present case on**



WEB COPY



C.R.P. (MD) No.340 of 2022

hand, the revision petitioner has not filed the application to set aside the sale within a period of 60 as per Article 127 of the Limitation Act and he belatedly filed the application on 24.06.2008 and the same cannot be entertained and not maintainable in law. Therefore the Judgment relied on by the revision petitioner is not helpful to him, since the same is not applicable to the facts of the present case on hand. Therefore I have no hesitation to hold that there is no irregularity in conducting the sale as urged by the learned counsel for the revision petitioner. The revision petitioner ought to have filed application within 60 days as per Article 127 of the Limitation Act under Order 21, Rule 90 of CPC that too after depositing the entire sale amount. **Therefore the application filed by the revision petitioner under section 47 of C.P.C is not at all maintainable in law.** Hence, the finding of the lower court that the revision petitioner did not prove his contention that the property sold in auction was more value than the decree amount is legally sustainable and the same is not warranting interference by this Court.

12.In view of the foregoing discussion, I am of the considered opinion that the learned Subordinate Judge, after considering the above legal aspects has rightly dismissed the application filed by the revision petitioner and I do not find any merits in this civil revision petition. Hence, the impugned order passed by the Execution Court is liable to be confirmed. It is needless to say that the revision petitioner is entitled to get refund of the amount deposited by him as per the direction of this Court at the time of granting interim order, before the lower court without filing any formal application.”



WEB COPY

6. Meanwhile, the Plaintiff / Decree Holder Kaleeswaran died on 23.12.2018. Therefore, the interest of Decree Holder late Kaleeswaran is now represented by his legal heirs, respondents 2 to 5 herein.

7. The 1st respondent/defendant – Judgment Debtor filed a further appeal before the Hon'ble Supreme Court in S.L.P.No.21762 of 2018 against the order dated 28.06.2018 passed by this Court in C.R.P.(MD) No.1454 of 2015. The Hon'ble Supreme Court dismissed S.L.P.No.21762 of 2018 on 26.02.2020 with the following observations:-

“Learned counsel for the petitioner submits that respondent no.1 is no more.

With the assistance of the learned counsel, we have gone through the record.

Having perused the papers, we see no reason to interfere in the matter. This special leave petition is, accordingly, dismissed.

The petitioner be allowed to withdraw the amount, which he had deposited in the Execution Court, along with any interest accrued thereon.

Pending application(s), if any, shall stand disposed of.”



8.Thus, the 1st respondent/defendant – Judgment Debtor was merely allowed to withdraw the amount deposited before the Execution Court, along with accrued interest, if any.

9.After the dismissal of S.L.P., the 1st respondent/defendant – Judgment Debtor herein initiated a fresh proceedings in E.A.No.1 of 2021 under Order XXI Rule 97 read with Section 47 of the Code of Civil Procedure, 1908. The EP Court had also returned E.A.No.1 of 2021 before it was numbered. The EP Court had asked the 1st respondent/defendant – Judgment Debtor as to how the Execution Application was maintainable under Order XXI Rule 97/99. Strangely, E.A.No.1 of 2021 was allowed to be numbered.

10.In the said proceedings, the petitioner who is the third party purchaser of the property through Court Auction held on 29.10.2007, to whom the Sale Certificate was issued on 02.01.2008, was arrayed as the 2nd respondent. The petitioner appeared before the Execution Court and prayed for filing counter on 14.09.2021.



WEB COPY

11. After seeking time to file counter affidavit in E.A.No.1 of 2021 filed by the 1st respondent/defendant – Judgment Debtor, the petitioner has filed the present Civil Revision Petition on 06.01.2022 to strike-off I.A.No.1 of 2021 in E.A.No.328 of 2008 in E.P.No.5 of 2006 in O.S.No. 102 of 2002 on the file of the Sub Court, Srivilliputtur.

12. It is submitted that the Court below has committed a grave error in numbering EA.No.1 of 2021 in E.A.No.328 of 2008 in EP.No.5 of 2006 under Order XXI Rule 97 of CPC r/w Section 47 of CPC.

13. It is submitted that the issue has attained finality in as much as the 1st respondent/defendant – Judgment Debtor's appeal before the Hon'ble Supreme Court against the order passed by this Court on 28.06.2018 in CRP.(MD).No.1454 of 2015, was also dismissed by the Hon'ble Supreme Court in SLP.No.21762 of 2018 on 26.02.2020.

14. It is submitted that the 1st respondent/defendant, who is the judgment debtor is dragging the proceedings for more than 15 years by preventing the petitioner from taking delivery of the possession of the property which was sold to him on 29.10.2007. It is submitted that the



Certificate of Sale was also issued as early as on 02.01.2008 to the petitioner. It is therefore, submitted that the grounds taken by the 1st respondent/defendant – Judgment Debtor in IA.No.1 of 2021 questioning the value of the property cannot be countenanced with.

15.On behalf of the 1st respondent/defendant – Judgment Debtor, the learned Senior Counsel submitted that the deceased respondent Kaleeswaran whose interest is represented by his legal heirs had secured an *exparte* Judgment and Decree on 14.07.2003.

16.It is submitted that only 4 days prior to the *exparte* Judgment and Decree dated 14.07.2003, the deceased plaintiff Kaleeswaran – Decree Holder secured an interim order dated 11.07.2003 attaching the property under Order 38 Rule 5 of Code of Civil Procedure, 1908.

17.It is submitted that E.P.No.5 of 2006 was filed on 17.07.2006 and proclamation of sale was ordered and the sale was made in favour of the petitioner in a court auction on 26.10.2007. The sale was confirmed in favour of the petitioner who is not a party to the proceedings in O.S.No. 102 of 2002 on 02.01.2008 by issuing the Sale Certificate.



18.It is submitted that under these circumstances the 1st respondent/defendant – Judgment Debtor filed E.A.No.328 of 2008 on 24.06.2008 under Section 47 of Code of Civil Procedure, 1908 to declare the entire sale proceedings in E.P.No.5 of 2006 as null and void. The learned senior counsel for the 1st respondent/defendant – Judgment Debtor submits that although the said proceeding has now attained finality as E.A.No.328 of 2008 was dismissed on 22.04.2015 which was affirmed by this Court in C.R.P.(MD) No.1454 of 2015 by its order dated 28.06.2018 and further was affirmed by the Hon'ble Supreme Court vide its order dated 26.02.2020 while dismissing the S.L.P.No.21762 of 2018, nothing precludes the petitioner from filing fresh application under Order XXI Rule 90 of CPC.

19.It is further submitted that although the 1st respondent had filed E.A.No.1 of 2021 under Order 21 Rule 97 of the Code of Civil Procedure, 1908, the correct provision for the above application is Order 21 Rule 90 of Code of Civil Procedure, 1908. It is therefore submitted the the wrong quoting of provisions is not fatal to E.A.No.1 of 2021. It is further submitted that petitioner has also not filed counter in E.A.No.1 of 2021 and therefore E.A.No.1 of 2021 cannot be short circuited.



20.It is also submitted that the sale and confirmation of sale in favour of the petitioner on 26.10.2007 and 02.01.2008 respectively was on account of the material irregularity committed and therefore the sale is liable to be interfered with and the 1st respondent/defendant – Judgment Debtor was entitled to file E.A.No.1 of 2021.

21.The total extent of land which belonged to the 1st respondent/defendant – Judgment Debtor was 85 Cents which were plotted and that about 6 Cents of land (3 Cents x 2 Plots) has been sold on 10.04.2000 and 12.04.2000 prior to the date of *exparte* Judgment and Decree in O.S.No.102 of 2002, i.e. 14.07.2003. In fact, it is submitted that it is even prior to the attachment before the Judgment on 11.07.2003.

22.The learned counsel for the 1st respondent further submits that dismissal of E.A.No.328 of 2008 cannot act as a bar for the 1st respondent/defendant – Judgment Debtor to file E.A.No.1 of 2021 under Order 21 Rule 90 of Code of Civil Procedure, 1908.

23.That apart, it is submitted that order of this Court dated 28.06.2018 in C.R.P.(MD) No.1454 of 2015 cannot said to have been



confirmed by the Hon'ble Supreme Court in its order dated 26.02.2020 in

S.L.P.No.21762 of 2018. The Hon'ble Supreme Court in **Kunhayammed**

and others Vs. State of Kerala and Another, (2000) 6 SCC 359,

wherein, it has been held as under:-

“4.By Amendment Act 36 of 1986 published in Kerala Government Gazette (Extraordinary) dated 1-12-1986 Section 8-C amongst others was enacted into the body of the Act giving it a retrospective effect from 19-11-1983. Sub-section (2) of Section 8-C, with which we are concerned, reads as under:

*“8-C. Power of Government to file appeal or application for review in certain cases.—(1)****

(2) Notwithstanding anything contained in this Act, or in the Limitation Act, 1963 (Central Act 36 of 1963), or in any other law for the time being in force, or in any judgment, decree or order of any court or other authority, the Government, if they are satisfied that any order of the High Court in an appeal under Section 8-A (including an order against which an appeal to the Supreme Court has not been admitted by that Court) has been passed on the basis of concessions made before the High Court without the authority in writing of the Government or due to the failure to produce relevant data or other particulars before the High Court or that an appeal against such



order could not be filed before the Supreme Court by reason of the delay in applying for and obtaining a certified copy of such order, may, during the period beginning with the commencement of the Kerala Private Forests (Vesting and Assignment) Amendment Act, 1986 and ending on the 31st day of March, 1987, make an application to the High Court for review of such order."

24. That apart, it is submitted that there is an alternative remedy and only if an adverse order is passed in E.A.No.1 of 2021 against the petitioner, the petitioner can approach this Court. Therefore, on this score, the present Civil Revision Petition is liable to be dismissed for abuse of Court proceeding.

25. By way of rejoinder, the learned counsel for the petitioner submits that the 2nd application in E.A.No.1 of 2021 was clearly barred under Explanation VII to Section 11 of the Code of Civil Procedure, 1908. The 1st respondent/defendant – Judgment Debtor cannot stagger and delay the execution proceedings.

26. It is submitted that whatever grounds which were available with the 1st respondent/defendant – Judgment Debtor should have been taken in



E.A.No.328 of 2008 and therefore having not taken all the available grounds in E.A.No.328 of 2008, it is not open for the 1st respondent/defendant – Judgment Debtor to intervene with the execution proceedings and to initiate further litigation.

27.It is submitted that the petitioner should be given the possession of the property which was sold to him through Court Auction on 26.10.2007 and that having deposited the amount pursuant to the sale conducted on 26.10.2007, the Sale Certificate was also issued in favour of the petitioner on 02.01.2008. However, the petitioner is unable to enjoy the possession of the property.

28.It is submitted that the Court sale was made on 26.10.2007 and sale was confirmed as early as 02.01.2008. It is further submitted that the petitioner is still unable to enjoy the fruits of the property purchased in 2007 and therefore, the present Civil Revision Petition is liable to be allowed.

29.I have considered the arguments advanced by the learned counsel for the petitioner and learned Senior Counsel for the respondents.



WEB COPY

30. It is noticed that during the pendency of E.A.No.328 of 2008, the 1st respondent/defendant – Judgment Debtor has deposited a sum of Rs. 6,00,000/- [a sum of Rs.5,00,000/- on 23.02.2015 and a sum of Rs. 1,00,000/- on 27.03.2017].

31. E.A.No.1 of 2021 filed by the 1st respondent/defendant – Judgment Debtor is contrary to the order passed by the Hon'ble Supreme Court in SLP.No.21762 of 2018 vide order dated 26.02.2020.

32. The 1st respondent/defendant – Judgment Debtor after having failed to raise the issue earlier in E.A.No.328 of 2008, cannot be permitted to raise it later by filing E.A.No.1 of 2021. There is *res judicata* under Section 11 of CPC. Bar under Section 11 of CPC also applies to proceedings under Order XXI of CPC. Further, proceedings under Section 47 of CPC is in the nature of a suit. Therefore, bar under Order II Rule 2 of CPC is also attracted. Explanation IV & VII to Section 11 CPC and Sub-Rule(2) to Rule 2 to Order II reads as under:

**Explanation to Section 11 of CPC, 1908:**

Explanation IV —Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.	Explanation VII .—The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.
---	---

ORDER II**2. Suit to include the whole claim:**

(2) Relinquishment of part of claim.—Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished.

33. Thus, E.A.No.1 of 2021 was barred under law in terms of Explanation VII to Section 11 of CPC. Further, Section 65 of the Code states that, where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute.

34. The sale of a property becomes absolute under Order XXI, Rule 92(1) after an application made under Rule 89, Rule 90 or Rule 91 is



disallowed and the court passes an order confirming the same. After the sale of an immovable property becomes absolute in terms of Order XXI, Rule 92(1), the Court has to merely grant a 'Certificate of Sale' under Rule 94. The certificate has to bear the date and the day on which the sale became absolute.

35.The 1st respondent/defendant – Judgment Debtor had already made submission that the market value of the property was more than Rs. 20 lakhs, whereas, it was auctioned for a sum of Rs.7,59,500/- in E.A.No. 328 of 2008. Thus, E.A.No.1 of 2021 was clearly barred on the ground of *res judicata*.

36.As per the latest decision of the Hon'ble Supreme Court in the case of **Dipali Biswas and others Vs Nirmalendu Mukherejee and others**, AIR Online 2021 SC 845 also I.A.No.1 of 2021 is not maintainable. Relevant conclusion from the decision of the Hon'ble Supreme Court in the case of **Dipali Biswas and others Vs Nirmalendu Mukherejee and others**, AIR Online 2021 SC 845 reads under:



WEB COPY



C.R.P. (MD) No.340 of 2022

“ ...

Conclusion

37. The appellants cannot be allowed to raise the issue relating to the breach of Order XXI, Rule 64 for the following reasons:-

(i) A judgment-debtor cannot be allowed to raise objections as to the method of execution in installments. **After having failed to raise the issue in four earlier rounds of litigation, the appellants cannot be permitted to raise it now;**

(ii) As we have pointed out elsewhere, the original judgment-debtor himself filed a petition under Section 47, way back on 02.09.1975. What is on hand is a second petition under Section 47 and, hence, it is barred by res judicata. It must be pointed out at this stage that before Act 104 of 1976 came into force, there was one view that the provisions of Section 11 of the Code had no application to execution proceedings. But under Act 104 of 1976 Explanation VII was inserted under Section 11 and it says that the provisions of this Section shall apply to a proceeding for the execution of a decree and reference in this Section to any suit, issue or former suit shall be construed as references to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree;

(iii) Even in the 5th round, the appellants have not pointed out the lay of the property, its dimensions on all sides and the possibility of dividing the same into two or more pieces, with a view to sell one or more of those pieces for the realisation of the decree debt;

(iv) The observations in paragraph 4 of the order of the High Court dated 20.12.1990 in



WEB COPY



C.R.P. (MD) No.340 of 2022

C.O.No.2487 of 1987 that, “none of the parties shall have any claim whatsoever as against the applicant in respect of the purchased property which shall be deemed to be his absolute property on and from the expiry of 15th December, 1980”, has attained finality;

(v) Section 65 of the Code says that, “where immovable property is sold in execution of a decree and such sale has become absolute, the property shall be deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute”. The sale of a property becomes absolute under Order XXI, Rule 92(1) after an application made under Rule 89, Rule 90 or Rule 91 is disallowed and the court passes an order confirming the same. After the sale of an immovable property becomes absolute in terms of Order XXI, Rule 92(1), the Court has to grant a certificate under Rule 94. The certificate has to bear the date and the day on which the sale became absolute. Thus a conjoint reading of [Section 65](#), Order XXI, Rule 92 and Order XXI, Rule 94 would show that it passes through three important stages (other than certain intervening stages).

They are,

- (i) conduct of sale;
- (ii) sale becoming absolute; and

(iii) issue of sale certificate. After all these three stages are crossed, the 4th stage of delivery of possession comes under Rule 95 of Order XXI. It is at this 4th stage that the appellants have raised the objection relating to Order XXI, Rule 64. It is not as if the appellants were not aware of the fact that the property in entirety was included in the proclamation of sale.



WEB COPY



C.R.P. (MD) No.340 of 2022

Therefore, the claim on the basis of Order XXI, Rule 64 was rightly rejected by the High Court.”

37. Deciding with a somewhat similar circumstances, the Hon'ble Supreme Court in **M/s. Jagan Singh and Co. Vs Ludhiana Improvement Trust & others**, 2022 LiveLaw (SC) 733, observed as under:-

“ ...

35. The Executing Court and the First Appellant Court duly supported the reasoning based on various failures of the Judgment Debtor: (a) did not file objections at the time of presentation of execution petition; (b) did not file any objections at the time of order of attachment; (c) no objections filed when proclamation under Order XXI Rule 66 of the said Code was made; (d) no objections filed even at the time of public auction being actually conducted.

....

39. We must note in the end that Order XXI of the said Code is exhaustive and in the nature of a complete Code as to how the execution proceedings should take place. **This is the second stage after the success of the party in the civil proceedings. It is often said in our country that another legal battle, more prolonged, starts in execution proceedings defeating the right of the party which has succeeded in establishing its claim in civil proceedings. This is exactly what has happened in the present case. The various**



WEB COPY



C.R.P. (MD) No.340 of 2022

stages of Order XXI of the said Code when violated cannot given right to some extra indulgence merely because the Respondent Trust is an Improvement Trust. There cannot be a license to prolong the litigation ad infinitum.”

38.The above views of the Hon'ble Supreme Court apply to the four corners of the facts of the present case. Thus, there is a clear bar under explanation VII to Section 11 CPC to re-agitate the issue. E.A.No.1 of 2021 was clearly barred under law. Whether the property that was auctioned on 29.10.2007 was undervalued or not cannot be re-agitated by filing another application under Order XXI Rule 90 of CPC.

39.The Court should not have numbered the same without examining its records in the first place as E.A.No.1 of 2021 filed by the 1st respondent/defendant – Judgment Debtor was barred by *res judicata*. E.A.No.1 of 2021 was nothing but an re-agitation of an issue already settled by this Court and abuse of Court proceedings.

40.Therefore, this Civil Revision Petition deserves to be allowed. While allowing this Civil Revision Petition, I am however refraining from



C.R.P. (MD) No.340 of 2022

imposing cost on the 1st respondent/defendant – Judgment Debtor.

Consequently, the connected Miscellaneous Petition is closed.

31.07.2023

Jen / krk

Index : Yes / No
Internet : Yes / No
Neutral Citation : Yes / No

To

The Subordinate Judge,
Sub Court, Srivilliputtur.



WEB COPY



C.R.P. (MD) No.340 of 2022

C.SARAVANAN, J.

Jen / krk

C.R.P.(MD).No.340 of 2022

31.07.2023