



C.R.P.(MD)No.236 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserving the Judgment	Date of Pronouncing the Judgment
05.04.2023	28.04.2023

CORAM:

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.R.P.(MD)No.236 of 2021

and

C.M.P.(MD)No.1409 of 2021

1.M.Selvaraj
2.A.Murugan

... Petitioners

VS.

1.Vetrikumar
2.S.Selvaraj

... Respondents

Prayer :- Civil Revision Petition is filed under Article 227 of the Constitution of India, against the petition and order of the Principal Sub Court, Tenkasi, made in E.A.No.6 of 2019 in E.A.No.703 of 2008 in E.P.No.55 of 2003 in O.S.No.123 of 1999, dated 05.12.2019.

For Petitioners

: Mr.G.Radhakrishnan

For Respondents

: Mr.G.Anto Prince

ORDER

The petitioner has filed this Civil Revision Petition against the impugned order dated 05.12.2019, passed by the Principal Subordinate Court, Tenkasi, in E.A.No.6 of 2019 in E.A.No.703 of 2008 in E.P.No.55 of 2003 in O.S.No.123 of 1999.



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2.By the impugned order, the Principal Subordinate Court, Tenkasi, has allowed E.A.No.6 of 2019 filed by the first respondent herein under Order XXI Rule 35(3) of C.P.C to break open the door for taking delivery of the property in E.A.No. 703 of 2003 in E.P.No.55 of 2003 in O.S.No.123 of 1999.

3.The petitioners herein are auction purchasers of the property in an insolvency proceedings as detailed below:-

I.P.No.	Auction Date	S.No/Property Type	Action Purchaser	Sale Certificate Date
16/1999,	22.01.2007	388/40 -Shop	Mr.M. Selvaraj/P1	02.02.2007
02/2006	15.02.2007	417- House	Mr.A.Murugan/P2	19.02.2007

4.The operative portion of the impugned order dated 05.12.2019, passed in E.A.No.703 of 2003 in E.P.No.55 of 2003 in O.S.No.123 of 1999 by the Principal Subordinate Court, Tenkasi, reads as under:-

"Prays to pass an order to the Break open the petition schedule property house.

Sec.151 CPC

For orders @ 05.12.2019

Heard. Ordered."

5.Heard the learned counsel for the petitioners. The learned counsel for the respondents sought time after the case was argued. Having heard at length, I do not wish to adjourn the case.



6.The petitioners herein had purchased two properties, namely, a shop and a house in public auctions held on 22.01.2007 and 15.02.2007 by the Official Receiver in I.P.No.2 of 2006 pursuant to the order allowing I.P.No.16 of 1999 filed on 01.12.1999 by the second respondent herein along with two of his brothers before the Principle Sub Court, Tenkasi, to declare themselves as an insolvents.

7.In the aforesaid insolvency proceedings, the second respondent and two of his brothers were declared as insolvents on 02.11.2006 by the Principle Sub Court, Tenkasi. In the aforesaid insolvency proceedings, the first respondent herein (the plaintiff in O.S.Nos.123-125 of 1999), was arrayed as the fourth respondent.

8.An official receiver was appointed in I.P.No.2 of 2006 for administering the properties of the second respondent and two of his brothers. The properties were auctioned on 22.01.2007 and 15.02.2007. The petitioners participated in two auctions and thus, became the auction purchasers of the properties. A sale certificate was also issued, which was registered in their favour on 02.02.2007 and 19.02.2007 respectively.

9.I.P.No.16 of 1999 was filed by the second respondent and two of his brothers in the background of O.S.Nos.123-125 of 1999 filed by the first respondent against the second respondent and two of his brothers before the same Principle Sub Court, Tenkasi.



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10. It appears that the second respondent and two of his brothers had earlier borrowed money from the first respondent but had failed to re-pay the same. The second respondent and his two brothers remained *ex-parte* in O.S.Nos.123-125 of 1999. Thus, O.S.Nos.123-125 of 1999 was decreed in favour of the first respondent on 02.11.2001.

11. Pursuant to the *ex-parte* decree dated 02.11.2001, the first respondent (the decree holder) herein had filed E.P.No.61 of 2003 in O.S No.124 of 1999 and E.P.No. 56 of 2003 in O.S No.125 of 1999 against the two brothers of the second respondent. Thus, sales were effected in favour of the first respondent (the decree holder) in the Court auction of the $\frac{2}{3}$ rd undivided share of the property belonging to the two brothers of the second respondent.

12. E.P.No.55 of 2003 in O.S.No. 123 of 1999 was filed by the first respondent (the decree holder) against the second respondent for the balance $\frac{1}{3}$ rd undivided share.

13. Pursuant to the above sale of $\frac{1}{3}$ share each in the two properties against the two brothers of the second respondent, the first respondent filed O.S.No.31 of 2007 before the Additional District Munsif Court, Tenkasi, for a declaration and injunction against the Official Receiver in I.P.No.2 of 2006. In O.S.No.31 of 2007 the Official Receiver was the first defendant. The two brothers of the second



respondent were the second and third defendants. The petitioners herein were the fourth and fifth defendants.

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14.O.S.No.31 of 2007 filed by the first respondent was dismissed by the Additional District Munsif Court, Tenkasi vide a judgment and decree dated 10.07.2013. It was held that the auction sale conducted by the Official Receiver in the Insolvency Proceedings had more credibility and prevailed over the Court auction in favour of the first respondent herein in view of Section 28(7) of the Provincial Insolvency Act, 1920.

15. Section 28(7) of the Provincial Insolvency Act, 1920 states that "an order of adjudication shall relate back to, and take effect from the date of the presentation of the petition on which it is made". Therefore, it was held that the relief claimed by the first respondent herein in O.S.No.31 of 2007 for a declaration of 2/3rd share in the subject property and for permanent injunction to restrain the Official Receiver in the said Insolvency Proceedings from putting up the property to sale has become infructuous, as the petitioners herein have bought the property in the auction conducted by the Official Receiver in I.P.No.2 of 2006 pursuant to the order in I.P.No.16 of 1999, dated 02.11.2006, declaring the second respondent and two of his brothers as insolvents. Accordingly, O.S.No.31 of 2007 was dismissed.



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16.The first respondent filed A.S.No.34 of 2013 against the judgment and decree dated 10.07.2013 in O.S.No.31 of 2007 of the Additional District Munsif Court, Tenkasi, before the Additional Sub Court, Tenkasi. The said Appeal Suit was also dismissed by the Additional Sub Court, Tenkasi, vide judgment and decree dated 22.11.2018.

17.It was held that since the first respondent herein has filed O.S.No.31 of 2007 suppressing the important and relevant facts in the plaint regarding the proceeding in I.P.No.16 of 1999, wherein the first respondent being the fourth respondent having received the summon remained ex-parte and regarding the order passed in I.P.No.16 of 1999 on 02.11.2006, the plaint was liable to be rejected. It was further held that the first respondent herein should have filed a suit for partition instead of a suit for declaration and injunction in O.S.No.31 of 2007 before the Additional Sub Court, Tenkasi. It was further held that the first respondent had not proved that O.S.Nos.124 and 125 of 1999 filed by the first respondent was prior to filing of I.P.No.16 of 1999 by the second respondent along with two of his brothers. Thus, the Additional Sub Court, Tenkasi, upheld the views of the Additional District Munsif, Tenkasi, regarding section 28(7) of the Provincial Insolvency Act, 1920.



18. Meanwhile, the first respondent bought the balance 1/3rd undivided share in subject properties of the second respondent in a Court auction in E.P.No. 55 of 2003 in O.S.No. 123 of 1999 pursuant to the *ex parte* decree dated 02.11.2001 in O.S.No. 123 of 1999 of Principal Sub Court, Tenkasi, against the second respondent. A sale certificate was also issued which was registered in favour of the first respondent on 17.07.2008.

19. The first respondent filed E.A.No.703 of 2003 in E.P.No.55 of 2003 in O.S.No.123 of 1999 for taking delivery of the property and E.A.No.1 of 2019 in E.A.No.703 of 2003 in E.P.No.55 of 2003 in O.S.No.123 of 1999 for Police Protection regarding 1/3rd share of the property pursuant to the the *ex parte* decree dated 02.11.2001 in O.S.No.123 of 1999 of Principal Sub Court, Tenkasi, filed by the first respondent against the second respondent.

20. The petitioners filed E.A.No.4 of 2019 in E.A.No.703 of 2003 in E.P.No. 55 of 2003 under Order XXI Rule 26 of C.P.C. before the Principal Sub Court, Tenkasi, to stay the further proceedings in execution of the decree in E.A.No.703 of 2003 in E.P.No.55 of 2003 in O.S.No.123 of 1999 till the disposal of the obstruction petitions filed by the petitioners herein.



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21.The petitioners also filed E.A.No.5 of 2019 under Section 47 r/w Section 146 of C.P.C before the Principal Sub Court, Tenkasi, challenging the maintainability of the decree obtained in O.S.No.123 of 1999 and its execution in E.P.No.55 of 2003 filed by the first respondent, contending that the petitioners had purchased the subject properties, namely, a shop and a house in public auctions held on 22.01.2007 and 15.02.2007 conducted by the Official Receiver in I.P.No.2 of 2006 pursuant to the order in I.P.No.16 of 1999 dated 02.11.2006 and contending that the sale obtained by the first respondent in E.P.No.55 of 2003 in O.S.No.123 of 1999 will not bind the sale obtained by the petitioners in public auctions held on 22.01.2007 and 15.02.2007 conducted by the Official Receiver in I.P.No.2 of 2006.

22.The first respondent filed E.A.No.6 of 2019 in E.A.No.703 of 2003 in E.P.No.55 of 2003 in O.S.No.123 of 1999 under Order XXI Rule 35(3) of C.P.C to break open the door for taking delivery of the property through Court Amin, which was allowed by the the Principal Subordinate Court, Teenkasi, on 15.12.2019. Aggrieved over the same, the petitioners have filed this Civil Revision Petition.

23.The learned counsel for the petitioners submits that the petitioners being the auction purchasers of the subject matter of the property in I.P.No.2 of 2006 through the public auctions conducted by the official receiver on 22.01.2007 and



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15.02.2007 and were in possession of the entire property being vested in them, should have been impleaded as parties in the delivery proceedings in E.A.No.703 of 2008 filed by the first respondent.

24.It is submitted that the delivery proceedings in E.A.No.703 of 2008 is with regard to 1/3rd undivided share in subject properties, but the Principal Subordinate Court, Tenkasi, has allowed E.A.No.6 of 2019 to take delivery for the entire property of the shop and residential house, though the petitioners are the owners.

25.It is submitted that the first respondent without mentioning the pendency of E.A.Nos.4 and 5 of 2019 before the Court has filed E.A.No.6 of 2019 on 05.12.2019, which was allowed on the same day without notice to the petitioners.

26.I have considered the arguments advanced by the learned counsel appearing for the parties.

27.Section 28(7) of the Provincial Insolvency Act,1920, the insolvency proceedings dates back to the date of filing the Insolvency Proceedings i.e., I.P.No.16 of 1999. It was filed on 01.12.1999. The subject matter of the property comes under the custody of the adjudicating Court i.e., Principal Subordinate Court, Tenkasi, and



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hence, forcefully taking delivery from the petitioners through E.A.No.6 of 2019 by the same Court shows non application of mind.

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28.E.A.No.4 of 2019 and E.A.No.5 of 2019 filed by the petitioners goes to the root of the execution of ex parte decree dated 02.11.2001 in O.S.No.123 of 1999 in E.P.No.55 of 2003 and the ex parte decree procured by the first respondent 02.11.2001 in O.S.No.123 of 1999 in the light of Section 28(7) of the Provincial Insolvency Act, 1920 which reads as under:-

"28. Effect of an order of adjudication - (7) An order of adjudication shall relate back to, and take effect from the date of the presentation of the petition on which it is made"

29.Impugned order dated 05.12.2019 in I.A.No.6 of 2019 in E.A.No.703 of 2003 in E.P.No.55 of 2003 in O.S.No.123 of 1999 filed by the first respondent (decree holder in O.S.No. 123 of 1999) is non-speaking in nature and has been passed during the pendency of E.A.No.4 of 2019 in E.A.No.703 of 2003 in E.P.No. 55 of 2003 in O.S.No.123 of 1999 filed under Order 21, Rule 26 C.P.C and E.A.No.5 of 2019 filed under Section 47 of C.P.C. Therefore, impugned order dated 05.12.2019 in I.A.No.6 of 2019 is set aside and the case is remitted back to the Court below to pass fresh orders after disposal of E.A.No.4 of 2019 and E.A.No.5 of 2019 within a period of 6 months.



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30. The Civil Revision Petition stands allowed by way of remand with the above observations. No costs. Consequently, connected Miscellaneous Petition is closed.

NCC : Yes / No
Index : Yes / No
Internet : Yes / No
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28.04.2023

To

The Principal Sub Judge,
Tenkasi.



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C.SARAVANAN, J.

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PRE-DELIVERY ORDER MADE IN
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DATED : 28.04.2023