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C.R.P.(PD).No.551 of 2024

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.12.2024

Coram

THE HON'BLE MR JUSTICE V. LAKSHMINARAYANAN

C.R.P.(PD).No.551 of 2024 &
CMP.No.2747 of 2024

mrs.Alice Manoranjitham (Deceased)

Mr.J.Ebenezer (Deceased)

1.Miller Joshua

2.Martin Caleb

... Petitioners

-Versus-

G.Natarajan

... Respondent

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the docket order of the learned IX City Civil Judge Chennai in EA.SR90540 of 2023 dated 07.12.2023 in E.P.No.4953 of 2014 in O.S.No.187 of 2009

For Petitioners : Mr.P.Prakash paul

*For Respondent : Mr.S.Shanmugha Sundaram for
Mr.R.Murugabharathi*

ORDER

This civil revision petition arises against the order passed by the learned IX Additional City Civil Court at Chennai in EA SR90540 of 2023 in



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EP.No.4953 of 2014 in O.S.No.187 of 2009 dated 07.12.2023.

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2. O.S.No.187 of 2009 is a suit for recovery of possession and for damages. Earlier, the civil revision petitioners had filed O.S.No.4730 of 2002, on the file of the learned II Assistant City Civil Court at Chennai. That suit was for a declaration that the auction notice dated 16.08.2002 was null and void, for redemption of the mortgage dated 07.09.1998, for the relief of injunction restraining the defendants therein from proceedings with the auction and for a declaration that the sale deed executed in Doc. No. 3806 of 2005 by the first defendant/auctioneer in favour of the third defendant/respondent as null and void.

3. The facts necessary for the disposal of the case are that one Alice Manoranjitham had mortgaged the suit schedule mentioned property with M/s.Sri Kandaswami Permanent Fund Limited. As there is a default, invoking the provisions of Section 69 of the Transfer of Property Act, the property was brought for auction. In the said auction, the respondent herein purchased the property. A sale deed was also executed in his favour.

4. On the strength of the sale deed, he filed O.S.No.187 of 2009.



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Challenging the sale, the plaint in O.S.No.4730 of 2002 was amended. Both the suits were contested. The suit in O.S.No.187 of 2009 was decreed and the suit in O.S.No.4730 of 2002 was dismissed on 08.07.2011. Aggrieved by the same, two appeals were preferred to the file of the IV Additional City Civil Court, Chennai. The Appeals were received as A.S.Nos.444 & 445 of 2011. The Appeals were dismissed on 10.10.2013. Second appeals were preferred to this court in SA.Nos.296 and 299 of 2015. The appeals were dismissed confirming the judgment and decree of the courts below on 06.09.2019. Aggrieved by the same, two Special Leave Petitions were preferred to the Supreme Court in SLP (Civil).Nos.20745 - 20746 of 2022. The Special Leave Petitions were dismissed on 29.11.2022. In the meantime, the decree holder had filed EP.No.4953 of 2014 for delivery of possession.

5. In the said execution petition, the civil revision petitioners filed an application under Section 47 of the Code of Civil Procedure. This petition was received in EA.SR90540 of 2023.

6. The plea of the judgment debtors is that, under Section 44 of the Transfer of Property Act, they are entitled to retain the schedule mentioned



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property, as it is a dwelling house. Hence, they resisted delivery. They further pleaded that unless and until the schedule mentioned property is partitioned by metes and bounds, a stranger auction purchaser is not entitled to seek for delivery of possession. This was opposed by the decree holder stating that it is yet another attempt by the judgment debtors to delay the proceedings.

7. On consideration of the pleas, the learned Executing Judge came to a conclusion that, the application under Section 47, is not maintainable and dismissed the same. Aggrieved by the same, the present civil revision petition.

8. I heard Mr.P.Prakash Paul for the civil revision petitioner and Mr.S.Shanmuga Sundaram for Mr.R.Murugabarathi.

9. Both counsels reiterated the contentions they made before the courts below.

10. According to Mr.P.Prakash Paul, being a joint family property and being a dwelling house, the auction purchaser of the property is not entitled to take possession of the property. His remedy is to file a suit for partition, obtain



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a decree and thereafter, file an execution petition.

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11. Mr.S.Shanmuga Sundaram points out that the property is not a dwelling house. He draws my attention to the mortgage deed executed by Alice Manoranjitham on 07.09.1998. From the schedule, he points out that the property is a flat, bearing Door No.11/3, Gengan Street, Old Washermenpet, Chennai. The flat, being an individual unit, the decree holder had purchased the undivided share of land together with the flat. Hence, he pleads that the argument of Mr.P.Prakash Paul does not deserve consideration.

12. I have carefully considered the arguments on both sides and gone through the records.

13. It is not in dispute that the original mortgagor is a Christian. The principle of joint family is unknown to those who belonging to Christian persuasion. Apart from that, for the purpose of Section 44 of the Transfer of Property Act to apply, the property should be a dwelling house. As to what is a “dwelling house” has its own connotation in law. As rightly contended by Mr.S.Shanmuga Sundaram, the property, which has been brought for auction



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and purchased by the respondent, is a flat together with an undivided share.

The flat has not been shown to be a dwelling house.

14. Further, this plea was neither taken at the time of the suit nor in the second appeal or even before the Supreme Court. It cannot be raised for the first time in an execution petition. Hence, the plea is barred by the principle of constructive *res judicata*. The plea, which might or ought to have been taken, during the course of the proceedings and not taken, certainly cannot be entertained at the time of execution of the decree.

15. I do not find any error in the order passed by the learned IX City Civil Judge, Chennai. The civil revision petition is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

16. The learned Executing Judge shall take note of the fact that the execution petition is pending for the past decade. He shall pass appropriate orders and ensure that the decree holder gets the fruits of the decree within a period of three months from the date of receipt of a copy of this order.



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Index : yes / no

Neutral Citation : yes / no

Speaking / Non Speaking Order

To

The IX City Civil Judge Chennai



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V.LAKSHMINARAYANAN, J.

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