



CRP.No.3031 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.11.2024

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.R.P.No.3031 of 2021
and C.M.P.No.21463 of 2021

Sellaravutha Gounder

.. Petitioner

Versus

1.V.M.China Gounder

2.Easwaran

.. Respondents

Prayer:- Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and final order dated 23.12.2020 made in E.A.No.29 of 2012 in E.P.No.22 of 2010 in O.S.No.174 of 2009 on the file of Principal District Munsif Court, Bhavani.

For Petitioner : Mr.P.V.Balasubramaniam, Senior Counsel
for Mr.M.Roshan Atiq

For Respondents : Mr.K.V.Babu
for Mr.S.Jeyakumar

ORDER

Challenge has been made to the order dismissing the application in E.A.No.29 of 2012 dated 23.12.2020 filed seeking to set aside the exparte order made in E.P.No.22 of 2010.

2. The petitioner has filed an application to set aside the exparte order



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passed in E.P.No.22 of 2010, wherein, the delivery order has been passed on 30.07.2010. According to the petitioner, the exparte order came to his knowledge only on 12.03.2012, when the Court officials came for effecting the delivery of possession. According to the petitioner, no notice was served on the petitioner and the petitioner's property is an ancestral property and there was no partition among the co-parcener. Therefore, sought to set aside the exparte order passed in E.P.No.22/2010 dated 30.07.2010 before the Principal District Munsif Court, Bhavani in E.A.No.29 of 2012. The said E.A was filed on 13.03.2012 and the same was dismissed on 23.12.2020 vide the impugned order. Challenging the said order, this revision petition has been filed.

3. The facts leading to this proceedings is relevant to be extracted:

3.a.The petitioner's father Marappa Gounder borrowed a sum of Rs.8000 from the second respondent and executed two promissory notes in favour of the second plaintiff. On failure of repayment, the second plaintiff filed a suit in O.S.No.1077 of 1981 on the file of learned District Munsif Court, Erode for recovery of money against the petitioner's father and the petitioner. The suit was decreed on 28.06.1982 and E.P.R.No.54 of 1992 was filed by the second respondent to execute the decree for sale of



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properties of the judgment debtors. The suit property owned by Marappa Gounder to an extent of 2.65 acres was brought for sale in public auction held on 02.02.1994 and the sale was confirmed on 04.04.1994 and sale certificate was issued in favour of the second respondent/second plaintiff. In pursuance to the sale certificate, the second respondent filed an application in E.A.No.537 of 1995 for possession and the same was ordered, the second respondent took symbolic possession on 05.05.1995 and the possession was recorded on 07.06.1995.

3.b. Subsequently, the first respondent executed the decree in O.S.No.1077 of 1981 for realisation of the balance of the decree amount in E.P.R.No.49 of 1994 by way of sale to an extent of 0.75.5 hectare and the petitioner purchased the same in the Court auction on 02.01.2002 and the sale was confirmed on 11.03.2002. In pursuance to the sale certificate, the second respondent filed an application in E.A.No.346 of 2002 for possession and the same was ordered, the second respondent took symbolic possession on 26.06.2004 and the possession was recorded on 30.06.2004.

3.c. Similarly, the petitioner's father Marappa Gounder borrowed a sum of Rs.2,550 from one Marakkal and executed a promissory note in her favour. On failure of repayment, the said Marakkal filed a suit in



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O.S.No.1912 of 1979 on the file of learned District Munsif Court, Erode for recovery of money against the petitioner's father and the petitioner. The suit was decreed on 10.04.1981 and E.P.R.No.47 of 1994 was filed by Marakkal to execute the decree for sale of properties of the judgment debtors. The suit property owned by Marappa Gounder to an extent of 0.50.0 hectares was brought for sale in public auction held on 02.02.2002 and the sale was confirmed on 11.03.2002 and sale certificate was issued in favour of first respondent/first plaintiff. In pursuance to the sale certificate, the first respondent filed an application in E.A.No.344 of 2002 for possession and the same was ordered, the first respondent took symbolic possession on 26.06.2004 and the possession was recorded on 29.06.2004.

3.d.Similarly, the petitioner's father Marappa Gounder borrowed a sum of Rs.2,400 from one Ammasiammal and executed a promissory note in her favour. On failure of repayment, the said Ammasiammal filed a suit in O.S.No.1696 of 1978 on the file of learned District Munsif Court, Erode for recovery of money against the petitioner's father and the petitioner. The suit was decreed on 08.02.1980 and E.P.R.No.48 of 1994 was filed by Marakkal to execute the decree for sale of properties of the judgment debtors. The suit property owned by Marappa Gounder to an extent of



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0.50.0 hectares was brought for sale in public auction held on 02.01.2002 and the sale was confirmed on 11.03.2002 and sale certificate was issued in favour of first respondent/first plaintiff. In pursuance to the sale certificate, the first respondent filed an application in E.A.No.345 of 2002 for possession and the same was ordered, the first respondent took symbolic possession on 26.06.2004 and the possession was recorded on 29.06.2004.

3.f. Thereafter, it appears the respondents/auction purchasers joined together and filed suit in O.S.No.174 of 2009 on the file of the learned District Munsif Court, Bhavani. The said suit was also decreed exparte on 21.04.2010. Execution Petition was filed in E.P.No.22 of 2010, wherein, they were set exparte on the ground that they refused to receive notice and the delivery order had been passed on 30.07.2010. Therefore, the petitioner sought to set aside the exparte order passed in E.P.No.22 of 2010 dated 30.07.2010 before the Principal District Munsif Court, Bhavani in E.A.No.29 of 2012. The said E.A was filed on 13.03.2012 and the same was dismissed on 23.12.2020 vide the impugned order. Challenging the said order, this revision petition has been filed mainly on the ground that the petitioner came to know about the exparte order only when the Court officials came to effect the delivery. The learned Trial Court had dismissed



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the application mainly on the ground that notice has been refused by the respondents 1 to 8 in the Execution Petition. The same had been returned "as refused" and the process server made an endorsement after obtaining the signature from the Village Administrative Officer. Hence, the Trial Court has held that there has been sufficient service and the petitioner was aware of the proceedings from long back and the knowledge of the exparte order pleaded by them is not acceptable and dismissed the application. Further, on 13.03.2012, it is also recorded in the E.P. that the Execution Petition has been terminated as the possession is delivered.

4.The learned Senior Counsel for the petitioner would mainly contend that the exparte order in E.P.No.22 of 2010 ought to have been set aside by the Trial Court, since, the notice has not been served to the petitioner as per Order V Rules 17, 18 and 19 of CPC read with Order XXI Rules 24 and 25 of CPC. Therefore, when the mandatory procedures have not been followed, the Trial Court holding that there was a proper service on the judgment debtor cannot be sustained in the eye of law. It is the further contention that though 2.65 acres of land is said to have purchased by the second plaintiff in the O.S.No.1077 of 1981 on 02.02.1994 and sale was confirmed on 04.04.1994, the suit has been filed only during the year 2009



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for recovery of possession which is ex-facie barred by law. The relief has been granted beyond the scope of the suit and the decree holders have obtained a wrongful gain by violating the procedure as contemplated under CPC. Therefore, the petitioner has to be given an opportunity in the execution proceedings to canvass all his grievances. Therefore, it is the contention that as long as the service has not been effected in the manner known to law on the judgments debtors, such passing of exparte order for effecting delivery cannot be sustained in the eye of law. In support of his submissions, he placed reliance on the following judgments:

- a. Order of this Court in *CRP.No.745 of 1991* dated 18.03.2016
- b. Order of this Court in *CRP.No.219 of 2004* dated 20.12.2010
- c. *Ganpath Singh (Dead) by Lrs. vs. Kailash Shankar and others* reported in *AIR 1987 SC 1443*.
- d. *Sushil Kumar Sabharwal vs. Gurpreet Singh and Ors.* reported in *AIR 2002 SC 2370*.

5. The learned counsel for the respondents submitted that in all the four suits filed by the plaintiffs/respondents, the revision petitioner remained exparte and when the suit was filed for recovery of possession in O.S.No.174 of 2009, the revision petitioner again remained exparte. The



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petitioner was aware of the proceedings, in this regard, the process server in his server report has clearly made an endorsement that the respondent purposefully refused to receive the notice and also obtained a signature from VAO. The revision petitioner is aware of the proceedings for the last 30 years and had purposefully refused to receive the notice and the same is recorded by the amin. Thereafter, the amin has affixed the notice. Therefore, the conduct of the petitioner remains significant and that cannot be brushed aside altogether. According to him, the procedure set out for service of summons is not applicable to the execution proceedings, whereas, in the execution proceedings, normally notice will be served. Hence, submitted that the contention of the revision petitioner that he came to know about exparte order only on 12.03.2012 is an afterthought and introduced only for the purpose of the execution proceedings. It is the further case of the respondents that the delivery is also recorded in the execution petition on 13.03.2012. Therefore, unless the termination of the execution procedure is challenged, this revision is not maintainable to set aside the exparte order alone. In support of his submissions, he placed reliance on the following judgments:

a. Hameed Kunju vs. Nazim reported in *AIR 2017 SC 3376*

b. Order of this Court in CRP.Nos.3193, 2584 and 2585 of 2018 dated



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11.02.2019

- c. Order of this Court in *CRP.No.3077 of 2013* dated 07.04.2021
- d. Order of this Court in *CRP.(MD).No.18 of 2017* dated 12.01.2022
- e. Order of this Court in *CRP.NPD.No.1152/2019* dated 02.02.2022
- f. Order of this Court in *CRP.(MD).No.2245 of 2019* dated 05.12.2023
- g. Order of the Kerala High Court in *O.P.(C).No.4059 of 2011* dated 06.03.2013

6. Heard both sides and perused the materials placed on record.

7. While exercising the power under Article 227 of the Constitution of India, when the Court finds that wrongful gain has been obtained by violating the procedures, this Court can very well interfere under Article 227 of the Constitution of India.

8. The submissions that merely because EP is terminated, the revision against the order dismissing the application filed to set aside the exparte order is concerned, such contention has no force at all. When the impugned order which has resulted in terminating the EP, it cannot be said that the impugned order cannot be challenged at all. If the Court finds that the impugned order is an utter violation of the provisions of law and the order



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is set aside, the termination of the EP becomes insignificant. Even if the property is delivered restoration can be ordered in favour of the party who succeeds in the proceedings. The procedures contained in the Code of Civil Procedure is a tool of fairness and not to take away substantive rights of the parties on mere technicalities.

9. In view of the above, now, it has to be decided whether the Order passed by the Trial Court/Executing Court require any interference by this Court. The facts as narrated above makes it clear that an extent of 4.63 acres of the land belonging to the father of the revision petitioner was brought for Court auction in a money decree in different suits filed by one Marakkal, Ammasiammal and the second respondent herein. The first respondent is the assignee of the decree holders in O.S.No.1912 of 1979 and O.S.No.1696 of 1978, i.e., Marakkal and Ammasiammal. Out of 4.63 acres, the second respondent was declared as successful bidder for 2.65 acres on 02.02.1994 and the sale was confirmed on 04.04.1994. Thereafter, in O.S.No.1912 of 1979 and O.S.No.1696 of 1978, the remaining property were brought for Court auction by the first respondent assignee in E.P.Nos.47 to 49 of 2024 and sale was confirmed during the year 2022. Symbolic possession is also said to have been recorded. Further, the



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respondents, who became the successful bidder in the Court auctions held during the year 1994 and 2002 joined together and filed a suit in O.S.No.174 of 2009 for recovery of possession. It is relevant to note that even in respect of 2.65 acres said to have been purchased by the second respondent in Court auction in E.A.No.1198 of 1996 in O.S.No.1077 of 1981 filed for recovery of possession after a period of twelve years not only for his share, but also for the shares purchased by the first respondent who claimed to be the assignee of the decree holders in O.S.No.1912 of 1979 and O.S.No.1696 of 1978. This Court prima facie finds that as far the extent of 2.65 acres which was purchased in a Court auction in the year 1994 is concerned, the suit is ex-facie barred by way of limitation.

10. Be that as it may, now, dealing with the impugned order, it is the specific case of the revision petitioner that he has not been served with the summons or notice in the execution proceedings. He came to know about the exparte order dated 30.07.2010 passed against them for delivery of possession only on 12.03.2012 when the Court officials visited the property after taking the delivery. The learned Trial Court simply relied upon the endorsement of the amin and held that service is sufficient and the petitioner has dragged the proceedings and refused to set aside the order.



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11. It is useful to extract the provisions of Order V Rules 17, 18 & 19 of CPC, which reads as follows:

" 17. Procedure when defendant refuses to accept service, or cannot be found.—Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

18. Endorsement of time and manner of service.—The serving officer shall, in all cases in which the summons has



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been served under rule 16, endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

19. Examination of serving officer.—Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further enquiry in the matter as it thinks fit; and shall either declare that the summons has been duly served or order such service as it thinks fit."

12. The above provisions makes it clear that when a summons is returned under Rule 17, the serving officer ought to have filed an affidavit substantiating the refusal by the parties. This Court also verified the records and no such affidavit has been filed by the amin. If such affidavit has not been filed by amin, the Court shall examine the serving officer on oath, touching his proceedings, and make such further enquiry in the matter as it thinks fit; and should either declare that the summons has been duly served



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or order such service as it thinks fit. Further, it would also make clear that before declaring that summons has been duly served to pass exparte order, particularly when the endorsement is made by the Amin to the effect that parties refused to receive the summons, the serving officer ought to have been examined as per Order V Rule 19 of CPC.

13. That apart, Order XXI Rules 24 and 25 of CPC reads as follows:

" 24. Process for execution.—(1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date the day on which it is issued, and shall be signed by the Judge or such officer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process, a day shall be specified on or before which it shall be executed and a day shall also be specified on or before which it shall be returned to the Court, but no process shall be deemed to be void if no day for its return is specified therein.

25. Endorsement on process.—(1) The officer entrusted with the execution of the process shall endorse thereon the day on, and the manner in, which it was executed, and, if the latest day specified in the process for the return thereof has



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been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court.

(2) Where the endorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged inability, and may, if it thinks fit, summon and examine witnesses as to such inability and shall record the result."

Rule 25(2) makes it very clear that when the execution of the process has not been executed by the serving officer, the Court shall examine him touching his alleged inability if it thinks fit, summon and examine witnesses as to such inability and shall record the result. Therefore, the above two provisions makes it clear that before declaring that there is a proper service, in the event of refusal by the parties, the Executing Court ought to have satisfied itself upon the affidavit filed by Amin or upon examination of Amin. Whereas, in this case, neither the affidavit has been filed by the Amin nor has the Amin been examined by the Trial Court to declare that there is a proper service effected on the parties. Therefore, when the mandatory procedures have not been followed, it cannot be held that there is a proper service. Without examining the Amin or the affidavit filed in this regard by the Amin, the Trial Court ought not to have held that



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the notice has been served and that was refused by the parties. Therefore, on this ground alone, this Court is of the view that the order of the Trial Court has to be set aside.

14. It is the contention of the learned counsel for the respondent that EP has been terminated, therefore, revision is not maintainable. On perusal of the entire papers including the EP in which E.A.No.29 of 2012, dismissed on 23.12.2020, wherein, after dismissing the Execution Application, it is recorded that possession has already been delivered on 13.03.2012 and the EP is terminated. It has to be noted that though it is recorded as the possession is delivered on 13.03.2012, the same was corrected as 12.03.2012 later. On that dates, i.e., 12.03.2012 or 13.03.2012, there was no orders passed by the Executing Court recording the delivery. Wherein, for the first time, when the application filed to set aside the exparte order was dismissed, such endorsement came to be passed.

15. Further, it is the contention of the learned counsel for the respondents in support of reliance of the judgment of the Hon'ble Supreme Court in the case of *Hamid Kunju vs. Nazim* reported in 2017-4-LW847, wherein, in paragraph 33 held as follows:



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"33. In our considered view, once the possession had been delivered and decree was recorded as satisfied in accordance with law, the litigation had come to an end leaving no lis pending. In these circumstances, in the absence of any prima facie case having been made out on any jurisdictional issue affecting the very jurisdiction of the Court in passing the eviction decree, the High Court should have declined to examine the legality of four orders impugned therein.

In the above case, out of 8 tenants against whom delivery is ordered, only one tenant has filed application in E.A.No.35 of 2015 to set aside the order dated 19.03.2015 directing delivery of possession. It is relevant to consider the fact that delivery has been effected in all the shops, the Hon'ble Apex Court has recorded the above facts. Whereas in this case the time barred claim has been revived and a decree was passed and sought to be executed. Auction purchaser appears to have obtained wrongful gain, when the summons was not properly served on the respondent and the delivery has been effected. Therefore, the above judgment of the Hon'ble Apex Court relied upon by the respondent counsel is not applicable to the facts of the case.

16. He also relied upon the order of this Court in CRP.Nos.3196, 2584



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and 2585 of 2018, wherein, this Court has just recorded the submissions of the revision petitioner that the landlord has taken possession by executing proceedings and therefore, nothing survives for consideration. Recording the same, the petitions were dismissed as infructuous.

17. Besides, he also relied on the order of this Court in CRP.NPD.No.1152/2019, wherein, this Court has held that as the delivery has been effected, execution petition comes to an end. Therefore, the application filed by the revision petitioner for stay of proceedings in E.P.No.24 of 2018 in O.S.No.125/2010 is unnecessary as the prayer has become infructuous. It is relevant to note that in the above case, this Court has taken note of the fact that the petitioner has pleaded fraud and has held that the petitioner cannot get any relief in the Civil Revision Petition. Therefore, in that context, the Revision Petition was dismissed.

18. Whereas, in this case, by exparte order, delivering of possession itself passed against law, mandatory procedures of service of notice has not been served. The amin has not filed any affidavit nor was examined by the Court to declare that there is a proper service as mandated under Order V Rules 17, 18 and 19 of CPC read with Order XXI Rules 24 and 25 of CPC.



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Therefore, when the Court has not followed the mandatory procedure prescribed under CPC, the order passed by the Trial Court has to be set aside. Accordingly, the impugned order stands quashed.

19. It is the contention of the revision petitioner that still he is in possession of the properties, he has also produced various documents. Without going into the merits, if at all he is really vacated and the properties is in the possession of the auction purchaser namely the decree holders, the Trial Court shall re-deliver the property and pass order in EP on its own merits. Such exercise shall be completed within a period of six months from the date of receipt of a copy of this Order.

20. In view of the above, this Revision Petition stands allowed. No costs. Consequently, connected miscellaneous petition stands closed.

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Index : Yes/No
Internet : Yes/No



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To,

The Principal District Munsif Judge,
Principal District Munsif Judge, Bhavani
City Civil Court, Chennai

N.SATHISH KUMAR, J.,



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