BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved On : 28.02.2024

Delivered On : **21.05.2024**

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.M.S.A.(MD)Nos.40 and 41 of 2016
and
C.M.P.(MD)Nos.9719 and 9720 of 2016

K.Balu ... Appellant in both C.M.S.As

Vs.

1.All India Islamic Foundation,
No.688, Anna Salai,
Chennai, Rep. By its General Manager.

2.V.Alagan

3.Indian Overseas Bank,
Appanthiruppathi Branch,
Madurai North Taluk,
Rep. By its Branch Manager ... Respondents in both C.M.S.As

COMMON PRAYER : Civil Miscellaneous Appeals filed under Section 100 r/w. Order 42 Rule 1 of C.P.C., to set aside the order dated 23.06.2016 made in C.M.A.Nos.8 and 14 of 2014 on the file of the learned Principal District Judge, Madurai reversing the order dated 15.04.2014 made in E.A.No.176 of 2010 in E.A.No.754 of 2009 in E.P.No.55 of 2009 in Lok Adalat No.79 of 2008 in Pre

Litigation Case No.52 of 2008 on the file of the learned First Additional Sub Judge, Madurai.

For Appellant (in both C.M.S.As)	: Mr.Lakshmi Shankar, For Mr.G.Mohankumar
For 1st Respondent (in both C.M.S.As)	: Mr.S.Subbiah, Senior Counsel For Mr.G.Aravinthan
For Respondents 2 & 3 (in both C.M.S.As)	: No Appearance

COMMON JUDGMENT

The Civil Miscellaneous Second Appeals have been filed to set aside the judgment and decree passed in C.M.A.Nos.8 and 14 of 2014 dated 23.06.2016, on the file of the learned Principal District Judge, Madurai reversing the order dated 15.04.2014 made in E.A.No.176 of 2010 in E.A.No.754 of 2009 in E.P.No.55 of 2009 in Lok Adalat No.79 of 2008 in Pre Litigation Case No.52 of 2008 on the file of the learned First Additional Sub Judge, Madurai.

2.The purchaser of the property consisting an area of 6.09 acres in Survey No.11-1 of Manjambatti village, Madurai North Taluk in an open public auction for recovery of decree amount under Order XXI Rule 66 and Section 72 of the Code of Civil Procedure,1908, in an Execution Petition in E.P.No.55 of 2009 in Lokadalat No.79 of 2008 in a Pre-Mediation Case No.52 of 2008 on the file of the learned First Additional Subordinate Judge, Madurai filed by the

Indian Overseas Bank, Appantiruppathi, Madurai district, is the appellant before this Court.

3.The facts, which form the prelude to the filing of these Appeals is set out in the chronology of dates and events given herein below:-

Sl.No.	Dates	Events
1.	18.09.1987 (Ex.P1)	V.Alagan (2nd respondent) as a Kartha for himself for his minor son A.Selvam executed a mortgage in favour of Indian Overseas Bank, Appanthirupathi Branch (3rd respondent) for Rs.20,000/- property in S.No.11/1-6.09 acres.
2.	02.04.1992 (Ex.P2)	V.Alagan (2nd respondent) sold eastern 3.09 acres in S.No.11/1 to E.M.Gopalakrishnan Kone Dharma Trust for Rs.70,000/- out of which V.Alagan (2nd respondent) received Rs.45,000/- and directed the purchaser to redeem the mortgage dated 18.09.1987 by retaining Rs.25,000/-
3.	29.05.1992 (Ex.P3)	A.Alagammal & S.Alagammal executed a Power of Attorney in favour of V.Alagan (2nd respondent) in respect of 3 acres in western portion of S.No.11/1 which jointly belonged to the principal and Power of Attorney.
4.	29.09.1992 (Ex.P4)	V.Alagan (2nd respondent) based on his own right and Power of Attorney sold remaining western 3 acres in S.No.11/1 to E.M.Gopala Krishna kone Dharma Trust clearly admitting 02.04.1992 sale deed.
5.	13.12.2000 (Ex.P7)	Letter sent by IOB, Appanthirupathi Branch (3rd respondent) to V.Alagan (2nd respondent) intimating about OTS scheme (This letter sent to Alagan is produced by the respondent/claimant. This shows respondent and Alagan are together.)

6.	09.04.2001 (Ex.P6)	E.M.Gopalakrishna Kone Dharma Trust represented by its Trustee E.M.G.Soundarajan sold 6.09 acres in S.No.11/1 to All India Islamic foundation, Chennai(1st respondent). EMG trust till date not discharged. This sale is not done after obtaining Court permission under Section 92 of CPC or Section 34 of Indian Trust Act. Therefore Void.
7.	04.05.2001	All India Islamic Foundation, Chennai(1st respondent) claims to have paid Rs.40,000/- (as stated by IOB Bank which was offered as OTS V.Alagan) to IOB, Appanthirupathi Branch (3rd respondent) and fully discharged the mortgage. It is claimed that IOB (3rd respondent) also issued receipt for the same. All India Islamic Foundation is well aware of the mortgage and its obligation to discharge it.
8.	19.07.2001 (Ex.P13)	Letter sent by IOB (3rd respondent) to V.Alagan (2nd respondent) shows no payment is made till 19.07.2001 for the 5 loans and demanded to pay the amount (mentioned that on 03.05.2001 Rs.40,000/-)
9.	09.02.2008 (Ex.P14)	Lok Adalat Award was passed on terms that V.Alagan (2nd respondent) & IOB (3rd respondent) agreed to settle the amount payable for 5 loans at Rs. 79,766/- which has to be paid on or before 29.02.2008. In default Bank is entitled to claim full amount as per records.
10.	29.02.2008	Last date to pay the sum of Rs.79,766/- to FOB (3rd respondent) as per terms of Lok Adalat Award.
11.	12.03.2009	IOB (3rd respondent) filed E.P.No.55/2009 in Lok Adalat 179/2008 in premediation case 52/2008 before Ist Additional Sub Judge, Madurai under Order 21 Rule 11 CPC to bring 6.09 acres in S.No.1/11 for open public auction for recovery of decree amount under Order 21 Rule 66 and 72 CPC
12.	24.08.2009	Court in E.P. declared K.Balu (appellant) as Highest Bidder for Rs.10,00,100/- in open public auction.
13.	30.10.2009	Court ordered to issue sale certificate to K.Balu (appellant) by confirming the sale.

14.	26.11.2009	Sale certificate issued to K.Balu
15.	27.11.2009	E.A.754/2009 in E.P.55/2009 filed
16.	05.01.2010 (Ex.P17)	Court ordered to issue sale certificate to K.Balu (appellant) by confirming the sale.
17.	03.02.2010 (Ex.P16)	E.A.No.83/2010 in E.P.No.55/2009 filed by V.Alagan (2nd respondent) for withdrawal of remaining sum of Rs.7,91,618/-
18.	15.03.2010	IOB (3rd respondent) withdraw sum of Rs.1,78,449/- as per E.A.No.81/2010. V.Alagan (2nd respondent) withdraw sum of Rs. 7,91,618/- as per E.A.81/2010 Court ordered delivery of property in E.A.No. 754/2009 and V.Alagan (2nd respondent) & IOB (3rd respondent) made no objection and posted E.P for delivery on 29.03.2010
19.	19.03.2010	K.Balu (Appellant) openly claimed that he had purchased property in court auction.
20.	26.03.2010	E.A.No.176/2010 filed by All India Islamic Foundation, Chennai before Ist Additional Sub Judge, Madurai under Section 47 of CPC
21.	December 2010	Counter filed E.A.No.176/2010 K.Balu by (appellant) in 2013
22.	17.04.2013 (Ex.P21 & Ex.P22)	Judgment & Decree passed in A.S.No.32/2008 by District Court, Madurai.
23.	15.04.2014	Order passed E.P.No.176/2010 in in E.A.No. 754/2009 in E.P.No.55/2009 was allowed partly in respect of 3 acres in western side of S.No.11/1 and partly dismissed in respect of 3.09 acres in eastern side of S.No.11/1.
24.	30.06.2014	C.M.A.No.8814 of 2014 filed
25.	23.06.2016	Common order passed in C.M.A.8814 of 2014
26.	10.06.2013	In E.A.No.176 of 2011 V.Alagan (2nd respondent) issued notice to appear in person to give evidence. He did not enter appearance. So, E.A.No.303/2013 filed for his arrest.

27.	16.06.2014	Trial Court Suo Moto reopened E.P.No.8/2010 where V.Alagan (2nd respondent) permitted to withdraw Rs. 7,79,618/- and ordered to re-deposit the said amount within 15 days (nothing in record as to whether amount was re-deposited or not.

4.The first respondent in this C.M.S.A's filed the Obstruction Petition under Order XXI Rule 97 read with Rule 101 and Section 47 of the Code of Civil Procedure in E.A.No.176 of 2010 before the Executing Court. The second respondent Mr.V.Alagan is the judgment debtor/mortgager who approached the Lokadalat in Lokadalat No.79 of 2008 in Pre-Mediation Case No.52 of 2008 before the learned First Additional Subordinate Judge, at Madurai. The third respondent is the Bank namely Indian Overseas Bank, Appantiruppathi Branch, which filed the Execution Petition in E.P.No.55 of 2009 before the learned First Additional Subordinate Judge, at Madurai.

5.The case of the objection petitioner/third party in a nutshell is as follows:-

(i)The land measuring 6 acres and 9 cents in S.No.11/1 in Manjampatti Village, originally belonged to one V.Alagan, V.Alagammal W/o Veeralingam and S.Alagammal W/o, Sami Ambalam. In the said 6.09 acres, the 2nd respondent owned the eastern 3 acres and 9 cents. The said V.Alagammal and

S.Alagammal owned the remaining western side 3 acres. The 2nd respondent was entitled to the eastern 3 acres and 9 cents only out of 6.09 cents in S.No. 11/1. But he executed a mortage deed on 18.09.1987 in favour of the 3rd respondent Bank in respect of the entire 6.09 acres. As per the mortgage deed he mortgaged the entire 6.09 acres to 3rd respondent Bank for a loan of Rs. 20,000/- advanced by 3rd respondent Bank to the 2nd respondent. The 2nd respondent has sold his eastern 3 acres and 9 cents in S.No.11/1 to E.M.Gopalakrishna Kone Dharma Trust under a registered sale deed dated 02.04.1992 for Rs.70,000/-. Out of the sale consideration of Rs.70,000/-, the 2nd respondent has received from the said Trust for Rs.45,000/- and directed the purchaser to pay Rs.25,000/- to the 3rd respondent to discharge the mortgage debt due under the mortgage deed dated 18.09.1987. The aforesaid V.Alagammal and S.Alagammal have executed a registered power of attorney deed dated 29.05.1992 in favour of the 2nd respondent and thereby appointed the 2nd respondent as their power agent in respect of the remaining western 3 acres in S.No.11/1. Thereafter, the 2nd respondent as the Power Agent of V.Alagammal and S.Alagamml sold the western 3 acres to the said E.M. Gopalakrishna Kone Dharma Trust under a registered sale deed dated 29.09.1992. From the date of purchase, the said Dharma Trust was in actual possession and enjoyment of the property and the Patta was also transferred in the name of the Trust.

(ii)The said E.M. Gopalakrishna Kone Dharma Trust represented by its Trustee E.M.G.Soundararajan sold the said 6.09 acres in S.No.11/1 to the obstruction petitioner under a registered sale deed dated 09.04.2001. From the date of purchase, the obstruction petitioner is in possession and enjoyment of the property. After the purchase, the obstruction petitioner has approached the 3rd respondent Bank to discharge mortgage loan due under the mortgage deed dated 18.09.1987. At that time the Branch Manager of the 3rd respondent Bank has stated that the Bank has offered to the 2nd Respondent one time settlement and the Bank is ready and willing to receive Rs.40,000/- in full quit of the mortgage debt. Accordingly, the obstruction petitioner has paid Rs.40,000/- to the 3rd respondent Bank on 04.05.2001 to discharge the mortgage debt. The 3rd respondent has received the said Rs.40,000/- on 04.05.2001 towards closure of the loan due to the Bank and issued a receipt for the same. Thus it is clear that the mortgage loan due under the mortgage deed dated 18.09.1987 was fully discharged on 04.05.2001 and thereafter, the 3rd respondent Bank has no right to proceed against the property. The patta for the property was also transferred in the name of the obstruction petitioner. The obstruction petitioner is in actual possession and enjoyment of the said 6.09 acres by paying kist to Government.

(iii)The appellant has openly claimed on 19.03.2010 that he had purchased the property in a Court auction. Immediately the obstruction petitioner has verified the fact and come to understand and that the respondents 2 and 3 have fraudulently colluded together and created false documents as against the obstruction petitioner. It appears that the 3rd respondent has claimed some loan amount from 2nd respondent and to receive the same both the respondents 2 and 3 have fraudulently approached Lok Adalat secretly even without any prior notice to the obstruction petitioners and collusively obtained an order in the year 2009 from Lok Adalat. The 2nd respondent, V.Alagammal and S.Alagammal sold 6 acres and 9 cents to E.M.Gopalakrishna Kone Dharma Trust and the said Trust sold the properties to the obstruction petitioner on 09.04.2001. The obstruction petitioner has also paid the mortgage loan and discharged it on 04.05.2001. Inspite of these facts the respondents 2 and 3 along with the appellant have colluded together and with the common intention to defeat and defraud the obstruction petitioner and its properties, created false records. It appears that the 3rd respondent had filed an E.P.No.55 of 2009 and had brought the said 6.09 acres for sale and in the sale, the appellant had purchased it for a meagre amount. The alleged decree passed by the Lok Adalat is not binding the obstruction petitioner, as he is not a party to the proceedings.

The alleged sale in favour of the appellant is illegal and void and not binding upon the obstruction petitioner. The appellant has no right or title whatsoever in the said property. However, the appellant has filed a petition in E.A.No.754 of 2009 in E.P.No.55 of 2009 for delivery of the property and the Execution Court has passed an order on 15.03.2010 for delivery. The obstruction petitioner is in actual possession and enjoyment of the property as its owner and the appellant has no right to dispossess the obstruction petitioner. Taking advantage of the fraudulent sale, the appellant is taking steps to take possession of the property and to dispossess the obstruction petitioner. If the appellant is allowed to do so the obstruction petitioner, who is the real owner will be put to heavy and irreparable loss. Under these circumstances, the obstruction petitioner has filed a claim application for adjudication.

6.The learned First Additional Subordinate Judge, Madurai proceeded to conclude that, the first respondent/third party purchased the property knowing the subsistence of the mortgage debt related to the third respondent Indian Overseas Bank and since the property in Survey No.11/1 to the extent of eastern portion measuring 3 acres 9 cents alone belong to the second respondent Mr.V.Alagan, the action of the said Mr.V.Alagan by way of mortgaging the entire property in Survey No.11/1 measuring 6 acres 9 cents could not be justifiable and the third respondent Bank in accordance with Lokadalat award L.A.C.No.52 of 2008, ought to have brought the property to auction only to the extent of the property of Mr.V.Alagan alone, that is, eastern side portion measuring 3 acres 9 cents in Survey No.11/1. Since on the date of execution of mortgage deed in favor of the third respondent Bank, the said second respondent Mr.V.Alagan was not having a title over the western half Survey No.11/1 measuring 3 acres and so the said property ought not to have been brought to sale in Court auction and the same is liable to be set aside partially.

7.However, the learned Subordinate Judge held that the Lokadalat award in L.A.C.No.52 of 2008, could not be questioned as to its validity and the same is enforceable against the property of the second respondent Mr.V.Alagan alone, that is, Survey No.11/1 measuring 3 acres 9 cents in the eastern portion. Further the learned Subordinate Judge held that the auction of the third respondent Bank in bringing the property of the second respondent Mr.V.Alagan to the extent of the eastern portion of survey No.11/1 to the extent of 3 acres 9 cents in accordance with Lokadalat award in L.A.C.No.52 of 2008 is legally valid and there is no infirmity in it. The learned Subordinate Judge further held since the second respondent Mr.V.Alagan mortgaged the property in Survey No.11/1, western portion to the extent of 3 acres as well for which he never had a valid title, the learned Court further held that the obstruction petitioner/third party is not having better title over the entire petition scheduled property in Survey No.11/1 measuring 6 acres 9 cents. On that basis, the learned Subordinate Judge concluded that, though the obstruction petitioner/third party purchased the entire area of 6 acres 9 cents as per Ex.P6, the same is subjected to the subsistence of mortgage, and hence the obstruction petitioner/third party is entitled only to 3 acres that is, the property which is situated in the western portion of Survey No.11/1 pertaining to Ex.P4 sale deed and thereafter, the Obstruction Petition was partly allowed with respect to the western portion of survey No.11/1 with respect to an area of 3 acres alone. However, with respect to the eastern portion of 3 acres and 9 cents pertaining to Ex.P2 sale deed, the learned Court held that the same is entitled to the appellant/auction purchaser, thereby, the petition filed by the obstruction petitioner/third party with regard to survey No.11/1, was partly allowed only with regard to the extent of 3 acres in survey No.11/1 on the western side and the petition was partly dismissed with regard to the 3 acres and 9 cents on the eastern side of the survey No.11/1.

8.Challenging the same, the first respondent that is the obstruction petitioner filed C.M.P.No.8 of 2014 and the appellant filed another C.M.P.No. 14 of 2014 on the file of the learned District Judge, at Madurai. The learned District Judge, Madurai upholding the validity of Lokadalak Award in L.A.C.No.52 of 2008, proceeded to allow C.M.P.No.8 of 2014 filed by the first respondent/obstruction petitioner with cost and thereby, dismissing C.M.P.No. 14 of 2014 filed by the appellant herein without cost.

9.Challenging the common order passed by the learned District Judge, Madurai in C.M.P.Nos.8 of 2014 and 14 of 2014, these two Civil Miscellaneous Second Appeals came to be filed by the appellant.

10.**The crux of the appellant's case in nutshell is as follows:-**

The petition scheduled property comprising an area of 6.09 acres in Resurvey No.11/1 of Manjambatti Village, Madurai North Taluk exclusively belonged to the second respondent. The second respondent availed loan from the third respondent Bank and executed a registered mortgage in favor of the Bank for the entire extent of 6.09 acres on 18.09.1987 under Ex.P1 mortgage deed dated 06.10.2016. The 2nd respondent has not repaid the loan and hence the-bank had issued notices for settlement of dues. On receipt of notice from the bank, the 2nd respondent has approached the Lok Adalat by way of Pre-litigation case under L.A.C.No.52 of 2008 and a settlement was arrived at in Lok Adalat No.79 of 2008 for payment of a sum of Rs.79,766/- and an award was passed to that effect on 09.02.2008. The award of Lok Adalat being equivalent to Civil Court decree, the 3rd respondent bank initiated execution proceedings in E.P.No.55 of 2009 to bring the properties for public auction. The appellant is the highest bidder in the court auction sale and he has deposited the entire sale consideration and a sale certificate was also issued. The appellant thereafter filed E.A.No.754 of 2009 to take delivery of the suit properties and the delivery was also ordered on 15.03.2010.

11.It was only after the order of delivery, the 1st respondent filed E.A.No. 176 of 2010 claiming title over the suit properties and prayed for adjudication of their alleged rights over the suit property. The 2nd respondent alone is the exclusive and absolute owner of the entire 6.09 acres and hence, he has mortgaged the same with the 3rd respondent bank in the year 1987 itself. After mortgaging the entire extent of 6.09 acres to the bank in the year 1987, the 2nd respondent created Ex.P3 power deed as if an extent of 3 acres belonged to his alleged co-sharers namely V.Alagammal and S.Alagammal. This power deed was created only to cheat the bank and there is no evidence to show that the said V.Alagammal and S.Alagammal are the co-sharers of the suit property and they are entitled to 3 acres out of 6.09 acres. The 2nd respondent thereafter, created a sale deed in favour of one E.M.Gopalakrishnan Kone Dharma Trust under Ex.P4 on 29.09.1992 under which he alienated 3.09 acres. The said sale deed clearly indicates about the existence of the mortgage with the bank and directs the purchaser to pay the mortgage money and redeem the mortgage. However, the EMG Trust has not repaid the mortgage loan and redeemed the mortgage.

12.The alleged sale deed said to have been executed by V.Alagammal and S.Alagammal through their power agent namely the 2nd respondent in favour of E.M.Gopalakrishnan Kone Dharma Trust is only to cheat the bank and has been executed in order to screen a portion of the mortgaged property from the bank proceedings. E.M.Gopalakrishnan Kone Dharma that E.M.G. Trust is a charitable endowment under the HR & CE Act and hence, the said Trust cannot alienate any property without obtaining prior permission of the Commissioner under the HR& CE Act, under Section 34 of the said Act. The said E.M.Gopalakrishnan Kone Dharma Trust has admittedly not obtained any permission under Section 34 of the HR & CE Act and hence, the sale deed in favour of the 1st respondent under Ex.P6 is void and it will not confer any title in favour of the 1st respondent. Without considering the invalidity of the sale deed in favour of the 1st respondent, the lower Courts proceeded to declare the title of the 1st respondent without properly considering the effect of Section 34 of the HR & CE Act. The Courts below erred in holding that the said V.Alagammal and S.Alagammal are the co-owners of the 2nd respondent and they are entitled to 3 acres without any document or oral evidence let in by the 1st respondent in this regard.

13.The Courts below erred in holding that the said V.Alagammal and S.Alagammal are the co-owners of the property ignoring the registered mortgage deed under Ex.P1 executed by the 2nd respondent. The First Appellate Court erred in holding that the award of the Lok Adalat is only a money decree and it is not a mortgage decree without properly appreciating the award passed by the Lok Adalat. The First Appellate Court failed to see that the award passed by the Lok Adalat clearly indicate that in case of non payment, the bank shall proceed to recover the full amount as per the bank records related to the borrower. Hence, the award passed by the Lok Adalat is only a mortgage deed and not a mere money decree as found by the first appellate court.

14.The questions which arises for consideration in the facts and circumstances of these Appeals are as follows:-

> "*(I)Whether the Courts below were right in holding that the sale deed in favour of the 1st respondent herein under Ex.P6 is valid in the eye of law in view of Section 34 of the HR & CE Act ?*
>
> *(II)Whether the Courts below were right in holding that the 1st respondent herein is the owner of the suit property when the sale deed in favour of the 1st respondent is void abinitio?*
>
> *(III)Whether the First Appellate Court was right in holding that the award of the Lok Adalat is only a money decree and not a money decree based on mortgage ?*
>
> *(IV)Whether the Courts below were right in holding that one V.Alagammal and S.Alagammal are co-owners of the property contrary to Ex.P1 registered mortgage deed executed by the first respondent in favour of the bank ?"*

Submissions:-

15.The learned counsel appearing for the appellant submitted that,

(i)In the obstruction petition, the pleadings were only with respect to the right and title of the 1st respondent, who is only a subsequent purchaser from the original mortgagor and two others. The relief is to determine and adjudicate the 1st respondent's right and title. In the application, it has been categorically pleaded that the Lok Adalat decree is not binding as the 1st respondent is not a party. Apart from that the pleadings are to that effect, the mortgagor and the bank had colluded together and obtained Lok Adalat, award is also raised. Then the said petition has been filed under Order XXI Rule 97 Rule 101 and Section 47 of CPC. The scope, effect and nature of the proceedings under Order XXI Rule 97 of CPC is completely different from the scope nature and effect of the proceedings under Section 47 of CPC.

(ii)The obstruction petition claiming independent right and claiming that decree cannot be executed against the applicant who is a 3rd party, on the ground that the said decree does not bind him, is one under Order XXI Rule 97 of CPC. It has to be tried like a suit. As per Order XXI Rule 103 CPC, the order is treated as decree and an appeal is only maintainable. In this case clearly, the application is made under Order 21 Rule 97 CPC. The 1st respondent's counsel before the Executing Court has made it very clear, by arguing that this application is to decide the title, ownership over the property and it has to be tried like a suit. The same is recorded in page No.8 of the order dated 15.04.2014 in E.A.No.176 of 2010.

(iii)Therefore, the mere mention of Section 47 CPC in the petition, which is only a misquoting of wrong provision of law, ought to have been considered by the Courts below. No appeal lies against order under Section 47 of CPC. Only a revision lies. Therefore a 3rd party claimant/Obstructor praying to decide its rights/ownership over the property cannot maintain application under Section 47 of CPC along with Order 21 Rule 97 CPC as they operate under factual situations producing different legal consequences. In any case, right or title to the property cannot be decided under Section 47 of CPC. The allegation of fraud and collusion either in respect of decree or the E.P. is also outside the scope of Section 47 of CPC.

(iv)The application in E.A.No.176 of 2010 has only been filed under Order XXI Rule 97 and 101 CPC. But the applicant/1st respondent is a purchaser from the purchaser of the original mortgagor. The original mortgagor is the judgment debtor. So the 1st respondent who is claiming under the Judgment debtor, cannot legally maintain an application under Order XXI Rule 97 of CPC as laid down in the case reported in ***2012 (5) LW 640,*** following the judgment of the Apex Court. Hence, the obstruction petition is legally incompetent and not maintainable. In fact the First Appellate Court having categorically come to the conclusion that a person who is claiming right under the judgment debtor cannot be dignified with the title of an obstructor within Order XXI Rule 97 of CPC, ought to have dismissed the appeal filed by the

Obstructor/1st respondent and allowed the appeal filed the appellant/auction purchaser and thereby, dismiss E.A.No.176 of 2010. But the First Appellate Court proceeded further by referring to Section 47 of CPC mentioned in the petition which is factually and legally untenable.

(v)Thus the First Appellate Court committed fundamental error of jurisdiction. In an appeal from an obstruction petition regarding the question of title, the questions relating to discharge or adjustment of decree cannot be considered, was completely overlooked by the First Appellate Court and pressed for allowing the Appeal.

16.Per contra the learned Senior Counsel appearing for the first respondent/obstruction petitioner submitted that, the outstanding loan amount of Rs.40,000/- was fully discharged and a receipt dated 04.05.2001 has been issued in favour of the second respondent by the third respondent Bank and the same has been marked as Ex.P8. The Manager of the third respondent Bank deposed his evidence as P.W.3 and in his cross examination, he admitted that Ex.P7 letter sent by Indian Overseas Bank to Mr.V.Alagan and Ex.P12 the petition filed by Mr.V.Alagan to Lokadalat for pre-litigation on the file of the District Legal Services Authority, Madurai are the documents of the Bank. The learned counsel further submitted that the Bank had offered a one-time settlement of a total amount of Rs.89,870/-, pointing out Ex.X3, the Indian Overseas Bank account statement marked in E.A.No.176 of 2010 in the pre-litigation case on the file of the District Legal Services Authority, Madurai and the learned Senior Counsel pointed out that there is an entry with respect to the payment of Rs.40,000/- twice in the said statement of account.

17.Further, the learned Senior Counsel insisted that the third respondent Bank being a Nationalised Bank suppressed this payment in evidence and the same amounts to fraud. Referring to the points of settlements of the Lokadalat marked as Ex.P14 (the award passed by Lokadalat), the learned Senior Counsel categorically contended that the same cannot be taken as a decree at all. He further insisted that the award passed by the Lokadalat on 09.02.2008 in a pre-litigation matter on the basis of the terms of settlement signed between the parties namely Mr.V.Azhagan, Manager of Indian Overseas Bank, Appanthiruppathi Branch cannot be considered as a decree in terms of Section 2 (2) of the Code of Civil Procedure. That apart if it is not a decree, the same cannot be executed by a Court. Categorically contending that the Lokadalat award dated 09.02.2008 do not satisfy the mandatory requirement under Section 2 (2) of the Code of Civil Procedure, obviously the same cannot be executed by an execution Court.

18.The learned Senior Counsel further submitted that, Order XXXIV, Rule 1 contemplates that all the persons having an interest either in the mortgage security or in the right of redemption shall be joined as party to any suit relating to a mortgage. However, in the instant case, all the parties having interest in the mortgage security was never impleaded as parties. He further submitted that the Execution Petition has been filed with respect to a property which do not belong to the judgment debtor.

19.The learned Senior Counsel further drew the attention of this Court to the cross examination of the appellant dated 25.11.2013 in E.A.No.176 of 2010, wherein he had fairly admitted that he had taken auction of the petition schedule property without properly enquiring as to the Ex.P1 sale deed by which the second respondent had alienated the total area of 6 acres 9 cents to one E.M.Gopalakrishnan Kone Dharma Trust. The learned Senior Counsel further pointed out that the auction purchaser at the time of his cross-examination dated 05.12.2013, further admitted that at the time of purchasing the said property in auction, he had the knowledge as to the fact that the same was already sold by the said Mr.V.Alagan to E.M.Gopalakrishnan Kone

Dharma Trust from the encumbrance certificate marked as Ex.R1.

20.The learned Senior Counsel also drew my attention to the admission of the appellant dated 05.12.2013, in his cross-examination that he had filed an application for delivery only after knowing the fact that the same has already been alienated to E.M.Gopalakrishnan Kone Dharma Trust. He further submitted that the admissions of the appellant in his cross-examination itself will be a conclusive proof to the fact that he had wantonly absolved from impleading the first respondent Trust in the Application filed by him in E.A.No. 754 of 2009. Further, the learned Senior Counsel relying upon Section 21 of the Legal Services Authorities Act, 1987, the award dated 09.08.2008 do not satisfy the mandates of an award as contemplated in the aforesaid Section. Further, the learned Senior Counsel categorically submitted that the evidence of the auction purchaser that is the appellant itself would prove that he had not acted in a very prudent manner by verifying all the particulars of encumbrances from the available records and hence, he is not a bona fide purchaser.

21.Further, the learned Senior Counsel relying upon the case of ***Gas Point Petroleum India Limited versus Rajendra Marothi and others*** reported in ***2023 6 SCC ,*** in which the Hon'ble Supreme Court has categorically held that at the time when a property was put to auction, if the judgment debtor was not the owner, then the same could not have been put to auction. The learned Senior Counsel insisted that even in the instant case, the property auctioned was put to auction at a time when the judgment debtor, namely the second respondent, Mr.V.Alagan had no title over the same. On that basis, the learned Senior Counsel pressed for dismissal of the Appeals.

Analysis:-

22.The obstruction petition was filed by the first respondent in E.A.No. 176 of 2010, in E.A.No.754 of 2009, in E.P.No.55 of 2009, in Lokadalat No.79 of 2008, in Pre-litigation Case No.52 of 2008, on the file of the District Legal Services Authority at Madurai, under Order XXI Rule 97 read with Rule 101 and Section 47 of the Code of Civil Procedure, 1908. Order XXI Rule 97 of the Code of Civil Procedure is extracted hereunder, for the sake of convenience:-

> *"97. Resistance or obstruction to possession of immovable property.—*
>
> *(1) Where the holder of a decree for the possession of immovable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction.*
>
> *[(2) Where any application is made under sub-rule (1), the*

Court shall proceed to adjudicate upon the application in accordance with the provisions herein contained.]"

23.Order XXI Rule 101 is further extracted hereunder:-

"101. Question to be determined.—All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceeding on an application under rule 97 or rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in force, be deemed to have jurisdiction to decide such questions."

24.Section 47 of the Code of Civil Procedure, 1908 is also extracted hereunder:-

"47. Questions to be determined by the Court executing decree.—

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit. 4 * * * **

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the

purposes of this section, be determined by the Court.

[Explanation I.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]"

25.Obviously, the said petition itself would reveal that the obstruction petitioner is a third party. Under Order XXI Rule 97, a petition can be filed either by the decree holder or by the purchaser of the property or by an auction purchaser. The language of the Provisions makes it clear that it is only the decree holder or the auction purchaser could make an application under the said provision. In the judgment of this Court reported in ***CDJ 2013 MHC 3690,*** in the case of ***Donna Rossi Kitchen Line versus D.Hari Krishnan and another***, this Court had held that the person who is resisting delivery of possession cannot maintain an application under Order XXI Rule 97 of the Code of Civil Procedure, 1908. This observation has been taken in the light of the judgment of the Hon'ble Supreme Court reported in ***1998 4 SCC 543*** in the case of

Srinath versus Rajesh. The case on hand squarely falls within the prohibition contained under the Provisions of Order XXI Rule 97 of the Code of Civil Procedure,1908. Therefore, the application filed by the third party under Order XXI Rule 97 is not at all maintainable.

26.However, both the lower Courts have lost sight on this legal aspect and it is significant to mention here that the learned First Additional Subordinate Judge, at Madurai has passed an order as if the Petition has been filed by the petitioner only under Section 47 of the Code of Civil Procedure to determine the petitioner's absolute title, possession and enjoyment over the petition scheduled property by allowing the aforesaid petition. Interestingly, Section 47 of the Code of Civil Procedure, 1908, mandates that only all those questions arising between the parties to the suit in which the decree was passed, or their representatives and relating to the execution, discharge or satisfaction of the decree, shall be determined by the executing Court. Therefore, a third party claimant/obstructor trying to decide his rights/ownership over the property cannot obviously maintain an Application under Section 47 of the Code of Civil Procedure, 1908. By all means, the right or title to the petition scheduled property cannot be decided under Section 47 of the Code of Civil Procedure, 1908. Thus, both the lower Courts erred by adjudicating that the

Obstruction Petition filed by the first respondent under Order XXI Rule 97 read with Rule 101 and Section 47 of the Code of Civil Procedure without going into the maintainability of the same.

27.The learned Senior Counsel appearing for the first respondent categorically contended that, the Lokadalat award did not satisfy the ingredients of Section 2 (2) of the Code of Civil Procedure and therefore, it is not at all a decree and the same is not capable of execution. For better clarity, Section 2 (2) of the Code of Civil Procedure is extracted as follows:-

> *“'decree' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within Section 144, but shall not include-*
>
> *(a)any adjudication from which an appeal lies as an appeal from an order, or*
>
> *(b)any order of dismissal for default.”*

28.Having considered the aforesaid submission of the learned Senior Counsel that the Lokadalat award does not satisfy the ingredients of Section 2 (2) of the Code of Civil Procedure, I carefully perused the Lokadalat award dated 09.02.2008, and found that both the parties have duly signed on the terms of settlement on the award with no allegation of duress or fraud. Thus, it is evident that a settlement/compromise has been arrived at amicably between the parties as envisaged in Section 21 of the Legal Services Authority Act, 1987. Section 21 of the Legal Services Authority Act, 1987 provides that:-

> *"Award of Lok Adalat*
>
> *(1) Every award of the Lok Adalat shall be deemed to be a decree of a civil court or, as the case may be, an order of any other court and where a compromise or settlement has been arrived at, by a Lok Adalat in a case referred to it under sub-section (1) of section 20, the court-fee paid in such case shall be refunded in the manner provided under the Court-fees Act, 1870 (7 of 1870).]*
>
> *(2) Every award made by a Lok Adalat shall be final and binding on all the parties to the dispute, and no appeal shall lie to any court against the award."*

29.In appreciating the above provision of Law, this Court is of the considered opinion that in the instant case, the parties have clearly come to an amicable settlement and the award dated 09.02.2008 is deemed a decree of a Civil Court which, if not duly executed, by any of the parties can be filed in the Court concerned with a request to execute it. However, if any of the parties is aggrieved by the award of Lokadalat for genuine reasons, the remedy available would be by filing a petition under Article 226 or Article 227 of the

Constitution as held by the Hon'ble Supreme Court in the case of ***State of Punjab and another versus Jalour Singh*** where it has been mentioned that, "*It is true that where an award is made by Lokadalat in terms of a settlement arrived at between the parties, (which is duly signed by parties and annexed to the award of the Lokadalat), it becomes final and binding on the parties to the settlement and becomes executable as if it is a decree of a civil Court, and no appeal lies against it to any Court. If any party wants to challenge such an award based on settlement, it can be done only by filing a Petition under Article 226 or Article 227 of the Constitution, that too on very limited grounds*". Both the lower Courts, that is, the learned first Additional Subordinate Judge, at Madurai and the learned District Judge, Madurai have concurrently upheld the validity of the award in the instant case. In view of the fact that a Lokadalat award is a deemed decree, the contention of the learned Senior Counsel that the said award did not satisfy the ingredients of Section 2 (2) of Code of Civil Procedure is not sustainable.

30.The learned District Judge, Madurai, having relied upon the case in ***A.R.Shankaran v. T.Mohamed, Arif Akhtar and others***, reported in ***2012 (5) Law Weekly 640***, wherein it is states that "*C.P.C., Order XXI Rule 97. Revision petition happened. A person who is claiming right under the judgment debtor,* *cannot be dignified with the title of an obstructor within Order XXI Rule 97.*” and concluded that the petition filed by the obstruction petitioner under Order XXI Rule 97 is not maintainable. However, the learned District Judge, Madurai, proceeded to adjudicate the said Petition, since the same has also invoked Section 47 of the Code of Civil Procedure, 1908.

31.I reiterate that both the learned First Additional Subordinate Judge, at Madurai and the learned District Judge, at Madurai have lost sight over the fact that under Section 47 of the Code of Civil Procedure, 1908, only the questions arising between the parties to the suit in which the decree was passed could be determined by the Court and the question which has been arisen by a third party cannot be adjudicated by the Court. It is ridiculous that the learned First Appellate Court having reached to a conclusion about the validity of the Lokadalat Award and its executability and non-maintainability by means of a petition by the obstructor, further proceeded to conclude that the Lokadalat Award is only a money decree and not a mortgage decree and there can be no direction to recover money from the mortgaged property. Having concluded that the Lokadalat Award is a valid decree, the First Appellate Court ought not to have travelled beyond the decree by concluding that the mortgage created by the second respondent i.e., Mr.V.Alagan is invalid and he is not the owner of the entire extent of 6 acres and 9 cents and that the entire mortgage property ought not to have been brought for sale.

32.It is pertinent to mention here that the Lokadalat Award is very clear to the effect that in case of failure by the second respondent to pay the amount, "*the respondent bank is entitled to recover the full amount as per bank records related to the second respondent*". Precisely, the Lokadalat proceedings were based on a mortgage loan. As per the bank records, there is a mortgage created over the property. Hence, the award cannot be said to be a simple money decree. Such a case is also not pleaded in E.A.No.176 of 2010 and on the other hand, the first respondent had categorically admitted the mortgage and has come forward with a case that after its purchase, the mortgage loan was fully discharged on 04.05.2021 and therefore, the bank should not have proceeded against the property.

33.The learned Senior Counsel appearing for the first respondent also categorically submitted that the receipt issued by the Indian Overseas Bank in the name of Mr.V.Alagan for Rs.40,000/-, which has been marked as Ex.P8 would itself prove the fact that the mortgage loan was fully discharged. However, both the lower Courts have categorically weighing the veracity of the evidence deposed by either parties have held that the genuinity of Ex.P8 receipt will not stand the scrutiny of law and the same is absolutely false. That apart, the First Appellate Court has clearly found in page Nos.44 and 45 of its order that the case of discharge of mortgage loan pleaded by the first respondent is completely false. Hence, the First Appellate Court's conclusions that the mortgage is invalid and the mortgage property should not have been brought for sale is self-contradictory and the same is not legally sustainable.

34.It is pertinent to mention here that the second respondent mortgaged the entire property on 18.09.1987 asserting title in himself. Thereafter, on 02.04.1992, he sold the eastern 3 acres 9 cents to the first respondent's predecessor clearly mentioning the mortgage and directing him to be discharged by the purchaser Trust, which retained a portion of the sale consideration of Rs.25,000/- for that purpose. Thereafter, the second respondent got the power of attorney from one B.Alagamal and S.Alagamal as if they also have some right in western 3 acres along with him and subsequently, sold it on 29.09.1992 to the very same Trust, which purchased the eastern portion on 02.04.1992. Therefore, E.M.Gopalakrishnan Kone Dharma Trust is well aware of 18.09.1987 registered mortgage deed created over the entire property. Even subsequent purchaser is also deemed to have constructive notice as per Section 3 of Transfer of Property Act. Therefore, the first respondent, which purchased the property on 09.04.2001 is equally bound by the said mortgage. That is why even in the obstruction petition in E.A.No. 176 of 2010, the first respondent has admitted the mortgage and the liability to discharge the mortgage. Under such facts and circumstances of this case, the Courts below misconstrued and misread the recitals in Exs.B2 and B3 concluding that the entire western 3 acres belonged to V.Alagamal and S.Alagamal. Therefore, the executing Courts order invalidating the auction sale with respect to western 3 acre is factually and legally incorrect. In fact, such a conclusion has been arrived at by the lower Courts negating the legal principle underlying section 65(a) of the Transfer of Property Act. Section 65 of the Transfer of Property Act, 1882 deals with implied contracts by mortgager and the same is extracted as follows:-

> *"In the absence of a contract to the contrary, the mortgager shall be deemed to contract with the mortgagee-*
>
> *(a) that the interest which the mortgager professes to transfer to the mortgagee subsists, and that the mortgager has power to transfer the same:*
>
> *(b) that the mortgager will defend or if the mortgagee be in possession of the mortgaged property, enable him to defend, the mortgager's title thereto."*

35.Thus, Section 65(a) of the Transfer of Property Act creates a warrant of title by the mortgager in favour of the mortgagee and expressly provides that the benefit of such warranty would be annexed and go with the interest of the mortgagee, that is, the purchaser in a Court auction under a mortgage decree being entitled also to the mortgagee's right would be entitled to have the benefit of the **covenant**. In the instant case, even assuming that the second respondent who was not the real owner of the western 3 acres of the petition scheduled property, but has mortgaged the same, in due course of time B.Alagamal and S.Alagamal executed a power of attorney in favour of the second respondent facilitating him to manage the petition scheduled properties. Thus, it could be fairly concluded that the aforesaid B.Alagamal and S.Alagamal by their conduct had represented that Mr.V.Alagan had the right to mortgage. Therefore, neither the said Mr.V.Alagan nor his representative in estate could be allowed to deny the truth of such a representation which had been acted upon by the mortgagee.

36.The Calcutta High Court has dealt with a similar matter in the case of ***Saroda Prosad Banerjee versus Gosta Behari*** reported in ***AIR 1922 Calcutta 542***. That was a case of two co-sharers in a Dayabaga family consisting of three, creating a mortgage representing to the mortgagee that they were entitled to deal with the whole interest of the property although the third co-sharer did not join in the mortgage. The interest of the third co-sharer subsequently vested in one of the other co-sharers. The question arose whether the interest of the third co-sharer, which subsequently devolved upon one of the surviving mortgages would enure for the benefit of the Court auction purchaser under the mortgage decree. The learned Judges held that the mortgager who subsequently obtained the property was bound by estoppel created by the statement made by him in the mortgage deed. Even in the instant case, the mortgager namely Mr.V.Alagan, that is, the second respondent subsequently obtained the property by means of a power of attorney executed in his favour by B.Alagamal and S.Alagamal and hence, he is bound by estoppel created by the statement made by him in the mortgage deed that he has the title over the entire 6 acres and 9 cents in the petition scheduled property. Therefore, the first respondent who is claiming under the mortgager, is also equally estopped. Therefore, the first respondent cannot obviously question the legality of mortgage and hence, the lower Courts ought not to have arrived at such a decision holding that the mortgage is invalid.

37.Before concluding, it is also necessary to analyze the legality of the sale effected by the E.M.Gopalakrishnan Kone Dharma Trust in favour of the first respondent. The E.M.Gopalakrishnan Kone Dharma Trust which is the purchaser from V.Alagan and others is a religious and charitable trust. Hence, it cannot alienate the property in favour of the first respondent obstructor without getting proper permission under the relevant provisions namely either Section 34 of the Hindu Religious and Charitable Endowments Act or Section 92 of the Code of Civil Procedure, 1908. Therefore, the very alienation of the petition scheduled property effected by E.M.Gopalakrishnan Kone Dharma Trust in favour of the first respondent trust is void *ab initio*. Even in that ground, the first respondent do not have a *prima facie* case to file the Obstruction Application.

38.In view of the same, the Civil Miscellaneous Second Appeals stands allowed. Consequently, the decreetal order in C.M.A.Nos.8 of 2014 and 14 of 2014 dated 23.06.2016 are hereby set aside. Consequently, the part of order in E.A.No.176 of 2010 dated 15.04.2014 on the file of the learned First Additional Sub Judge, Madurai, which was partly allowed with regard to the extent of 3 acres in Survey No.11/1 on the western side is set aside. Consequently, connected civil miscellaneous petitions are closed. There shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

21.05.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
Mrn

To

1.The I Additional Sub Judge, Madurai.

2.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.

L.VICTORIA GOWRI, J.

Mrn

C.M.S.A.(MD)Nos.40 and 41 of 2016

21.05.2024