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**(2010) 06 MAD CK 0107**

**Madras High Court**

**Case No:** C.R.P. (NPD) No. 3773 of 1999

Karunanidhi Mudaliar

APPELLANT

Vs

Lakshmanan and Others

RESPONDENT

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**Date of Decision:** June 29, 2010

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 47

**Citation:** (2010) 4 LW 164

**Hon'ble Judges:** G. Rajasuria, J

**Bench:** Single Bench

**Advocate:** V. Raghavachari, for the Appellant; B.R. Balasubramanian, for R1 and R2; S. Subbiah, for R3 and Chitra Sampath, for R5 to R8, for the Respondent

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### **Judgement**

@JUDGMENTTAG-ORDER

G. Rajasuria, J.

Inveighing the order dated 30.07.1999, passed in CMA No. 8 of 1998 by the learned Subordinate Judge, Villupuram,

confirming the judgment and decree dated 23.07.1997, passed in unnumbered E.A. of 1990 in E.P. No. 1012 of 1985 in O.S. No. 657 of 1973

by the Principal District Munsif, Villupuram, this civil revision petition is focussed.

2. Heard both sides.

3. A summation and summarisation of the relevant facts absolutely necessary and germane for the disposal of this revision petition would run thus:

The decree holder/Kuppulakshmiammal in this case by way of recovering the money due under the decree, filed E.P. No. 1012 of 1985, so as to

bring three lots of properties belonging to the judgment debtor for sale and accordingly, the first lot was sold in the public auction and one

Venugopal was the successful bidder. Thereafter, an unnumbered E.A. was filed under Order 21 Rule 90 CPC for getting the sale aside. At that

stage, the learned Munsif, Villupuram by virtue of his order dated 18.09.1990 called upon the judgment debtor to furnish security. However, till

18.10.1990 no security was furnished. Whereupon, the learned District Munsif dismissed that unnumbered application and also confirmed the sale

of the first lot of property in favour of the said successful bidder. Being aggrieved by the said order, revision was filed before this Court in CRP

No. 247 of 1991. The learned single Judge of this Court referring to the Division Bench judgment of this Court reported in Ramaswamy Gounder

Vs. T.S. Ramaswamy Gounder and Another, remanded the matter back to the Executing Court. Whereupon, the Executing Court by virtue of its

order dated 23.07.1997, dismissed the unnumbered application on the main ground that as mandated by the High Court in the said order, no

application was filed by the judgment debtor to get dispensed with the security to be furnished by him. Being aggrieved by the same, CMA was

filed before the lower appellate Court and it was dismissed.

4. Being aggrieved by and dissatisfied with the order of both the Courts below, this revision has been filed on various grounds, the quintessence of

the same would run thus:

The orders of both the Courts below are contrary to law as no security at all is contemplated for filing an application u/s 47 of CPC. The legal

rights of the parties have not been considered. Fraud has been played upon the Court in selling the property of the judgment debtor. The learned

Judge ought to have numbered the application. Without holding an enquiry the lower Court passed order which is illegal and unsound. The delivery

was effected beyond the period of limitation. As such, the orders passed by both the Courts below have to be set aside.

5. Placing reliance on the grounds of revision, the learned Counsel for the revision petitioner herein would put forth his arguments, which could

succinctly and pithily be set out thus:

(1) The Executing Court was not justified in simply dismissing the unnumbered application without adhering to the procedure contemplated under

Order 21 Rule 90 of CPC and more specifically the proviso added by virtue of the Madras High Court Amendment.

(2) The order of this Court dated 13.12.1995 had been misunderstood by the lower Court and expected that an application should have been filed

for dispensing with the security, even though law does not contemplate the same.

(3) The learned single Judge of this Court in the operative portion of the order directed the Executing Court to adhere to the procedure

contemplated under law. The procedure as such contemplated under law is that the Executing Court before numbering the application under Order

21 Rule 90 of CPC should give notice to the judgment debtor either to furnish security to the satisfaction of the Court for an amount equal to that

mentioned in the sale warrant or to that realised by the sale, whichever is less or to deposit such amount in Court. The lower Court instead of

resorting to such a procedure, simply and summarily dismissed the unnumbered E.A. on the ground that no application was filed to dispense with

the security being furnished. Accordingly, he prays for setting aside the order of the lower Court and to direct the lower Court to follow the

aforesaid procedure strictly in accordance with law.

6. Whereas, the learned Counsel for the respondents by way of torpedoing and pulverising the arguments as put forth on the side of the revision

petitioner would develop her argument, the quintessence of the same would run thus:

The judgment debtor cannot try to interpret the judgment dated 13.12.1995 of this Court in his own way so as to suit his convenience.

Unambiguously and unequivocally, the learned single Judge of this Court by virtue of the said order after setting aside the order dated 18.10.1990

of the lower Court directed it to dispose of the matter. In such a case, the judgment debtor cannot expect that the lower Court itself should have

given notice to him calling upon him to furnish security etc., so as to enable him to furnish his explanation to the contrary. The order dated

18.09.1990 passed by the Executing Court was not set aside by this Court as per the earlier order dated 13.12.1995. The judgment debtor after

the dismissal of the unnumbered E.A., on 23.07.1997 did choose to file spate of applications one for dispensing with the security and another for

rehearing and yet another application for stopping the delivery etc. In those affidavits also the judgment debtor understood the earlier order of this

Court in true spirit and never raised pleas now raised by the learned Counsel for the revision petitioner/judgment debtor in his argument. The

decree holder died even during the pendency of the earlier CRP and thereafter, no steps have been taken by the judgment debtor to implead the

legal heirs of the decree holder in any of the proceedings which emerged subsequently. The third party purchaser obtained the sale certificate and

also took delivery of the property in the meanwhile. The judgment debtor is guilty of laches and he was a silent spectator in watching the

proceedings. He participated in the proceedings by fits and starts and put others in quandary and thereby creating confusion and keeping alive the

litigation just to compel the other side to come to a compromise table. According to the learned Counsel for the respondents, absolutely there is no

irregularity or illegality in the order passed by both the Courts below and therefore, this revision has to be dismissed.

7. The point for consideration is as to whether the order of the Executing Court, which was confirmed by the lower appellate Court, suffers from

illegality or impropriety in view of the grounds as found set out in the revision petitioner? and whether the Executing Court has not followed the

procedure after the matter was remitted back to it by this Court vide the order dated 13.12.1995?

8. The whole kit and caboodle of the facts and figures as found evinced and evidenced from the typed set of papers and the arguments on both

sides would be that the unnumbered application has been litigated ever since 1990 and that too on a short point as to whether security has to be

furnished by the judgment debtor or not. The Division Bench of this Court in Ramaswamy Gounder v. T.S. Ramaswamy Gounder and Anr. (cited

supra) set the law at rest, an excerpt from the said judgment would run thus:

8. Therefore, now we shall examine whether the proviso is in any way inconsistent with Rule 90, Order XXI Code of Civil Procedure. It may be

pointed out here that the proviso does not in any way alter the conditions laid down in sub-rules (1) (2) and (3) and the explanation thereto of Rule

90, Order XXI, Code of Civil Procedure, as substituted by Amending Act 104 of 1976. The proviso only provides that the Court may after notice

to the applicant seeking to set aside the sale, call upon him before admitting the application either to furnish security to the satisfaction of the Court

for an amount equal to that mentioned in the sale warrant or to that realised by the sale whichever is less or to deposit such amount in Court. This

proviso only enables the Court at the initial stage after hearing the applicant to find out whether there is a prima facie case for setting aside the sale

or not and if that be so whether in the facts and circumstances, there is a case for directing any security. The proviso does not lay down that in

every case it is incumbent upon the court to insist upon furnishing of security to the satisfaction of the Court or depositing of the amount as stated

therein nor does it make it as a condition precedent for filing and for setting aside the sale that security should be furnished. The proviso contains a

very statutory Rule. It is intended to prevent frivolous applications to delay the execution. It is well known that the real troubles of the decree-

holders commences only after he obtains the decree and puts into execution. It is also well known that the execution proceedings are the paradise

for the Members of the Bar. It is also well known that there are very few decree holders, who are fortunate to execute and realise the decree

during their life time. Such is the law governing the execution proceedings and if that be so, there is no doubt that there would be number of

frivolous applications filed for setting aside the sale and it is to prevent such applications and to enable the Court at the initial stage to apply its mind

to find out whether there is a prima facie case for setting aside the sale and if that be so, whether in the facts and circumstances of the case, it is

necessary to order security. Such rule cannot be held to be inconsistent with the provisions contained in Rule 90, Order XXI, CPC as substituted

by Act 104 of 1976. The grounds prescribed for setting aside the sale and the procedure to be followed for setting aside the sale are not in any

manner affected by the proviso. Therefore, we are of the view that looked at from any point of view, the proviso cannot be held to be inconsistent

with Rule 90, Order XXI, CPC as substituted by Act 104 of 1976. Consequently, we find it difficult to agree with the decisions in V.Kannan v.

Haji Abdul Rawoof Sahib and Janakirama Iyer v. Radhakrishnan Chettiar.

A mere poring over and perusal of the said judgment would amply make the point clear that furnishing of security is not compulsory in all cases. By

that, what the Division Bench laid down as law was that, as per Order 21 Rule 90 of CPC, the Court is enjoined to apply its mind as to the

necessity on the part of the judgment debtor to furnish security and whereupon alone notice has to be given to the judgment debtor to furnish

security and in my opinion, it implies that on receipt of notice, the judgment debtor is entitled to explain and expound to the Court that he is not

liable to furnish any security, whereupon, reasoned order has to be passed by the Court and if the judgement debtor fails to comply with the

furnishing of security, then he would face rejection of that unnumbered application.

9. I am fully aware of the fact that judicial discipline warrants that one single Judge has to respect the judgment of another single Judge. In this case,

I am not in any way trying to take a view different from the view taken by the learned single Judge of this Court in his order dated 13.12.1995, but

what I would like to highlight is that the learned single Judge in the body of the order stated thus:

....Subsequently, the question has been set at rest by a Division Bench of this Hon"ble Court in the decision reported in Ramaswamy Gounder Vs.

T.S. Ramaswamy Gounder and Another, wherein, the Division Bench has held that it is incumbent on the applicant who files an application for

stetting aside the sale to furnish security or otherwise he has to seek the permission of the Court for dispensing with the security and the lower

Court has to consider the application if it is filed for dispensation of the security amount and dispose of the same on merits.

(emphasis supplied)

which in my considered view does not reflect the dictum of the Hon"ble Division Bench of this Court.

10. No where in the Division Bench judgment referred to supra it is found stated that an application has to be filed to dispense with the furnishing

of security. In fact, the learned single Judge also never in his operative portion of the order mandated the lower Court to expect an application to

"dispense with" should be filed before the lower Court as per Order 21 Rule 90 of CPC. Any order of a Court has to be interpreted by taking

note of the operative portion of the order. Once the operative portion of the order is clear, there is no question of going into the body of the order

of the Court and try to interpret the operative portion of the order differently. Here the operative portion of the order of my learned Predecessor

would run thus:

In view of the judgment, the order of the lower Court is set aside and the matter is remitted back to the lower court for fresh consideration for

disposing the unnumbered R.A., in accordance with law. No costs.

(emphasis supplied)

11. The next question arises as to what the term ""in accordance with law"" means. To the risk of repetition and pleonasm, but without being

tautologous, I would like to refer to the Division Bench judgment which alone laid down the law finally and as such the law laid down by the

Division Bench should be followed by the Executing Court by giving notice to the judgment debtor calling upon him to furnish security as

contemplated under Order 21 Rule 90 CPC and more specifically, the proviso appended to the said Rule by the Madras High Court. However,

without going into that aspect whether in the facts and circumstances involved in this matter security was necessary or not, the lower Court took a

hyper technical view that no application for dispense with security was filed by the judgment debtor and hence the unnumbered E.A. under Order

21 Rule 90 of CPC should be dismissed. The appellate Court also took the same view and confirmed the order of the Executing Court, which in

my opinion is not in accordance with law as contemplated in the operative portion of my Predecessor's order dated 13.12.1995.

12. The learned Counsel for the third party purchaser would submit that this Court vide the order dated 13.12.1995 set aside only the order dated

18.10.1990 dismissing the unnumbered E.A. and not the order dated 18.09.1990 calling upon the judgment debtor to furnish security. In my

considered opinion that said order dated 18.09.1990 itself automatically stood annulled by virtue of the order of the learned single Judge for more than one reason. The learned single Judge of this Court in his order dated 13.12.1995 by referring to the Division Bench judgment remanded the matter back to the lower Court for dealing with the matter as per law. In fact, this Court considering the previous order dated 18.09.1990 calling upon the judgment debtor to furnish security, dealt with the matter and that was why the Division Bench judgment of this Court was referred to, as otherwise, there would have been no necessity at all to refer to any precedent relating to Order 21 Rule 90 of CPC and the revision would have been dismissed simply without remanding the matter back to the lower Court. In fact, ex facie and prima facie, the Executing Court committed error in its order dated 18.09.1990 by placing reliance on a wrong proposition of law. The Executing Court referred to the decision reported in 1988 1 LW 18 (Karuppanna Gounder v. Velappa Naicker) and precisely the Division Bench of this Court in its decision referred to that decision and held as already detailed supra that furnishing of security is not mandatory in all cases.

13. It is therefore crystal clear that it cannot be taken that the Executing Court dealt with the matter by applying the correct proposition of law.

14. The learned Counsel for the auction purchaser virtually tried her level best to canvass the point that taking into account the circumstances

involved in the case, the lower Court called upon the judgment debtor to furnish security. But a reading of the order dated 18.09.1990 would

clearly evince and evidence that the Executing Court proceeded on the wrong footing as though furnishing of security by the judgment debtor was

sine qua non for entertaining such application under Order 21 Rule 90 of CPC by the Court. These defects in the order dated 18.09.1990 of the

lower Court were presumably taken into account by the learned single Judge of this Court and by relying on the Division Bench judgment, remitted

the matter back to the Court for dealing with it as per law. It is therefore crystal clear that my learned Predecessor in his order dated 13.12.1995

set aside virtually the order dated 18.09.1990 as well as the order dated 18.10.1990 and remitted the matter back to the lower Court for adhering

to the law laid down in the said Division Bench judgment. Wherefore, the third party purchaser cannot try to rely upon only certain words in the body of the learned single Judge's order dated 23.12.1997 and try to insist that the trial Court was right in not once again applying his mind about furnishing of security and that the trial Court was justified in expecting an application from the judgment debtor to get dispensed with the furnishing of security.

15. In this factual matrix, the matter has to be remitted back to the trial Court to adhere strictly to the procedure contemplated under Order 21

Rule 90 of CPC as found detailed and delineated in the present order.

16. The learned Counsel for the third party purchaser also would submit that non impleadment of the L.Rs. of the decree holder was fatal to the revision as well as the CMA filed earlier.

17. I would like to point out that the subsequent litigation arose only in respect of the unnumbered E.A. and it was mainly between the Court and

the judgment debtor at the initial stage. No doubt, in this case third party purchaser has been cited as a party earlier and he continues to participate

in the proceedings. Not even a moment I incline to say that the deceased decree holder's legal heirs are not at all necessary parties, but non

impleadment of such is not fatal to the CRP proceedings and once the E.A. is numbered, then it is incumbent upon the judgment debtor to implead

the legal heirs of the deceased decree holder also. In this connection, the learned Counsel for the third party purchaser would cite the decision of

this Court reported in Ramaswamy Gounder Vs. T.S. Ramaswamy Gounder and Another, and point out that non impleadment of the legal heirs of

the auction purchaser was fatal to CRP. In that case, auction purchaser was very much on record and on his death, his legal heirs were not added

and in that context such observation emerged, but in this case, the decree holder was not at all a party and it appears she died even during the

pendency of the previous CRP and I am of the view that at this distant point of time, this Court need not ponder over those points. It is also a trite

proposition of law that non impleadment of legal heirs in E.P. would not result in abatement. I am of the considered view that the Executing Court

in fact misunderstood the actual gamut of the matter and passed such an order dated 23.07.1997, which is hereby set aside. Consequently, the order in CMA No. 8 of 1998 also stands set aside and the matter is remitted back to the Executing Court. By way of disambiguity, the ambiguity if any, I would like to once again give direction at this operative portion of this order as under:

On receipt of the order of this Court, the unnumbered E.A. shall be considered by the Executing Court and notice be issued to the judgment

debtor calling upon to furnish security to the satisfaction of the Court for an amount equal to that mentioned in the sale warrant or to that realised

by the sale, whichever is less or to deposit such amount in Court. On receipt of such notice, the judgment debtor shall explain and expound as to

how he is not liable to furnish security, whereupon, after hearing him, the Court on considering the pro et contra/pros and cons and the over all

circumstances involved in the matter shall pass a reasoned order as to whether the judgment debtor should necessarily furnish security or not. The

entire procedure set out supra shall be completed within a period of one month from the date of receipt of a copy of this order.

Accordingly, this civil revision petition is disposed of. No costs.