

(2012) 11 MAD CK 0173

Madras High Court**Case No:** C.M.S.A. No. 9 of 2012 and Tr.C.M.P. No. 540 of 2012 and M.P. No's. 1, 1 of 2012

Jacob Nixon

APPELLANT

Vs

Nirmala and D. Varadarajan

Nirmala and D. Varadarajan

RESPONDENT

Vs V. Jacob Nixon

Date of Decision: Nov. 21, 2012**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 21 Rule 100, Order 21 Rule 102, Order 21 Rule 105(2), Order 21 Rule 106, Order 21 Rule 98
- Limitation Act, 1963 - Section 5

Citation: (2013) 1 CTC 680 : (2013) 1 LW 965 : (2013) 2 MLJ 330**Hon'ble Judges:** R.S. Ramanathan, J**Bench:** Single Bench

Advocate: D. Murthy in C.M.S.A. No. 9 of 2012 and D. Shivakumaran in Tr.C.M.P. No. 540 of 2012, for the Appellant; D. Murthy, Advocate in Tr.C.M.P. No. 540 of 2012 and D. Shivakumaran, Advocate for Respondent Nos. 1 and 2 in C.M.S.A. No. 9 of 2012, for the Respondent

Judgement

R.S. Ramanathan, J.

The Appellant is the decree holder. The Appellant filed O.S. No. 170 of 2005 on the file of the Subordinate Court, Kancheepuram for specific performance of an Agreement of Sale dated 15.4.2005 executed by the Respondents. An ex parte decree was passed in the Suit on 11.8.2006. Thereafter, the Appellant filed E.P. No. 2 of 2009 to execute the decree and on 12.10.2009 an ex parte order was passed directing the Appellant to produce the draft Sale Deed. Thereafter, the Respondents herein who are the judgment-debtors filed I.A. No. 49 of 2009 in O.S. No. 170 of 2005 u/s 5 of the Limitation Act to condone the delay in filing the Application to set aside the ex parte decree dated 11.8.2006. The Respondents also filed E.A. No. 444 of 2009 to set aside the order passed in E.P. No. 2 of 2009 dated 12.10.2009. The

Court below, namely, the Sub-Court, Kancheepuram dismissed the I.A. No. 49 of 2009 as well as E.A. No. 444 of 2009 filed by the Respondents by order dated 23.4.2010. The Respondents herein filed C.R.P. (NPD) No. 1771 of 2010 before this Court challenging the order passed in I.A. No. 49 of 2009 and this Court allowed the Revision and condoned the delay by order dated 27.9.2010 and the same was also confirmed by the Hon"ble Supreme Court in S.L.P.(Civil) No. 3678 of 2011. As the delay has been condoned, the Respondents herein filed I.A. No. 510 of 2011 to set aside the ex parte decree passed in O.S. No. 170 of 2005 and that was dismissed and aggrieved by the same the Respondents filed C.M.A. No. 3 of 2012 before the District Court II, Kancheepuram. The Respondents also filed C.M.A. No. 93 of 2010 before the District Court II, Kanchipuram challenging the order passed in E.A. No. 444 of 2009 and the learned District Judge II, Kancheepuram allowed the C.M.A. No. 93 of 2010 and aggrieved by the same, this Second Appeal is filed by the Appellant.

2. It is submitted by the learned Counsel appearing for the Appellant that after an ex parte decree was passed in O.S. No. 170 of 2005, the Respondents sold the property on 20.12.2006 and therefore, as on date they have no subsisting interest over the suit property and hence, they have no right to challenge the ex parte decree or challenge the Execution proceedings initiated by the Appellant to execute the decree passed in O.S. No. 170 of 2005. Therefore, the Respondents have no locus standi to file E.A. No. 444 of 2009 to set aside the order passed in E.P. No. 2 of 2009 and therefore, the Appeal has to be allowed and he also relied upon the judgment of this Court rendered in C.R.P.(NPD) No. 1207 of 2011, dated 11.4.2011 between A. Mary and another v. A. Fathima and another, and another judgment of this Court rendered in C.M.S.A. No. 11 of 2010, dated 18.2.2011 between [Thangeswari, Arumba Ammal and Ponnusamy Vs. Thirumalvalavan and Others](#) . He therefore submitted that the Appeal has to be allowed and the Transfer Petition filed by the Respondents to transfer the C.M.A. No. 3 of 2012 on the file of the District Court II, Kancheepuram to this Court to be tried along with this C.M.S.A. is liable to be dismissed.

3. The learned Counsel appearing for the Respondents in this Second Appeal submitted that the Respondents have filed I.A. No. 510 of 2011 to set aside the ex parte decree passed in O.S. No. 170 of 2005 and though the application was filed after a delay of 389 days, the Application to set aside the ex parte decree was passed along with the Application to condone the delay and the Court below numbered the Application to condone the delay as I.A. No. 49 of 2009 and initially the delay was not condoned by the Trial Court and this Hon"ble Court set aside the order in C.R.P.(NPD) No. 1771 of 2010 and allowed the Revision and condoned the delay and the same was confirmed in S.L.P.(Civil) No. 3678 of 2011. Thereafter, the Application to set aside the ex parte decree was numbered as LA. No. 510 of 2011 and that was dismissed and aggrieved by the same, the Respondents filed C.M.A. No. 3 of 2012 pending before the District Court II, Kancheepuram. He, therefore, submitted that in the event of C.M.A. No. 3 of 2012 being allowed, then the ex parte decree passed in O.S. No. 170 of 2005 will be set aside and the Appellant cannot

execute the decree and therefore the Transfer Petition was filed to transfer the C.M.A. No. 3 of 2012 to this Court to be heard along with this Second Appeal. He further submitted that the Respondents have sold the property to the third parties and in law they are bound to make good the title to the third parties and therefore, it cannot be stated that the Respondents have got no interest over the suit property. He, therefore, submitted that the judgments relied on by the learned Counsel for the Appellant cannot be applied to the facts of this case and having regard to the fact that the delay in filing the Application to set aside the ex parte decree was condoned, the Court below ought to have allowed the Application to set aside the ex parte decree and hence, the C.M.S.A. No. 9 of 2012 has to be dismissed.

4. According to me, the judgments relied on by the learned Counsel appearing for the Appellant cannot be applied to the facts of this case.

(i) In the Judgment rendered in C.R.P.(NPD) No. 1207 of 2011, dated 11.4.2011 between A. Mary and another v. A. Fathima and another, the order challenged was the order of dismissal of the Application filed u/s 5 and while dismissing the Revision filed by the judgment-debtors, this Court has held that the Revision Petitioners having sold the property cannot maintain the Revision and that they have no subsisting right over the property. According to me, having regard to the facts of this case, namely, the Suit was filed by the Appellant for specific performance and decree was passed directing the Respondents herein to execute the Sale Deed, it cannot be stated that the Respondents have no interest over the subject matter of the suit property, after they sold the property to the third parties.

(ii) Similarly, in the judgment rendered by me in C.M.S.A. No. 11 of 2010, dated 18.2.2011 between [Thangeswari, Arumba Ammal and Ponnusamy Vs. Thirumalvalavan and Others](#) . I dealt with the scope of Order 21, Rule 98 to 102 and held that the transferee pendente lite cannot maintain the Application challenging the execution and in this case, the Respondents are the Defendants and were the owners. Hence, both these judgments cannot be applied to the facts of the present case on hand.

5. The Appellant raised seven substantial questions of law in the grounds of Appeal and the learned Counsel for the Appellant submitted that the substantial questions of law "a" and "b" are to be framed as substantial questions of law for decision in this Second Appeal and they are as follows:

a. Whether the Respondents/Judgment-debtors could invoke the provisions of order 21, Rule 106 of C.P.C., after alienating the suit property to third party, after decree, without having any subsisting interest in the property ?

b. Whether the Transferee pendente lite could claim legal protection available under Order 21, Rule 106 of C.P.C. through the Judgment-debtors/Vendors especially when there is a fetter expressly provided under Order 21, Rule 98(2) and Rule 102 of C.P.C.

6. Order 21, Rule 106, C.P.C. reads as follows:

106. Setting aside order passed ex parte, etc.-

(1) The Applicant, against whom an order is made under sub-rule (2) of Rule 105 or the opposite party against whom an order is passed ex parte under sub-rule (3) of that Rule or under sub-rule (1) of Rule 23, may apply to the Court to set aside the order, and if he satisfies the Court that there was sufficient cause for his non-appearance when the Application was called on for hearing, the Court shall set aside the order on such terms as to costs or otherwise as it thinks fit, and shall appoint a day for the further hearing of the Application.

(2) No order shall be made on the Application under sub-rule (1) unless notice of the Application has been served on the other party.

(3) An Application under sub-rule (1) shall be made within thirty days from the date of the order, or where, in the case of an ex parte order, the notice was not duly served, within thirty days from the date when the Applicant had knowledge of the order.

7. Therefore, as per Order 21, Rule 106, C.P.C., any person aggrieved by the order made under Order 21, Rule 105(2), C.P.C. can apply to the Court to set aside the order. The Respondents herein filed Application in E.A. No. 444 of 2009 to set aside the order dated 12.10.2009 passed in E.P. No. 2 of 2009 in O.S. No. 170 of 2005 on 19.10.2009, within 30 days and that was dismissed and the same was challenged in C.M.A. No. 93 of 2010 and the C.M.A. No. 93 of 2010 was allowed. Therefore, while considering the Application filed under Order 21, Rule 106, C.P.C., the Court has to satisfy itself whether the Applicant has given sufficient reason for his non-appearance and if the Court is satisfied with the reasons can allow the Petition.

8. But, the main contention of the learned Counsel appearing for the Appellant is that the Respondents having sold the property, lost interest in the property and as per Order 21, Rule 102, C.P.C., the provisions of Rule 98 & 100 cannot be applied to transferees from the judgment-debtor and therefore, the judgment-debtor cannot challenge the orders passed in Execution Application as they are only doing it at the instance of the transferees and the transferees are prohibited from invoking the provisions of Order 21, Rules 98 & 100, C.P.C. and hence, the Application filed by the Respondents are not maintainable.

9. According to me, even after the sale of the property by the judgment-debtors, they are in law bound to give clear title to the purchasers and therefore, it cannot be stated that they have no interest in the suit property. Further, the Suit was filed by the Appellant for specific performance of the Agreement of Sale and a decree was passed directing the Respondents herein to execute the Sale Deed and as the Respondents failed to execute the Sale Deed as per the decree, the Execution Petition was filed by the Appellant to execute the decree and in E.P. No. 2 of 2009,

an order was passed by the Executing Court directing the Appellant to file the draft Sale Deed and that order was challenged in E.A. No. 444 of 2009 and that was allowed and the same is challenged in this Second Appeal. Therefore, when the decree was against the judgment-debtors and the judgment-debtors were directed to execute the decree, it cannot be stated that after the sale of the property by the judgment-debtors, they have no subsisting interest over the property and therefore, they cannot maintain the Application. Further, as stated supra, the Application to set aside the ex parte decree passed in O.S. No. 170 of 2005 was dismissed and C.M.A. No. 3 of 2012 was filed challenging the said order and in the event of C.M.A. No. 3 of 2012 being allowed, the Appellant cannot execute the decree. Hence, the substantial questions of law, raised by the Appellant are answered against the Appellant and I hold that even after the sale of the property by the judgment-debtor, considering the nature of decree passed against them, it cannot be stated that they have no interest over the suit property and they can challenge the Execution proceedings and under Order 21, Rule 102, C.P.C. the transferee pendente lite alone are prohibited from challenging the Execution proceedings initiated by the Decree holder and the Respondents are the judgment-debtors and they are not prohibited. Further, as stated supra, the scope of Order 21, Rule 106, C.P.C. is to set aside the ex parte decree on showing sufficient cause and while dealing with the same, the Court need not go into the rights of the judgment-debtors and the Court has to consider the cause shown by the judgment-debtor for setting aside the order. Hence, the C.M.S.A. No. 9 of 2012 is dismissed and the order of the District Court II, Kancheepuram made in C.M.A. No. 93 of 2010 is confirmed.

10. As C.M.S.A. No. 9 of 2012 is dismissed, there is no need to transfer the C.M.A. No. 3 of 2012 pending before the District Court II, Kancheepuram and the judgment-debtors have to agitate their case before the District Court II, Kancheepuram and the District Court II, Kancheepuram is directed to dispose of the C.M.A. No. 3 of 2012 within a period of six weeks from the date of receipt of a copy of this order. In the result, both the C.M.S.A. No. 9 of 2012 and Tr. C.M.P. No. 540 of 2012 are dismissed. Consequently, connected Miscellaneous Petitions are closed. However, no order as to costs.