

**(2011) 10 MAD CK 0062**

**Madras High Court (Madurai Bench)**

**Case No:** C.R.P. (PD) (MD) No. 1340 of 2009 and M.P. (MD) No.1 of 2009

S. Selvakumar

APPELLANT

Vs

Nagarani Chitfunds (Pvt.) Ltd.

RESPONDENT

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**Date of Decision:** Oct. 13, 2011

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Section 64

**Citation:** (2012) 1 LW 777

**Hon'ble Judges:** M. Jaichandren, J

**Bench:** Single Bench

**Advocate:** R. Surianarayanan, for the Appellant; V. Kannan for Respondents 1 and 4 and Mr. G.R. Swaminathan for Respondents 2 and 3, for the Respondent

**Final Decision:** Allowed

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### **Judgement**

@JUDGMENTTAG-ORDER

Honourable Mr. Justice M. Jaichandren

1. This Civil Revision Petition has been filed against the order, dated 05.02.2009, made in the unnumbered interlocutory application, in E.P.No.50 of 2007, on the file of the District Munsif-cum-Judicial Magistrate Court, Thiruppathur.

2. The petitioner had filed the unnumbered interlocutory application, as a third party, under Order 21, Rule 89 of the Civil Procedure Code, 1908, to set aside the sale, dated 18.2.2008, stating that he is a bona fide purchaser of the property in question. It has been stated that the petitioner had purchased the schedule property, from the second respondent, on 18.2.2008, for valuable consideration. The first respondent/decreed holder had obtained an Award No.182 of 2006, on the file of the Deputy Registrar of Chits, Karaikudi. He had filed an Execution Petition No.50 of 2007 against the second and the third respondents, for attachment and sale of the schedule property. The schedule property had been attached and it had been sold in

a public auction. The fourth respondent is the auction purchaser.

3. The petitioner had further stated that, as the bona fide purchaser of the suit property in question, he is in possession and enjoyment of the same. The respondents 2 to 4, having colluded with each other, had filed the Execution Petition and had brought the schedule property for auction. The fourth respondent had purchased the property by collusion. Therefore, the petitioner had prayed for setting aside the sale stating that it was irregular and illegal. The District Munsif-cum-Judicial Magistrate, Tirupatthur, had dismissed the application filed by the petitioner, by his order, dated 5.2.2009, stating that there was no oral or documentary evidence in support of the claims made by the petitioner. He had stated that the first respondent/deed holder had obtained the Award No.182 of 2006 against the respondents 2 and 3, on the file of the Deputy Registrar of Chits, Karaikudi, on 18.8.2006, for the realisation of the amounts due to him, based on the chit accounts.

4. It had also been found that the first respondent/deed holder had filed E.P.No.50 of 2007, on 4.7.2007, for the attachment and sale of the immovable property of the second respondent. The Execution Petition was taken on file, on 21.8.2007, in E.P.No.50 of 2007. From the records available, it had been found that the notice of the Execution Petition had been served on the second respondent/judgment debtor, on 19.11.2007. The second respondent/judgment debtor was set ex-parte as he had failed to file the counter. On 19.11.2007, attachment of the schedule property was ordered and it had been attached, on 13.12.2007. The intimation of the attachment had been served on the Sub-Registrar of Singampuneri, on 13.12.2007.

5. It had also been stated that the first respondent/deed holder had filed the sale paper, on 12.3.2008 and the sale notice was ordered. The judgment debtor had received the sale notice and he was called, absent and set ex-parte, on 13.6.2008 and the settlement of the proclamation had been ordered.

6. It had been further stated that, on 8.8.2007, the market value of the schedule property had been fixed and the property was ordered to be sold in public auction, on 17.9.2008. On the said date, the property in question had been sold in the public auction held by the Court Officer, for a sum of Rs.2,01,000/-. Further, the fourth respondent/auction purchaser had deposited 1/4th of the sale price in the Court, on 17.9.2008. He had paid the balance 3/4th of the sale price in the Court, within the period of limitation, as there was no application, either by the respondents 2 and 3 or by any person having interest in the schedule property, to set aside the sale. Thereafter, the sale had been confirmed by the Court, on 19.11.2008. The sale certificate had also been issued in favour of the fourth respondent auction purchaser, on 5.1.2009. In the mean time, the petitioner, who is a third party to the proceedings, had filed an interlocutory application, under Order 21 Rule 89 of the Civil Procedure Code, 1908, to set aside the sale on the ground of irregularities. The petitioner had filed the application stating that he had purchased the schedule

property from the second respondent/judgment debtor through a registered sale deed, on 18.2.2008. The District Munsif-cum-Judicial Magistrate, Tirupathur had found that the schedule property had been attached, on 13.12.2007, even before the petitioner had purchased the said property, by way of a sale, dated 18.2.2008.

7. It had also been found that the sale of the property in question was on 19.9.2008. The sale deed, dated 18.2.2008, was, admittedly, subsequent to the attachment of the said property, on 13.12.2007. As such, the said sale, said to be in favour of the petitioner, is invalid and void, as per Section 64 of the Civil Procedure Code, 1908. Further, according to Order 21 Rule 89 of the Civil Procedure Code, 1908, no sale shall be set aside on the ground of irregularity or fraud, unless it had been proved on facts that, the applicant had sustained substantial injury, by reason of such irregularity or fraud. Further, no application to set aside the sale shall be entertained upon any ground on which the applicant could have taken, on or before the date on which the proclamation of sale was drawn up. In such circumstances, the application filed by the petitioner was held to be devoid of merits.

8. The main contention of the learned counsel appearing on behalf of the petitioner is that the District Munsif-cum-Judicial Magistrate, Tirupathur, had disposed of the interlocutory application filed by the petitioner, on merits, without even numbering the same and without giving an opportunity to the petitioner to put-forth his case. The order passed by the District Munsif-cum-Judicial Magistrate, Tirupathur, on 5.2.2009, in the unnumbered application filed by the petitioner, cannot be held to be valid in the eye of law. Even the petitioner ought to have filed the said application, under Order 21 Rule 90 of the Civil Procedure Code, 1908. The said application had been filed, mistakenly, under Order 21 Rule 89. In such circumstances, the impugned order, dated 5.2.2009, ought to be set aside, directing the District Munsif-cum-Judicial Magistrate, Tirupathur, to number the interlocutory application filed by the petitioner and to dispose of the same, on merits and in accordance with law, after giving an opportunity of hearing to the petitioner and the other parties concerned. He had also submitted that the petitioner may be permitted to file an amendment petition before the Court concerned to amend the application appropriately, if it is found to be necessary.

9. The learned counsel appearing on behalf of the respondents had submitted that the interlocutory application filed by the petitioner to set aside the sale of the proclamation, is devoid of merits. The claim of the petitioner is that he had purchased the schedule property from the second respondent/judgment debtor, by way of registered sale deed, dated 18.2.2008. However, the said property had been attached, on 13.12.2007 itself. Thereafter, it had been sold, by way of a public auction, on 17.9.2008. On the fourth respondent-auction purchaser depositing the sale price, the sale had been confirmed, on 19.11.2008. The sale certificate had also been issued, on 5.1.2009. While so, it is not open to the petitioner to seek for setting aside the sale of the schedule property stating that he had certain rights, in respect

of the same. However, the learned counsel appearing on behalf of the respondents had not been in a position to show that the dismissal of the interlocutory application filed by the petitioner by the District Munsif-cum-Judicial Magistrate, Tirupathur, by his order, dated 5.2.2009, on merits, without numbering the said application and without giving an opportunity of hearing to the petitioner is valid in the eye of law. Further, they have not been in a position to show that the application filed by the petitioner could be validly disposed of even without numbering the same.

10. In such circumstances, this Court finds it appropriate to set aside the impugned order of the District Munsif-cum-Judicial Magistrate, Tirupathur, on 5.2.2009. The District Munsif-cum-Judicial Magistrate, Tirupathur, is directed to number the interlocutory application filed by the petitioner, in E.P.No.50 of 2007 and dispose of the same, on merits and in accordance with law, after giving opportunity of hearing to the petitioner and the other parties concerned, within a period of two months from the date of receipt of a copy of this order.

11. The learned counsel appearing on behalf of the petitioner had also submitted that the petitioner would file an appropriate petition before the Court concerned, to implead Kasi Kumar, who had purchased the property, originally, and to amend the provisions cited therein so as to read as Order 21, Rule 90, instead of Order 21, Rule 89, in the Interlocutory Application. If such a petition is filed, it would be open to the Court concerned to pass appropriate orders on the said petition,

12. With the above observations, the Civil Revision Petition stands allowed. Consequently, the connected Miscellaneous Petition is closed. No costs.