
(2008) 11 MAD CK 0038

In the Madras High Court

Case No : C.R.P (NPD) No"s. 1281 of 2007 and 1191 and 1242 of 2008

K. Noor Mohammed

APPELLANT

Vs

A. Chinnasamy and Others
Kanagarathinam Vs Star of
India and Others

RESPONDENT

Date of Decision : 10-11-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 47

Citation : (2008) 11 MAD CK 0038

Hon'ble Judges : S. Tamilvanan, J

Bench : Single Bench

Advocate : Ishtiaq Ahmed, in C.R.P NPD Nos. 1191 and 1242 of 2008 and C. Ravichandran, in C.R.P NPD Nos. 1281 and 2595 of 2007, for the Appellant; T.P. Manoharan, for R1 in C.R.P (NPD) Nos. 1281 and 2595 of 2007 and for R12 in C.R.P (NPD) Nos. 1191 and 1242 of 2008, for the Respondent

Final Decision : Dismissed

Judgement

S. Tamilvanan, J.—C.R.P (NPD) No. 1281 of 2007 has been preferred by the petitioner, K. Noor Mohammed, fourth respondent in E.P.

No. 43 of 1986, against the impugned order dated 04.04.2007 passed in E.A. No. 121 of 2005 in E.P. No. 43 of 1986 in O.S. No. 11 of 1975

on the file of the Sub-Court, Pollachi and the said suit was filed on the file of the Sub-Court, Badagara, Kerala State, wherein the petitioner herein

was the fourth defendant. E.A. No. 121 of 2005 had been filed by the revision petitioner u/s 47 r/w 151 and Order XXI Rules 64, 66 and 90 of

the Code of Civil Procedure, seeking an order to set aside the court auction sale, dated 30.03.1988 and the confirmation of sale on 04.05.1990.

2. C.R.P (NPD) No. 2595 of 2007 has been filed by the petitioner, fourth respondent in the E.P. No. 43 of 1986 against the order, dated

04.04.2007 passed in E.A. No. 114 of 2005 in the aforesaid Execution Petition on the file of the aforesaid court. E.A. No. 114 of 2005 has been

filed by the first respondent/auction purchaser, under Order XXI Rule 95 r/w 151 CPC, seeking delivery of possession of the property, as per the

sale certificate issued by the Executing Court in his favour.

3. C.R.P (NPD) No. 1191 of 2008 has been filed by one Kanagarathinam, who is the petitioner herein, third party in the E.P and the suit, against

the order, dated 04.04.2007 passed in E.A. No. 1371 of 2006 in E.A. No. 118 of 2005 in the aforesaid Execution Petition on the file of the

aforesaid court. E.A. No. 1371 of 2006 was filed by the third party u/s 146 r/w 151 CPC, seeking a direction to make necessary amendment in

the E.P to implead the legal heirs of the deceased decree-holder, but filed without furnishing the details about the deceased decree-holder and the

legal heirs, though the respondents 2 to 7 are stated as decree-holders in the E.P.

4. C.R.P (NPD) No. 1242 of 2008 has been filed by the said third party in the E.P and the suit, against the order, dated 04.04.2007 passed in

E.A. No. 1370 of 2006 in E.A. No. 118 of 2005 in E.P. No. 43 of 1986 on the file of the aforesaid court. In E.A. No. 1370 of 2006, the

petitioner/third party has sought an order to stay the entire E.P Proceedings till the legal heirs of the deceased decree-holders are impleaded in the

E.P.

5. All the aforesaid revision petitions are arising out of the orders passed in the Execution Applications relating to the same Execution Petition in

E.P. No. 43 of 1986 on the file of the Sub-Court, Pollachi.

6. It is an admitted fact that the revision petitioner, K. Noor Mohammed is one of the sons of late Kader Basha Sahib, who had landed properties

in Kinathukkadavu Village and was also running "copra" and oil business, as a partnership firm, under the name and style of Kadher Basha Sahib

& Sons. According to the revision petitioner, after the demise of his father, his brothers late K. Nawabjan and late K. Majeeth were carrying on

the business. He has admitted that he was also a partner in the said partnership firm till 1969. After the demise of his father, he retired from the

above partnership business in the year 1969 and continued his business and according to him, the transactions of the partnership firm after 1969

will not bind the revision petitioner herein. The respondents 2 to 7 had filed a

suit in O.S. No. 11 of 1975 on the file of the Sub-Court, Badagara, Calicut District, Kerala State against M/s. K.M. Kadher Basha Sahib and Sons, a partnership firm, seeking a decree for a sum of Rs. 46,000/-

directing the partners of the firm to pay jointly and severally the amount due and payable with interest and costs and the revision petitioner had

been stated as one of the partners of the firm.

7. The Sub-Court, Badagara decreed the suit on 02.02.1976 against the partnership firm and all its partners including the petitioner herein.

According to the petitioner, it was an exparte decree and the petitioner filed an application in I.A. No. 2311 of 1977, seeking the court to set aside

the exparte decree passed against him and as per the order, dated 31.08.1978, the decree passed against the petitioner herein was set aside.

Subsequently, the petitioner filed application in I.A. No. 3086 of 1978 before the Sub-Court, Badagara under Order XXX Rule 8 of CPC to

determine whether he was a partner of the first defendant firm in the suit, on the date of filing of the suit, on the ground that the decree cannot be

passed against him, as he had already retired from the firm, however, the court held that the partnership was subsisting on the date of filing of the

suit and the petitioner herein was one of its partners, with that finding, dismissed the application filed by the petitioner.

8. The said order was challenged by way of revision in C.R.P. No. 1201 of 1979 on the file of the High Court of Kerala at Ernakulam, which was

allowed on 13.07.1979, whereby setting aside the order passed in I.A. No. 3086 of 1978. Based on the order passed by the High Court of

Kerala in C.R.P. No. 1201 of 1979, the Sub-Court, Badagara took up the matter on file for final hearing and passed the judgment dismissing the

suit in O.S. No. 11 of 1975 on 26.10.1976, as against the revision petitioner, who was the fourth defendant in the suit. According to the revision

petitioner, suppressing the said facts, the decree-holders, respondents 2 to 7 herein filed the E.P against the petitioner and others, under Order

XXI Rule 11(2) of C.P.C and the whole property was brought for sale. In the court auction sale that was taken place on 30.08.1988, the first

respondent herein purchased the property being the highest bidder and on 04.05.1990, the sale was confirmed by the Executing Court.

9. According to the revision petitioner, the respondents 2 to 7 had played fraud

on the court by bringing the petitioner's share of the property also for sale, though the first petitioner was not liable to discharge the debts. In the Interlocutory Application, E.A. No. 121 of 2005, the revision petitioner had prayed the Executing Court to cancel the court auction sale held on 30.03.1988 and the subsequent confirmation, dated 04.05.1990 in respect of share of the revision petitioner in the property, that was dismissed by the court below.

10. E.A. No. 114 of 2005, relating to C.R.P (NPD) No. 2595 of 2007 was filed by the first respondent herein, as auction purchaser, under Order

21 Rule 55 r/w 151 CPC, seeking an order directing the respondents 7 and 9 to 14 therein to hand over the possession of the property, as per the

sale certificate issued in his favour by the court below. The application filed by the first respondent/auction purchaser was allowed and the

Executing Court directed the respondents, Judgment-debtors therein to hand over the possession of the property by 25.04.2007. Aggrieved by

the aforesaid orders passed in E.A. No. 121 of 2005 and E.A. No. 114 of 2005, the revision petitions in C.R.P (NPD) Nos. 1281 of 2007 and

2595 of 2007 have been filed by the Revision Petitioner, K.Noor Mohammed.

11. Mr. C. Ravichandran, learned Counsel appearing for the revision petitioner in C.R.P (NPD) Nos. 1281 of 2007 and 2595 of 2007 submitted

that fraud has been played by the decree-holders, respondents 2 to 7 in bringing the entire property, including the share of the revision petitioner in

the court auction sale, though he was not liable to discharge the debts. According to him, in the suit in O.S. No. 11 of 1975 on the file of the Sub-

Court, Badagara, Kerala State, the partnership firm and its partners, including the petitioner/fourth defendant were originally arrayed as defendants.

Though the Interlocutory Application filed by the revision petitioner in I.A. No. 3086 of 1978 was dismissed by the said court, in view of the order

passed in C.R.P. No. 1201 of 1979 by the Kerala High Court, the suit against the revision petitioner, who was the fourth defendant therein was

dismissed. According to the petitioner, suppressing the said facts, the respondents 2 to 7 filed the Execution Petition in E.P. No. 43 of 1986 under

Order XXI Rule 11(2) of CPC, wherein the whole property of the petitioner's father Khader Basha Sahib, including the share of the petitioner had

been described. In the auction sale, the first respondent herein participated and

being the highest bidder, he took the whole property in the auction sale on 30.03.1988 for a consideration of Rs. 1,25,400/- and the sale was confirmed on 04.05.1990 in favour of the first respondent/auction purchaser. According to the learned Counsel, the Executing Court could have set aside the sale and confirmation of sale, so far as the share of the revision petitioner is concerned, on the ground of fraud being played by respondents 2 to 7, the decree-holders.

12. Per contra, Mr. T.P. Manoharan, learned Counsel appearing for the first respondent submitted that the property belongs to the revision petitioner/fourth defendant was not brought for sale. In the Execution Proceedings, the revision petitioner was arrayed as fourth respondent, being a son of late Khader Basha Sahib and only after contest, the aforesaid court auction sale and confirmation of the sale were passed by the Executing Court on merits and that there was no possibility for fraud being played as contended by the revision petitioner. According to the learned Counsel, filing the C.R.P (NPD) No. 1281 of 2007 is nothing but a second round of litigation on the decided issues, which is a futile attempt by the revision petitioner. It is not in dispute that the first respondent in C.R.P (NPD) Nos. 1281 of 2007 and 2595 of 2007 is only a court auction purchaser and the real dispute is between himself and the revision petitioner, therefore, the petitioner cannot raise any allegation of fraud against the first respondent, who is a bonafide purchaser of the property in the court auction sale and also deposited the entire sale consideration before the Executing Court, as per law.

13. Learned Counsel appearing for the first respondent/auction purchaser strenuously submitted that the property belongs to the revision petitioner was not brought in the court auction sale, being the legal heir of late Khader Basha Sahib, the petitioner was arrayed as fourth respondent and therefore, there is no illegality or error in the orders passed by the Executing Court in dismissing the application in E.A. No. 121 of 2005 filed by the revision petitioner herein and allowing the application in E.A. No. 114 of 2005 filed by the first respondent/auction purchaser and ordering delivery of possession, pursuant to the sale certificate issued by the court below.

14. Mr. C. Ravichandran, learned Counsel appearing for the revision petitioner in C.R.P (NPD) Nos. 1281 of 2007 and 2595 of 2007 drew the

attention of this court to the copy of the order, dated 26.10.1979 passed by Subordinate Judge, Badagara, whereby the said court dismissed the suit against the revision petitioner herein, in view of the order passed in C.R.P. No. 1201 of 1979 by the High Court of Kerala. According to the learned Counsel, the said decree passed in O.S. No. 11 of 1975 was transmitted to the Sub-Court, Udumalpet in E.P.R. No. 43 of 1986, then transferred to the file of the Subordinate Court, Pollachi. According to him, the court auction sale, dated 30.03.1988 and the confirmation of sale, dated 04.05.1990 are liable to be set aside, so far as the share of the revision petitioner is concerned, on the ground of fraud being played by the decree-holders, respondents 2 to 7.

15. Mr. C. Ravichandran, learned Counsel appearing for the petitioner has relied on the following decisions, in support of his contention:

1. S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others,
2. A.V. Papayya Sastry and Others Vs. Government of A.P. and Others,
3. Ram Chandra Singh v. Savitri Devi and Ors. 2004-2-LW 70
4. Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another,
5. Jagdev Singh and Another Vs. State of Punjab,
6. Sabitri Dei and Others Vs. Sarat Chandra Rout and Others,
7. Dr. T. Vijayendradas and Anr. v. M. Subramanian and 4 Ors. 2006 2 LW 572
8. T. Vijendradas and Another Vs. M. Subramanian and Others,
9. Niyamat Ali Molla v. Sonargon Housing Co-operative Society, 2008 1 LW 106
10. Kannappa Mudaliar (died) and 2 others Vs. Ayyaswami Gounder (died) and 7 others,
11. Varada Reddiar and Another Vs. Jayachandran and Others,
12. Sai Enterprises Vs. Bhimreddy Laxmaiah and Another,
13. Mil Merin Gas Agencies Vs. TVS Finance and Services Ltd. Formerly known as Harita Finance Ltd. and Mr. R. Muralikrishnan,
14. Karnail Singh v. Bhajan Singh AIR 2005 Punjab and Haryana 207
15. Vummidi Bangaru Chetty (P) Ltd. v. Spencer & Co. Ltd. 2002 3 LW 644
16. Surya Dev Rai Vs. Ram Chander Rai and Others,
17. Col. Anil Kak (Retd.) Vs. Municipal Corporation, Indore and Others,

16. Mr. T.P. Manoharan, learned Counsel appearing for the first respondent/auction purchaser submitted that there is no dispute that the revision petitioner is one of the sons of Khader Basha Sahib, who had properties in Kinathukadavu village and was doing copra and oil business in the name and style of Khader Basha Sahib & Sons, a partnership firm. The Execution Petition was originally filed in E.P.R. No. 91 of 1977 for sale of the properties belonging to M/s. Khader Basha Sahib and sons, the eighth respondent firm and also individual properties belonged to the partners of the firm and on enquiry, it was found by the learned Subordinate Judge, Udumalpet in E.P.R. No. 91 of 1977, that in view of the order passed by Kerala High Court in C.R.P. No. 1201 of 1979, the Execution Petition in E.P.R. No. 91 of 1977 had to be closed, accordingly, the same was closed on 02.02.1978, however, the court ordered to continue the attachment for 10 years. Subsequently, the respondents 2 to 7 filed another EP in E.P.R. No. 17 of 1978 deleting the individual properties belonging to the revision petitioner and brought the property belonging to the eighth respondent firm, namely, K.M. Kadher Basha Sahib & Sons. The said EP was closed subsequently, however, the attachment was ordered to be continued for three months from 31.03.1986. Again the decree-holders filed a fresh petition in E.P.R. No. 43 of 1986 bringing the properties belonging to the eighth respondent's firm for sale and the first respondent herein was the successful bidder in the auction that was held on 30.03.1988.

17. According to Mr. T.P. Manoharan, learned Counsel appearing for the first respondent/auction purchaser, before the confirmation of sale, the revision petitioner and the judgment-debtors have filed similar applications on the same provision of law to set aside the court auction sale held on 30.03.1988. The applications are taken on file in E.A. No. 161/1988, E.A. No. 163/1988 and E.A. No. 327 of 1988. All the applications were heard together by the Subordinate Judge, Udumalpet and dismissed the same and the sale was confirmed on 04.05.1990. Against the order of dismissal and confirmation of sale, the present revision petitioner along with the judgment-debtors had filed an appeal before this Court in C.M.A. No. 741 of 1990, wherein all the appellants have raised the very same plea. However, this Court dismissed the appeal and upheld the court

auction sale in favour of the first respondent/auction purchaser on merits. Accordingly, the sale certificate has been issued in favour of the first

respondent/auction purchaser. Pursuant to the sale certificate, the first respondent filed E.A. No. 275 of 2001 for delivery of possession. Similarly,

the decree-holders have filed an application in E.A. No. 276 of 2001 before the Executing Court for withdrawal of sale proceeds.

18. According to the learned Counsel appearing for the first respondent/auction purchaser, the petitioners in C.R.P (NPD) Nos. 1281 of 2007

and 2595 of 2007, suppressing the material facts have come forward with the revision petitions. It is seen that the above arguments advanced by

the learned Counsel appearing for the first respondent/auction purchaser is available in the counter affidavit filed by him before the Executing Court

in E.A. No. 33 of 2002 in E.P.R. No. 43 of 1986.

19. Mr. T.P. Manoharan, learned Counsel appearing for the first respondent/auction purchaser, in support of his contention relied on the following

decisions:

1. Chandra Choor Deo and Another Vs. Smt. Krishnawati,

2. Ranipet Municipality Vs. M. Shamsheerkhan,

3. M. Satyanarayana Murthy v. Mandal Revenue Officer-cum-Land Acquisition Officer 1998 SCC 445

4. S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others,

5. Alagammal Vs. Sivasubramanian and Others,

6. The Bahrein Petroleum Co. Ltd. Vs. P.J. Pappu and Another,

7. Merla Ramanna Vs. Nallaparaju and Others,

8. Smt. Pushpa Vs. Ganpatsingh and Others,

20. In the decision, S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, , the Hon''ble Supreme Court has held

that a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order

to gain by another''s loss. It is a cheating intended to get an advantage. A litigant, who approaches the court, is bound to produce all the documents

executed by him which are relevant to decide the litigation and if he withholds a vital document in order to gain advantage against the other side,

then he would be guilty of playing fraud on the court as well as on the opposite party.

21. It is a settled proposition of law that one who comes to court must come with clean hands. A person whose case is based on falsehood, has no right to approach the court and he could be thrown out at any stage of the litigation.

22. In the decision, A.V. Papayya Sastry and Others Vs. Government of A.P. and Others, , the Hon''ble Supreme Court has held as follows:

22. It is thus settled proposition of law that a judgment, decree or order obtained by playing fraud on the court, tribunal or authority is a nullity and non est in the eye of the law. Such a judgment, decree or order is by the first court or by the final court has to be treated as nullity by every court, superior or inferior. It can be challenged in any court, at any time, in appeal, revision, writ or even in collateral proceedings.

23. In Ram Chandra Singh v. Savitri Devi and Ors. reported in 2004 2 LW 70, the Hon''ble Apex Court has held that it is a fraud in law if a party makes representations which he knows to be false and injury ensues therefrom although the motive from which the representations proceeded may not be bad.

24. In Urban Improvement Trust, Jodhpur Vs. Gokul Narain and another, , the Hon''ble Apex Court has ruled as follows:

15. ...A decree passed by such a court is a nullity and is non est. Its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right even at the stage of execution or in collateral proceedings. The defect of jurisdiction strikes at the authority of the Court to pass a decree which cannot be cured by consent or waive of the party. If the court has jurisdiction but there is any defect in its exercise of jurisdiction it does not go to the root of its authority....

25. On consideration of the decisions of the Hon''ble Apex Court, I am of the view that the authorities cited by the learned Counsel appearing for the revision petitioner are not applicable to the facts and circumstances of this case, since there was no fraud alleged by the revision petitioner against the first respondent/auction purchaser, but only against decree-holders, though he was a party to all the proceedings.

26. It is not in dispute that one who comes to court must come with clean hands

and the process of the court should not be abused. Here in the instant case the revision petitioner herein and the first respondent/auction purchaser are the real contesting parties. The respondents 2 to 7 were only decree-holders and the suit in O.S. No. 11 of 1975 had been filed by them against M/s. K.M. Kadher Basha Sahib & Sons and they obtained a money decree. Pursuant to the decree, they brought the property for court auction sale, the decree was transmitted from Sub-Court, Badagara, Kerala State to the Sub-Court, Udumalpet and then transferred to Sub-Court, Pollachi and the entire sale consideration was deposited by the first respondent/auction purchaser into court. Being the decree-holders, respondents 2 to 7 are entitled to realise the amount, as per the decree and cannot raise any other plea, at this stage, adverse to the rights of the auction-purchaser.

27. It is an admitted fact that the first respondent was a successful bidder in the court auction sale held on 30.03.1988 and before the confirmation of sale, the revision petitioner in C.R.P (NPD) Nos. 1281 of 2007 and 2595 of 2007 and the judgment-debtors herein had filed applications challenging the court auction sale held on 30.03.1988. It is an admitted fact that the applications in E.A. No. 161 of 1988, E.A. No. 163 of 1988 and E.A. No. 327 of 1988 were heard together by the Executing Court and dismissed on merits. The auction sale, dated 30.03.1988 in favour of the first respondent/auction purchaser, was confirmed on 04.05.1990. The aforesaid facts are not in dispute. Against the order of dismissal, the revision petitioner and others, the judgment-debtors preferred Civil Miscellaneous Appeal in this court in C.M.A. No. 741 of 1990.

28. The C.M.A. No. 741 of 1990 was filed by the revision petitioner, K. Noor Mohammed and two others, namely his brother K. Majeed and M/s. K.M. Khader Basha Sahib and Sons against the first respondent and the decree-holders, who are the respondents 2 to 7 herein. Though the revision petitioner and two others had raised the same defence, by a detailed order, dated, 10.12.1990, discussing various aspects of the case, this Court dismissed the C.M.A. No. 741 of 1990 filed by the revision petitioner and two others.

29. Therefore, it is clear that the fraud alleged by the revision petitioner was negated by this Court in C.M.A. No. 741 of 1990 as baseless and

not sustainable in law against the respondents, especially against the first respondent, who is the real contesting respondent in the Civil Revision

Petitions, being the auction purchaser of the property. It is not in dispute that being the successful bidder, he deposited the entire amount into court

and the sale was also confirmed by the Executing Court on 04.05.1990.

30. The judgment reported in S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others, was also relied on by the

learned Counsel appearing for the first respondent/auction purchaser, wherein the Hon"ble Supreme Court has categorically ruled that one who

comes to court should come with clean hands.

31. It is a clear case by the first respondent/auction purchaser that he participated in the court auction sale and was the successful bidder in the

auction and that the sale was confirmed by the court below, according to law on 04.05.1990 and he had deposited the entire amount into court.

Therefore, on the facts and circumstances, there is no scope to hold that there was any fraud being played by the first respondent/auction

purchaser against the revision petitioner. On the other hand, the revision petitioner was a party to the suit as well as in the E.P Proceeding and the

C.M.A. No. 741 of 1990 filed by the revision petitioner along with two others for the same relief was dismissed by this Court on merits.

32. According to the learned Counsel appearing for the revision petitioner, in view of the dismissal of the suit against the revision petitioner, who

was the fourth defendant, the attachment against the property belongs to revision petitioner was raised and in E.P. No. 43 of 1986, only the

property belonged to the firm M/s. Khader Basha Sahib & Sons and its partners was brought for sale. Being the son of Khader Basha Sahib, the

petitioner was also arrayed as respondent. He had filed various Execution Applications before the Executing Court, that were dismissed on merits,

after hearing both sides.

33. The Civil Miscellaneous Appeal preferred by the revision petitioner, his brother K. Majeed and M/s. Kahder Basha Sahib & Sons in

C.M.A.No.741 of 1990 against the first respondent/auction purchaser and the decree-holders who are respondents 2 to 7 herein was dismissed

on 10.12.1990 only on merits. The same decided issues in the Civil Miscellaneous Appeal by this Court have been raised by the petitioner once

again by suppressing the facts. According to the first respondent/auction-purchaser, only the petitioner herein has suppressed the material facts

before this court, so as to create another round of litigation.

34. Division Bench of Patna High Court in Chandra Choor Deo and Another Vs. Smt. Krishnawati, has held that in a proceeding for execution of

a money decree by attachment and sale of the judgment-debtor's immovable property all objections to the executability of the decree have to be

raised before the order of attachment is made. If the notice under Order 21, Rule 22 is not served upon the judgment-debtor, that is a different

matter; but if in spite of service of notice he fails to raise an objection which he might and ought to have raised at that stage in the Court, before

passing the order for execution of the decree, it must be deemed to have decided the objection against him and the order attaching the properties

operates as res judicata in all further proceedings.

35. In the instant case, it is not in dispute that the revision petitioner in C.R.P (NPD) Nos. 1281 of 2007 and 2595 of 2007 was a party to the suit

as well as in the E.P and he raised various objections by filing Execution Application in bringing the property for sale along with the judgment-

debtors, however, the objection raised by the petitioner herein was negated by the Executing Court and that was confirmed by this court on

merits in C.M.A. No. 741 of 1990 by a detailed order. Pursuant to the sale certificate issued in his favour, the first respondent/auction purchaser

has filed E.A. No. 114 of 2005 for delivery of possession. In such circumstances, it is not open to the revision petitioner to raise the settled issues

once again by raising the same allegation that the properties were brought for sale by the decree-holders, respondents 2 to 7 fraudulently.

36. This Court, by order, dated 10.12.1990 made in C.M.A. No. 741 of 1990 has categorically held as follows:

The appeal is against an order dismissing the application for setting aside a sale. The appellants filed the application purporting to be under Sections

47 and 151 C.P.C., but a perusal of the application shows that the application will not fall u/s 47 C.P.C. All the grounds urged in the application

for setting aside the sale will be within the four corners of Order 21 Rule 90 C.P.C., as they relate to illegality, irregularity or fraud in the matter of

publication and conduct of sale....

In the said judgment, this Court has held further in paragraph 9 as follows:

As pointed out by me, the document has been created for the purpose of supporting the claim of the appellants that the property was sold in court

auction for a low value. The date of the document is very significant. The two applications were filed under Order 21 Rule 90 C.P.C by partners,

individually, one in April 1988 and another in Jun3 1998. The third application is filed on 15.11.1988, four days prior thereto the document in

question was brought into existence. Nothing more need to be stated about this document to reject the same as it is created evidence for the

purpose of application.

The finding of this court in C.M.A. No. 741 of 1990 is against the revision petitioner, who was the third appellant therein and the aforesaid finding

of this Court shows that the revision petitioner has no locus standi to raise the allegation that fraud has been played against him by the respondents

2 to 7, the decree-holders, since such an allegation could be available, on the facts and circumstances, only against the revision petitioner herein.

37. It is seen that E.A. No. 121 of 2005 in E.P. No. 43 of 1986 had been filed u/s 47 r/w 151 CPC and Order XXI Rules 64, 66 and 90 of the

Code of Civil Procedure. As contemplated u/s 47 CPC, all questions arising between the parties to the suit in which decree was passed, or their

representatives, relating to the execution, discharge and satisfaction of the decree, shall be determined by the court executing the decree and not by

a separate suit. Explanation (b) to Sub-section 3 of Section 47 CPC, clearly stipulates that all questions relating to the delivery of possession of

such property to auction- 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.

38. This Court in the aforesaid Civil Miscellaneous Appeal in C.M.A. No. 741 of 1990 has clearly held that the earlier application, seeking an

order to set aside the sale would be within the four corners of Order XXI Rule 90 CPC, though the petitioner herein and others had filed the

application before the Executing Court purporting to be u/s 47 and 151 CPC.

39. It is clear that Order XXI Rule 64 deals with the power to order the property attached, to be sold and proceeds to be paid to persons entitled.

Order XXI Rule 66 deals to proclamation of sales by public auction and as such,

Order XXI Rules 64 and 66 are not applicable to the relief

sought for by the revision petitioner in C.R.P (NPD) Nos. 1281 of 1007 and 2595 of 2007. Under Order XXI Rule 90 CPC, where any

immovable property has been sold in execution of a decree, the decree-holder or purchaser or any other person entitled to share in a rateable

distribution of assets, or whose interests are affected by the sale, may apply to the court to set aside the sale on the ground of a material irregularity

or fraud in publishing or conducting the sale.

40. The averments of the revision petitioner and the prayer sought for by him would attract only Order XXI Rule 90 CPC, but as per the order,

dated 10.12.1990 passed in C.M.A. No. 741 of 1990, this Court has categorically held that all the grounds urged in C.M.A. No. 741 of 1990 for

setting aside the sale, was within the four corners of Order XXI Rule 90 CPC, as they relates to illegality, irregularity or fraud in the matter of

publication and conduct of sale and accordingly, on merits, considering all the aspects and the grounds raised by the revision petitioner herein, the

Civil Miscellaneous Appeal was dismissed with costs.

41. The revision petitioner has filed the application relating to the Civil Revision Petition by raising the very same grounds that had been decided by

this court in C.M.A. No. 741 of 1990, wherein the petitioner herein had alleged fraud against the respondents 2 to 7, though they are only decree-

holders and the real contesting party is only the first respondent/auction purchaser. The petitioner in C.R.P (NPD) Nos. 1281 of 2007 and 2595

of 2007, he has raised the very same grounds that had been already decided in C.M.A. No. 741 of 1990 by this Court. Hence, it is only a clear

abuse of process of the Court, as rightly argued by the learned Counsel appearing for the first respondent/auction purchaser. It is a settled

proposition of law that no party to a proceeding is entitled to create a second round of litigation after the issues were finally decided. Had the

Revision Petition really aggrieved by the order, dated 10.12.1990 passed by this court in C.M.A. No. 741 of 1990, he could have challenged the

order, as per procedure known to law, since he was a party therein. But, he cannot raise the very same grounds subsequently before the Executing

Court, by way of filing Execution Application and after its dismissal, again approach this Court by way of revision.

42. It is seen that the E.A. No. 1371 of 2006 relating to C.R.P (NPD) No. 1191 of 2008 has been filed by one Kanagarathinam, claimant/third

party before the Executing Court, seeking an order to make necessary amendments in E.P. No. 43 of 1986 to implead the legal heirs of the

decree-holder. E.A. No. 1370 of 2006 relating to C.R.P.(NPD) No. 1242 of 2008 was filed by her before the Executing Court, seeking stay of

the E.P Proceedings in E.P. No. 43 of 1986 in O.S. No. 11 of 1975 till the amendment for impleading the parties and carry out in the Execution

Petition.

43. This Court is of the considered view that the Civil Revision Petition filed in C.R.P (NPD) No. 1191 of 2008 and C.R.P (NPD) No. 1242 of

2008 by the petitioner, who is a third party to the suit and the E.P, is a clear example for abuse of process of court. In E.A. No. 1371 of 2006

relating to C.R.P (NPD) No. 1191 of 2008, the petitioner has sought an order to direct the surviving decree-holder or auction purchaser to make

necessary amendments in E.P.No.43 of 1986 to implead the legal heirs of the deceased decree-holder. It is an admitted fact that the respondents

2 to 7 are the decree-holders, however, the petitioner has not specifically stated the name and other details of any deceased decree-holder and

similarly, she has not given the particulars of their legal heirs of such deceased decree-holder, either in the Execution Application or in the

supporting affidavit. She has not even stated anything about her locus standi to maintain the E.A. No. 1371 of 2006, as well as her revision petition

in C.R.P (NPD) No. 1191 of 2008. Similarly, E.A. No. 1370 of 2006 relating to C.R.P (NPD) No. 1242 of 2008 has been filed by her seeking

stay of all the proceedings in E.P. No. 43 of 1986 till the said amendment is carried out.

44. Though the petitioner/third party has stated in the affidavit, dated 28.03.2007 that E.A. No. 118 of 2005 to reopen the E.P, had been

dismissed by the court below. It is seen from the copy of the order, dated 04.04.2007 passed by the Executing Court in E.A. No. 1371 of 2006

in E.A. No. 118 of 2005 in E.P. No. 43 of 1986 that the said main application had already been dismissed by the Executing Court and the

subsequent re-open petition filed by the petitioner was also dismissed. Suppressing the facts, the revision petitioner/third party has preferred the

revision petitions in C.R.P (NPD) Nos. 1191 of 2008 and 1242 of 2008. Hence, they are liable to be dismissed with costs.

45. As contended by the learned Counsel appearing for the first respondent/ auction purchaser, only after the order passed in C.M.A. No. 741 of

1990, the third party has filed the application before the Executing Court. According to the third party/claimant, the first respondent/decreed-holder,

namely, Star of India is defunct now and therefore, as per Order XXI Rule 64 CPC, the legal heirs of the said first respondent could have been

impleaded. As per the plaint in O.S. No. 11 of 1975, the first respondent is stated as Star of India, a registered partnership firm. Had the firm been

dissolved, due to the death of any partner, it is left open to the erstwhile partners or the legal heirs of the deceased partners to implead them as

parties for getting the proportionate share amount payable to them as per the decree, that is being executed. After the auction sale is confirmed and

the entire sale consideration has been deposited by the first respondent/auction purchaser into court, the auction-purchaser is entitled to seek

delivery of possession of the property, as per Order XXI Rule 95 r/w 151 CPC, which cannot be objected to by any decree-holder or his legal

heirs. The petitioner/third party has no locus standi to seek an order, directing the decree-holders or the auction purchaser to implead the legal

representatives of the deceased decree-holder, even without furnishing any details, though the first respondent is a firm, which is a clear abuse of

process of the court by the revision petitioner/third party in C.R.P (NPD) Nos. 1191 of 2008 and 1242 of 2008.

46. It has been established clearly that the revision petitioner, Noor Mohammed in C.R.P (NPD) Nos. 1281 of 2007 and 2595 of 2007 was

already a party to the suit in O.S. No. 11 of 1975. The suit was decreed and the properties belong to the judgment-debtor, namely the partnership

firm, M/s. K.M. Khader Basha Sahib & Sons were attached. As per order, dated 26.10.1970 passed by Subordinate Judge, Badagara, in view

of the order passed in C.R.P. No. 1201 of 1979 by the High Court of Kerala, the suit against the revision petitioner, who was the fourth defendant

in the suit, was dismissed and the attachment against his property was also raised. Pursuant to the decree, the decree-holders filed the Execution

Petition, accordingly, the property belonged to the firm and its partners were brought for court auction sale and the first respondent was a

successful bidder and the sale was also confirmed by order, dated 04.05.1990. The first respondent/auction-purchaser has also deposited the

entire amount before the court below. This Court, by order dated 10.12.1990 passed in C.M.A. No. 741 of 1990 has clearly ruled that the Civil

Miscellaneous Appeal filed by K. Noor Mohammed, the revision petitioner in C.R.P. (NPD) Nos. 1281 of 2007 and 2595 of 2007 and two

others, seeking an order for setting aside the sale would be within the four corners of Order XXI Rule 90 CPC as they relates to alleged illegality,

irregularity or fraud in the matter of publication and conduct of sale and dismissed the Civil Miscellaneous Appeal on merits.

47. The revision petitioner by raising the very same grounds had filed E.A. No. 121 of 2005, that was rightly dismissed by the Executing Court.

The decisions cited by the learned Counsel appearing for the revision petitioner are no way applicable to the facts and circumstances of this case.

On the other hand, the materials available on record would show that the revision petitioner alone has suppressed the material facts and raised a

second round of litigation on the same grounds already raised by him and decided by this Court in the Civil Miscellaneous Appeal. It is very clear

that there is no scope for the revision petitioner for raising fraud as against the first respondent/court auction purchaser. The first respondent being

the auction purchaser having obtained sale certificate from the competent court, after the confirmation of sale is entitled to seek delivery of

possession. It is a second round of litigation and the grounds raised by the revision petitioner is not legally sustainable, but it is only an abuse of

process of court and therefore, I could find no illegality or material irregularity, which would warrant any interference of this Court in the impugned

order passed in E.A. No. 114 of 2005 in favour of the first respondent/auction purchaser. Therefore, C.R.P (NPD) Nos. 1281 of 2007 and 2595

of 2007 fail and the same are liable to be dismissed.

48. As discussed earlier in this common order, I am of the view that C.R.P (NPD) Nos. 1191 of 2008 and 1242 of 2008 are clear abuse of

process of court by a third party to the suit and E.P, hence, which are also liable to be dismissed with costs.

49. In the result, C.R.P (NPD) Nos. 1281 of 2007, 2595 of 2007, 1191 of 2008 and 1242 of 2008 are dismissed and both the revision

petitioners are directed to pay cost to the first respondent/auction-purchaser in the Civil Revision Petitions. Consequently, connected miscellaneous petitions are closed. Considering the facts and circumstances, the Executing Court is directed to proceed with the order, dated 04.04.2007 passed in E.A. No. 114 of 2005 on the file of the court below.