

(1991) 07 MAD CK 0009

In the Madras High Court

Case No : C.R.P. No's. 140 and 245 of 1989

Kamalam and Rajan and Sri Rajendra Mills Ltd., Salem

APPELLANT

Vs

V. Gopal and two others

RESPONDENT

Date of Decision : 10-07-1991

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1991) 07 MAD CK 0009

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : T.R. Rajagopalan, for the Appellant; U. Thiagarajan and V. Sundararaj, for the Respondent

Final Decision : Allowed

Judgement

Srinivasan, J.—These two Civil Revision Petitions have a long history, but the point that arises for consideration is a very simple one.

Unfortunately, it has been overlooked by the executing Court, which has resulted in the filing of these two revision petitions. Chronologically, there

was a mortgage by deposit of title deeds on 10.6.1959 in favour of Pandiyan Bank Limited, which was subsequently merged with Canara Bank.

There was a suit for recovery of certain money against the mortgagors by a third party creditor in O.S. No. 100 of 1960 on the file of Sub Court,

Salem, which ended in a decree. In execution of the decree, in E.P. No. 143 of 1964 items 2 to 5 of the suit properties were brought to sale.

While so, the mortgagee Pandiyan Bank filed a suit O.S. No. 185 of 1964, in Sub Court, Salem for enforcement of the mortgage. When that suit

was pending, defendants 2 to 10, who were the mortgagors, entered into an agreement of sale with respect to item 4 thereof on 11.11.1964 with

M/s. Rajendra Mills Ltd. The said Rajendra Mills Limited is the petitioner in C.R.P. No. 245 of 1989 and hereafter, it will be referred to as "the

1st petitioner". There was a preliminary decree in the suit on 1.3.1965. On 27.3.1965, defendants 2 to 10 executed a sale deed in favour of the

1st petitioner with a direction to pay a sum of Rs. 85,000/- to the Bank. On 21.7.1966, all the properties were brought to sale in court auction in

E.P. No. 143 of 1964 by the money-decree holder. They were purchased by one Kandasami Chettiar. On 31.7.1966, a final decree was passed

in the mortgage suit and the Bank filed R.E.P. No. 1 of 1967 for sale of the mortgaged properties. On 6.2.1967, the 1st petitioner got the sale

deed compulsorily registered in its favour with respect to item 4. Thereafter, the 1st petitioner filed R.E.A. No. 443 of 1967 in R.E.P. No. 143 of

1964 for setting aside the court auction sale held on 21.7.1966 with respect to item 4. The auction purchaser had taken possession on 11.1.1971

through Court, but on 28.4.1973, the application filed by the 1st petitioner to set aside the sale was allowed. On 1.12.1973, the auction purchaser

sold items 2, 3 and 5 to one Sahadevan, who is the 10th respondent in R.E.P. No. 1 of 1967. Sahadevan had filed R.E.A. No. 258 of 1976 for

impleading him as a party to the execution proceedings, but it was dismissed and he filed C.M.A. No. 556 of 1976 in this Court, which was

allowed. Consequently, he was impleaded as the 10th respondent in R.E.P. No. 1 of 1967. On 23.6.1980, the petitioners in C.R.P. No. 140 of

1989 purchased items 2, 3 and 5 from Sahadevan and his sons. Those petitioners are referred to hereafter as "petitioners 2 and 3. On 4.8.1980,

the Subordinate Judge, Salem, directed in R.E.P. No. 1 of 1967 the sale of items 1 and 4 in the first instance. The 1st petitioner filed C.R.P. No.

2337 of 1980 against the said order after getting leave of this Court to file the same in C.M.P. No. 8680 of 1980. The said revision petition was

allowed on 7.9.1982. The matter was remanded to the executing Court. this Court directed the 1st petitioner to implead himself as a party to the

execution proceedings. The 1st petitioner filed R.E.A. 223 of 1983 for impleading it as a party. That petition was ordered and the 1st petitioner

was impleaded. One of the judgment debtors, by name, V. Gopal, who is the 1st respondent in these revision petitions, filed R.E.A. No. 850 of

1983 for appointment of a Commissioner to make local inspection, etc. and R.E.A. No. 851 of 1983 for the appointment of a Receiver for items

2, 3 and 5. He did not implead petitioners 2 and 3 as parties to those applications. It may be noted that item 4 is not one of the properties, for

which, appointment of Receiver was sought. Both petitions were ordered on 1.10.1983. Petitioners 2 and 3 filed R.E.A. Nos. 881 and 883 of

1983 for setting aside the orders made in R.E.A. Nos. 850 and 851 of 1983. Those applications were allowed on 6.1.1984. The executing Court

found that the 1st respondent was guilty of abuse of process of Court in filing R.E.A. Nos. 850 and 851 of 1983. The 1st respondent filed C.R.P.

Nos. 738 and 739 of 1984 in this Court against the orders in R.E.A. Nos. 881 and 883 of 1983. But the revision petitions were not pressed

ultimately and they were dismissed on 27.6.1986. The 1st respondent also filed C.R.P. Nos. 736 and 737 of 1984 against the orders in R.E.A.

Nos. 850 and 851 of 1983, which were consequential to the orders in R.E.A. Nos. 881 and 883 of 1983. this Court set aside those orders on the

ground that they were non-speaking orders and remanded the same for fresh consideration. Obviously, it was not brought to the notice of this

Court that the orders in R.E.A. Nos. 850 and 851 of 1983 were consequential to the orders in R.E.A. Nos. 881 and 883 of 1983.

2. After remand, the learned Subordinate Judge directed the 1st respondent to implead the necessary parties to his applications in R.E.A. Nos.

850 and 851 of 1983. The learned Subordinate Judge viewed that petitioners 2 and 3 were necessary parties, as they had purchased items 2, 3

and 5 from the 10th respondent on 23.6.1980. However, the 1st respondent filed C.M.A. No. 680 of 1987 in this Court against the said direction

to implead necessary parties.

3. The C.M.A. was presented in this Court on 3.8.1987 and taken on file on 4.8.1987. The matter was posted for admission on 5.8.1987. On

that day the learned Judge who heard the appeal for admission, passed the following order:

It is seen that this Court in C.R.P. No. 737 of 1984 directed the learned Subordinate Judge to dispose of the matter on merits after setting aside

the order already passed in E.A. No. 850/83 on 6.1.1984. The learned Judge instead of complying with the order passed by this Court and

disposing the matter on merits, has directed the petitioner to implead the other parties in this petition by 10.8.1987. It is brought to my notice by

Learned Counsel for the appellant that except the decree-holder, respondents 2 to 9 were already ex parte and at regards respondent No. 10 is

concerned, he has already parted with the property and this Court has already found him not entitled to marshalling and so they are not necessary

parties in the present proceedings. In the circumstances the Court below is directed to dispose of the application on merits without insisting to

implead the other respondents. This appeal is ordered accordingly.

Thus, the learned Judge allowed the appeal even without admitting the appeal or issuing notice to the respondents therein. The matter was brought

to this Court again "on being mentioned on 23.10.1987. It was represented to the learned Judge that there was a mistake in the number of the

application which was stated as R.E.A. No. 850 of 1983 but the correct number was R.E.A. No. 850 of 1983. Thereupon, the learned Judge

directed the correction to be made and also gave a direction that the Subordinate Judge should take up the matter and dispose of the same

positively of 9.11.1987.

4. In view of the order made in C.M.A. No. 680 of 1987, referred to above, the learned Subordinate Judge allowed the application R.E.A. No.

851 of 1983 on 25.11.1987 appointing a receiver. That order was challenged in C.M.A. No. 53 of 1988 in this Court by the 1st petitioner on the

ground that the receiver was trying to dispossess the 1st petitioner of item 4. Subsequently, on 25.1.1988, the 1st petitioner entered into a

compromise with the decree holder (Bank) and similarly, petitioners 2 and 3 also entered into a compromise. By virtue of the settlement, the 1st

petitioner paid Rs. 1,08,000/- to the Bank and petitioners 2 and 3 paid Rs. 3,82,760/- to the Bank. On receipt of the amounts, the Rank filed a

memo in the executing Court, which read as follows:

This execution petition is not pressed since the matter settled out of Court. The decree-holder prays that the Hon"ble Court may be pleased to

dismiss the petition as not pressed without costs and render justice.

5. Accordingly, the execution petition was dismissed by the executing Court on 29.1.1988 and the receiver was discharged. Consequently, the 1st

petitioner withdrew C.M.A. No. 53 of 1988 as settled out of Court.

6. The 1st respondent herein filed R.E.A. No. 294 of 1988 for discharging the receiver from receivership and directing him to deliver the

properties taken over by him and in his custody pursuant to the order in R.E.A. No. 851 of 1983. He also filed R.E.A. No. 230 of 1988 for the

return of the title deeds filed in Court under O.34, R.5, C.P.C. The 10th respondent in the E.P., viz., Sahadevan filed E.A. No. 360 of 1988 for

delivery of possession to him of items 2, 3 and 5 by the receiver. To the above petitions, the petitioners herein were not made parties. Petitioners 2

and 3 filed R.E.A. Nos. 963 to 965 of 1988 for impleading them as parties in E.P. No. 1 of 1967 and for directions. The executing Court heard

R.E.A. Nos. 230, 294 and 360 of 1988 together and disposed them of by a long order containing about 100 pages. But, the order part of it runs

only to a page and a half. The rest is only a reproduction of the affidavits filed in support of the petitioners, counter affidavits and the written

arguments submitted by counsel. The executing Court held that the first respondent was entitled to get possession of the properties from the

receiver and allowed the petitions filed by him. The petition filed by Sahadevan was dismissed. Consequent to the said order, the executing Court

dismissed R.E.A. Nos. 963 to 965 of 1988 filed by petitioners 2 and 3.

7. These two revisions are filed against the order of the executing Court in R.E.A. No. 294 of 1988 directing the receiver to deliver possession of

properties to the first respondent. The petitioners obtained leave of this Court to file revision petitions as they were not parties to the application

before the executing Court. There is no revision petition against the orders in the other applications.

8. A bare perusal of the facts stated above clearly shows that the first respondent is not entitled to get possession of the properties from the

receiver. Item 4 was sold by the judgment-debtors including the first respondent to the first petitioner. I have already referred to the relevant

transactions. It was the first petitioner who got the Court auction sale of the said item set aside by filing R.E.A. No. 443 of 1967 in R.E.P. No.

143 of 1964. As regards items 2, 3 and 5, petitioners 2 and 3 purchased from Sahadevan, who in turn purchased them from Kandhaswamy

Chettiar, the Court auction purchaser. I have already referred to the fact that the Court auction purchaser took possession of all the properties

through Court on 11.1.1971. Thus, the title and possession of the properties had gone out of the judgment-debtors long back and they had no

interest in them thereafter. The order of the executing Court in favour of the first respondent does not contain any appreciable reasoning. It states

merely that the written arguments submitted by counsel for the first respondent were well-founded.

9. Learned Counsel for the first respondent contends before me that the executing Court dismissed the execution petition and the decree remains

unsatisfied for the purpose of the record. Further, according to him, a fresh execution petition cannot be filed as it will be time-barred. Hence, it is

argued that the first respondent being one of the mortgagors is entitled to take possession of the properties since the purchasers of the properties,

i.e., the petitioners, had not complied with the terms of the conveyance and discharged the mortgage decree. This contention is wholly without any

substance. I have already referred to the fact that the decree-holder had filed a memo in the executing Court stating that the matter has been settled

out of Court and it is on that basis the execution petition was not pressed. The petition was dismissed only on filing the memo. If there was no

certification of the payment of the decree amount and satisfaction of the decree, the decree-holder could if at all take advantage of the same; but

certainly not the judgment-debtors. The Judgment-debtors having parted with their title decades back cannot claim to be entitled to possession of

the properties. In fact, in this case, there was no necessity for certification of payment separately. The memo filed by the decree-holder proves that

the decree had been satisfied by settlement outside Court. The fact that the decree-holder who is no longer interested in executing the decree will

not nullify the transactions between the judgment-debtors and the petitioners or enable the judgment-debtors to wriggle out of the same.

10. Learned Counsel for the first respondent submits that the receiver took possession of the properties from the first respondent and, therefore,

the latter is entitled to get back possession. Even the averments made in the affidavit filed in support of the application for appointment of receiver

viz. R.E.A. No. 851 of 1983 prove that possession was not with the first respondent at that time. In fact, he would not have filed any application

for appointment of receiver if he had been in possession of the properties. On the other hand, the allegations in the affidavit were that third parties

were attempting to cause damage to the properties and trying to waste the same. The first respondent referred to petitioners 2 and 3 herein as third

parties. But, they had in fact purchased the property from Sahadevan, who was a purchaser from the Court auction purchaser. It is futile on the

part of the first respondent to contend that he was in possession before the appointment of receiver and that the receiver took charge of the

properties from him. The records prove the contrary. The report filed by the receiver does not also support the claim of the first respondent.

11. It is argued that the first respondent being the person at whose instance the receiver was appointed, is entitled to get possession from the

receiver on the termination of the proceedings. There is no substance in this contention. The receiver was not appointed in a proceeding between

the petitioners on the one hand and the first respondent on the other. In fact, the first respondent secured the appointment of receiver behind the

back of the petitioners, without impleading them as parties. The petitioners had no opportunity to contest the application for appointment of

receiver. The application was dismissed by the executing Court consequent to the orders in R.E.A. Nos. 881 and 883 of 1983 on a finding that the

first respondent was guilty of abuse of process of Court. But, without bringing the facts to the notice of this Court, the first respondent managed to

get his C.R.P. Nos. 736 and 737 of 1984 allowed by this Court on the ground that the executing Court had passed non-speaking orders and the

application for appointment of receiver remanded for fresh consideration. At any rate, the order appointing a receiver made by the Executing Court

cannot bind the petitioners and no reliance can be placed thereon by the first respondent to defeat the rights of the petitioners.

12. It is then contended that this Court held in C.M.A. No. 680 of 1987 that the petitioners were not necessary parties to the petition for

appointment of receiver and directed the executing Court to dispose of the petition within a specified time and, therefore, the order of the executing

Court is binding on the petitioners and at any rate they cannot challenge the validity thereof. I have already referred to the fact that the order in

C.M.A. No. 680 of 1987 was made at the stage of admission without even notice to the respondents. For the second time the first respondent

was guilty of suppression veri and suggestio false and he obtained the said order. He did not inform this Court of its earlier order in C.R.P. No.

2337 of 1980 and the orders of the executing Court is R.E.A. Nos. 881 and 883 of 1983. this Court was misled to believe that the executing

Court was acting contrary to the directions issued by this Court in C.R.P. No. 737 of 1984 by directing the first respondent to implead the

necessary parties to R.E.A. No. 850 of 1983. Hence, it is not open to the first respondent to rely on an order which he obtained from this Court

by concealing the relevant facts.

13. Even otherwise, the order made in C.M.A. No. 680 of 1987 is unsustainable as it is one allowing an appeal at the admission stage without any

notice to the respondents or giving an opportunity to them to be heard. Such an order cannot bind the petitioners herein. In *The Management*

of Oriental Mercantile Agency Vs. The Presiding Officer and Others, the Supreme Court had considered the validity of an order of a Division

Bench of this Court in a Writ Appeal while dismissing the appeal in limine but containing remarks prejudicial to the rights of the respondent. In that

case an industrial dispute was referred to the Labour Court for adjudication. The question was whether the non-employment of its workmen was

justified and what relief they were entitled to. The Labour Court held that the non-employment of the workmen was justified and they were not

entitled to any relief. A writ petition was filed by the workmen and a single Judge of this Court held that the non-employment was unjustified and

set aside the order of the Labour Court. The learned single Judge remanded the matter back to the Labour Court for granting reliefs to the

workmen on the basis of his finding. An appeal was filed by the management and it was dismissed in limine. But the Appellate Bench observed that

the effect of the judgment of the single Judge was to set the entire matter at large and the Labour Court should decide the case afresh on all the

issues. What happened thereafter in that case is no necessary for the purpose of this judgment though the matter became intriguing and complicated

on account of subsequent orders passed by the single Judge and Division Benches. Suffice it for this case to refer to the observations made by the

Supreme Court on the order passed by the Division Bench referred to above:

We have no doubt that the learned Judges who dismissed Writ Appeal 113 of 1967 were, with respect, in error in making observations which

were calculated to prejudice the workmen without giving them an opportunity of being heard. True, that the appeal of the management was

dismissed but that was only in form. In substance, the management got the

relief it wanted, because it was really interested in getting over the judgment of Venkatadri, J. so that the Labour Court to which the matter was remitted could commence a fresh adjudication. The Division Bench, by its order of summary dismissal, asked the Labour Court to start scratch, in total violation of the principles of natural justice. We are also clear that, apart from this, the Division Bench was in error in taking the view that Venkatadri, J. had not expressed a final conclusion on the questions arising before him. It is unfortunate that the learned Judge remitted the matter to the Labour Court for "fresh disposal", for had he, as he ought to have, specifically directed the Labour Court to pass final orders in accordance with his judgment, the unsavory sequence of events following upon his order could have been easily avoided. That, however, is not to indicate approval in any manner of the view taken by the Division Bench that the learned Judge had released the proceedings for a fresh determination by the Labour Court. Thus, the order of the Division Bench in Writ Appeal 113 of 1967 is unsustainable.

14. In *The Director of Handlooms and Textiles, Office of the Director of Handlooms and Textiles, Madras and others v. K. Venkatesan and others* 1988-I.L.W. 605, a Division Bench of this Court strongly depreciated the practice of allowing writ petitions at the stage of admission

without issuing notice to the respondents, virtually granting the relief desired by the petitioner though technically the order is termed as one of

dismissal. The Division Bench observed as follows:

... Allowing a writ petition straightaway when it comes up for admission is therefore an improper disposal, even though the power exercisable is

under Art.226 of the Constitution of India. The principles of fair play and justice are not excluded, when this power is invoked. It has become

necessary to elaborate upon this point because this is not the first case wherein a writ petition without issue of notice to respondents and without

hearing them, gets ordered as it comes up for admission. There are instances in which writ petitions are dismissed in admission stage, but directions

are issued for compliance, which virtually results in petitioner getting the desired relief. This sort of directions or conditions imposed in admission

stage, but technically concluding the order as dismissed or ordered accordingly, would not also be proper or permissible, because to the extent

relief is extended by such manner of disposal leads to respondents without notice, being compelled to do certain acts, about which they have not been heard at all.

15. In *Hajee Syed Ishaq Sahib v. Hajee A. Moqdoom Sheriff and others* 1988 T.L.N.J. 325 I had occasion to point out that when a revision or

appeal is dismissed in limine without notice to the respondent, the decision might be binding on the petitioner or appellant and may operate as *res*

judicata against him in a subsequent proceeding with reference to issue decided against him but it cannot operate as *res judicata* as against the

respondent who had no opportunity to put forward his case.

16. Thus, the order in C.M.A. No. 680 of 1987 is of no effect in so far as the petitioners are concerned. They are, therefore, entitled to question

the correctness and validity of the order of the executing Court appointing a receiver without hearing them. At any rate, that stage having passed

now and the receiver having claimed to have taken possession, it is certainly open to the petitioners to appear before the executing Court and claim

that they are entitled to be put back in possession when the receiver is discharged. They are in no way prevented from making such a claim and

enforcing their rights as against the first respondent, by the order of this Court in C.M.A. No. 680 of 1987. Hence, the contentions advanced by

Learned Counsel for the first respondent are negatived. The order passed by the executing Court in R.E.A. No. 294 of 1988 directing delivery of

possession to the first respondent is unsustainable and it is hereby set aside. These two Civil Revision Petitions are allowed and E.A. No. 294 of

1988 filed by the first respondent herein is dismissed. It is stated that pursuant to the order of the executing Court the first respondent claims to

have taken possession from the receiver. If that is so, he is bound to deliver the property to the petitioners herein, who are rightfully entitled

thereto. It is open to the petitioners to file appropriate applications before the executing Court, if necessary, for appropriate reliefs. It is made clear

that neither the first respondent nor other judgment-debtors have any right to claim possession of any of these properties as they have already

parted with their title. The petitioners are entitled to their costs in these revision petitions which shall be paid by the first respondent.