



C.R.P.(MD)No.53 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 26/03/2024

CORAM

The Hon'ble Mr.Justice **G.ILANGOVAN**

C.R.P (MD) No.53 of 2024

and

CMP (MD) No.293 of 2024

Eswari : Petitioner/Petitioner/
7th Defendant/Nil
Vs.

G.Kutha Baksh (Died)

1.K.Saleem
2.K.Haleem
3.K.Hasina Banu
4.K.Nayeem
5.K.Shaniya Banu : Respondents 1 to 5/
Respondents/Petitioners/
Plaintiffs

Mayandi (Died)

Ramu (Died)

6.Notchi @ Chandran
7.Seeniammal
8.Boomadevi
9.Valli : Respondents 6 to 9/
Respondents/Respondents/
Defendants

PRAYER:-Civil Revision Petition has been filed under Section 115 of the Code of Civil Procedure, to set aside the fair and decreetal order, dated 29/09/2023 passed in EA No.117 of 2020 in E.P No.165 of 1991 in OS No.995 of 1990 on the file of the Principal District Munsif Court, Madurai Town.



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For Petitioner : Mr.M.Vallinayagam
Senior Counsel
for Mr.M.Kannan

For Respondents : Mr.S.Prabhu Rajadurai
for Mr.Ponnaiah

O R D E R

This civil revision petition is filed seeking an order to set aside the fair and decreetal order, dated 29/09/2023 passed in EA No.117 of 2020 in EP No.165 of 1991 in OS No.995 of 1990 by the Principal District Munsif, Madurai Town.

2.The facts in brief:-

Suit in OS No.995 of 1990 was filed by the deceased G.Kutha Baksh as plaintiff against one Mayandi, who is deceased now. The legal-heirs of Mayandi were brought on record as defendants. The relief sought in the suit is for mandatory injunction directing Mayandi to remove the superstructure put up by him in the suit property, for permanent injunction preventing Mayandi from putting up further construction and superstructure in the suit property. The suit property is mentioned as 10 cents situated in R.S No.168/17 in Vilangudi Village, Madurai North Taluk.



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3.In that suit, Mayandi remained *ex-parte*. An *ex-parte* decree and judgment was passed on 24/10/1990 as prayed for in the plaint. To execute the decree passed in OS No.995 of 1990, EP No.165 of 1991 was filed by the legal-heirs of the Decree Holder namely the respondents 1 to 5 herein against the Legal-heirs of the Judgment-Debtor Mayandi, who are the respondents 6 to 9 herein.

4.In EP No.165 of 1991 delivery was ordered on 31/07/1991. Second time delivery was ordered on 11/06/1998. A partial delivery was effected on 11/01/1999 and the third time delivery was effected on 31/01/2008. Later on 22/01/2008, EA No.656 of 1999 was filed by Natarajan, Duraipandi, K.Rajangam, R.Subraanian and Sithan under Order 21 Rule 97 CPC. That was dismissed on 22/01/2008. Another application was filed by Rajangam in EA No.385 of 2008 under the very same provision. That was dismissed on 29/01/2013.

5.Similarly, one Balamurugan also filed EA No.118 of 2013 under the very same provision. That also came to be dismissed on 30/06/2016. Later, this petitioner namely Eswari filed EA No.241 of 2016 under section 47 CPC to declare that the decree passed in OS No.995 of 1990 is null and void. That was not-pressed by her and so, it was



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dismissed on 02/11/2016. Again, on the very same day, this petitioner namely Eswari filed in EA No.242 of 2016 under Order 21 Rule 97 CPC and also the present subject matter petition in EA No.117 of 2020 was filed under order 47 CPC. That came to be dismissed on 29/09/2023.

6.Against which, this civil revision petition is preferred by the petitioner, who is the 7th defendant.

7.These are the dates and events, as admitted by both sides and also mentioned in the typed set of papers.

8.Before we go into the merits of the matter, the learned Senior Counsel appearing for the petitioner would submit that the Execution Court, without going into the merits of the matter, dismissed the very maintainability of the petition filed under Order 47 CPC by making the following observation.

"20.மனுதாரர் மோசடியாக O.S.No.995/1990 வழக்கில் தீர்ப்பாணை பெற்றுள்ளார் என்றும் அந்த தீர்ப்பாணை செல்லாநிலையது என்று விளம்புகை செய்ய வேண்டி பரிகாரம் கோரியுள்ளார். O.S.No. 995/1990 வழக்கில் மோசடியாக தீர்ப்பாணை பெறப்பட்டுள்ளது என்பதை எதிர்வாதம் செய்ய வேண்டிய பொறுப்பு அசல் வழக்கின் பிரதிவாதியும், 7ம் எதிர்மனுதாரரான மாயாண்டி என்பவரை சேரும்.



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ஆனால் அவர் எவ்வித எதிர்வாதம் செய்யாது இருந்துள்ளார் என்பதை அறிய முடிகிறது. ஒரு வழக்கின் தீர்ப்பாணை நிறைவேற்றுகை மற்றும் தீர்த்தல் சம்பந்தமாக எழும் பிரச்சனை குறித்து தான் பிரிவு 47 மனுக்களில் தீர்மானிக்க முடியும். வழக்கின் தீர்ப்பாணை மோசடியாக பெறப்பட்டது என்ற சங்கதி குறித்து தீர்மானிப்பதற்கு இந்த தீர்ப்பாணை நிறைவேற்றுகை நீதிமன்றத்திற்கு எவ்வித அதிகாரம் இல்லையென்று இந்நீதிமன்றம் தீர்மானிக்கின்றது. மேலும் இந்த தீர்ப்பாணை நிறைவேற்றுகை நீதிமன்றம் தீர்ப்பாணைக்கு முரணாக செயல்பட முடியாது என்று இந்நீதிமன்றம் தீர்மானிக்கின்றது. மனுதாரர் முன்னிறுத்தியுள்ள வாதமான 1ம் எதிர்மனுதாரருக்கு வழக்குச் சொத்தில் முறையான உரிமைமூலம் இல்லை என்பதும், O.S.No. 495/1990 வழக்கில் மோசடியாக தீர்ப்பாணை பெறப்பட்டுள்ளது அது செல்லத்தக்கதல்ல என்று விளம்புகை பரிகாரம் குறித்து அசல் வழக்கு தாக்கல் செய்து நிவாரணம் தேடிக்கொள்ளலாம். எனவே மனுதாரர் மனுவில் கூறியுள்ள காரணங்கள் பிரிவு 47 சிபிசி-ன் கீழ் தாக்கல் செய்துள்ள இம்மனுவில் தீர்மானிப்பதற்கு ஏற்புடையதாக இல்லை என்று தீர்மானித்து மனுதாரர் தாக்கல் செய்துள்ள இம்மனு தள்ளுபடி செய்து உத்தரவு பிறப்பிக்கப்படுகிறது.”

9. So this observation, according to the learned Senior counsel, is not at all maintainable not only on the point of jurisdiction, but also on the point of factual issue.



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10.We need not go into the factual issues now at this stage. Now whatever it may be, the matter must be decided on the question of maintainability before going into the factual aspects, if required.

11.Reading of the observation made by the trial court shows that if the petitioner wants to challenge the decree under section 47 CPC, that can be proceeded by filing a separate suit. Another ground is that since Mayandi remained *ex-parte* before the trial court, this revision petitioner cannot maintain and challenge the decree under section 47 CPC.

12.The learned Senior Counsel appearing for the petitioner would submit that the Decree-Holder has fraudulently introduced the subject survey number in the partition deed, which is marked as Ex.A4. But actually, that property was not purchased by the Decree- Holder. By stealthily introducing the subject matter in the partition deed, they obtained a decree. According to him, it is nothing, but a fraudulent decree.

13.He would also further submit that the judgment passed by the trial court does not satisfy the requirement of law to be called as judgment. He will be



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referring to the Hon'ble Supreme Court judgment reported in ***Asma Lateef and another Vs. Shabbir Ahamed and others*** (2024 SCC Online 42).

14. But this point is left open to be decided by the Execution Court. So, I am not touching on this point. Now coming to the trace of title of the Decree-Holder, a lengthy history has been made in the written argument. In page No.17 of the written argument, it has been stated that the origin of title of the property is traced from 1928. As mentioned above, the subject property was not purchased by one Kayambu Servai under Ex.A20. As mentioned above, the subject property has been stealthily included in the partition deed. So, according to him, the decree obtained by suppressing the fact will amount to fraud, vitiating the entire proceeding. On the sole ground, he is entitled for the order as prayed for in EA No.117 of 2020.

15. Per contra, the learned counsel appearing for the respondents would submit that a similar application was filed by the petitioner, as noted in the preamble portion, later, he withdrew the same, so, the second petition is not maintainable.



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16.For which, the learned Senior Counsel appearing for the petitioner would submit that the earlier application was filed, when he was not brought on record. So it was dismissed as withdrawn. Later, he was brought on record. Thereafter only, the second application is filed. So, according to him, earlier withdrawal application will not stand in the way of entertaining the second petition.

17.Now leaving all those things, a greater judicial enquiry is required to record a finding as to whether the Decree-Holder, by suppressing the earlier title, obtained decree by fraud. When title of the parties is now questioned in view of the document ranging from 1928, I am of the considered view that the matter must be remitted back to the Execution Court to decide all the issues raised herein.

18.Even though, the case was heard on merit also, unless the evidences are brought on record in the proper form, a binding and conclusive finding can not be recorded. As mentioned above, a greater judicial enquiry is required.



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19.In the light of the controversy that has been raised by the parties, the order passed by the Execution Court not only on the point maintainability is not correct on record, but also on the point of jurisdiction. When fraud is raised, the matter must be decided on its own merit.

20.The observation of the Execution Court that only a separate suit will lie is also not correct. Section 47 CPC clearly bars a fresh suit. When the petitioner has been brought on record, then he is entitled to maintain the petition under section 47 CPC. But the trial court omitted to consider this aspect.

21.So without considering the facts and circumstances of the case, without going into the merits of the title claimed, the matter is remitted back to the trial court for fresh consideration.

22.In the result, this civil revision petition is **allowed**. The impugned order passed by the execution court is set aside. The matter is remitted back to the Executing Court to restore EA No.117 of 2020 on its file and dispose of the same on its own merits by affording opportunity to both parties to lead evidence both oral



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and documentary. Considering the oldness of the matter,
the Execution Court may dispose of the same at the
earliest taking the case as exceptional one. No costs.
Consequently, connected Miscellaneous Petition is closed.

26/03/2024

Index:Yes/No
Internet:Yes/No
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To,

- 1.The Principal District Munsif,
Madurai Town.
- 2.The Section Officer,
ER/VR Section,
Madurai Bench of Madras High Court,
Madurai.



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G.ILANGOVAN, J

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