

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 04.12.2014

Decided on : 16.02.2015

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.R.P(NPD)No.4493 of 2014
and M.P.No.1 of 2014

Navaneedha Kannan .. Petitioner / 14th Respondent

Vs

Radha (Died)

1.S.Raveeswaran @ Ravi

2.S.Rajendran

3.S.Manikandasamy

.. Respondents 5 to 16 / Plaintiffs

Balakrishnan (Died)

Karunakaran (Died)

Avinashiappan (Died)

K.Ramasamy (Died)

Ramasamy (Died)

Son of Arachalai

Krishnasamy (Exonerated)

P.M.Muthusamy Thevar (Exonerated)

A.V.Manicka Mudaliar (Died)

Nachimuthu Gounder (Exonerated)

4.P.Elango

5.P.Elavarasu

6.K.Leela @ Leelavathi

.. Respondents 4 to 6 / Judgment Debtors

7.Rayathal

8.Indirani

9.M.Viswanathan

10.M.Gnanavel

11.M.Balashanmugam
 12.M.Rathinavel
 13.Kamalam @ Kamala
 14.Saradhambal @ Saradhambal
 15.M.Angulakshmi
 16.M.Karunambigai
 17.Palanisamy
 18.A.Gurusamy
 19.Dhanabakkiam
 20.Ramathal @ Kutti

... Respondents 7 to 20 /
 Proposed Respondents 13, 15 to 27

Prayer: Civil Revision Petition is filed under Section 115 of CPC against the fair and final order in E.A.No.33 of 2013 in EP No.45 of 2004 in O.S.No.8 of 1981 dated 31.10.2014 pending on the file of Sub Court, Tiruppur.

For Petitioner : Mr.V.Bharathidasan
 For Respondents : Mr.V.Radhakrishnan,
 Senior Counsel for
 M/s.S.Kadarkarai

ORDER

This revision is directed against the order dated 31.10.2014 passed by the District Munsif, Avinashi in E.A.No.33 of 2013 in E.P.No.45 of 2014.

2. Brief facts necessary for disposal of the revision are as follows -

(i) One Radha, the mother of the respondents 1 to 3 had instituted a suit in O.S.No.8 of 1981 on the file of the Sub Court, Tirupur against one Balakrishnan and six others for declaration of title, recovery of possession and for other reliefs. After contest, the suit was dismissed by the trial court. Aggrieved by the judgment and decree, the plaintiff filed an appeal in A.S.No.2011 of 1983 before the District Munsif, Coimbatore. The Appellate Court allowed the appeal on 27.04.1984. Against the judgment and decree, the defendants 1 and 2 preferred Second Appeal in S.A.No.1271 of 1984 and the defendants 3 to 5 and 7 filed another appeal in S.A.No.1623 of 1984. This Court, dismissed both the appeals on 15.04.1998. Thereupon, the plaintiff laid an execution petition in E.P.No.45 of 2004. In the execution proceedings, the decree holder filed E.A.No.22 of 2008 to implead the LRs of the defendants 4 and 8, under Section 50 of CPC. The executing court allowed the application.

(ii) Aggrieved by the order, the petitioner who was impleaded as 14th defendant in the execution petition filed CRP NPD No.2436 & 3108 of 2012 contending that the application ought to have been filed under Order 21 Rule 22 CPC and the application filed under Section 50 of CPC is not maintainable. The learned counsel who was appearing for the respondent conceded that the application ought to

have been filed under Order 21 Rule 22 CPC. Therefore, this Court, on 17.12.2012 disposed of both the revision petitions giving direction to the respondents to file appropriate application under Order 21 Rule 22 CPC. Subsequently, the respondents 1 to 3 filed E.A.No.33 of 2013 under Section 50 and Order 21 Rule 22 and 151 of CPC to implead the respondents 13 to 27 as LR's of the deceased respondents 3, 4 and 8 in the execution petition. The application was resisted by the petitioner contending that the application is barred by limitation. Despite objections by the petitioner, the executing court allowed the application. Questioning the correctness of the order, the present revision is filed.

3. Mr.V.Bharathidasan, learned counsel for the petitioner submitted that the court below erred in allowing the application without considering the fact that the application filed by the decree holders is barred by limitation; that the 4th respondent in the execution petition died on 24.11.1997 but the present application to implead his LR's was filed after a period of 12 years from the date of the judgment in the second appeal; that the present application is not maintainable as the second appeal was dismissed on 15.04.1998 and that pending the appeal, the 4th respondent died on 24.11.1997 but the EP was filed on 30.03.2004 against the dead person. The learned counsel has

relied on the judgments reported in -

- (i) *AIR 1969 Bombay 84 [Presidency Industrial Bank v. H.L.Industries]*
- (ii) *AIR 1932 Allahabad 273 (FB) [Gobardhan v. Dau Dayal]*
- (iii) *AIR 1964 SCC 1454 [Venkanna v. Bangararaju]*

4. On the other hand, Shri V.Radhakrishnan, learned Senior Counsel for the respondents would submit that originally the suit was dismissed by the trial court on 16.02.1983 however the appeal filed by the plaintiff was allowed on 27.04.1984. The second appeals filed by the defendants were dismissed only on 15.04.1998 and the execution petition was filed on 30.03.2004, which is within the period of limitation. It is further contended that after the death of the defendants, pending second appeal, the defendants ought to have taken steps to bring the LRs on record and for the mistake committed by the defendants, the petitioners cannot be made to suffer.

5. The learned Senior Counsel further submitted that at the time of filing the execution petition, the decree holders were not aware of the death of the defendants, but subsequently they have taken appropriate steps to bring the LRs on record. In the earlier

revision, this court has directed the decree holder to file appropriate application under Order 21 Rule 22 CPC. Accordingly, the respondents 1 to 3 had taken out an application and the same was rightly allowed by the executing court which does not warrant any interference by this Court. The learned counsel has relied upon the following judgments -

(i) 1948 (2) MLJ 377 [Chinnan Chettiar v. Estate Manager, Sivaganga Estate]

(ii) 1992 (1) MLJ 420 [Sameera Rasheed by her Power Agent M.Abdul Rasheed]

6. It is not in dispute that the mother of the respondents 1 to 3 had instituted the suit for declaration and for recovery of possession. The suit was decreed by the Appellate Court in A.S.No.201 of 1983 on 27.04.1984. The second appeals filed by the defendants in S.A.Nos.1271 and 1623 of 1984 were dismissed by this Court on 15.04.1998. It is settled law that the decree passed by the trial court will merge with the decree of the Appellate Court. The decree holders had laid the execution petition on 10.08.2004 in E.P.No.45 of 2004. The respondent in the execution petition objected execution of the decree alleging that the LRs of deceased defendants were not brought on record. Only thereafter, the decree holders filed

execution applications to bring the LR's of the deceased defendants 4 and 8 on record.

7. This Court, in CRP Nos.2436 and 3108 of 2012, while setting aside the order of the executing court, directed the decree holder to file an application under Order 21 Rule 22 of CPC. Indisputably, the execution petition was laid against the judgment debtors who died pending the Second Appeals. In **1948 (2) MLJ 377**, cited *supra*, the Division Bench of this Court had an occasion to consider a similar case of an execution petition laid against the deceased judgment debtor. The Division Bench, following the judgment reported in **1893 (4) MLJ 8 = ILR 17 MAD 76** in the case of **Samia Pillai vs. Chockalingam Chettiar** has held that for the mistake of entering the name of the deceased judgment debtor in the execution application, as a party against whom execution was sought was only a bonafide mistake. The relevant portion is extracted hereunder -

It was suggested that Samia Pillai v. Chockalingam Chettiar was wrongly decided and should not be followed and our attention was drawn to Gulab Singh v. Nathu decided by a Single Judge as laying down the correct principle. If the matter were res integra in this Court, it would be a question for serious consideration whether the view expressed in the above case is not the sounder one. But

Samia Pillai v. Chockalinga Chettiar has never been departed from in this Court but has been followed in subsequent cases (e.g., *Subramania Desika v. Rangaswami Chettiar* and *Jagannath Rao v. Narayanamurthi*) and also in other High Courts (see *Bepin Behari Mitter v. Bibi Zohra* and *Shegobind Ram v. Mst.Kishunbasi Kuar*). In this state of the authorities we are inclined to follow the decision in *Samia Pillai v. Chockalinga Chettiar*, where, as already observed, the mention of the name of the deceased judgment -debtor as the person against whom relief in execution is sought was regarded as a matter for amendment under Order 21 Rule 17. In this view, the representatives of Kannappa having been brought on record by way of amendment in E.P.No.5784 of 1994 in the place of the deceased judgment-debtor, that application which was admittedly filed within twelve years from the date of the decree is not barred under Section 48 of the Code of Civil Procedure.

8. Hon'ble Mr.Justice M.Srinivasan, following the decision of the Division Bench in ***Sameera Rasheed's case***, cited *supra*, has held as follows -

12.With regard to the sustainability of the execution petition and continuation of the same as against the legal representatives, the matter is not res-integra. The matter has been considered at length by a Division Bench of this Court in *Chinnan Chettiar v. Sivaganga Estte Manaer*, (1948) 2 MLJ 377 : AIR 1949 Mad. 348. The Bench held that an execution application filed against a deceased Judgment-debtor is not a nullity and there is only a mistake in giving the particulars required by O.21, Rule 11(2) and the defect can be remedied by on amendment under O.21 Rule 17(1). It is worthwhile extracting the following observations made by the

Division Bench; as it lays down the law clearly:

“It was next urged that the present execution application was barred by Sec.48, C.P.C. The argument was put thus; the application having been filed against a deceased judgment-debtor, was a nullity even as a plaint filed against a deceased person is a nullity; see Veerappa Chettiar v. Tindal Ponnai, 17 M.L.J. 555 : ILR 31 Mad. 86. It become an effective application only when the legal representatives of Kannappa including that appellant were brought on record, and as this was done on 27th October, 1943, more than 12 years after the date of the decree, no order for execution should be passed on the application. This point, again is concluded against the appellant by the decision in Samia Pillai v. Chockalingam Chettiar, 4 MLJ 8: ILR. 17 Mad.76. In that case, the naming of a deceased judgment-debtor as the person against execution is sought was regarded as no more than a mistake in giving the particulars required under Sec.235 of the old Code Corresponding to O.21, Rule 11 (2) of the Present Code.”

The learned Judges observed:

“Where there has been in fact an application for execution made by the party entitled to make it the mere fact of a mistake having been made in giving the particulars by Sec.235, CPC cannot we think, have the effect of rendering the application a nullity.”

If so, the defect could be remedied under O.21, Rule 17(1) and when so remedied by amendment “it shall be deemed to have been an application in accordance with law and presented on the date when it was first presented.”

14. In view of the judgment of the Division Bench, which is binding on me, I hold that the application for execution filed by the first respondent is not barred by

limitation. The first respondent is entitled to execute the decree as against the legal representatives of the deceased judgment debtor as well as the petitioner herein, who has now been impleaded by my other in CRP No.3159 of 1989.

9. In the judgments cited by the learned counsel for the petitioner reported in **AIR 1969 Bombay 84 [Presidency Industrial Bank v. H.L.Industries]**, the Bombay High Court has held as follows -

(I) Limitation Act (1963) Art.136 - Execution application filed within 12 years of decree against judgment-debtors one of whom was dead - Application is nullity so far as deceased judgment-debtor is concerned - Even otherwise if legal representatives of deceased judgment-debtors are impleaded after 12 years, execution would be barred against them.

10. In **AIR 1964 SCC 1454 [Venkanna v. Bangararaju]** in that case, the decree holder while filing fresh application, omitted some of the parties in the subsequent applications. The question arose whether the subsequent application to continue the previous application or a fresh application. In those facts, the Hon'ble Apex Court has held that it would a fresh application if it is asked for a relief against the parties or proposed parties are different from those proceeded against in the previous execution

petition.

11. In **AIR 32 Allahabad 273 [FB] [Gobardhan v. Dau Dayal]**, the Hon'ble Full Bench has held as follows -

(d) Limitation Act (1908), Art.182 - Continuation of proceedings - Application asking new relief cannot be treated as continuation.

An execution application asking for a new relief cannot be treated as an application for the revival or continuation of the previous execution proceedings. When the character of the application is different from that of the previous application, it cannot be treated as a continuation.

12. In view of the judgments of the Hon'ble Division Bench and Single Judge of this Court, I am unable to accept the decision of the Bombay High Court reported in **AIR 1969 Bombay 84 [Presidency Industrial Bank v. H.L. Industries]**, cited *supra*. The other two judgments relied on by the learned counsel for the petitioner do not have bearing on the facts of this case.

13. In the case on hand, it is not in dispute that the Execution Petition was filed in time. However, the petitioner resisted the petition filed to bring the legal heirs of the deceased Judgment

debtors 4 and 8 contending that it is barred by limitation. In the light of the judgments of this Court, the objections of the petitioner cannot be countenanced. The trial court has rightly allowed the application which does not warrant interference by this Court. I do not find any merits in this revision.

14. In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

16.02.2015

Index:Yes
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To

The Sub Court,
Tiruppur.

K.KALYANASUNDARAM,J
rgr

Pre-delivery order in
C.R.P(NPD)No.4493 of 2014

16.02.2015