

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.12.2014

Delivered on : 23.01.2015

Coram

THE HONOURABLE MR. JUSTICE B. RAJENDRAN

Second Appeal No. 422 of 2012

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1. Shanmugam
2. Shankar
3. Rajendran
- Amirthammal (died)
4. Jayalakshmi
5. Selvaraj
6. Sundarangathan
7. Bhavani Bai .. Appellants/Defendants

Versus

1. The Child Trust
rep. by its Trustees
(1) Sri. J.H. Tarapore
(2) Sri. K.R. Ramani
(3) Sri. S.V. Narasimhan
(4) Sri. V.R. Raghavan
(5) Sri. N. Shankar
(6) Sri. V. Chidambaram
(7) Sri. S.L. Chitale
(8) Sri. N.R. Rajagopalan
(9) Sri. Rajiv Rai
(10) Sri. Snehalatha Datar
(11) Sri. Mahendra Dadha
(12) Sri. S.A. Balasubramaniam
substituted instead of
Dr. M.S. Ramakrishnan (died)
(13) Sri. Padmanabha Rao
(14) Smt. Hemalatha Ramamani

Annapoorani Ammal (died)
Chinnappa Naicker (died)
Kanniah (died)
Muthu Achari (died)

2. Ramaiah (given up) Gokulapathy (died)
3. Mrs. Thayarammal
4. Thambiah (given up)

Natesa Mudaliar (died)
Mrs. Mariammal (died)

5. Radha Ammal
6. Shakunthala
7. Pankajam
8. Saraswathi
9. Kausalya
10. Manohar
11. Govindasamy
12. Magalakshmi
13. Mallika
14. Sarasu
15. Velu
16. Seetha Ramji

.. Respondents /defendants

Second Appeal filed under Section 100 of the CPC against the Judgment and Decree dated 12.08.2011 made in A.S. No. 51 of 2008 on the file of Additional District Judge, II Fast Track Court, Chennai confirming the judgment and decree dated 06.08.2007 made in O.S. No. 12738 of 1996 on the file of I Asst. Judge, City Civil Court, Chennai.

For Appellants : Mr. S. Parthasarathy, Senior Advocate
for Mr. J. Saravanavel

For Respondents : Mr. A.L. Somayaji, Senior Advocate
for Mr. K. Chandrasekaran for R1

Mr. K.V. Anandhakrishnan
for Mr. V. Chandrasekaran for RR5 to 15

RR2 and 4 given up

No appearance for RR3 and 16

JUDGMENT

The defendants 2, 3, 11, 12, 14 and 15 in O.S. No. 12738 of 1996 on the file of the learned I Assistant Judge, City Civil Court, Chennai are the appellants in this appeal. The said suit was filed by the Plaintiffs/respondent No.1 and the deceased Annappoorani Ammal praying for a declaration to declare that they are the owners of B Schedule property mentioned in the plaint; for a direction to the defendants to deliver vacant possession of the suit property and for costs. The suit was decreed by the trial court and it was affirmed by the first appellate Court. The defendants, having suffered a concurrent decision before the courts below, have filed the present second appeal.

2. For the sake of convenience, the parties in this appeal shall be referred to as "plaintiffs" and "defendants" as has been arrayed before the trial court.

3. According to the plaintiffs, the suit property was purchased by one P.N. Krishna Iyer, husband of second plaintiff Annappoorani Ammal, by a registered sale deed dated 27.03.1944. The brother of the said P.N. Krishna Iyer namely Mr. P.N. Easwara Iyer filed Civil Suit No. 367 of 1950 before this Court claiming

partition of the suit property along with other properties on the ground those properties are family properties over which P.N. Krishna Iyer has no exclusive right. The suit in C.S. No. 367 of 1950 was resisted by the defendants therein contending that the suit property is not a joint family property but it was the exclusive property of Krishna Iyer. The suit was decreed against which Original Side Appeal was filed before this Court. During the pendency of Original Side Appeal, Mr. K.R. Venkatarama Sharma was appointed as advocate receiver to manage the properties covered in the suit. There were occupants in the suit property and therefore the advocate receiver filed various suits against the occupants of the suit property. The advocate receiver filed O.S.No. 867 of 1962 against the 7th defendant in this suit namely deceased Gokulapathy. O.S. No. 1109 of 1962 was filed against the first defendant - Chinna Naicker, husband of the fourth defendant namely Mrs. Kanniah and father of the third defendant namely Kanniah. Similarly, O.S. No. 1410 of 1962 was filed by the advocate receiver against T. Kanna. O.S. No. 1411 of 1962 was filed against Muthu Asari and others. In the above said suits, the occupants claiming themselves to be tenants inducted by one Lakmana Naicker contended that they are entitled to remain in possession of the property. Ultimately, the suits filed by the Advocate Receiver was decreed on 18.09.1963 by the learned II Assistant Judge, City Civil Court, Madras and the occupants were directed to handover delivery of possession to the advocate receiver. As against the decree and judgment passed on 18.09.1963, A.S. Nos. 327 of 1964, 723 of 1967, 724 of 1967 and 259 of 1965 were filed by some of the occupants. All the appeals filed by the occupants were dismissed by this Court in A.S. Nos. 329 of 1964 and 723 and 724 of 1967 by a judgment dated 22.04.1971 confirming the decree and judgment passed by the trial court. In so far as the suit filed against the second plaintiff Annapoorani Ammal, by Easwara Iyer, her brother-in-law, it was appealed before the Honourable Supreme Court in Civil Appeal No. 1278 of 1968 and by judgment dated 05.05.1978, the title of Annapoorani Ammal was upheld by the Honourable Supreme Court. Thereafter, even before the receiver could be discharged, he died in the year 1980.

4. According to the plaintiffs, the first plaintiff was started as a charitable institution with the object of establishing a modern and sophisticated hospital for the children. With this object, the first plaintiff obtained right over portion of the property from the second plaintiff Annapoorani Ammal by means of a registered gift deed dated 28.06.1984 executed by her. According to the plaintiffs, the possession of the suit property remained with the Court receiver who also died in the year 1980. In fact, during the life time of the advocate receiver, the defendants have delivered possession of the suit property. However, Taking advantage of the death of the advocate receiver, notwithstanding the handing over of possession of the suit property, the defendants raised a claim for adverse possession of the suit property. The defendants have also claimed the benefits conferred under the City Tenants Protection Act. The defendants have also put up huts and temporary superstructure for which they have attempted to get electricity service connection from the Electricity Board. In those circumstances, the plaintiffs have filed the suit before this

Court on 28.04.1986 which was subsequently transferred and re-numbered as O.S. No. 12738 of 1996.

5. The suit was resisted by the defendants 1 to 6 and 9 to 12 by filing a written statement contending inter alia that they are not parties to the Civil Appeal No. 1278 of 1968 filed before the Honourable Supreme Court. They have no knowledge about the judgment passed by the Honourable Supreme Court on 05.05.1978 in Civil Appeal No. 1278 of 1968 whereby the title of the second plaintiff Annapoorani Ammal was upheld. According to the defendants, they continued to remain in possession of the suit property on their own right continuously, uninterruptedly for more than the period prescribed under the statute. Therefore, the decision rendered in Civil Appeal No. 1278 of 1968 will not bind them in any manner. The defendants never delivered possession of the suit property to the advocate receiver, as alleged. The alleged gift deed executed by the second plaintiff Annapoorani Ammal in favour of the first plaintiff will not bind the defendants in any manner. Only in order to circumvent the legal process, such a gift deed was executed by the second plaintiff in favour of the first plaintiff. The second plaintiff has no transferable right to execute the gift deed in favour of the first plaintiff. The defendants 9 to 11 have filed separate suits in O.S. No. 214 of 1986 and O.S. No. 283 of 1986 for bare injunction restraining the plaintiffs herein from interfering with their possession before the City Civil Court, Madras in which the first plaintiff is a party. Even assuming that the possession of the defendants is illegal, still, they are entitled to the benefits of the provisions of City Tenants Protection Act. The suit is not properly valued by the plaintiffs and the court fee paid is not proper and therefore prayed for dismissal of the suit.

6. Before the trial court, one Anantha Narayanan was examined as PW1 and Exs. P1 to P8 have been marked. On behalf of the defendants, the eleventh defendant Rajendran was examined as DW1 and Exs. B1 to B20 have been marked. The trial court relied on Ex.P4, judgment dated 22.04.1971 passed by this Court in A.S. No. 329 of 1964 and 723 and 724 of 1967 wherein this Court held that Lakshmana Naicker, who alleged to have let out the properties to the occupants, himself deposed that he was not the owner of the suit property. Relying on this portion of the judgment, the trial court held that the defendants have no right to remain in possession of the suit property and they can only be construed as occupants of the suit property. The trial court also pointed out that when an advocate receiver was appointed, the possession of the suit property vests with him and in those circumstances, the defendants cannot lay any claim for adverse possession over the suit property. The trial court also held that the defendants raised a claim for adverse possession and the burden is on their part to prove such plea, however, they failed to prove their continued and uninterrupted possession over the suit property. The trial court also pointed out the inconsistencies pleaded by the defendants in their written statement wherein they have alleged that they are in possession of the suit property in their own right, however, in the deposition, they have taken a contrary stand

that they are occupants of the suit property for a long period and are entitled to the benefits of City Tenant Protection Act. The trial court, relying on Ex.P2, Gift Deed dated 28.06.1984 held that it was validly executed by the second plaintiff and she has transferable right to gift the suit property in favour of the first plaintiff.

7. As against the judgment and decree passed in O.S. No. 12738 of 1996, Shanmugam and others have filed an appeal in A.S. No. 51 of 2008. The first appellate Court framed four issues for consideration namely (i) Whether the defendants have proved that their possession in the suit property is adverse to the right and title of the second plaintiff Annapoorani Ammal (ii) Whether the suit filed by the plaintiffs is hit by the provisions of Section 47 of CPC (iii) Whether the plaintiffs are not entitled for the suit relief in view of the non-impleading of legal heirs of the deceased sixth and ninth defendants and (iv) whether the judgment and decree passed by the trial court is vitiated by errors of law. The first appellate Court on analysis of oral and documentary evidence pointed out that the plea of adverse possession is a mixed question of law as well as fact. The first appellate Court held that the defendants are trespassers and squatters in the suit property and they have no right to remain in possession thereof. The first appellate Court further held that the decree passed by the trial court is a joint decree and is not a separate decree, as alleged by the defendants. The suit as against the deceased sixth defendant abated on 07.01.1993 and the ninth defendant abated on 24.03.2002. By virtue of the death of defendants 6 and 9, the plaintiffs cannot claim any title against them and therefore, the plaintiffs have title against the defendants except defendants 6 and 9. It was further held that the defendants, who raised the plea of adverse possession, have miserably failed to prove it to the satisfaction of the Court by adducing legally acceptable evidence. The first appellate Court also pointed out that the defendants have defended the suit on the ground that they are in possession of the suit property as tenants having been inducted by Lakshmana Naicker. While so, it is futile on the part of the defendants to contend that their possession is adverse to the interest and title of the second plaintiff Annapoorani Ammal. Holding so, the first appellate Court dismissed the first appeal. Aggrieved by the same, the present second appeal is filed.

8. When the appeal was taken up for admission on 29.03.2012, the following substantial questions of law have been framed for consideration in this appeal viz.,

(i) Whether the finding of the lower appellate Court that the receiver committed an error in not applying for execution and such error is deemed to be one committed by this Court is vitiated in the absence of any plea and evidence and sustainable in law?

(ii) Whether alleged error on the part of Court enables a litigant to get exemption from the operation of Section 47 of C.P.C.?

(iii) Whether the finding of the lower appellate Court that a receiver appointed in a suit

represent all parties and hence a person whose title is declared ultimately cannot execute the decree obtained by the receiver is against the decisions reported in AIR 1952 Madras 51 and AIR 1945 Calcutta 387?

9. Subsequently, when the appeal was taken up for hearing on 26.11.2014, after considering the arguments raised by both sides, the below mentioned two additional questions of law have been framed for consideration in this appeal:-

(i) Whether on the admitted facts, the defendants have not acquired prescriptive title in accordance with the principles laid down in AIR 2001 SC 700 and also for reasons stated in ground 17?

(ii) Whether the entire suit has not abated on account of abatement of suit against D6 and D9 in view of the principles laid down on 1974 (2) SCC 41?

10. The learned senior counsel appearing for the appellants would contend that the brother-in-law of the second plaintiff viz., Easwara Iyer filed the suit in O.S. No. 367 of 1950 for partition. In that suit, it was vehemently contended that the suit property along with other properties have been purchased by him during the year 1944. On appeal before this Court, an advocate receiver was appointed and the receiver filed various suits for recovery of possession. The receiver did not execute the decrees obtained by him and he died in the year 1980. The advocate receiver was not discharged from the receivership in accordance with law by this court. The plaintiffs ought to have taken steps to execute the decree obtained by the advocate receiver at least after his death, as succeeding parties. However, the plaintiffs did not execute the decrees obtained by the advocate receiver in the suits filed by him and consequently, the present suit filed by the plaintiffs is barred under Section 47 of CPC. The remedy for the plaintiffs is only to execute the decrees obtained by the advocate receiver and without executing the decrees obtained thereof, the second plaintiff is estopped from filing the present suit. The learned senior counsel for the defendants/appellants would contend that the Honourable Supreme Court delivered the judgment on 05.05.1978 in the partition suit filed by the brother-in-law of the second plaintiff. During 1980, the advocate receiver died. In the meantime, the second plaintiff ought to have moved the trial court for discharge of the advocate receiver, however, for the reasons best known, the second plaintiff did not take any action to discharge the advocate receiver from the receivership. This Court, in the judgment dated 22.04.1971 made in AS Nos. 329 of 1964 and 723 and 724 of 1967 confirmed the decree and judgment passed by the trial court. The advocate receiver died during the year 1980 and till his death, the receiver did not take steps to execute the decrees. In order to execute the decrees passed by the trial court on 18.09.1963, which were upheld by this Court on 22.04.1971, the second plaintiff also did not take any steps to file Execution Petitions at least before 1983. In other words, the period for filing execution petition commences from 22.04.1971 and ends on 21.04.1983. However, the plaintiffs have filed the present suit

originally on 28.04.1986 for declaration of title instead of executing the decree passed in the suits filed by the advocate receiver. When the court appointed receiver failed to execute the decree, the beneficiary or successful party in the suit has to take necessary steps to get the decree executed by seeking possession. In the present case, such a course has not been followed by the second plaintiff Annapoorani Ammal. Therefore, according to the learned senior counsel for the appellants, the present suit filed by the plaintiffs, for the very same relief, is barred as contemplated under Section 47 of Civil Procedure Code. In support of this contention, the learned senior counsel for the appellants relied on the decision of this Court in the case of (Koypathodi Moidin Kutty (died) and others vs. A.K. Doraisami Aiyar) reported in AIR 1952 Madras page No.51 to contend that the receiver is appointed to act as a receiver of the party who may ultimately be found to be entitled to the property. A decree obtained by a receiver will enure for the benefit of that party and any adjudication against the receiver as representing the estate will operate as res judicata as against that party and that on principle, therefore, when the receiver is discharged, the party should have the right to step in to the receiver's place. In para No.3, 7 to 15 of this decision, it was held as under:-

3. Mr. N.R. Seshalier, the learned advocate for the appellant has raised two contentions. Firstly he urged that the order in E. P. No. 71 of 1943 and dated 6th June 1945 is a final one and that it really amounts to one of dismissal and that, therefore, the present application dated 16th June 1948 could not be treated as its continuation. Now it is well settled that when an execution application is closed or struck off such an order does not terminate the proceedings. The decree-holder having died and the legal representatives not having come on record, the order closing the petition must be construed not as one of dismissal but as one of disposal for statistical purposes. In 'Damodara v. Official Receiver, Krishna', I L R (1946) Mad 527, an execution application was closed and it was held that the subsequent application for execution of the decree was one really to continue the previous petition and not a fresh application. The present case is directly governed by this decision. The order dated 6th June 1945 cannot be construed as one of dismissal for any default on the part of the decree-holder because he was dead. The following passages from the judgment of the Privy Council in 'Debi Baksh Singh v. Habis Shah', 35 All 331 are in point:

"It requires no words of their Lordships to show the inapplicability of the rules or orders dealing with cases of the non-appearance of a suitor to the situation which arises when a suitor is dead. The principle of forfeiture of rights in consequence of a default in procedure by a party to the cause is a principle of punishment in

respect of such default, but the punishment of the dead or the ranking of death under the category of default, does not seem to be very stateable."

The order dated 6th June 1945 refers expressly to the death of the decree-holder and closes the petition and does not dismiss it. We must accordingly hold that the order dated 6th June 1945 is not a final order amounting to the dismissal of the E. P.I No. 71 of 1943 and that the petition must be deemed to be pending and the present E. p. No. 192 of 1948 has rightly been held by the lower Court to be one in continuation of E. P. No. 71 of 1943. We accordingly reject this contention of the appellant.

7. If a receiver has no title and if he is not an agent of the parties by what right is he entitled to maintain actions in court? It is now well settled that where a Court confers authority on the receiver under Q. XL, Rule 1, C. P. C. he becomes the representative of the true owners and as such representative he is entitled to conduct all proceedings which the owner can. The leading case on the subject is 'Jagat Taranl Debi v. Nabia Gopal', 34 Cal 305. There the question arose as to whether a receiver can file a suit in his own name. The question was elaborately considered by Mookerjee and Holmwood JJ. with reference to the principles and authorities applicable to the case. At page 316 they observe,

"Although the receiver has no title to the property, and although he is as custodian to take charge and hold the property during or pending litigation, it does not necessarily follow, that if he is authorised to sue, he cannot sue in his own name though he is in one sense custodian of the property of the person, whom in some respects he is made to supplant. There seems to be no reason why his power should not be held to be coextensive with his functions. It is clear that he cannot conveniently perform those functions, unless upon the theory that he has sufficient interest in the subject-matter committed to him, to enable him to sue in respect thereof by virtue of his office, in his own name",

and again at page 317 their Lordships observe:

"On the whole, we are disposed to take the view that, although the receiver is not an assignee or beneficial owner of the property entrusted to his care, it is an incomplete and inaccurate statement of his relations to the property to say that he is merely its custodian. A Receiver is appointed for the benefit of all concerned. Title of the property for the time being, and for purposes of the

administration, may, in a sense, be said to be in the Court. The receiver is appointed for the benefit of all concerned and he is the 'representative of the Court, and of all the parties interested in the litigation', wherein he is appointed".

In 'Achut Sitaram v. Shivaji Rao', AIR (24) 1937 Bom 244 the following passage occurs at page 261:

"The objects for which a receiver is appointed are preservation and realisation of the subject-matter of the litigation pending determination of the rights of the parties. He is appointed for the benefit of all the parties concerned in the litigation and is the 'representative of the Court and parties interested in the litigation.'"

8. In Alderson on "Receivers" the law is stated in these terms:

"There is no satisfactory reason why a receiver should not in every instance and under all conditions be permitted to sue in his own name as receiver. In his 'representative capacity' he is indeed the real party in interest and as he conducts and controls the suit it is more reasonable and consistent that it should be in his name. Any other doctrine borders on the eccentric and absurd." (Section 562 p. 766)

9. We are, therefore, of opinion that the true position of the receiver in law is that though he is not the owner or agent of the owner he is nevertheless his representative and as such representative he is entitled to take all such proceedings in Court as are open to the owner and he can do so in his own name.

10. The learned advocate for the appellant is willing to concede that the receiver has a right to institute proceedings as representative of the person entitled to the property but he contends that he has no power to continue proceedings started by the owner because it is a procedural right which must be found within the four corners of the Code. Let us examine the position of the receiver in a pending action. Now what is to happen when a receiver applies to continue a suit instituted by a party or where a party applies to continue a suit instituted by the receiver after the latter has been discharged. The authorities establish that such applications fall under Order XXII, Rule 10, C. P. C. Mr. Mulla observes that whenever a suit is brought by or against a person in a representative character it can be continued by the persons entitled, under this provision of law (vide Mulla's C. P. C. 14th Edn. page 946). The case in 'MacLeod v Kisen', 30 Bom 250 is directly in point.

In that case a suit had been Instituted by the receiver and while that was pending the rights of the owner, Bank of Bombay, had been declared and one Dwarakadosh an assignee of the bank and who was already on record wanted to continue the suit. That was resisted by the defendant on the ground that no right of the receiver devolved upon the Bank of Bombay or Dwarakadosh and that he was not entitled to continue the suit. But it was held by Chandavarkar J. that as the receiver filed the suit as representing the owner the latter could come on record and continue the action and that Section 372, C.P.C., now Order XXII Rule 10 was applicable. The learned Judge observed, "The industry of Counsel on either side has not enabled them to find any decided case as direct authority on the point thus raised and I am left to decide It by the light of first principles."

The learned Judge then points out that the receiver is acting as the representative of the party who may ultimately be found to be entitled to the property; that a decree obtained by the receiver will enure for the benefit of that party, that any adjudication against the receiver as representing the estate will operate as 'res judicata' as against that party and that on principle, therefore when the receiver is discharged the party should have the right to step into the receiver's place.

11. Then occurs the following passage at page 257:

"But asked Mr. Kirk Patrick, under what law could the party so ascertained step into the shoes of the receiver in this suit? There is answer to that. Under Section 372, C.P.C."

Reference is then made to 'Sourindramohun v. Siro-moni Devi', 28 Cal 171 where the manager of a Chota 'Nagpur encumbered estate commenced an action but was discharged when the action was pending and the owners applied to come on record and continue the suit and it was held by the learned Judges that the language of Section 372, C.P.C. was wide enough to cover such an application.

12. In both the above cases suits instituted by receiver or manager were sought to be continued by the owner and in the present case the receiver seeks to continue proceedings started by the owner but in principle that cannot make any difference. If owners can continue actions commenced by receivers under Order XXII, B. 10, C.P.C. it must follow that the receivers also must have the right to continue actions instituted by the owners under that provision of law and that indeed is in consonance with everyday practice.

13. We can now consider the question as to whether a receiver has a right to continue execution proceedings under Section 146 of the Code. If the language of the section is to be strictly and narrowly interpreted the receiver may not be entitled to apply under that section because he is not a person claiming under the decree-holder. In 'Sitaramasami v. Lakshminarasimham', 41 Mad 510 seshaglr1 Aiyar and Napier JJ. make the following observations:

"The expression 'claiming under' is wide enough to cover cases of devolution mentioned in Order XXII, B. 10, C. P. C. As the receiver has been held entitled to apply under Order XXII, Rule 10 it will follow that he can apply under Section 146. Moreover, there is ample authority for the view that Section 146 should receive a liberal construction and that if a person is entitled to relief under the law he can apply under this section if there is no prohibition anywhere in the Code against such an application."

In 'Mahanandi Beddi v. Venkatappa', 1941-2 Mad L. J. 631 there was an assignment of the decree before it had been passed. The assignee applied to execute the same under Order XXI, Rule 16 and Section 146, C. P. C. It was held that the applicant was not entitled to apply under Order XXI, Rule 16 but it was observed that a liberal construction ought to be put upon Section 146 and that the rights of the assignee recognised (sic) under that section. At page 635 the learned Judges observe:

"According to the learned advocate for respondent (1) where the transferee of a decree desires to execute it definite provisions are laid down by Rule 16 and he can do so only if his case conforms to those provisions. The learned advocate for the appellant interprets the phrase more liberally as permitting applications under Section 146, C.P.C. which do not conflict with the provisions of the Code. Of these two diverse views we prefer to choose the latter".

14. Then the learned Judges follow the decision in 'Muthiah Chettiar v. Lodd Govindas Krishnadas', 44 Mad 919 where it was held that the assignment of a portion of a decree was valid under Order XXI, Rule 16 C. P. C. and that even if it was not valid, the assignee was entitled to proceed under B. 146 there being nothing in the Code prohibiting it. As there is no prohibition in the Code against the receiver continuing any proceeding in execution he must be declared entitled to apply under Section 146, C. P. C. The learned advocate for the appellant strongly relies on the decision reported in 'Hemanta Narayana

v. B. R. Jainapur', AIR (25) 1938 Bom 458. With respect, we are unable to follow the observations in that case. The learned Judges state that a receiver is not the legal representative or assignee of the decree-holder. That is so. But that does not conclude the matter. The right of the receiver to continue proceedings as representative in interest of the decree-holder is not considered. No reference is made to Section 146, C. P. C. and the view that the receivers might continue execution proceedings in the name of the decree-holder reduces them to the position of agents of the decree-holder having no effective control over them. We are unable to agree that the receivers cannot in their own name continue execution proceedings.

15. To sum up we are of opinion that a receiver acting under the authority of the Court is a statutory representative of the real owner. He is entitled to commence proceedings in his own name so as to bind the true owner and he should be entitled to continue all proceedings initiated by him. If it is a suit the application will fall under Order XXII Rule 10 and if it is an execution proceeding it will fall under Section 146, C. P. C. We accordingly hold that the present execution application by the receiver can validly be treated as one to continue E. P. No. 71 of 1943 filed by the decree-holder and that it is, therefore, not barred by Section 48 C. P. C.

11. The learned senior counsel for the appellants also relied on the decision of this Court in the case of (Noor Saheb and another vs. S.A. Mohammad Ghouse) reported in 1959 AIR (Madras) 105 to contend that when the decree holder has a right to get the decree executed, no separate suit for any other relief is required. In para No.3 to 5 of this decision, it was held as under:-

"3. The decision of a Division Bench of the Patna High Court in Raghunandan v. Wajid Ali, AIR 1929 Pat 439 is directly in point. In that case a money decree in terms of a compromise was obtained by the plaintiff against the defendant and the decree further declared that certain property belonging to the defendant should be hypothecated to secure payment under the decree and in default of payment plaintiff would be entitled to sell the property. It was held that the plaintiff had the right to bring the property charged to sale in execution proceedings and no separate mortgage suit for the sale of the property was necessary.

The learned Judges followed the ruling in ILR 43 Bom 631: (AIR 1919 Bom 56). All these decisions amply support what to us appears to be quite clear from the language of Order 34, Rule 14 itself. Where as charge

is created by a decree in a suit which has no relation to a charge and indeed could not have because there was no charge prior to the decree in that case, Order 34, Rule 14 cannot have any application. The learned Judge in more than one place has missed the essential condition which is necessary before Order 34, Rule 14 could apply.

The learned Judge relied upon certain decisions which really do not support his conclusion. In *Bam Raghubir Lal v. United Refineries (Burma) Ltd.*, ILR 11 Rang 186: (AIR 133 PC 143) it was held that a decree to enforce by sale a vendor's lien should be in the form of a preliminary decree for sale. Obviously so because the vendor's lien which is in the nature of a charge existed prior to the institution of the suit.

The case in *Postimal v. Radhakrishnan Lalchand*, ILR 54 All 763: (AIR 1933 All 439) is not relevant because in that case the compromise decree merely declared the right of the decree-holder to a charge and did not provide for the manner in which the charge could be enforced. The ruling in *Ramanand v. Jairam*, ILR 43 All 170: (AIR 1921 All 369) was cited to the learned Judge but he sought to distinguish it. With great respect to the learned Judge, it appears to us that on principle the decision cannot be distinguished in the way in which the learned judge has sought to distinguish it.

In his opinion the compromise decree by giving a charge on the property gives rise to a fresh cause of action different from that on which the plaintiff filed the suit. The learned Judge apparently thinks that Section 47, C. P. C. will not be a bar because though the compromise decree may give the plaintiff a right to execute the decree and obtain the relief sought by him, the right of suit is not taken away.

The learned Judge evidently overlooked the fact that if the matter relates to the execution, discharge and satisfaction of a decree, such a matter shall be decided in execution and not in a separate suit. It is not correct to assume that a person may have both the remedies of execution and separate suit.

4. There can be no doubt that what the plaintiff is now seeking to do is to file a suit for a relief which he should have obtained in execution but the right to which he has lost by his own inaction by lapse of time. He cannot certainly be permitted to do so.

5. We are clearly of opinion that the decision of *Somasundaram J.* cannot be sustained. The appeal is therefore allowed with costs and the decree of the trial judge dismissing the suit restored.

12. By relying on the above decision of this Court, the learned senior counsel for the appellants would contend that the second plaintiff, having lost her right to get the decree executed, has filed the present suit which is legally impermissible and not maintainable.

13. The learned senior counsel for the appellants further relied on the decision of the Honourable Supreme Court in the case of (Ajit Chopra vs. Sadhu Ram and others) reported in AIR 2000 Supreme Court 212 to contend that the failure on the part of the second plaintiff to get the decree executed in a manner known to law, will disentitle her to file the present suit. In para No. 26 of this decision, it was held as follows:-

"26. Where an earlier decree based on title for ejectment is not executed in time but a fresh suit is however filed on the same basis against the same defendant for ejectment relying on the earlier judgment, it has been held that a second suit does not lie. This is based on the principle that no second suit lies merely on the basis of the earlier judgment if the time for execution of the earlier decree has become barred. The cases relied upon by the High Court in Ramanand vs. Jai Ram, AIR 1921 All 369; Sovani Jena vs. Bhima Ray, AIR 1922 Pat 407; Mal Singh Bika Singh vs. Mohinder Singh Mehar Singh, AIR 1970 Pun & Har 509, belong to this category. But in the present case, they are distinguishable. The plaint before is not based on the decree obtained in the first eviction case filed under the Rent Control Law. We may add that Chhagan Lal vs. The Indian Iron and Steel Co., AIR 1979 Cal 160 also belongs to this category."

14. The learned Senior counsel for the appellants also relied on the decision in the case of (Chhagan Lal vs. The Indian Iron and Steel Co., Limited and others) reported in AIR 1979 Calcutta 160 to contend that under Order 21 Rule 35 of CPC, the decree becomes ineffective and no separate suit can be filed for obtaining the same relief or reliefs or any relief based on the decree. If such a suit is allowed, there would be violation of law and would be no end of litigation. In Para No.10, the Division Bench of the Calcutta High Court held as follows:-

"10. In this connexion we may refer to the decision of the Privy Council in the case of Mirza Mahammad Aga Ali Khan Bahadur v. the widow of Balmakaund reported in (1876) 3 Ind App 241. That was an appeal from the judgment, and the decree of the Judicial Commissioner of Oudh. In that case the plaintiffs filed a suit resting the claim on a decree previously obtained practically to enforce the previous decree. In the appeal below, the learned Judicial Commissioner of Oudh in a portion of his judgment held:

Civil P. C. in regard to executions of the decree would be of no avail. But it is evident to the Court that where the Legislature has prescribed a particular mode of enforcing a right created by a decree, the possessor of that right is bound to follow the procedure prescribed, and no other. The Judicial Committee of the Privy Council agreed with that principle and approved of it. When in the Civil P. C. there is the mandatory provision for execution of the decree as prescribed for getting the reliefs under the decree, no separate suit shall lie for vetting the reliefs under the decree by a separate suit. Clearly, therefore, when a decree is executable under the law and when the decree-holder allows such decree to become barred by law, he cannot be allowed to get the fruits of the decree by a separate action."

15. The learned senior counsel for the appellants also relied on the decision of the Calcutta High Court rendered in the case of (Satyanarayanan Banerji and another vs. Kalyani Prosad Singh Deo Bahadur and others) AIR 1945 Calcutta 387 wherein it was held that the words "parties to the suit" or the words "their representatives" in Section 47 of the Code can be extended to include a receiver appointed under Order 40 Rule 1 of the Code to take charge of property, which is subsequently sold in execution of a decree suffered by the owner thereof.

16. The learned senior counsel for the appellants would further contend that even before the trial court, the sixth defendant died on 07.10.1992 and on his death, the suit stands abated on 07.10.1993. Subsequently, the ninth defendant died on 24.12.2001 and the suit, on his death, abates on 24.03.2002. Admittedly, the legal heirs of the deceased defendants 6 and 9 were not brought on record by the plaintiffs. However, the relief sought for against the defendants 6 and 9 have been given up only on 18.06.2003 long after the abatement of the suit owing to the death of defendants 6 and 9. The courts below ought not to have permitted the plaintiffs to give up their relief against the defendants 6 and 9 when the suit abated long back. The plaintiffs prayed for a joint decree against all the defendants. While so, on account of the abatement caused due to the death of the defendants 6 and 9, the decree passed in the present suit cannot be executed against all the defendants and consequently, the decree became inexecutable. The lower appellate Court failed to consider that there were two inconsistent decrees, one relating to dismissal of suit against the defendants 6 and 9 and the other against the other defendants in the suit.

17. On the contrary, the learned senior counsel for the first respondent/first plaintiff would vehemently contend that the plea regarding the bar of the present suit under Section 47 of CPC or the defence that the suit was abated due to the death of defendants 6 and 9 was not raised before the trial court, but such a plea was raised only before the first appellate Court. Further,

it is not the case of the defendants that they have informed the plaintiffs or the Court regarding the death of the defendants 6 and 9 and the plaintiffs failed to take steps to implead their legal heirs. When the defendants did not furnish the particulars of legal heirs of the deceased sixth and ninth defendants, the plaintiffs/appellants will have no knowledge about their death and consequently, they cannot be found fault for non-impleading the legal heirs. In such circumstances, according to the learned senior counsel for the first plaintiff/first respondent, the appellants are estopped from raising the plea regarding the maintainability of the suit as well as the non-impleadment of the legal heirs of the deceased sixth and ninth defendants before this Court. The learned senior counsel for the first plaintiff/first respondent would further contend that the suit property is divisible in nature and it was also clearly identified by the plaintiffs in their plaint. In the present case, along with the plaint, a plan was attached wherein the suit properties have been clearly and separately identified and demarcated. In such event, when the decree is separable, the plea regarding non-impleadment of the legal heirs of defendants 6 and 9 does not arise.

18. The learned senior counsel for the first plaintiff/first respondent would further contend that the title of the second plaintiff Annapoorani Ammal was upheld by the Honourable Supreme Court in Civil Appeal No. 1278 of 1968 by judgment dated 05.05.1978 in the suit filed by her brother-in-law claiming partition. In the meantime, the advocate receiver appointed by the Court filed several suits against the occupants of the suit property separately and those suits were decreed. The appeals filed thereagainst were dismissed by this Court on 22.04.1971. Admittedly, the appointment of advocate receiver is not to safeguard the interest of a particular party to the suit and such appointment is made to safeguard the interest of all the parties to the lis. The advocate receiver is a custodia legis and his appointment is aimed to maintain and safeguard the properties covered under the lis till it is finally adjudicated. In other words, the appointment of an advocate receiver is for and on behalf of all the parties to the lis and to their benefit as a whole. An advocate receiver holds the property for the benefit of those ultimately found to be rightful owners. Therefore, when the advocate receiver did not take steps to execute the decrees obtained by him, the plaintiffs cannot be found to be fault. Consequently, the suit filed by the plaintiffs on 28.04.1986 is well within the period of limitation especially when the right of the second plaintiff Annapoorani Ammal flows from the date on which the Honourable Supreme Court ordered the Civil Appeal filed by her brother-in-law on 05.05.1978. Thus, the period of limitation for filing the present suit commences from 05.05.1978 and consequently, the suit filed on 28.04.1986, within a period of 9 years, is within the period of limitation. In any event, for the mistake committed by the advocate receiver in not filing execution petitions for executing the decrees obtained by him, the plaintiffs cannot be made to suffer. Further, the advocate receiver filed the suits for eviction of the unauthorised occupants to ensure that the suit properties are safeguarded till such time they are handed over to the party who succeeds in the

litigation. Such a suit can be construed as a suit simplicitor. The suits filed by the advocate receiver was against various individuals. The second plaintiff Annapoorani Ammal, after getting her title declared by the Honourable Supreme Court executed the gift deed on 28.06.1984 in favour of the first plaintiff Trust. Therefore, the present suit has been filed by both the donor and the donee under the Gift Deed dated 28.06.1984 with a different set of cause of action. The courts below have properly dealt with this legal aspect and therefore interference of this Court is unwarranted.

19. The learned senior counsel for the first plaintiff/first respondent would further contend that the suit in C.S. No. 367 of 1950 was filed by P.N. Eswara Iyer, brother in law of the second plaintiff Annapoorani Ammal for the relief of partition and separate possession by contending that the properties covered therein are liable for division and they are not exclusive properties of the husband of Annapoorani Ammal. In this suit, the suit property is described as item No.34. The litigation went up to Honourable Supreme Court and by judgment dated 05.05.1978, it was declared that Annapoorani Ammal, the second plaintiff, is the owner of the suit property. Whereas, in the present suit namely O.S. No. 12738 of 1996, the relief of declaration is sought as against the defendants, who are occupants of the suit property and for delivery of possession. Therefore, the present suit cannot be construed to be hit by the provisions of Section 47 of CPC

20. In support of his contentions, the learned senior counsel for the first plaintiff/first respondent relied on the decision of this Court in the case of (Vadlamannati Venkatakrishnaiya and others vs. Vadlamannati Venkatanarayana Rao and others) reported in AIR 1936 Madras 733 to contend that when the owner of the land while taking possession is obstructed by certain persons some of whom were parties to the suit and who claimed occupancy rights therein in so far as such a dispute was raised by the parties to the suit, the question should be decided in execution proceedings, but as to others who were not parties to that suit, a regular suit must be the only remedy and Section 47 is no bar. In the present case, the suit was instituted by the plaintiffs in their capacity as donor and donee especially when the defendants have denied their title. In such event, the present suit is not barred under Section 47 of CPC.

21. Next, the learned senior counsel for the first plaintiff/first respondent relied on the decision of the Honourable Supreme Court in the case of (Ameena Bi vs. Kuppusamy Naidu and others) reported in (1993) 2 Supreme Court Cases 405 wherein in para No.17, it was held as follows:-

"17. The next question is the limitation. There is a concurrent finding of both the courts below that the suit had been filed within 12 years of dispossession of Ameena Bi and was based on title and was really within time. Under Article 65 of the Limitation Act which provides a period of 12 years as a period of

limitation in filing the suit, the period begins to run 'when the possession of the defendant becomes adverse to the plaintiff. Once it is found that the purchase of properties by Kuppuswami Naidu in court auction was illegal and without any authority, further transfer by Kuppuswami Naidu to the remaining defendants/respondents also do not acquire any legitimacy. The possession was obtained by the defendants within 12 years from the date of filing of the suit by the plaintiff/appellant. 18. We thus set aside the impugned judgment and decree passed by the High Court dated 26th July, 1976 and restore the judgment and decree passed by the court of Subordinate Judge, Cuddalore date 30th October' 1972. The plaintiff/appellant would be entitled to full costs throughout.

22. The learned Senior counsel for the first plaintiff/first respondent also relied on the decision of the Honourable Supreme Court of India in the case of (Hiralal Patni vs. Loonkaran Sethiya and others) reported in 1962 AIR (SC) 21 to contend that a receiver is appointed for a limited time and his office determines on the expiration of that time without any further order of the Court and his appointment is "until judgment or further order". In para No.10 of this decision, the Honourable Supreme Court, placing reliance on Halsbury's law held as follows:-

"10. In Halsbury's Laws of England, 3rd edn., Vol. 32 (Lord Simonds), at p. 386 under the heading "Duration of appointment by court", the following statement occurs:

"When a receiver is appointed for a limited time, as in the case of interim orders, his office determines on the expiration of that time without any further order of the court, and if the appointment is until judgment or further order' it is brought to an end by the judgment in the action. The judgment may provide for the continuance of the receiver, but this is regarded as a new appointment. If a further order of the court, though silent as to the receivership, is inconsistent with a continuance of the receiver, it may operate as a discharge.

When a receiver has been appointed on an interlocutory application without any limit of time, it is not necessary to provide for the continuance of his appointment in the final judgment. The silence of the judgment does not operate as a discharge of the receiver or determination of his powers. So, also the appointment of a receiver generally by the judgment in an administration action need not be continued by the order on further consideration."

23. The learned senior counsel for the first plaintiff/first

respondent relied on the Full Bench decision of this Court in the case of (Arumugha Gounder vs. Ardhanari Mudaliar and others) reported in 88 Law Weekly 113 to contend that for the mistake committed by a receiver appointed by the Court, the parties cannot be made to suffer or the original owner will not be disentitled from seeking the relief prayed for in the suit. In this decision, it was held by the Full Bench of this Court in para No.5 as follows:-

"5.The position is more or less the same in England too. In Halsbury's Laws of England, Third Edition, Volume 32, Page No.607, we have the observation that a receiver is a person appointed for the collection or protection of property. Where that is the position, that is to say, when he is appointed for the collection or protection of property, it will be travesty of justice if by his act of letting out he brings about a situation where his act ceases to be one of protection but of destruction of the rights of the successful party as declared by the Court. Again as observed in Halsbury's Laws of England at Page 384, a Receiver appointed by the Court is in no sense an agent or trustee for the party at whose instance the appointment is made. He is an officer of the court appointed for the benefit of all the parties to the action. By the order for the appointment of a Receiver, the Court assumes control of the property affected and from that time, the parties to the action retain possession only as custodians for the Court. In fact, as noticed by Halsbury, any interference with the possession of a Receiver appointed by the Court is a contempt of Court and renders the offending party liable to committal....."

24. The learned counsel appearing for the respondents 5 to 15 supported the arguments advanced by the learned senior counsel for the appellants. They have not preferred any separate appeal as against the order passed by the trial court or the appellate Court, but they argued on the same lines by specifically making a plea of adverse possession.

25. I heard the learned Senior counsel appearing for the appellants, the learned Senior counsel appearing for the first respondent and also the learned counsel appearing for the respondents 5 to 15 at length. I have carefully considered the arguments advanced by both sides and also perused the materials placed on record, including the orders passed by the trial court as well as the First Appellate Court.

26. First, let me deal with the questions of law Nos. 1 to 3 which were framed on 29.03.2012 as well as the additional question of law No.1 inasmuch as they together deal with the question as to whether the mistake committed by an Advocate Receiver appointed by the Court can be put against the plaintiffs/respondents 1 and 2 herein and consequently, the present suit filed by them is barred

under Section 47 of CPC.

27. At the outset, it is relevant to point out that originally, the present suit was filed by the plaintiffs before this Court on 14.10.1987 and subsequently, due to enhancement of pecuniary jurisdiction, it was transferred to the City Civil Court and re-numbered as O.S. No. 12738 of 1996 on 22.08.1996 on the file of the I Assistant Judge, City Civil Court, Chennai.

28. In C.S. No. 367 of 1950, filed by brother-in-law of second plaintiff Annapoorani Ammal, her husband Krishna Iyer was arrayed as fourth defendant. On the death of Krishna Iyer, the second plaintiff Annapoorani Ammal was impleaded as 18th defendant in the suit. Admittedly, the said suit was decreed and the title of the second plaintiff Annapoorani Ammal over the suit property was finally adjudicated by the Honourable Supreme Court by the judgment dated 05.01.1978 passed in Civil Appeal No. 1278 of 1968. In the meantime, during the pendency of the Original Side Appeal before this Court, an advocate receiver was appointed. The advocate receiver, in his capacity as an officer appointed by the Court has filed various suits against the tenants and predecessors of the present defendants and others in O.S.No. 867 of 1962, O.S. No. 1109 of 1962, O.S. No. 1410 of 1962 and O.S. No. 1411 of 1962. In the suits filed by the advocate receiver, it was defended by the defendants that they are tenants having been inducted by one Lakshmana Naicker, who has title over the suit property. It was also pleaded that they are in continued possession and enjoyment of the suit property as tenants under the said Lakshmana Naicker. The suits filed by the advocate receiver were decreed on 18.09.1963. As against the same, some of the defendants filed A.S. No. 329 of 1964, A.S. No. 723 of 1967, A.S. No. 724 of 1967 and A.S. No. 259 of 1965 before this Court. All the appeals were dismissed by this Court on 22.04.1971 holding that Lakshman Naicker, under whom the defendants alleged to be tenants, has no title over the suit property. Admittedly, the decrees passed by the trial court in the suits instituted by the advocate receiver could not be executed inasmuch as the advocate receiver died during the year 1980. In the meantime, as stated supra, in the partition suit filed by the brother-in-law of the second plaintiff Annapoorani Ammal, on appeal, the Honourable Supreme Court upheld the title of the second plaintiff in the judgment dated 05.01.1978. By virtue of the judgment dated 05.01.1978 and on the death of Krishna Iyer, husband of the second plaintiff Annapoorani Ammal, she derived title to the suit property. On the strength of such ownership, Annapoorani Ammal executed a registered Gift Deed dated 28.06.1984 in favour of the first plaintiff-Trust. Later on, both the donor and the donee covered under the gift deed, as plaintiffs, have filed the present suit in O.S. No. 12738 of 1996. As mentioned above, this suit was originally instituted before this Court on 14.10.1987 and in view of the enhancement of the pecuniary jurisdiction, the suit stood transferred to the City Civil Court, Madras on 28.04.1986 and re-numbered as O.S. No. 12738 of 1996. This suit came to be instituted on the ground that the defendants have encroached upon the suit property unauthorisedly and refused to handover the possession thereof, besides denied the title of the plaintiffs.

29. According to the learned senior counsel for the plaintiffs, the present suit filed by the plaintiffs is barred under Section 47 of CPC inasmuch as this Court, by judgment dated 22.04.1971, confirmed the decree passed in the suits filed by the advocate receiver and either the advocate receiver or on his death the second plaintiff ought to have taken steps to execute the decree atleast before 22.04.1983. Rather, the plaintiffs have filed the present suit for declaration of title only on 28.04.1986 and therefore, it is barred under Section 47 of CPC. Section 47 of CPC is extracted hereunder:-

"47. Questions to be determined by the Court executing decree- (1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

(2) Omitted by Amendment Act, 1976 w.e.f. 01.02.1977)

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[Explanation I.-For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.-(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such 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.]"

30. On careful analysis of the submissions made on behalf of both sides and the various decisions relied on by them, which are cited supra, it is clear that an Advocate Receiver appointed by a Court is not to represent a particular party but for and on behalf of all the parties to the lis. Such appointment will be made to safeguard and protect the property in dispute and/or to collect the rents and to deposit them in to the Court till such time the dispute is finally adjudicated upon by the Court. From the various judgments relied on by both sides, it could be seen that if an Advocate Receiver commits any mistake, it will not have any effect on the succeeding party and such mistake committed could be construed as the one committed by the Court. In the present case, admittedly, there is failure on the part of the advocate receiver

to execute the decrees obtained by him as against the occupants of the suit property till his death in the year 1980. Therefore, for the failure on the part of the advocate receiver, the plaintiffs, who are decree holders, cannot be penalised. The first appellate Court also, upon placing reliance on various decisions, correctly held that an Advocate Receiver is an agent of the Court and any mistake committed by such receiver will not have any bearing on the succeeding party in the lis. In this context, the learned senior counsel for the appellants relied on the decision of the Calcutta (Satyanarayanan Banerji and another vs. Kalyani Prosad Singh Deo Bahadur and others) AIR 1945 Calcutta 387. However, this decision rendered by the Calcutta High Court was overruled by the Division Bench of the Kerala High Court in the case of (Mrs. K.P.M. Shaheed and others vs. Aluminium Fabricating Company and others) reported in AIR 1986 Kerala 209 wherein it was held by the Division Bench of Kerala High Court that a Court appointed receiver is a custodia legis and such receiver is a representative of the Court. It was further held that if the receiver causes sale of the property entrusted in his hands, without the leave of the Court, such sale is not valid. The Division Bench further held that the decision of the Calcutta High Court reported in AIR 1945 Calcutta 387 does not lay down the correct law besides being contrary to the decision of the Honourable Supreme Court. In para No.23, the Division Bench held as follows:-

23. Thus, when a property in the hands of the receiver appointed by Court is sold in Court auction, the receiver is a representative entitled to maintain an appeal under Section 47 of the Code. The validity of the sale can thus be decided at his instance. AIR 1945 Calcutta 387 to the extent it takes a contrary view does not lay down the correct law in view of the Supreme Court ruling referred to above.

31. As regards the plea of adverse possession raised by the learned senior counsel appearing for the defendants/appellants, in the suits filed by the advocate receiver against the occupants of the suit property, it was specifically held by the trial court that the occupants, some of them are defendants in the present suit, are trespassers and that Mr. Lakshmana Naicker, under whom they alleged to have been inducted as tenants, himself has no title over the property or right to induct the occupants as tenants. According to the learned senior counsel for the appellants, such a finding rendered by the courts below will not prevent the defendants from claiming adverse possession as against the person who got a decree since, even after the decree was passed in the suits filed by the advocate receiver, they continued to remain in possession of the suit property and such possession is adverse to the claim of the plaintiffs. The defendants/appellants have lawfully entered into possession of the suit property and they have also denied title of the plaintiffs. Therefore, the possession of the defendants/appellants or their predecessor is to be reckoned atleast from 1971 onwards and in such event, their possession is adverse to the claim of the plaintiffs and that the defendants/appellants have prescribed adverse possession. In support of this contention, the learned senior counsel for the

appellants relied on the decision of the Honourable Supreme Court in the decision rendered in (Balakrishnan vs. Satyaprakash and others) reported in AIR 2001 Supreme Court 700 wherein in para No.11, it was held as follows:-

"In our view this conclusion of the High Court is erroneous. The fact remained that in spite of order of the Tehsildar against the appellant which was not acted upon, nor executed, the appellant continued in possession of the suit land and, therefore, the continuity of his possession of the suit land was neither interrupted nor lost. Mere passing of an order of ejectment against a person claiming to be in adverse possession neither causes his dispossession nor discontinuation of his possession which alone breaks the continuity of possession."

32. Relying on this decision, the learned senior counsel for the appellants would contend that the defendants have established that their long, continued and uninterrupted possession for more than 40 years is adverse to the title of the plaintiffs.

33. Repudiating such contention of the learned senior counsel for the appellants, the learned senior counsel for the first plaintiff/first respondent has relied upon the plaint averments to contend that even during the year 1979 or 1980, just prior to the death of the advocate receiver, the defendants have handed over possession, however, it was not recorded by the trial court. Taking advantage of the death of the advocate receiver during 1980, the appellants have re-gained possession of the suit property. Further, the identity of the property has been duly explained by the plaintiffs by annexing a rough sketch with the plaint wherein the description of the property and their boundaries have been clearly demarcated. The learned senior counsel for the first plaintiff/first respondent would further contend that for raising the plea of adverse possession, the defendants should first establish that there is animus to claim adverse possession. In the present case, the defendants have miserably failed to establish the existence of animus and therefore, the courts below have rightly rejected their claim for adverse possession. For establishing the plea of adverse possession, the existence of animus should be proved by the defendants. In the earlier suit, their contention was one Lakshmana Naicker has inducted them as tenants. They have also claimed the benefits of City Tenants Protection Act. It is needless to mention that to claim the benefits of City Tenants Protection Act, one must be inducted as a tenant by the original owner. In the present case, this Court has already held that Lakshmana Naicker has no title to the properties in question. Therefore, the defence raised by the defendants in the earlier suit is that they were inducted as tenants under one Lakshmana Naicker and if at all, they can claim any right over the said Lakshmana Naicker alone and not against the second Plaintiff Annapoorani Ammal, whose title was ultimately upheld by the Honourable Supreme Court on 05.05.1978. Therefore, the defendants cannot now raise a plea of adverse possession as against Annapoorani Ammal, whose title was upheld by the Honourable Supreme Court. In the present

case, there is no plea that the defendants possession is adverse to the title of Annapoorani Ammal. Annapoorani Ammal was not a party to the earlier proceedings. Therefore, the plea of adverse possession cannot be raised as against Annapoorani Ammal. Further, in the present case, in the written statement, the defendants have specifically pleaded for seeking the benefits of City Tenants Protection Act, meaning thereby, they have accepted the theory of landlord tenant relationship i.e., the ownership of Annapoorani Ammal has been admitted. Having admitted the ownership of Annapoorani Ammal and having claimed the benefit of City Tenants Protection Act, the defendants are estopped from raising the plea of adverse possession.

34. Though a plea was made before this Court that being the defendants, they can approbate and reprobate, the conduct of the defendants in doing so has to be looked into. The conduct of the defendants in the earlier suit as well as the present proceedings were contrary to each other. When the person whom the defendants claimed to be the owner of the property lost his title by virtue of the judgment of the Honourable Supreme Court rendered on 05.05.1978, they have changed their stand and claimed the benefits of the City Tenants Protection Act as against the present owner. However, they have never raised the plea of adverse possession as against the second plaintiff herein viz., Annapoorani Ammal. Therefore, the right of approbating and reprobating cannot be raised because of the inconsistent stand taken by the defendants in the previous suit as well as in the present suit.

35. The suit filed by the brother in law of second plaintiff in C.S. No. 367 of 1950 for partition was dismissed. During the pendency of the suit, the husband of the second plaintiff Annapoorani Ammal died and in his place, Annapoorani Ammal was arrayed as one of the defendants in the suit. As against the same, O.S.A. No. 76 of 1959 was filed before this Court. The Division Bench of this Court reversed the decree and judgment passed by the trial court, granting the relief of partition, by an order dated 21.01.1965. Thereagainst, the matter was taken up on appeal before the Honourable Supreme Court. The Honourable Supreme Court finally adjudicated the dispute on 05.05.1978 by holding that the husband of the second plaintiff Annapoorani Ammal was the owner of the suit property and on the death of her husband, the second plaintiff has succeed to his estate. During the pendency of the Original Side Appeals, an advocate receiver was appointed by this Court. The advocate receiver, in order to safeguard and protect the interest of the suit property, filed various suits against the occupants of the suit property. The contention of the defendants in those suit was that they were inducted as tenants under one Lakshmana Naicker. Such a contention has been specifically negatived by this Court in the appeal in the judgment dated 22.04.1971 holding that Lakshmana Naicker has no title to the suit property. When that be so, can it be construed that the occupation or possession of the defendants is adverse to the right and title of the plaintiffs or the defendants can raise a plea for adverse possession. Such a claim made by them was negatived by this Court in the appeals even as early as 22.04.1971. Thereafter, the right and title of Annapoorani Ammal

was decided by the Honourable Supreme Court on 05.05.1978 for the first time. Further, the advocate commissioner, as custodia legis was in possession of the properties for a substantial period. In such circumstances, the plea of adverse possession raised by the appellants has to be rejected and the courts below have rightly rejected it. In fact, the first appellate Court relied on the decision of the Honourable Supreme Court in the case of (L.N. Aswathama and another vs. P. Prakash) (2009) 13 Supreme Court Cases 229 to render a finding that the first appellate Court, in the suits filed by the Advocate Receiver, concluded that the defendants are occupants of the suit property. Immediately thereafter, the advocate receiver or the succeeding party being Annapoorani Ammal has not taken steps to execute the decree, but the present suit was filed on 28.04.1986 within 12 years. Therefore, the plea of adverse possession raised by the defendants cannot be countenanced.

36. As regards the bar of the present suit, admittedly, the right and title of the second plaintiff Annapoorani Ammal was finally declared by the Honourable Supreme Court on 05.05.1978 in the litigation initiated by her brother in law. The argument of the learned Senior counsel for the appellants is that the suit filed by the Advocate Receiver was decreed and confirmed by the first appellate Court on 22.04.1971 and therefore the period of limitation for executing the decree by the second plaintiff, in her capacity as a decree holder, expires on 21.04.1983. The second plaintiff, having lost her right to file an execution petition cannot be permitted to file the present suit as it is barred under Section 47 of CPC. This argument of the learned senior counsel for the appellants cannot be countenanced for the simple reason that the advocate receiver filed different suits against various occupants of the suit property as an agent of the Court. The advocate receiver ought to have executed those decrees within the period of limitation, but there is failure on his part. Till his death in the year 1980, the Advocate receiver did not file any execution petition. For his failure to file execute petition, the second plaintiff Annapoorani Ammal, being the succeeding party, cannot be made to suffer. As far as Annapoorani Ammal is concerned, her title was declared for the first time on 05.05.1978 when the Honourable Supreme Court passed the judgment in the suit filed by her brother in law. Thereafter, within nine years, the present suit was filed by the plaintiffs on a different set of cause of action for declaration of their title, especially when it was denied by the defendants.

37. The learned Senior counsel for the appellants would contend that the advocate receiver appointed by the Court was not discharged in a manner known to law especially when the second plaintiff Annapoorani Ammal takes advantage of the judgment of the Honourable Supreme Court rendered on 05.05.1978 declaring her title. While so, immediately thereafter, the second plaintiff Annapoorani Ammal ought to have taken steps to discharge the advocate receiver and ought to have taken steps for executing the decree. In this context, it has to be pointed out that discharge of an advocate receiver is automatic or there need not be any specific order for discharge of the advocate Receiver. This was

the view taken by the Honourable Supreme Court in (Hiralal Patni vs. Loonkaran Sethiya and others) reported in 1962 AIR (SC) 21 wherein the Honourable Supreme Court, placing reliance on Halsbury's law held if an order of the court is silent as to the receivership it may operate as a discharge. In the present case, admittedly, the advocate Receiver died during the year 1980 and on his death, his appointment as advocate receiver terminates automatically. It is needless to point out that an advocate receiver does not become the representative of one of the parties, but is an officer, agent and representative of the Court which appoints him for and on behalf of all the parties to the lis. Such appointments shall be made to safeguard and protect the property in dispute so that the Court can effectively manage the property through the advocate receiver. Therefore, I hold that the present suit is not a bar under Section 47 of CPC. Consequently, I hold that the questions of law No. 1 to 3 and additional question of law No.1 are answered against the defendants/appellants and in favour of the first plaintiff/first respondent herein.

38. The next substantial question of law arise for consideration is whether the suit filed by the plaintiffs got abated due to non-impleadment of legal heirs of defendants 6 and 9. It is argued by the learned senior counsel for the appellants that the sixth defendant died on 07.10.1992 and on 07.10.1993, the suit as against the sixth defendant stands abated. Similarly, the 9th defendant died on 24.12.2001 and on 24.03.2002, the suit abates as against the ninth defendant. However, only on 18.06.2003, long after abatement of the suit, the plaintiffs have made an endorsement giving up the relief sought against the defendants 6 and 9. When the suit itself was abated as on 07.10.1993 on the death of the sixth defendant, the abatement made on 18.06.2003 will have no effect. Therefore, there cannot be two decree against two set of defendants and the decree cannot be split up. In view of the death of the sixth defendant on 07.10.1992 and owing to the fact that his legal heirs have not been impleaded within the period prescribed, the abatement of the suit is automatic. Further, the properties are not identifiable and therefore also the decree cannot be executed. The abatement of the suit is against all the defendants and it cannot be only against the defendants 6 and 9. In order to lend support to this contention, the learned senior counsel for the appellants relied on the decision of the Honourable Supreme Court in the case of (Chaya and others vs. Bapusaheb and others) reported in (1994) 2 Supreme Court Cases 41 to contend that the courts below ought to have held that the suit is abated due to non-impleading of the legal heirs of deceased 6 and 9 especially when the prayer is for a joint decree against all the defendants and there cannot be a decree of abatement as against the defendants 6 and 9 alone. In Para No.15 of this decision, it was held as follows:-

"15.Apart from the fact that R.S. Nos. 975/1 and 975/2 were originally the joint family property of all the defendant-brothers, whatever the inter-se relation between them with respect to the said property, various portions of both the survey numbers were sold to the vendee-defendants. The plaintiffs had

not made clear as to which of the remaining portions of the suit land were the subject matter of their customary right. Admittedly, on the sold lands, vendee-defendants had constructed houses. The trial court, while granting the decree, had excluded the portions of the land which were occupied by residential houses. The trial court, had further, not granted decree in respect of specific portions of the suit property against specific defendants. It had granted decrees generally against the entire land minus that occupied by the houses, and against all the defendants together. Defendant 1 had preferred an appeal before the District Court challenging the decree granted by the trial court against the entire land viz., that belonging to himself and to all the other defendants. It is that appeal which was decided on merits by the appellate Court, notwithstanding the death of defendant 2 during the pendency of the appeal. Thus, granting decree in favour of defendant 1 alone when it was not claimed by the plaintiff in the original suit, and based upon a common right asserted against the entire land which was the relief claimed by the plaintiffs, would in the present case result in contradictory findings viz., that whereas the customary right would not be claimed against any portion of the suit property (that is the finding of the High Court), the trial court's decree for exercise of such rights would continue to operate against a part of the land merely because the other defendants had not preferred any appeal.

16. We find that in the circumstances, this was a fit case where the High Court ought to have exercised its power under Order 41 Rule 33. In fact, the non-exercise of the power has resulted not only in the miscarriage of justice but in contradictory results in respect of the same subject-matter and based on the same alleged right....."

39. The learned senior counsel for the appellants also relied on the decision in the case of (State of Punjab vs. Nathu Ram) reported in (1962) 2 scr 636 = AIR 1962 SC 89 to contend that non-impleading of the legal heirs of defendants 6 and 9 is fatal to the case of the plaintiffs especially when the cause of action said to have arisen for filing the suit against all the defendants is one and the same. Reliance was also placed on the decision of the Calcutta High Court in the case of (Hakir Mohamad and others vs. Abdul Majid and others) reported in AIR 1963 Calcutta 588 to contend that if there is abatement, it must be for the whole suit and there cannot be any separate decree. For the same proposition, reliance was placed on the decision of the Orissa High Court in the case of (Damodar Patra and others vs. Kanchan Sahwani and others) reported in AIR 1963 Orissa 140

40. The reliance placed by the learned senior counsel for the appellants to the decision of the Honourable Supreme Court in (Chaya and others vs. Bapusaheb and others) reported in (1994) 2 Supreme Court Cases 41 mentioned supra will not apply to the facts of the case. The facts in that case are distinguishable especially in that case before the Honourable Supreme Court, there was no specific plea as to which of the portions of the property for which decree is sought. There was no clear and specific identity of the properties involved in this case. Therefore, the decision relied on by the learned senior counsel for the appellants has no application to the facts of this case. In this context, reliance can be made to the decision of the Honourable Supreme Court in the case of (Budu Ram and others vs. Bansi and others) reported in (2010) 11 Supreme Court Cases 476 which was relied on by the learned senior counsel for the appellants wherein it was held in para No.17 as follows:-

"17. Therefore, the law on the issue stands crystallised to the effect that as to whether non-substitution of legal heirs of the respondents-defendants would abate the appeal in toto or only qua the deceased respondents-defendants, depends upon the facts and circumstances of an individual case. Where each of the parties has an independent and distinct right of his own, not interdependent upon one or the other, nor the parties have conflicting interests inter se, the appeal may abate only qua the deceased respondent. However, in case, there is a possibility that the court may pass a decree contradictory to the decree in favour of the deceased party, the appeal would abate in toto for the simple reason that the appeal is a continuity of suit and the law does not permit two conflictory decrees on the same subject matter in the same suit. Thus, whether the judgment/decreed passed in the proceedings vis-a-vis remaining parties would suffer the vice of being a contradictory or inconsistent decree is the relevant test.

41. Therefore, as held by the Honourable Supreme Court, whether a suit abated in toto or against the deceased defendants depends upon the facts and circumstance of each case and a straight-jacket formula could not be adopted. If the facts in the present case are considered, the suit was filed as against the defendants contending that they are occupants of the suit property. Each and every property occupied by the defendants was clearly demarcated and identified. The defendants have no common or independent interest of their own but they only contended that they were inducted by one Lakshmana Naicker, whose title was negated by this Court in the appeals.

42. The learned senior counsel appearing for the first respondent/first plaintiff, on the other hand, would contend that the plea regarding non-impleadment of the legal heirs of the deceased 6 and 9 was raised for the first time only before the

first appellate Court and it was never raised before the trial court. Further, when the defendants did not furnish the details regarding the date of death of the deceased defendants 6 and 9 and their legal heirs, the plaintiffs will have no knowledge about such death and they have no obligation to implead the legal heirs. It is further contended that suit was filed for recovery of possession and the properties were identified by attaching a plan along with the plaint showing the area and boundaries of the properties occupied by the defendants, as occupiers. Further, in the written statement, the defendants, after verifying the correctness of the description of the property shown in the plaint, also laid a claim for deriving the benefits of the provisions of City Tenant Protection Act. The defendants have also claimed compensation as contemplated under the City Tenant Protection Act. Further, some of the defendants alone have filed appeals and others did not file any appeals with respect to the findings rendered against them. There is no joint decree passed in the present case. The learned senior counsel for the first plaintiff/first respondent also placed reliance on the decision relied on by the learned Senior counsel for the appellants in (State of Punjab vs. Nathu Ram) reported in (1962) 2 scr 636 = AIR 1962 SC 89 and relied on para No.6 thereof, wherein it was held as follows:-

6. The question whether a court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the court's passing a decree which will be contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed.

LRs and Others vs. Pramod Gupta (Smt) (Dead) by LRs and others) reported in (2003) 3 Supreme Court Cases 272. In that case which arise out of land acquisition proceedings, the question arise for consideration was when a proceeding before the Court becomes or is rendered impossible or possible to be proceeded with, after it had partially abated on account of the death of one or the other party on either side. The Honourable Supreme Court, in effect, had held that in deciding questions of this nature, no hard and fast rules can be applied and such questions can broadly be decided on the basis of the facts of each and every one of the case to render substantial justice.

44. It is not in dispute that in the present case, the properties which were in occupation of the respective defendants were identified in the plan annexed along with the plaint. It is also not in dispute that the defendants did not furnish the details regarding the death of the defendants 6 and 9 or their legal heirs for being impleaded in the suit. In the absence of furnishing such details, the plaintiffs cannot be expected to implead their legal heirs. When the plaintiffs came to know about their death, they have given up their relief on 18.06.2003. Further, it was contended that the question as to non-impleadment of the legal heirs of deceased 6 and 9 was raised for the first time before the first appellate Court and not before the trial court. From the above two decisions of the Honourable Supreme Court, it could be evident that a suit will be bad for non-impleading of legal heirs of the deceased only if it is proved that when a proceeding before the Court becomes or is rendered impossible or possible to be proceeded with, after it had partially abated on account of the death of one or the other party on either side. When we analyse this proposition of law in the present context of the case, as rightly pointed out by the learned senior counsel for the first plaintiff/first respondent, the earlier suit filed by the advocate receiver is in respect of specific property and the present suit is also filed for delivery of possession in respect of the property occupied by them and which is clearly identified in the plaint plan. Therefore, there is a demarcation of the property and if at all, the delivery of property in respect of the legal heirs of the deceased will have a bearing. When bifurcation of the property is possible, the question of non-impleading legal heirs of the deceased will no way affect the suit as has been held in the decision of the Honourable Supreme Court in (State of Punjab vs. Nathu Ram) reported in (1962) 2 scr 636 = AIR 1962 SC 89 and the decision rendered in (Sardar Amarjit Singh Kalra (dead) by LRs and Others vs. Pramod Gupta (Smt) (Dead) by LRs and others) reported in (2003) 3 Supreme Court Cases 272. Therefore, the arguments advanced by the learned senior counsel for the appellants in this context cannot be accepted.

45. In this context, reference can be made to Section 96 of CPC which provides for filing an appeal against a decree passed by the Court of first instance. Sub-section (4) of Section 96 of CPC provides that an appeal can be entertained by the appellate Court only on a question of law. In fact, the issue as regards non-impleadment of legal heirs of deceased 6 and 9 is a mixed question

of fact as well as on law. In the present case, the decree passed by the trial court and affirmed by the appellate Court is executable and it is not a joint decree. Merely because defendants six and nine died and their legal heirs were not brought on record, on such technical consideration, the plaintiffs cannot be ousted from praying the relief of declaration and recovery of possession as a whole or it will not nullify the decree passed by the court. If at all, if the legal heirs are not impleaded, no claim can be made against that property. In the present case, the plaintiffs have made an endorsement giving up the relief as against the defendants 6 and 9 and it is valid and legal. In any event, non-impleadment of the legal heirs of deceased sixth and ninth defendant in the suit will not be a reason for denying the right of the plaintiffs over the suit property. Accordingly, the additional substantial question of law No.2 is answered against the defendants/appellants.

46. In the result, the decree and judgment passed by the courts below are confirmed. The second appeals fails and it is dismissed. No costs. Time for delivery of possession of the suit property by the defendants is one month from today.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

rsh

To

1. The Additional District Judge
II Fast Track Court,
City Civil Court, Chennai
 2. The I Asst. Judge
City Civil Court, Chennai.
 3. The Section Officer, V.R. Section, High Court, Madras.
- 2 cc to Mr. J. Saravanel ,Advocate, SR.No.3640
3 cc to Mr. K. Chandrasekaran,Advocate, SR.No.3647

S.A. No. 422 of 2012

tej(co)
pmk.18.2.2015