

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.09.2015

CORAM

THE HONOURABLE MS. JUSTICE K.B.K.VASUKI

C.R.P.No.884 of 2006

1.Vatchala Ammal
2.Indumathi
3.Damodaran
4.Chitra Devi
5.Sathish Kumar
6.Sujatha

.. Petitioners

Vs

1.Parameshwari
W/o.Jagannathan
2.J.Kumar
3.J.Vivekanandan
4.Janaki
5.Annandaraj
6.J.Arul
7.Vaideki
8.Radhabai Ammal
9.Ibrahim Sahib
10.Vijayaraghavan
11.Babu
12.Lakshmi Ammal
13.Selvi

.. Respondents

This Revision Petition is filed under Article 227 of the Constitution of India against the fair and decretal order dated 17.02.2006 made in E.A.No.321 of 2003 in E.P.No.67 of 2003 in O.S.No.303 of 1975 before the Subordinate Judge, Vellore.

For Petitioner : Mr.V.Raghavachari

For Respondents : Ms.Anisha

ORDER

The legal representatives of the third defendant in O.S.No.303 of 1975 on the file of the Subordinate Judge, Vellore, have come forward with this Civil Revision Petition against the order rejecting their petition EA.No.201 of 2003 in E.P.No.67 of 2003 in O.S.No.303 of 1975 filed under Section 47 r/w.151 C.P.C.

2. The facts which are relevant for consideration herein are as follows :

The property measuring 1.25 acres in Survey No.21/4 in Kanniyampadi Village, Kannamangalam Sub District, erstwhile North Arcot District and other properties were the ancestral properties of (1) K.T.Varadaraja Mudaliar and his brothers K.T.Kandasamy Mudaliar, K.T.Nataraja Mudaliar and K.T.Narayanasami Mudaliar, who were arrayed as the defendants 1 to 4 in O.S.No.303 of 1975. One Radha Bai Ammal, who was the 10th defendant in OS.303/1975 filed a money suit in O.S.No.140 of 1963 against the first defendant K.T.Varadaraja Mudaliar and the same was decreed and the property measuring 1.25 acres in S.No.21/4, as referred to

above, was attached and brought for sale in public auction, in execution of money decree and Mr.V.K.Jagannathan/plaintiff in OS.No.303 of 1975 arising out of which is the present CRP purchased the property in the Court Auction held on 22.11.1965 and the sale was confirmed on 03.01.1966.

3.After coming to know about the sale of the property in Court Auction, the third defendant K.T.Nataraja Mudalair, who was one of the judgment debtors filed O.S.No.242 of 1966 on the file of the District Munsif Court, Vellore for the relief of declaration that the property sold in Court Auction along with another item was allotted to him on the basis of Kurchit, dated 19.02.1960 and for the relief of permanent injunction, restraining the auction purchaser from taking possession of the same. The suit OS.No.242 of 1966 was disposed of by upholding the joint family nature of the property and by disbelieving the plea of allotment of the property to K.T.Nataraja Mudhaliar and possession and enjoyment of the property by him on the basis of Kurchit. The suit was disposed of with a direction issued to the Auction Purchaser to file a suit for partition of the properties including the property which was purchased by him in the Court Auction.

4. In pursuance of such a direction issued in O.S.No.242/1966 filed by K.T.Nataraja Mudaliar, the Auction Purchase, by name, V.K.Jagannathan come forward with a partition suit in O.S.No.303 of 1975 for division of all the suit items into four equal shares and to allot one such share to K.T.Varadharaja Mudaliar who was the judgment debtor in the earlier money suit in OS.No.140 of 1963 and who was arrayed as the first defendant in partition suit in OS.No.303 of 1975 and to allot the same item towards the share of the first defendant/K.T.Varadharaja Mudaliar and delivery of the said item to the plaintiff who was the Court auction purchaser of the same. The suit was filed by the auction purchaser against four brothers i.e. K.T.Varadaraja Mudaliar, K.T.Kandasamy Mudaliar, K.T.Nataraja Mudaliar and K.T.Narayanasami Mudaliar and their sisters Meenambal (died), Sarojammal, Padmavathi Ammal, Saraswathi Ammal, Vaidehi Ammal and also the 10th defendant Radha Bai Ammal, who was the decree holder in the money suit in O.S.No.140 of 1963, in which the property was brought for sale in the Court Auction.

5. A perusal of the suit records reveal that the suit OS.No.303 of 1975 was not contested by the defendants 1 to 11 but

was contested only by the 12th defendant who was also one of the purchasers of the property. The reading of the preamble portion of the decree made in O.S.No.303 of 1975 would disclose that the learned counsel for the defendants 1 and 3 reported no instructions and the defendants 2 and 4 though entered appearance through counsel had made no representation, and therefore, the defendants 2 and 4 and the defendants 1 to 11 were called absent and set ex parte.

6.The suit was contested by the plaintiff and the 12th defendant and the suit was decreed on 19.07.1983 and preliminary decree was passed for partition of the suit properties into four equal shares and to allot one such share to the first defendant and put him in possession of one such share and liberty was given to the plaintiff-Auction Purchaser, to workout his claim for allotment of the suit item No.1 (i.e. property purchased in the Court Auction) to the share of the first defendant and delivery of the said item to the plaintiff-auction purchaser by way of equity at the stage of passing of final decree. The trial Court also directed the mense profits in respect of item No.1 of the suit properties will be determined in a separate proceedings under Order 20 Rule 12 of Civil Procedure

Code. Thereafter, the final decree petition in I.A.No.209 of 1996 came to be filed on 23.09.1988 and the suit was restored on the same day for proceeding with final decree and the final decree proceedings was completed on 31.01.1995.

7.The final decree petition in I.A No.209/1986, was thereafter re-numbered as I.A.No.438/1988. The plaintiff / Auction Purchaser in the affidavit filed in support of the final decree petition sought for allotment of the property purchased by him in the Court Auction which was mentioned as suit item No.1 to the share of the first defendant/Varadharaja Mudaliar. Pending the same, the 6th defendant died. In the final decree proceedings also, the respondents-defendants 2, 4 to 11 and 13 to 17 were set exparte. A reading of the endorsement made in the court docket sheet reveals that the defendants 3 and 12 though entered appearance through their counsel, were set exparte on 27.07.1993 for not filing their counter.

8.After setting the respondents 3 and 12 exparte, final decree petition was proceeded with and the Commissioner was appointed and he filed his report and plan on 09.11.1994 and no

objection was filed to his report and plan and arguments were heard in the final decree petition on 28.11.1994 and the IA stood adjourned for passing final decree and the final decree was passed on 31.01.1995, thereby, Item No.1 of the suit property is allotted to the first defendant K.T.Varadaraja Mudaliar and Item Nos.44 to 46 were allotted to the 12th defendant by way of equity and the defendants 1 to 11 and 13 to 17 were further directed to hand over the possession of Item Nos.1 and 44 to 46 and final decree was accordingly passed.

9.After obtaining final decree, E.P.No.67 of 2003 was filed by the plaintiff/auction purchaser against K.T.Varadaraja Mudaliar, K.T.Kandasamy Mudaliar, K.T.Nataraja Mudalaier and K.T.Narayanasami Mudaliar and other surviving defendants for delivery of possession of suit item No.1. and pending EP, the plaintiff/decreed holder V.K.Jagannathan died and his legal heirs were brought on record in E.P.No.67 of 2003.

10.Pending E.P.67/2003, E.A.Nos.320/2003 and 321/2003 were filed by the legal heirs of the third defendant/third respondent/K.T.Nataraja Mudaliar. While E.A.No.320/2003 was filed

under Section 47 r/w. 151 CPC, to set aside the final decree passed on 31.01.1995 in IA.438 of 1988 in O.S.No.303 of 1975 as nullity, the relief sought for in E.A.No.321/2003 is to stay all further proceedings in E.P.No.67/2003 including delivery of possession to the legal heirs of the deceased decree holder. It is stated in both E.A.s filed by the legal heirs of the third defendant during December 2003, that the third defendant K.T.Nataraja Mudaliar died in road accident on 12.09.1994 and the final decree dated 31.01.1995 was obtained by playing fraud without impleading LR's of the third defendant/K.T.Nataraja Mudaliar and as the final decree was passed against the dead person, the decree is nullity and unenforceable and is liable to be set aside.

11. Pending EAs, EP was proceeded with and possession of the suit item No.1 was handed over to the LR's of the Plaintiff V.K.Jagannathan by the Court Ameen in the presence of the witnesses on 28.11.2003 and the same was intimated to the Executing Court and after recording the delivery, E.P. was terminated on 13.03.2006 by the Executing Court. Much before the same, E.A.Nos.320/2003 and 321/2003 were dismissed on merits on 17.02.2006 by way of impugned order.

12.While dismissing E.A.No.320/2003 by negating the contention that the final decree passed against the dead person is nullity, the Executing Court was of the view that the factum of the death of the third defendant-K.T.Nataraja Mudaliar was not brought to the knowledge of the decree holder to enable him to move the Court for impleading the LRs of the third defendant within the period of limitation and on the failure of the LRs to do so, E.A.Nos.320 and 321 of 2003 filed were belated and time barred. The trial Court was of the further view that as there is no property in excess of the decree delivered to the legal heirs of the deceased plaintiff, no petition under Section 47 is maintainable and the stay petition is also consequently dismissed as not maintainable. The executing Court saying so, dismissed the main application filed under Section 47 CPC and the stay petition. Aggrieved against the order passed in Section 47 petition, the present Civil Revision Petition is filed.

13.The learned counsel for the revision petitioners/LRs of the third defendant seriously challenged the correctness of the impugned order by denying the validity and executability of final decree obtained in I.A.No.438/1988 in O.S.No.303 of 1975 solely on the ground that the decree obtained against the dead person i.e,

third defendant without impleading his Legal heirs is without jurisdiction and is a nullity. The learned counsel for the petitioners has also cited the following authorities in support of such contention raised herein.

- 1. AIR (39) 1952 Assam 54 Division Bench – Ajoy Kumar Mukhopadhaya V. Pushpabala Choudhury and another.**
- 2. AIR 1962 Patna 178 (V 49 C 41) Full Bench – Ramsewak Mishra and another V. Mt.Deorati Kuer and others.**
- 3. 1972 KLT 101 – Assy Amma V. Aisbi**
- 4. MANU/TN/0980/1991-DB – Annapoorni V. Janaki Suo motu Revision**
- 5. AIR 1992 MAD 159 – Elisa v. A.Doss**
- 6. 1994 Supp (3) SCC 314 – Rajendra Prasad and another V. Khirodhar Mahto and others.**
- 7. (2001) 5 SCC 570 – Amba Bai and others V. Gopal and others.**
- 8. 2005 (2) Shim LC 162 – G.S.Chahal and others V. Punjab National Bank and others**
- 9. (2005) 6 SCC 300 – Kishun @ Ram Kishun (dead) through Lrs V. Behari (dead) by LRs.**
- 10.(2008) 8 SCC 521 – Jaladi Suguna (deceased) through Lrs V. Satya Sai Central Trust and others.**

**11.2013-3-LW 659 – M.Dhandapani V.
P.K.Ramakrishnan**

14.Per contra, the learned counsel for the respondents 1 to 7 herein would seriously argue that it is the duty of the defendants to bring it to the notice of the Court below about the death of the third defendant and the plaintiff who was totally a stranger to the family, was not aware of the death of the third defendant and on the failure of either of the defendants to inform the Court about the death of the third defendant, they cannot be permitted to raise any plea regarding non-substitution of LRs and against the validity of final decree passed. It is also argued on their side that the deceased plaintiff having purchased the property in the Court Auction in 1966, had been fighting before the Court for more than 40 years and the defendants in the suit and the LRs of the other defendant having remained absent and having failed to contest the suit both at preliminary and final decree stage and having allowed the proceedings to go on, cannot have any grievance against the final decree passed by the Trial Court. It is also their case that the suit for partition is filed by the Auction Purchaser only in pursuance of the direction issued in the suit filed by the third defendant and the plea of the third defendant that the properties

were allotted to him under Kurchit was already negated in his suit by the trial Court and neither the third defendant, either of his brothers nor his LRs had any defence against either preliminary decree or final decree passed by the trial Court in respect of the joint family properties.

15.It is further argued that what is allotted to the deceased plaintiff was only towards 1/4th share of the deceased first defendant and as it was not in excess of the share due to the first defendant and as it was allotted by way of equity, none of the other defendants or the LRs of the third defendant, who have all along been not in the picture, can have any objection against the allotment of suit item No.1 to the deceased plaintiff.

16.Heard the rival submissions made on both sides and perused the records.

17.Admittedly, K.T.Nataraja Mudaliar who was arrayed as third respondent in OS.No.303 of 1975 was alive when the preliminary decree was passed determining the shares of the parties and the third defendant/K.T.Natraja Mudaliar died only during the

pendency of final decree proceedings in IA.No.438 of 1999 in OS.No.303 of 1975. The legal proposition laid down by the Hon'ble Apex Court and our High Court to the effect that any judgment obtained against the dead person without substituting his legal heirs is nullity and inoperative. The case in which it is held so by the Hon'ble Apex Court and our High Court is either suit for money or declaratory suit or for removal of trespassers or at preliminary decree stage, wherein the judgment and decree conclusively determining the rights of the parties was made for the first time when the defendant was dead. In all the cases cited above on the side of the petitioners, it is decided so by taking the view that Order 22 Rules 3 and 4 CPC apply to such cases and by holding that the provisions of Order 22 and Rules 3 to 5 CPC are mandatory. It is held so by the Hon'ble Supreme Court and our High Court that non substitution of the legal representatives of the dead person as provided under Order 22 Rule 4 CPC render the decree against the dead person is nullity and in-executable.

18.However, the Division Bench of Patna High Court has in the judgment reported in **AIR (29) 1942 Patna 340 – Babuie Shanti Devi v. Khodai Prasad Singh and others** held that Rules

3 and 4 of Order 22 do not apply in case of the death of party after a preliminary and before the final decree in a mortgage suit. It is categorically held therein that the subsequent arrangement for continuation of the suit must be governed by Order 22 Rule 10 and not Rules 3 and 4 of Order 22.

19. It is held so by following the decision of privy council reported in **AIR 1924 privy council 198 – Lachmi Narain V. Balmakund** and the decision of the privy council is followed by full bench of Madras High Court and Patna High Court in the judgments reported in **AIR 1928 Mad 914 : 55 MLJ 453 Full Bench - Perumal Pillay v. Perumal Chetty** and **AIR 1931 Patna 57 - Mt. Bhatia V. Abdus Shakur** and followed by Calcutta High Court in the judgment reported in **AIR 1929 Cal 430 – Nazir Ahmad V. Tamijadii** and **AIR AIR 1927 Oudh 156 - Lakhpatti Kuar V. Daulat Singh.**

20. The same view is expressed by majority of Full Bench reported in **AIR (39) 1952 Assam 54 - Ajoy Kumar Mukhopadhyaya V. Pushpabala Chaudhury and another.** The question arose before the full bench was as to whether the final

decree obtained in the absence of original defendant without making his legal heirs as parties is void and nullity and whether the executing court has jurisdiction to go into the question whether the final decree was passed after the death of the defendant is nullity and the executing court could refuse to execute such void decree. The then Chief Justice of Assam High Court held as follows (i) if a decree properly so called, that is to say, a decree falling within the definition of sub section (2) of Section 2 of Civil Procedure Code is for the first time passed when the defendant was dead, the decree would be a nullity. (ii) where a decree within the meaning of sub section (2) of section 2 CPC has been passed, when the defendant was alive and such a decree requires further proceedings to be taken for the purpose of completely disposing of the suit, the adjudication in that behalf call it a final decree, cannot be regarded as a nullity because the adjudication was made at a time when the defendant was dead. The adjudication in such case is not a nullity, but merely voidable and binding on the legal heirs of the defendant and it cannot be avoided in execution proceedings; (iii) the final decree obtained after the death of the defendants in a suit for accounts without making his heirs party was not a void decree but was only voidable; and (iv) that the executing court and more so the

transferee executing court had no jurisdiction to go into the matter and examine for itself as to whether the decree was valid or not. In other words it could not go behind the decree as it appeared from the decree sheet.

21.The learned co-judge of the Division Bench Justice Ram Labhaya differed with such finding of the Chief Justice. According to the learned co-judge any degree passed against a dead person would be nullity if it is passed before the conclusion of the hearing and without bringing on record the LRs of the defendant who died and no distinction can be made between preliminary and final decree. The decree being a nullity does not require to be set aside and if it is sought to be enforced against a legal representative he can show that it is a nullity and inexecutable. When the executing Court takes cognisance of such objection and gives effect to it, it does not go behind the decree at all. It merely holds that no decree capable of execution exists.

22.In view of the divergent view expressed by the co-judge of the Assam High Court, the case was referred to third judge. The final decree passed against dead person who was alive

at the preliminary decree stage is held to be voidable by Hon'ble Chief Justice by relying on the decision of Privy council in **Lachmi Narain V. Balmakund – 51 Ind. App. 321** whereas the same is held to be void by relying on the judgment of the Full Bench of the Patna High Court reported in **AIR (6) 1919 Pat. 430 – Jangli Lal V. Laddu Ram**. The learned third judge, in order to answer the question, followed the Privy council case reported in **Radha Prasad V. Lal Sahab Rai - 17 Ind App. 150 PC : 13 All.53 (PC)**. It is held therein that *“an operative decree obtained after the death of a defendant by which the extent and quality of his liability, already declared in general terms, are for the first time ascertained, cannot bind the representatives of the deceased, unless they were made parties to the suit in which it was pronounced”*. The same view is accepted by the learned third judge, who was inclined to hold that the final decree obtained after the death of the defendant when a preliminary decree was obtained against the defendant when he was alive is not binding upon the heirs of the defendant unless they were made parties at the time when the decree was pronounced. The learned third judge in para 63 of the judgment expressed his agreement with the view of the Allahabad High Court in **AIR (18) 1931 ALL 490 (FB) - Mahabir Singh V. Narain Tewari**. It is held

by the Full Bench of Allahabad High Court that "*the question as to whether the decree is a nullity or not is not a question relating to execution or satisfaction of the decree. It goes to the very root of the decree and is a matter which the executing court cannot decide, the dispute involved not being within the scope of Section 47*".

Following the same, it is held by the learned third judge that whether the decree is effective or not due to the death of the defendant is not a matter which the executing Court can decide as the dispute involved not being within the scope of Section 47 CPC and that where the decree is sought to be challenged on the ground of its invalidity, the proper remedy is by a separate suit" whether it be the executing court which pass a decree or a transferee court. The Full Bench of Allahabad High Court in the judgment above cited was in approval with the principle laid down in other cases that where the decree is sought to be challenged on the ground of its invalidity, the proper remedy is by a separate suit. Applying the same view, the learned third judge upheld the contention regarding the competency of the executing court to go into the validity of the decree and decided the ground that the final decree was void as passed in the absence of the original defendant, as not maintainable in the execution proceedings. In view of the majority opinion of the

judges, the Assam High Court was pleased to set aside the order passed by the Executing Court refusing to execute the decree and the matter was sent back to the Executing court for disposal of the same according to law.

23. Thus, the principles laid down by the Privy Council, Full Bench of Allahabad High Court and majority of two judges, out of three judges bench of Assam High court are that (i) the final decree obtained after the death of the defendant, when a preliminary decree was obtained against the defendant, when he was alive, is not binding upon the heirs of the defendant, unless they were made parties at the time when the decree was pronounced, (ii) Whether the decree is effective or not due to the death of the defendant, is not a question relating to execution or satisfaction of the decree and the Executing court cannot decide the dispute involved the same not being within the scope of Section 47 CPC. (iii) where the decree is sought to be challenged on the ground of its invalidity, the proper remedy available is by a separate suit.

24. In my considered view, the authorities cited on the side of the revision petitioners are not applicable to the facts of the

present case. While the cases cited by the revision petitioners are relating to execution of original decree granted for the first time, the adjudication involved herein is not for the first time, but is after passing the preliminary decree, determining the rights of the parties, in the presence of all the parties and the adjudication sought to be challenged herein is at the final decree stage. As there is no abatement at that stage, Order 22 Rules 3 and 4 CPC is not applicable to such stage.

25.It is note worthy to mention at this juncture that the third defendant while he was alive, did not choose to challenge the correctness of the preliminary decree. The third defendant did not file any counter in the final decree proceedings and was hence set exparte on 27.7.1993. Here again, the third defendant while he was alive, did not take any steps to get exparte order set aside and to file counter along with the application to set aside the exparte order. The legal heirs of the third defendant, after having come to know about the final decree granted after the death of their father, without impleading them as legal heirs of third defendant, did not come forward to file any application to set aside the final decree passed against the dead person and to have the matter heard

afresh in their presence. They straight away filed Section 47 CPC petition before the Executing Court questioning the enforceability and executability of the same. There is absolutely no explanation offered by the revision petitioners/legal heirs of the third defendant either for the failure of the third defendant or for the failure on their part to take steps to have the decree passed in their absence set aside. In that event, the objection raised on the side of the revision petitioners that the final decree passed against the dead person without impleading the legal heirs is nullity and they need not go for any independent suit questioning the validity of the final decree so passed and the legal heirs can straight away file Section 47 application and seek to challenge the executability and enforceability of the final decree in the Execution Proceedings, in view of the principles laid down by the Privy Council, Full bench of Allahabad High Court and Assam High Court, deserves no merit and acceptance.

26. Thus, by applying the same principles, this Court though on different ground, is of the considered view that the impugned order, executing the final decree, passed by the Executing Court does not suffer from any infirmity or irregularity,

calling for any interference by this court.

K.B.K.VASUKI, J

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27.In the result, the Civil Revision Petition is dismissed. No costs.

07.09.2015

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To
The Sub Court, Vellore.

C.R.P. No.884 of 2006