

**THE HONOURABLE SRI JUSTICE M.S.RAMACHANDRA
RAO**

C.R.P.No.4822 OF 2014

ORDER :

This Civil Revision Petition is filed challenging the order dt.18.11.2014 in EP.No.95 of 2011 in O.S.No.648 of 2001 of the Principal Junior Civil Judge, Tadepalligudem.

2. The petitioner herein is the legal representative of the 1st defendant/2nd respondent in the said suit, which was filed by the wife of the 1st respondent for specific performance of an agreement of sale dt.08.10.1998 said to have been executed by respondents 2 and 3.

3. The said suit was decreed on 25.07.2003 directing respondents 2 to 4 to execute a regular sale deed in favour of 1st respondent's wife who was the decree holder and who had died on 12.10.2003.

4. Thereafter, EP.No.95 of 2011 was filed to execute the said decree seeking a direction to the respondent 4 to 7 and the petitioner to execute a regular sale deed in favour of the 1st respondent.

5. This application was opposed by the petitioner, who filed a counter contending that even before the decree was passed in the suit, the respondents 2 and 3 had died. He

gave the date of death of 2nd respondent as 02.08.2002 and of 3rd respondent as 06.03.2003 and contended that the 1st respondent was aware of this and in spite of that he did not take any steps to implead the legal representatives of the deceased-respondents 2 and 3, and therefore the decree is *non est* in the eye of law and liable to be set aside. He also contended that the dates of death of respondents 2 and 3 indicated in the EP cause title as 10.02.2004 and 15.01.2009 respectively, are not correct.

6. Before the Court below, the 1st respondent examined PWs.1 to 3 and the petitioner examined himself as RW1 and also marked EXs.R1 and R2, which are death certificates relating to the 2nd respondent, who is his mother.

7. By order dt.18.11.2014, the Court below rejected the objections raised by the petitioner and allowed the EP declaring that the 1st respondent is entitled to get a regular sale deed. It held that respondents 2 and 3 along with the 4th respondent had executed the suit agreement of sale in favour of the 1st respondent's wife and it is now not open to the petitioner to plead that no such sale agreement was executed in her favour. It also rejected the contention of the petitioner that the decree obtained cannot be executed on the ground that both respondents 2 and 3 had remained ex parte in the suit before passing of the decree and held that the 1st

respondent was not obliged to implead the legal heirs. It further held that the petitioner as well as respondents 4 to 7 are liable to execute a regular sale deed in favour of the 1st respondent.

8. Challenging the same, this Revision is filed.

9. Heard Sri Srinivas Emani, Counsel for the petitioner and Sri Yallabandi Ramatirtha, Counsel for 1st respondent.

10. Counsel for the petitioner contended that the order passed by the Court below is vitiated by the error in the exercise of jurisdiction vested in it and that the view taken by the Court below that the decree holder/1st respondent is not obliged to implead the legal heirs of respondents 2 and 3 in the suit since they were set ex parte in the suit, is not correct.

He contended that the 1st JDR had died on 02.08.2002 and the 2nd JDR died on 06.03.2003 i.e., before the decree in the suit was passed on 25.07.2003, and since their legal representatives were not brought on record, the decree is un-executable and is *non est* in the eye of law. He also contended that the 1st respondent as well as the witnesses examined by him are fully aware of the fact that respondents 2 and 3 had died before the decree was passed in the suit and their failure to implead the legal representatives disentitles the 1st respondent to seek any relief in the EP.

11. Counsel for the 1st respondent on the other hand refuted the above contentions. He stated that the 4th respondent is the husband of the 2nd respondent and he was on record in the suit in his own capacity; even if the 2nd respondent had died before the decree was passed in the suit, since the 4th respondent is a Class-I heir to the 2nd respondent under the provisions of Hindu Succession Act, 1956, the estate of the 2nd respondent is represented and therefore, there is no abatement of the suit caused by the death of the 2nd respondent prior to the decree. He further contended that although the petitioner had alleged that 3rd respondent died on 06.03.2003, he had not mentioned the said date in his evidence as RW1; that the 7th respondent, who is the son of the 3rd respondent had not even gone into the witness box to state about the date of the death of the 3rd respondent; no evidence in the form of any death certificate issued by the panchayat officials had been produced to prove that the 3rd respondent had in fact died prior to the decree. He therefore, contended that the decree passed by the Court below cannot be said to be *non est* in the eye of law, since the estate of the 2nd respondent was already represented by the 4th respondent and since there is no material placed to prove when the 3rd respondent died, adverse inference has to be drawn on account of non production of evidence as to the

actual date of death of the 3rd respondent, by the petitioner and respondents 4 to 7 and it has to be construed that the 3rd respondent had died after the decree is passed.

12. I have noted the submissions of both sides.

13. It is the contention of the 1st respondent that the 2nd respondent died on 10.02.2004 and the 3rd respondent died on 15.01.2009 i.e., after the decree was passed on 25.07.2003, and so there is no abatement of the suit.

14. The petitioner on the other hand contended that the 2nd respondent died on 02.08.2002 and in support his contention, he marked Exs.R1 and R2 and also examined himself in the Court below as RW1 asserting that she died on 02.08.2002.

15. In the light of this evidence, it has to be taken that the 2nd respondent died on 02.08.2002 and not on 10.02.2004 as alleged by the 1st respondent. But the petitioner has not disputed that the 4th respondent, who is the husband of the 2nd respondent, is a party in the suit and that he was also set ex parte in the suit.

16. Since it is not disputed that the 4th respondent is Class-I heir of the 2nd respondent and he was already on record in the suit as a party, notwithstanding the death of the 2nd

respondent pending suit, the estate of the 2nd respondent was represented by the 4th respondent. Merely because, the petitioner and other children of the deceased-2nd respondent were not added as legal heirs in the suit, it cannot be said that the suit had abated and the decree is a nullity as regards the 2nd respondent.

17. Coming to the 3rd respondent's death, it is the case of the 1st respondent that she died on 15.01.2009 but it is the case of the petitioner that she died on 06.03.2003. The petitioner having mentioned so in the counter filed by him in the EP No.95 of 2011, did not mention this date in his chief examination affidavit filed in the EP. No death certificate was filed in support of the plea that the 3rd respondent died on 06.03.2003. Further, the son of the deceased-3rd respondent, who is the 7th respondent, is also not examined as a witness by the petitioner.

18. Therefore, the Court is left with no option except to draw an adverse inference against the petitioner that the evidence available with the petitioner and the 7th respondent regarding the date of death of 3rd respondent was deliberately suppressed and that if that had been produced, it would not support their plea that the 3rd respondent had died pending suit.

19. I am also unable to subscribe the contention of the counsel for the petitioner that the 1st respondent had knowledge about the date of death of both respondents 2 and 3 because he was residing two streets away from the houses of petitioner and respondent 2 to 7, as no such presumption can be drawn under law. Although, the petitioner alleged that 1st respondent was related to respondents 2 and 3, this was specifically denied by PW1 in the Court below. PW2 also stated that the 1st respondent was not related to respondents 2 and 3. Therefore, notwithstanding the fact that the petitioner had urged that the 1st respondent is related to respondents 2 and 3, it cannot be said on the basis of his oral evidence, that there is a relationship between the parties. It is no doubt true that PW2 had stated that he is aware that 2nd respondent died on 02.08.2002 and also stated that 3rd respondent died within two or three months thereafter, but the knowledge of this witness cannot be attributed to the 1st respondent.

20. Therefore, I am of the considered opinion that the petitioner had failed to establish that 3rd respondent had died before the decree was passed in the suit and the suit had abated on account of her death.

21. No doubt, the observation made by the Court below that once the defendant is set ex parte in the suit by the Court, the

plaintiff is not obliged to implead the legal heirs of that defendant, if that defendant had died pending the suit is not correct. But the said view of the Court below does not in any way affect its conclusion that the petitioner and respondents 4 to 7 are liable to execute a regular sale deed in favour of the 1st respondent.

22. So, I do not find any merits in this Civil Revision Petition and is accordingly dismissed. There shall be no order as to costs.

23. Consequently, Miscellaneous Petitions pending if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

20th August, 2015.
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