

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.01.2016

CORAM:

THE HON'BLE **MS. JUSTICE R.MALA**

C.R.P.(PD).Nos.1245 & 1246 of 2012

and

M.P.No.1 of 2012

C.R.P.(PD).No.1245 of 2012

1.V.O.Duraisamy Mudaliar [Deceased]

2.Saradha

3.Durai Senthil

.. Petitioners/Respondents/Defendants

Vs.

Parijathammal (died)

P.Jayalakshmi

.. Respondent/Petitioner/Plaintiff

*[Petitioners 2 and 3 recorded as LRs of the deceased
1st Petitioner vide order of the Court dated 10.07.2015
made in memo dated 22.06.2015 in CRP.No.1245/2012]*

Prayer:

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the order dated 10.09.2009 made in I.A.No.790 of 2006 in O.S.No.27 of 2005 on the file of the learned District Munsif, Pallipattu.

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Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the order dated 10.09.2009 made in I.A.No.791 of 2006 in O.S.No.27 of 2005 on the file of the learned District Munsif, Pallipattu.

For Petitioners
in both CRP's : Mr.N.Ramesh

For Respondent
in both CRP's : Mr.G.Poonkundran

COMMON ORDER

Heard the learned counsel appearing for the revision petitioners and the learned counsel appearing for the respondent.

2. These Civil Revision Petitions have been filed challenging the impugned orders dated 10.09.2009 made in I.A.No.790 of 2006 and I.A.No.791 of 2006 in O.S.No.27 of 2005, wherein the application filed under Order 1 Rule 10 r/w Order 22 Rule 5 CPC to implead the subsequent purchaser as party to the proceeding and the application filed under Order 9 Rule 9 CPC to set aside the exparte dismissal of the suit and to restore the same came to be allowed.

3. The learned counsel appearing for the revision petitioners would submit that one Parijathammal as plaintiff has filed the suit in O.S.No.27 of 2005 for bare injunction in respect of 4 items of the suit property. The said Parijathammal died on 09.07.2006 and thereafter, the suit was dismissed for default on 14.07.2006. While so, the respondent herein who has purchased the 1st item of the suit property on 24.06.2006 has filed the applications to restore the suit which was dismissed for default on 14.07.2006 and also to implead herself as

party to the proceeding. The Trial Court allowed those applications, which act is against the law.

4. The learned counsel for the revision petitioners would advance his argument in three folds.

(i) The suit is filed by the plaintiff Parijathammal seeking for a relief of permanent injunction in respect of 4 items of the property against her brother. So, once the plaintiff dies, there will not be any cause of action. Further, the respondent herein has purchased the 1st item of the property only on 26.04.2006 and therefore, on the date of filing of the suit, there is no cause of action in favour of the respondent herein. Hence, the petition itself is not maintainable. However, the said factum was not considered by the Trial Court in proper perspective.

(ii) The suit property is in respect of 4 items and the respondent herein has purchased only the 1st item of the property on 26.04.2006. Hence, the application for restoration of the suit in respect of all the 4 items is against law.

(iii) The suit has been filed seeking for the relief of bare injunction and not for declaration of title. In such circumstances, there is no cause of action for the respondent herein who is the subsequent

purchaser for filing the application to implead. If the suit has been filed for declaration of title, the respondent herein can very well step into the shoes of the deceased plaintiff. However, since the suit is only for bare injunction, the said option is not available to the respondent.

5. To substantiate his argument, the learned counsel for the revision petitioners relied upon the following decisions:

- 1. (1973) 1 Supreme Court Cases 688, Phul Rani v. Sh.Naubat Rai Ahluwalia**
- 2. 2013 (3) CTC 356, Smt.Bhagwati v. Shri Kanshi Ram**
- 3. 109 (2004) DLT 852, Asha Batra and Others v. Dharam Devi**
- 4. CDJ 2013 SC 310, Ram Prakash Agarwal and Others v. Gopi Krishan (Dead through L.Rs.) and Others**

6. Resisting the same, the learned counsel for the respondent would submit that the respondent/plaintiff is none other than the sister of the deceased Parijathammal and also the sister of the deceased first defendant. The learned counsel would further submit that the respondent herein has restricted her claim only in respect of 1st item of the suit property. As per Order 1 Rule 10 and Order 22 Rule 5 of CPC,

the respondent herein is having interest over the property and hence, she can very well step into the shoes of the deceased plaintiff Parijathammal. Further, it is submitted that the respondent/proposed party purchased the property on 26.04.2006, learned counsel for the plaintiff died on 23.06.2006, the plaintiff died on 09.07.2006 and the suit was dismissed for default on 14.07.2006. Immediately, the respondent herein filed the applications to restore the suit and also to implead herself as party to the proceedings. The Trial Court considered all the aspects in proper perspective and came to the correct conclusion and hence, the learned counsel for the respondent prayed for dismissal of the Civil Revision Petition.

7. Considered the rival submissions made by both sides and perused the typed set of papers.

8. One Parijathammal as plaintiff has filed the suit for permanent injunction in respect of 4 items of property against 3 defendants. Admittedly, the said Parijathammal died on 09.07.2006 and the suit was dismissed for default on 14.07.2006. Thereafter, the respondent herein who is none other than the sister of the deceased plaintiff as well as the deceased first defendant/first revision petitioner filed

application under Order 9 Rule 9 CPC to set aside the exparte dismissal of the suit and to restore the same and also an application under Order 1 Rule 10 r/w Order 22 Rule 5 CPC to implead herself as party to the proceeding. On perusal of the plaint it is seen that the cause of action has been mentioned as "*The cause of action for the suit arose on 27.01.1967 when the suit property was purchased and on 17.05.2004, 20.03.2005 the defendants made an attempt to trespass into the suit property*". But according to the respondent/proposed party, she has purchased the property only on 26.04.2006 and so, as on the date of filing of the suit, there is no cause of action and she was not the person in possession. Further, if the suit is for declaration of title for the entire 4 items of the suit property, the respondent herein can step into the shoes of the deceased party as her valuable right is involved and hence, her impleadment is necessary and mandatory. But in the instant case, the suit is only for bare injunction and the respondent/proposed party has purchased the 1st item of the suit scheduled property only after the filing of the suit. So, the contention raised by the learned counsel for the revision petitioner that there is no cause of action involved for the proposed party to adjudicate the suit is acceptable one.

9. Further, the suit is dismissed for default in respect of 4 items of property. When that being so, the respondent herein who has purchased only the 1st item of the suit scheduled property cannot seek to restore the suit in respect of items 2 to 4 of the property. In such circumstances, I am of the view that the argument raised by the learned counsel for the petitioner in this regard is also acceptable.

10. At this juncture, it would be appropriate to consider the decisions relied on by the learned counsel for the revision petitioner.

10.1. In the decision reported in **(1973) 1 Supreme Court Cases 688, Phul Rani v. Sh.Naubat Rai Ahluwalia**, the learned counsel relied on paragraphs 9 and 21 of the decision and the same is usefully extracted here under:

"9. Though the plaintiff died during the pendency of the appeal, it is as if he died during the pendency of the suit because the suit was dismissed on a preliminary issue concerning the validity of the notices to quit and was remanded in appeal for trial on the merits. It is patent and would be altruism to say that the death of the plaintiff will not cause the ejectment proceedings to abate if the right to sue survives. That is the formula contained in Order 22

Rule 1 of the Code of Civil Procedure, a formula simple in its wording but not simple in its application. The "right to sue" as said succinctly in Saraj Chandra v. Nani Mihan(1) means 'the right to bring a suit asserting a right to the same relief which the deceased plaintiff asserted at the time of his death". Thus contracts involving the exercise of special skill like a promise to paint a picture do not bind the the representatives of the promisor nor do they create in them a right that can survive the death of the promisor.

21. We have referred to some of the decisions in the three Cate- gories, not with a view to determining their correctness but only in order to show that they rest on different principles or could be explained in reference to such principles. We are concerned with a matter not involving the application of any of those principles. For reasons already stated, we are of the view that considering the nature of the claim made in the instant case and the bundle of facts which constitute the plaintiff's cause of action, his right to sue will not survive to his legal representatives. "

But the above decision is not applicable to the facts of the present case because the said decision deals with the suit for ejectment for personal occupation and so, the legal heirs of the subsequent purchaser can step into the shoes of the real owner and they can maintain the suit. However, in the instant case, the suit is only for bare injunction and so, when the plaintiff dies, the subsequent purchaser is not entitled to maintain the suit in respect of all the items. So, I am of the view that that the right to sue will not survive to the proposed party and hence, the suit is liable to be dismissed.

10.2. In the decisions relied on by the learned counsel for the revision petitioners reported in **2013 (3) CTC 356, Smt.Bhagwati v. Shri Kanshi Ram; 109 (2004) DLT 852, Asha Batra and Others v. Dharam Devi; CDJ 2013 SC 310, Ram Prakash Agarwal and Others v. Gopi Krishan (Dead through L.Rs.) and Others**, it was held that the suit being simply for the grant of injunction, it would come to an end on the death of the defendant. But in the instant case it was a suit for bare injunction and when the suit was dismissed for default on the death of the plaintiff, the proposed party cannot step into the shoes of the deceased plaintiff and contest the suit. So, the above decisions are not relevant to the facts of the present case.

11. As discussed supra, the respondent/proposed party has no locus standi to file an application to restore the suit because the respondent herein has purchased only the 1st item of the suit property. Further, since the suit is for bare injunction, there arose no cause of action for the proposed party because she has purchased the property only after the filing of the suit. The Trial Court without considering these aspects in proper perspective has allowed the application filed by the respondent. Hence, the order of the Trial Court is perverse and the same is liable to be set aside and accordingly set aside and the Civil Revision Petition stands allowed. However, it is left open to the respondent to work out her remedy by filing a separate suit.

12. In fine, these Civil Revision Petitions are allowed. Consequently, the impugned order passed in I.A.Nos.790 and 791 of 2006 in O.S.No.27 of 2005 are set aside and the applications are dismissed. Connected miscellaneous petition is closed. No costs.

04.01.2016

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R.MALA, J.

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To

The learned District Munsif,
Pallipattu.

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