

*HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

+CIVIL REVISION PETITION No.2362 of 2015

% Dated 20.09.2016

Between:

Mohammad Azam Moinuddin ... Petitioner

and

\$ H.E.H.the Nizam Awaqf Committee,
Rep. by its Secretary Mohd. Kasim Paza,
Office behind Judi Masque, Hyderabad
and others . Respondents

! Counsel for the petitioner : M/s. P.Sridhra Reddy,

^ Counsel for respondents : Sri V.Ramachander Goud
Sri Shaik Iqbal Pasha
Sri Zeeshan Adnan Mahmood

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? Cases referred:

¹ AIR 1997 SC 856

² (1998) 3 SCC 148

³ AIR 1995 SC 358

⁴ AIR 1996 SC 2000



HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

Civil Revision Petition No. 2362 of 2015

ORDER:

The revision petitioner is making a claim as independent claimant as tenant under the D.Hr. over the decree schedule property under execution for delivery. The E.P.No.32 of 2012 was filed by the revision 1st respondent-D.Hr. against the revision 2nd respondent sole J.Dr. by name Mohd.Mainuddin, on 03.04.2012 under Order XXI Rule 35 CPC for recovery of possession of the E.P. Schedule property, pursuant to the decree and judgment dated 10.03.2008 in the suit supra. The schedule property described as shop bearing No.15-6-81 of Afzalgunj mosque bounded by North: cement road, South: Afzalgunj Mosque, East: Mulgi No.15-6-80, and West: Mulgi No.15-6-82. The D.Hr. is H.E.H. Nizam Mir Barkat Ali Khan represented by Awakf Committee through its Secretary Mohammad Khasim Raza. The said suit was decreed by the Wakf Tribunal and sent for execution to the Chief Judge, City Civil Court and same is pending before the learned III Additional Chief Judge, City Civil Court, for execution in the above E.P.

2. Before filing of the above E.P. sole J.Dr. named supra died in the year 2008. The D.Hr. supra however filed the Execution Petition against the dead person as if alive. It is in the pending Execution Petition later the D.Hr. filed application in E.A.No.45 of 2014, showing the legal representatives in possession to represent the J.Drs' estate right as succeeded, and impleaded respondents 2 to 4 as J.Drs. 2 to 4 of the E.P. by mentioning the provision of law, section 50 and 151 of CPC in November, 2011 in so stating in the supporting affidavit of the Secretary of the D.Hr. Committee.

3. It was even before filing by the D.Hr. of the E.A.No.45 of 2014, the revision petitioner no other than brother of said J.Dr. filed claim petition E.A.No.2 of 2013, claiming independent rights and not as one of the legal representative of his late brother sole J.Dr. since died in 2008. It is one of his contentions that he claims tenancy rights independently over the schedule premises. While so, the E.A.No.45 of 2014 by order dated 20.02.2015 was allowed to implead the respondents 2 to 4 as legal representatives of sole J.Dr. which includes the revision petitioner-claimant of E.A.No.2 of 2013. In fact, pending the claim in E.A.No.2 of 2013, the E.A.No.45 of 2014 2nd respondent (Revision petitioner herein) sought for stay of E.P. proceedings in E.A.No.1 of 2013. There is another E.A.No.58 of 2013 filed by the E.A.No.45 of 2014 respondents 3 and 4, no other than wife and daughter of the sole J.Dr.

4. In the relevant factual background of the lis, before coming to the correctness of the impugned order in E.A.No.45 of 2014 dated 20.02.2015 of the learned III Addl. Chief Judge, City Civil Court, the further facts in dispute covered therein are that:-

a) The E.A.No.45 of 2014 2nd respondent (revision petitioner) claimant in E.A.No.2 of 2013, according to the D.Hr. is an old tenant of the E.P.Schedule property and he was a chronic and willful defaulter of rents and thereafter, the D.Hr. committee filed O.S.No.157 of 2003 before the Wakf Tribunal, Hyderabad and in the eviction suit, he filed written statement admitting the property as Wakf property and he was a tenant on rent of Rs.70/- p.m. under the Wakf Committee and the suit was ultimately decreed and execution petition was filed against that the J.Dr. of decree in O.S.No.157 of 2003 (Revision petitioner herein).

b. The revision petitioner filed a counter as 2nd respondent in E.A.No.45 of 2014 impugning the maintainability of the implead petition showing him also as one of the legal representatives of sole J.Dr. with the contention that he is not one of the legal representatives of the sole J.Dr. but for independent claimant of the suit schedule property for which he already maintained a claim in E.A.No.2 of 2013 and also submitted that sole J.Dr. died way back in 2008 with death certificate as proof of it in E.A.No.2 of 2013 and the D.Hr. having knowledge filed the implead petition in E.A.No.45 of 2014 belatedly and thereby the E.A.No.45 of 2014 is liable to be dismissed, so also the E.P.No.32 of 2012.

5. Whereas, the learned Addl. Chief Judge observed that:-

The suit was decreed and E.P.No.32 of 2012 filed pursuant to it is in seeking delivery of the property and at that stage, the 2nd respondent (revision petitioner) filed E.A.No.2 of 2013 making a claim with stay petition E.A.No.1 of 2013, and the respondents 3 and 4 (wife and daughter of sole J.Dr.) filed E.A.No.58 of 2013 and when those matters were pending, objection raised by the learned counsel for the E.A.No.45 of 2014, 2nd respondent/ claimant, of E.A.No.2 of 2013 for taking up to give disposal of this E.A.No.45 of 2014, without deciding his claim made in E.A.No.2 of 2013. A perusal of the judgment placed reliance in *Brahmdeo Chowdhary Vs. Rishikesh Prasad Jaiswa*¹ regarding succession and administration of Mahamadan law, the devolution of interest among sharers, residuaries, distant Kindred in Hanafi Law of inheritance, list of sharers and full brother becomes the descendent of the father and thus all the respondents 2 to 4 of the E.A.No.45 of 2014

¹ AIR 1997 SC 856

come within the meaning of legal representatives of the deceased of sole J.Dr. and allowed the E.A.No.45 of 2014.

6.It is the same impugned in the revision with the contentions by the revision petitioner/ 2nd respondent to E.A.No.45 of 2014/ claimant in E.A.No.2 of 2013 that the impugned order herein is illegal, vitiated by the material irregularities, the petitioner shown as 2nd respondent being brother of deceased along with daughter and wife of deceased J.Dr. but in fact he is not at all the legal representative of the deceased J.Dr. but for independent claimant of tenancy rights over the decree schedule property as claimed in E.A.No.2 of 2013 and without considering the same, the executing Court cannot proceed, and firstly it ought to have decided the E.A.No.2 of 2013 and instead of doing so, wrongly decided the E.A.No.45 of 2014 and mechanically allowed the same even the E.P.No.32 of 2012, filed against a dead person is no way sustainable. The lower Court failed to consider under what circumstances brother of deceased under Muslim law becomes legal heir, that too when he claims tenancy in his own rights, the question of impleading him as one of the legal representatives of sole J.Dr. does not arise even he is otherwise a legal representative for his possession is not as such but as tenant over the property and sought for setting aside the impugned order.

7.Heard both sides at length and perused the material on record.

8.Undisputedly, the suit O.S.No.110 of 2012 was filed only against the sole defendant and after decree dated 10.03.2008, E.P.No.32 of 2012 was maintained against the said defendant as sole J.Dr. However, the undisputed fact remains from the record that the sole J.Dr. died even way back in 2008 itself though subsequent to the decree dated 10.03.2008 to say the death was long before filing of E.P.No.32 of 2012

against the dead person. Thus, the very Execution Petition filed against a dead person has no legs to stand.

9. No doubt, as pointed out by learned counsel for D.Hr, Order XXII Rules 3,4 and 8 of CPC, have no application to proceedings in execution of a decree or order, as the case may be. The Rule 3 speaks of death of one of several plaintiffs or sole plaintiff and Rule 4 speaks of death of one of several defendants or sole defendant, when died pending suit to bring the legal representatives and Rule 8 speaks of insolvency of plaintiff in any suit which the assignee or receiver has to maintain for benefit of creditors shall not cause abate unless such assignee and receiver declines to continue the suit or unless for any special reasons Court otherwise directs, or the exclusion of the costs, Court may direct whether assignee or receiver neglects to continue the suit and give security within the time so ordered, defendant may apply the suit may be dismissed under the grant of plaintiff insolvent and the Court may make order dismissing the suit and award costs to the defendant against the plaintiff's estate.

10. In fact, Order 22 Rules 1 and 2 speaks about the question of abatement on the death of the plaintiff or of the defendant in a civil suit and procedure where one of several plaintiffs or defendants dies and right to sue survives to the other parties to the suit, the Court shall cause entry to that effect and proceed at the instance of the surviving plaintiffs or against surviving defendants.

11. The Supreme Court in V.Uthirapathi Vs. Ashrabali² dealing with the execution proceedings for eviction, observed that pending execution, in case the J.Dr. or D.Hr. dies execution petition will not

² (1998) 3 SCC 148

abate but will remain pending for no limitation to bring on record legal representatives of deceased for them to come at any time on record within the statutory time of limitation of execution petition. For the reason Order 22 Rule 12 of CPC speaks Rules 3,4 and 8 of Order XXII have no application to the execution proceedings. The decision no way speaks about execution proceedings can be maintained against a dead person.

12. In fact, under Section 50 CPC, where the J.Dr. dies before decree has been satisfied, the holder of decree may apply to the Court which passed it to execute the same against the legal representatives of the deceased where the decree is executed against the legal representatives, it shall be liable only to the extent of propriety of the deceased which has come to his ends and has not been disposed off and the Court shall compel such legal representatives to produce such accounts as the things fit. Even from this provision, the EP can be filed showing the defendant to the suit and decree as died and other respondents to the E.P. are the legal representatives and but for that the E.P. filed against dead person cannot be given life to implead the legal representatives subsequent thereto even from what is laid down in V.Uthirapathi supra, for where it is held of in pending execution proceedings, if the J.Dr. or D.Hr. dies, execution proceedings shall not abate but for to proceed after bringing the respective legal representatives who are liable to submit the relief on record and for which there is no limitation, if the main execution petition is within the period of limitation.

13. Section 146 CPC in fact says, save or otherwise provided by the Court or by any law for time being in the force where any proceedings may be taken or application made by or against any person,

then the proceedings may be taken or application may be made by or against any person claiming under him. Thus, what it speaks is for death of any J.Dr. or D.Hr. before filing of execution petition even execution petition can be maintained against the legal representatives and in the case of pending execution petition even the legal representatives can be impleaded.

14. Here, in the case on hand, by the time E.P. is filed, J.Dr. is no more and the E.P. filed is against dead person and thereby it no way survives but for remedy of D.Hr. is to file fresh E.P. by showing sole defendant died as pro-forma 1st respondent (since died) and the other respondents are his/ her legal representatives.

15. Once the E.P.No.32 of 2012 filed is against the dead person, subsequent filing of E.A.No.45 of 2014 no way survives, but for by showing the legal representatives only filing of fresh Execution Petition and seeking therein to recognize legal representatives of the J.Dr. to proceed against them even from combined reading of Section 50 and 146 of C.P.C.

16. In fact, the execution for recovery of possession under Order XXI Rule 35 of C.P.C. need not be filed against all legal representatives of the sole defendant since died by showing as J.Drs. but for against those persons who are actually in possession in claiming through deceased J.Dr. Here the wife and daughter are only claiming as legal representatives in possession, if any, whereas, the brother of the sole defendant is not claiming as legal representative in possession, though he is in possession, same is his claim in E.A.No.2 of 2013 that he is a tenant under the D.Hr. Committee in relation to the plaint schedule property covered by the decree and the decree obtained thereby is not

binding on him and his claim is liable to be adjudicated and his claim petition is liable to be decided independently, even the E.P.No.32 of 2012 is not maintainable for the same filed against a dead person. The claim petition vide E.A.No.2 of 2013, like an independent suit, is required to be adjudicated from what is contemplated by Order XXI Rule 101 CPC, at least by taken the same as obstruction to the delivery from the independent claim made by the third person who need not wait till dispossession to maintain a claim under Order XXI Rule 99 CPC, but for before his dispossession even from what is laid down by the Apex Court in *Brahmadeo Chowdary supra*, leave about the earlier expressions in this regard in *Bhanwarlal Vs. Satyanarayana*³ and *Babulal Vs. Rajkumar*⁴. Thus, the independent claim of the revision petitioner made in E.A.No.2 of 2013 on merits is decided and also if at all on merits it is found that said claim of him is unsustainable and he is also the person bound by the decree, then only it is to be ordered under Order XXI Rule 35 CPC, for re-delivery by showing him as one of the J.Drs. to take possession. Thereby without deciding on merits the E.A.No.2 of 2013, merely because even from the Muslim law of inheritance for wife is entitled to 1/8th share; daughter, where there is no son, is entitled to 2/3rd and the remaining that goes back to the descendants of the father i.e. the full brother is one of such descendants, he cannot be shown as one of the legal representatives along with the wife and daughter of the sole J.Dr. for being the brother of the sole J.Dr., unless there is a finding of his claim, in E.A.No.2 of 2013 won't lie on merits and he is also the person in possession as legal representative of the J.Dr. and bound by the decree under the guise of D.Hr's showing him as one of the legal representatives of the J.Dr. when it is not his claim through the

³ AIR 1995 SC 358

⁴ AIR 1996 SC 2000

J.Dr., but for independently and when that requires adjudication, he cannot be dispossessed.

17. Having regard to the above, the revision is allowed by setting aside the order dated 20.02.2015 in E.A.No.45 of 2014 consequently dismissing the application in E.A.No.45 of 2014 and equally the proceedings in E.P.No.32 of 2012 for originally maintained against a dead person since unsustainable, however by left open remedy to the D.Hr. to file fresh Execution Petition by showing therein all the respondents to E.A.No.45 of 2014 as J.Drs. with a petition to so recognize as per Sections 50 and 146 CPC, for there is no limitation for such recourse as Order XXII CPC has no application to the execution proceedings and the decree thus can be executed by array of them so long as the executability of the decree for recovery of possession is not barred by 12 years limitation from the date of decree. However, it is made clear that, the array of the revision petition 2nd respondent to E.A.45 of 2014 (claimant in E.A.No.2 of 2013) as co-J.Dr. in a fresh proceedings to be filed, no way takes away the independent right of him claimed in E.A.No.2 of 2013, but for to decide the claim is correct and sustainable or not on own merits and pass a decree as per Order XXI Rules 97 to 99 and 101 r/w 103 CPC and as per law. No costs.

18. Consequently, pending miscellaneous petitions, if any, in this revision shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date:20.09.2016

Note: L.R.Copy to be marked.

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