

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 17.08.2017

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD)No.1890 of 2010
& M.P.No.1 of 2010

1. Jakku @ Gangadevi
2. Shanmugarajulu
3. Jothiraman .. Petitioners

Vs.

1. E.P.Saraswathi
2. Krishnamoorthy @ Durai
3. Lalitha
4. Jayanthi
5. Rajeswari
6. Saravanan
7. Prema .. Respondents

PRAYER: Civil Revision Petition filed Under Article 227 of the Constitution of India, against the fair and decreetal order dated 12.08.2009, made in I.A.No.173 of 2008 in O.S.No.130 of 2007, on the file of the First Additional Subordinate Court, Erode.

For Petitioners	: Mr.N.Manokaran
For R1	: No appearance
For R2 & R3	: Batta due
For R4 to R7	: I.C.Vasudevan

ORDER

This Civil Revision Petition is filed against the fair and decreetal order dated 12.08.2009, made in I.A.No.173 of 2008 in

O.S.No.130 of 2007, on the file of the First Additional Subordinate Court, Erode.

2. The petitioners are defendants 4 to 6, first respondent is the plaintiff, respondents 2 & 3 are the defendants 2 & 3 and respondents 4 to 7 are the proposed parties in O.S.No.130 of 2007. The first respondent filed the said suit for partition and separate possession, on the file of the First Additional Subordinate Court, Erode. Pending suit, the first defendant died. First respondent filed I.A.No.173 of 2008 for impleading the proposed parties as legal representatives of the deceased first defendant.

3. The petitioners filed counter affidavit and submitted that the proposed parties have no connection with the deceased first defendant. The first defendant had two wives and they are alive and they are the only legal heirs of deceased first defendant. The third respondent and proposed parties remained exparte. The second respondent did not file any counter affidavit.

4. Before the learned First Additional Subordinate Judge, no oral and documentary evidence was let in. The learned Judge,

allowed the application on the ground that whether the respondents 4 to 6 are the legal representatives of the deceased first defendant or not can be decided, only after appreciating the evidence let in by the parties during the trial.

5. Against the said order dated 12.08.2009, made in I.A.No.173 of 2008 in O.S.No.130 of 2007, the present civil revision petition is filed by the petitioners.

6. The learned counsel appearing for the petitioners submitted that the learned Judge, committed an irregularity in not deciding the issue whether the respondents 4 to 6 are the legal heirs of the deceased first defendant. As per Order 22 Rule 5 of the Code of Civil Procedure, it is the duty of the Court to determine whether proposed parties are the legal heirs of the deceased first defendant or not. The learned counsel appearing for the petitioner relied on the judgments reported in

(i) (2006) 5 CTC 606 (Chhabil Das v. Pappu):

"8. The question of substitution of Jarwali by Pappu, therefore, was in issue in a proceeding under Order 22, Rule 5 of the Code of Civil Procedure, 1908.

Order 22, Rule 5, reads thus:

"5. Determination of question as to legal representatives-- When a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court:

Provided that where such question arises before an Appellate Court, that Court may, before determining the question, direct any Subordinate Court to try the question and to return the records together with evidence, if any recorded at such trial, its findings and reasons therefore, and the Appellate Court may take the same into consideration in determining the question."

9. The appellant, therefore, did not deny or dispute that the respondent herein could represent the estate of Jarwali. When a question arose as to who is the legal representative of a party to the Suit who had expired, the same was required to be determined in terms of Order 22, Rule 5 of the Code of Civil Procedure.

(ii) 2015 (1) CTC 114 (Karedla Parthasaradhi V. Gangula Ramanamma (D) through L.Rs. & Others):

"28. In the first place, the High Court should have

remanded the case to the Trial Court by taking recourse to the provision of Order 22, Rule 5, Proviso for deciding the question as to whether K.Sanjiva Rao (Respondent NO.1 herein) was the Legal Representative of deceased Defendant No.1 (Gangula Ramanamma) and if so, in what capacity – adopted son or legatee on the strength of Will dated 02.01.1984. Secondly, without first deciding this material question, the High Court could not have either allowed the Application and nor it could have proceeded to decide the Appeal on merits. Thirdly, the High Court simply allowed the Application without recording a finding as to whether any right in the suit property was devolved in favour of K.Sanjiva Rao after the death of Defendant NO.1 and if so, in what capacity. This finding alone would have enabled K.Sanjiva Rao to become the appellant and prosecute the Appeal on merits and lastly, this was a case where inquiry into the question was necessary and it could be done only by the Trial Court.”

7. Though the name of the first respondent is printed, there was no representation either in person or through the counsel. The second respondent did not file any counter affidavit before the Trial Court and the third respondent remained exparte. In view of the same, notice to the respondents 2 and 3 are dispensed with.

8. The learned counsel appearing for the respondents 4 to 7 submitted that they are the legal heirs of the deceased first defendant. The learned Judge has rightly impleaded the legal heirs of the deceased Jayachandran. In support of his contentions, the learned counsel appearing for the respondents 4 to 7 relied on the following judgment: **1999 (11) MLJ 514 (Vasantha Ammal and others V. Narasimha Naidu):**

"5. The applications to implead themselves as legal representatives of Duraisamy Naidu in all the suits were resisted by the respondent Sankaran stating that he is the only legal heir of late Duraisamy Naidu, and Vasantha Ammal was already married and Vasantha Ammal and her minor daughters are not the legal representative of Duraisamy Naidu.

15. the enquiry order under Order 22, Rule 5, C.P.C., is not meant to determine the heirship of the deceased. But it is an enquiry to determine whether the person who sought to be impleaded as legal representative has sufficient interest in carrying on the litigation. I therefore, hold that the learned District Munsif had exceeded in his jurisdiction, and converted the summary enquiry into a full-fledged trial.

17. The consequence of holding a full trial and giving a finding on the question of legal heirs would

create several difficulties. Firstly as I have already seen, the finding rendered his final conclusion in the matter that would finally determine the rights of the parties in the interlocutory stage. Secondly there is no provision of appeal against the order passed by him under Order 22, Rule 5, C.P.C, holding on whether a person is a legal representative or not. The revisional Court while examining the matter may either confirm or differ from the views of the trial Court.

21. Hence, this petition filed to receive the additional document is rejected, but it is made clear that it will be open to the respondent to mark the document in question at the time of trial if the same is subject to proof and other objections that may be raised by the petitioners herein."

9. Heard the learned counsel appearing for the petitioners and respondents 4 to 7 and perused the materials available on record.

10. The first respondent filed suit. Pending suit, the first defendant died. The first respondent filed the present I.A.No.173 of 2008 for impleading respondents 4 to 7 as legal heirs of deceased first defendant. The petitioners opposed the said application on the ground that the respondents 4 to 7 are not the legal heirs of the

deceased first defendant. Only two wives of first defendant, who are alive are the legal heirs of the deceased first defendant. The petitioners have not taken any steps to substantiate their contention. Whether the proposed parties are the legal heirs of the deceased first defendant or not, cannot be decided in a summary proceedings. The said issue can be decided only after appreciating the evidence let in by parties at the time of conclusion of trial. By impleading the proposed parties, rights of the parties are not decided. The issue before the Court is whether the proposed parties can represent deceased first defendant or not. The learned Judge has rightly held that the issue whether the proposed parties are legal heirs of the deceased first defendant can be decided only after appreciating the evidence let in by the parties.

11. In view of the above facts, the judgments relied on by the learned counsel appearing for the petitioners are not applicable to the facts of this case. There is no illegality or irregularity warranting interference with the order of the learned trial Judge dated 12.08.2009. The petitioners are disputing that the proposed parties are the legal heirs of deceased first defendant. In view of the said objection, the learned Judge is directed to decide the said issue as a

preliminary issue and then proceed to decide the suit on merits.

12. With the above direction, the civil revision petition is disposed of. No costs. Consequently, the connected miscellaneous petition is closed.

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Index: Yes/No
gsa

Note: Issue order copy on 18.08.2017

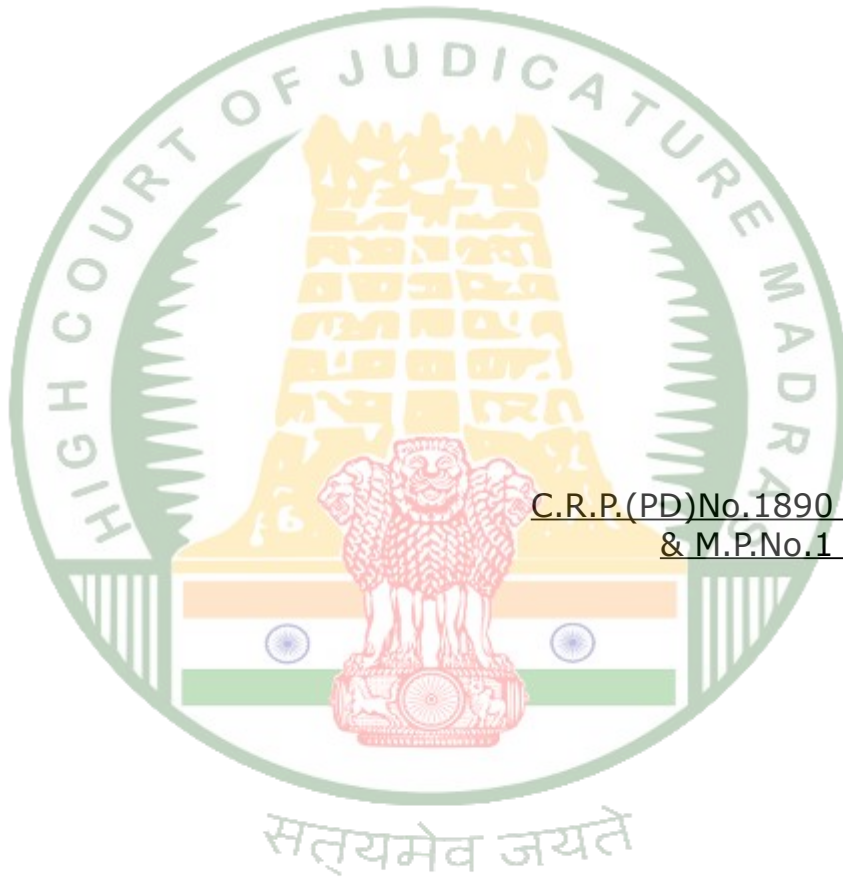
To
The First Additional Subordinate Judge,
Erode.



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V.M.VELUMANI, J.

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