

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.11.2017

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.R.P. (NPD) No.1410 of 2003

1.Laiqua Sultana
2.Mohammad Ghiasuddin .. Petitioners

vs

1.Syed Begum (died)
2.M.H.Liyahat Ali
3.L.Javid Ali
4.L.Farooq Ali
5.L.Mushtaq Ali .. Respondents

(Respondents 2 to 5 brought on record
as LRs of deceased sole respondent
as per order dt. 20.12.2013 in CMP.Nos.
559, 560 & 561 of 2011)

Civil Revision Petition filed under Section 115 of the Code
of Civil Procedure against the order dated 12.8.2003 passed in
E.A.No.2383 of 2002 in E.P.No.234 of 2002 in O.S.No.5276 of 1994
on the file of X Assistant City Civil Judge, Chennai.

For Petitioners : Mr.A.V.Munuswamy

For Respondents : No Appearance

ORDER

This Civil Revision Petition is directed against the order
dated 12.08.2033 passed in E.A.No.2383 of 2002 in E.P.No.234 of
2002 in O.S.No.5296 of 21994 on the file of the learned X
Assistant City Civil Judge, Chennai.

2. In this revision, the first respondent died and her heirs
were brought on record as respondents 2 to 5. Respondent Nos.2
and 4 have not entered appearance despite service and the
respondents 3 and 5 have unclaimed the notice.

3. I heard Mr.A.V.Munuswamy, learned counsel for the petitioners and also perused the materials available on record. No representation on behalf of the respondents.

4. The petitioners have filed E.A.No.2383 of 2002 under Section 47 of C.P.C. alleging that the first respondent filed the suit for passing preliminary decree against their mother and pending suit, their mother died on 21.6.1997. Without impleading the heirs of the defendant in the suit, the first respondent (now deceased) obtained an ex parte preliminary decree and based on the ex parte preliminary decree, she had also filed I.A.No.3991 of 2000 for passing final decree. By an order dated 07.3.2001, the final decree was passed. Pursuant to the ex parte preliminary decree and the final decree, the first respondent filed E.P.No.234 of 2002 for execution of the decree.

5. It is alleged that on the date of passing the preliminary decree the sole defendant was not alive and therefore, the preliminary decree passed in the suit was nullity and non-est in law. It is further alleged that since the final decree dated 7.3.2001 passed in the suit was based on the ex parte preliminary decree, the same is also null and void and consequently, the Execution Petition filed based on the ex parte preliminary decree and final decree is not maintainable in the eye of law.

6. Resisting E.A.No.2383 of 2002, the first respondent filed counter stating that since the petitioners or their mother did not pay the amount, she had filed O.S.No.5276 of 1994 for foreclosure of the mortgage and the sole defendant i.e., the mother petitioner filed her written statement contesting the suit and she was represented through her counsel. The counsel for the sole defendant represented on various dates and as there was no representation on 09.7.1997, the sole defendant was set ex parte and preliminary decree was passed. It is stated that pursuant to the preliminary decree, the first respondent took steps to file final decree application and at that time, she learnt that the sole defendant died. Hence, the first respondent filed I.A.No.10599 of 1998 to bring on record the petitioners as legal heirs of the sole defendant, where notice was received by the petitioners and had entered appearance through their counsel. After several adjournments, I.A.No.10599 of 1998 came to be allowed and the final decree application was numbered as I.A.No.3991 of 2000. In I.A.No.3991 of 2000, the second petitioner filed her counter and after taking several adjournments, did not choose to contest the final decree

proceedings and finally, the Court passed the final decree on 7.3.2001. According to the first respondent, the petition under Section 47 of C.P.C. filed by the petitioners is only to drag on the proceedings and also to delay the fruits of the decree obtained by the first respondent. Hence, prayed for dismissal of the petition.

7. Upon consideration of the rival submissions, the Executing Court dismissed E.A.No.2383 of 2002 on the ground that the petitioners have failed to produce the death certificate of their mother to show that their mother died before passing the preliminary decree. Moreover, after passing the preliminary decree, the first respondent took steps to bring on record the petitioners as legal heirs of the sole defendant and final decree was passed against the petitioners. Since the first respondent filed Execution Petition after obtaining final decree against the petitioners, they have no right to file E.A.No.2383 of 2002 contending that the preliminary decree was not executable.

8. It appears that the Executing Court dismissed E.A.No.2383 of 2002 mainly on the ground that the petitioners have failed to produce their mother's death certificate to show that before passing the preliminary decree she died. The petitioners have contended that their mother died on 21.6.1997, whereas the preliminary decree was passed on 09.7.1997.

9. During the course of hearing, the learned counsel for the petitioners produced documents to show that the mother of the petitioners died before passing the preliminary decree. Since the petitioners have raised the plea that preliminary decree was passed against the dead person and also in order to give an opportunity to the petitioners to show before the Executing Court that their mother died before passing the preliminary decree, it would be appropriate to remand the matter back to the Executing Court for fresh consideration of E.A.No.2383 of 2002.

10. In the result, the Civil Revision Petition is allowed and the order dated 12.8.2005 passed in E.A.No.2383 of 2002 in E.P.No.234 of 2002 in O.S.No.5296 of 1994 on the file of the learned X Assistant City Civil Judge, Chennai is set aside and E.A.No.2383 of 2002 is remanded back to the Executing Court for fresh consideration. The petitioners are directed to file death certificate of their mother before the Executing Court. It is made clear that this Court has not expressed any opinion on the merits of E.A.No.2383 of 2002 and it is open to the

Executing Court to deal with E.A.No.2383 of 2002 on merits and in accordance with law, after affording an opportunity to both sides, within a period of two weeks from the date of receipt of a copy of this order. No costs.

Sd/-
Assistant Registrar(CS)

//True Copy//

Sub Assistant Registrar

To

The X Assistant City Civil Judge,
Chennai.

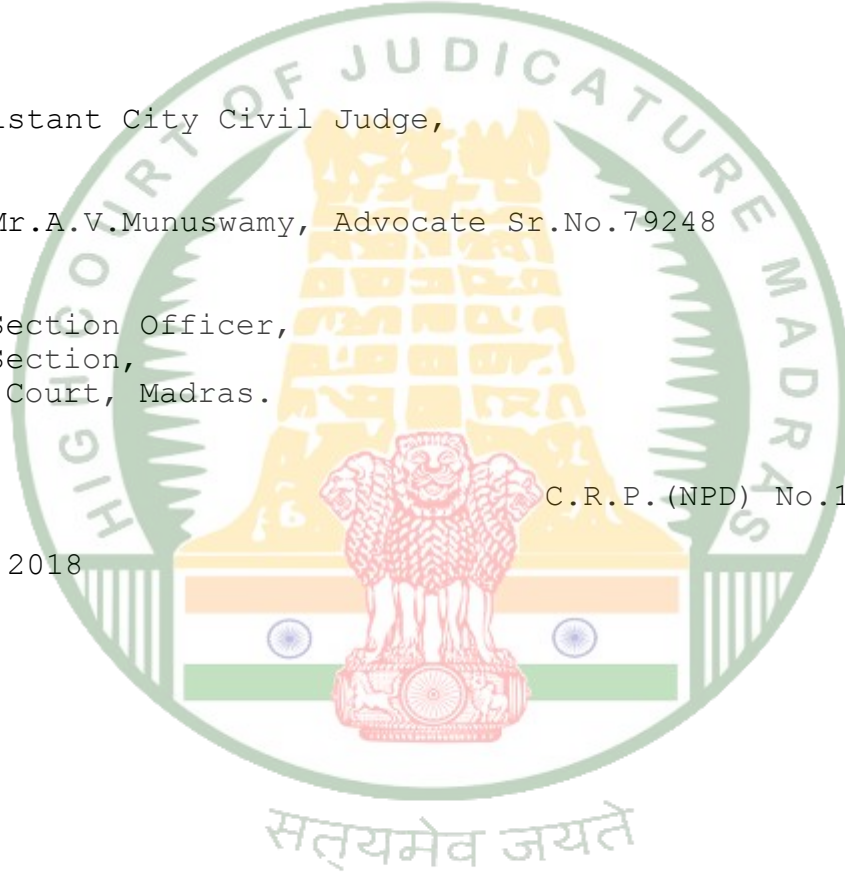
+1 cc to Mr.A.V.Munuswamy, Advocate Sr.No.79248

Copy To:

The Section Officer,
V.R.Section,
High Court, Madras.

NM(CO)
CSL/12.12.2018

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