

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 18.04.2017

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

**CRP(NPD)No.963 of 2012
and
M.P.No.1 of 2012**

1.Sadam Hussain
2.M.Salman
3.M.Saleem (Minor)
(Minor rep. by Guardian
and Hasina)

.. Petitioners

Vs.

1.R.G.Ramasamy Reddy
2.C.S.Munaf

..Respondents

Prayer: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, against the fair and decreetal order of the learned District Munsif at Tirupattur, Vellore, dated 10.10.2011 made in REA.No.47 of 2011 in REA.No.9 of 2008 in E.P.No.63 of 2006 in O.S.No.232 of 2004.

For Petitioners : Mr.G.Jeremiah

For Respondents : Mr.R.Ramesh (for R1)
No Appearance (for R2)

ORDER

The petitioners are the third parties in E.P.No.63 of 2006 in R.E.A.No.47 of 2011 in R.E.A.No.9 of 2008 before the learned District Munsif, Tirupattur, Vellore District, are the Civil Revision Petitioners before this Court.

2.The case of the petitioners is that the petitioners have filed a petition in R.E.A.No.47 of 2011 in R.E.A.No.9 of 2008 in E.P.No.63 of 2006 in O.S.No.232 of 2004 before the learned District Munsif Court, Tirupattur, Vellore District, under Order 23 Rule 1 and Section 151 of C.P.C. seeking permission to the Court, to permit the petitioners to file a fresh petition under Order 23 Rule 1 CPC, to withdraw the petition filed under Section 47 of C.P.C. in R.E.A.No.9 of 2008.

3.It is the case of the petitioners is that originally they are the third parties in E.P.No.63 of 2006, were filed the petition under Section 47 of C.P.C. in R.E.A.No.9 of 2008 for attachment of the property in the Execution Petition. The said application has been filed under Section 47 of C.P.C. on the advice of the early Advocate by one Mr.K.Umar.

4.It is further case of the petitioners that thereafter, the petitioners engaged the present counsel in the place of the early counsel Mr.K.Umar, Advocate and on perusal of the papers, the present Advocate advised the petitioners to withdraw the petition under Section 47 of C.P.C. and filed a fresh petition under Order 21 Rule 58 of C.P.C. on the ground that the property belongs to the petitioners, even before the attachment by way of gift deed. Therefore, the petitioners filed the petition under Order 23 Rule 1 and Section 151 of C.P.C. to permit the petitioner to withdraw the R.E.A.No.9 of 2008 in E.P.No.63 of 2006 pending on the file of the learned District Munsif, Tirupattur, Vellore District and permit the petitioner to file a fresh petition under Order 21 Rule 5 of C.P.C.

5.For the above petition filed in R.E.A.No.47 of 2011, the 1st respondent has filed a counter affidavit by denying the entire allegations set out in R.E.A.No.47 of 2011.

6.It is the case of the 1st respondent that the petitioner filed a petition in R.E.A.No.9 of 2008 is not maintainable and it is vexatious, since there is no provision to withdraw the petition already filed.

7.The respondents also stated in their counter that though the application was filed in R.E.A.No.9 of 2008 and pending for more than 3 years and the evidence of both sides were already completed and the petitions were already adjourned by several times for arguments. On that stage, the present application in R.E.A.No.47 of 2011 was filed.

8.It is the further case of the respondent that there is no provision in law to withdraw the petition already filed and prosecuted. The provision mentioned under Order 23 Rule 1 C.P.C. does not apply to the petitioners' case. After dragging the proceedings in the E.P.No.63 of 2006, the present petitioners filed the petition only to drag on the proceedings and the petitions are being filed belatedly and the delay is not explained properly. Therefore, the 1st respondent has prayed this Court for dismissal of the application.

9.Considering both side arguments, the learned District Munsif Court, Tirupattur, by order dated 10.10.2011 dismissing the application on the ground that the application in R.E.A.No.9 of 2008 filed long back and the matter was taken after evidence on either side and adjourned for arguments on both sides for more than seven

months for seven hearings, but no argument was advanced by the petitioners.

10.The learned Judge also states that because of change of advice by the present counsel even then, the respondents have no knowledge about the proper petition filed by the petitioners, cannot be a ground for withdrawal, and permitted to file a fresh petition under Order 21 Rule 5 C.P.C. Challenging the said dismissal order, the present petition has been filed by the petitioners belatedly only to drag on the proceedings. Challenging the said order, this Civil Revision Petition has been filed for the aforesaid prayer.

11.I heard Mr.G.Jeremiah, learned counsel for the petitioner and there is no representation on behalf of the respondents.

12.It is admitted fact that the third parties are the petitioners, but their cases is that prior to the attachment of the property in question, the petitioners are in possession of the property. When the petitioners filed R.E.A.No.9 of 2008 and the same is pending and the present counsel advised him to file petition under Order 21 Rule 5 of C.P.C., instead of petition filed under Section 47 of Cr.P.C.

13. Order 21 Rule 5 of C.P.C. which reads as follows:

"5. Mode of transfer.- Where a decree is to be sent for execution to another Court, the Court which passed such decree shall send the decree directly to such other Court whether or not such other Court is situated in the same State, but the Court to which the decree is sent for execution shall, if it has no jurisdiction to execute the decree, send it to the Court having such jurisdiction."

14. The petitioners filed objections under Order 21 Rule 3 of C.P.C. seeking permission to withdraw the application filed in R.E.A.No.9 of 2008 filed under Section 47 of C.P.C., this Court permit the petitioners to file a fresh application under Order 21 Rule 5 of C.P.C., no prejudice would be caused to the respondents.

15. Though the Court as well as the respondents strongly objected on the ground that only to drag on the proceedings, the present petitioners filed this present petition. Therefore, I am inclined to allow this petition by setting aside the order passed by the Court below with a direction to the petitioners to file a petition under Order 21 Rule 58 of C.P.C., since the petitioners are entitled to withdraw the petition and to file a fresh petition.

16.In the result:

(a) this Civil Revision Petition is allowed by setting aside the order passed in R.E.A.No.47 of 2011 in R.E.A.No.9 of 2008 in E.P.No.63 of 2006 in O.S.No.232 of 2004, dated 10.10.2011, on the file of the learned District Munsif, Tirupattur, Vellore District;

(b) the petitioners are permitted to file a fresh petition under Order 21 Rule 5 of C.P.C.;

(c) the Executing Court is directed to number the application within a period of 15 days thereafter, after disposal of the same by giving notice to both the parties on merits. No costs. Consequently, connected miscellaneous petition is closed.

18.04.2017

Note:Issue order copy on 13.03.2018

vs

Index:Yes/No

Internet:Yes/No

To

The District Munsif Court,
Tirupattur, Vellore.

WEB COPY

M.V.MURALIDARAN, J.

VS



Pre-Delivery order made in
CRP(NPD)No.963 of 2012
and
M.P.No.1 of 2012

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18.04.2017

CRP.No.963 of 2012**M.V.MURALIDARAN, J.**

This Court passed an order in CRP.No.963 of 2012 on 18.04.2017. At the instance of the learned counsel appearing for the petitioner and the 2nd respondent, this petition has been posted before this Court today under the caption "for being mentioned".

2.I have heard the learned counsel appearing for the petitioner and the learned counsel appearing for the 2nd respondent. I have also gone through the documents including the order passed by this Court on 18.04.2017.

3.In the said order, the petitioner has mentioned the provision under Order 21 Rule 5 instead of Order 21 Rule 58 of CPC.

4.Admittedly, the petitioner would have mentioned the provision under Order 21 Rule 58 of CPC, but it is wrongly mentioned Order 21 Rule 5 of CPC.

5.It is admitted fact that the petitioner though filed petition in

R.E.A.No.9 of 2008 under Section 47 of Cr.P.C. instead of Order 21 Rule 58 of CPC, this Court is inclined to allow this Civil Revision Petition on 18.04.2017.

6.It is made clear that the Order 21 Rule 5 is entirely different that the Mode of transfer. But the Order 21 Rule 58, it is clearly stated as follows:

"58.Adjudication of claims to, or objections to attachment of property.- (1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to adjudicate upon the claim or objection in accordance with the provisions herein contained:

Provided that no such claim or objection shall be entertained—

(a) where, before the claim is preferred or objection is made, the property attached has already been sold; or

(b) where the Court considers that the claim or objection was designedly or unnecessarily delayed.

(2) All questions (including questions relating to right, title or interest in the property attached) arising between the parties to a proceeding or their representatives under this rule and relevant to the adjudication of the claim or objection, shall be determined by the Court dealing with the claim or objection and not by a separate suit.

(3) Upon the determination of the questions referred to in sub-rule (2), the Court shall, in accordance with such determination,—

(a) allow the claim or objection and release the property from attachment either wholly or to such extent as it thinks fit; or

(b) disallow the claim or objection; or

(c) continue the attachment subject to any mortgage, charge or other interest in favour of any person; or

(d) pass such order as in the circumstances of the case it deems fit.

(4) Where any claim or objection has been adjudicated upon under this rule, the order made thereon shall have the same force and be subject to the same conditions as to appeal or otherwise as if it were a decree.

(5) Where a claim or an objection is preferred and the Court, under the proviso to sub-rule (1), refuses to entertain it, the party against whom such order is made may institute a suit to establish the right which he claims to the property in dispute; but, subject to the result of such suit, if any, an order so refusing to entertain the claim or objection shall be conclusive."

7. Therefore, the provision under Order 21 Rule 58 should be inserted wherever in the order mentioned Order 21 Rule 5 of CPC.

8. Registry is directed to correct the provision under Order 21 Rule 5 as Order 21 Rule 58 of CPC and issue fresh order copy to the petitioner.

9. Apart from this, for the 1st respondent, the learned counsel Mr. R. Ramesh is appeared, but mistakenly it was mentioned that "there

was no representation on behalf of the respondents". Therefore, Registry is directed to carry out the correction in paragraph-11 as "heard the learned counsel for the 1st respondent" instead of "there was no representation on behalf of the respondents".

10.Except the above modifications, the order passed by this Court on 18.04.2017 remains unaltered in all other aspects.

11.Registry is directed to incorporate the above mentioned in the order and issue a modified order immediately.

vs

26.03.2018



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M.V.MURALIDARAN, J.

VS



CRP.No.963 of 2012

26.03.2018

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