

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 13.08.2019

C O R A M

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

CRP (NPD) No.3003 of 2013 and
M.P.No.1 of 2013

1. Edukula Kumari
2. Krishna Bharathi (died)
3. Ravichandran

(3rd petitioner brought on record as Legal Heirs
of the deceased 2nd petitioner vide order
dated 06.09.2016 made in a memo in
CRP No.3003 of 2013)

4. Vasanthakumari
5. S.Venkatesh Babu
6. Priya

... petitioners

Vs.

Chandrasekaran

... Respondent

PRAYER: Civil Revision Petition filed under Section 115 of the Code
of Civil Procedure against the orders dated 26.07.2013 passed in E.P.No.88
of 2006 in O.S.No.774 of 1974 on the file of the Principal District Munsif,
Ambur.

For Petitioners : Mr.A.R.Ravichandran

For Respondent : Ms. AC.Ganthimathi

ORDER

The revision petitioners are the respondents 3 to 6 in E.P.No. 88/2006 in O.S.No.774/1974 on the file of the Principal District Munsif, Ambur. The respondent along with one Loganathan (since deceased) filed the E.P.No.88/2006 under Order XXI Rule 11(2) of the Code of Civil Procedure to deliver or restitution of the suit property to them. The learned Principal District Munsif, Ambur after analysing the evidence on record, allowed the execution petition ordering delivery of property, vide his fair and decreetal order dated 26.07.2013. Aggrieved over the same, the present civil revision petition is filed.

2. One Danalakshmi and Sundaresan (since deceased) filed the suit in O.S.No.774 of 1974 against the present respondent and one Loganathan (since deceased) before the Additional District Munsif, Tirupattur for declaration of their title to the suit properties and for a permanent injunction and also for a mandatory injunction. The said suit was dismissed with costs by the trial judge vide his decree and judgment dated 29.01.1977. Aggrieved over the same, they filed A.S.No.59 of 1977 before the Subordinate Judge Tirupattur. The appeal was allowed by the Subordinate Judge, Tirupattur vide his decree and judgment dated

30.11.1978 and the decree and judgment passed by the Additional District Judge, Ambur was set aside. Subsequently, in the second appeal in S.A.No.43/1995, this court set aside the decree and judgment passed by the first appellate court and restored the decree and judgment passed by the trial court.

3. In the original suit in O.S.No.774 of 1974, the plaintiffs have also sought for a relief of mandatory injunction to demolish the upstairs portion of the suit property and they filed E.P.No.707 of 1984 before the District Munsif, Tirupattur and obtained possession of the suit property. However, in the second appeal, since the decree and judgment passed by the trial court was restored and the decree and judgment passed by the first appellate court was set aside, the defendants in O.S.No.774 of 1974 filed E.P.No.88 of 2006 before the Principal District Munsif, Ambur for delivery of possession of the property or restitution of the suit property to them. Since the plaintiffs and the 2nd defendant died, their legal heirs were impleaded. The present revision petitioners/respondents filed their counter in E.P.No.88 of 2006 contending that the petition filed by the defendants is not maintainable, since there is no specific order in the second appeal directing the plaintiffs to deliver or restitution of the property in favour of them. It is further contended by the civil revision

petitioners/plaintiffs that the defendants should file a separate suit and cannot file a petition under Order 21 Rule 11(2) of the Code of Civil Procedure seeking for delivery of the property.

4. Mr.A.R.Ravichandran, learned counsel appearing for the revision petitioners contended that during the pendency of the second appeal in S.A.No.43 of 1985 before this court, Danalakshmi, one of the plaintiffs died and without impleading her legal heirs, the first defendant cannot file an execution petition against the legal heirs of the first plaintiff. He would therefore contend that the decree passed in S.A.No.43 of 1985 is non-est in the eye of law.

5. He also relied on the following decisions in

1. *Amba Bai and others Vs. Gopal and others* reported in 2001-5 Supreme Court Cases 570 .

2. *Gurnam Singh (dead) Through legal representatives and others Vs. Gurbachan Kaur (dead) by legal representatives* reported in 2017-3 Supreme Court Cases 414.

3. *Jaladi Suguna (deceased) through Lrs. Vs. Satya Sai Central Trust and others* reported in 2008-8

Supreme Court Cases 521.

and contended that

(i) On the death of a party to an appeal, if no application is filed within 90 days from the date of death of the said party, the right to sue to bring the legal heirs of the deceased on whom right to sue had devolved, then such appeal stands abated automatically on expiry of 90 days. On 91st day, there is no appeal pending before the court as it stood dismissed as abated.

(ii) Where, during the pendency of the second appeal one of the parties died and his legal heirs are not brought on record and the High Court disposed the second appeal without knowing the death of the appellant, the judgment of the inferior court is deemed to lose its identity and merges with the judgment of the superior court.

(iii) The provisions of Order XXII Rule 4 and 5 of the Code of Civil Procedure are mandatory and when the respondent in an appeal dies, and the right to sue survives, the legal representatives of the deceased respondent have to be brought on record before the court can proceed further in the appeal.

6. A perusal of the records shows that the revision petitioners had not indicated the exact date of death of the first respondent/first plaintiff in S.A.No.43 of 1985. The death extract has not also been filed. Even assuming that the first plaintiff died during the pendency of the second appeal, and the factum of the death of the first respondent/first plaintiff was not made known to this court, it is to be seen that the 2nd respondent, who is the son of the first respondent was very much alive on the date of passing of decree in S.A.No.43 of 1985. Therefore, the rulings relied upon by the learned counsel appearing for the revision petitioners are not applicable to the facts of the present civil revision petition.

7. Ms.A.C.Ganthimathi, learned counsel appearing for the respondent relied upon the decision in *Mohd Hussain (dead) by LRs and others Vs. Occhavlal and others reported in 2008 - 3 Supreme Court Cases 233* and contended that if some of the legal heirs of the deceased respondent are already on record, it should be construed that there is a substantial /sufficient representation of interest of the non impleaded heirs and therefore, it would be too technical to set aside the entire judgment of the High Court on the ground of not bringing the entire body of one of the respondents as legal heirs on record.

8. In the instant case, as already observed, the second appeal did not get abated for non impleadment of the legal heirs of the deceased first respondent. It is also relevant to point out that though it is contended by the revision petitioners that the first respondent (Danalakshmi) in S.A.No.43 of 1985 died during the pendency of the second appeal, this fact was not brought to the notice of this court, before passing of decree in the second appeal. At this juncture, it is relevant to extract Order XXII Rule 10(A) of the Code of Civil Procedure.

10-A Duty of pleader to communicate to court death of a party - Whenever a pleader appearing for a party to the suit comes to know of the death of that party, he shall inform the court about it, and the court shall thereupon give notice of such death to the other party, and, for this purpose, the contract between the pleader and the deceased party shall be deemed to subsist.

The new Rule 10(A) is introduced to impose an obligation on the pleaders of the party to communicate to the court the death of the party represented by him. In the instant case, this has not been done by the counsel, who appeared on behalf of the first respondent. Therefore, the revision petitioners now cannot contend that the decree passed in S.A.No.43 of 1985

is non-est in law.

9. The Principal District Munsif, Ambur in his fair and decreetal order dated 26.07.2013 in E.P.No.88 of 2006 had observed that the execution petition filed by the defendants was maintainable and that they cannot be driven to file a separate suit for recovery of possession of the suit property from the present revision petitioners/plaintiffs. It is further observed that as per Order XXI Rule 101 and Section 47 of the Code of Civil Procedure, any dispute between the parties to the suit can be decided in the execution petition itself and not by way of separate suit.

10. In the instant case, the suit was filed for a declaration, permanent injunction and also for a mandatory injunction to demolish the upstairs portion of the first floor of the suit property. Though the Principal District Munsif dismissed the suit in O.S.No.774 of 1974 and the first appellate court reversed the findings of the trial court, this court restored the decree and judgment passed by the trial court.

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11. Since the first appeal in A.S.No.59 of 1977 was allowed by the first appellate court, the revision petitioners/plaintiffs filed a petition in E.P.No.707 of 1984 and took possession of the suit property. When the decree and judgment of the first appellate court was set aside, the party

should be placed in the original position. At this juncture, it is relevant to extract Section 144 of the Code of Civil Procedure.

144. Application for restitution. (1) Where and in so far as a decree or an order is varied or reversed in any appeal, revision or other proceeding or is set aside or modified in any suit instituted for the purpose, the court which passed the decree or order shall, on the application of any party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position which they would have occupied but for such decree or order or such part thereof as has been varied, reversed, set aside or modified and, for this purpose, the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation, reversal, setting aside or modification of the decree or order.

As per Section 144 of the Code of Civil Procedure, once the decree already passed was set aside, the person who lost the possession by virtue of the

said decree is entitled for restitution. More over, as rightly observed by the learned Principal District Munsif, Ambur, as per Section 47 and Order XXI Rule 101 of the Code of Civil Procedure, any dispute between the parties should be decided only in the execution petition. In the facts and circumstances, the orders passed by the learned Principal District Munsif, Ambur in E.P.No.88 of 2006 is perfectly in order and I do not see any reason to interfere with the findings recorded by him.

12. In the result,

(i) The civil revision petition is dismissed. No costs. The connected miscellaneous petition is closed.

(ii) The fair and decreetal orders passed in E.P.No.88 of 2006 in O.S.No.774 of 1994 dated 26.07.2013 by the Principal District Munsif, Ambur is upheld.

13.08.2019

Index : Yes/No
Internet : Yes/No
Speaking/non-speaking order
mst

To

The Principal District Munsif, Ambur.

R.HEMALATHA,J.
mst



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