

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.03.2019

CORAM :

THE HON'BLE Ms. JUSTICE P.T. ASHA

C.R.P. (NPD) No.3914 of 2018

and

C.M.P.Nos.21714 & 21716 of 2018

D.Bhavanraj

... Revision Petitioner

Vs.

Rajendran (died)

Sudhakar

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the docket order dated 03.10.2018 made in the unnumbered E.A.SR.No.1384 of 2018 in E.P.No.49 of 2004, thereby directing the lower Court to take the claim petition on board and number it and dispose of the same on merits on the file of the learned District Munsif cum Judicial Magistrate, Arcot, Vellore District in the interest of justice and equity.

For Petitioner : Mr.T.K.Kulasekaran

For Respondent : Mr.Sandeep
for M/s.Shah & Shah

ORDER

The above Civil Revision Petition has been filed, challenging the return of the application under Section 47 of the Code of Civil Procedure, filed by the

revision petitioner/3rd party, without being numbered in E.P.No.49 of 2004 on the file of the District Munsif-cum-Judicial Magistrate Court, Arcot.

2.It is necessary to briefly touch upon certain facts, which precede the filing of this Civil Revision Petition. It appears that a suit in O.S.No.10 of 1991 has been filed by the respondents herein against the revision petitioner's father, one A.T.Dhayanandham and others, for partition on the file of the Subordinate Court, Ranipet (presently on the file of the Subordinate Court, Vellore, in O.S.No.130 of 1970). Ultimately, the suit was decreed and a preliminary decree was passed and thereafter, on 29.03.1993, a final decree had also come to be passed. The revision petitioner's father had participated in all the proceedings up to the final decree stage.

3.After passing of the final decree, the revision petitioner's father filed an appeal in A.S.No.71 of 1993 on the file of the Additional District Court, Vellore. The learned Additional District Judge had passed a judgment and decree dated 29.06.2001 in A.S.No.71 of 1993, which reads as follows.

“(iii) Appeal is allowed. The lower Court judgment is modified. The Eastern portion of Shop No.175 in Item No.1 shown as 'B' in Commissioner's plan is allotted to the plaintiff and the Western Portion (A) will go to the 8th defendant. Since both are adjacent owners, they shall bear their cost throughout.”

4. Therefore, by virtue of this decree, the plaintiff had become entitled to the eastern portion of the shop, bearing Door No.175 and the revision petitioner's father, viz., the 8th defendant had become entitled to the western portion. After the decree was passed, the same was sought to be executed, since, the revision petitioner's father had not handed over the vacant possession of the said portion.

5. Meanwhile, one of the defendants had challenged his decree in A.S.No.74 of 1993 by filing a Second Appeal in S.A.No.516 of 2003 and the same is pending herein, before this Court. In that appeal, the 8th defendant, viz., the revision petitioner's father is not a party to the proceedings.

6. Thereafter, the plaintiff had filed execution proceedings in E.P.No.379 of 2003 on the file of the Subordinate Court, Ranipet, which was subsequently renumbered as E.P.No.49 of 2004, for delivery of the eastern portion of Shop No.175, besides other reliefs. This execution petition was filed on 30.12.2003 and the 8th defendant was shown as 8th Judgment Debtor. On 11.06.2004, the 8th respondent/8th defendant was set *exparte*. It is seen that the possession has already been taken from the tenants in possession of the Shop No.175 on 13.11.2018 and the bailiff report in support of the same is also enclosed in the Typed Set of Papers.

7. Meanwhile, the revision petitioner, son of the 8th defendant, has taken up an application under Section 47 of the Code of Civil Procedure, contending that, he is the son of the 8th defendant, who had been set *ex parte* and who died thereafter and that without bringing the legal representatives on record, the present delivery, that was executed, was *per se* illegal. Therefore, he would contend that the revision petitioner should be restituted back into possession.

8. Such an application under Section 47 of CPC has been filed by the revision petitioner on 03.10.2018, but, was returned on the same day by the Court below with an endorsement, calling upon the revision petitioner to state, as to how the application under Section 47 of CPC is maintainable, besides also observing that the 8th respondent/8th defendant, under whom the revision petitioner claims, was set *ex parte* as early as on 11.06.2004 and break open was ordered much later, however, no steps have been taken, either to set aside the order or to implead the legal representatives of the 8th respondent/8th defendant.

9. The revision petitioner has re-presented the returned application with a statement that, he was not aware of the execution proceedings and the subsequent orders of delivery and break open, and as soon as he came to know about that, he has moved the said application under Section 47 of CPC.

He would also contend that there is an interim stay of decree in O.S.No.10 of 1991, granted in entirety in the Second Appeal. Therefore, he would contend that the application has to be numbered and it should be taken on file.

10.A reading of the application under Section 47 of CPC, which has been filed by the revision petitioner on the file of the District Munsif-cum-Judicial Magistrate Court, Arcot, would state that the entire proceedings came to his knowledge, only when the delivery was taken and that the delivery, being ordered against a dead person, is a nullity. This was the only ground on which the said application has been filed. Since, the learned Judge has refused to number the said application and returned it, the revision petitioner has approached this Court by way of Civil Revision Petition, invoking the superintending jurisdiction of this Court under Article 227 of the Constitution of India.

11.Heard Mr.T.K.Kulasekaran, learned counsel, appearing on behalf of the revision petitioner. He would contend that the Decree Holder is guilty of suppression, inasmuch as he has not deemed it fit to implead the legal representatives of the 8th Judgment Debtor, especially after making him as a party to the proceedings. He would further contend that the learned Judge has erred in not numbering the application and in simply returning the same. If the Decree Holder sought to exempt himself from taking notice to the legal

representatives of the 8th defendant, then an application should have been moved and an order in writing should have been obtained. In the absence of the same, the order returning the application under Section 47 of CPC is without any basis. In support of his contentions, the learned counsel has relied upon the following judgments.

(i) *Zahirul Islam v. Mohd. Usman & Ors.* **[2003 (1) SCC 476]**

(ii) *Shahazada Bi and Others v. Halimabi (since dead) by her Legal Representatives* **[(2004) 7 SCC 354]**

(iii) *Venkataramana and Others v. N.Munuswamy Naidu*
[2010 (4) CTC 640]

All these judgments have been relied in support of the proposition that, as per the provisions of Order XXII Rule 4 of CPC, exemption in writing has to be obtained, before the Court could proceed with order of delivery.

12. Per contra, Mr. Sandeep, learned counsel appearing on behalf of the respondents would place the facts in perspective and state that, as early as on 11.06.2004, the revision petitioner's father had been set *ex parte*, however, he had not chosen to file any application to set aside the *ex parte* order till his death on 10.06.2008, only on account of the fact that, in the final decree that was passed in A.S.No.71 of 1993, which was filed by him, the Court had decreed the eastern portion of the shop bearing No.175 in favour of the plaintiffs and it is this portion that is being sought to be taken delivery of. He

further argued that this judgment has reached its finality, since, there was no appeal from the said judgment and decree. He would further submit that, possession has already been taken from the tenant in possession of the property and all the articles have also been handed over to him and it is only on 23.11.2018, that this present Civil Revision Petition has been filed.

13.He would further contend that, as per the provisions of Order XXII Rule 12 of the Code of Civil Procedure, the provisions of Rule 3, 4 and 8 of Order XXII of the Code of Civil Procedure would not apply in the execution proceedings and therefore, the arguments advanced by the learned counsel appearing on behalf of the revision petitioner that there should be a written order exempting the Decree Holder from bringing on record the legal representatives of the deceased Judgment Debtor does not have any leg to stand on. In support of the contention, he referred to the provisions of Order XXII Rule 12 of the Code of Civil Procedure and relied on the judgment of the Division Bench of this Court reported in **1954 AIR (Mad) 760 [Pethaperumal Ambalam v. Chidambaram Chettiar, Minor through Property Guardian P.E. Eapen]** and the judgment of the High Court of Andhra Pradesh reported in **AIR 1962 Andhra Pradesh 520 [Medaboyina Seethanna and Others v. Arubandi Sankara Lakshmi Devi and Others]**, wherein, the judgment reported *supra* has been referred to, with approval.

14. Heard the learned counsel for both sides and perused the papers on record.

15. It is clearly evident that the plaintiffs, who have filed the suit as early as in the year 1991, are seeking to have the decree executed and that too, after the revision petitioner's father had unsuccessfully challenged the decree in A.S.No.71 of 1993, wherein, the eastern half of Shop No.175 has been allotted to the share of the Decree Holder. The father of the revision petitioner was impleaded as a party in the execution proceedings, but, he chose to remain *ex parte* as early as in the year 2004 and thereafter, he was alive for another four years, but he has not chosen to implead himself, since, what was sought to be executed was a decree of the Court, which had attained its finality.

16. Further, the revision petitioner has not made out any case under Section 47 of CPC, so as to have his application numbered and posted for hearing. Section 47 of the Code of Civil Procedure reads as follows:

"47. Questions to be determined by the Court executing decree?"

(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.

[29]* * * *

(3) *Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.*

[30] *[Explanation I.? For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.*

Explanation II.? (a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]”

17. In the instant case, the 8th defendant, under whom the revision petitioner claims the right, has not chosen to question the decree and the revision petitioner cannot maintain an independent right over the said property. That apart, the main argument on which the application under Section 47 of CPC is sought to be filed is that, the legal representatives of the 8th defendant have not been brought on record and therefore, the order of delivery is a nullity. However, in the light of the provisions of Order XXII Rule 12 of the Code of Civil Procedure, such an argument falls flat.

18. The High Court of Andhra Pradesh, in the judgment in **AIR 1962 Andhra Pradesh 520**, cited *supra* has observed as follows :

"Consequently, it is no necessity to issue notice to the judgment-debtor in such an application, if it is unnecessary to serve the judgment-debtors with notice, it is equally so even with regard to their legal representatives because they could oppose such an application only on grounds which were open to the judgment-debtors. So, possession could be obtained without notice to them or even without formally bringing them on record.

This view of ours gains support from the judgment of the Madras High Court in Pethaperumal v. Chidambaram, ILR (1954) Mad 1206. It was ruled by a Division Bench of the Madras High Court consisting of Rajamannar C.J., and Rajagopala Ayyangar, J. that there was no legal obligation on the part of a decree-holder to implead the legal representatives of a deceased judgment debtor at the stage of taking delivery of possession of property and the proceedings taken under O.XXI, R.96, without impleading them could not be held to be void."

19. Consequently, I find no infirmity in the order of return, passed by the Court below and taking into consideration the fact that, there is no reasonable ground made out in the application under Section 47 of CPC, this

Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

11.03.2019

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Index : Yes / No

Internet : Yes / No

Speaking order / Nonspeaking order

To

1.The Additional District Judge,
Vellore.

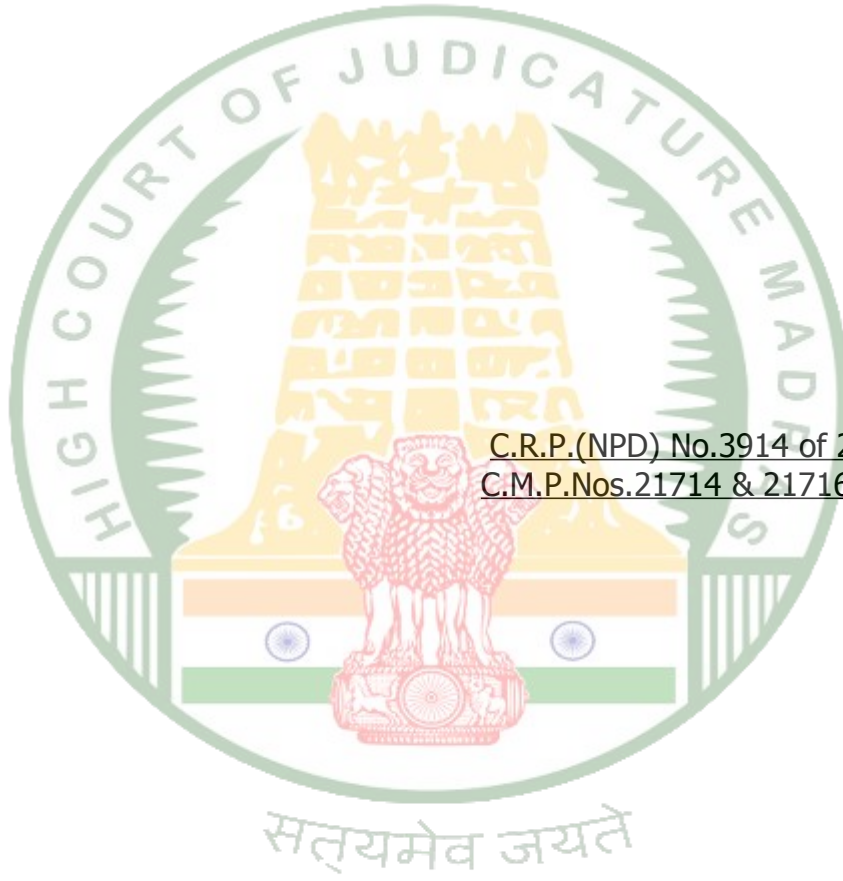
2.The District Munsif-cum-Judicial Magistrate,
Arcot,
Vellore District.



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P.T.ASHA, J.

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