



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED: 14.08.2019

CORAM:

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THE HONOURABLE MR.JUSTICE S.S. SUNDAR

C.M.S.A. (MD) .No.25 of 2018
and
C.M.P. (MD) .No.4491 of 2019

1.Mohamed Ushman Mydeen

(AA1 and 3 who were already on record and recorded as Lrs of deceased 2nd appellant, vide Court order dated 14/08/2019 made in CMP(MD)No.4492/2019 in CMSA(MD)No.25/2018)

2.Minor Mehraj Shakitha Banu (Died)
(represented by her natural guardian mother Hasanammal, the third petitioner herein)

3.Hasanammal ... Appellants/Appellants/Petitioners/
Third Parties/Third Parties

Vs.

1.Ravi ... Respondent/ Respondent/Respondent/
Third Party/Third Party

2.Kumar ... Respondent/ Respondent/ Respondent/
Petitioner/Plaintiff

Prayer: Civil Miscellaneous Second Appeal filed under Order 43 Rule 1 read with Section 100 of the Code of Civil Procedure, to call for the records pertaining to the fair and decreetal order passed by the learned III Additional District Judge, Tirunelveli in C.M.A.No.14 of 2015 dated 11.12.2015 confirming the fair and decreetal order passed in E.A.No.890 of 2013 in E.A.No967 of 2009 in E.P.No.154 of 2008 in O.S.No.356 of 2003 and to set aside the same.

For Appellants : Mr.V.Meenakshi Sundaram
for Mr.A.Mohamed Yusuf

For R1 : Mr.A.Arumugam assisted by M/S.S.Prabha and
for Mr.S.Gokulraj



JUDGMENT

This Civil Miscellaneous Second Appeal was filed originally as a Civil Revision Petition. Subsequently, it was numbered as Civil Miscellaneous Second Appeal. Third parties to the suit in O.S.No.356 of 2003, are the appellants in the Civil Miscellaneous Second Appeal. Since the second appellant died during the pendency of this appeal, the legal representatives of the second appellant are brought on record.

2.The brief facts, that are necessary for the disposal of this Appeal are as follows:

The suit in O.S.No.356 of 2003 came to be filed by the second respondent on the file of the Sub Court, Thenkasi, for recovery of a sum of Rs.1,07,166.50/- being the amount towards principal with interest. The said suit was decreed on 10.03.2004. Pursuant to the decree, the second respondent herein filed an execution petition in E.P.No.154 of 2008 on 21.08.2008 and attached the properties of the judgment debtor. The judgment debtor namely, Mohamed Masood appears to be dead long before the filing of execution petition. From the police records filed before the Court, it is stated that the said Mohamed Masood /judgment debtor was murdered by some police officers when he was taken under police custody. Criminal prosecution has been lodged against the police officers, who are responsible for the death of deceased Mohamed Masood. The appellants are the legal representatives of the deceased Mohamed Masood. On their complaint, a charge sheet also has been filed against the police officers, who are held responsible for the death of the deceased Mohamed Masood.

3.It is not in dispute that on 21.08.2008, the execution petition in E.P.No.154 of 2008 was filed before the Subordinate Court, Thenkasi. After drawing proclamation of sale, the first respondent purchased the property in Court auction for a sum of Rs.10,55,000/- on 17.04.2009. In a petition in E.A.No.536 of 2009 filed by the appellant to set aside the sale under Order 21 Rule 90, it was pointed out by the appellants that the judgment debtor namely Thiru. Mohamed Masood died on 30.11.2005 and that the execution petition had been proceeded against the dead person. However, the execution Court dismissed the said application for want of proof of the death of judgment debtor on 30.11.2005. It is to be seen that the lower Court while dismissing the said application observed that the objection cannot be considered, since there is no proof that the judgment debtor died at that time. Since consequences of allowing the application under Order 20 Rule 90 would be more serious than dismissing the application, the petition was dismissed. It is on record that on 17.04.2009 itself the said application was filed. It is not the case of the first respondent that the judgment debtor was alive on the date, when the execution petition was filed.

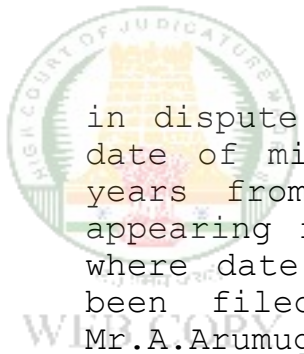


4.It is to be seen that the first respondent filed a counter affidavit in E.A.No.536 of 2009 on 19.06.2009. In the said counter affidavit the auction purchaser specifically pleaded that the petitioners have not filed documents to prove the death. Since the auction was conducted following the procedure, it was contended further that the sale cannot be set aside. After the dismissal of E.A.No.536 of 2009, dated 26.06.2009, it was stated that an application in E.A.No.967 of 2009 for delivery was filed by the first respondent.

5.Thereafter, a petition was filed by the appellant in E.A.No.695 of 2010 to implead the appellant as parties to the execution proceedings. Subsequently, the appellants filed an application in E.A.No.890 of 2013 under Order 21 Rule 97 to record their obstructions to the delivery. The said petition was dismissed by the executing Court on the ground that the petition under Order 21 Rule 97 is not maintainable as the appellants are only the legal heirs of the judgment debtor.

6.Aggrieved by the same, the appellants preferred an appeal in C.M.A.No.14 of 2015 before the III Additional District Judge, Tirunelveli. The Appellate Court also dismissed the appeal, confirming the order of execution Court and held that the appellants are only the legal heirs of the judgment debtor and bound by decree and cannot maintain an application obstructing the execution of the decree. Aggrieved by the same, this Civil Miscellaneous Second Appeal has been preferred by the appellants. The Court below may be on the interpretation of Order 21 Rule 97, that an application under Order 21 Rule 97 is not maintainable by the legal heirs of the deceased judgment debtor. But, this Court noticed a peculiar situation in this case that the judgment debtor is said to have died on 30.05.2005. Though the death of judgment debtor is not an issue, it is contended by the respondent that the date of death is not confirmed. Since the execution proceedings cannot be filed or continued as against a dead person, the learned counsel for the appellants submitted that the whole proceedings culminating in the sale of the property of Mr. Mohamed Masood is a nullity and that therefore, the legal consequences should follow.

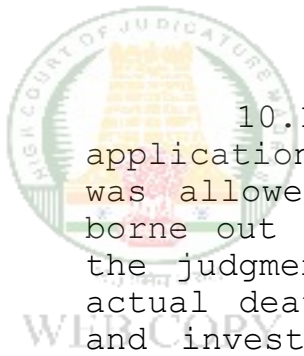
7.The learned counsel for the appellants further submitted that the Courts below ought to have seen that the date of death was reported long back and that the First Information Report in Crime No.391 of 2006 on the file of the Kadaiyanallur Police Station was dated 25.07.2006. The third appellant in the Civil Miscellaneous Second Appeal filed, H.C.P. before this Court, in H.C.P.(MD)No.223 of 2006, where this Court issued a direction to the police to trace the husband of the petitioner/ third appellant herein. Thereafter, criminal complaint was taken on file and the investigation was done by CBCID. A charge sheet was filed as against three police officers for the murder of Mohamed Masood. It is not



in dispute that the said Mohamed Masood was not heard of from the date of missing and even civil death can be presumed after seven years from the date of missing. However, the learned counsel appearing for the auction purchaser submitted that this is a case, where date of death was never confirmed. Though charge sheet has been filed against the police officials, it is submitted by Mr.A.Arumugam that the criminal case is only pending and that the death of Mohamed Masood is not yet confirmed. Even if the criminal Court gives a finding with regard to the death of Mohamed Masood, it is submitted by the counsel for auction purchaser that it would not bind the civil Court and the civil Court, for granting relief in favour of the appellants should be in a position to ascertain the actual death which depends upon proof.

8.The learned counsel appearing for the respondent further submitted that there is no presumption as to the date of death of Mohamed Masood. Eventhough by lapse of more than seven years it can be presumed that the judgment debtor is not alive, the counsel for respondent submitted that the execution proceedings was initiated long back and the sale deed itself was executed in favour of auction purchaser, on 17.04.2009, and that therefore the Court cannot presume that the execution proceedings was initiated against the dead person and that the proceedings culminated in the sale of property of judgment debtor is a nullity. The learned counsel then submitted that the appellants filed an application earlier under Order 21 Rule 90 in E.A.No.536 of 2009. Though the said petition in E.A.No.536 of 2009 was dismissed, the appellants have not filed any appeal as against the said order. In the said circumstances, it is submitted by the learned counsel for the respondent that the subsequent application filed by the appellants on the same set of facts is barred not only by applying the principles of *resjudicata* but also by applying the principle that re-litigation is an abuse of process of law. The learned counsel for the respondent further submitted that from the charge sheet that was filed by the CBCID in the year 2009 presuming the death of Mohamed Masood, the civil Court cannot assume unless there is positive evidence let in by the appellants to prove the same independently. The learned counsel then submitted that the Court auction purchaser has paid poundage and stamp duty and heavy amount for litigation expenses. All the inconvenience was caused by the inaction and negligence of the appellants. In such circumstance, it was contended that if this Court is inclined to allow the Civil Miscellaneous Second Appeal, it should compensate the first respondent for all the sufferings of the first respondent. He also pointed out that the entire money deposited by him (more than Rs.10 lakhs) is lying in the Court deposit without any interest and that the appellants are liable to compensate the first respondent by making good the loss.

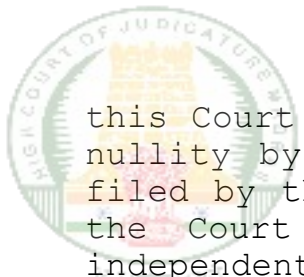
9.This Court considered the rival submission on both counsels.



10.It is not in dispute that the appellants have filed an application earlier to implead them as parties, the said petition was allowed by the lower Court by taking into account the facts borne out from the police records. It is an undisputed fact that the judgment debtor died. Even though there is no proof for the actual death by independent evidence, going by the police records and investigation report, the Court in the earlier proceeding, where the appellants wanted themselves to implead themselves as parties in the execution proceedings has accepted the position that the judgment debtor by name Mohamed Masood died on 30.11.2005. The first respondent/ auction purchaser challenged the said order by filing a Civil Revision Petition before this Court in C.R.P.(MD) No.3095 of 2011. The Civil Revision Petition was dismissed after recording the fact that the State itself has taken the cause of the deceased Mohamed Masood and the said fact can be taken as proof of death of Mohamed Masood for the purpose of execution petition. It was observed that it is open to the legal representatives of the deceased Mohamed Masood to work out the remedy as the proceedings cannot be held to have got obliterated automatically unless the legal representatives prove that the proceedings went on after the death of deceased Mohamed Masood. From the nature of the order passed by this Court and the observation, this Court also accept the case of the appellants that the appellants have proved the death of Mohamed Masood and the date of death as per the charge sheet filed against the police officials. In such circumstances, this Court feel that it may not be proper to take a different view that the date of death has to be independently established. The civil Court has to decide the issue by considering the facts and events that are placed before the Court. By preponderance and probabilities and by the fact that there is no evidence contrary to show that the deceased Mohamed Masood was seen alive any time after 30.11.2005, this Court also comes to the conclusion the judgment debtor by name Mohamed Masood died on 30.11.2005.

11.The next question arises as to whether the execution proceedings and the sale in favour of the first respondent can be validated by the subsequent orders and conduct of the appellants. The legal position is well settled that any proceedings of civil nature against a dead person is a nullity. The execution proceeding against a dead person is a nullity and it cannot be saved subsequently by substitution. This position is relevant to decide as to the status of the execution petition and the subsequent sale which proceeded against the dead person. This Court has no hesitation to hold that the whole execution proceedings and the auction sale stated to have been confirmed in favour of the first respondent is void and liable to be declared as a nullity. The legal consequence that would follow is that the sale is neither legal nor valid for any purposes. Once the legal implication of the death of the judgment debtor prior to the initiation of execution proceedings is admitted, the first respondent has no right as an

<https://hccs.courts.gov.in/crises/> in a proceeding which is liable to be declared by



this Court as a nullity and the Court auction sale is declared as a nullity by this order. In the said circumstances, the petition filed by the appellants under Order 21 Rule 97 is maintainable, as the Court auction sale is a nullity and the appellants have independent right to resist dispossession.

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12. Having regard to the facts and extraordinary circumstances in this case, in view of the in-validity of proceeding and the illegality in the whole process culminating in the auction sale in favour of the first respondent, the legal consequences should follow without even driving the appellants to initiate a separate proceeding to set aside the sale. When the sale itself is a nullity, the position is that the appellants are entitled to protect their possession. Though the appellants are only the legal heirs of judgment debtor, they are entitled to protect their property by showing that the Court auction sale, is a nullity and on the ground that the Execution Petition was filed against a dead person. The learned counsel for the first respondent submitted that the appellants are liable to pay the entire amount deposited by him and the other expenses he had incurred pursuant to the auction. The learned counsel submitted that the first respondent has not committed any fault and hence he should be adequately compensated.

13. The learned counsel for the appellants submitted that the appellants undertake to pay the poundage and the amount payable in terms of Order 21 Rule 89. It is open to the first respondent to withdraw the amount that is now lying to the credit of the execution proceedings in E.P.No.154 of 2008 on the file of the Sub Court, Thenkasi. Since the appellants are still in possession of the property and delivery is not effected so far, the said fact is recorded. This Civil Miscellaneous Second Appeal is allowed subject to the appellants depositing the decree amount along with poundage and stamp duty calculated and payable in terms of Order 21 Rule 89 within a period of eight weeks from the date of receipt of copy of this order. It is made clear that the first respondent is entitled to withdraw the amount which he has deposited pursuant to the auction sale in his favour. The first respondent is also entitled to the money deposited by the appellants excluding the decree amount, pursuant to this order. The decree amount should be calculated as on this date and the decree holder is entitled to the said amount with interest as per the decree. It is also open to the



first respondent to file a suit against the decree holder for any other loss caused to him. The orders of Courts below challenged in this Appeal are set aside. The Execution Application filed under Order 21 Rule 97 filed by appellants in E.A.No.890 of 2013 in E.A.No.967 of 2009 in E.P.No.154 of 2008 in O.S.No.356 of 2003 on the file of Sub Court, Tenkasi stands allowed.

14.This Civil Miscellaneous Second Appeal is allowed and disposed of accordingly. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (Crl.side)

// True Copy //

Sub Assistant Registrar(CS)

To

1. The III Additional District Judge,
Tirunelveli
2. The Subordinate Judge,
Tenkasi

Copy to: The Section Officer,
VR Section,(2 Copies),
Madurai Bench of Madras High court, Madurai

+1 CC to Mr.S.GOKULARAJ, Advocate (SR-81741[F] dated 14/08/2019)
+1 CC to Mr.A.MOHAMED YUSUF, Advocate (SR-82092[F] dated
16/08/2019)

C.M.S.A. (MD) .No.25 of 2018
14.08.2019

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