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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
Criminal Jurisdiction

Wednesday, the Twenty Third day of December Two Thousand and Twenty
PRESENT:

The Hon`ble Mr Justice B.PUGALENDHI
CRL MP(MD) No.11115 of 2019
and
CRL MP(MD) No.11117 of 2019
and
CRL OP(MD)No.11163 of 2017

Nesamony (Died)
1.Kamala Bai
W/o Nesamony

2.N.Christudas

... Petitioners/Respondent No.4 and
Non-party, Legal Representative
of Deceased 3rd Respondent,
(in both MPs)

Vs

1.Russel Raj

... 1st Respondent/Petitioner
(in both Mps)

2.The Superintendent of Police, Kanyakumari District.

3.The Inspector of Police, Kollemcode Police Station,
Kanyakumari District.

4.Gunamony
5.Rosily
6.Anilkumar
7.Sunilkumar
8.Ginikumar

... Respondents 2 to 8/Respondent
1,2,5 to 9
(in both MPs)

Prayer in CRL MP(MD) No.11115 of 2019:-

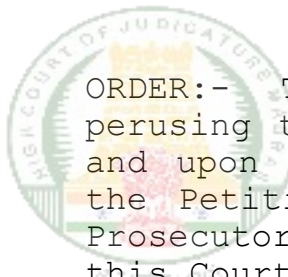
Criminal Miscellaneous Petition filed under Section 482 of
Cr.P.C. Praying to re-call the order dated 25.09.2019 in Crl.OP(MD)
No.11163 of 2017 on the file of this Court.

Prayer in CRL MP(MD) No.11117 of 2019:-

Criminal Miscellaneous Petition filed under Section 482 of
Cr.P.C., Praying to stay the operation of the order dated 25.09.2019
in Crl.OP(MD)No.11163 of 2017 .

Prayer in CRL OP(MD)No.11163 of 2017:

Criminal Original Petition filed under Section 482 of Cr.P.C.,
Praying to direct the respondent to provide adequate police
protection for fencing the patta land of the petitioner in
R.S.No.27/10 in Adaikakuzhi Village, Vilavancode Taluk, Kanyakumari
District.



ORDER:- These Petitions coming up for orders on this day and upon perusing the petitions and the affidavits filed in support thereof and upon hearing the arguments of Thiru. K.N.Thampi, Advocate for the Petitioners and of Thiru. K.K.Ramakrishnan, Additional Public Prosecutor, for R2 and R3 and of Ms.J.Anandhavalli, Advocate for R4, this Court made the following order:

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The Criminal Miscellaneous Petition in CrI.M.P(MD)No.11115 of 2019 is filed to recall the order of this Court dated 25.09.2019 passed in CrI.O.P(MD)No.11163 of 2017, by the legal heirs of the third respondent one Nesamony in the above said Criminal Original Petition.

2.The first respondent Russel Raj filed the above Criminal Original Petition as against the third respondent and 8 others for a direction to provide adequate Police protection for fencing his patta land in R.S.No.2/1C, in Adaikakuzhi Village, Vilavancode Taluk, Kanyakumari District.

3.The 1st respondent Russel Raj [petitioner in CrIOP(MD)No.11163 of 2017] made out a case that a suit was filed in O.S.No.55 of 1997 on the file of the District Munsif, Kuzhithurai for partition and the final decree was also passed. A share was also allotted in favour of his father by way of final decree dated 29.01.2014 and the judgment of the Civil Court has also become final. Pursuant to the passing of the final decree, the petitioner filed a Execution Petition in E.P.No.66 of 2014 for delivery of possession and it was also effected on 15.10.2015 and when the petitioner was attempting to fence the property, the private respondents 3 to 9, caused threat and hindrance to the same. He also lodged a complaint, seeking Police protection and the same was not considered and hence, he approached this Court by filing the above Criminal Original Petition. Considering the submission of the learned Additional Public Prosecutor made on behalf of the official respondents, the final decree that was passed in favour of the petitioner's father and the delivery of possession effected in favour of the petitioner in the Executive Petition, this Court by order dated 25.09.2019 passed an order in the following terms.

"5.The learned Additional Public Prosecutor, on instructions, submitted that the parties were called for an enquiry and both of them informed the police that they will work out their remedy before the Court.

6.In view of the decree that was passed in favour of the petitioner's father and was executed by the petitioner and delivery of possession was also effected in favour of the petitioner, the private respondents will not have the right to interfere with the property and prevent the petitioner from fencing the property.



7. In view of the above, there shall be a direction to the second respondent to call the parties for an enquiry and instruct the private respondents not to interfere with the possession and enjoyment of the properties and not to cause threat to the petitioner. If required, the second respondent shall provide police protection to enable the petitioner to fence the property.

8. The criminal original petition is disposed of with the above directions."

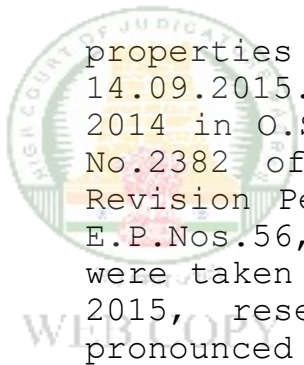
4. The learned Counsel for the petitioners submitted this petition is filed by the legal heirs of the 3rd respondent that the said Nesamony arrayed was as the 3rd respondent in the criminal original petition died as early as on 31.10.2018 and the petitioner Russel Raj was also residing in the same place at Mankuzhivilai Veedu, Adaikkakuzhi Post, Vilavancode Taluk, Kanyakumari District, knows very well about the demise of the 3rd respondent Nesamony, failed to inform the same and moreover, no notice was served on the 3rd respondent in the criminal original petition.

5. The learned Counsel would further submit that the 1st respondent Russel Raj filed the above criminal original petition in the strength of the final decree passed in O.S.No.55 of 1977 on 29.01.2014 and with an averment that the decree passed on 29.01.2014 became final and the order of delivery was also passed in E.P.No.66 of 2014, but failed to mention the Appeal Suit in A.S.No.120 of 2014 pending before the Sub Court, Kuzhithurai and the Civil Revision Petition filed before this Court, as against the order of the Execution Petition in E.P.No.66 of 2014 and the order has also been obtained by suppression. Therefore, prayed that the order dated 25.09.2019 passed in the said Criminal Original Petition be recalled.

6. Heard Mr.K.N.Thampi, learned Counsel for the petitioners, Ms.J.Anandhavalli, learned Counsel for the 1st respondent and Mr.K.K.Ramakrishnan, learned Additional Public Prosecutor appearing for respondent Nos.2 and 3 and there is no representation for the respondent Nos.4 to 8.

7. Mr.K.N.Thampi, learned Counsel for the petitioners submitted that the 3rd respondent in CrI.O.P(MD)No.11163 of 2017 is the husband of the 1st petitioner and the father of the 2nd petitioner and he died on 31.10.2018. He was the 155th defendant in O.S.No.55 of 1997 on the file of the District Munsif, Kuzhithurai and final decree was also passed, but most of the parties have died and the final decree was passed as against dead persons and the Appeal Suit filed in A.S.No.120 of 2014 as against the final decree is also pending.

8. The 1st respondent Russel Raj has filed the Execution Petition to execute the final decree in O.S.No.55 of 1977 in E.P.NO.66 of 2014 and the 3rd respondent Nesamony is also arrayed as 163rd respondent in the said Execution Petition. The Execution Petition in E.P.No.66 of 2014, was allowed by ordering the delivery of



properties mentioned in the Execution Petition by order dated 14.09.2015. As against the order dated 14.09.2015 in EP.No.66 of 2014 in O.S.No.55 of 1977, the civil revision petition in C.R.P(MD) No.2382 of 2014 was filed before this Court and 4 other Civil Revision Petitions were also filed as against the orders passed in E.P.Nos.56, 58, 60 and 64 of 2014. These Civil Revision Petitions were taken up together by this Court in C.R.P(MD)Nos.2378 to 2382 of 2015, reserved for orders on 30.07.2018 and the orders were pronounced on 30.10.2018, allowing the Civil Revision Petitions.

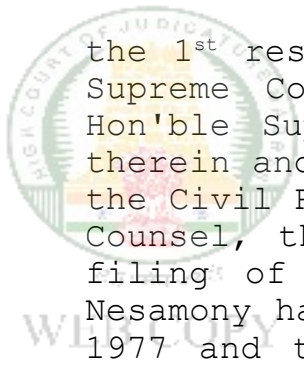
9.The order passed in E.P.No.66 of 2014 was set aside by referring the Appeal Suit pending in A.S.No.120 of 2014 before the Sub Court, Kuzhithurai. Further, the fact that the filing of the above Civil Revision Petitions before this Court and reserving for orders by this Court, was not brought to the knowledge of this Court while passing orders in Crl.O.P(MD)No.11163 of 2017.

10.The learned Counsel for the petitioners would further submit that the 1st respondent in similar manner by suppressing the Appeal Suit, has filed similar application in Crl.O.P(MD)No.12613 of 2016 for Police protection for fencing the land in RS.No.2/1C in Adaikakuzhi village and this Court by order dated 26.07.2016, allowed the Criminal Original Petition and the 3rd respondent Nesamony and his wife Kamala Bai, the 1st petitioner herein filed the Criminal Miscellaneous Petition in Crl.M.P(MD)NO.6135 of 2017 for recalling the order dated 26.07.2016 and the same was allowed by this Court by order dated 07.08.2017, recalling the orders of this Court in Crl.O.P(MD)No.12613 of 2016, dated 26.07.2016.

11.He further submitted that no notice was served upon the 3rd respondent Nesamony or to 1st petitioner/ his wife Kamala Bai. Even assuming that the notice was returned as refused as per Order VII Sub Rule 7 of the Madras High Court Appellate Side Rules, 1965, refusal of notice does not mean that service has been effected and therefore, Mr.K.N.Thampi, learned Counsel for the petitioners submitted that this order dated 25.09.2019 obtained by the 1st respondent for Police protection by suppressing the above material particulars, is liable to be recalled.

12.Ms.J.Anandhavalli, learned Counsel for the 1st respondent herein / the petitioner in Crl.O.P(MD)No.11163 of 2017 submitted that the 3rd respondent Nesamony has not challenged the order of delivery taken by the petitioner in E.P.No.66 of 2014 and it is one Gunamani and 4 others have filed the Civil Revision Petitions in C.R.P(MD)NOS.2378 to 2382 of 2015, challenging the orders passed in the Execution Petitions and when Crl.O.P(MD)No11163 of 2017 was taken up for final disposal, no orders have been passed in the said Civil revision petitions and moreover, this Court in the above Civil Revision Petitions protected the delivery taken by the parties in the Execution Petitions in Para No.27 of the order.

13.The learned Counsel further submitted that though the orders in the Execution Petition having been set aside and as against the orders of this Court passed in C.R.P(MD)Nos.2378 to 2382 of 2015,



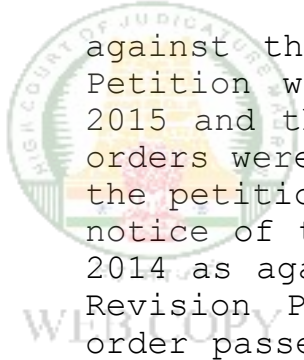
the 1st respondent filed Special Leave Petitions before the Hon'ble Supreme Court in SLP Civil Nos.20570 to 20574 of 2019 and the Hon'ble Supreme Court has also ordered notice to the respondents therein and granted an order of interim stay to the orders passed in the Civil Revision Petitions and therefore, according to the learned Counsel, the status of the parties remain the same on the date of filing of the criminal original petition and the 3rd respondent Nesamony has not challenged the final decree passed in O.S.No.55 of 1977 and these petitioners claiming their rights pursuant to the settlement deed dated 31.07.2018, executed by Nesamony and therefore, they cannot claim any right and their contention that the orders have been passed without any notice to the 3rd respondent is not correct and the notice sent to the 3rd respondent and his wife Kamala Bai 1st petitioner was returned as refused and she would further submit that the suit property is having vast extent and there are more than 300 parties to the suit property and therefore, the petitioners cannot make bald statements, when the petitioner are residing in the same suit property.

14.Mr.K.K.Ramakrishnan, learned Additional Public Prosecutor submitted that the parties were called for enquiry pursuant to the representation of the 1st respondent and both parties informed that they will work out their remedy before the Court and therefore, they have not taken any further action and pursuant to the directions of this Court, when they were about to provide police protection, this miscellaneous petition came to be filed to recall the order dated 25.09.2019 passed in CrI.O.P(MD)No.11163 of 2017 and in view of the interim order of this Court, they have not provided any police protection yet.

15.This Court paid its anxious consideration to the rival submission made and also perused the available records.

16.The 1st petitioner Nesamony is arrayed as 3rd respondent in the Criminal Original Petition in CrI.O.P(MD)No.11163 of 2017, he is also the 155th defendant in O.S.No.55 of 1977 and 163rd respondent in E.P.No.66 of 2014. The 1st respondent Russel Raj has filed a petition in CrI.O.P(MD)No.11163 of 2017, before this Court, seeking for a direction for Police protection for fencing his land in RS.No.2/1C in Adaikakuzhi Village, Vilavancode Taluk, Kanyakumari District, based on the final decree passed in O.S.No.55 of 1977 dated 21.09.2014 and the delivery of possession ordered in his favour in E.P.No.66 of 2014 dated 15.10.2015. This Court, under the impression that the judgment of the Civil Court has become final and the delivery of possession was also ordered in EP No.66 of 2014, passed an order on 25.09.2019, directing the respondent Police to provide police protection, if required.

17.It appears that the final decree in O.S.No.55 of 1977 was passed on 29.01.2014, there were several defendants in the said suit and some of them have also died at the time of passing of the final decree. It is one of his contentions that the final decree was passed against the dead persons. As against the final decree passed in O.S.No.55 of 1977, an Appeal Suit was filed in A.S.No.120 of 14 and the same is also pending before the Sub Court, Kuzhithurai. As



against the order passed in E.P.No.66 of 2014, a Civil Revision Petition was also filed before this Court in C.R.P(MD)No.2382 of 2015 and the same was also reserved for judgment on 30.07.2018 and orders were pronounced on 30.10.2018. But the 1st respondent herein/ the petitioner in Crl.O.P(MD)No.11163 of 2017 has not brought to the notice of this Court about the Appeal Suit pending in A.S.No.120 of 2014 as against the final decree in O.S.No.55 of 1977 and the Civil Revision Petition in C.R.P(MD)No.2382 of 2015 filed against the order passed in E.P.No.66 of 2014. Though the 1st respondent claimed that the Special Leave Petitions have been filed as against the order in C.R.P(MD)Nos.2378 to 2382 of 2015 in SLP Nos.20570 to 20574, interim stay has also been obtained, the fact remains that as on 25.09.2019, when the Crl.O.P(MD)No.11163 of 2017 was taken up for hearing, the petitioner therein has not taken any step to inform this Court about the Civil Revision Petition filed by the parties as against the orders of this Court in EP.No.66 of 2014.

18.The 1st respondent/ the petitioner in Crl.O.P(MD)No.11163 of 2017, has filed a similar petition in the year 2016 in Crl.O.P(MD) No.12613 of 2016 by suppressing the Appeal Suit pending as against the final decree passed in O.S.No.55 of 1977 and this Court on the petition filed by the 3rd respondent Nesamony and his wife Kalama Bai, the 1st petitioner herein, by order dated 07.08.2017 in Crl.M.P (MD)No.6135 of 2017, allowed the petition in the following terms and recalled the order in Crl.O.P(MD)No.12613 of 2016:

"6.The learned counsel for the petitioners submitted that the first respondent has not stated the particulars about the death of parties in the suit and the particulars relating to the submissions that the final decree itself is a nullity as several persons, who are parties were no more as on date of final decree. The learned counsel for the petitioners strongly relied upon the conduct of first respondent for obtaining orders behind their back suppressing material facts and the pendency of various proceedings. Having regard to the fact that the first respondent has obtained order affecting the interest of the several persons, who are interested and the first respondent has obtained the order behind the back of persons, who are interested, I am of the view that the petitioners are also interested in the subject matter. Of course petitioners have not filed any appeal as against the final decree that was passed in O.S.No.55 of 1997. However, pendency of appeal as against preliminary decree in the suit is relevant and the petitioners are entitled to raise their objections at every stage.

7.It cannot be stated that the final decree has become final as against the petitioner. In a suit for partition, the parties are interested in the subject matter till the matter is crystallized by final order binding on all the parties concerned. It is admitted that the appeal is pending as against the preliminary decree and several



revision petitions have been filed, challenging the order of delivery. The petitioners are also necessary parties to be heard along with the others. It is also brought to the notice of this Court that the contempt petition filed by the first respondent was also closed by this Court by order dated 22.03.2017. It was also observed by this Court that this Court cannot give police protection to the first respondent in compliance with the order, dated 26.07.2016, since, the contesting parties were not made as parties in CRL.O.P.No.12613 of 2016. Hence, this Court is of the firm view that the order in CRL.O.P(MD)No.12613 of 2016, dated 26.07.2017 cannot be sustained especially, having regard to the material facts which are brought to the notice of this Court and the suppression of the facts while getting order. It is open to the first respondent to seek any relief, after impleading all the necessary parties not only the petitioners herein but also all the others, who are interested."

19.Even after this order of this Court in Crl.M.P(MD)No.6135 of 2017, the 1st respondent has filed this petition Crl.O.P(MD)No.11163 of 2017 in the same manner by suppressing the pendency of the Appeal Suit in A.S.No.120 of 2014, the filing of the Civil Revision Petition in C.R.P(MD)No.2382 of 2015 and the final orders passed in the Civil Revision Petition on 30.10.2018, setting aside the orders passed in E.P No.66 of 2014.

20.Further, as rightly pointed out by the learned Counsel for the petitioners, as per the Madras High Court Appellate Side Rules, under Order VII, on service of notice, endorsement of refusal, however of the notice shall not be deemed to be due service of notice in the proceedings and to be declared as such by the Court.

21.In the light of the above discussion, the Miscellaneous Petition in Crl.M.P(MD)No.11115 of 2020 is allowed and the order dated 25.09.2019 passed by this Court in Crl.O.P(MD)No.11163 of 2017 is hereby recalled. In view of the order passed in Crl.M.P(MD)No.11115 of 2019, the miscellaneous petition in Crl.M.P(MD)No.11117 of 2019 is closed as no further order needs to be passed.

22.Post the Criminal Original Petition in Crl.O.P(MD)No.11163 of 2017 in the usual course.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

/ /2021

Sub Assistant Registrar(CS)



TO

1. The Superintendent of Police, Kanyakumari District.
2. The Inspector of Police, Kollemcode Police Station,
Kanyakumari District.
3. The Additional Public Pleader,
Madurai Bench of Madras High Court, Madurai.

Copy to: The Section Officer, Criminal Section,
Madurai Bench of Madras High Court, Madurai. (2C)

+1 CC to M/s K.N.Thampi, Advocate, in SR.No.27208.

+1 CC to M/s J.Anandhavalli, Advocate, in SR.No.27325.

ORDER DATED : 23/12/2020

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ORDER
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CRL MP(MD) No.11115 of 2019
and
CRL MP(MD) No.11117 of 2019
and
CRL OP(MD) No.11163 of 2017

(PM) CO
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