

**IN THE HIGH COURT OF JUDICATURE AT MADRAS**

DATED: 08.09.2021

CORAM:

**THE HONOURABLE MS.JUSTICE V.M.VELUMANI**

C.R.P.(NPD).No.2867 of 2013

and

M.P.No.1 of 2013

1.M.Palanisamy

2.M.Natarajan

3.M.Sukumar

.. Petitioners

**Vs.**

1.N.Subramaniam

2.N.Karthikeyan

3.A.Kandasamy

4.Jayaprakash

5.Kanakaraj

6.Lakshmi Industries,  
rep. by Suryaraj & Mohanraj,  
Main Street, Murugan Layout,  
Sundakamuthur, Coimbatore.

7.P.Sundaram

8.Ponnusamy (Died)

.. Respondents

**Prayer:** This Civil Revision Petition is filed under Section 115 of C.P.C., against the fair and final order dated 05.09.2012 made in E.A.No.233 of 2007 in E.P.No.395 of 2003 on the file of the II Additional Sub Court, Coimbatore.

Petitioners : Mr.Palani Selvaraj

Respondents : Mr.Ma.P.Thangavel  
(for RR 1, 3 & 4)

RR 2 & 5 : Died

### **ORDER**

(The matter is heard through “Video Conferencing/Hybrid Mode”).

This Civil Revision Petition is filed against the fair and final order dated 05.09.2012 made in E.A.No.233 of 2007 in E.P.No.395 of 2003 on the file of the II Additional Sub Court, Coimbatore.

2.The petitioners are the defendants 1 to 3 and judgment debtors 1 to 3 in O.S.No.75 of 1997. The respondents 1 to 5 filed the suit for declaration, recovery of possession and injunction against the petitioners, one N.Ponnusamy, who is the elder brother of respondents 1 & 2 as 4<sup>th</sup> defendant and 6<sup>th</sup> respondent herein as 5<sup>th</sup> defendant. In the said suit, the petitioners and

defendants 4 & 5 did not file written statement and they were set exparte and exparte decree was passed on 21.09.1999.

3.The respondents 1 to 5 filed E.P.No.395 of 2003 for possession of the property in execution of decree. The 3<sup>rd</sup> petitioner filed counter statement in E.P.No.395 of 2003 in October 2004 and the same was adopted by the petitioners 1 and 2. Subsequently, on 15.06.2007, the petitioners filed the present E.A.No.233 of 2007 under Section 47 R/W Section 151 of C.P.C. for declaring the decree as nullity. According to the petitioners, they filed I.A.No.639 of 2000 to set aside the exparte decree dated 21.09.1999. The said I.A.No.639 of 2000 was ordered on 19.04.2001 on payment of cost of Rs.700/- (Rupees Seven Hundred Only). The said cost was not paid by the petitioners and I.A.No.639 of 2000 was dismissed for default on 15.06.2001.

4.According to the petitioners, the case was looked after by 4<sup>th</sup> defendant, as he was the head of the family and petitioners had no knowledge about the suit. While so, the 4<sup>th</sup> defendant suddenly died on 27.03.1999. Suppressing the death of the 4<sup>th</sup> defendant, the respondents 1 to 5 obtained exparte decree on 21.09.1999 without impleading the legal representatives of the deceased 4<sup>th</sup> defendant. After the death of the 4<sup>th</sup> defendant, the 1<sup>st</sup>

petitioner was conducting the case. He suddenly fell ill and he was admitted in P.S.G. Hospital, Coimbatore on 28.10.2000. Hence, the 1<sup>st</sup> petitioner did not inform the case to the petitioners 2 & 3. While so, the I.A. filed by the petitioners to condone the delay in filing the petition to set aside the exparte decree was dismissed for default on 15.06.2001. The petitioners' counsel Mr.C.K.Sundaram also died. In the meantime, the respondents 1 to 5 filed E.P.No.395 of 2003 for possession. The E.P. filed by the respondents 1 to 5 is not maintainable. The decree obtained by the respondents 1 to 5 is nullity because of non-joinder of the legal heirs of the deceased 4<sup>th</sup> defendant, who died on 27.03.1999 before passing of exparte decree dated 21.09.1999. If the said decree is executed, the petitioners will be put to irreparable loss and prayed for allowing the E.A.

5.Before the E.P. Court, the respondents 1 to 5 filed counter statement. The counsel for the respondents 1 to 5 submitted that petitioners cannot question the decree. The 7<sup>th</sup> respondent P.Sundaram, who is the son of N.Ponnusamy, 4<sup>th</sup> defendant got impleaded himself in the E.P. and he is having share in the suit property. I.A.No.639 of 2000 filed by the petitioners to condone the delay in filing the petition to set aside the exparte decree was dismissed for default for non payment of cost. The said exparte decree dated

21.09.1999 has become final. The respondents 1 to 5 filed E.P.No.395 of 2003 for execution of the decree. In spite of the decree and injunction, the petitioners sold portion of the suit property, altered the physical features of the suit property and leased out the suit property to the 6<sup>th</sup> respondent herein and are getting rental income at the rate of Rs.20,000/- per month. The intention of the petitioners is only to squat on the suit property and to drag on the proceedings. The 7<sup>th</sup> respondent viz., P.Sundaram, son of N.Ponnusamy, deceased 4<sup>th</sup> defendant has not joined with the petitioners to file the present petition under Section 47 R/W Section 151 of C.P.C. and prayed for dismissal of E.A. The 7<sup>th</sup> respondent filed separate counter affidavit before the E.P. Court in the present E.A. After making various averments, prayed for dismissal of E.A., filed by the petitioners.

6.The learned Judge considering the materials on record, averments in the affidavit, written arguments and counter affidavit filed by the 7<sup>th</sup> respondent and arguments of counsel for parties and written arguments of respondents 1 to 5, dismissed the E.A.

7.Against the said order of dismissal dated 05.09.2012 made in E.A.No.233 of 2007, the petitioners have come out with the present Civil

## Revision Petition.

8.The learned counsel appearing for the petitioners submitted that the learned Judge has passed the order without application of mind. The learned Judge ought to have seen that the allegations are made against all the defendants and decree is passed against all the defendants including the 4<sup>th</sup> defendant, who died before passing of the decree. The respondents 1 to 5 ought to have impleaded the legal heirs of the 4<sup>th</sup> defendant in the E.P. The learned Judge has committed material irregularity with non-application of mind. It is the case of the respondents 1 to 5 that no case was sought to be adjudicated against the deceased 4<sup>th</sup> defendant N.Ponnusamy and his legal heirs are not necessary parties in the suit. The learned Judge erred in holding that decree obtained by the respondents 1 to 5 does not suffer from any irregularity or illegality. The learned Judge ought to have seen that declaratory relief was sought against all the defendants and it was not a contested decree, but it was only an exparte decree for non-payment of cost. The respondents 1 to 5 have not established their case for declaration by adducing documentary evidence to prove that they are owners of the property and prayed for allowing the Civil Revision Petition.

9.The learned counsel appearing for the respondents 1, 3 & 4 submitted that the petitioners cannot question the decree. In the E.A.No.233 of 2007 filed by the petitioners, the 7<sup>th</sup> respondent herein viz., P.Sundaram, legal heir of the deceased N.Ponnusamy was added as 7<sup>th</sup> respondent and he is not joining with the petitioners and questioning the decree obtained by respondents 1 to 5. The respondents 1 to 5 have not denied the share of the 7<sup>th</sup> respondent. The petitioners did not file any appeal against the decree obtained by the respondents 1 to 5 and in view of the dismissal of I.A.No.639 of 2000 filed to condone the delay in filing the application to set aside the exparte decree, the said decree has become final. Before the E.P. Court, the petitioners have no right to file the present petition and the learned Judge considering the entire materials, rightly dismissed E.A.No.233 of 2007 and prayed for dismissal of the Civil Revision Petition.

10.Heard the learned counsel appearing for the petitioners as well as the learned counsel appearing for the respondents 1, 3 & 4 and perused the entire materials on record.

11.From the materials available on record, it is seen that the respondents 1 to 5 filed the suit for declaration, possession and injunction

against the petitioners as defendants 1 to 3 and one N.Ponnusamy, who is the elder brother of respondents 1 & 2 as 4<sup>th</sup> defendant and 6<sup>th</sup> respondent herein as 5<sup>th</sup> defendant. The petitioners and 4<sup>th</sup> defendant viz., N.Ponnusamy did not file any written statement and they were set exparte. Before exparte decree was passed on 21.09.1999, the 4<sup>th</sup> defendant viz., N.Ponnusamy died on 27.03.1999. The respondents 1 to 5 did not implead the legal heirs of the 4<sup>th</sup> defendant. On the failure on the part of the respondents 1 to 5 in not bringing the legal heirs of the 4<sup>th</sup> defendant – deceased N.Ponnusamy, the suit is abated only against the 4<sup>th</sup> defendant as per Order XXII Rule 1 of C.P.C. The entire suit will not be abated on the death of the 4<sup>th</sup> defendant and cause of action survives against the petitioners. It is pertinent to note that the petitioners filed I.A.No.639 of 2000 to condone the delay in filing the petition to set aside the exparte decree dated 21.09.1999. The said I.A. was allowed on condition that the petitioners have to pay a sum of Rs.700/- (Rupees Seven Hundred Only) as cost. The petitioners did not pay the cost and hence, the said application was dismissed for default on 15.06.2001. The petitioners have not taken any further proceedings. On dismissal of the said application, the exparte decree passed has become final. The petitioners filed the present E.A.No.233 of 2007 under Section 47 R/W Section 151 of C.P.C. alleging that decree obtained after death of the 4<sup>th</sup> defendant is nullity and is not maintainable.

12.The learned counsel for the respondents 1 to 5 filed written arguments before the Execution Court and submitted that 4<sup>th</sup> defendant is a co-sharer along with respondents 1 to 5 and they have not sought for any relief against the 4<sup>th</sup> defendant and decree dated 21.09.1999 passed is not nullity for not bringing the legal heirs of the 4<sup>th</sup> defendant in the suit. The said decree has become final. The petitioners are not entitled to challenge the validity of the decree in the E.P. Court. It is further to be noted that the 7<sup>th</sup> respondent viz., P.Sundaram, who is the son of one N.Ponnusamy, 4<sup>th</sup> defendant herein impleaded himself in the present E.P. and filed counter affidavit and prayed for dismissal of the present E.A. filed by the petitioners. From the E.P., it is seen that the respondents 1 to 5 are not seeking any relief against the legal heirs of the deceased 4<sup>th</sup> defendant. If any relief is sought against them, then only the legal heirs of the deceased 4<sup>th</sup> defendant can challenge the decree passed as nullity. As already stated above, the suit against the deceased 4<sup>th</sup> defendant alone is abated as he is co-sharer along with respondents 1 to 5 and suit in its entirety is not abated. In view of the same, the contention of the learned counsel appearing for the petitioners that decree is a nullity and it cannot be executed is not correct. The learned Judge has considered all the materials and dismissed the E.A. by giving cogent and

valid reason. There is no error or irregularity in the order of the learned Judge warranting interference by this Court.

13.In the result, this Civil Revision Petition stands dismissed.  
Consequently, the connected Miscellaneous Petition is closed. No costs.

08.09.2021

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Index : Yes / No  
Internet : Yes / No

To

The Learned II Additional Subordinate Judge,  
Coimbatore.



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**V.M.VELUMANI, J.**  
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