

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 21.04.2021

CORAM

THE HON'BLE MR. JUSTICE A.D. JAGADISH CHANDIRA

C.R.P. (NPD) No. 4645 of 2017

R.Velladurai

... Petitioner

-VS-

1. C.Tamil Selvi

2. Minor Ananda Kirubakaran,
Rep. by Mother and Natural Guardian,
C.Tamil Selvi.

... Respondents

Prayer:- Civil Revision Petition filed under Section 115 of the Code of Civil Procedure, 1908, praying to set aside the order and decretal order dated 27.03.2017 passed in E.A. No. 688 of 2014 in E.P. No. 840 of 2013 on the file of the X Assistant Judge, City Civil Court, Chennai and allow this Civil Revision Petition.

For Petitioner : Mr. C.Umashankar

For Respondents : Mr. A.G.Rajan

ORDER

(The case has been heard through video conference)

The Civil Revision Petition has been filed seeking to set aside the order and decretal order dated 27.03.2017 in E.A. No. 688/2014 in E.P. No. 840 of 2013 in O.S. No. 7540 of 2000 passed by the Learned X Assistant Judge, City Civil Court, Chennai.

2. The Learned Counsel for the Petitioner would submit that the Petitioner is the Judgment Debtor in O.S. No. 7540 of 2000 filed by the Respondents/Plaintiffs. He would further submit that the First Respondent had filed the suit in O.S. No. 7540 of 2000 on behalf of the Second Respondent as his mother and natural guardian. He would further submit that even during the pendency of the suit, the Second Respondent minor had attained majority and that the First Respondent did not bring it to the knowledge of the Trial Court. He would further submit that as per Order XXXII Rule 12 of the Code of Civil Procedure, 1908, when a minor plaintiff becomes major, he has to make an election whether to contest the suit or abandon the same and if he chooses to continue with the suit, he has to apply for discharging of his next friend. He would further submit that in this case, the Respondents have failed to do so. He would further submit that even as per the judgment dated 25.04.2012 in O.S. No. 7540 of 2000, the Second Respondent was aged 15 years during the year 1999 and subsequently, after obtaining judgment and decree, the Respondents have filed the Execution Petition in E.P. No. 840 of 2013. He would further submit that even at that stage, though the Second Respondent has attained majority, it was suppressed and that the Execution Petition was filed only by the First Respondent as mother and natural guardian of the Second Respondent

in violation of Order XXXII Rule 12 of the Code of Civil Procedure, 1908. He would further submit that thereby, the Revision Petitioner has filed an application in E.A. No. 688 of 2014 under Section 47 of the Code of Civil Procedure, 1908, to dismiss the E.P. No. 840 of 2013 as the decree dated 24.05.2012 passed in O.S. No. 7540 of 2000 is null and void and inexecutable under law. He would further submit that the Petitioner had raised two grounds, viz., one stating that the suit property is a Government property and that the name of the settlor of the Second Respondent figures in the register of the Government as encroacher and another ground is that procedure under Order XXXII Rule 12 of the Code of Civil Procedure, 1908, has not been followed. He would further submit that though the Respondents/Plaintiffs have filed counter, they did not appear appear before the Execution Court and that they were set exparte, whereas the Execution Court without properly considering the objections raised by the Petitioner, had dismissed the E.A. No. 688 of 2014. He would further submit that in fact, the Second Respondent is the actual party interested in the suit and the First Respondent has filed the suit and the Execution Petition as the mother and next friend of the Second Respondent. He would further submit that the Petitioner is not aware whether the Second Respondent is interested in continuing with the execution proceedings or not, whereas the Learned Judge did not take into consideration that the Second

Respondent, who is the interested person, has been kept in dark even after the decree and that the Execution Petition has been filed by mother of the Second Respondent as next friend without bringing the interested party on record. He would further submit that in view of the non-compliance of Order XXXII Rule 12 of the Code of Civil Procedure, 1908, the decree itself has become null and void and not valid in the eye of law and inexecutable under law. He would further submit that when a ground has been raised by the Petitioner and it has been brought to the notice of the Court that the Second Respondent has attained majority, the Court ought to have issued notice to the Second Respondent for appearance before the Court and the Court should have heard the Second Respondent with regard to the continuance of the execution proceedings and directed him to take positive steps in compliance of Order XXXII Rule 12 of the Code of Civil Procedure, 1908, whereas the Court without considering that aspect erred in dismissing the application. He would further submit that even in the Civil Revision Petition, the First Respondent has not stated anything about the Second Respondent having attained majority and whether the Second Respondent is interested in proceeding with the execution proceedings. He would further submit that even before this Court the interested party has not filed vakalat and the First Respondent, who is the mother of the Second Respondent, has filed the vakalat on behalf of both the Respondents. He would

further submit that once, when the Plaintiff attains majority, he is required to take certain positive steps and the litigation cannot be permitted to exist in a vacuum and he cannot be allowed to take a plea that he would continue to be represented by his guardian and thereby, the entire proceedings have to be set aside. In respect of his contention, he would rely on the judgment of the Madhya Pradesh High Court in ***Bajranglal -vs- Umesh Kumar and another*** reported in [(2001) 4 M.P.L.J. 274].

3. Mr. A.G.Rajan, Learned Counsel for the Respondent would submit that non-filing of necessary application under Order XXXII Rule 12 of the Code of Civil Procedure, 1908 is not an illegality and it could be only an irregularity. However, he would further submit that the matter may be remitted back to the Execution Court and the Second Respondent may be permitted to file necessary applications as per law to discharge the next friend and natural guardian and declare him as major and contest the Execution Petition on merits.

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4. In this case, it is apposite to refer to the judgment of the Madhya Pradesh High Court in ***Bajranglal -vs- Umesh Kumar and another*** reported in (2001) 4 M.P.L.J. 274, which reads as follows:-

"4. To appreciate the rival submissions raised at the Bar it is apposite to refer to Order 32, Rule 12 of the Code of Civil Procedure. It reads as under:

"Order 32, Rule 12 — (1) A minor plaintiff or a minor not a party to suit on whose behalf an application is pending shall, on attaining majority, elect whether he will proceed with the suit or application.

(2) Whether he elects to proceed with the suit or application, he shall apply for an order discharging the next friend and for leave to proceed in his own name.

(3) The title of the suit or application shall, in such a case be corrected so as to read henceforth thus:—

"A.B., late a minor, by C.D., his next friend, but now having attained majority."

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on repayment of the costs incurred by the defendant or opposite party which may have been paid by his next friend.

(5) Any application under this rule may be ex parte: but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without notice to the next friend."

On a bare perusal of the aforesaid provision it becomes quite vivid that after the minor plaintiff becomes a major he has to make an election to contest the suit or abandon the same. If he

claims to proceed with the suit he has to pray for discharging of the next friend and to seek leave to proceed on his own.

5. In the case of Ishar Singh (supra) it has been held as under:

“Where during the pendency of an appeal on behalf of a minor it was discovered that the minor had attained majority after the institution of the appeal and the Court instead of calling upon the quondam minor (who was present in Court) to elect whether he intended to proceed with the appeal or not dismissed it “for want of prosecution.” (Quoted from the placitum)

In the case of Bhanu Pratap Singh (supra) the learned Chief Justice spoke thus:—

“Rule 12 provides that a minor plaintiff shall, on attaining majority, elect whether he will proceed with the suit and where he elects to proceed with the suit he shall apply for an order discharging the next friend and for leave to proceed in his own name. The application made for adjournment of the case by the counsel for the plaintiff's was rejected and as the counsel refused to examine witnesses and sought time for filing a revision, the plaintiff's case closed. In my opinion, when it was brought to the notice of the trial Court that the plaintiff No. 1 had attained majority during the pendency of the suit, he ought to have adjourned the suit for ascertaining whether the said plaintiff elected to proceed with the suit

or not. Such a statement could not have been made by the counsel presumably for the reason that he had obtained the power from the guardian.”

In Vidya Wati (supra) the High Court of Delhi in paragraph 51 of the decision held as under:—

“51. The contention of the learned counsel for the tenant is that appellant No. 5 has become major long back and if she was to file the appeal after becoming major the same would have been time barred and thus, as she had not elected to continue with the appeal within the limitation of 60 days which was the period for filing the appeal, the whole appeal should be dismissed. There is no merit in this contention. Order XXXII, Rule 12 of the Code of Civil Procedure which requires the minor plaintiff to make the election does not at all provide that if no such election is made by the minor on attaining the majority the suit is to be dismissed. In Ishar Singh v. Bakshish Singh, AIR 1929 Lahore 555 (2), similar question arose for decision. In the said case during the pendency of the appeal on behalf of a minor it was discovered that the minor had attained the majority after the institution of the appeal and the Court instead of calling upon the quondam minor to elect whether he intended to proceed with the appeal or not, dismissed it for want of prosecution.....”

6. In view of the aforesaid enunciation of law, there remains no iota of doubt, that the plaintiff after attaining the age

of majority is required to take certain positive steps and the litigation cannot be permitted to exist in a vacuum. He cannot take the plea that he would continue to be represented by his guardian. In view of the aforesaid the impugned order is unsustainable and is accordingly set aside and plaintiff is directed to take positive steps as contemplated under Order 32 Rule 12 of the Civil Procedure Code within a period of eight weeks from today.

7. The civil revision is accordingly allowed. However, in the peculiar facts and circumstances of the case, there shall be no order as to costs."

5. In view of the above, the order dated 27.03.2017 in E.A. No. 688 of 2014 in E.P. No. 840 of 2013 in O.S. No. 7540 of 2000 passed by the Learned X Assistant Judge, City Civil Court, Chennai is set aside and the matter is remitted back to the Execution Court and the Second Respondent is directed to take positive steps as contemplated under Order XXXII Rule 12 of the Code of Civil Procedure, 1908, within a period of eight weeks from today. The Execution Court shall hear the parties afresh with regard to the objections raised by the Petitioner and pass orders on merits in accordance with law without being carried with the observation made by this Court in this Civil Revision Petition.

6. With this observation, the Civil Revision Petition is disposed of. No costs.

21.04.2021

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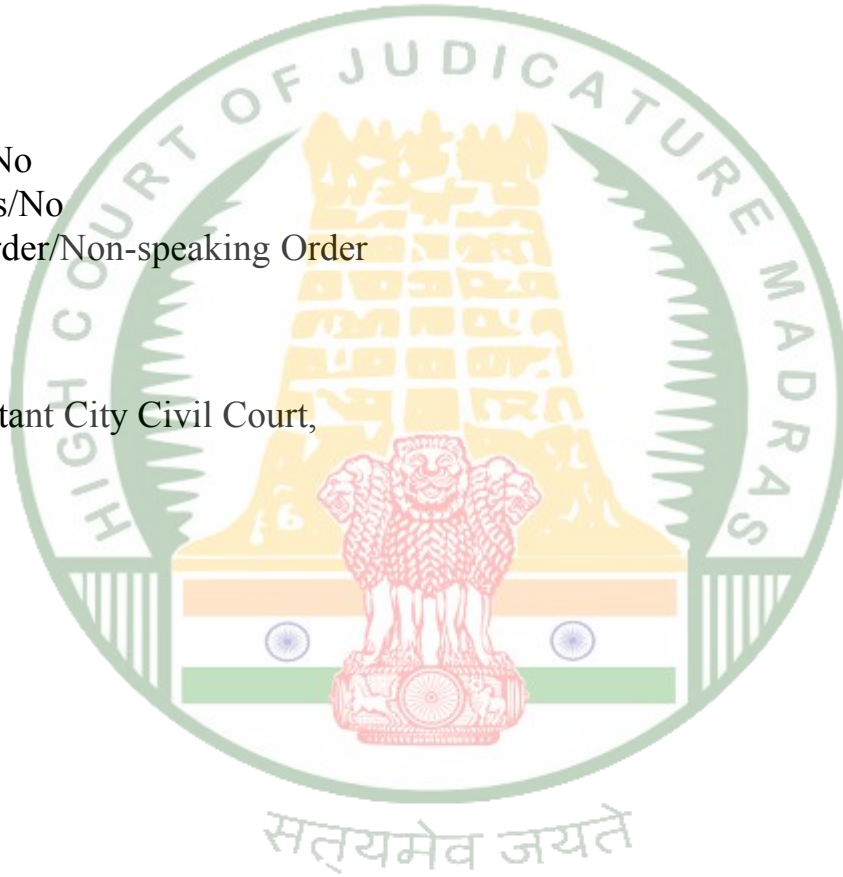
Index: Yes/No

Internet: Yes/No

Speaking Order/Non-speaking Order

To

The X Assistant City Civil Court,
Chennai.



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A.D. JAGADISH CHANDIRA, J.

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