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C.M.S.A.No.13 of 2002

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.08.2023

CORAM :

THE HON'BLE MR. JUSTICE P.VELMURUGAN

C.M.S.A.No.13 of 2002

and

C.M.P.No.5123 of 2002

Rani (Died)

2. Gunasekaran

3. Gnanasekaran

4. Santhanalakshmi

5. Selvakumar

... Appellants

[Appellants 2 to 5 are brought on record as L.R's of the deceased sole appellant viz., Rani vide order dated 09.11.2022 made in C.M.P.Nos.19097 and 19099 of 2022 in C.M.S.A.No.13 of 2022]

Vs.

1.Kumarasamy (Died)

2.Elumalai

3.Abirami

4.Ravi

5.Viswanathan

... Respondents

[Respondents 3 to 5 are brought on record as L.R's of the deceased R1 vide order dated 18.03.2021 made in C.M.P.Nos.982 to 984 of 2017]



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in C.M.S.A.No.13 of 2022]

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Civil Miscellaneous Second Appeal filed under Section 100 r/w 106 of Civil Procedure Code against the fair order and decretal order of the Principal Subordinate Judge, Villupuram dated 14.03.2002 passed in C.M.A.No.15 of 2000 by confirming the decretal order and fair order of Principal District Munsif, Villupuram in E.A.No.864/97 in E.P.No.738/96 in O.S.No.54 of 1991, dated 23.09.1998.

For Appellants : Mr.N.Suresh

For Respondents : No appearance
for R2
Mr.A.Sivaji
for R3 to R5

J U D G M E N T

This civil miscellaneous second appeal is arising out of the fair and decretal order passed by the learned Principal Subordinate Judge, Villupuram in C.M.A.No.15 of 2000, dated 14.03.2002, confirming the fair and decretal order passed by the learned Principal District Munsif, Villupuram in E.A.No.864 of 1997 in E.P.No.738 of 1996 in O.S.No.54 of 1991, dated 23.09.1998.



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2. The brief facts of the case are as follows :

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The property having an area of 80 cents, originally belonged to one Govindasamy Gounder, who sold the same to one Pandurangan in the year 1982. The said Pandurangan had two sons viz., Arunagiri and Raju, in whose favour the said Pandurangan executed a settlement deed on 15.12.1986. As per the settlement deed, both Arunagiri and Raju are having equal share in the said property. The appellant is the subsequent purchaser, who purchased the property of 40 cents from one Raju on 19.03.1996. Since then she is in possession and enjoyment of the said property. The deceased first respondent herein, on the basis of the illegal sale in his favour by one Arunagiri with regard to the entire 80 cents, had filed a suit in O.S.No.54 of 1991 on the file of the Principal District Munsif Court, Villupuram against the second respondent herein, who is the husband of the appellant herein. The said suit was decreed allowing the first respondent herein/plaintiff to recover the property from the second respondent herein/defendant. Against the said decree, the defendant took the matter in appeal as A.S.No.24 of 1993 on the file of the Sub Court, Villupuram. The lower Appellate Court reversed the judgment of the trial Court and allowed



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the appeal suit. Challenging the same, the deceased first respondent herein preferred second appeal as S.A.No.1283 of 1995 before this Court, which came to be allowed on 10.01.1996 by holding that the title of the first respondent will be valid only in respect of Arunagiri share. On the basis of the decree obtained in the suit, the deceased first respondent herein had filed execution petition in E.P.No.738 of 1996 in O.S.No.54 of 1991 for delivery of property in respect of the entire 80 cents. Hence, the appellant herein filed an application under Order XXI Rule 97 CPC in E.A.No.864 of 1997. In the said application, the first respondent raised the preliminary issue of maintainability. The trial Court took up the application for maintainability and by its order dated 23.09.1998, holding that the application was maintainable, however, dismissed the same on merits, without affording an opportunity to the appellant to let in evidence on the merits of the case. Assailing the said order, the appellant herein filed C.M.A.No.15 of 2000 on the file of the Principal Sub Court, Villupuram and the same was dismissed on 14.03.2002. Challenging the same, the appellant has come forward with the present civil miscellaneous second appeal.



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3. The learned counsel for the appellant submitted that pending

E.P.No.738 of 1996, the appellant filed E.A.No.864 of 1997 and the Executing Court without giving an opportunity to the appellant dismissed the application, at the first instance itself, which is against the principles of natural justice. When the appellant filed the application pending execution petition invoking under Order XXI Rule 97 CPC, the Executing Court has to decide the application on merits or it has to be adjudicated under Order XXI Rules 97 and 98 CPC and the title, right or interest of the parties has to be decided under Order XXI Rule 101 CPC. In the present case, the appellant is the third party to the suit, and she is entitled to invoke Order XXI Rule 97 CPC, whereas the Executing Court dismissed the application at the first instance and without deciding the matter on merits. Therefore, the appellant is before this Court.

4. The learned counsel appearing for respondents 3 to 5 submitted that the appellant is a third party to the suit. Only the decree holder is entitled to make objections under Order XXI Rule 97 CPC and a third party has no right to invoke the said provision.



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5. Per contra, the learned counsel for the appellant placed reliance on the latest judgment of the Hon'ble Supreme Court in the case of ***Jini Dhanrajgir and Another Vs. Shibu Mathew and Others*** reported in **[CDJ 2023 SC 498]** wherein it is held that third party to the suit can also invoke Order XXI Rules 97 to 99 CPC. The relevant portion of the said judgment is extracted here under :

"17. Section 47 of the CPC, being one of the most important provisions relating to execution of decrees, mandates that the court executing the decree shall determine all questions arising between the parties to the suit or their representatives in relation to the execution, discharge, or satisfaction of the decree and that such questions may not be adjudicated in a separate suit. What is intended by conferring exclusive jurisdiction on the executing court is to prevent needless and unnecessary litigation and to achieve speedy disposal of the questions arising for discussion in relation to the execution, discharge or satisfaction of the decree. Should there be any resistance offered or obstruction raised impeding due execution of a decree made by a court of competent jurisdiction, the provisions of Rules 97, 101 and 98 of Order XXI enable the executing court to adjudicate the



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inter se claims of the decree-holder and the third parties in the execution proceedings themselves to avoid prolongation of litigation by driving the parties to institute independent suits. No wonder, the provisions contained in Rules 97 to 106 of Order XXI of the [CPC](#) under the sub-heading "*Resistance to delivery of possession to decree-holder or purchaser*" have been held by this Court to be a complete code in itself in *Brahmdeo Chaudhary vs. Rishikesh Prasad Jaiswal* (1997) 3 SCC 694 as well as in a decision of recent origin in *Asgar v. Mohan Verma* (2020) 16 SCC 230. In the latter decision, it has been noted that Rules 97 to 103 of Order XXI provide the sole remedy both to parties to a suit as well as to a stranger to the decree put to execution."

6. This appeal is pending from the year 2002 without formulating any substantial questions of law. Today, this Court has formulated the following substantial questions of law :

"1. Whether the third party can invoke Order XXI Rule 97 CPC or not ?

ii) Whether the right, title or interest in the



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property can be decided in the E.A. proceedings itself?"

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7. Heard the learned counsel for the appellant and the learned counsel for respondents 3 to 5 and perused the materials available on record. Despite service of notice, the second respondent has not chosen to enter appearance either through a counsel or in person.

8. Admittedly, the first respondent herein filed the suit in O.S.No.54 of 1991 against the second respondent herein for declaration and recovery of possession and mesne profits. The said suit was decreed in favour of the first respondent. Though the second respondent filed the appeal in A.S.No.24 of 1993 and the same was allowed, as against the same, the first respondent filed S.A.No.1283 of 1995, which came to be allowed. On the basis of the decree obtained in the suit, the deceased first respondent filed E.P.No.738 of 1996. Pending execution petition, the appellant herein filed E.A.No.864 of 1997. The said application was resisted by the first respondent raising the preliminary issue regarding the maintainability and the said application was dismissed at the first instance, without going into



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merits. Though the appellant filed C.M.A.No.15 of 2000 and the lower appellate Court also dismissed the same, the appellant is before this Court.

9. **Substantial Question No.I**

"1. Whether the third party can invoke Order XXI Rule 97 CPC or not ?

(i) It is seen from the decision of the Hon'ble Supreme Court reported in [**2022(4) CTC 278**] that only the decree holder is entitled to make objection under Order XXI Rule 97 CPC and a third party has no right to invoke the said provision. However, in the decision of the Hon'ble Supreme Court reported in [**CDJ 2023 SC 498**] referred to supra it is clear that the third party can also invoke order XXI Rule 97 to 99 CPC and all rights and title of the property can be decided only under Order XXI Rule 101 CPC.

(ii) Further, a bare reading of Order XXI Rule 97 CPC., it is very clear that the persons other than the parties, who are in possession of the property, can also file an application under Order XXI Rule 97 CPC. In the present case, pending execution proceedings the appellant, who is the



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third party to the proceedings filed the suit in O.S.No.598 of 1996 on the file of the District Munsif Court, Villupuram, claiming right, title over the disputed property. In view of the pendency of the said suit, the execution application in E.A.No.864 of 1997 filed by the appellant was dismissed. Subsequently, the appellant withdrew the said suit as not pressed and therefore, the said suit was dismissed.

(ii) Further, Order XXI Rule 101 CPC makes it very clear that there is no necessity to file separate suit. Though the suit filed by the appellant was not decided on merits, the objection application filed by the appellant in E.A.No.864 of 1997 claiming right, title or interest in the property can be decided on merits, whereas, in the present case the said application was dismissed only on technical grounds and not on merits and the right, title, or interest of the appellant was not decided on merits in the execution application. Further, as per the latest decision of the Hon'ble Supreme Court referred to supra, the third party, who was not party to the suit can also invoke Order XXI Rule 97 CPC. If that be the case, it has to be decided under Order XXI Rule 101 CPC and right, title and interest of the



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parties over the properties can be decided. Therefore, the contention raised by the learned counsel for respondents 3 to 5 cannot be acceptable. Hence, the third parties can also invoke Order XXI Rule 97 CPC. Therefore, this substantial question of law answered in favour of the appellant.

10. **Substantial Question No.2**

2. Whether the rights and titles of the property can be decided in the E.A proceedings itself ?

For better appreciation, it is appropriate to extract Order XXI Rule 101 CPC which read as follows:

"Question to be determined – All questions (including questions relating to right, title or interest in the property) arising between the parties to a proceedings on an application under Rule 97 or Rule 99 or their representatives, and relevant to the adjudication of the application, shall be determined by the Court dealing with the application, and not by a separate suit and for this purpose, the Court shall, notwithstanding anything to the contrary contained in any other law for the time being in



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force, be deemed to have jurisdiction to decide such question."

Therefore, Order XXI Rule 101 CPC is very clear that if any right, title or interest in the property, arising between the parties, who filed an application under Order XXI Rule 97 CPC., shall be determined by the Court dealing with the application on merits. Therefore, there is no necessity for the parties to file a separate suit. The substantial question of law answered accordingly.

11. Considering the facts and circumstances and the submissions made by the learned counsel on either side, this Court is of the opinion that the execution application in E.A.No.864 of 1997 filed by the appellant under Order XXI Rule 97 CPC is not decided on merits and hence, the order passed by the learned Principal District Munsif, Villupuram, in E.A.No.864 of 1997 in E.P.No.738 of 1996 in O.S.No.54 of 1991, is set aside and the matter is remitted back to the Executing Court for fresh consideration. The Executing Court is directed to decide the application afresh and pass orders on merits and in accordance with law,



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after giving notice to all the parties, and if any parties are not alive, steps are to be taken to implead their legal representatives. Such exercise shall be completed by the Executing Court within a period of six months from the date of receipt of a copy of this order. Consequently, connected miscellaneous petition is closed. There shall be no order as to costs.

03.08.2023

Index: Yes/No
Speaking Order/Non-Speaking Order
Neutral Citation Case : Yes/No
ms

To

1. The Principal Subordinate Judge,
Villupuram.
2. The Principal District Munsif,
Villupuram
3. The Section Officer,
V.R. Section,
High Court, Madras.



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P.VELMURUGAN, J.

ms

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