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C.M.S.A. No.19 of 2006

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

DATE: 14.08.2023

Coram:

**THE HONOURABLE MR. JUSTICE P.VELMURUGAN**

Civil Miscellaneous Second Appeal No.19 of 2006

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1. V.Thangavel (Deceased)  
2. Punithambal  
3. T.Boovaragavan  
4. Gandhimathi  
5. T.Venkatachalam  
6. T.Baskar  
7. Krishnaveni  
(Appellants 2 to 7 brought on record as LRs  
of the deceased sole appellant vide order of  
Court dated 23.03.2015 made in CMP  
No.260 of 2012 in CMSA No.19 of 2006.)

... Appellants

Vs.

1. Govindan (Deceased)  
2. Venkatachalam  
3. Alamelu (Died)  
4. Vaiyapuri Gounden  
5. Selvam  
6. Ravi  
7. Rani  
8. Shanthi  
9. Rajamani  
10. Radhamani  
11. Chandra  
12. Rathinavel  
13. Vaithi  
14. Murugan  
15. Thangamani



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16.Shanthi

. Respondents

RR 13 to 16 brought on record as LR's of the deceased 3rd respondent viz. Alamelu vide Court order dated 05.04.2019 made in CMP Nos.8820, 8824 and 8826 of 2019 in CMSA No.19 of 2006 (MGRJ)

**PRAYER:** This Civil Miscellaneous Second Appeal is filed under Order 21 Rule 99 read with Section 100 of C.P.C., against the order dated 12.09.2005 passed in C.M.A. No.20 of 2003 on the file of the 1st Additional District Judge, Salem, confirming the judgment dated 29.08.2003 passed in REA No.1112 of 1993 in REP No.169 of 1992 in O.S.No.250 of 1967 on the file of the Principal District Munsif Court, Salem, and to set aside the same.

For Appellants : Mr.A.S.Narasimhan

For Respondents : Mr.V.Sekar for RR-2 and 5 to 8 and 9 to 16  
R1- and R-3 - dead  
R-4 Notice served. No appearance



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## **JUDGMENT**

This Civil Miscellaneous Second Appeal is filed against the judgment dated 12.09.2005 in C.M.A. No.20 of 2003 on the file of the 1st Additional District Judge, Salem, confirming the judgment dated 29.08.2003 in REA No.1112 of 1993 in REP No.169 of 1992 in O.S.No.250 of 1967 on the file of the Principal District Munsif Court, Salem.

2. In this case, the respondents 1 to 3, along with one Chinnammal and Krishna Ammal filed a suit in OS No.250 of 1967 on the file of the District Munsif Court, Salem, for partition. In the said suit, a preliminary decree was passed on 21.01.1969. Thereafter, the plaintiffs therein, along with six others, filed an application in I.A. No.32 of 1982 in O.S.No.250 of 1967 for passing final decree, in which, a Commissioner was appointed and based on his report, final decree was also passed on 10.12.1991. In order to execute the final decree, the applicants in I.A.No.32 of 1982 filed an execution petition in R.E.P. No.169 of 1992 and the same was ordered. The deceased appellant herein filed R.E.A. No.1112 of 1993 for re-delivery of the property and the said petition was dismissed by the Execution Court on



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29.08.2003, against which, he filed an appeal in CMA No.20/2023 on the file of the Principal District Court, Salem and the same was made over to the 1<sup>st</sup> Additional District Court, Salem for disposal. The 1<sup>st</sup> Additional District Judge, after hearing the same, dismissed the said appeal. Now, challenging the same, he has filed the present Second Appeal before this Court.

3. This Court, while admitting this appeal, formulated the following substantial questions of law;

(i) Whether the lower Courts are right in holding that the claim petition under Order 21 Rule 99 of C.P.C. is not maintainable and the remedy for the appellant is by way of an independent suit, ignoring that a separate suit does not lie as contemplated in Order 21 Rule 101 of C.P.C.?

(ii) Whether or not the Judgment and decree in O.S.No.250 of 1967 are void and enforceable in law since the appellant and other co-owners of S.No.5/32 are not made as parties to the said suit?

(iii) Whether or not the appellant proved his title and possession of the petition property under Ex.P6 to P8, Ex.P19 and other documents?



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(iv) Are not the respondents lost their right in entire survey number 5/32, since they had sold their entire share in S.No.5/32 under Ex.P10 and P11 and the same was affirmed in Ex.R7 the Muchalika and the partition deed Ex.P12 dated 11.06.1992?

(v) Whether the lower courts are right in holding that the appellant is not in possession of the petition property ignoring the voluminous of documentary evidence adduced by the appellant?

4. The learned counsel for the appellants submitted that the father of the deceased appellant namely Venkatachalam was entitled to an extent of 8/15 share by inheritance and also by purchases. The respondents, being the heirs of one Lakshmana Gounder, are entitled only to 2/15 share and they can only deal with the said 2/15 share. The preliminary decree obtained by the respondents is void in law, in view of the fact that only 1/3<sup>rd</sup> share in the land and Well in S.No.5/52 are the subject matter of the suit and appeal and the owners of the remaining 2/3<sup>rd</sup> shares were not made as parties in the said suit in O.S.No.250 of 1967. S.No.5/32, measuring 9 cents of land with a Well therein, originally belonged to one Dada Gounder, the common ancestor. The said Dada Gounder had 5 sons, each having 1/5th share. One



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of his sons, namely Perumal purchased 1/5<sup>th</sup> share of Sevi Perumal, who had three sons, by names Lakshmana Gounder, Venkatachalam and Rangasamy, each having 2/15<sup>th</sup> share in the suti properties. In that way, Venkatachalam and Rangaswamy each are entitled to 2/15<sup>th</sup> share in the suit property. The Lakshmana Gounder enjoyed only 2/15<sup>th</sup> share inherited by him. He did not purchase any other property. His wife's name is Kuppayee. He has 4 sons and they are parties to the suit in O.S.No.250 of 1967 and they could divide among themselves only 2/15<sup>th</sup> share of Lakshmana Gounder. The said Venkatachala Gounder, had apart from his 2/15<sup>th</sup> share, purchased 2/15<sup>th</sup> share of his brother Rangasamy. The 1/5<sup>th</sup> share of his uncle Narayanan and 1/15<sup>th</sup> share of his cousin C.Raman making in all 8/15<sup>th</sup> share, which is approximately 11/20 share. The said Venkatachalam, for a loan transaction, executed a sale deed in favour of Senniappa Nadar on 26.03.1949 under Ex.A1. The said Senniappa Nadar, after the death of Venkatachalam, re-sold the property to the widow of Venkatachalam, by name Govindammal on 27.03.1951 under Ex.A4. In the said sale deed, the property is described as 11/20 which is 1/60 in excess of 8/15 share. In the family partition between six sons of Venkatachalam, 8/15 share in S.No.5/31 was allotted to Thangavel, the deceased appellant herein and he was in



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possession of the said 8/15th share and running a fuel depot in a portion of it after getting licence from the Panchayat and paying licence fees. The deceased appellant also orally leased out a portion to Ramasamy Nadar for a workshop and subsequently, he surrendered possession of the property to the deceased appellant after purchasing a land under Ex.A10 from Kuppusamy and put up a construction thereon. The said portion was subsequently sold to Sakthivel by the deceased appellant under the sale deed Ex.B1 and the deceased appellant was in possession of balance 2¼ cents in S.No.5/32. The said Lakshmana Gounder had sold his 2/15<sup>th</sup> share of the property to Venkatachala Gounder under Ex.A16 dated 29.1.1932 for redemption of mortgage under Ex.A.17 dated 01.11.1924 and the property of Lakshmana Gounder was subsequently sold under Ex.A15 on 11.10.1943 to Thangayammal, who in turn re-conveyed it to Lakshmana Gounder under Ex.A14 dated 07.06.1946. The property was again sold by Lakshmana Gounder and others to Marimuthammal on 05.02.1949 and was re-purchased in the name of Kuppusamy, the 1<sup>st</sup> defendant in the suit, being the elder member of the family, on 20.04.1966. In the said document, the share re-purchased was wrongly mentioned as 1/3rd share in S.No.5/32 instead of 2/15<sup>th</sup> share. Kuppuswamy, son of Lakshmana Gounder, in turn, sold it to



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Ramaswamy Gounder under Ex.A10. The respondents and Chinnammal, wife of Ponnuswamy and her sons filed a suit in O.S. No.250 of 1967 against her husband's brothers for partition of the properties of Lakshmana Gounder, in which,  $1/3^{\text{rd}}$  share of the land in S.No.5/32 was one of the items of the suit property. But the family was entitled to only  $2/15^{\text{th}}$  share and not  $1/3^{\text{rd}}$  share.

4 (a). During the pendency of the suit, the 1<sup>st</sup> defendant sold the share of the family to Rangasamy Nadar under Ex.A10 on 30.03.1990 and the document was rectified under Ex.A11 dated 19.02.1991. The purchaser Rangasamy Nadar raised loan by mortgaging the property to the Ayothiyapattanam House Building Society under Ex.A23 and he has put up a terraced construction and he is in possession and running a Lathe work shop. Apart from the property sold under Ex.A10, the branch of Lakshmana Gounder is not entitled to any extent in S.No.5/32. Under Ex.A12 dated 11.06.1992, the heirs of Lakshmana Gounder, namely the plaintiffs in O.S.No.250 of 1967 have partitioned the entire properties. Their shares in S.No.5/32 does not find place in Ex.A12, because, already it was alienated by Kuppusamy under Ex.A10 to Rangasamy Nadar. In Ex.B7, being the



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Panchayath Muchalika, it is recited that the plaintiffs in O.S.No.250 of 1967 were allotted 2 cents in excess of their share in S.No.5/1, instead of their share in S.No. 5/32 sold by Kuppusamy to Rangasamy Nadar under Ex.A10. Further, the release deed dated 15.06.1992 under Ex.A13 by the plaintiffs to Kuppuswamy sets at rest their dispute in respect of S.No.5/32. The subdivision of the property in S.No.5/32 by the Estate Manager, Salem under Ex.A6 dated 19.12.1990 goes to show that the plaintiffs in the said suit are not entitled to, nor they were in possession of any extent and it is reflected in the Chitta Ex.A7 and the field plan under Ex.A19 wherein, the portion in possession of the appellant is sub divided as S.No.5/32 with an extent of 0.01.5 ares with assessment 0.05 paise.

4 (b). The trial Court wrongly made an observation that the documents under Exs.A6 to A13 are hit by lis-pendens. The principle of lis-pendens would apply only in cases where the party to the proceeding transfers or enters into any other transactions. But this principle will not be applicable to the properties and the parties are not concerned with those transaction or proceedings. Ex.A10 to A13 are the documents executed by the respondents herein. The deceased appellant filed an application in R.E.A. No.1112 of 1993 only in the year 1993 and as such, the documents in



favour of the deceased appellant will not be hit by the principle of lis-pendens and they cannot be rejected at the instance of the parties who have no right or title to the property. The alienation by the defendants would be taken note of while dividing the properties in pursuance of the preliminary decree. When the Court rejected the sale deed in favour of Rangasamy Nadar, the property conveyed under that sale deed ought to have been taken into consideration while dividing and allotting the properties to the parties. The said fact cannot be ignored and the property of non alienating co-sharer cannot be allotted to the respondents in excess of their entitlement. The deceased appellant is not a party to the suit in O.S.No.250 of 1967. Therefore, the decree passed in the said suit would not bind the deceased appellant herein. The Executing Court erroneously dismissed the petition filed by the deceased appellant under Order 21, Rule 99, C.P.C. and ignoring Order 29, Rule 101, C.P.C. and directed the deceased appellant to work out his remedy by filing a fresh suit. Once a person, who is not a party to the proceedings and in possession of the property, files an application for obstruction or re-delivery, invoking the provisions under Order 21, Rule 99, C.P.C., the right, title and possession of the property can be decided in the said proceeding itself under Order 21, Rule 99, C.P.C. and there is no need to file a separate suit. Therefore, the Executing Court failed to consider the



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same and ignored the legal provisions as well as the factual aspects that the respondents are not entitled to get preliminary decree, based on which, they cannot take delivery of possession. The Executing Court, instead of trying the said petition and rendering a finding with regard to the right, title and possession of the deceased appellant, dismissed the petition stating that since he is in possession of the property and he is not entitled to invoke the provisions of Order 21, Rule 99, C.P.C., ignoring Order 21, Rule 101, C.P.C. Therefore, the appellant has filed the present appeal before this Court.

5. The learned counsel for the respondents submitted that, based on the preliminary decree, they filed an application in I.A No.32 of 1982 for passing final decree, in which, a Commissioner was appointed and based on his report, final decree was also passed. Thereafter, the respondents filed an execution petition in R.E.P.No.169 of 1992 for taking delivery after apportionment as per the final decree and pending execution petition, the deceased appellant filed the application under Order 21, Rule 99, C.P.C. Even in his petition itself, the deceased appellant has clearly stated that he is in possession of the property. Once he has stated that he is in possession of the property, he cannot invoke Order 21, Rule 99, CPC. A person, who was



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in possession and despite his obstruction delivery was taken, can only file the application invoking Order 21, Rule 99, C.P.C., whereas, in this case, the deceased appellant himself has stated in the petition that he is in possession of the property and the Commissioner also, in his report, has stated that somebody is in possession of the property and also stated about the physical features. Therefore, the Executing Court rightly held that the deceased appellant who is in possession of the property and not dis-posessed from the property, cannot invoke Order 21, Rule 99, C.P.C. Therefore, the petition itself is not maintainable. Both the fact finding Courts below have clearly made observations and also dismissed the applications and the appeal and this Court, only based on the substantial questions of law, can decide the issue. But there is no substantial question of law exists in this appeal when the petitioner has not established that he was in possession of the property and despite raising obstructions, his possession was taken from him by the Court. The issue involved are only factual aspects. Therefore, the present appeal is not maintainable and the same is liable to be dismissed.

6. Heard both sides and perused the materials available on record.

7. While admitting this second appeal, this Court formulated the



above said substantial questions of law. It is the specific case of the appellant that he is the owner of the property and the respondents have not implicated the other sharers of the property in the suit and obtained preliminary decree. They suppressed the actual shares and obtained the decree behind the back of the other share holders. Therefore, it would not bind the appellant (since deceased). Further, the deceased appellant was in possession of the property. Since it was only a paper delivery order by the Court, he has invoked Order 21 Rule 99 C.P.C. Under Order 21, Rule 99, C.P.C., all the rights, title and possession of the property can be decided in the said proceeding itself and it cannot be left without giving effect to that.

8. The case of the respondents is that the appellant has never been in possession. When he had been in possession and he was removed despite raising objections for delivery and if he was dis-possessed, then only, he can invoke Order 21 Rule 99 CPC for re-delivery. When his possession was not established, his removal is also not established. Even otherwise, the appellant's claim is that he is in continuous possession. If that be the case, when he was not a party to the suit and he is a rightful owner of the property and he is in possession of the property, he should have filed application under Order 21 Rule 97 CPC and despite his possession removed, without



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considering his objection for delivery, he can file an application, whereas, in this case, he himself stated that he is in possession of the property but he has not proved that when they came for taking delivery, he was in possession and he made resistance or obstruction and he also filed an application under Order 21 Rule 97 CPC. In the absence of the same, he is not entitled to the relief.

9. As far as 1<sup>st</sup> substantial question of law is concerned, as already stated, the appellant filed the application in R.E.A.No.1112/1993 under Order 21 Rule 99 read with Section 151 CPC praying to order re-delivery of the property to the petitioner. If that be the case, the appellant has to establish that at the time of taking the delivery through Court, he raised objections and despite his objections, his obstruction was removed. In such circumstances, he can invoke Order 21 Rule 99 CPC for re-delivery. But he has not proved that his possession was removed despite his obstruction. As pointed out by the learned counsel for the respondents, only the person who was in actual possession and then dis-possessed, could file petition under Order 21, Rule 99, C.P.C. But in this case, his main claim is that he is in continuous possession of the property. But he has not proved as to on what



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date, his possession was removed despite his obstruction having been made and hence, he filed the application under Order 21 Rule 99 CPC. No doubt, Order 21 Rule 99 C.P.C. is clear that if any right and title arises, that can be decided in the said application. But Order 21 Rule 99 C.P.C. is very clear where any person other than the judgment debtor is dis-possessed of immovable property by the holder of a decree for possession of such property or, where such property has been sold in execution of a decree by the purchaser thereof, he may make an application to the Court complaining of such dis-possession.

10. If at all the appellant (deceased) was in possession of the property, when the Court Ameen had come to the property for taking delivery of the property, he should have made objections or he should have filed an application under Order 21 Rule 97 CPC for obstruction or possession of immovable property and when that be the case, the Court will adjudicate the case under Order 21 Rule 98 CPC. Still, if a person who was in possession of the property was removed, he can file an application under Order 21 Rule 99 CPC, or at the time of taking delivery, the obstruction made by the person who is in possession of the property resisted or made obstruction, still his obstruction was removed, those persons can invoke



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Order 21 Rule 99 CPC. If that be the case, the question regarding right, title, interest and right to be in possession over the property, can be determined under Order 21 Rule 101 CPC. In this case, in the very opening of the application filed by the appellant (deceased) himself, he has prayed to order to re-delivery of the property to him, whereas, he has said that he is in possession of the property. But the appellant has not established that he was in possession of the property at the time of taking delivery and despite his obstructions, the said obstruction was removed and delivery was effected. No doubt, if he filed a petition under Order 21 Rule 99, it can be decided on merits under Order 21 Rule 101 of CPC regarding right and title of the property, whereas, he has not established the same. Therefore, he is not entitled to invoke under Order 21 Rule 101 of CPC. Accordingly, the 1<sup>st</sup> substantial question of law is answered.

11. As far as 2<sup>nd</sup> substantial question of law is concerned, it is a suit for partition and preliminary decree was earlier obtained and final decree proceedings were also over. If at all the appellant is aggrieved, he should have filed an appeal and he could have been implicated as a party, whereas, the appellant has not stated anything about his awareness of the suit. Further,



it is only factual aspects and despite knowing the pendency of the suit and whether he was impleaded as a party or not, this question may not be considered as a substantial question of law. It is purely based on the factual aspects.

12.As far as the 3<sup>rd</sup> substantial question of law is concerned, since the petitioner has not established that he was in possession of the property and his possession was subsequently removed despite he having raised obstructions/resistance, the trial Court as well as the appellate Court rightly held. If at all, the appellant can file a separate suit for declaration and establish his title. The 3<sup>rd</sup> substantial question of law is answered accordingly.

13. As far as the substantial questions of law 4 and 5 are concerned, it is purely on factual aspects. Both the Courts based on the pleadings and evidence, have given the findings and this Court does not find any perversity in appreciation of evidence, which leads for framing of substantial question of law. Both the Courts below have also not gone into the rights and titles of the parties. Since the appellant did not establish the



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fact that he was in possession and his possession was removed subsequently despite obstruction, he cannot invoke Order 21 Rule 99 CPC. Unless the appellant establishes that he was in possession of the property and his possession was removed despite obstruction, the application under Order 21 Rule 99 CPC would not be applicable. Under these circumstances, the appellant has filed the second appeal. All the substantial question of law are answered accordingly in favour of the respondents and against the appellants.



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14. However, the appellant is at liberty to work out his remedy in the manner known to law and not under Order 21 Rule 99 CPC, since he has not established the foundational fact that his possession was removed despite the obstruction raised by him.

15. Therefore, there is no merit in this appeal and the same is liable to be dismissed. Accordingly, the Civil Miscellaneous Second Appeal is dismissed. There shall be no order as to the costs.

14.08.2023

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- To
1. The 1st Additional District Judge, Salem
  2. The Principal District Munsif Court, Salem
  3. The Section Officer,  
VR Section,  
High Court,  
Madras.



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**P.VELMURUGAN, J**

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