



C.R.P.(NPD)(MD).No.612 of 2012

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 10.02.2023

DELIVERED ON: 22.02.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.R.P.(NPD)(MD).No.612 of 2012

and MP(MD).No.1 of 2012

1.Arumugam

2.Natarajan

3.Velladurai(died)

4.Bethanesh

5.Gnanalakshmis

6.Selvarani

7.Anantha Mahesh

8.Anantha Raj

9.Kalaivanan

10.Selvi

....Petitioners

(Petitioners 4 to 10 are brought on record as legal heirs
of the deceased 3rd petitioner vide Court order dated 22.11.2021)



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Vs

1.Kuruvidurai Pallivasal
Through its Secretary
K.M.Seyyed Ahamed

2.Vellakkilavan

3.Ponnuruvi

...Respondents

(Cause list amended vide Court order dated 02.07.2020)

PRAYER: Civil Revision Case is filed under Section 115 of Code of Civil Procedure, to set aside the fair and decreetal order passed in E.P.No.21 of 2008 in O.S.No.62 of 2000 on the file of the Principal District Munsif Cum Judicial Magistrate, Tiruchendur dated 27.09.2011.

For Petitioners : Mr.M.P.Senthil

For R1 : Mr.M.Md.Ibrahim Saibu

ORDER

The present revision petition has been filed by the defendants 1 to 3 in O.S.No.62 of 2000 on the file of the Principal District Munsif Cum Judicial Magistrate, Tiruchendur.

2.O.S.No.62 of 2000 was filed by a Pallivasal for declaration of title, permanent injunction and recovery of possession.

3.According to the plaint averments, the suit schedule properties



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belonged to the plaintiff Pallivasal and the defendants are the encroachers in the two schedule of properties from October 1999 onwards.

4.The defendants had filed a written statement disputing the title of the plaintiff Pallivasal and contended that they are in possession for more than 60 years in their own right and they have acquired title by adverse possession.

5.After hearing both the parties, the trial Court decreed the suit as prayed for on 25.09.2001.

6.The plaintiff had filed E.P.No.71 of 2004 for recovery of possession from the defendants.

7.According to the learned counsel appearing for the plaintiff, possession was taken on 23.02.2005 and the same was also recorded. Thereafter, a second execution petition was filed in E.P.No.21 of 2008 alleging that the defendants have again encroached upon the second schedule property, on 15.07.2007 they had put up a thatched house.

8.In the said E.P.No.21 of 2008, the defendants had filed a counter contending that the delivery dated 23.02.2005 said to have been recorded in E.P.No.71 of 2004 is only a paper delivery and physical



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possession was not taken. The defendants had further contended that they are only renovating their old houses and no new constructions were put up on 15.07.2007 as alleged by the plaintiff. The defendants had further raised an issue that if the contention of the plaintiff that it is a Waqf property is true, the Civil Court does not have any jurisdiction to entertain the suit and the decree for recovery of possession is not executable in view of lack of subject matter jurisdiction.

9.The Executing Court after considering the contentions of either parties, arrived at a finding that the Civil suit is maintainable and the delivery effected in the previous execution proceedings is not a paper delivery. Based upon the said findings, the second E.P. for delivery was ordered. Challenging the same, the present revision petition has been filed by the defendants.

10.The learned counsel for the petitioners had contended that the Waqf Act had come into force from 01.01.1996. Under Section 83 of the said Act, the Tribunals have been constituted conferring exclusive jurisdiction upon them to determining any dispute or question or other matters relating to a waqf or waqf property, eviction of a tenant or determination of rights and obligations of the lessor and the lessee of such



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property, under this Act and define the local limits and jurisdiction of such Tribunals.

11.Under the said Act, a Waqf Tribunal was constituted in the year 1997 in Tuticorin. After establishment of the Waqf Tribunal, the Civil Court will not have any jurisdiction to entertain a suit for declaration of title, that it is Waqf property or for permanent injunction or for recovery of possession. However, the present suit for declaration of title and recovery of possession has been filed on 28.04.2004. Therefore, when the suit was filed before the Additional District Munsif Court, Tuticorin, the said Court lacked subject matter jurisdiction and hence, a decree passed by the said Court is null and void and the same is not enforceable.

12.The learned counsel for the petitioners had relied upon a judgement of the Hon'ble Supreme Court reported in **(1990) 1 SCC 193(Sushil Kumar Mehta Vs. Gobind Ram Bohra (dead) through his legal heirs)** to contend that a decree passed by a Court without jurisdiction over the subject matter is a nullity and it is non est in the eye of law. The invalidity of the said decree can be questioned whenever it is sought or it is acted upon as a foundation even at the stage of execution or in collateral proceedings.



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13.The learned counsel for the petitioners further relied upon a judgement of the Hon'ble Supreme Court reported in **(2004) 8 SCC 706 (Balvant N.Viswamitra and others -vs- Yadav Sadashiv Mule (dead) Through legal heirs and others)** to contend that if the Court lacks inherent jurisdiction in passing a decree, the order passed by such Court would be without jurisdiction, *non est* and void ab initio. A defect of jurisdiction of the Court goes to the root of the matter and strikes at the very authority of the Court to pass a decree or make an order. Such defect has to be treated as a basic and fundamental. The validity of such decree can be challenged at any stage even in execution or collateral proceedings.

14.The learned counsel for the petitioners had further contended that just because of the petitioners had not raised such a defence in E.P.No. 71 of 2004, they are not prevented from raising the issue in the present execution proceedings. A jurisdiction cannot be conferred upon the Court, based upon the consent of the parties, especially when it relates to the subject matter jurisdiction. Therefore, the contest of the defendants in E.P.No.71 of 2004 without raising the jurisdictional issue, cannot take away the right of the defendants to raise the same in the second execution proceedings. Therefore, he prayed that the second execution proceedings



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should have been dismissed by the Executing Court on the ground of lack of subject matter jurisdiction.

15.Per contra, the learned counsel appearing for the respondents had contended that the defendants in their written statement have not raised any issue with regard to the lack of subject matter jurisdiction for the Civil Court after enactment of the Waqf Act. The defendants had also not challenged the decree passed by the Civil Court in a manner known to law. When E.P.No.71 of 2004 was filed, the defendants had not raised the issue of lack of jurisdiction and also had not filed an application under Section of 47 C.P.C contending that a decree is an executable.

16.The learned counsel for the respondents had further contended that the defendants having subjected themselves to the jurisdiction of the civil Court during the trial as well as in the first execution proceedings, thereafter they cannot turn around and contend that the said Court lacks subject matter jurisdiction. He had further contended that the delivery of possession has been taken from the defendants in E.P.No.71 of 2004. The second execution proceedings have been filed only for a re-delivery on the ground that the defendants have encroached over the suit property after the plaintiff Pallivasal had taken delivery in the first



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execution proceedings. Therefore, according to the learned counsel appearing for the respondents, the issue of lack of subject matter jurisdiction cannot be raised in a second execution proceedings for re-delivery when the same has not been raised during the first execution proceedings. Hence, he prayed that the order of the trial Court may be sustained.

17.I have considered the submissions made on either side and perused the materials available on record.

18.A perusal of the plaint indicates that the property belongs to the plaintiff Pallivasal. It is also not in dispute that it is a registered Waqf and hence, it is a Waqf property. The Waqf Act 1995 has come into force with effect from 01.01.1996. Under Section 83 of the said Act, the Waqf Tribunal have been constituted to exclusively deal with the issue relating to the Waqf and Waqf properties.

19.A perusal of Section 85 of the said Act reveals that no suit or other legal proceeding shall lie in any Civil Court, Revenue Court or any other authority in respect of any dispute, question or other matter relating to any property or other matter which is required by or under this Act to be determined by a Tribunal. Therefore, it is clear that there is an express bar



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under the Waqf Act for entertaining the civil suit relating to a Waqf or Waqf property by a competent civil Court.

20. On the basis of the above said Act, a Waqf Tribunal has been constituted in Tuticorin District in the year 1997. The present suit for declaration of title and recovery of possession has been filed by the Pallivasal relating in the year 2000 before the civil Court. Therefore, it is clear that the jurisdiction of the civil Court is expressly barred and the civil Court cannot entertain such a suit in view of Section 9 of C.P.C.

21. As rightly pointed out by the learned counsel appearing for the revision petitioners, the objection raised by the defendants is not relating to lack of territorial jurisdiction and it relates to subject matter jurisdiction in view of Sections 83 and 85 of Waqf Act 1995. When a Court lacks subject matter jurisdiction and passes a decree, it can only be considered to be a void decree and non est in the eye of law. When a decree is void and non est in the eye of law, the validity of the said decree can be questioned even in the execution proceedings or in the collateral proceedings, in view of the judgement of the Hon'ble Supreme Court reported in **(1990) 1 SCC 193 (Sushil Kumar Mehta Vs. Gobind Ram Bohra (dead) through his legal heirs)**. Therefore, the contention of the



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plaintiff/ decree holder that the issue relating to lack of jurisdiction cannot be raised in the execution proceedings is not legally sustainable.

22.The learned counsel for the plaintiff had further contended that the defendant had not raised any such objection during the trial or during the hearing of the first execution proceedings and hence, they are estopped from raising the said ground in the second execution proceedings. It is settled position of law by consensus, jurisdiction cannot be conferred by the parties to a Court which lacks jurisdiction in view of statutory provisions. Therefore, the said contention is also not legally sustainable.

23. In view of the above said reasons, I find that the Executing Court has not properly appreciated Sections 83 and 85 of the Waqf Act and has proceeded to order re-delivery, in favour of the plaintiff Pallivasal based upon a decree which is passed by a civil Court which lacked subject matter jurisdiction. However, the plaintiff Pallivasal is always at liberty to either initiate proceedings before the Waqf Tribunal or initiate proceedings under Section 54 of the Waqf Act 1995.

24. In view of the above said deliberations, the impugned order passed by the Executing Court is not sustainable in the eye of law and the



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same is set aside. This Civil Revision Petition is allowed with liberty to the plaintiff to the extent as stated above. No costs. Consequently, connected miscellaneous petition is closed.

22.02.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

1. The Principal District Munsif Cum Judicial Magistrate,
Tiruchendur
2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR, J

msa

Pre-delivery order made in
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