



C.R.P.(MD)No.1639 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 20.04.2023

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THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.R.P.(MD)No.1639 of 2022

and

C.M.P.(MD)Nos.7171 and 12837 of 2022

1.Anna Swarna Bai
2.Amarnath

.. Petitioners

Versus

1.Ayyaswamy

Kumaraswamy (Died)
Meganathan (Died)
V.K.Sathasivam (Died)

2.Chandra Sekaran

Rathina Swamy (Died)

3.S.P.Jegan

4.Ganesan

5.Azhagianayagam

6.Murugan

Chellappam (Died)

Janarthanan (Died)

7.A.N.Vijayan

8.Paulgani

<https://www.mhc.tn.gov.in/judis>



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9.Mohana Packya Bai

.. Respondents

[Respondent Nos.3 to 6 and 7 to 9 herein are given up,
since they remained ex parte before the lower Court]

Prayer :- Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 19.03.2022, passed in E.A.No.45 of 2015 in E.P.No.37 of 2012 in O.S.No.186 of 1978, on the file of the I Additional Subordinate Court, Nagercoil.

For Petitioners : Mr.R.J.Karthick

For Respondents : Mr.M.P.Senthil

ORDER

The petitioners are aggrieved by the impugned order, dated 19.03.2022, passed by the learned I Additional Sub Judge, Nagercoil, in E.A.No.45 of 2015 in E.P.No.37 of 2012 in O.S.No.186 of 1978.

2.By the impugned order, the learned I Additional Sub Judge, Nagercoil, has allowed the application filed by the respondents for appointing an Advocate Commissioner. The relevant portion of the order reads as under:

"10. Both side submissions considered in the light of available records. Considering the objections raised by the contesting respondents regarding the validity of the decrees this court could conclude that the objections could not be entertain able. Because the objections now raised by the respondents are already raised by them before the trial court during trial and the trial court over ruled those objections and passed the decrees. The respondents themselves in their counter admitted that they raised the same objections before the trial court and the trial court already negated those objections. For an easy reference the relevant



portion of the counter affidavit is extracted here under:

"25. It is submitted that certain facts narrated in this counter were already dealt with in the preliminary Judgment and were found against. Yet the same facts are stated here only for the purpose of bringing before this court the whole history as to what happened in the trust already"

Therefore the respondents are estopped from raising the same objections once again, they are barred by principle of resjudicata. Therefore it is clear that after knowing the fact that their objections were already considered by the courts and negatived the respondents raised the same objections once again only to drag on the proceedings.

11. The next material objection raised by the respondents is, there is no provision in the scheme authorize the court to appoint advocate commissioner to prepare the voters list and to conduct election. Considering this objection this court perused the scheme framed by this court in the final decree proceedings, which is marked as Ex.P1 in this petition. Clause No. 10 of the scheme is relating to the election of trustees. Under the heading of election the procedure to be followed in electing the executive committee members is detailed. It is admitted that in the scheme it is not specifically stated that the election should be conducted by the court appointed advocate commissioner. The court is guardian of the trust. When that scheme decree is silent about who has to conduct the election when the eligible members are not at consensus to conduct the election it is the duty of the court which framed the scheme to, conduct the election and see the trust was managed as per the scheme decree framed by it. Therefore this court conclude that this court has an authority to appoint an Advocate Commissioner to conduct the election. This petition is filed only to appoint an Advocate Commissioner to prepare voters list and to conduct the election as per the scheme decree passed by this court. Therefore to the considered opinion of this court by allowing this application the respondents may not be prejudiced in any manner. Hence this court inclined to allow this application. Accordingly petition is allowed.

12. In the result,

This petition is allowed. Advocate Thiru S. Muthukaruppalai is appointed as Advocate Commissioner. The Advocate Commissioner is directed to prepare a voters list from the eligible members of the trust after giving notice to both sides. After preparing the voters list Advocate



Commissioner is directed to conduct the election of the trustees for the executive committee of the trust in terms of the scheme decree framed by this court. Advocate Commissioner fee is fixed at Rs.25,000/- (Rupees Twenty five thousand only). Advocate Commissioner fees should be paid by the petitioners and they have to deposit the fees within a week. For filing status report call on 10.06.2022".

3.The petitioners are the legal heirs of Late.V.Karunanithi, who was managing the property of the Trust. An order came to be passed by the Deputy Commissioner of H.R. & C.E. Department, Tirunelveli, on 22.02.1977 in O.A.No.59 of 1976. The application was filed to declare the said V.Karunanithi as a Trustee.

4.The order of the Deputy Commissioner, dated 22.02.1977, in O.A.No.59 of 1976 was challenged before the Principal Sub Court, Nagercoil, in O.S.No.186 of 1978. The relief sought for in the above suit was to set aside the order of the Deputy Commissioner, dated 22.02.1977, in O.A.No.59 of 1976 and for recovery of possession of the property, which was under the control of Late.V.Karunanithi through whom the petitioners claim rights. The suit was also filed for framing of a scheme for managing the Trust (Arulmighu Ponnambalam Pillaiyar Swami Kovil Trust) properties.

5.A preliminary decree came to be passed by the said Court on 07.01.2003. By the aforesaid decree, the Court accepted the plea of the respondents that they were the Trustees, however, declined to give relief as far as the recovery of the Trust



property under the control of V.Karunanithi (since deceased). The operative portion of the preliminary decree reads as under:

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"மேலும் டிரஸ்டின் நிர்வாகத்தையும், கோவில் மற்றும் அதன் சொத்துக்களின் சுவாதீனத்தையும் வாதிகளுக்கு ஒப்படைக்க வேண்டும் என்று கேட்டுள்ள பரிகாரத்தைப் பொறுத்து இறுதி நிலைத் தீர்ப்பாணையின் போது முடிவு செய்யப்படும்.

மேலும் டி பரிகாரத்தைப் பொறுத்து வழக்கு தள்ளுபடி செய்யப்படுகிறது."

6.The above extracted portion also indicates that as far as recovery of possession is concerned, it was to be decided at the culmination of the proceedings in O.S.No.186 of 1978. The Principal Sub Court, Nagercoil, thereafter, proceeded to pass final decree on 28.11.2007 and thus, framed a scheme. The operative portion of the decree of the Principal Sub Court, Nagercoil, while framing the scheme decree reads as under:

"Petition filed under Section 151 of C.P.C., for passing final decree in terms of the preliminary decree for scheme.

"This petition is coming on 26.11.2007 for final hearing before me in the presence of Thiru.K.Sahayadhas, Advocate for the petitioners and of Thiru.M.S.Moorthy, Advocate for the respondents 1, 2,6, 13 to 15 and of Thiru.A.Samuel Edwin, Advocate for the third respondent and of Thiru.S.Periavan, Advocate for the respondents 10 and 12 and respondents 5, 7 and 8 are being called absent set exparte and respondents 4, 9 and 11 reported dead, and upon hearing both side and perusing the records and having stood over for consideration till this day, this Court doth order and decree:

That the petitioner be and hereby is allowed and, that the following scheme be and hereby is framed for the proper and effective management of the suit trust (scheme attached), and that the parties do bear their respective costs."



7.The scheme decree also forms part of the aforesaid decree of the Principal Sub Court, Nagercoil. Under these circumstances, the respondents have filed E.P.No. 37 of 2012 under Order XXI Rules 35 and 36 read with Section 151 of C.P.C., for recovery of possession of the property in line with the scheme decree framed by the Court. It appears that during the interregnum, the appeal was also filed by the first petitioner against the final decree of the Principal Sub Court, Nagercoil, in A.S.No. 42 of 2008, which was dismissed for default on 09.07.2010 by the learned Principal District Judge, Nagercoil. Thereafter, an application in I.A.No.1 of 2023 was filed for restoration of A.S.No.42 of 2008 and the matter is still pending before the Principal District Court, Nagercoil.

8.It is submitted that the entire proceedings initiated by the respondents under Order XXI Rules 35 and 36 read with Section 151 of C.P.C., for recovery of possession cannot be countenanced. It is submitted that though in the preliminary decree passed on 07.01.2003, it has been stated that as far as recovery of possession of the trust property is concerned, it was to be subjected to final outcome of the suit in O.S.No.186 of 1978. There is no decree for recovery of possession. It is submitted that only a scheme decree has been framed and therefore, it is open for the respondents to initiate fresh proceedings in accordance with law.

9.In this connection, the learned counsel for the petitioners has placed reliance on the decision of the Hon'ble Supreme Court in the case of *M/s.Century Textiles Industries Limited Vs Deepak Jain and another* reported in **2009 (2) SCC (Civ)**



608. A specific reference is made to Paragraph 13 of the order, which reads as under:

"13. There is no quarrel with the general principle of law and indeed, it is unexceptionable that a court executing a decree cannot go behind the decree; it must take the decree according to its tenor; has no jurisdiction to widen its scope and is required to execute the decree as made. However, the question which falls for consideration in the present case is that when a specific issue regarding the identity of the judgment-debtor had been raised and entertained by the High Court in the first Civil Revision Petition, decided on 21st August, 2002, and the Court having remitted the matter to the Executing Court, the enquiry conducted by the Executing Court in furtherance of the said direction, could its order be said to be without jurisdiction?

It is therefore submitted that the subsequent application filed in E.A.No.45 of 2015 for appointment of Advocate Commissioner also without jurisdiction.

10.The learned counsel for the petitioners placed reliance on the decision of the Hon'ble Supreme Court in the case of **Lakshmi Kumar @ Vasudevan and others Vs. Shri Ahobila Mutt by his Holines and others** reported in **2020 (1) CTC 395**. A specific reference is made to Paragraph 6 of the order, which reads as under:

"6.The learned counsel appearing on either side made elaborate submissions. The main grievance of the petitioners seems to be with regard to the so-called violation of the terms and conditions of the Scheme Decree. It is a settled law that it is only the Scheme Court, which will continue to have a control over the proceedings and the lis and it does not become a functus officio on the basis of the Scheme Decree. Useful reference can be made to the judgment of this Court in the case of Janab Dr.Hisamuddin Papa Sahib and 4 others Vs. Janab Kazim Hussain Sahib reported in 2000-1-L.W.552. The relevant portions of the judgment is extracted hereunder:

"But under the scheme decree, it is the Court that is empowered to appoint certain trustees. The over all control is thus with the Court. Therefore, the Court continues to have



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control over the proceedings and the lis. It had not ceased to have power nor has become functus officio. Under the scheme decree, it is only the Court that has to appoint the trustees. The trustees have to apply to the Court. The scheme decree vests with Court the power of removal of a trustee. The budget has to be submitted to the Court. The Scheme Court has power to give direction for the working of the scheme. Therefore, when an institution like this is governed by or controlled by scheme, the authority of the Court to deal with it arises from the scheme. Therefore, when the Court has still such power drawable from the scheme, then it follows that such scheme decree can be transferred from one Court to another and such powers can be equally exercised by another equal and competent Court. It will be like a Executing Court to which the decree is transferred. In that sense, the matter is still pending and the passing of a decree had not brought end to the proceedings. It still has jurisdiction to decide the dispute arising between the parties or relating to the management of the trust, removal and appointment of trustees. It still has power to issue direction for the working of the scheme. The scheme decree only sets down the rules for administration, management and appointment. It has to be done in the term of the scheme decree. It has thus power of superintendence over the trust. The decree is thus alive and relevant. It has not become a spent force.”

The above judgment clearly explains the law on the issue.

11.The learned counsel for the respondents has placed reliance on the decision of this Court in **Janab Dr.Hisamuddin Papa Sahib and four others vs. Janab Kazim Hussain Sahib** reported in **2000 (1) LW 552**. A reference is made to Paragraph 3 of the said judgment. It appears that the said decision is also referred to by this Court in **Lakshmi Kumar @ Vasudevan and others Vs. Shri Ahobila Mutt**



by his Holines and others reported in **2020 (1) CTC 395**, which has been extracted above.

12.The learned counsel for the respondents submits that the scheme decree merged with preliminary decree and therefore, the respondents are entitled to file a separate Execution Petition for executing the preliminary decree, dated 07.01.2003 and the final decree, dated 28.11.2007.

13.I have heard the learned counsel for the petitioners and the learned counsel for the respondents and perused the materials available on record.

14.In my view, the Execution Petition that has been filed by the respondents was without jurisdiction. The petitioner has to move the Court, which framed the scheme decree and therefore, the petitioners have to file an I.A. for obtaining suitable orders pursuant to the preliminary decree, dated 07.01.2003 and final decree, dated 28.11.2007 in O.S.No.186 of 1978, to proceed further. To implement the scheme decree also, the petitioners have to only move the Sub Court, as the said Court does not become *functus officio* in the scheme decree as held by this Court in **Janab Dr.Hisamuddin Papa Sahib's case** referred to supra.

15.In the light of the above, I am inclined to dispose of this Civil Revision Petition. However, liberty is given to the respondents to file an appropriate



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Interlocutory Application in O.S.No.186 of 1978 for evicting the petitioners. At the same, the petitioners are also at liberty to file an application for implementing the order.

16.With the above liberty, the present Civil Revision Petition stands disposed of. In case, such an application is filed, the same shall be disposed of by the Court below as expeditiously as possible, preferably, within a period of six months from the date of filing such applications, as the suit is of the year 1978. No costs. Consequently, connected Miscellaneous Petitions are closed.

NCC : Yes/No
Index : Yes/No
Internet : Yes/No
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20.04.2023

To

The I Additional Subordinate Judge,
Nagercoil.



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C.SARAVANAN, J.

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Order made in
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