



S.A.(MD)Nos.187, 410, 411 and 412 of 2018

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

DATED : 20.08.2024

CORAM

**THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN**

S.A.(MD)Nos.187, 410, 411 and 412 of 2018  
and  
C.M.P.(MD)No.11791 of 2018

**S.A.(MD)No.187 of 2018 :**

Ellaiyamman and Dhroupathi Amman Kovil,  
Kumbakonam,  
Rep. by Trustee,  
M.V.Ramamoorthy (Deleted).

... Appellant / Respondent /  
Petitioner / Plaintiff

*(The name of the trustee is deleted vide order  
dated 05.08.2024 in S.A.(MD)Nos.187, 410, 411  
and 412 of 2018 by GRSJ)*

**Vs.**

1.V.Manimekalai

2.N.Nagavalli

3.R.Suseela

... Respondents 1 to 3 / Petitioners  
Obstructors

4.Elizabeth Arockiasamy (Died)

5.Josphin

6.Recklaeniya

7.Poulic Irudaya Mari

8.Rani



S.A.(MD)Nos.187, 410, 411 and 412 of 2018

9.Yagappa

10.Anae Nirmala

... Respondents 4 to 10 / Respondents 1 to 7 /  
Defendants

**Prayer :** Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree passed in A.S.No.3 of 2015 dated 05.10.2017 on the file of the Principal Sub Court, Kumbakonam confirming the decreetal order and fair order of partly allowing the E.A.No.37 of 2010 dated 02.09.2014 on the file of the I Additional District Munsif Court, Kumbakonam.

For Appellant : Mr.V.Santharaman

For Respondents : Mr.S.Srinivasa Raghavan for R1 to R3

**S.A.(MD)No.410 of 2018:**

1.Manimegalai

2.Nagavalli

3.Sucila

... Appellants / Appellants/  
Obstructors

1.Sri Ellaiaimman and Throuwpathyamman Kovil,  
Kumbakonam,  
Rep. by Trustee,  
M.V.Ramamoorthy (Deleted).

... 1<sup>st</sup> Respondent / 1<sup>st</sup> Respondent /  
1<sup>st</sup> Respondent /Petitioner / Plaintiff

*(The name of the trustee is deleted vide order  
dated 05.08.2024 in S.A.(MD)Nos.187, 410, 411  
and 412 of 2018 by GRSJ)*

Elizabeth Arockiasamy (Died)



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2. Josephin

3. Rekleniya

4. Bowlin Hiruthayameri

5. Rani

6. Yagappa

7. Aney Nirmala ... Respondents 2 to 7 / Respondents /  
Respondents

**Prayer :** Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 05.10.2017 made in A.S.No.49 of 2014 on the file of the Principal Sub Court, Kumbakonam confirming the judgment and decree dated 02.09.2014 made in E.A.No.11 of 2012 in E.P.No.24 of 2008 in O.S.No.600 of 2004 on the file of I Additional District Munsif Court, Kumbakonam.

For Appellants : Mr.K.Mahendran

For Respondents : Mr.V.Santharaman for R1

**S.A.(MD)No.411 of 2018:**

1. Manimegalai

2. Nagavalli

3. Sucila ... Appellants / Appellants/  
Obstructors

1. Sri Ellaianman and Throuwpathyamman Kovil,  
Kumbakonam,



**S.A.(MD)Nos.187, 410, 411 and 412 of 2018**

Rep. by Trustee,  
M.V.Ramamoorthy (Deleted).

... 1<sup>st</sup> Respondent / 1<sup>st</sup> Respondent /  
1<sup>st</sup> Respondent /Petitioner / Plaintiff

*(The name of the trustee is deleted vide order  
dated 05.08.2024 in S.A.(MD)Nos.187, 410, 411  
and 412 of 2018 by GRSJ)*

Elizabeth Arockiasamy (Died)

2.Josephin

3.Rekleniya

4.Bowlin Hiruthayameri

5.Rani

6.Yagappa

7.Aney Nirmala ... Respondents 2 to 7 / Respondents /  
Respondents

**Prayer :** Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 05.10.2017 made in A.S.No.50 of 2014 on the file of the Principal Sub Court, Kumbakonam confirming the judgment and decree dated 02.09.2014 made in E.A.No.37 of 2012 in E.P.No.24 of 2008 in O.S.No.600 of 2004 on the file of I Additional District Munsif Court, Kumbakonam.

For Appellants : Mr.K.Mahendran

For Respondents : Mr.V.Santharaman for R1

**S.A.(MD)No.412 of 2018:**

1.Manimegalai



S.A.(MD)Nos.187, 410, 411 and 412 of 2018

2.Nagavalli

3.Sucila

... Appellants / Appellants/  
Obstructors

1.Sri Ellaiaimman and Throuwpathyamman Kovil,  
Kumbakonam,  
Rep. by Trustee,  
M.V.Ramamoorthy (Deleted).

... 1<sup>st</sup> Respondent / 1<sup>st</sup> Respondent /  
1<sup>st</sup> Respondent /Petitioner / Plaintiff

*(The name of the trustee is deleted vide order  
dated 05.08.2024 in S.A.(MD)Nos.187, 410, 411  
and 412 of 2018 by GRSJ)*

Elizabeth Arockiasamy (Died)

2.Josephin

3.Rekleniya

4.Bowlin Hiruthayameri

5.Rani

6.Yagappa

7.Aney Nirmala

... Respondents 2 to 7 / Respondents /  
Respondents

**Prayer :** Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 05.10.2017 made in A.S.No.58 of 2014 on the file of the Principal Sub Court, Kumbakonam confirming the judgment and decree dated 02.09.2014 made in E.A.No.49 of 2012 in E.P.No.24 of 2008 in O.S.No.600 of 2004 on the file of I Additional District Munsif Court, Kumbakonam.



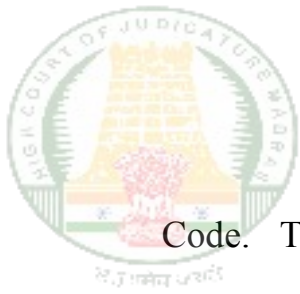
S.A.(MD)Nos.187, 410, 411 and 412 of 2018

For Appellants : Mr.K.Mahendran

For Respondents : Mr.V.Santharaman for R1

### **COMMON JUDGEMENT**

Sri Ellaiyamman and Draupadi Amman Kovil, Kumbakonam, represented by its trustee filed O.S.No.89 of 1986 for recovery of possession. One Elizabeth Arockiasamy figured as the sole defendant. The suit was filed on the basis of a registered usufructuary mortgage deed executed on 24.01.1928 (Ex.A3). The suit was decreed on 23.06.2005. The defendant was directed to surrender possession of the suit property to the plaintiff / temple. Aggrieved by the same, the defendant filed A.S.No.126 of 2005 before the Additional Sub Court, Kumbakonam. The appeal was dismissed on 15.02.2006. Aggrieved by the same, the defendant filed S.A.No.1160 of 2006. The second appeal was dismissed on 14.09.2007. The plaintiff filed E.P.No.24 of 2008 on the file of the I Additional District Munsif Court, Kumbakonam to execute the decree. In the said execution petition, Manimegalai, Nagavalli and Sucila filed E.A.No.37 of 2010, E.A.No.11 of 2012 and E.A.No.49 of 2013. E.A.No.37 of 2010 and E.A.No.11 of 2012 were filed under Order XXI Rule 97 of Civil Procedure Code. E.A.No.49 of 2013 was filed under Section 47 of the Civil Procedure



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Code. The executing Court dismissed E.A.No.11 of 2012 and E.A.No.49 of 2013 vide order dated 02.09.2014. It partly allowed E.A.No.37 of 2010 in respect of the tiled house bearing Door No.9B comprised in T.S.No.152 measuring an extent of 526 ½ square feet. Aggrieved by the order passed in E.A.No.37 of 2010, the plaintiff / temple filed A.S.No.3 of 2015 before the Principal Sub Court, Kumbakonam. Aggrieved by the orders passed against them, Manimegalai, Nagavalli and Sucila filed A.S.Nos.49, 50 and 58 of 2014 before the Principal Sub Court, Kumbakonam. All the four appeals were dismissed by a common judgment and decree dated 05.10.2017. Challenging the same, the plaintiff / temple filed S.A.(MD)No.187 of 2018. It was admitted on the following substantial questions of law on 20.06.2018:-

*"(a) Whether the plaintiff temple is entitled for delivery of possession against the obstrucster is not having any document of title as against the temple property and whether any adverse possession can be claimed against the temple in view of amended Section 109 of H.R.&C.E., Act?*

*(b) Whether an obstructionists were in possession of the property in their own right by documents prior to 1928 upto 1976 the year of filing of the suit?*

*(c) Whether the non-production of documents prior to the usufructuary mortgage of the year 24.01.1928 and the assignment*



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*dated 11.07.1935 will create lawful possession on title on the respondent against the property of the temple in a suit for redemption of usufructuary mortgage?"*

Manimegalai, Nagavalli and Sucila filed S.A.(MD)Nos.410, 411 and 412 of 2018. They were admitted on the following substantial questions of law:-

*"(i) In a suit for recovery of possession when the title of the plaintiff is denied is it not the duty of the plaintiff to establish his title in the suit?*

*(ii) Can a recovery of possession decree granted as against a person who is actually not in possession of the suit property be executed as against a person who is found to be actually in possession of the suit property, more particularly when the person in actual possession is not a party to the suit?*

*(iii) As per Sections 78, 79 and 108 of the HR&CE Act when civil suit for recovery of possession is barred in law, whether the Courts below or correct in decreeing a suit?*

*(iv) Can a execution petition filed by the trustee of the temple be represented by the Executive Officer of the temple without getting property impleaded in the execution proceedings?"*

2. The learned counsel appearing for the respective appellants reiterated all the contentions set out in the respective memorandum of grounds and pressed their respective cases.



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3.Let me take up S.A.No.412 of 2018 first. E.A.No.49 of 2013 was filed under Section 47 of the Civil Procedure Code. The learned counsel appearing for the appellants submitted that an application under Section 47 of the Civil Procedure Code must be dealt like a suit. He faulted the executing Court for having given a summary disposal to the E.A. filed by the appellants.

4.I am not swayed by the said submission. Section 47 of the Civil Procedure Code reads as follows:-

***“47. Questions to be determined by the Court executing decree.***

*—(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit.”*

*4\* \* \* \* \**

*(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.”*

*[Explanation I.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.*

*Explanation II.—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and*

*(b) all questions relating to the delivery of possession of such*



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*property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]”*

5.The plaintiff had obtained a decree against one Elizabeth Arockiasamy. This decree was put to execution. Manimegalai, Nagavalli and Sucila did not claim under Elizabeth Arockiasamy / original defendant in the suit. They set up an independent claim. Section 47 will be applicable if only a question relating to execution had been raised by the parties to the suit or by their representative in interest. The applicants in E.A.No.49 of 2013 will not come under this category. The application filed by them was not clearly maintainable. The executing Court was justified in summarily dismissing the said E.A. Only if the application fell within the scope of Section 47, it should be tried like a suit and not otherwise. An application that did not fall within its scope and purview deserved summary dismissal. No substantial question of law arises. The Courts below have correctly approached the issue. In this view of the matter, S.A.(MD)No.412 of 2018 stands dismissed.

6.E.A.No.37 of 2010 and E.A.No.11 of 2012 were filed under Order XXI and Rule 97 of Civil Procedure Code. The scope of this provision was dealt with by the Hon'ble Supreme Court in the decision reported in **(2003) 12 SCC**



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**219 (Ashan Devi v. Phulwasi Devi)**. This decision was cited with approval in a subsequent decision of the Hon'ble Supreme Court reported in **(2019) 17 SCC 279 (Shamsher Singh v. Nahar Singh)**. **Ashan Devi** decision was followed by a learned Judge of this Court in the decision reported in **2011-1-L.W. 647 (Munusamy v. Vengadachalam)**. It was held therein as follows:-

*“16. Therefore, from the above judgments, it has been made clear that in an enquiry Under Order XXI, Rule 97, the court has to decide the rights of the obstructors who are in possession of the property and there is no need to go into the title of the decree holder even though the same is questioned by the obstructor. As held in the judgment reported in AIR 1998 SC 1754, the questions which the Executing Court is obliged to determine under Rule 101 must possess two adjuncts. The first is that such dispute should have legally arisen between the parties, and the second is, such questions must be relevant for consideration and determination between the parties. Further, in [the said judgment](#), it has been made clear by the Honourable Supreme Court that a third party, who questions the validity of a transfer made by a decree holder to an assignee, cannot claim that the question regarding its validity should be decided during execution proceedings. Further, in the judgment reported in 2000 (10) SCC 405, it is made clear that an obstructor cannot be dispossessed till his rights are adjudicated in appropriate proceedings. In the decision reported in AIR 2004 SC 511 also it has been made clear that the legislator purposely amended the provisions in Order XXI to enable the third parties to seek*



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*adjudication of their rights in execution proceedings themselves with a view to curtail prolongation of litigation and arrest the delay caused in execution of decrees.*

*17. Therefore, it has been made clear by the Honourable Supreme Court that in an enquiry under Order XXI Rule 97, when an obstructor objects to the delivery of possession by the decree holder, claiming independent right, the court has to find out whether the obstructor has got any legal right to be in possession of the property and if the court comes to the conclusion that he has got every right to be in possession of the property, the court can pass orders to that effect and dismiss the application filed by the decree holder and in that proceedings, the court cannot go into the legality of the decree passed in favour of the decree holder at the instance of the obstructor. Therefore, the substantial question of law raised by the appellants that the decree obtained by the first respondent/decreed holder is nullity and he has no right or title to A portion of the property and that question has to be gone into execution proceedings cannot be accepted. The substantial questions of law raised by the appellants are decided against them.”*

7. From the above case laws, one can easily come to the conclusion that an applicant raising third party obstruction and seeking relief under Order XXI Rule 97 must establish his independent title or legal right to possession. In this case, no doubt, the applicants have shown the existence of a tiled house in a portion of the suit property. It is true that this house was in existence since 1975 and that it was also assessed to property tax. It was also enjoying



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electricity service connection. The exhibits marked on the side of the applicants clearly bear this out. But this by itself would not be sufficient. It is true that mutations have been made in the town survey register on the strength of settlement deed dated 08.02.2015 executed by Veeramuthu in favour of the applicants. There has been one more execution of settlement deed in the year 2010 by Chinna Ponnu in favour of the applicants.

8.In both these documents, there is no tracing of title. There is nothing on record as to how, the applicants came to be in possession of the property. It is well settled that in an enquiry under Order XXI Rule 97 of Civil Procedure Code, the decree holder's right and title cannot be in issue.

9.The Courts below simply went by the factum of possession alone. They noticed that a tiled house had been put up and that the applicants are in possession of the same. This cannot be the end of the matter. Something more was required. The applicants ought to have shown as to how they acquired the legal right to possession. In other words, the basis of possession must have been delineated and established. This exercise was not undertaken. Failure to prove legal right to possession is fatal to the case of the applicants. I, therefore, answer the substantial questions of law in favour of the plaintiff / temple and



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against the applicants in E.A.No.37 of 2010 and E.A.No.11 of 2012. I set aside the judgment and decree dated 05.10.2017 in A.S.No.3 of 2015 on the file of the Principal Sub Court, Kumbakonam. S.A.(MD)No.187 of 2018 is allowed. S.A.(MD)Nos.410 and 411 of 2018 are dismissed. No costs. Consequently, connected miscellaneous petition is closed.

**20.08.2024**

Index : Yes / No  
Internet : Yes/ No  
ias

To:

- 1.The Principal Sub Court,  
Kumbakonam.
- 2.The I Additional District Munsif Court,  
Kumbakonam.

**Copy to:**

The Record Keeper,  
V.R. Section,  
Madurai Bench of Madras High Court,  
Madurai.



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**G.R.SWAMINATHAN, J.**

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