



C.R.P.(MD).No.1657 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON: 10.03.2025

DELIVERED ON: 12.06.2025

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

**C.R.P.(MD).No.1657 of 2019
and CMP(MD).No.8604 of 2019**

1.Ramanathan

2.Chandran

3.Karunanidhi

4.Thangamuthu

...Petitioners/Respondents 34,

35, 37 & 38 /Lrs. of 5th Defendant

Vs

1.Rajagopalan (died)

2.Subramanian

3.Sundaram

4.Sambasivam

5.Chandrabala (died)

....Respondents 1-5/Petitioners1-5

/Plaintiffs 1-5

Sambasiva Iyer (died)

Sundaresa Iyer (died)

Padmavathi (died)

1/23



C.R.P.(MD).No.1657 of 2019

WEB COPY

Alamelu Ammal (died)

Palanivel Ambalam (died)

Rengasamy Ambalam (died)

6. Alagar Ambalam

Kasi Ambalam (died)

Raman Ambalam (died)

Natesan Ambalam (died)

7. Velu Ambalam

8. Subbiah Ambalam

Arumugam Ambalam (died)

9. Karuppiah Ambalam

10. Shanmugam Ambalam

Durairasu (died)

Shamuga Ambalam (died)

11. Natesan

12. Karuppiah

13. Silambayee

14. Kanthan

15. Veeramuthu

16. Ammakannu

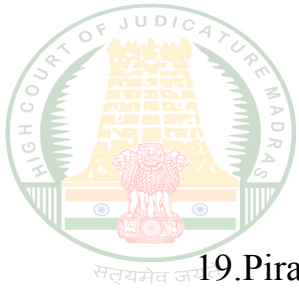
17. Rajammal

Durairasu (died)

18. Sethurama Iyer

Sundari (died)

2/23



C.R.P.(MD).No.1657 of 2019

19.Piraman

20.Mahalingam

Chidambaram(died)

Karuppiah (died)

Narayanasamy (died)

21.Balasubramanian

...Respondents 6 to 21
/Petitioners 6 to 33
/Defendants 6 to 33

22.Manoharan

23.Nagarathinam

24.Sankar

25.Hariharan

26.Venkataraman

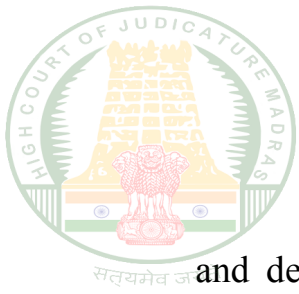
(Memo dated 04.07.2024 is recorded, as R5 died and taking steps to implead her legal heirs is dispensed with vide order dated 24.07.2024 made in CRP(MD).No.1657 of 2019)

(Respondents 2 to 5 represented by their power agent 1st respondent)

(Respondents 6 to 22 are given up)

(Respondents 23 to 26 are brought on record as legal heirs of the deceased 1st respondent vide Court order dated 12.01.2024 made in CMP(MD).Nos.9313, 9316 ad 9318 of 2021 in CRP(MD).No.1657 of 2019)

PRAYER: Civil Revision Case is filed under Section 115 of Code of Civil Procedure, to allow the civil revision petition setting aside the fair order



C.R.P.(MD).No.1657 of 2019

and decretal order passed by the District Munsif Court, Aranthangi in E.P.No.48 of 2010 in O.S.No.72 of 1984 dated 10.09.2018 insofar as they relate to 2 acre 90 cents of petitioners comprised in suit 2nd item in S.No. 298/2 (New Survey No.298/2B1) and 298/2B2) with an extent of 2.90 acres.

For Petitioner : Mr.N.Balakrishnan

For Respondents :M/s.J.Anandhavalli
For R2 to R4 and R23 to 26

: R5 dispensed with

:R6 to R22 given up.

ORDER

The legal heirs of the 5th defendant in O.S.No.72 of 1984 on the file of the District Munsif Court, Aranthangi have filed the present civil revision petition challenging the order of delivery passed by the Executing Court in E.P.No.48 of 2010.

(A)Factual Backgrounds:

2.The ancestors in title of the respondents 1 to 5 herein had filed the above said suit for the relief of partition and separate possession.

3.A preliminary decree came to be passed on 13.04.1994. The legal heirs of the plaintiff had filed I.A.No.105 of 1998 for passing of final



C.R.P.(MD).No.1657 of 2019

WEB COPY

decree and a final decree came to be passed on 22.12.2003. Based upon the said final decree, the legal heirs of the plaintiff have filed E.P.No.48 of 2010 seeking delivery of the property allotted to them in the final decree. Under the impugned order, the Executing Court has allowed the delivery application. Challenging the same, the present civil revision petition has been filed by the legal heirs of the 5th defendant.

(B).Submissions of the counsels appearing on either side:

4The learned counsel appearing for the revision petitioner herein has challenged the executability of the final decree passed in the partition suit on the following grounds:

a)Two of the brothers of the original plaintiff were working as a Village Headmen and due to misappropriation of funds, their shares in the joint family property was brought to auction. In the sale conducted by the Government, the 5th defendant has purchased 3.75 acres. Out of the said extent, an extent of 85 cents was acquired for formation of road. Balance 2.90 acres is in possession and enjoyment of the 5th defendant. Therefore, the 5th defendant is a necessary party to the suit for partition.



b)The 5th defendant had passed away on 26.06.1988.

The plaintiff and the 5th defendant also hail from the same village and therefore, the death of the 5th defendant was within the knowledge of the plaintiff. Initially, the suit was dismissed for default on 08.10.1990 and it was restored as per order in I.A.No.228 of 1991 dated 21.03.1994. In the restoration proceedings, notice was not served upon the 5th defendant or his legal heirs. Therefore, the restoration of the suit is bad in the eye of law.

c)Without impleading the legal heirs of the 5th defendant, a preliminary decree came to be passed as against the dead person namely the 5th defendant on 13.04.1994. Therefore, the said preliminary decree is a nullity.

d)Though the decree holder had knowledge about the death of the 5th defendant, without impleading the legal heirs of the 5th defendant, a final decree application came to be filed in I.A.No.105 of 1998 by the decree holder. There is a specific reference in the final decree proceedings that the 5th defendant had passed away. However, no steps were taken to implead the



C.R.P.(MD).No.1657 of 2019

WEB COPY

legal heirs of the 5th defendant.

5.The trial Court has proceeded to pass a final decree on 22.12.2003. Therefore, the final decree, having been passed as against a dead person, is also a nullity.

6.Based upon the final decree, the decree holders have filed E.P.No.48 of 2010. In the execution proceedings, the legal heirs of the deceased 5th defendant have been impleaded as respondents 34 and 35. Though specific objections were raised with regard to the executability of the final decree, the Executing Court without properly appreciating the validity of the final decree, has proceeded to pass the delivery order.

7.The learned counsel appearing for the revision petitioners had contended that the preliminary decree and the final decree being nullity, the order of delivery should be set aside. He had further contended that the revision petitioners are in settled position and therefore, they cannot be dispossessed unless by due process of law. He relied upon the judgment of the Hon'ble Supreme Court reported in **2004-3-L.W.143 (Rame Gowda (D) by Lrs. Vs. M.Varadappa Naidu (D) by Lrs. & Anr.)**. He had further contended that the 5th defendant who has purchased the shares of the brother of the plaintiff, is also one of the co-sharer and therefore, he is a



C.R.P.(MD).No.1657 of 2019

necessary party in the suit for partition. In such circumstances, without impleading the legal heirs of the 5th defendant, ought not to have proceeded to pass the preliminary decree and the final decree.

8.The learned counsel for the petitioners had further submitted that the Executing Court had arrived at an erroneous finding that there is no reference about the death of the 5th defendant till passing of the preliminary decree. The learned counsel appearing for the 5th defendant has not informed the Court about the death of his client as contemplated under Order 22 Rule 10A of C.P.C. When the plaintiffs are from the same village, they cannot take advantage of the provisions of C.P.C and contended that the death of the 5th defendant was not informed to the Court by the counsel.

9.The learned counsel for the petitioners had further contended that when the preliminary decree as well as the final decree are nullity, the legal heirs of the 5th defendant need not file any application to set aside the same or challenge the same in independent proceedings. The Executing Court was not right in arriving at a finding that the preliminary decree and the final decree have not been put to challenge.



C.R.P.(MD).No.1657 of 2019

WEB COPY

10.The learned counsel for the petitioners had further contended that the Executing Court has arrived at an erroneous finding that since the 5th defendant was not allotted any share in the preliminary decree, his non-impleadment in the final decree proceedings would not be a fatal. In fact, the 5th defendant had filed a written statement claiming share over the property. Without impleading his legal heirs, the Court has proceeded to pass a decree as against the 5th defendant, rejecting his claim for a share. In such circumstances, the Executing Court cannot rely upon the observation made in the judgment of the trial Court. Hence, he prayed for allowing the revision petition.

11.Per contra, the learned counsel for the respondents/decreed holders had contended that the same counsel had appeared for the 5th defendant as well as the defendants 6, 7, 10, 11, 13, 30 and 31. In case, if the 5th defendant had passed away, he should have brought to the notice of the Court as contemplated under Order 22 Rule 10(A) of C.P.C. Therefore, the plaintiffs cannot be found fault with for non impleading the legal heirs of the 5th defendant.

12.The learned counsel for the respondents had further contended that the 5th defendant had filed a written statement claiming that



C.R.P.(MD).No.1657 of 2019

he had purchased a portion of the suit schedule property in an auction conducted by the Government.

13.The 6th defendant had also filed a written statement making a similar claim. The trial Court has relied upon the documents filed on behalf of the 6th defendant and has arrived at a finding that only the 6th defendant has purchased the property in the Government auction and the same is in possession of the 7th defendant. In such an event, the 5th defendant does not have any right over the suit schedule property and therefore, the non-impleading of the legal heirs of the 5th defendant would not be a fatal.

14.The learned counsel for the respondents herein had further contended that even before this Court, an opportunity was granted to the legal heirs of the 5th defendant to produce the sale certificate issued by the Government. Except some revenue records, they were not able to produce any other documents. The 5th defendant being a third party to the family, unless he establishes the fact that he had purchased a portion of the suit schedule property through Government auction, he would not be a necessary party in the suit for partition.



C.R.P.(MD).No.1657 of 2019

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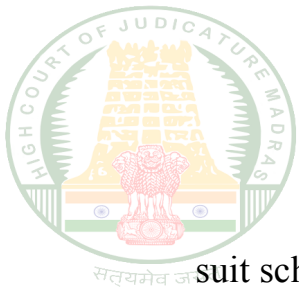
15.The learned counsel for the respondents had further contended that when the 5th defendant could not place on record any document to show that he had purchased a portion of the property through Government auction and he being a third party to the family, non impleading of his legal heirs would not in any way affect the validity of the preliminary decree or final decree proceedings. Even assuming that the revision petitioners are in possession of the property, unless they establish their right to be in possession, they cannot stall the delivery proceedings. Hence, she prayed for confirming the order of delivery passed by the Executing Court.

16.Heard both sides and perused the material records.

(C)Discussion:

17.The primary ground on which the order of delivery is challenged is that the preliminary decree and final decree proceedings are a nullity in view of the fact that they have been passed as against a dead person.

18.The present revision petition has been filed by the legal heirs of the deceased 5th defendant. The 5th defendant had filed a written statement on 18.09.1997 claiming that he had purchased a portion of the



C.R.P.(MD).No.1657 of 2019

WEB COPY

suit schedule property in a Government auction.

19.The 5th defendant had passed away on 26.06.1988. The suit was dismissed for default on 08.10.1990 and it was restored on 21.03.1994. Admittedly, in the restoration application, notice was not ordered to the legal heirs of the 5th defendant.

20.The decree in the suit came to be passed on 13.04.1994. A perusal of the preliminary decree reveals that there is no reference about the death of the 5th defendant and the decree reflects that he was continued to be represented through a counsel who was also a counsel for other defendants. Based upon the preliminary decree, a final decree application was filed by the legal heirs of the deceased plaintiff. A perusal of the final decree reveals that the 5th defendant had passed away. The final decree came to be passed on 22.12.2003.

21.Based upon the final decree, the decree holder had filed E.P.No.48 of 2010. In the execution proceedings, for the first time, the legal heirs of 5th defendant were impleaded as respondents 34 and 35. As per Column No.10 of the execution petition, the property allotted to the decree holder is in possession of the respondents 34 and 35 and therefore, a prayer has been sought for, to take possession from them. Therefore, it is



C.R.P.(MD).No.1657 of 2019

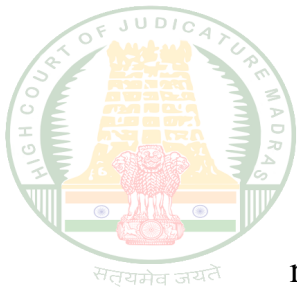
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clear that the legal heirs of the 5th defendant are in possession of the properties allotted in favour of the plaintiff.

22.It is further clear that the preliminary decree as well as the final decree have been passed as against a dead person who was in possession of the property. The legal heirs of the deceased 5th defendant had raised objection with regard to the nullity of the said decree and the executability of the final decree as against them. The Executing Court was pleased to reject those objections on the following grounds:

i)It has not been brought to the notice of the Court that the 5th defendant had passed away while the suit was pending. There is an obligation cast upon the counsel as contemplated under Order 22 Rule 10A of C.P.C to inform the Court about the death of his client. However, such an obligation has not been carried out by the counsel and in such circumstances, during execution proceedings nullity of the decree cannot be raised.

ii)The legal heirs of the 5th defendant have not taken any steps to get themselves impleaded during trial or during the final decree proceedings. Therefore, they cannot



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raise the plea of nullity during execution proceedings.

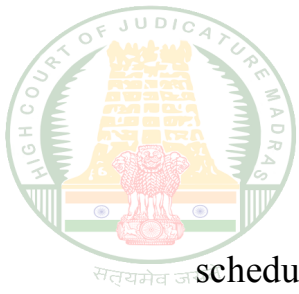
iii) Even after receipt of notice in the execution proceedings, the legal heirs of the defendant have not taken any steps to challenge the preliminary decree or the final decree.

iv) The 5th defendant has not been allotted any share in the preliminary decree. In such circumstances, the legal heirs of the 5th defendant cannot have any locustandi to question the executability of the final decree.

v) The Executing Court cannot go behind the decree. In such circumstances, during execution proceedings, the Court cannot consider the issue whether the deceased 5th defendant had any title over the property.

vi) There is no bar for the legal heirs of the 5th defendant either by filing a separate suit or by an independent application to establish their rights over the suit schedule properties.

23. From the facts narrated above, it is clear that the 5th defendant had passed away after filing a written statement claiming a share in the suit



C.R.P.(MD).No.1657 of 2019

schedule property. Without impleading the legal heirs, a preliminary decree has been passed as against the 5th defendant. Unless the legal heirs had been impleaded during the trial, they would not been in a position to establish their alleged rights/share in the suit schedule properties. Therefore, the Executing Court is not right in arriving at a finding that the 5th defendant has not been allotted any share in the preliminary decree and as a consequence, his legal heirs are not entitled to question the executability of the decree.

24.The plaintiff or his successor in interest have not impleaded the legal heirs of the 5th defendant during trial or during the final decree proceedings. However, at the time of filing execution proceedings, the legal heirs of the 5th defendant have been impleaded and possession is sought for only as against the legal heirs of the 5th defendant as per Column No.10 of the Execution Petition. Therefore, it is clear that the 5th defendant as well as his legal heirs are in possession of the property. In such circumstances, without hearing the legal heirs of the 5th defendant, a preliminary decree could not have been passed as against the 5th defendant. Therefore, the findings of the Executing Court that no share was allotted in the preliminary decree in favour of the 5th defendant and hence, the



C.R.P.(MD).No.1657 of 2019

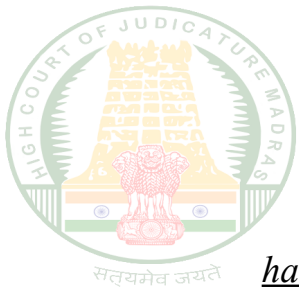
executability of the final decree cannot be questioned by the legal heir of the 5th defendant is not legally sustainable.

25) The Hon'ble Supreme Court in a judgment reported in **(1979) 3 SCC 578 (N.Jayaram Reddy and another Vs. Revenue Divisional Officer and Land Acquisition Officer, Kurnool)** in paragraph No.5 has held as follows:

“5.....It has to be appreciated that a decree against a dead person is not necessarily a nullity for all purposes. It will be sufficient to say that such a decree has been held to be a nullity because it cannot be executed against his legal representative for the simple reason that he did not have a full opportunity of being heard in respect of it, and the legal representative can not be condemned unheard.....”

26)The Hon'ble Supreme Court in a judgment reported in **AIR 1967 SC 1786 (Mangal Singh and others Vs. Smt.Rattno (dead) by her legal representative and another)** in paragraph No.3 has held as follows:

“3.....In the appeal in this Court also, in these circumstances, Ishar Singh was an unnecessary party and, consequently, the failure to implead his legal representatives as respondents in the appeal after his death does not affect the right of defendants 1 to 3 to claim the relief for which they



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have come up to this Court in appeal. The preliminary objection, therefore, fails and is rejected.”

27) The Hon'ble Supreme Court in a judgment reported in **(1983) 2 SCC 260 (Kanhaiyalal Vs. Rameshwar and others)** in Paragraph No.6 has held as follows:

“6.....It was urged that the failure to implead the legal representatives of a proforma respondent against whom no relief is claimed would not have the effect of abating the appeal preferred by the present appellant. The heir of secretly was contesting his liability to satisfy the decretal debt. The appellant claimed no relief against the pro-forma judgment-debtor. The judgment-debtor is contesting his liability with which we are not concerned. By the death of proforma respondent, judgment-debtor, right to sue does not revive against him or his heirs and their presence was unnecessary and the appeal can proceed in their absence. Therefore, the High Court was clearly in error in holding that the appeal would abate on the sole ground that the heirs of the deceased judgment-debtor proforma respondent No. 2 were not substituted in time. No substitution was necessary and appeal could have been proceeded with in the absence of the deceased judgment-debtor and disposed of on merits.”



C.R.P.(MD).No.1657 of 2019

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28) A cumulative reading of the judgment of the Hon'ble Supreme Court cited supra, it is clear that a decree passed against a dead person is nullity and it cannot be executed as against the legal representative of the deceased party. However, if the party who had passed away is an unnecessary party or a mere proforma party, his death would not result in abatement of the suit. Failure to implead his legal representatives would not affect the decree. In such cases, the decree passed as against a dead person would not be a nullity.

29. The learned counsel who had appeared for the 5th defendant had also appeared for some other defendants. As contemplated under Order 22 Rule 10A of C.P.C, the counsel is under an obligation to inform the Court about the death of his client. This is only for the purposes of speedy action on the part of the other side to take steps to implead the legal heirs. The non performance of this obligation on the part of a counsel, will not in any affect the rights of the legal heirs of a deceased party.

30) The Hon'ble Supreme Court in a judgment reported in **(1984) 1 SCC 121 (Gangadhar and another Vs. Raj Kumar)** in paragraph No.6 has held as follows:

18/23



C.R.P.(MD).No.1657 of 2019

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“6.....The legislative intention of casting a burden on the learned Advocate of a party to give intimation of the death of the party represented by him and for this limited purpose to introduce a deeming fiction of the contract being kept subsisting between the learned Advocate and the deceased party was that the other party may not be taken unawares at the time of hearing of the appeal by springing surprise on it that the respondent is dead and appeal has abated.....”

31) The Hon'ble Supreme Court in a judgment reported in **(2009) 11 SCC 183 (Katari Suryanarayana and others Vs. Koppiseti Subba Rao and others)** in Paragraph No.15 has held as follows:

“15.The appellants themselves rely on the provisions of Order 22 Rule 10-A of the Code of Civil Procedure, which was inserted by reason of the Code of Civil Procedure (Amendment) Act, 1976. It does not, however, provide for consequences. It does not take away the duty on the part of the plaintiff or the appellant, as the case may be, to file an application for condonation of delay in bringing on record the heirs and legal representative of a deceased plaintiff/appellant or defendant/respondent within the period prescribed.”

32)A cumulative reading of the judgments of the Hon'ble Supreme Court cited supra will clearly indicate that though a duty is cast



C.R.P.(MD).No.1657 of 2019

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upon a counsel to inform the Court about the death of his client, the same does not relieve the plaintiff or the appellant of his duty to file a condone delay application to bring on record the legal heirs of the deceased party. The non compliance of Order 22 Rule 10-A of C.P.C would only a reasonable cause to the plaintiff/appellant seeking to condone the delay in setting the abatement. Since the non-compliance of Order 22 Rule 10-A of C.P.C does not provide for any adverse consequences, the said provision cannot be invoked to validate a decree which was otherwise a nullity.

33. When the 5th defendant was a party to the proceedings and a preliminary decree and the final decree have been passed as against him, it would not be open to his legal heirs to challenge the same in an independent proceedings. Therefore, the trial Court was not right in ordering delivery after reserving the right of the legal heirs of the 5th defendant to challenge the same in independent proceedings. Without deciding the right and title of the 5th defendant, it may not be appropriate to order delivery, especially when the legal heirs of the 5th defendant are admittedly in possession of the property.



C.R.P.(MD).No.1657 of 2019

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34.The legal heirs of the 5th defendant have filed E.A.No.12 of 2019 under Section 47 of C.P.C on 29.10.2018 and the same is pending. A perusal of the Court records reveal that along with Section 47 application, documents have also been filed to establish the right of the 5th defendant. In case, if the legal heirs of the 5th defendant are able to establish their rights/ share in the suit schedule property, the preliminary decree and the final decree would be a nullity and it could not be executed as against him. On the other hand, if they are unsuccessful, in such an attempt, the 5th defendant becomes an unnecessary party to the suit and his death would not in any way affect the validity of the decree.

35.In such circumstances, this Court is of the considered opinion that the order of delivery impugned in the revision petition, has to be set aside. Depending upon the results in Section 47 application, either in the execution proceedings can be proceeded with or it may be dismissed. The Executing Court is directed to dispose of Section 47 application as well as Execution Petition on or before 31.12.2025.

36.In view of the above said deliberations, the order impugned in the revision petition, namely the order of delivery, is set aside and the matter is remitted back to the file of the Executing Court. Accordingly, this



C.R.P.(MD).No.1657 of 2019

civil revision petition stands allowed. No costs. Consequently, connected miscellaneous petition is closed.

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12.06.2025

Index : Yes/No
Internet : Yes/No
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To

1.The District Munsif
Aranthangi.

2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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C.R.P.(MD).No.1657 of 2019

R.VIJAYAKUMAR, J

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Pre-delivery order made in
C.R.P.(MD).No.1657 of 2019
and CMP(MD).No.8604 of 2019

12.06.2025