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VARADARAJAN

v.

KANAKAVALLI & ORS.

(Civil Appeal No. 5673 of 2009)

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JANUARY 22, 2020

[L. NAGESWARA RAO AND HEMANT GUPTA, JJ.]

- Code of Civil Procedure, 1908 – Or. XXII, r.5 and s.115 – Wife filed suit inter alia for partition in respect of the suit property as the successor-in-interest of her husband – Husband had a son from his earlier marriage – Suit decreed – She sought execution of the decree but, died soon thereafter – Appellant, the son of deceased's younger sister filed application to execute the decree as her legal representative on the basis of a Will – Allowed – Appellant sought eviction of the respondent and for delivery of vacant possession of the premises – Executing Court held that the appellant as legal representative of the deceased is entitled to execute the decree – High Court in revision found that the execution of the Will was surrounded by suspicious circumstances and thus, held that the appellant cannot become a legal representative to come on record in order to maintain the execution petition – On appeal, held: Appellant is the sole claimant to the estate of the deceased on the basis of Will – Witnesses deposed the execution of the Will in favour of the appellant – No one else came forward to seek execution of decree as the legal representative of the deceased decree holder – In the absence of any rival claim, the High Court was not justified in setting aside the order of the Executing Court, when in terms of Or.XXII, r.5, the jurisdiction to determine who is a legal heir is summary in nature – Or. XXII is applicable to the pending proceedings in a suit – But the conflicting claims of legal representatives can be decided in execution proceedings in view of the principles of r.5 of Or.XXII – Further, in addition to the nature of proceedings to implead the legal representative to execute the decree, none of the tests laid down in s.115 were satisfied by the High Court so as to set aside the order passed by the Executing Court – High Court in revision jurisdiction interfered with the order*

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passed by the Executing Court as if it was acting as the first court of appeal – Mere fact that it had different view on the same facts would not confer jurisdiction to interfere with an order passed by the Executing Court – Order passed by the High Court is set aside and that of the Executing Court is restored.

*Code of Civil Procedure, 1908 – s.115 – Revision – B
Jurisdiction of High Court – Discussed.*

Allowing the appeal, the Court

HELD: The order of the High Court is not sustainable in law. The appellant claims to be the legal representative of the deceased decree holder on the basis of the Will executed by her. He has produced an attesting witness and the scribe of the Will. The witnesses have deposed the execution of the Will by her in favour of the appellant who is the son of her sister. No one else has come forward to seek execution of decree as the legal representative of the deceased decree holder. It is the deceased decree holder who filed the execution petition but after her death, the appellant filed an application to continue with the execution. In the absence of any rival claimant claiming to be the legal representative of the deceased decree holder, the High Court was not justified in setting aside the order of the Executing Court, when in terms of Order XXII Rule 5 of the Code, the jurisdiction to determine who is a legal heir is summary in nature. Order XXII of the Code is applicable to the pending proceedings in a suit. But the conflicting claims of legal representatives can be decided in execution proceedings in view of the principles of Rule 5 of Order XXII. [Paras 7, 8] [137-E-H]

*V. Uthirapathi v. Ashrab & Ors. (1998) 3 SCC 148 :
[1998] 1 SCR 937 ; Daya Ram & Ors. v. Shyam Sundari & Ors. AIR 1965 SC 1049 : [1965] SCR 231 ; Dashrath Rao Kate v. Brij Mohan Srivastava (2010) 1 SCC 277 : [2009] 15 SCR 643 ; Jaladi Suguna (Deceased) through LRs. v. Satya Sai Central Trust & Ors. (2008) 8 SCC 521 : [2008] 7 SCR 734 ; Suresh Kumar Bansal v. Krishna Bansal & Anr. (2010) 2 SCC 162 : [2009] 16 SCR 419 – relied on.*

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- A *Kadir v. Muthukrishna Ayyar ILR 26 MAD 230 ; Mohinder Kaur & Anr. v. Piara Singh & Ors. AIR 1981 P&H 130 – referred to.*
- 1.2 The appellant is the sole claimant to the estate of the deceased on the basis of Will. The Executing Court has found
- B that the appellant is the legal representative of the deceased competent to execute the decree. In view of the said fact, the appellant as the legal representative is entitled to execute the decree and to take it to its logical end. In addition to the nature of proceedings to implead the legal representative to execute the decree, it is found that none of the tests laid down in Section 115 of the Code were satisfied by the High Court so as to set aside the order passed by the Executing Court. The High Court in exercise of revision jurisdiction has interfered with the order passed by the Executing Court as if it was acting as the first court of appeal. An order passed by a subordinate court can be interfered
- C with only if it exercises its jurisdiction, not vested in it by law or has failed to exercise its jurisdiction so vested or has acted in exercise of jurisdiction illegally or with material irregularity. The mere fact that the High Court had a different view on the same facts would not confer jurisdiction to interfere with an order passed by the Executing Court. Consequently, the order passed by the High Court is set aside and that of the Executing Court is restored. [Paras 14, 15] [143-E-G; 144-A]

Case Law Reference

	[1998] 1 SCR 937	relied on	Para 8
F	[1965] SCR 231	relied on	Para 9
	ILR 26 MAD. 230	referred to	Para 9
	AIR 1981 P&H 130	referred to	Para 10
	[2009] 15 SCR 643	relied on	Para 11
G	[2008] 7 SCR 734	relied on	Para 12
	[2009] 16 SCR 419	relied on	Para 13

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5673 A
of 2009.

From the Judgment and Order dated 27.11.2007 of the High Court of Madras in Civil Revision Petition (NPD) No. 1859 of 2005.

C. Paramasivam, A.S. Vairawan, Rakesh K. Sharma, Hardik Gautam, Advs. for the Appellant. B

Rohit Dutta, Shubhangi Sangal, Chira Ranjan Addy, Advs. for the Respondents.

The Judgment of the Court was delivered by

HEMANT GUPTA, J. C

1. The order dated 27th November, 2007 passed by the High Court of Judicature at Madras in revision petition under Section 115 of the Code of Civil Procedure, 1908¹ is the subject matter of challenge in the present appeal.

2. The revision petition is directed against an order passed by the Executing Court on 19th September, 2005 wherein the possession of the suit property in pursuance of a decree passed in favour of one Umadevi was ordered to be given to the present appellant as the legal representative of Umadevi. D

3. Umadevi filed a suit for partition and separate possession in respect of the suit property as the successor-in-interest of one Manicka Naicker, her husband. Prior to Umadevi, he had earlier married one Valliammal and had a child one Munisamy Naicker. Manicka Naicker died in the year 1971. Umadevi filed a suit for partition claiming half share in the suit property against Manicka Naicker. This suit was decreed on 7th April, 1989 and such decree had attained finality. It was in 1999 that Umadevi sought execution of the decree passed but she died on 22nd July, 1999. The appellant who is the son of Umadevi's younger sister filed an application to execute the decree as her legal representative on the basis of a Will dated 16th July, 1999 (Ex.P/1). The said application was allowed by the Executing Court on 29th March, 2004. E F G

4. The appellant filed an application under Order XXI Rule 35 of the Code for eviction of the respondent and to deliver vacant possession

¹ for short, 'Code'

- A of the premises. In response to such petition, the respondent asserted that the Will is forged and that the son of a sister is not a legal heir as per Section 15 of the Hindu Succession Act, 1956. The learned Executing Court decided the application on 19th September, 2005. It found that the Will was attested by PW-2 Ayeeypappa who had signed it as one of the attesting witnesses and PW-3 Mohan had scribed the Will. The respondent examined Senthilnathan as RW-1 and Krishnan as RW-2. The learned Executing Court held that the appellant as legal representative of the deceased Umadevi is entitled to execute the decree. The Executing Court held as under:
- C “11. ...Further in OS No. 30 of 1982 a judgment and decree was granted in favour of Umadevi on 7.4.1989. Either the deceased Munusamy or his son the said Senthilnathan had not filed any appeal as against the decree. But the said Umadevi had filed an Execution petition duly signed by her. Further, the said Umadevi, before her death, i.e. 6 days earlier to her death, she had executed the Ex.P-1 Will. This court finds that her actions in filing the execution petition and the Will are accepted to be correct, even by the respondents. Further this court finds that since the said Munusamy, who is the son of the first wife of her husband, did not give her food, cloth and shelter and did not take care on her, the deceased Umadevi had gone to the house of her younger sister and stayed along with her and since her health condition got deteriorated, she had executed a Will in favour of the son of her younger sister namely Varadarajan and these facts are found to be true.”
- F 5. The said order was challenged by the judgment debtor by way of a revision under Section 115 of the Code. It may be noticed that no one else other than the appellant had come forward to continue the execution of the decree as the legal representative of Umadevi.
- G 6. The High Court held that the Executing Court is the competent and proper Court to determine the validity of the Will as well as the legatee under a Will can be construed as a legal representative and come on record to seek execution of the decree. However, the High Court found that the execution of the Will was surrounded by suspicious circumstances. It may be noticed that the High Court in revisional jurisdiction has interfered with the findings of fact recorded by the
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Executing Court in respect of execution of Will arrived at after considering the evidence led by the parties. The High Court found that as per the appellant, the decree holder, Umadevi, was driven out of her house by her step son Munisamy Naicker and was staying with her sister for nearly 20 years but the execution of the Will at the last moment is a suspicious circumstance. The High Court returned the following findings:

“19. In view of all the above facts which were established by way of evidence, this Court is of the view that the propounder on whom the allegation casts upon to dispel the suspicious circumstances surrounded the execution of the will. Further, the Court below has not given satisfactory reasons while coming to the conclusion that the will was proved. In the absence of satisfactory evidence, I am unable to ascertain as to whether the will was executed by the testatrix. Therefore, when once it is held that the very execution of the will has not been proved and it is not genuine, consequently, the legatee under the said will cannot become a legal representative to come on record in order to maintain the execution petition in the place of the decree holder, i.e. the testatrix.”

7. We find that the order of the High Court is not sustainable in law. The appellant claims to be the legal representative of Umadevi on the basis of the Will executed by her. He has produced an attesting witness and the scribe of the Will. The witnesses have deposed the execution of the Will by Umadevi in favour of the appellant who is the son of her sister. No one else has come forward to seek execution of decree as the legal representative of the deceased decree holder. It is Umadevi who has filed the execution petition but after her death, the appellant has filed an application to continue with the execution. In the absence of any rival claimant claiming to be the legal representative of the deceased decree holder, the High Court was not justified in setting aside the order of the Executing Court, when in terms of Order XXII Rule 5 of the Code, the jurisdiction to determine who is a legal heir is summary in nature.

8. We may state that Order XXII of the Code is applicable to the pending proceedings in a suit. But the conflicting claims of legal representatives can be decided in execution proceedings in view of the principles of Rule 5 of Order XXII. This Court in a judgment reported as

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- A *V. Uthirapathi v. Ashrab & Ors.*² held that the normal principle arising in a suit — before the decree is passed — that the legal representatives are to be brought on record within a particular period is not applicable to cases of death of the decree-holder or the judgment-debtor in execution proceedings. This Court held as under:-
- B “11. Order 22 Rule 12 of the Code of Civil Procedure reads as follows:
- “*Order 22 Rule 12: Application of order to proceedings.— Nothing in Rules 3, 4 and 8 shall apply to proceedings in execution of a decree or order.*”
- C 12. In other words, the normal principle arising in a suit — before the decree is passed — that the legal representatives are to be brought on record within a particular period and if not, the suit could abate, — is not applicable to cases of death of the decree-holder or the judgment-debtor in execution proceedings.
- D 13. In *Venkatachalam Chetti v. Ramaswami Servai* [ILR (1932) 55 Mad 352 : AIR 1932 Mad 73 (FB)] a Full Bench of the Madras High Court has held that this rule enacts that the penalty of abatement shall not attach to execution proceedings. *Mulla's Commentary on CPC* [(Vol. 3) p. 2085 (15th Edn., 1997)] refers to a large number of judgments of the High Courts and says:
- “Rule 12 engrafts an exemption which provides that where a party to an execution proceedings dies during its pendency, provisions as to abatement do not apply. The Rule is, therefore, for the benefit of the decree-holder, for his heirs need not take steps for substitution under Rule 2 but may apply immediately or at any time while the proceeding is pending, to carry on the proceeding or *they may file a fresh execution application.*”
- (emphasis supplied)
- G 14. In our opinion, the above statement of law in *Mulla's Commentary on CPC*, correctly represents the legal position relating to the procedure to be adopted by the parties in execution proceedings and as to the powers of the civil court.”

9. The legal representatives are impleaded for the purpose of a suit alone as held by this Court in *Daya Ram & Ors. v. Shyam Sundari & Ors.*³ wherein it was held that impleaded legal representatives sufficiently represent the estate of the deceased and the decision obtained with them on record will bind not merely those impleaded but the entire estate, including those not brought on record. This Court approved the judgment of the Madras High Court in *Kadir v. Muthukrishna Ayyar*⁴.

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10. The Full Bench of the Punjab & Haryana High Court in a judgment reported as *Mohinder Kaur & Anr. v. Piara Singh & Ors.*⁵ examined the question as to whether a decision under Order XXII Rule 5 of the Code would act as *res judicata* in a subsequent suit between the same parties or persons claiming through them. The Court held as under:

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“5. So far as the first argument of Mr. Bindra, noticed above is concerned, we find that in addition to the judgments of the Lahore High Court and of this Court, referred to in the earlier part of this judgment, he is supported by a string of judgments of other High Courts as well wherein it has repeatedly been held on varied reasons, that, a decision under Order 22, Rule 5, Civil Procedure Code, would not operate as *res judicata* in a subsequent suit between the same parties or persons claiming through them wherein the question of succession or heirship to the deceased party in the earlier proceedings is directly raised. Some of these reasons are as follows:—

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(i) Such a decision is not on an issue arising in the suit itself, but is really a matter collateral to the suit and has to be decided before the suit itself can be proceeded with. The decision does not lead to the determination of any issue in the suit.

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(ii) The legal representative is appointed for orderly conduct of the suit only. Such a decision could not take away, for all times to come, the rights of a rightful heir of the deceased in all matters.

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(iii) The decision is the result of a summary enquiry against which no appeal has been provided for.

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³ AIR 1965 SC 1049

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⁴ ILR 26 MAD. 230

⁵ AIR 1981 P&H 130

- A (iv) The concepts of legal representative and heirship of a deceased party are entirely different. In order to constitute one as a legal representative, it is unnecessary that he should have a beneficial interest in the estate. The executors and administrators are legal representatives though they may have no beneficial interest.
- B Trespasser into the property of the deceased claiming title in himself independently of the deceased will not be a legal representative. On the other hand the heirs on whom beneficial interest devolved under the law whether statute or other, governing the parties will be legal representatives.
- C xx xx xx
9. We are, therefore, of the opinion that in essence a decision under Order 22, Rule 5, Civil Procedure Code, is only directed to answers an orderly conduct of the proceedings with a view to avoid the delay in the final decision of the suit till the persons claiming to be the representatives of the deceased party get the question of succession settled through a different suit and such a decision does not put an end to the litigation in that regard. It also does not determine any of the issues in controversy in the suit. Besides this it is obvious that such a proceeding is of a very summary nature against the result of which no appeal is provided for. The grant of an opportunity to lead some sort of evidence in support of the claim of being a legal representative of the deceased party would not in any manner change the nature of the proceedings. In the instant case the brevity of the order (reproduced above) with which the report submitted by the trial Court after enquiry into the matter was accepted, is a clear pointer to the fact that the proceedings resorted to were treated to be of a very summary nature. It is thus manifest that the Civil Procedure Code proceeds upon the view of not imparting any finality to the determination of the question of succession or heirship of the deceased party.”
- G 11. The judgment in *Mohinder Kaur* was referred to and approved by this Court in a judgment reported as *Dashrath Rao Kate v. Brij Mohan Srivastava*⁶. In the said case, the High Court came to the conclusion that since the inquiry under Order XXII Rule 5 of the Code

was of a summary nature, it was limited only to the determination of the right of the appellant therein to be impleaded as the legal representative. This Court in the said case held as under:

“21. As a legal position, it cannot be disputed that normally, an enquiry under Order 22 Rule 5 CPC is of a summary nature and findings therein cannot amount to res judicata, however, that legal position is true only in respect of those parties, who set up a rival claim against the legatee. For example, here, there were two other persons, they being Ramesh and Arun Kate, who were joined in the civil revision as the legal representatives of Sukhiabai. The finding on the will in the order dated 9-9-1997 passed by the trial court could not become final as against them or for that matter, anybody else, claiming a rival title to the property vis-à-vis the appellant herein, and therefore, to that extent the observations of the High Court are correct. However, it could not be expected that when the question regarding the will was gone into in a detailed enquiry, where the evidence was recorded not only of the appellant, but also of the attesting witness of the will and where these witnesses were thoroughly cross-examined and where the defendant also examined himself and tried to prove that the will was a false document and it was held that he had utterly failed in proving that the document was false, particularly because the document was fully proved by the appellant and his attesting witness, it would be futile to expect the witness to lead that evidence again in the main suit.

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25. Dr. Kailash Chand, learned counsel appearing for the respondent, also relied on ruling in *Vijayalakshmi Jayaram v. M.R. Parasuram* [AIR 1995 AP 351]. It is correctly held by the Andhra Pradesh High Court that Order 22 Rule 5 is only for the purpose of bringing legal representatives on record for conducting of proceedings in which they are to be brought on record and it does not operate as res judicata. However, the High Court further correctly reiterated the legal position that the inter se dispute between the rival legal representatives has to be independently tried and decided in separate proceedings. Here, there was no

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- A question of any rivalry between the legal representatives or anybody claiming any rival title against the appellant-plaintiff. Therefore, there was no question of the appellant-plaintiff proving the will all over again in the same suit.
- B 26. The other judgment relied upon is the Full Bench judgment of the Punjab and Haryana High Court in *Mohinder Kaur v. Piara Singh* [AIR 1931 P&H 130]. The same view was reiterated. As we have already pointed out, there is no question of finding fault with the view expressed. However, in the peculiar facts and circumstances of this case, there will be no question of non-suiting the appellant-plaintiff, particularly because in the same suit, there would be no question of repeating the evidence, particularly when he had asserted that he had become owner on the basis of the will (Ext. P-1)."
- C 12. In another judgment reported as *Jaladi Suguna (Deceased) through LRs. v. Satya Sai Central Trust & Ors.*⁷, this Court held that D the determination as to who is the legal representative under Order XXII Rule 5 of the Code is for the limited purpose of representation of the estate of the deceased and for adjudication of that case. This Court held as under:
- E "15. Filing an application to bring the legal representatives on record, does not amount to bringing the legal representatives on record. When an LR application is filed, the court should consider it and decide whether the persons named therein as the legal representatives, should be brought on record to represent the estate of the deceased. Until such decision by the court, the persons claiming to be the legal representatives have no right to represent the estate of the deceased, nor prosecute or defend the case. If there is a dispute as to who is the legal representative, a decision should be rendered on such dispute. Only when the question of legal representative is determined by the court and such legal representative is brought on record, can it be said that the estate of the deceased is represented. The determination as to who is the legal representative under Order 22 Rule 5 will of course be for the limited purpose of representation of the estate of the
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deceased, for adjudication of that case. Such determination for such limited purpose will not confer on the person held to be the legal representative, any right to the property which is the subject-matter of the suit, vis-à-vis other rival claimants to the estate of the deceased.”

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(emphasis supplied) B

13. In another judgment reported as *Suresh Kumar Bansal v. Krishna Bansal & Anr.*⁸, this Court held as under:

“20. It is now well settled that determination of the question as to who is the legal representative of the deceased plaintiff or defendant under Order 22 Rule 5 of the Code of Civil Procedure is only for the purpose of bringing legal representatives on record for the conducting of those legal proceedings only and does not operate as res judicata and the inter se dispute between the rival legal representatives has to be independently tried and decided in probate proceedings. If this is allowed to be carried on for a decision of an eviction suit or other allied suits, the suits would be delayed, by which only the tenants will be benefited.”

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14. In view of the aforesaid judgments, we find that the appellant is the sole claimant to the estate of the deceased on the basis of Will. The Executing Court has found that the appellant is the legal representative of the deceased competent to execute the decree. In view of the said fact, the appellant as the legal representative is entitled to execute the decree and to take it to its logical end.

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15. In addition to the nature of proceedings to implead the legal representative to execute the decree, we find that none of the tests laid down in Section 115 of the Code were satisfied by the High Court so as to set aside the order passed by the Executing Court. The High Court in exercise of revision jurisdiction has interfered with the order passed by the Executing Court as if it was acting as the first court of appeal. An order passed by a subordinate court can be interfered with only if it exercises its jurisdiction, not vested in it by law or has failed to exercise its jurisdiction so vested or has acted in exercise of jurisdiction illegally or with material irregularity. The mere fact that the High Court had a

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⁸ (2010) 2 SCC 162

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- A different view on the same facts would not confer jurisdiction to interfere with an order passed by the Executing Court. Consequently, the order passed by the High Court is set aside and that of the Executing Court is restored. The appeal is allowed.

Divya Pandey

Appeal allowed.