

**Thangaiyan and ors. Vs. Chellappan**

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**SooperKanoon Citation :** [sooperkanoon.com/821907](http://sooperkanoon.com/821907)

**Court :** Chennai

**Decided On :** Oct-31-1994

**Reported in :** (1995)1MLJ390

**Appellant :** Thangaiyan and ors.

**Respondent :** Chellappan

**Judgement :**

ORDER

**N. Arumugham, J.**

1. The two revisions C.R.P. Nos. 128 of 1994 and 129 of 1994 are directed against the decree and judgment rendered in Civil Miscellaneous Appeal No. 10 of 1991 dated 24.6.1993 on the file of Subordinate Judge, Kuzhithurai, Kanyakumari District, confirming the order passed in I.A. Nos. 151 and 152 of 1989 both dated 26.6.1991 by the learned Additional District Munsif Kuzhithurai, Kanyakumari District.

2. The matrix of the case on hand as gathered from the case records may be stated in brief as follows: The first revision petitioner is the second defendant in the suit and the others are the legal representatives of the first and third defendants, in the suit O.S. No. 500 of 1985 on the file of the District Munsif s Court, Kuzhithurai which was filed by the respondent herein as plaintiff against the defendants for the relief of delivery of possession of the suit property and so on. As the defendants

had not entered their appearance, it was decided ex parte on 17.11.1987: Subsequently, after 11 months and 14 days on coming to know of the passing of the ex pane decree, since the first defendant died, two petitions were filed with the sworn affidavit, one for setting aside the ex pane order under Order 9, Rule 13 of C.P.C. and another for the relief of condoning the delay in filing the said application under Section 5 of the Limitation Act, which was resisted by the plaintiff/respondent. On 26.6.1991 after considering the entire gamut of the matter, and perusing the affidavit and counter, the trial court found that there were no merits in the applications and thereby attributing knowledge to the defendants 2 and 3, dismissed both the petitions I.A. Nos. 151 and 152 of 1989. Thus, petitions to condone the delay as well as to set aside the ex pane decree were rejected by the trial court.

3. Challenging the orders passed in the above two applications separately, it appears that a consolidated appeal C.M.A. No. 190 of 1991 was filed challenging the orders passed above referred, in two applications. After hearing both sides, on merits, the lower appellate authority, viz., learned Subordinate Judge, Kuzhithurai by his judgment under this revision on 24.6.1993 dismissed the same and thereby confirmed the order passed by the learned District Munsif on 26.6.1991. Aggrieved at this, the present two revisions under Section 115 of the Code of Civil Procedure has been filed.

4. As the parties to the said two revisions, the subject-matter of the factual and legal aspects, and the nature of question to be decided as well as the property are one and the same and identical, both the revisions were heard together and as consented to. disposed of by passing this common order.

5. I have heard the Bar for respective parties. I was persuaded by Mr. Govinda Reddy on behalf of the revision petitioners to show the indulgence of this Court towards the revision petitioners on the ground of illiteracy and poverty by placing reliance on The Collector, Land Acquisition, Ananmag v. Katiji : (1987)ILLJ500SC and other case laws. The other ground urged before me on behalf of the revision petitioners is that a civil court cannot be seized of the matter as it has no jurisdiction to entertain the very suit itself for the reason that the right vested in the

revision petitioners is a statutory one conferred by the Tamil Nadu Kudiyiruppu Occupants' Rights Act and as such, the respondent does not have any common law right to be agitated in the civil court and referring the above two contentions mainly it was the effort taken by the Bar on behalf of the revision petitioners to get the impugned order set aside and thereby wanted an opportunity to be given to the revision petitioners to agitate the case. Per contra, the said contentions were controverted seriously by Mr. K. Sreekumaran Nair on behalf of the respondent, stating that there are absolutely no merits in these revisions and so, the revision petitioners do not have any right to get the indulgence of this Court as they are not the persons deserving it in law and on facts. While the Bar has been canvassing their respective rights, it appears it has not challenged the order passed by the trial court in all its right spirit but however pleaded for the lenient view in favour of the revision petitioners.

6. In the light of the above rival position. I have to consider the following two questions.

(1) Whether the revisions on hand are maintainable in law?

(2) Whether the orders passed by the trial court in both the applications are vitiated with any illegality or impropriety and as such have become erroneous and liable to be interfered with in these revisions?

7. Points 1 and 2: It is the common case that the respondent being the plaintiff has filed the suit before the trial court against the defendants for the relief of possession of the suit property and so on. Admittedly, the first defendant died and the defendants 2 and 3 are living in the suit property which is a hut in unequivocal terms. Both are brothers living with their family and the deceased first defendant was their mother. The allegation in the affidavit and the finding recorded by the trial court was that though the summons in the suit was served on behalf of the defendants, were received by one on behalf of another, since both are living in the same precincts with every amity and friendship, the receipt of the same by one on behalf of another must be deemed to be within knowledge of the other and that, therefore, the defendants challenging the passing of ex parte decree on the pretext of no knowledge of the same cannot be accepted. This finding of the

learned trial Judge seems to be well founded and cannot be assailed for any reason as no ground has been made out to vary the same. However, it is worthwhile at this stage to note that a petition was filed under Section 5 of the Limitation Act to condone the delay of 11 months and 14 days to set aside the ex parte decree. On merits the learned trial Judge dismissed the same. Under Order 43, Rule 1, C.P.C. there is no appeal provided against the order passed in a petition filed under Section 5 of the Limitation Act, but revision alone was available. But, admittedly in the instant case no revision has been filed. A lacuna in this regard has erupted already at the bottom of the proceedings.

8. In a similar fashion the rejection of the application filed under Order 9, Rule 13 of C.P.C. has been upheld in CM. A. No. 10 of 1991. But it is to be noticed that this appeal C.M.A. No. 10 of 1991 has been filed challenging the order passed in both the applications and disposed on merits however. In my respectful view, the appeal CM.A. No. 10 of 1991 itself cannot lie and ought not to have been entertained by the lower appellate court under the law. It is strange and amusing to note that two independent orders were passed in two separate applications against one of which no appeal lies and against another if appeal lies and both were challenged in filing an appeal CM.A. No. 10 of 1991 and which was entertained wrongly without any jurisdiction by the lower appellate court and disposed on merits as above referred to. It is thus seen that it was rather unfortunate for the learned Subordinate Judge to entertain a wrong appeal and dispose of the same on merits without any jurisdiction. The lower appellate court in this regard is not competent to exercise its appellate jurisdiction. Therefore, whatever may be the judgment or order passed by the lower appellate court in CM.A. No. 10 of 1991 it is null and void and for the said reason deemed to be not in existence and non-est in law. Either the lower Appellate Court or the Bar has not noted down the patent defects, which is so grievous and which cannot be taken so lightly. Nonetheless the appeal has got to be disposed of. Therefore, in my respectful view, the judgment rendered by the lower appellate court on 24.6.1993 in CM.A. No. 10 of 1991 is not deemed to be in existence in law.

9. The matter does not end with this. Two revisions, the case on hand, were preferred against a single judgment rendered by the lower appellate court. I am at

every difficulty to digest the concept in entertaining the two revisions C.R.P. Nos. 128 and 129 of 1994 filed challenging the correctness and propriety of a non-est order passed in the appeal C.M.A. No. 10 of 1991 on 24.6.1953. It is not known under what procedure of the appellate side of this Court or the Code of Civil Procedure, the two revisions under Section 15 of the Code of Civil Procedure would lie. Here again at the top level the error has been followed in entertaining the revisions wrongly. Even if I were to find reasons to allow these revisions, I am at every difficulty to endorse the same in the context that the impugned order is a non-est and not at all in existence. Therefore, the present two revisions are filed only to canvass a judgment or order, which is not found to be in existence in law. On this ground alone, I am of the firm view that both the revisions ought to be dismissed in limine.

10. The other contentions raised on behalf of the revision petitioners is that the suit itself cannot be sustained for the reason of the jurisdiction of the civil court is barred. As it involves directly the provisions of Tamil Nadu Kudiyiruppu Occupants Rights Act, the materials available to substantiate the above contention is the address of the defendants given in the plaint referring their occupation as 'agriculture'. This one and the only word is relied on by the Bar to project the above contention that the civil court does not have jurisdiction. In this regard I have gone through the description of the property given in the plaint and as admitted by the Bar for respective parties as well as the pleadings set out in the plaint, nowhere in the pleadings it has been referred to that the suit property has been given to the custody of the defendants for the purpose mentioned in the Tamil Nadu Kudiyiruppu Occupants' Rights Act. The various concepts defined under the special enactment do not confer the rights of Kudiyiruppu Occupant in the instant case. Therefore, after having considered, I feel that the first contention raised on behalf of the revision petitioners is only a belated attempt and effort taken to wriggle out of the legal clutches. For the said reason, I am totally unable to countenance the continuous effort taken by Mr. Govinda Reddy, the learned Counsel for the revision petitioners. With regard to the other contention, the granting of indulgence to the revision petitioners to afford an opportunity to agitate the case cannot be availed of by a Court of Law for the mere reason of sentimentalities or the mercy or on compassionate grounds. To mould a relief as

provided under law, there must be adequate legal and acceptable evidence to be prostrated by the respective parties before the court and unless and until the same are accomplished to, no relief under law can be granted for the reason of the specific rules and laws enacted in this regard. The litigation in this case started in the year 1985 and has now crossed successfully nearly a decade. Under these circumstances without providing any acceptable prejudice or ground seeking the indulgence of this Court is not conducive either in the eye of law or on the factual aspects, which tends to do no justice to either of the party. Therefore, I do not find or come across any merits or ground in this case to grant the indulgence in favour of the revision petitioners.

11. In the result, both the revisions fail and accordingly, they are dismissed. The finding given by the learned District Munsif in I.A. Nos. 151 and 152 of 1989 on 26.6.1991 is hereby confirmed. However, there will be no order as to costs under the circumstances.

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