

RAJESWARI AMMA AND ANR.

A

v.

JOSEPH AND ANR.

JANUARY 10, 1995

[K. RAMASWAMY AND SUJATA V. MANOHAR, JJ.]

B

*Code of Civil Procedure—Section 36—Execution Petition—One respondent not impleaded as party—Execution Petition in respect of the same undivided property not executable against others.*

*Constitution of India—Article 136—Appeal by Special Leave—Pure question of law—Not raised before High Court—Could be allowed to be raised in Supreme Court.*

C

Execution petition filed by the legal representatives of deceased was allowed by the District Munsif. In the revision one of the legal representatives was not impleaded as a party and, therefore, the order directing delivery of possession in her favour became final. The High Court allowed the revision filed by the respondent.

D

In the appeal, it was contended that since the order in favour of the party not impleaded had become final and the execution petition was with respect to the same undivided property between the decree holders, the High Court could not have set aside the order as against the appellants.

E

Allowing the appeal, this Court

HELD : Since the Order in favour of the party not impleaded had become final and the execution petition was in respect of the same undivided property, the decree was inseparable and the order of the High Court is unsustainable. No doubt, this contention was not raised before the High Court but being a question of law, it is open to be raised and can be considered as the order is one of inseparable. Since the order against the party not impleaded had attained finality, the High Court was not right in reversing the order of the executing Court as against two respondents.

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G

[164-F-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 695 of 1986.

H

A From the Judgment and Order dated 1.7.85 of the Madras High Court in C.R.P. No. 2747 of 1982.

G. Vishwanatha Iyer, Ms. Anjani Aiyagari, N. Sridhar and K. Ram Kumar for the Appellants.

B Dr. Francis Julian and R. Mohan for the Respondents.

The following Order of the Court was delivered :

C Admittedly, the Execution petition was filed by Rajeshwari Amma, Sukumara Pillai and Neelamma Pillai, the legal representatives of the deceased Kolappa Pillai. After the Execution Petition was ordered by the Court of District Munsif at Kuzhithurai in E.P. No. 274/81 in O.S. No. 14/61 dated August 12, 1981, the respondents carried it in revision to the High Court. Therein only the deceased Kolappa Pillai, Rajeswari Amma and Sukumara Pillai were impleaded as respondents omitting Neelamma Pillai.

D In other words, the order of the Executing Court directing delivery of possession which was executed and possession taken in favour of the three persons was challenged against only two persons. The order in favour of 3rd person, namely, Neelamma Pillai became final. The Execution Petition being of the same property which is undivided between the decree-holders, the question emerges whether the High Court was right in allowing C.R.P.

E No. 2747/82 by order dated July 1, 1985 as against the unimpleaded respondent and whether that order also comes in aid to the appellants. On going through the record we find that there is some force in the arguments of Sri G. Viswanatha Iyer, the learned Senior counsel for the appellants. Since the order of delivery of possession in favour of the decree-holders is common and inseparable and since it has become final as against Neelamma,

F the High Court was not right in setting aside the order as against the appellants. No doubt, as rightly pointed out by the learned counsel for the respondents that this contention was not raised before the High Court. But being a question of law, it is open to be raised and can be considered as the order is one of inseparable. Since the order against Neelamma had attained finality, we think that the High Court was not right in reversing

G the order of the executing Court as against two respondents. The appeal is accordingly allowed. No costs.

A.G.

Appeal allowed.