

IN THE COURT OF THE III ADDITIONAL DISTRICT COURT, SALEM.

Present: Tmt. L.Kalaivani, BA.,B.L.,
III Additional District Judge, Salem.

Tuesday, the 15th day of April 2025.

I.A.1/2025
in
CMA.No.4/2025

1. S.Leela
2. Selvam
3. Kasi

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Petitioners/Appellants

/vs/

1. Suseela
2. Chellammal (Died)
3. K.Palani
4. K.Nagamani (Died)
5. K.Murugan
6. Palaniyammal

...

Respondents/Respondents

This petition is coming on 07.04.2025 before me for final hearing in the presence of Thiru.P.Shanmugam, learned counsel for the petitioners, Thiru. R.Senthilkumar, learned counsel for the 1st respondent, 3rd, 5th and 6th respondents remained exparte and 2nd and 4th respondents were died upon hearing both their arguments and having stood for consideration till date this court delivered the following:-

ORDER

The petitioners have come forward with the present petition under section 151 of CPC seeking Interim Stay of all further proceedings in REP.No.79/2013 on the file of 1st Additional Subordinate Court, Salem till the disposal of CMA.No.4/2025.

1.The averments in the petition is as follows:

The petitioners herein are the appellants in the appeal suit. The appeal

has been filed as against the order passed by the 1st Additional Subordinate Judge, Salem in REA.No.313/2014 dated 26.11.2024. The father of the 1st petitioner namely Kanchamalai Achari has purchased the petition mentioned property and other properties under the sale deed in document No.418/1974 dated 02.02.1978. The total extent of property purchased by the Kanchamalai Achari is 2628 sq ft land in which there is a tiled house, electricity service and a well. The Kanchamalai Achari died intestate on 30.10.1997 and after the demise, his legal heirs inherited the suit property and they have been in joint possession and enjoyment over the suit property.

The said Kanchamalai Achari had 2 wives namely Chellammal and Palaniammal, 4 sons namely Palani, Balasubramaniam, Murugan, Nagamani and 2 daughters Neela and Rani. After, the demise of Kachamala Achari his 1st wife Chellammal, 4 sons and 2 daughters inherited the property of Kanchamalai Achari. In the 2 daughters, a daughter namely Rani died leaving behind the 2nd and 3rd petitioners. The petitioners never agreed for sale and executed any agreement of sale. There was no partition in the family properly after the demise of Kanchamalai Achari. The petitioners have been in joint possession and enjoyment over the petition mentioned property and they are entitled to get 2/7 share in the petition mentioned property and other property of Kanchamalai Achari.

The 1st petitioner is sister of the 3rd to 5th respondents and they are judgment debtors. The 2nd respondent is the mother of the petitioner. On 21.10.2014 the 1st respondent who is the decree holder came along with the court amin to the petition mentioned property as if the 1st Additional Subordinate Judge, Salem has passed order of delivery of the petition mentioned property in REP.No.79/2013 in favour of the 1st respondent. Therefore, the petitioners abstained for the delivery as the lawful co-owners of

the property. However, the Amin of the court has not considered the objections. Thereafter, the petitioners came to know about the suit filed by the 1st respondent as against the 2nd to 5th respondents in OS.No.80/2005 on the file of 1st Additional Subordinate Court Salem by playing fraud and based upon the forged and fabricated documents.

During the pendency of the execution petition the 4th respondent Nagamani was died and his mother Palaniammal was brought on record as the 5th respondent in the execution petition. Thenceforth, the 2nd respondent Chellammal was died. If the 1st respondent took steps the appellants would have been impleaded and the right of the petitioners would have been protected. But, the 1st respondent purposely did not take steps to implead the petitioners in the execution petition. The 1st respondent seems to have got the exparte decree by suppressing the real facts.

The 1st respondent is the 3rd party purchaser of undivided share and the 3rd party purchaser of undivided share is not entitled for delivery of possession. Even if the 1st respondent has got right, he has to file suit for partition and separate possession. Therefore, the execution petition filed by the 1st respondent in EP.No.79/2013 is not maintainable. The 1st respondent is not entitled for delivery of possession. The learned 1st Additional Subordinate Court Salem mechanically dismissed the claim petition on the ground that the petitioners have not produced the legal heir certificate of Kanchamalai Achari. Now, the petitioners are producing the legal heir certificate of Kanchamalai Achari and the petitioners are preparing to file appeal against the decree passed in OS.NO.80/2005. While so, the order of delivery is not stayed the petitioners will be put into irreparable loss and hardship. Hence, the present petition to grant an order of interim stay of all further proceedings in REP.NO.79/2013 on the file of 1st Additional Subordinate Judge, Salem.

2. The counter filed by the 1st respondent is as follows:

Denied and decried all averments made in the petition and affidavit except those are specifically admitted. It is true that delivery order was passed by the executing court as against the 2nd to 5th respondents. It is true that during the pendency of the claim petition the Chellammal and Nagamani were died. The decree is passed against the 2nd to 5th respondents. If really, the defendants are aggrieved they can prepare an appeal and this respondent is lawfully entitled to the petition mentioned property as the decree holder in OS.No.80/2005. The death certificate of Nagamani dated 31.12.2014, death certificate of Chellammal dated 09.05.2019, other death certificates dated 22.12.2014 and 21.11.2019 and also legal heir certificates dated 09.01.2020 and 13.02.2025 are now only submitted in the appeal. It is pertinent to note that the affidavit is dated 04.02.2015. But, the legal heir certificate was issued 13.02.2025 only after the filing of the appeal. There are no prima facie case and no balance of convenience in favour of the petitioner. The petitioners have no case as per the averments in the affidavit. There are merits in this petition. Hence, it is prayed for dismissal.

3. Now the point for consideration is:

Upon considering the petition, the counter and other materials this court has framed the following point for consideration:

" Whether the petition filed by the petitioners are liable to be allowed or not?"

4. Answer to the point:-

This petition has been filed by the petitioners who are appellants seeking to stay the all the further proceedings of REP.No.79/2013 in OS.No.80/2005 of 1st Additional Subordinate Judge, Salem. It is the contention of the petitioners that the petition mentioned property on the other properties originally belonged to the Kanchamalai Achari by virtue of sale deed dated 02.02.1978

and he was in possession over the same. The said Kanchamalai Achari has purchased 2628 sq ft land with tiled house, electricity connection and a well and he was died on 30.10.1997 leaving behind his 2 wives namely Chellammal, Palaniammal and 4 sons namely Palani, Balasubramaniam, Murugan, Nagamani and 2 daughters the 1st petitioner and one Rani. The said Rani was died leaving behind the 2nd and 3rd petitioners and thus, the petitioners have got 2/7 in the undivided share in the property purchased by the Kanchamalai Achari and they are in joint possession over it. While so, on 21.10.2014 the 1st respondent came along with the Amin of the court to the petition mentioned property as if the 1st Additional Subordinate Court has passed order of delivery in REP.No.79/2013. Thereafter, only the petitioners came to know that the 1st respondent has obtained an exparte decree based on the fabricated documents in OS.No.80/2010.

5. During the pendency of the execution petition the Nagamani and Chellammal were died. However, the 1st respondent has not taken any steps to implead the petitioners as the parties in the execution petition. The 1st respondent is the 3rd party purchaser of an undivided share and thus, he is not entitled to delivery as prayed in the EP.No.79/2013. Therefore, the petitioners have filed a petition in REA.No.3/2014 on the file of 1st Additional Subordinate Judge, Salem. However, the trial court has passed mechanical order without considering the submission of the petitioner. Therefore, it is submitted by the petitioners that if the 1st respondent is continued the proceeding in the REP.No.79/2013 their right would be affected. Hence, the petitioners sought to stay the all further proceedings of execution petition in REP.No.79/2013. To support the above said contention the petitioners have placed reliance upon the judgment reported in **2009 AIR SCW 4365**.

6. Per contra, the 1st respondent filed counter and he would contend that the petitioners have not at all produced the documents to show that they are

the legal heirs of Kanchamalai Achari and the suit was decreed in the year 2005 and the execution petition also filed in the year 2013. But, the petitioners have not filed any suit for partition so far. In order to delay the proceeding the present petition has been filed.

7. Having regard to the rival submissions it is noted that the petitioners herein have filed REA.No.313/2015 on the file of 1st Additional Subordinate Judge Salem and after considering the oral and documentary evidence the trial court has dismissed the REA.No.313/2015 on 26.11.2024 holding that the petitioners have not produced any documents to show that they are the legal heirs of the Kanchamalai Achari and the petitioners are not residing in the petition mentioned property and also the petitioners can claim the share remaining 2233 sq ft of Kanchamalai Achari.

8. It is discovered from the materials available of record that the suit was filed by the 1st respondent seeking the relief of specific performance and the suit was decreed by the trial court and subsequently, the execution petition REP.No.79/2013 has been filed by the 1st respondent in which the petitioners herein have filed a petition in REA.No.330/2014 under order 21 rule 97 of CPC and the same was dismissed. Upon perusal of the materials available on record it seems that the execution petition was allowed and delivery was ordered and till today the possession was not handed over.

9. Rule 5 of order 41 provides for stay for an execution of a decree or an order. After the appeal has been filed the appellate court may order stay for proceedings of execution of such decree. However, it is well settled principle of law that mere filing of appeal does not suspend the operation of the decree. Stay may be granted if sufficient ground are established. The object of rule 5 of order 41 is to safeguard the interest of both parties. It is the right of decree

holder to enjoy of fruits of decree and it is the right of the judgment debtor not merely to get barren success in case his appeal is allowed by the appellant court. Therefore, the rules make a responsible balance to these conflicting rights.

10. In this situation, it is noted that the 1st respondent in this appeal already filed a suit and decree was passed. The execution proceeding was initiated and it is at this stage to culmination. At this stage petitioners/appellant filed petition under order 21 rule 97 of CPC claiming right in the property and the same was dismissed by the execution court. A perusal of the order passed by the execution court would go to show that it has assigned reason while denying the right of the petitioners in the suit property. Moreover, inspite of obtaining the decree, the 1st respondent is unable to enjoy the fruits of the decree even after the 10 years. A further studying of the supporting affidavit and facts and circumstances would indicate that there are no sufficient grounds established to grant the stay order. Hence, this court is of the considered view that it is not fit case to grant the stay. Therefore, this court is not inclined to allow this petition. Accordingly, the point is answered.

In fine, this petition is dismissed. No cost.

Dictated by me, to the Steno Typist, transcribed and computerized by her, corrected by me and pronounced in the open court, on this 15th day of April 2025.

(Sd/-L.Kalaivani)

III Additional District Judge,
Salem.

Fair/Draft Order in
I.A.No.3/2024 in
O.S.No.224/2023
Dt. 15.04.2025
III ADJ.,Salem.