

(2014) 12 MAD CK 0278

Madras High Court (Madurai Bench)

Case No: C.R.P. (MD) No. 1353 of 2007 and M.P. (MD) No. 1 of 2007

S.A. Buvaneshwari

APPELLANT

Vs

P.A. Nagarajan

RESPONDENT

Date of Decision: Dec. 9, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 7 Rule 11
- Evidence Act, 1872 - Section 68
- Succession Act, 1925 - Section 63

Hon'ble Judges: M. Duraiswamy, J

Bench: Single Bench

Judgement

@JUDGMENTTAG-ORDER

M. Duraiswamy, J.

Challenging the fair and final order passed in I.A.No. 2 of 2007 in O.S.No. 109 of 2006 on the file of the Principal District Court, Virudhunagar District at Srivilliputhur, the first defendant has filed the above Civil Revision Petition.

2. Heard the submissions of the learned counsel for the petitioner and the learned counsels for the respondents 1 to 3 and 5.

3. The plaintiff filed the suit in O.S.No. 109 of 2006 for partition. The suit has been filed in respect of several items of suit properties including gold jewellery, which is mentioned in schedule "C". The first defendant has filed an application in I.A.No. 2 of 2007 under Order 7 Rule 11 of the Code of Civil Procedure, 1908 to reject the plaint stating that in view of the final decree passed in O.S.No. 122 of 1988 on the file of the Sub Court, Srivilliputtur, the present suit filed by the plaintiff is liable to be rejected. According to the plaintiff, the decree obtained in O.S.No. 122 of 1988 is collusive in nature and that he did not receive any summons in the said suit. The defendants 2 to 5 admitted the decree and pursuant to which, a preliminary decree

was passed.

4. On a perusal of the plaint filed in O.S.No. 109 of 2006, it could be seen that the plaintiff had averred that he did not receive any summons at the time of passing of preliminary decree. So far as the final decree application and also the Execution Petition in E.P.No. 177 of 2004 are concerned, he has not stated anything about the service of summons. The earlier suit was filed by the first defendant in the year 1988 and a preliminary decree was passed on 08.01.1995 and the final decree was passed on 30.06.2003. The present suit has been filed by the first defendant in the year 2006.

5. It is also brought to the notice of this Court by Mr.M.Thirunavukkarasu, learned counsel appearing for the revision petitioner that pursuant to the final decree passed in the suit, the first respondent has also taken possession of some of the properties. The learned counsel further submitted that except schedule II, which is mentioned in O.S.No. 109 of 2006, all other properties were the subject matter in O.S.No. 122 of 1988 and the description of schedule II at page No. 47 of the typed-set of papers is extracted hereunder:-

"Schedule II

Tirunelveli District, Sankarankovil Taluk,
Sub-Registrar Office Thenmalai Village

S.No. 6 9 0 -2-3 4

S.No. 663/2 - 1-04

Punja lands

S.No. 669/8 - 2-24

S.No. 669/11 -1-9 6"

6. On a perusal of the schedule of properties in O.S.No. 122 of 1988 and in O.S.No. 109 of 2006, according to the learned counsel for the revision petitioner, except schedule II of the properties, all the other properties were partitioned and final decree was also passed.

7. It is settled position that once a property has been partitioned and a final decree was passed, for the very same relief, the said property cannot be subjected to partition in the subsequent proceedings, unless the decree passed in the earlier suit is set aside.

8. In the case on hand, though the earlier suit was filed in the year 1988, after a lapse of 18 years, the plaintiff has filed the present suit seeking for the very same relief, which was sought for in the earlier suit, except stating that no summons was served on the first defendant in O.S.No. 122 of 1988 at the time of passing of preliminary decree. The plaintiff has not stated anything as to the service of

summons in the final decree application and in the Execution Application.

9. On a reading of the plaint averments, it is clear that the plaintiff had ignored the decree passed in O.S.No. 122 of 1988 and filed the suit for partition.

10. The trial Court while dismissing the application found that the issue involved in the present suit can be decided only after the trial. Since the issue was already decided in O.S.No. 122 of 1988, the trial Court cannot decide the very same issue that was decided in the earlier suit. Therefore, except schedule II of the suit property mentioned in O.S.No. 109 of 2006, the plaintiff cannot seek for partition in respect of the other properties, which were already partitioned pursuant to the final decree passed in O.S.No. 122 of 1988.

11. Mr.M.Thirunavukkarasu, learned counsel appearing for the revision petitioner submitted that the schedule II of the property was bequeathed in her favour under a Will, dated 28.12.1971.

12. However, the Will have to be proved under Section 68 of the Indian Evidence Act and also under Section 63 of the Indian Succession Act before the trial Court. The will have to be proved by the revision petitioner/first defendant as per law and she should establish her case with regard to the proof of the Will. Therefore, the trial Court can decide the issue with regard to the right of the parties in respect of Schedule II of the property at the time of passing of preliminary decree. Since the other properties were already partitioned in O.S.No. 122 of 1988, the trial Court need not decide the rights of the parties in respect of the other properties.

13. With these observations, this Civil Revision Petition is disposed of. The Principal District Judge, Virudhunagar District at Srivilliputtur is directed to dispose of the suit in O.S.No. 109 of 2006 on merits and in accordance with law within a period of four months from the date of receipt of a copy of this order. However, there shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.