

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.12.2015

CORAM:

THE HON'BLE **MS. JUSTICE R.MALA**

C.R.P.(PD).No.483 of 2014

and

M.P.No.1 of 2014

Mrs.Vijaya Venkataraman
Flat No.4, Block No.5,
"NUTECH INDIRA Apartments"
No.150, Pillaiyar Koil Street
Jafferkhanpet
Ashok Nagar, Chennai – 600 083.

.. Petitioner/Petitioner/Plaintiff
Vs.

1.Mrs.Muniammal
Flat No.G-3, Vinayaka Villa
Door No.4-A, 4th Street
Andavar Nagar, Kodambakkam
Chennai – 600 024.

2.The Commissioner
Corporation of Chennai
Ripon Buildings
EVR Salai, Chennai – 600 003.

..Respondents/Respondents/Defendants

Prayer:

Civil Revision Petition filed under Article 227 of the Constitution of India against the order and decretal order dated 20.01.2014 made in I.A.No.18034 of 2013 in O.S.No.6189 of 2012 on the file of the learned IV Assistant Judge, City Civil Court, Chennai.

For Petitioner : Mr.K.Ramu

For Respondents : Ms.Jayanthi Sekar, for R1

R2 – No Appearance

ORDER

Heard the learned counsel appearing for the revision petitioner and the learned counsel appearing for the first respondent.

2. The revision petitioner has come forward with the present Civil Revision Petition challenging the impugned order dated 20.01.2014 made in I.A.No.18034 of 2013 in O.S.No.6189 of 2012, wherein the application filed under Order 14 Rule 5(2) CPC to delete the issue framed in the suit came to be dismissed.

3. The learned counsel appearing for the revision petitioner would submit that the revision petitioner as plaintiff has filed the suit for declaration that the judgment and decree passed in O.S.No.2653 of 2005, dated 30.10.2009 on the file of the V Assistant Judge, City Civil Court is null and void and unexecutable and also for a permanent

injunction restraining the defendants and their men from in any manner demolishing any portion of the 'B' scheduled property, pursuant to the Judgment and Decree passed in O.S.No.2653 of 2005, dated 30.10.2009.

4. It is the case of the revision petitioner that the suit in O.S.No.2653 of 2005 was filed by the first respondent herein as plaintiff seeking for a relief of permanent injunction restraining the defendants 1 to 3 or any other person claiming through them from putting up any further construction in the common area of the suit scheduled property and also for a mandatory injunction directing the 4th defendant to demolish the unauthorized construction put up by the defendants 1 to 3 in the common area, more fully described and stated in the plan. Further, in the above said suit, the revision petitioner herein is not a party to the proceedings and the said suit was decreed exparte. Thereafter, the first respondent herein preferred an execution petition in E.P.No.2978 of 2012 and only at that juncture, the revision petitioner came to know of the judgment and decree made in O.S.No.2653 of 2005. Immediately, the revision petitioner filed the present suit in O.S.No.6189 of 2012 for declaration that the judgment and decree passed in O.S.No.2653 of 2005, dated

30.10.2009 on the file of the V Assistant Judge, City Civil Court is null and void and unexecutable.

5. After the respondent/defendant entered appearance and filed written statement in O.S.No.6189 of 2012, the Trial Court framed the following issues on 26.09.2013.

(A). *Whether the non-impleadment of plaintiff in O.S.No.2653 of 2005 was initiated?*

(B). *Whether the construction is unauthorized in common area as alleged by D1?*

(C). *Whether the injunction in O.S.No.2653 of 2005 is suffered with any infirmities?*

(D). *Whether the plaintiff is entitled to declaration as prayed for?*

(E). *Whether the plaintiff is entitled to permanent injunction as prayed for?*

(F). *To what other relief?*

6. While so, the revision petitioner/plaintiff filed an application in I.A.No.18034 of 2013 in O.S.No.6189 of 2012 to strike off or delete issue No.2 viz., "*Whether the construction is unauthorized in common area as alleged by D1?*" stating that since she is not a party to the

earlier proceedings viz., *O.S.No.2653 of 2005*, she has filed the suit only for setting aside the judgment and decree passed in *O.S.No.2653 of 2005* and the issue as to whether the construction is unauthorized or not is a issue to be decided in the suit. However, the Trial Court without considering the averment made by the revision petitioner/plaintiff dismissed the said application, against which the present Civil Revision Petition has been preferred.

7. Challenging the impugned order, the learned counsel for the revision petitioner would submit that since the revision petitioner is not a party to the proceedings, she has filed the suit for setting aside the judgment and decree made in *O.S.No.2653 of 2005*. So, the only point to be decided is whether the decree made in *O.S.No.2653 of 2005* will vitiate for not impleading the plaintiff in the suit and it is not necessary to decide whether the construction is unauthorized in the common area as alleged by D1? The learned counsel also relied on Order 14 Rule 1 and 2 CPC and drawn my attention through Order 14 Rule 1(2) CPC which states that the material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence. Thus, the learned counsel for the revision petitioner would submit that

there is no defence and hence, there is no necessity to frame a issue as to whether the construction is unauthorized in the common area.

8. It is also pertinent to note that the first respondent herein had also filed another suit in O.S.No.838 of 2014 wherein the revision petitioner is also impleaded as party to the proceedings. The relief sought for in the above suit is a mandatory injunction directing the 6th defendant/The Commissioner, Corporation of Chennai to demolish the unauthorized flat No.G-1 owned by the 3rd defendant, unauthorized flat No.F-1 owned by the 4th defendant [revision petitioner herein] and unauthorized flat No.G owned by the 5th defendant.

9. The learned counsel for the revision petitioner would further submit that since no suit is filed in respect of the issue as to whether the construction made by the revision petitioner is unauthorized, there is no necessity to adjudicate the matter otherwise. He would further submit that even in the previous suit, though it was decided exparte, unless it was set aside, it would be in force and when the issue has been decided, there is no necessity to decide the issue once more. Thus, the learned counsel for the revision petitioner prayed for setting aside the impugned order.

10. To substantiate his contention, the learned counsel for the revision petitioner relied upon the following decisions.

1. 1998 (4) AWC 611, University of Allahabad v. District Judge, Allahabad and other.

2. Judgment of the Gujarat High Court, dated 29.04.2011 made in Special Civil Application No.13066 of 2010.

11. Resisting the same, the learned counsel for the first respondent would submit that it is true that the petitioner herein is not a party to the previous suit. In the written statement, she has raised the plea that unauthorized construction was made. So, by invoking Order 14 Rule 2 CPC, the 2nd issue has been framed. As per Order 14 Rule 1 CPC, while framing the issues the Court has to take into consideration the plaint averment as well as the defence taken by the defendant and thereafter resolve those issues. In the instant case, the first respondent/defendant has taken the defence that the construction made in the common area is unauthorized. So that point has to be decided. Further, even though an ex parte decree was passed in O.S.No.2653 of 2005 and the petitioner herein is not a party to the said proceedings, the petitioner herein has filed a suit in O.S.No.6189

of 2012 to declare that the judgment and decree passed in O.S.No.2653 of 2005, dated 30.10.2009 on the file of the V Assistant Judge, City Civil Court is null and void, since he has not been impleaded as a party to the proceedings. So, the first respondent herein was forced to file another suit in O.S.No.838 of 2014 for a mandatory injunction directing the 6th defendant/The Commissioner, Corporation of Chennai to demolish the unauthorized constructions. Thus, there arises no necessity to delete the second issue. To substantiate her contentions, the learned counsel for the first respondent relied on the following decisions:

- 1. Judgment of Punjab & Haryana High Court, dated 03.07.2012 made in Civil Revision No.5807 of 2011.**
- 2. Judgment of Kerala High Court, dated 04.04.2007 made in WP(C).No.5436 of 2007.**
- 3. Judgment of Delhi High Court, dated 22.01.2013 made in CM(M).80/2013 and C.M.No.1063 of 2013.**

12. Considered the rival submissions made by both sides and perused the typed set of papers.

13. The first respondent herein, who is one of the flat owner has

filed the suit in O.S.No.2653 of 2005 for the following reliefs:

"(a) Permanent injunction restraining the defendants 1 to 3 or any other persons, servants, agents or anybody else claiming through them from putting up any further construction in the common area of the scheduled property more fully described in the Schedule and stated in the plan;

(b) Mandatory injunction directing the fourth defendant to demolish the unauthorized construction put up by the first to third defendant in the common area more fully described and stated in the plan;

(c) any other relief or reliefs as this Hon'ble Court may deem fit and proper in the circumstances of the case and thus render justice."

14. In the above suit, in paragraph 7 of the affidavit, it has been stated as follows:

"7. The Plaintiff further states the first defendant had subsequently sold the common area place which is earmarked in the plan given to us to one Mr.Venkataraman, who is residing at F-1 for parking his

vehicle for Rs.50,000/- and also a single bedroom flat was constructed in the remaining portion of the common area and let out from November 2001 and also a room has been constructed for watchman next to flat G-4 everything in violation of the plan.”

15. Though it was specifically averred in the affidavit, the revision petitioner herein was not impleaded as a party. Only after the suit was decreed and when the first respondent filed an Execution Petition in E.P.No.2978 of 2012, the revision petitioner herein came to know about the decree passed in O.S.No.2653 of 2005 and immediately thereafter, the revision petitioner filed a suit in O.S.No.6189 of 2012 for declaration that the judgment and decree passed in O.S.No.2653 of 2005, dated 30.10.2009 on the file of the V Assistant Judge, City Civil Court is null and void and unexecutable.

16. The defendant filed the written statement and contested the suit. On the basis of the same, the Trial Court framed the issues which are incorporated in the earlier paragraphs. Now the point to be decided is whether the issue No.2 is liable to the adjudicated or deleted as prayed for by the revision petitioner in I.A.No.18034 of

2013?

17. At this juncture, it is appropriate to incorporate Order 14 Rule 1 CPC.

1. Framing of issues— (1) *Issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other.*

(2) *Material propositions are those propositions of law or fact which a plaintiff must allege in order to show a right to sue or a defendant must allege in order to constitute his defence.*

(3) *Each material proposition affirmed by one party denied by the other shall form the subject of distinct issue.*

(4) *Issues are of two kinds :*

(a) *issues of fact,*

(b) *issues of law.*

(5) *At the first hearing of the suit the Court shall, after reading the plaint and the written statements, if any, and [after examination under rule 2 of Order X and after hearing the parties or their pleaders], ascertain upon what material propositions of fact or of law the parties are at*

variance, and shall thereupon proceed to frame and record the issues on which the right decision of the case appears to depend.

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit makes no defence.

18. Now, it would be appropriate to consider the decisions relied on by the learned counsel for the revision petitioner.

18.1. In the ***Judgment of the Gujarat High Court, dated 29.04.2011 made in Special Civil Application No.13066 of 2010***, in paragraph 8.3, it was held as follows:

"8.3. As per Order 14, Rule 2 of CPC, issues are to be framed on material proposition of law and facts of which parties are at variance and which are necessary for decision of the suit. It is required to be noted that the issues are not to be framed on each and every material proposition or point at variance, but are to be framed which are necessary for decision of the suit."

Thus, it can be inferred from the above decision that since there is variance in the facts put forth by both the parties, the issue has to

be decided.

18.2. The decision reported in **1998 (4) AWC 611, University of Allahabad v. District Judge, Allahabad and other** is not applicable to the facts of the present case because in the said case, the issue has been framed and it was subsequently deleted by the Presiding Officer. When it was questioned, it has been held that the Court has ample power to delete any issue framed by it at any time before the judgment is actually delivered. However, here it is not the case that the Judicial Officer has deleted the issue.

19. Now it would be appropriate to consider the decisions relied on by the learned counsel for the first respondent.

19.1. In the **Judgment of Delhi High Court, dated 22.01.2013 made in CM(M).80/2013 and C.M.No.1063 of 2013**, in paragraph 11, it was held as follows:

*"11. In **Makhan Lal Bangal v. Manas Bhunia AIR 2001 SC 490**, the Apex Court while dealing with the importance and objective of the stage of framing of issues, observed as under:-*

The stage of framing the issues is an important one

inasmuch as on that day the scope of the trial is determined by laying the path on which the trial shall proceed excluding diversions and departures therefrom. The date fixed for settlement of issues is, therefore, a date fixed for hearing. The real dispute between the parties is determined, the area of conflict is narrowed and the concave mirror held by the court reflecting the pleadings of the parties pinpoints into issues the disputes on which the two sides differ. The correct decision of civil lis largely depends on correct framing of issues, correctly determining the real points in controversy which need to be decided. The scheme of Order XIV of the Code of Civil Procedure dealing with settlement of issues shows that an issue arises when a material proposition of fact or law is affirmed by one party and denied by the other.”

19.2. In the ***Judgment of Punjab & Haryana High Court, dated 03.07.2012 made in Civil Revision No.5807 of 2011***, it was held that as regards deletion of issue No.5-B already framed, judgment Annexure P-3 vide which they said issue was framed has already attained finality. Even otherwise, while arguing this issue,

plaintiff-petitioner may rely on the alleged admission that she is daughter of Sohan Singh. So, the said issue is not required to be deleted.

Considering the facts of the present case in the light of the above decision, in the suit in O.S.No.2653 of 2005, only an exparte decree has been passed and it will not take away the right to decide the issue in respect of unauthorized construction.

19.3. In the ***Judgment of Kerala High Court, dated 04.04.2007 made in WP(C).No.5436 of 2007***, it was held that the issues sought to be struck off were the issues framed originally and considered by the trial Court, first appellate court and this court. In the instant case, already the suit in O.S.No.2653 of 2005 has been decreed in respect of permanent injunction and also mandatory injunction. However, it was decreed exparte and the said exparte decree was challenged in the present suit in O.S.No.6189 of 2012. So, the issue has not been finally disposed of.

20. In these circumstances, I am of the considered view that the second issue is necessary for adjudication on the basis of the defence

raised by the defendants. Hence, the Civil Revision Petition deserves to be dismissed and accordingly dismissed with costs of Rs.5000/- for abusing the process of Court. The said costs has to be paid to the Chief Minister's Flood relief fund. Consequently, connected miscellaneous petition is closed.

21. I also deem it fit to conduct joint trial of the suits in O.S.No.6189 of 2012 and O.S.No.838 of 2014 for earlier disposal of the matter. Accordingly, the suit is O.S.No.838 of 2014 pending on the file of the VIII Assistant Judge, City Civil Court, Chennai is ordered to be transferred to the file of the IV Assistant Judge, City Civil Court, Chennai to be tried along with O.S.No.6189 of 2012. The learned IV Assistant Judge, City Civil Court, Chennai is directed to conduct joint trial of the suits and dispose of the same as expeditiously as possible.

16.12.2015

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To

- 1)The learned IV Assistant Judge,
City Civil Court, Chennai
- 2)The learned VIII Assistant Judge,
City Civil Court, Chennai

R.MALA, J.

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C.R.P.(PD).No.483 of 2014

Dated : 16.12.2015