

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.11.2014

Decided on : 02.02.2015

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

C.R.P(NPD)No.4484 of 2013
and M.P.No.1 of 2013

Pushpakanthamani Ammal

.. Petitioner

Vs

- 1.Suryanarayanan
- 2.Pandurangan (deceased)
- 3.Sarojini
- 4.Devaki Ammal
- 5.Mani (deceased)
- 6.Dasarathan
- 7.Munusamy (deceased)
- 8.Mohan
- 9.Parthiban
- 10.Kamatchi
- 11.Ambika
- 12.Minor Kannan
- 13.Minor Nalini
- 14.Minor Karnan
- 15.Rajalakshmi
- 16.Ashok
- 17.Suresh
- 18.Prema
- 19.Sundar

[Respondents 2 to 19 are given up]

.. Respondents

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India against the order and decree dated 19.09.2013 made in I.A.No.728 of

2013 in I.A.No.1639 of 1999 in O.S.No.652 of 1994 on the file of District Munsif Court, Ponneri.

For Petitioner : Mr.M.Sriram

For Respondents : Mr.N.R.Anantharama Krishnan
for R1

R2 to R19 given up

ORDER

This revision is directed against the order passed by the District Munsif Court, Ponneri in I.A.No.728 of 2013 in I.A.No.1639 of 1999 in O.S.No.652 of 1994.

2. The petitioner had instituted a suit in O.S.No.652 of 1994 against her brother Pandurangan, her sisters Mrs.Sarojini, Devaki Ammal and the purchasers of the suit property. The plaintiff claims 1/3rd share in the suit properties. The defendants 1 to 3 were set exparte. The first respondent herein who was arrayed as 4th defendant contested the suit. The trial court passed a preliminary decree on 16.03.1999 allotting 1/3rd share to the plaintiff. Thereupon, the plaintiff filed I.A.No.1639 of 1999 for passing a final decree.

3. In the final decree proceedings also, the respondents 1 to 3 did

not contest and the 4th defendant / 1st respondent herein alone filed a counter stating that the suit items 1 to 5 are wet lands to an extent of 2.71 acres. As per the preliminary decree, the plaintiff is entitled to 90.3 cents in the wet land. The 4th defendant had purchased the suit items 3 and 4 from the defendants 1 to 3 through registered sale deeds dated 12.08.1988 and 05.07.1990 and therefore he prayed for allotment of the items 3 and 4 which is to an extent of 1.87 acres. As the plaintiff was already in possession and enjoyment of items 1 and 2 to an extent of 84 cents, the 4th defendant prayed for allotment of items 1 and 2 in favour of the plaintiff and for the short fall of 6.4 cents, he expressed his willingness to pay the market value of the land.

4. In the final decree proceedings, the 4th defendant was examined as RW1 and he marked Exs.R1 to R6. As regards items 5 to 7, there was no dispute between the parties. The trial court, after considering the contention of the 4th defendant, by order dated 06.10.2007, appointed an Advocate Commissioner to apportion 6.4 cents in items 3 or 4 based on factors such as proximity to items 1 and 2. The trial court has held that as far as divisions of items 1 to 4 into three equal shares and allotment of one share to the plaintiff, the division should be made that items 1 and 2 shall form one share and the commissioner shall carve out the deficit extent of 6.4 cents from items 3 and 4 proximity to items 1 and 2. As per the order passed by the trial

court, the commissioner inspected the property and also filed his report with a sketch on 14.08.2008.

5. It is seen that thereafter, the plaintiff filed I.A.No.1639 of 1999 to amend Survey Number in Item No.5 as S.F.No.19/1 instead of 10/1. The petition was allowed and again the trial court appointed another Advocate Commissioner to divide the suit properties. The second Advocate Commissioner filed his report on 08.09.2011. The trial court, based on the report filed by the second Advocate Commissioner, passed a final decree on 17.12.2011 allotting 18 cents in items No.1, entire extent in item 4 and 1.02 acres in item 5 to the plaintiff. Aggrieved by the order, the 4th defendant/1st respondent herein filed review application in I.A.No.728 of 2013 seeking allotment of property as per the order dated 06.10.2007. The learned District Munsif, Ponneri allowed the review petition. Challenging the order, the present revision has been filed.

6. Mr.M.Sriram, learned counsel for the petitioner submitted that the trial court exceeded its jurisdiction in reviewing the order as if the trial court is sitting in the appeal ; that the trial court failed to note that the 4th defendant/1st respondent herein has not made out grounds for reviewing the earlier order; that there is no error apparent on the face of record in the final decree dated 17.12.2011 and hence the trial court ought to have dismissed the

review petition. It is further contended that the order dated 06.10.2007 is only an interim direction which cannot form basis to review the order passed on 17.12.2011. The learned counsel relied upon the following judgments -

(1) 2009 14 SCC 663 [Inderchand Jain v. Motilal]

(2) 2013 (4) CTC 788 [The Administrator,
Kancheepuram Kamakshiamman
Co-operative Spinning Mills Ltd. v.
Kakkera Brothers and others]

(3) 2013 (4) CTC 882 [Kamlesh Verma v.
Mayawati & others]

7. Per contra, Mr.M.R.Anantharama Krishnan, learned counsel for the 1st respondent submitted that the defendants 1 to 3 are the brothers and sisters of the plaintiff and the defendants 4 to 7 are the purchasers of the suit properties. The 4th defendant/1st respondent herein had purchased items 3 and 4 from the defendants 1 to 3, so he is not interested in respect of other items of the suit properties. The learned counsel further submitted that except the 4th defendant/1st respondent herein, the other defendants did not chose to contest the suit and after considering the case of the 1st respondent herein, the trial court passed a well considered order on 06.10.2007 allotting the items 1 to 3 to the petitioner/plaintiff and 3 & 4 to the 1st respondent herein. The order was not challenged by the petitioner and further, the petitioner did not file any objection to the report filed by the first Advocate Commissioner.

While so, the plaintiff filed application for amendment of preliminary decree only to change the survey number in item 5 of the suit property and therefore there was absolutely no necessity to appoint a second Advocate Commissioner to inspect the suit property.

8. The learned counsel further submitted that the 4th defendant/1st respondent herein had filed his objection to the report filed by the second Advocate Commissioner but, without considering the objections, the trial court passed the final decree on 19.09.2013. It is further contended that without scrapping the report of the first Advocate Commissioner, appointing second Advocate Commissioner itself is not sustainable in law; that the error is apparent on the face of the record and also allowing the final decree would cause miscarriage of justice. The trial court has rightly allowed the review application which does not warrant interference by this Court.

9. It is seen from records that the petitioner had instituted the suit claiming 1/3rd share in the suit properties. It is not in dispute that items 1 to 4 of the suit properties are wet lands to an extent of 2.71 acres. Undisputedly, the 4th defendant had purchased items 3 and 4 from defendants 1 to 3 through registered sale deeds in the year 1988 and 1990. As per the preliminary decree, the plaintiff is entitled to 90.3 cents in the wet lands.

10. It is also not in dispute that the plaintiff has been in possession and enjoyment of items 1 and 2 to an extent of 84 cents. In the final decree proceedings, the District Munsif, Ponneri, by order dated 06.10.2007, after taking into consideration of the entire facts held that the division shall be made that, items 1 and 2 shall form one share and the Commissioner should carve out the short fall of 6.04 cents from items 3 and 4 and the plaintiff should be given choice to take that portion in items 3 and 4 or to receive market value price for the difference from the 4th defendant. The trial court, after considering the allotment of shares, appointed an Advocate Commissioner with specific direction to apportion 6.4 cents in items 3 or 4 to make up the deficit for 1/3rd portion to the petitioner/plaintiff. Admittedly, the order was not challenged by the petitioner.

11. It is to be noted that the plaintiff thereafter filed the application to amend the survey number in item 5 of the suit properties. After the amendment application was allowed, the trial court appointed the second Advocate Commissioner. It is also admitted that the plaintiff did not file objections to the report filed by the first Advocate Commissioner and he had not taken out any application to scrap the report of the first Advocate Commissioner and sought for appointment of second Advocate Commissioner.

In the above facts, the appointment of second Advocate Commissioner was not at all required in this case. The Second Advocate Commissioner filed his report with plan on 08.09.2011. The 4th defendant / 1st respondent herein filed his objections to the report filed by the second Advocate Commissioner. However, the trial court, without considering the objections, passed the final decree on 17.12.2011.

12. It is an admitted fact that the 4th defendant did not file appeal against the final decree, however, filed the application to review the final decree contending that there was an error apparent on the face of the record. The trial court, after considering the entire facts, allowed the review application. It is settled law that under Section 114 and Order 47 Rule 1 CPC, the trial court can review the order which suffers from error apparent on the face of record and permitting the same would lead to failure of justice.

13. The Hon'ble Apex Court in the case of ***Inderchand Jain v. Motilal (referred above)*** has held as follows -

9. The power of review can also be exercised by the court in the event discovery of new and important matter or evidence takes place which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. An application for review would also lie if the

order has been passed on account of some mistake. Furthermore, an application for review shall also lie for any other sufficient reason.

14. In the judgment reported in **2013 (4) CTC 882 [Kamlesh Verma v. Mayawati]**, the Hon'ble Apex Court has provided guidelines, under what circumstances the review application is maintainable, which is extracted below -

(A) When the review will be maintainable :

- 1. Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within knowledge of the petitioner or could not be produced by him;*
- 2. Mistake or error apparent on the face of the record;*
- 3. Any other sufficient reason.*

In **2013 (4) CTC 788 [The Administrator, Kancheepuram Kamakshiamman Co-operative Spinning Mills Ltd. v. Kakkera Brothers (DB)]**, the Division Bench of this Court has held that the review application cannot be a re-hearing of the case.

15. In the present case, the first respondent/4th defendant has categorically stated that he is owning lands to the immediate east of items 3 and 4. He had purchased items 3 and 4 on the basis of a registered partition

deed dated 03.09.1987 and also based on the assurance given by the defendants 1 to 3 that there is no dispute over the suit properties. It is also not disputed that the plaintiff has been in possession of the suit items 1 and 2 which is convenient for her enjoyment. The trial court, after holding that the 4th defendant is a bonafide purchaser for valuable consideration and on the principle of equity, allotted items 3 and 4 to the 4th defendant. The plaintiff has not challenged the order and the trial court, without considering the objections filed by the 4th defendant to the report filed by the second Advocate Commissioner, passed the final decree.

16. In my considered opinion, the error apparent on the face of the record permitting the same would lead to failure of justice. Keeping in mind the principles laid down in the decision cited supra, the trial court allowed the application. Hence, I do not find any reasons to interfere with the order impugned in this revision.

In the result, the Civil Revision Petition is dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

02.02.2015

Index:Yes/No
rgr

K.KALYANASUNDARAM,J

rgr

To

The District Munsif,
Ponneri.

Pre-delivery order in
C.R.P(NPD)No.4484 of 2013

02.02.2015