

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 09.03.2016

CORAM

THE HONOURABLE Mr. JUSTICE P.R.SHIVAKUMAR

C.R.P (PD) Nos.1131 of 2015 and 3616 of 2013
and
M.P.Nos.1 of 2014 and 1 of 2013

J.Jayakar

... Petitioners in both CRPs

vs.

1. J.Susheela

2. J.Jawahar

...Respondents in both CRPs

Prayer in C.R.P.No.1131 of 2015

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decretal order passed in I.A.No.192 of 2014 in O.S.No.5348 of 2012 pending on the file of XVIII Additional Judge, Civil Court, Chennai and allow the revision petition.

Prayer in C.R.P.No.3616 of 2013

Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decretal order dated 01.08.2013 made in I.A.No.10 of 2013 in O.S.No.5348 of 2012 pending on the file of XVIII Additional Judge, Civil Court, Chennai and allow the revision petition.

For Petitioner :Dr.C.Ravichandran for
in both CRPs Mr.P.C.Harikumar and Associates

For Respondent-1: Mr.K.Chandrasekaran
For Respondent-2: Mr.R.Sunilkumar

COMMON ORDER

C.R.P.No.3616 of 2013 has been filed against the order of the trial Court dated 01.08.2013 made in I.A.No.10 of 2013 in O.S.No.5348 of 2012 seeking rejection of the plaint in the said suit under Order VII Rule 11 C.P.C. During the pendency of the Civil Revision Petition, the petitioner herein, who figures as the first respondent in the above said original suit, was set *ex parte* by an order dated 03.09.2014 for non-filing of the written statement. To set aside the said order, the petitioner herein filed I.A.No.192 of 2015 under Order IX Rule 7 C.P.C. The learned trial Judge, after hearing, dismissed the said application by order dated 08.12.2014 and as against the said order, C.R.P.No.1131 of 2015 has been filed. Since both the Civil Revision Petitions have arisen out of orders passed in two different interlocutory applications in the very same suit, both the civil revision petitions have been listed together and they are heard together.

2. When a defendant does not appear or fails to file written statement, Order IX Rule 7 C.P.C permits the Court to proceed against him *ex parte*. An order setting him *ex parte* will not preclude him from

taking part in the subsequent stage of the proceedings. A formal order setting aside the said order shall be needed, if the defendant wants restoration of status-quo ante to enable him to file the written statement. Normally, a defendant, who has failed to file the written statement because of the pendency of the application for rejection of plaint, shall be permitted to contest the case by filing written statement if he comes forward with such written statement at a later stage assigning valid reasons for not filing the written statement. Even, if such defendant is not permitted to file a written statement, it does not mean that he shall not be permitted to take part in the subsequent proceedings. The learned trial Judge seems to have lost sight of the said aspect and chose to pass an elaborate order, dismissing the said application.

3. The learned counsel for the first respondent, who is the contesting respondent, is magnanimous, perhaps with a view to avoid further delay, by expressing consent for setting aside the order of the trial Court dated 03.09.2014 setting the petitioner herein / first defendant *ex-parte* in the original suit. An endorsement to that effect has been made by the learned counsel for the first respondent. However it is brought to the notice of this Court that written statement was not filed along with the petition under Order IX Rule 7 C.P.C. The

learned counsel for the petitioner took time till today to file the written statement. Today, the written statement, notice of which has been served on the counsel for the first respondent is sought to be produced in this Court. As the same should be filed in the trial Court, the fact that the written statement is ready and a copy of the same has been furnished to the first respondent is recorded. Learned counsel for the the first respondent states that the petitioner can be permitted to file the written statement in the trial Court along with a copy of the order in the Civil Revision Petition.

4. In view of the endorsement and the above said submission of learned counsel for the first respondent C.R.P.No.1131 of 2015 is allowed and the order of the trial Court dated 08.12.2014 is set aside. I.A.No.192 of 2014 shall stand allowed. The order of trial Court dated 03.09.2014 setting aside the first respondent *ex-parte* is set aside.

5. So far as C.R.P.No.3616 of 2013 is concerned, the petitioner / first defendant unsuccessfully prosecuted an application under Order VII Rule 11 C.P.C. for rejection of the plaint. The rejection of plaint was sought for on two grounds:- (i) The plaintiff who filed the suit for partition relying on a Will, filed earlier petition before the High Court as O.P.No.235 of 2012 for probate, which came

to be withdrawn by her and an order dismissing the petition came be passed on 29.06.2012. Since no leave was obtained, according to the petitioner, the first respondent / plaintiff cannot rely on the Will in support of his case in the suit. Citing the dismissal of the probate proceedings as withdrawn, petitioner claimed that the suit for partition on a different ground was maintainable and hence, the plaint should be rejected and (ii) the property was not properly valued and proper Court fee was not paid and if proper valuation was made, the trial Court would not have the jurisdiction, as the value would exceed the pecuniary jurisdiction of the trial Court, in which, the suit is pending.

6. The question regarding valuation cannot be the sole ground on which one can seek rejection of the plaint under Order VII Rule 11 C.P.C Sub-Clause (b) of the Rule 11 C.P.C makes the plaint liable to be rejected only on failure of the plaintiff to correct the valuation, after the Court directs such a correction in the valuation. Similarly, under Sub Clause (c) states that though the relief could have been correctly valued, if correct Court fee is not paid, after a direction in this regard, then only the plaint becomes rejectable under the said Clause.

7. In the case on hand, the question of valuation raised by

the petitioner involves a decision to be rendered after giving opportunity to both the parties to adduce evidence regarding valuation of the property. In case, there is no admission by any party regarding such valuation, payment of Court fee also depends upon the decision to be rendered on the question of valuation. The question of jurisdiction also depends on the outcome of the enquiry regarding valuation. All these aspects cannot be gone into in an enquiry in application under Order VII Rule 11 C.P.C. At the best, they can be tried as preliminary issues. However, the trial Court seems to have chosen to go into the merits of the issues.

8. So far as the contention that the suit filed claiming partition on the basis of intestate succession shall not be maintainable is concerned, it cannot be sustained. When a person fails in an attempt relying on testamentary succession, cannot be driven without any remedy, when he becomes non-testamentary successor, from seeking relief as a non-testamentary successor. However, learned counsel for the petitioner would submit that, after filing the suit claiming non-testamentary succession, the first respondent / plaintiff cannot be allowed to fall back on the plea of the testamentary succession and try to prove the Will in the suit for partition. The said question is outside the scope of consideration of an application under

order VII Rule 11 C.P.C. However, learned counsel for the first respondent/plaintiff submits that the first respondent/plaintiff has once for all given up his claim as a testamentary successor under the Will, which is sought to be probated under O.P.No.235 of 2012. The same is recorded.

9. An proper consideration of the order of the Court below made in I.A.No.10 of 2013 will make it clear that the trial Court has not committed any error in dismissing the application seeking rejection of the plaint on the grounds alleged therein. Hence, the Civil Revision Petition No.3616 of 2013 is bound to fail.

10. In the result,

(i) C.R.P.No.1131 of 2015 is allowed and the order of the trial Court dated 08.12.2014 made in I.A.No.192 of 2014 is set aside. The petitioner in C.R.P.No.1131 of 2015 / first defendant in the suit permitted to file the written statement along with a copy of this order within a week from the date of receipt of a copy of this order.

(ii) C.R.P.No.3616 of 2013 is dismissed confirming the order of the trial Court dated 01.08.2013 made in I.A.No.10 of 2013 in O.S.No.5348 of 2012. However, it is made clear that it shall be open

to the petitioner in the said revision petition / first defendant to raise

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the issues regarding valuation, Court fee and jurisdiction as preliminary issues.

However, there shall be no order as to costs. Consequently, connected miscellaneous petition are closed.

09.03.2016

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Index: Yes/No

Internet: yes/No

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To

The XVIII Additional Judge, Civil Court,
Chennai

C.R.P (PD) Nos.1131 of 2015 and 3616 of 2013

and

M.P.Nos.1 of 2014 and 1 of 2013