

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **21.11.2016**

CORAM:

THE HONOURABLE MR.**JUSTICE K.K.SASIDHARAN**

C.R.P.(P.D.) No.270 of 2015 and
MP.Nos.1 and 2 of 2015

1.Parveen Sultana
2.M.Malika

...Petitioners

versus

1.Minor.Mohammed Abbas
Rep. by next friend & Care taker
S.Sharmila

2.M.Papitha Sultana
3.M.A.Shajahan

...Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the order and decree dated 18.11.2014 passed by the I Additional District Munsif, Salem made in I.A.No.265 of 2013 in O.S.No.100 of 2007.

For Petitioners : Ms.A.Arulmozhi

For Respondents : Mr.R.Agilesh for R1
Mr.P.Jagadeesan for R2 and R3

ORDER

This is a classic case of abuse of process of law at the instance of a practising Lawyer to defeat the rights of the legal representatives

of the common ancestors and to grab the property by making a false plea of Hiba in favour of his son, notwithstanding the fact that in the earlier suit filed by the legal representatives, including his wife, a preliminary decree was passed by consent for partition of the properties into three shares and allotment of two such shares to the petitioners.

2. The petitioners and the second respondent are the children of Mrs.Mehurunissa, who purchased the suit properties. The mother of the petitioners died on 18.01.2003. The second respondent along with third respondent filed a suit for partition in O.S.No.106 of 2007. The Trial Court passed a preliminary decree on 23.02.2007 holding that the petitioners are entitled to 2/3 shares and the second respondent is entitled to 1/3 share. Thereafter, respondents 2 and 3 filed I.A.No.919 of 2009 for passing a final decree in terms of the preliminary decree. The petitioners filed I.A.No.294 of 2009 for appointment of Advocate Commissioner and to pass a final decree.

3. While the final decree petition was pending, the third respondent invented a novel device of grabbing the entire property by putting up a false plea of Hiba. The respondents 2 and 3, without filing

application on behalf of their son made a third party to file a petition on behalf of their son. Accordingly, one Mrs.S.Sharmila filed petitions in I.A.No.112 of 2011 and I.A.No.114 of 2011 to implead the first respondent as party in I.A.No.919 of 2009 and I.A.No.294 of 2009 respectively in O.S.No.106 of 2007. The petitioners filed counter and opposed the applications. The Trial Court dismissed the applications by order dated 19 January 2012. The order has become final.

4. Subsequently, the first respondent through Mrs.Sharmila, next friend filed I.A.No.265 of 2013 in O.S.No.106 of 2007 to reopen the preliminary decree passed by the Trial Court on 23.02.2007. The Trial Court, by order dated 18.11.2014 allowed the application. The order is under challenge in this civil revision petition.

5. Heard the learned counsel for the petitioners and the learned counsel on behalf of the respondents.

6. The documents available on record shows that respondents 2 and 3 initially filed a suit for partition in O.S.No.106 of 2007. The second respondent specifically pleaded that consequent to the death of Mrs.Mehurunissa, the property devolved on her and the other two

children, who are the petitioners herein. Since the parties are entitled to 1/3 share each, the petitioners consented to the decree passed by the Trial Court. The Trial Court passed a preliminary decree on 23.02.2007 dividing the property into three shares and allotting two such shares to the petitioners and one share to the second respondent. The preliminary decree has become final.

7. The third respondent, who is stated to be a practising lawyer before the Subordinate Court at Salem invented a method for grabbing the property. The third respondent, therefore set up a next friend to file an impleading petition on behalf of the first respondent in the final decree petition. The next friend filed application in I.A.No.112 of 2011 to implead the first respondent as party in I.A.No.919 of 2009 filed by the respondents 2 and 3 to pass a final decree, in terms of the preliminary decree, dated 23.02.2007. The first respondent, through the very same next friend filed another application in I.A.No.114 of 2011 to implead him as party in I.A.No.294 of 2009 filed by the petitioners for appointment of Advocate Commissioner to divide the property by metes and bounds and to pass a final decree.

8. The learned Additional District Munsif, Salem, by way of a

detailed order dismissed both the applications on merits. It is a matter of record that further proceedings were not taken by the first respondent challenging the order dated 19.01.2012 in I.A.Nos.112 and 114 of 2011.

9. The third respondent filed another suit in O.S.No.28 of 2011 through Mrs.S.Sharmila, next friend to declare the oral Hiba valid and a declaration that the preliminary decree dated 23.02.2007 in O.S.No.106 of 2007 is not binding on him. The third respondent wanted a decree of title in favour of the first respondent. The petitioners filed written statement and opposed the said suit. The suit was thereafter dismissed as not pressed on 01.12.2014. The decree has become final.

10. The first respondent once again filed a petition through next friend Sharmila in I.A.No.265 of 2013 in O.S.No.106 of 2007 to reopen the preliminary decree dated 23.02.2007 in O.S.No.106 of 2007. The learned Additional District Munsif, notwithstanding the fact that earlier proceedings have become final allowed the application in I.A.No.265 of 2013 by order dated 18.11.2014 and reopened the preliminary decree proceedings.

11. Thereafter, very strangely, respondents 2 and 3, who were the plaintiffs in O.S.No.106 of 2007 and petitioners in the final decree petition in I.A.No.919 of 2009 filed a memo before the Trial Court not pressing the suit in O.S.No.106 of 2007. The petitioners filed a memo of objection and opposed the prayer for withdrawal of suit, after passing a preliminary decree. The petitioners filed a memo to transpose them as plaintiffs in the suit in O.S.No.106 of 2007 in view of the fraudulent action taken by the respondents 2 and 3 to withdraw the suit, after restoring the preliminary decree petition by filing application through the first respondent.

12. The learned Additional District Munsif, Salem committed a jurisdictional error by allowing the application in I.A.No.265 of 2013 filed by the first respondent and re-opening the preliminary decree passed long back on 23.02.2007.

13. The background facts narrated above clearly shows that respondents 2 and 3 were acting behind the scene through the first respondent. Since the respondents 2 and 3 are the biological parents of the first respondent, they are aware of the fact that being the plaintiffs

in O.S.No.106 of 2007, it would not be possible for them to file an application to re-open the preliminary decree passed by the Trial Court. Therefore, they have set up the first respondent to file petition through a stranger, calling her as next friend.

14. The legal brain of the third respondent worked swiftly and the same resulted in filing the interlocutory application by the first respondent through the next friend. Since biological parents are alive, it is really a wonder as to how a next friend can maintain an application on behalf of the minor. Unfortunately, this aspect was not considered by the learned Additional District Munsif, Salem.

15. The first respondent subsequently filed a suit in O.S.No.28 of 2011 through the next friend to recognise the Hiba. The said suit was dismissed as not pressed on 01.12.2014. Therefore, it is not open to the first respondent to take up the plea of Hiba henceforth. In fact, it was only after filing written statement by the petitioners, the suit in O.S.No.28 of 2011 was dismissed as not pressed. Therefore, the subsequent application in I.A.No.265 of 2013 to reopen the preliminary decree on the strength of the Hiba in favour of the first respondent is clearly not maintainable. This aspect was also not considered by the

learned Additional District Munsif.

16. The series of proceedings initiated by the respondents 2 and 3 through the first respondent clearly show that they wanted to enjoy the property owned by Mehurunissa, notwithstanding the entitlement of 2/3 shares by the petitioners.

17. There is no dispute that the first respondent earlier filed two applications to implead him as a party in the final decree proceedings. Those applications were filed by him on the ground that there was a Hiba in his favour and as such, petitioners are not entitled to a share in the properties left by Mehurunissa. Those applications were dismissed. The order has become final. Therefore, the first respondent is not entitled to take up a plea of Hiba hence forth with respect to the properties left by Mehurunissa.

18. In view of the judgment dated 01.12.2014 in O.S.No.28 of 2011 dismissing the suit as withdrawn and the order dated 19.01.2012 in I.A.Nos.112 and 114 of 2011, the subsequent application in I.A.No.265 of 2013 is not maintainable. The learned First Additional District Munsif, omitted to consider all these vital facts while allowing

the application in I.A.No.265 of 2013 by order dated 18.11.2014.

19. The documents available on record clearly shows that the third respondent is resorting to back seat driving to grab the property. The course of conduct adopted by him clearly shows that he wanted to deny the petitioners their due share. The learned I Additional District Munsif, unfortunately ignored the fundamental principles of law that in case an adverse order has been passed against a party in the very same subject matter, it would not be possible for him to file similar application for the very same relief later in the very same suit.

20. The order impugned in this civil revision petition clearly shows that the learned First Additional District Munsif without verifying the earlier order entertained the request of the first respondent. I am therefore of the view that this is a fit case to invoke Article 227 of the Constitution of India.

21. The application in I.A.Nos.919 of 2009 and 294 of 2009 in O.S.No.106 of 2007 are withdrawn from the file of the I Additional District Munsif, Salem and are transferred to the file of Principal District Munsif, Salem.

22. The learned Principal District Munsif, Salem is directed not to permit the parties to withdraw the suit in O.S.No.106 of 2007. In view of the preliminary decree passed in O.S.No.106 of 2007, dismissal of the application in I.A.No.112 of 2011 and the dismissal of the suit in O.S.No.28 of 2011, the first respondent is not entitled to take a plea of Hiba henceforth.

23. In the result, the order dated 18.11.2014 is set aside. The application in I.A.No.265 of 2013 is dismissed with costs quantified at Rs.25,000/-. The cost amount shall be paid to the petitioners within a period two weeks from the date of receipt of a copy of this order.

24. There shall be a further direction to the learned Principal District Munsif, Salem to dispose of the final decree applications on the strength of the preliminary decree dated 23.02.2007, as expeditiously as possible, and in any case on or before 31 March 2017 and report compliance to this Court.

25. The Civil Revision Petition is allowed as indicated above. No costs. Consequently, connected miscellaneous petitions are closed.

21.11.2016

Index : Yes/No
svki

To

- 1.The I Additional District Munsif, Salem
2. The Principal District Munsif, Salem

K.K.SASIDHARAN,J.

(svki)

C.R.P.(P.D.) No.270 of 2015

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