

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.01.2016

(Orders Reserved on : 16.12.2015)

CORAM:

THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

C.R.P.(NPD) No.1805 of 2013
and
M.P.No.1 of 2013

C.S.Kamalakshi ... Petitioner/first Plaintiff

Vs.

P.K.Balakrishnan ...Respondent/Defendant

Prayer: Petition is filed under Article 227 of the Constitution of India, against the order dated 07.01.2013 made in I.A.No.2 of 2004 in O.S.No.3 of 2004 on the file of the learned District Judge, Nilgiris at Udagamandalam.

For Petitioner : M/s.R.Gouri

For Respondent : Mr.S.K.Rakhunathan

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ORDER

This Civil Revision Petition is filed by the petitioner/first plaintiff, against the order dated 07.01.2013 passed by the learned District Judge, Nilgiris at Udagamandalam, in I.A.No.2 of 2004 in

O.S.No.3 of 2004, in and by which, in the application filed by the revision petitioner/first plaintiff for appointment of Commissioner to divide the suit schedule property as per the preliminary decree and to pass the final decree, Commissioner was appointed to execute the first suggestion of this Court and file report on or before 11.2.2013.

2. Learned counsel for the petitioner/first plaintiff contended that the trial Court, without proper application of mind and without giving any opportunity to the petitioner, passed an order directing the Commissioner to make a publication for auctioning of the suit property. The learned counsel further contended that the trial Court has failed to consider the fact that the petitioner and her daughters are not willing to sell the property in public auction. The respondent/defendant is having only 1/12th share and the petitioner and other plaintiffs are having 11/12th share in the suit property. The respondent/defendant is not in the possession of the suit property and therefore, he is not interested for division of the property by metes and bounds according to his respective shares. Therefore, the learned counsel submitted that the impugned order of the trial Court, viz., to execute the first suggestion given by this Court in A.S.No.573 of 2005, is not at all maintainable and hence,

the same may be set aside and the Civil Revision Petition may be allowed. In support of his submissions, learned counsel for the revision petitioner relied on a decision of the Supreme Court reported in AIR 1978 SC 845 = 1978 (3) SCC 30 (Badri Narain Choudhry Vs. Nil Ratan Sarkar), wherein, the Supreme Court observed as follows:

"11. Sections 2 and 3 of the Act are interlinked. A perusal of Sections 2 and 3 will show that the Court can exercise the power under Section 3, if--"(i) there is a request by any of such shareholders interested individually or collectively to the extent of one moiety or upwards, for sale of the property and its distribution; and

(ii) it reaches an opinion that by reason of the nature of the property or the number of shareholders or some special circumstances, a division of the property cannot reasonably or conveniently be made, and that a sale of the property and distribution of the proceeds would be more beneficial for all the shareholders.

Even when both these conditions are satisfied, the Court has a discretion to direct or not to direct sale of the property and distribution of the proceeds. This is clear from the word "may" used in this section.

12. It will be seen from the above analysis that the request contemplated in (i) is a sine qua non for directing a sale because such a request necessarily signifies his willingness to have his share converted into money, so that the co-sharers may, by means of the procedure provided in Section 3, buy them out. The request for sale envisaged by Section 2 must be one for public sale. If no such request has been made to the Court, Section 3 cannot be brought into operation."

3. Learned counsel for the respondent/defendant submitted that there is no infirmity or illegality in the impugned order passed by the trial Court and therefore, the Civil Revision Petition may be dismissed.

4. This Court heard the submissions made by the learned counsel on either side and perused the materials available on record.

5. Admittedly, the plaintiffs 1 to 5 have filed the suit earlier in O.S.No.26 of 1998 on the file of the Sub-Court, Nilgiris at Uthagamandalam, for partition and separate possession of their total 11/12th share in the suit schedule property and the suit was decreed on 11.07.2002 as prayed for. The above five plaintiffs have jointly filed a final decree application in I.A.No.2 of 2004 and the said suit was transferred and re-numbered as O.S.No.3 of 2004 on the file of the District Court, Nilgiris at Uthagamandalam. The said final decree application was allowed on 12.08.2004. As against the order passing final decree, the second defendant (legal heir of the deceased first defendant) filed an appeal before this Court in A.S.No.573 of 2005 and this Court disposed of the said appeal on 04.08.2011, observing as follows:

"8. It is not in dispute that the appellant is having 1/12th share and the respondents are having 11/12th share. In the above mentioned property, ground floor consists of 2685 sq. ft, first floor consists of 1400 sq. ft and the total area is 4085 sq. ft. The vacant land of the suit property is 6334.75 sq. ft.

9. This Court, considering the objections raised and also the rival submissions made by both parties, is inclined to remit the matter back to the Court below. Therefore, while setting aside the matter in I.A.No.2 of 2004 in O.S.No.3 of 2004, the Court below shall consider the following while ordering partition of the suit schedule properties as to whether

"(i) The Commissioner can be directed to make a publication regarding auctioning of the property and further both parties are at liberty to bring bidders and they are also permitted to participate in the bid and the Court below shall decide the successful bidder and the sale proceeds shall be divided between the parties in respect of the shares as already determined by the Court below and in the alternative;

(ii) Without allotting any share in the open space to the appellant, an extent of 340 sq. ft (out of total extent of 4085 sq. ft, 1/12th share comes to 340 sq. ft) can be provided in the building with access to the property or

(iii) A common pathway can be provided in the land for access facility considering the shares allotted to the parties if the other side agrees or the entire space can be spared to the appellant himself towards his shares

(iv) The trial Court is also at liberty to decide the issue after hearing the both sides".

and pass suitable orders after hearing the parties in the final decree proceedings. The parties are directed to appear before the Court below on 12.09.2011."

6. As against the above said judgment of this Court in A.S.No.573 of 2005, dated 04.08.2011, no appeal was preferred by either parties before the proper forum. Hence, the said judgment of this Court dated 04.08.2011 has become final. Thereafter, the

matter was sent back to the trial Court, viz., District Court and the District Court restored the final decree application to file and the trial Court issued notice and took up the matter on file and attempted to form consensus regarding which mode of partition could be taken up. In spite of giving several chances, there was no consensus among the parties to decide the second, third and fourth options of this Court. Hence, the trial Court, by the impugned order, appointed Advocate Commissioner to execute the first suggestion of this Court and file report on or before 11.02.2013 and his fee was fixed at Rs.25,000/- to be paid by the applicant directly.

7. Being not satisfied with the impugned order of the trial Court, the first plaintiff alone has preferred this Civil Revision Petition. Totally, in final decree application, there are five plaintiffs, but this C.R.P. is filed only by the first plaintiff without adding the other plaintiffs as the co-revision petitioners or respondents. The plaintiffs are jointly allotted 11/12 th share in the suit property. If at all the other co-plaintiffs refused to join with the first plaintiff, they must be added as the respondents in the present Civil Revision Petition. Without adding the other plaintiffs as co-revision petitioners or respondents, this Civil Revision Petition is not maintainable and it is liable to be dismissed. Since the other

plaintiffs 2 to 5 are not added as co-revision petitioners or respondents, they have no knowledge of this Civil Revision Petition and it is not known as to whether they are aggrieved by the impugned order of the trial Court, even though they are jointly entitled to 11/12 th share in the suit property. Since other co-plaintiffs 2 to 5 are not added as co-revision petitioners or respondents, this Civil Revision Petition preferred only by the first plaintiff, is not maintainable. Accordingly, the Civil Revision Petition is dismissed as not maintainable. No costs. The Miscellaneous Petition is closed.

05.01.2016

Index :Yes / No
Internet :Yes / No
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To

The District Judge,
Nilgiris at Udagamandalam.

G.CHOCKALINGAM, J.

JrI

Order in

C.R.P.(NPD).No.1805 of 2013

05.01.2016