

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: **08.09.2016**

CORAM:

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

C.R.P.(P.D.) No.2652 of 2016 and
CMP.No.13652 of 2016

1.V.E.K.Abdul Razak
2.V.E.K.Syed Ibrahim

...Petitioners

versus

V.E.K.Kader Jahan

...Respondent

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and decreetal order dated 05.07.2016 made in I.A.No.1 of 2016 in O.S.No.6559 of 2014 on the file of XVIII Additional Judge, City Civil Court, Chennai.

For Petitioner : Mr.N.A.Nissar Ahmed

ORDER

The respondent filed an application before the Trial Court for amendment of plaint to incorporate a plea regarding joint possession. The application was allowed by the Trial Court, notwithstanding the objection raised by the petitioners with regard to the maintainability of such application, after filing an interlocutory application by them for a direction to the respondent to pay proper court fee on the premise that

the respondent is out of possession. Feeling aggrieved, the petitioners have come up with this Civil Revision Petition.

2. The learned counsel for the petitioners contended that even as per plaint averments, the petitioners are in possession of the property. There was no pleading with respect to joint possession. The petitioners filed an application for a direction to the respondent to pay proper court fee. It was only to get over that application, the respondent has filed the application for amendment. The learned Trial Court without considering the background facts wrongly allowed the said application.

3. The learned counsel placed reliance on a decision of this Court reported in **CDJ 2011 MHC 3383 [Balasubramaniam and others v. Masilamai and others]**, wherein, it was observed that in case the parties are not in possession of the property, they need to pay proper court fee.

4. The factual matrix indicates that the suit property originally belonged to Thiru.V.E.K.Abdul Kareem. He died intestate on 14.05.1986, leaving behind the petitioners and the respondent. Since the petitioners failed to initiate action for partition of the property, the

respondent filed the suit in O.S.No.6559 of 2014. The respondent in the plaint in O.S.No.6559 of 2014 made a claim that he is entitled to a share in the property. He has also stated that the petitioners herein are in physical possession of the property. It was only by making use of the said averment with regard to physical possession, the petitioners filed application before the Trial Court to direct the respondent to pay proper court fee treating him as a person not in possession of the property. It is also a matter of record that thereafter, the respondent filed an application for amendment of the plaint so as to incorporate a plea regarding joint possession.

5. The petitioners have no case that their father died after executing a Will. The natural corollary is that the petitioners and respondent are entitled to a share in the property left by their predecessor in interest. Event though the respondent has made a claim that he is also entitled to a share in the property, the plaint was not happily worded. He has only stated that the petitioners are in physical possession of the property. Just by saying that the petitioners are in physical possession of the property, it cannot be said that the respondent has admitted that their possession is adverse. The plaint, if taken as a whole would show that the respondent has made a claim

that he is entitled to a share in the property. He has simply stated that the petitioners are in physical possession of the property. By being in physical possession, the petitioners cannot be heard to say that they have excluded the respondent from possession of the property and as such, it is not a joint family property liable for partition. This aspect was rightly considered by the learned Trial Judge. I do not find any error or illegality in the findings recorded by the learned Trial Judge warranting interference by this Court by invoking the revisional jurisdiction under Article 227 of the Constitution of India.

6. In the up shot, I dismiss the Civil Revision Petition. No costs. Consequently, connected miscellaneous petition is closed. It is open to the petitioners to file a written statement in view of the amendment now made in the plaint. The learned Trial Judge is directed to decide the suit on merits without influenced by the observations made in this order. No costs. Consequently, connected miscellaneous petition is closed.

08.09.2016

Index:Yes/No
svki

To

The XVIII Additional Judge, City Civil Court, Chennai.

K.K.SASIDHARAN,J.

(svki)

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