

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 29.11.2016

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

CRP(NPD)No.2224 of 2012

1.Mallika

2.Ekatha

... Petitioners

Vs.

1.Rani Ammal

2.Mannu Ammal

3.Rukku

4.Murugan

5.Padma

..Respondents

Prayer: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the order and decretal order dated 28.09.2011 made in E.P.No.211 of 2007 in O.S.No.669 of 1973 on the file of the learned Principal District Munsif Court, Kancheepuram.

For Petitioners : Mr.M.Sriram

For Respondents : M/s.A.Sumathy

ORDER

The defendants in O.S.No.669 of 1973 are the revision

petitioners herein. The 1st respondent as plaintiff has filed the above suit for partition in which a Preliminary Decree was passed on 12.09.1977. Based on the preliminary decree, the final decree application in I.A.No.1114 of 2006 was filed by the revision petitioners/defendants 2 and 3 and in the final decree application, commissioner was appointed and he filed a report stating that item No.3 in the suit schedule is a house property and the same is incapable of partition. Therefore the lower court by directing the parties to file appropriate application as per Section 2 and 3 of the Partition Act and closed the final decree application.

2. Thereafter the revision petitioners filed execution petition in E.P.No.211 of 2011 for delivery of property which was allotted as their share in the final decree application in I.A.No.1114 of 2006 dated 17.10.2006.

3. In the said E.P, the respondents herein filed counter and contended that since the house property in item No.3 is indivisible, the revision petitioners ought to have filed necessary application under Section 3 of the Partition Act in the final decree proceedings itself. Further without filing such application the petitioners herein straight away filed the execution petition and the same is not at all maintainable in law. Again the revision petitioners have included all the

lands in the execution petition as if it was allotted to them. Hence they prayed to dismiss the above execution petition. The Learned Principal District Munsif upon considering the case of the parties, was thus pleased to dismiss the E.P.No.211 of 2007 by an order dated 28.09.2011 by holding that unless the petitioners invoke Section 2 & 3 of Partition Act in the final decree application, they cannot maintain the EP and they have no right to execute the decree.

4.I heard Mr.M.Sriram, learned counsel appearing for the petitioners and M/s.A.Sumathy, learned counsel appearing for the respondents and perused the entire records.

5.On perusal of the impugned order, it is found that the execution petition filed by the revision petitioners/decreed holders/2nd & 3rd defendants is dismissed in whole by holding that the decree on hand is a defective one and hence it is non executable. It is noticed by this court that the entire controversy which made the execution court to determine the decree as non executable, rest on an indivisible house property in item No.3 of the suit schedule.

6.According to the execution court as well as the commissioner report in final decree proceedings, the house property in item No.3 is indivisible and cannot be partitioned by meets and bounds. Therefore it

is held by the execution court that unless otherwise the petitioners invoke section 2 of Partition Act and make an application to court auction the house property, so as to sell the property and distribute the auctioned value in line with their respective shares, the Decree cannot be executed.

7.No doubt that the execution court was right in holding as such to invoke Section 2 of Partition Act, however, at the same time this court is not in a position to appreciate the dismissal of the execution petition holding that the decree is non executable and defective one. It is needless to say that the parties herein are before the court of law praying for Partition from the year 1973, besides that the Execution Court cannot go beyond the Decree. Therefore this court is of the considered opinion that one more opportunity could be granted to the parties to work out their remedy in the execution petition. On the other hand if the dismissal of the execution petition is upheld by this court, definitely it would affect the final decree made in the above suit. Further, it is to be pointed out that the respondents herein have not challenged the final decree and they allowed the same to become final. Now they cannot agitate the merits of the matter in the execution proceedings.

8.In view of the facts involved in the case, the impugned order is hereby set aside by giving liberty to the petitioners and respondents to

file an appropriate application in the final decree proceedings and in the execution petition under Section 2 of Partition Act to enforce and execute the decree, if so advised. Such application shall be made by the parties within a period of one month from the receipt of copy of this order. In turn the concerned court shall take the application on file and shall dispose of the same within a period of 3 months thereafter.

9. With above directions, this Civil Revision Petition is allowed by setting aside the order and decretal order dated 28.09.2011 in E.P.No.211 of 2007 in O.S.No.669 of 1973, on the file of the learned Principal District Munsif Court, Kancheepuram. The petitioners/decreed holders are entitled to execute the portion of the decree in the suit in O.S.No.669 of 1973. No costs.

29.11.2016

vs

Note: Issue order copy on 14.11.2017

Internet: Yes

Index: Yes

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M.V.MURALIDARAN, J.

VS

To

The Principal District Munsif Court,
Kancheepuram.



**Pre-delivery order made in
CRP(NPD)No.2224 of 2012**

29.11.2016

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