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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
DATED : 05.12.2016
CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI
C.R.P. (MD) No.962 of 2013 (PD)
& M.P. (MD) No.1 of 2013

1.V.Veeranan
2.O.Panchavarnam

.. Petitioners

Vs.

1.Varadharajan, S/o.Paramasivam
2.Senthilkumar, S/o.Paramasivam
3.Karthikeyan, S/o.Paramasivam
4.Sathiyabama, W/o.Karuppanan
5.Amirdha Valli, W/o.Reguraman
6.Meenachi, W/o.Nandhakumar
7.P.Sreenivasan, S/o.K.Perumal
8.Alamelu, W/o.P.Ramanathan

.. Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India, against the order and decreetal order, dated 27.04.2013, made in I.A.No.1056 of 2011 in O.S.No.299 of 2004, on the file of the District Munsif Court, Melur.

For Petitioners : Mr.V.Sitharanjandas
For R1 to R6 : Mr.R.Suriyanarayanan
For R7 & R8 : No Appearance

ORDER

This Civil Revision Petition has been filed against the order and decreetal order, dated 27.04.2013, made in I.A.No.1056 of 2011 in O.S.No.299 of 2004, on the file of the District Munsif Court, Melur.

2. The petitioners are the plaintiffs 2 and 3 in O.S.No.299 of 2004 and the respondents 1 and 2 in I.A.No.1056 of 2011 on the file of the District Munsif Court, Melur. The respondents 1 to 6, who are third parties, are the petitioners in I.A.No.1056 of 2011. The respondents 7 and 8, who are the defendants 2 and 3, are the respondents 3 and 4 in the said I.A.

3. Facts of the case:

(i) Originally, on 19.02.1993 the first plaintiff - Mookammal @ Irulayee filed the suit in O.S.No.283 of 1983, before the II Additional Subordinate Court, Madurai, against the respondents 1 and 8 and one Krishnammal, one of the daughters of Amirtham Ammal, who is the one of the daughters of Amma Pillai @ Rakayee, for declaration and permanent injunction, by virtue of



the Will, dated 24.03.1972, executed by Amma Pillai @ Rakkayee in favour of Mookammal @ Irulayee.

(ii) Pending suit, on 16.09.1993, the said Krishnammal, mother of the respondents 1 to 6, died and thereafter, on 20.01.2001, the first plaintiff Mookammal @ Irulayee died. On 19.07.2002, the petitioners/plaintiffs 2 and 3 herein were brought on record as legal representatives of the deceased first plaintiff. The said Krishnammal, mother of the respondents 1 to 6 did not contest the suit and was set *ex parte* on 27.07.1993 and subsequently, on 16.09.1993, she died. Thereafter, the suit in O.S.No.283 of 1993 was transferred to the District Munsif Court, Madurai, and renumbered as O.S.No.221 of 1996. The first plaintiff - Mookammal @ Irulayee filed a Memo, dated 24.09.1997, to exonerate the first defendant from the suit. By order dated 26.09.1997, the said Krishnammal was exonerated and the suit was proceeded with. Thereafter, the suit in O.S.No.221 of 1996 was transferred to the II Additional Subordinate Court, Madurai, and renumbered as O.S.No.283 of 1996. One of the Attestors of the Will was examined as P.W.2. Subsequently, the suit in O.S.No.221 of 1996 was transferred to District Munsif Court, Melur, and renumbered as O.S.No.299 of 2004. On 17.09.2004, the defendants 2 and 3 were set *ex parte* and the suit was decreed. Thereafter, on 22.07.2005, I.A.No.197 of 2005 filed to set aside the *ex parte* decree was dismissed. On 06.03.2006, the *ex parte* decree was set aside in C.M.A.No.58 of 2005. Thereafter, P.Ws.3 and 4 were examined on the side of the plaintiffs. D.W.1 was examined on the side of the defendants 2 and 3. On 23.11.2010, I.A.Nos.241 and 242 of 2010 were filed to re-open the plaintiff's evidence and recall P.W.3 at the instance of the defendants 2 and 3 and the said applications were dismissed. On 24.03.2011, the matter was argued by the parties in full and written arguments were also filed. Thereafter, on 22.07.2011, the petition filed with a request to facilitate the defendants 2 and 3, for filing petitions for re-opening the defendants' evidence and recall D.W.1, was dismissed. Tr.O.P.No.42 of 2011, for transferring the suit was filed and the same was also dismissed.

(iii) On 24.11.2011, the respondents 1 to 6/legal heirs of the first defendant Krishnammal have filed I.A.No.1056 of 2011, for impleading themselves as parties in the suit. The respondents 1 to 6 contended that they are interested in the suit property and therefore, they are necessary and proper parties in the suit. The petitioners filed counter affidavit and contended that the respondents 1 to 6 are not necessary and proper parties and opposed the same. The petitioners submitted that only at the instigation of the respondents 7 and 8, who are defendants 2 and 3, the respondents 1 to 6 have filed I.A.No.1056 of 2011, for impleading themselves as parties in the suit after 18 years of death of their mother. The mother of the respondents 1 to



6 did not contest the suit and she remained *ex parte* on 27.07.1993. Therefore, the respondents 1 to 6 are not proper and necessary parties in the suit.

(iv) The learned District Munsif, Melur, considering the averments in the affidavit and the counter affidavit and the judgments relied on by the learned counsel for the parties, allowed the application, vide order dated 27.04.2013, holding that it is the duty of the petitioners to implead the legal heirs of the deceased first defendant and they must take steps in this regard. The learned District Munsif after taking note of the fact that the respondents 1 to 6 had sought the relief after several years, allowed the application in order to avoid further complication.

4. Against the said order, dated 27.04.2013, the present Civil Revision Petition has been filed.

5. The learned counsel for the petitioners has referred to the grounds raised in the Civil Revision Petition and contended that the 7th respondent dragged on the proceedings and even after 18 years of filing of the suit, the same has not attained finality. The learned counsel for the petitioners contended that the Memo filed by their mother/first plaintiff to exonerate the first defendant must be treated as an application claiming exemption under Order 22 Rule 4 C.P.C. He further contended that the suit was filed in the year 1993 and the first defendant was set *ex parte* on 27.09.1993 and she died on 16.09.1993 and she was exonerated on 26.09.1997 on the Memo filed by the first plaintiff. The application filed by the respondents 1 to 6 in the year 2011, in the circumstances, is not maintainable and devoid of merits. The learned District Munsif without properly considering these facts, allowed the application for impleading the respondents 1 to 6 as party defendants and committed an irregularity and has not exercised the jurisdiction properly and prayed for allowing the Civil Revision Petition.

6. In support of his contentions, the learned counsel for the petitioners relied on the judgment reported in 2003 (1) SCC 476 [Zahirul Islam Vs. Mohd. Usman and others], wherein at paragraph 4, it has been held as follows:

"4. The impugned order was passed by the High Court on the application of the appellant legal representative of the deceased Defendant 2 who is said to have died on 1.2.1995. He sought stay of execution of the decree in proceedings under Order 9 Rule 13 of the Code of Civil Procedure, 1908. That application was dismissed. He approached the High Court by filing civil revision petition. The High Court dismissed the revision on the ground that the



deceased Defendant 2 had not chosen to appear before the trial court and the matter proceeded ex parte during his lifetime. The order of the High Court is under challenge in this appeal."

7. Per contra, the learned counsel for the respondents 1 to 6 submitted that the mother of the respondents 1 to 6 is also entitled to a share in the suit property and after her death, they have inherited her share in the suit property. Therefore, they are necessary and proper parties for proper adjudication in the suit. The learned District Munsif has exercised the jurisdiction conferred on her properly and there is no illegality or irregularity in the order passed by the learned District Munsif, Melur.

8. In support of his submissions, the learned counsel for the respondents 1 to 6 relied on the following judgments:

(i) AIR 1958 SC 886 : 1958 (2) MLJ 193 [Razia Begum Vs. Sahebzadi Anwar Begum and others]

(ii) AIR 1978 Mad 384 : 1978 (91) LW 468 : 1977 (90) LW 469 [Aruppukottai Sri Jaya Vilas (P.) Ltd., Vs. K.N.Karuppiah and others], wherein at paragraphs 4 and 5, it has been held as follows:

"4. In the present case, the suit is one for recovery of damages sustained in an accident. The first defendant is the owner of the lorry and the second defendant is the Insurance Co. It may not be proper and comprehensive adjudication of the question that may come up for consideration, if the suit is to be decided in the absence of the first defendant. Even assuming that the plaintiff can institute a fresh suit as contemplated under Order 1, Rule 10 (2) (sic) (Order 9, Rule 5 (2)?) C.P.C., there is a likelihood that conflicting decisions may be rendered in the suits.

5. A similar question arose for consideration before the Calcutta High Court, and in Setabi Dei v. Ramdhani Shaw and Others, Mallick J. held that there is no reason why, power under Order 1 Rule 10 (2), could not be exercised in appropriate cases by adding a person as a party against whom an order under Order 9, Rule 5, C P. C. has been passed previously. I appreciate the view taken by the learned Judge and adopt the same and in my opinion, even in cases where the suit has been dismissed as against the defendant or defendants concerned under Order 9, Rule 5, C.P.C., yet the court may have the power to implead the very same defendant or defendants concerned by

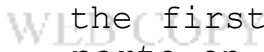


exercise of power under Order 1 Rule 10 (2) C. P. C. to give a complete and comprehensive adjudication of the questions that would arise for consideration in the suit. In the present case, the court below was under the impression that the order of dismissal passed earlier against the first defendant, admittedly under Order 9, Rule 5, C. P. C., can be set aside by an application. This approach is not tenable on the facts of the case. There is a warrant for adding the first defendant again as a party defendant to the suit. Since the correct principles have not been applied by the court below, to the facts of the present case, I am inclined to allow this revision. Hence, this revision is allowed, and the order of the court below is set aside and the application I. A. No. 779 of 1973 in O.S. 380 of 1972 on the file of the District Munsif, Sattur, will stand allowed and the court below will proceed with the suit after adding the first defendant as a party defendant to the suit. There will be no order as to costs in this revision.

(iii) 2003 (1) LW 549 : 2003 (1) MLJ 536 [V.R.Subbaraya Gounder and Sons Vs. S.K.Samy and Sons and State], wherein at paragraph 5, it has been held as follows:

5. According to the petitioner/first defendant, the goods in question were admittedly deposited by it in the warehouse of M/s.S.K.Samy and Sons, the first respondent/plaintiff and when the suit was filed by the first respondent/plaintiff, the petitioner and the son of the petitioner were arrayed as the defendants 1 and 2 in the suit. When the application was filed by the defendants 1 and 2 to order appointment of Commissioner to take inventory of the goods in the plaintiff's premises, the names of the defendants 1 and 2 have been exonerated and as such, the petitioner-firm was constrained to file the present I.A. for impleading it as a party to the suit with a view to protect its interest in the goods deposited by it with the plaintiff-firm."

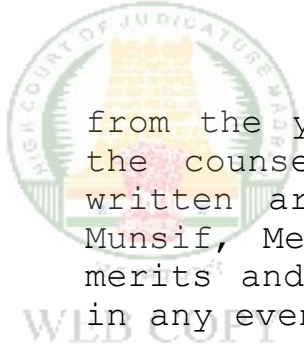
9. Notice was served on the 7th respondent and he has entered appearance through his counsel. Today, when the matter is taken up for hearing, there is no representation on behalf of 7th respondent. Though notice was served on the 8th respondent and her name is printed in the cause list, she has not chosen to appear either in person or through counsel.



12. It is relevant to extract Order 22 Rule 4(4) C.P.C.

4. The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

14. In the circumstances, the Civil Revision Petition is allowed. No costs. Consequently, the connected miscellaneous petition is closed. Considering the fact that the suit is pending



from the year 1993 and already the trial was conducted and both the counsel for the plaintiffs and the defendants filed their written arguments on 24.03.2011, I direct the learned District Munsif, Melur, to dispose of the suit in O.S.No.299 of 2004, on merits and in accordance with law, as expeditiously as possible, in any event, not later than 28th February, 2017.

Sd/-
Assistant Registrar(CO)

/TRUE COPY/

Sub Assistant Registrar

To
The District Munsif,
Melur.

+1cc to Mr.V.Sitharanjandas,Advocate Sr.No.79317

C.R.P. (MD) No.962 of 2013 (PD)
& M.P. (MD) No.1 of 2013
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