

THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

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C.R.P.No.451 of 2016

ORDER:

This Civil Revision Petition, under Section 115 of C.P.C, is preferred by the appellant in A.S.No.157 of 2011 and the defendant in O.S.No.7186 of 2007. I.A.No.1410 of 2014 was filed under Order 41 Rules 23 and 25, read with Section 151 of C.P.C, to frame an additional issue with regards the common seri between the property of the petitioner and the respondent i.e whether there was a common seri between the two properties of the petitioner and the respondent; and to adjudicate the same by recording oral evidence.

An elaborate counter affidavit was filed by the respondent herein. The Court below, however, merely observed that the petitioner, in her original plaint, did not plead about the common seri; the common seri between her property and the property of the respondent herein was pleaded in the written statement filed by her in O.S.No.7186 of 2012; the lower Court had not framed any issue with regards the common seri but, as per the oral and documentary evidence adduced by both the parties, the lower Court had discussed about the common seri in its judgment; and it had found that P.W.1 (petitioner) had no right over the common seri which exclusively belonged to D.W.1.

The Court below, thereafter, examined the matter on merits and held that Ex.A.1 did not disclose that there was a common seri on the south of the petitioner's property; it was clear that the common seri and the house of the petitioner were situated on the northern side of the respondent's property; and it was not the case of the petitioner that, as per Ex.A.1, she had a right over the common seri. On the basis of these facts the Court below was of the view that there was no need to frame an additional issue with regards the common seri.

Before us Sri A.Manik Prabhu, learned counsel for the petitioner, would contend that the Court below, without examining whether the petitioner's application for framing an additional issue should be entertained or not, had examined the matter on merits, and had held against the petitioner on the question of existence of a common seri; the

findings recorded by the Court below on facts could not have been considered at that stage; the findings, recorded in the order under revision, were erroneous; and, as the Court below had exceeded its jurisdiction in rejecting the petitioner's request, for an additional issue to be framed, on facts, the order under revision necessitated being set aside.

On the other hand Sri Rupendra Mahendra, learned counsel for the respondent, would submit that this plea of a common seri was not even taken in the original plaint; an application was filed for amendment of the pleadings to include the plea with regards existence of a common seri; the said application was dismissed by the trial Court; the petitioner did not question the said order thereafter; and, in such circumstances, the appellate Court was justified in rejecting the petitioner's request that additional issues be framed at the appellate stage. Learned counsel would further submit that, subsequent to the order passed by the Court below, the petitioner had filed O.S.No.536 of 2016 seeking declaration of title over the common seri; and, as the petitioner had filed a separate Suit in this regard, the question of an issue being framed in the present suit would not arise.

While the submission of Sri Rupendra Mahendra, learned counsel for the respondent, cannot be said to be without merit, the fact remains that none of the contentions, now urged by the learned counsel before this Court, were even considered by the appellate Court in the order under revision. The Court below was primarily concerned with the question whether or not an additional issue should be framed and, at that stage, it could not have examined the matter on merits. While Sri Rupendra Mahendra, learned counsel for the respondent, would request this Court to examine the order under revision on facts also, I consider it wholly inappropriate to do so as these are all matters which the appellate Court should have considered before disposing of I.A.No.1410 of 2014.

The order under revision is set aside and I.A.No.1410 of 2014 is restored to file. As the appeal relates to the year 2011, against a suit filed in the year 2007, it is but appropriate that the Court below decides I.A.No.1410 of 2014 with utmost expedition, preferably within three months from the date of receipt of a copy of this order. It is made clear that it is open to both the parties to raise all contentions, including those urged

The C.R.P. is disposed of accordingly. Miscellaneous Petitions pending, if any, shall also stand disposed of. There shall be no order as to costs.

10th June 2016.
JSU

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Date: 10.06.2016

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