

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 04.11.2016

PRONOUNCED ON : 12.09.2017

CORAM :

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Crl.A.No.313 of 2011

Mr.Vijaya

... Appellant

Vs.

1.Mrs.Havamma Basha
2.Rabia
3.Abdullah
4.Mohammed
5.Sakunthala
6.R.Santhana Lakshmi
7.Veera Srinivasan

... respondents

PRAYER : Criminal Appeal is filed under Section 341 of the Criminal Procedure Code, to set aside the order passed in IA.No.11738 of 2010 in OS.No.4329 of 2008 dated 09.04.2010 passed by the learned III Assistant Judge, City Civil Court, Chennai.

For petitioner : Mr.G.Vasudevan

For Respondents : Mr.S.Janarthanam for R2 to R4
Mr.R.Soundarrajan for R5 to R7

No appearance.

R1 – Notice served – No appearance.

JUDGMENT

This Criminal Appeal is filed by the appellant challenging the order passed by the III Assistant Judge, City Civil Court, Chennai made

in IA.No.11738 of 2010 in OS.No.4329 of 2008 dated 09.04.2010.

2. The appellant filed the suit for partition of the suit schedule property into 1/8th equal share and allot one such share to the respondent herein and obtained an exparte preliminary decree dated 24.03.2009 and thereafter the appellant filed IA.No.16874 of 2009 for appointment of Advocate Commissioner and IA.No.16875 of 2009 for passing final decree in the above suit. The trial Court passed the order on 16.12.2009 for appointment of Advocate Commissioner and ordered remuneration of Rs.8,000/- to inspect the suit schedule property and divide the same as per the preliminary decree. In the meanwhile, the respondents 2 to 4 filed a petition to set aside exparte preliminary decree without serving notice to the first respondent in IA.No.23936 of 2009 against the exparte preliminary decree in OS.No.4329 of 2008 and the same was dismissed on 07.12.2009.

3. The learned Advocate Commissioner after receiving the remuneration on 07.01.2010, issued notice on 09.02.2010 to all the parties by fixing the date on 21.02.2010 at 11.00am to inspect the suit schedule property and to divide the same as per the preliminary decree. Suddenly, the respondents/defendants counsel given a letter dated 17.02.2010 to the learned Advocate Commissioner stating that

the respondents 2 to 4 have already moved petition to set aside the exparte preliminary decree and will obtain order from the Court on 23.03.2010 in the petition and also stated that not to execute the Advocate Commissioner warrant till the order of the Court on set aside petition. The same was intimated to the appellant counsel through telegram on 20.02.2010 by the learned Advocate Commissioner.

4. The case of the appellant is that no such application is pending before the Court either prior to the letter dated 17.02.2010 or until 21.02.2010. Infact the respondents 2 to 4 filed restoration petition on 15.12.2009 against the order of IA.No.23936 of 2009 without notice to the first respondent/first defendant and the same was returned and taken by them. The said petition was represented only on 22.02.2010 with the petition to condone the delay in representation and the same was numbered as IA.No.4233 of 2010 and subsequently the delay was condoned and petition was allowed and IA.No.4232 of 2010 for restoration was dismissed on 18.03.2010. Thereafter, the petitioner obtained fair and decreetal order on 29.03.2010 and filed caveat petition No.32438 of 2010 dated 06.04.2010 before this Court. Once again, the learned Advocate Commissioner fixed the date for inspection on 17.04.2010 at 12.50pm.

5. In the said circumstances, the second respondent herself and on behalf of the respondents 3 and 4 filed a petition on 15.04.2010 seeking for stay in IA.No.7796 of 2010 against the order dated 18.03.2010 made in IA.No.4232 of 2010 and sworn in false affidavit in petition for stay stating that they have filed C.A. for the certified copy of the fair and decreetal order before the Court knowingly that they are false and thereby they have committed the offence of perjury punishable under Section 193 of IPC r/w. Section 195(1)(b) Cr.PC.

6. Further the appellant states that as per the above sworn in affidavit in IA.No.7796 of 2010, there is no such copy application(C.A.) filed on or before 15.04.2010. The respondents 2 to 4 have filed false affidavit and petition for stay on 15.04.2010 with false statement by misleading the trial Court and obtained notice order on 16.04.2010 and stopped the Advocate Commissioner's inspection to be held on 17.04.2010 and caused mental agony to the appellant. When there is no copy application (C.A.) has been filed on or before 15.04.2010, the respondents 2 to 4 deliberately filed a false affidavit in the stay petition stating that they filed copy application, thus the respondents 2 to 4 have committed the offence under Section 193 of IPC r/w. Section

195(1)(b) Cr.PC. On perusal of the records, the respondents 2 to 4 have filed a copy application through their counsel for certified copy in CA.No.10597 of 2010 in IA.No.4232 of 2010 in OS.No.4329 of 2008 only on 21.04.2010 and not on or before 15.04.2010 as stated in the sworn in affidavit.

7. The case of the respondents 2 to 4 is that the appellant filed the suit for partition against the respondents, the suit property has been purchased by the deceased father out of his own self earnings. The appellant obtained an ex parte decree for non filing of the written statement. The fact that the counsel had filed the copy application and the respondents have been resisting the suit on the ground that the suit property has been purchased only out of the self earning funds of the respondents father and the appellant herein has no right title and interest over the suit property and they have not committed any act of perjury as alleged by the appellant. The appellant had filed vexatious petition against the respondents with an malafide intention, the averments made in the affidavit in IA.No.7796 of 2010 would not in any way amounts to perjury. Hence, the respondents prays for dismissal of the appeal.

8. The trial Court framed the following point for determination is

as to whether the petition can be allowed.

9. In order to prove the case of the appellant before the trial Court, the appellant had produced four documents viz., Ex.P1 to Ex.P4, the trial Court after considering the facts and circumstances of the case and also the materials placed before it, dismissed the interlocutory application filed by the appellant. Aggrieved against the said order, the appellant filed the present appeal before this Court.

10. Heard the rival submissions made on both sides and perused the available records.

11. The learned counsel for the appellant would submit that after obtaining exparte preliminary decree in OS.No.4329 of 2008 dated 24.03.2009, the appellant filed two applications one for appointment of Advocate Commissioner and another for passing final decree. The trial Court appointed an Advocate Commissioner in IA.No.16874 of 2009 dated 16.12.2009, after receiving the Commissioner's warrant, the learned Advocate Commissioner after issuing notice to all the parties, fixed the date for inspection on 21.02.2010 at 11.00am. At that time, the counsel for the respondents 2 to 4 given a letter dated 17.02.2010

stating that the respondents 2 to 4/defendants 2 to 4 have already moved petition to set aside the exparte preliminary decree and will obtain the order on 23.03.2010, therefore, the Advocate Commissioner could not inspect the property on the said date. On verification, there is no such application pending before the Court either prior to 17.02.2010 or until 21.02.2010. The respondents counsel sent the letter only with an intention to stop the inspection process of the Advocate Commissioner. Infact the respondents 2 to 4 filed restoration petition on 15.12.2009 against the order passed in IA.No.23936 of 2009 without giving notice to the first respondent/first defendant and the same was returned and taken by them. Thereafter, the said petition was represented only on 22.02.2010. The petition in IA.No.4233 of 2010 to condone the delay was allowed and IA.No.4232 of 2010 for restoration was dismissed on 18.03.2010. Thereafter, the petitioner obtained fair and decreetal order on 29.03.2010 and filed caveat petition No.32438 of 2010 dated 06.04.2010 before this Court. Once again, the learned Advocate Commissioner had taken steps to execute the warrant and fixed the date for inspection on 17.04.2010 at 12.50pm. In such circumstances, the second respondent herself and on behalf of the respondents 3 and 4 filed a petition on 15.04.2010 seeking for stay in IA.No.7796 of 2010 against the order dated

18.03.2010 made in IA.No.4232 of 2010 and sworn in false affidavit in petition for stay stating that they have filed copy application (C.A.) for the certified copy of the fair and decreetal order before the Court knowingly that they are false and thereby they have committed the offence of perjury.

12. The counsel for the respondents would submit that they have not made any false application and they gave instruction to their counsel to make an arrangement to file an appeal against the order of dismissal of restoration application and the respondents have nothing to do with it and they have not made any false allegation, therefore, the appeal is liable to be dismissed. The trial Court considered all the aspects elaborately and after carefully perusing the records and the applications filed by the parties rightly dismissed the application filed by the appellant. There is no valid grounds raised in this appeal to interfere with the order of the trial Court.

13. It is the case of the appellant that the suit is filed for partition of the suit schedule properties into 1/8th equal shares and for allotment of one such share to the appellant/plaintiff and for separate possession and got an exparte preliminary decree. The respondents 2

to 4 filed petition for setting aside the exparte preliminary decree, the same was returned and not represented. Thereafter, the appellant filed two applications for appointment of an Advocate Commissioner and for passing final decree. The trial Court allowed the application for appointment of Advocate Commissioner, inturn the Advocate Commissioner has also taken effective steps for executing the warrant. But the respondents 2 to 4 prevented the Advocate Commissioner from executing the warrant by filing false affidavit before the Court. Therefore, the appellant filed petition before trial Court under Section 340 of Cr.P.C., to issue process to the respondents 2 to 4, for making complaint before the judicial magistrate to take action against the respondents 2 to 4 for filing false affidavit. But the trial Court simply dismissed the petition without assigning any valid reason, hence the appellant is before this Court by way of filing this appeal.

14. The case of the respondents 2 to 4 is that the appellant obtained exparte preliminary decree in their absence, the respondents have taken steps to set aside the exparte preliminary decree. In the meanwhile, due to some in adverted circumstances, they could not proceed with the application to set aside the exparte decree. Subsequently, filed petition for restoration and the same was dismissed. Challenging the order passed by the trial Court in IA.No.4232 of 2010 and applied CA, everything has been done by the counsel,

the counsel has taken steps and the respondents are not aware of stage by stage proceedings before the Court and without knowing the actual position 2nd respondent made the averments in the affidavit under the instruction of the counsel. Therefore, there is no question of perjury arises at this stage.

15. On perusal of the records, the suit was filed by the appellant against the family members and the appellant obtained an ex parte preliminary decree. Thereafter, filed applications for appointment of Advocate Commissioner and for passing final decree. The respondents 2 to 4 filed application to set aside the ex parte decree in IA.No.23936 of 2009 and the same was dismissed on 07.12.2009. Subsequently, they have filed petition to restore the dismissal order and the same was returned and represented on 22.02.2010 with the petition to condone the delay in representation and the same was numbered as IA.No.4233 of 2010 and subsequently the delay was condoned and petition was allowed and IA.No.4232 of 2010 for restoration was dismissed on 18.03.2010. Thereafter, the appellant obtained fair and decretal order on 29.03.2010 and filed caveat petition No.32438 of 2010 dated 06.04.2010 before this Court. Once again, the learned Advocate Commissioner fixed the date for inspection on 17.04.2010 at

12.50pm. In the meanwhile, the second respondent herself and on behalf of the respondents 3 and 4 filed a petition on 15.04.2010 seeking for stay in IA.No.7796 of 2010 against the order dated 18.03.2010 made in IA.No.4232 of 2010 and sworn in false affidavit in petition for stay stating that they have filed C.A. for the certified copy of the fair and decreetal order before the Court knowingly that they are false and thereby they have committed the offence of perjury.

16. The main allegation taken on hand by the appellant is that the second respondent filed sworn in affidavit in petition for stay stating that they have filed copy application for the certified copy of the fair and decreetal order before the Court knowingly fully well that they are false and thereby they have committed the offence of perjury. Whereas, on bare reading of Ex.P3 shows that the content of the affidavit is in English and the petitioner therein who sworn in affidavit has signed in Tamil, wherein page 2 of the affidavit, it is seen that CA number and the date of filing are not mentioned in the affidavit and the same are left as blank, this shows the respondents 2 to 4 were not aware of all the aspects filed the affidavit before the Court. Further, this Court feels that the counsel only knows the stage of the case of

his/her parties and the content of the affidavit filed before the Court. It is the bounden duty of the counsel to make copy application after getting instructions from the parties as to whether they want to file an appeal against the order and the parties may not know about the procedure for filing copy application and when the counsel filed copy application and all.

17. Every false statement made in a plaint or a written statement may not invite a prosecution. The Court must before making a complaint be satisfied that it was expedient in the interest of justice to make an enquiry into the offence committed by the parties. At that stage, the Court only considers whether it is expedient in the interest of the justice that an enquiry should be made into any offence affecting administration of justice. The scope is confined to see whether the Court could then decide on the materials available that the matter requires inquiry by a criminal Court and that it is expedient in the interest of justice to have it inquired into.

18. Thus, for the discussions held above, this Court finds that there is no reason to interfere with the order passed by the trial Court and the same does not warrant any interference.

19. In the result, the criminal appeal stands dismissed by confirming the order made in IA.No.11738 of 2010 in OS.No.4329 of 2008 dated 07.04.2011 on the file of the III Assistant Judge, City Civil Court, Chennai.

12.09.2017.

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Index : Yes/No.

Internet : Yes/No.

To

The III Assistant Judge, City Civil Court, Chennai.



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P. VELMURUGAN, J.

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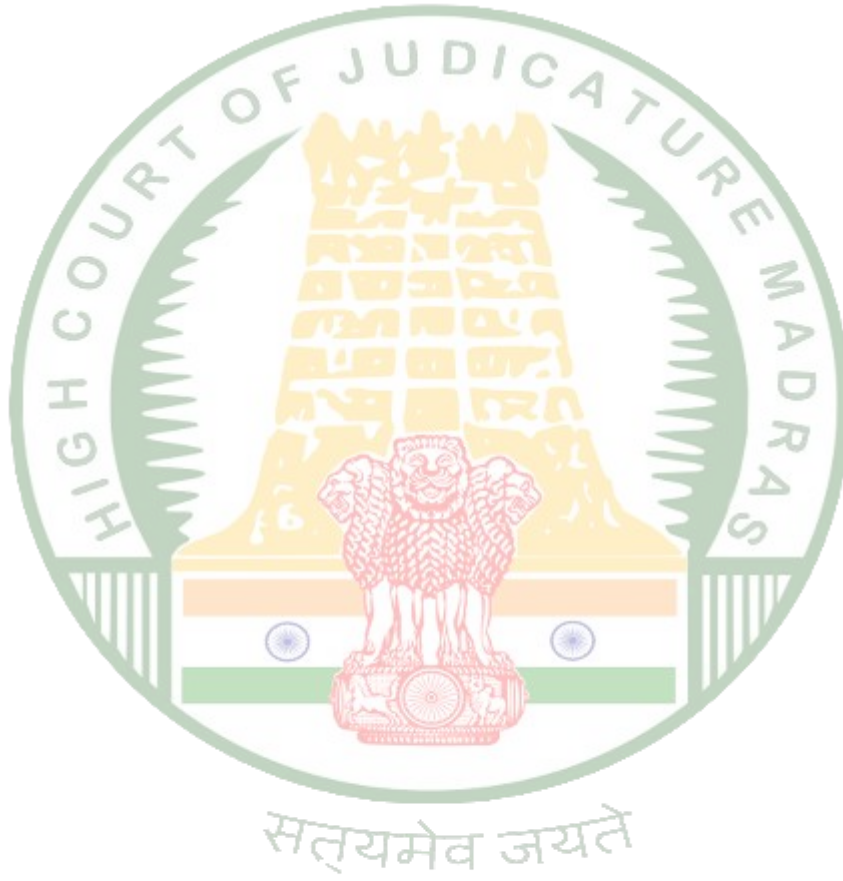


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