

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 08.03.2017

CORAM

THE HONOURABLE DR. JUSTICE P.DEVADASS

C.R.P.(PD). No.2236 of 2011

1. M.Baggia Lakshmi
2. Packiathai

... Petitioners/Respondents 1 &

2/Plaintiffs

Versus

1. M.Vijaya Rajan ... 1st Respondent/Petitioner/1st Defendant

2. M.Japa Arunthathi

... 2nd Respondent/3rd Respondent/2nd

Defendant

Civil Revision Petition filed under Article 227 of the Constitution of India praying to allow the C.R.P by setting aside the fair and decretal order in I.A.No.17831 of 2010 dated 02.03.2011 on the file of the VII Assistant Judge, City Civil Court, Chennai.

For Petitioner : Mr.A.Amal Raj
For R1 : Mr.J.Titus Enock
For R2 : given up

ORDER

Here is the case where the son is fighting tooth and nail as against his mother and sister, in various courts. Offshoot of the

same is the present revision.

2. Mayamuthu and Baggia Lakshmi are spouses. Their son is Vijaya Rajan and daughters are Packiathai and Japa Arunthathi. Japa Arunthathi is neither against her brother nor against her mother. She is not interested in the property.

3. Mayamuthu left this world after leaving his legal heirs to fight among themselves for his properties. Plaintiffs, namely, Baggia Lakshmi and Packiathai have filed O.S.No.630 of 2010 against Vijaya Rajan and Japa Arunthathi claiming their share in the properties left by Mayamuthu.

4. Vijaya Rajan filed I.A.No.10487 of 2010 under Order 7 Rule 11 CPC to reject the plaint on the ground of non payment of proper Court Fee. He has also filed I.A.No.17831 of 2010 for valuing the Court Fee in accordance under Section 37(1) and not under Section 37 (2) of the Court Fees and Suit Valuation Act.

5. After hearing both sides, the trial court dismissed I.A.No.10487 of 2010, however, allowed I.A.No.17831 of 2010 holding that as the plaintiffs are not in possession of the property,

the suit should have been valued under Section 37(1) and the Court Fee should have been paid on the market value of the property.

6. Aggrieved, the plaintiffs have preferred this revision. The learned counsel for the revision petitioners/plaintiffs would contend that the plaintiffs are co-owners of the property. This has also been confirmed in a litigation initiated by the defendant which has attained finality in S.A.No.89 of 2007. It is not necessary that to value the suit under Section 37(2), the sharer/co-owner should be in actual position. It is also not necessary that the plaintiffs should have been in enjoyment of usufructuous or income from the property. And appropriation of the income from the property by the defendant would be deemed to be also on behalf of the plaintiffs.

7. To fortify his said submission, the learned counsel for the petitioners would cite **Neelavathi V. N.Natarajan, (AIR 1980 S.C. 691)** and **Virudambal and others V. Kandasamy and others [2000 (II) CTC 263]**.

8. On the other hand, the learned counsel for the first defendant would contend that the first defendant is in possession of the property in pursuance of Ex.A2 a written partition arrangement.

It has been negated by the courts below in the other parallel litigation only on the ground that the said document has not been registered. That would be his exclusive possession of the property.

9. The learned counsel for the 1st defendant would also submit that the plaintiffs should specifically plead in the plaint that they are in joint possession. In the absence of such pleadings Section 37(2) of the Court Fees and Suit Valuation Act will not apply.

10. In this connection, the learned counsel for the 1st defendant would cite **Jayanthil G.Bafna & Another Vs V.Dharaj & Others [CDJ 2015 MHC 6602]** and **Balambal Vs Sundaresan and nine others [1996(1) CTC 420]**.

11. In reply, the learned counsel for the revision petitioners would submit that the application of a prior decision is not automatic to a subsequent case regardless of its factual matrix. Application of Judge made law depends on the facts and circumstances of each case.

12. The present case is a peculiar case. Paragraphs 8 and 9 in the plaint cannot be read in isolation and there cannot be any hair splitting exercise. Why the plaint has been valued under Section

37(2) of the Court Fees and Suit Valuation Act could be known by reading plaintiff paragraphs 8 and 9. The prior litigation which ended up to the second appeal has been mentioned in the said paragraphs, wherein exclusive possession claimed by the 1st defendant as plaintiff has been negated by this court. In such circumstances, an inescapable answer/outcome will be that the plaintiffs also have a share in the property and their stand as a co-owner has been upheld and in the wake of decision so rendered, the present suit itself has been filed. It is not that in such circumstances, the missing of a stray sentence that the plaintiffs are also in joint possession will not make the section 37(2) of the Court Fee and Suit Valuation Act non applicable.

13. I have given my thoughtful consideration to the rival submissions, perused the impugned order, materials on record and the decisions cited by both sides.

14. The Plaintiffs are mother and sister of the first defendant. Since the 1st defendant is not amenable to the division of property by metes and bounds, the plaintiffs have filed the suit in O.S. NO. 630/2010 for partition and valued the suit under Section 37(2) of Court Fees Act. As rightly, pointed out by the learned counsel for the

1st defendant, there should have been a pleading in the plaint that the plaintiffs are also in joint possession of the property to so value the suit. The decision cited by the learned counsel for the 1st respondent are also on similar line of thinking. But, let us not blindly apply the ratios, regardless of the factual matrix involved in the case.

15. As rightly pointed out by the learned counsel for the plaintiffs, really, this case presents a peculiar case. From the beginning, the plaintiffs are agitating for their share in the property. It is being thwarted by the first defendant throughout and even now. Earlier the first defendant as plaintiff sued his mother and sister in O.S.No. 3054 of 1996 claiming his exclusive ownership based on Ex.A.2 stated to be a partition arrangement entered into between himself and his father. In Such case it has been negated by the trial Court, First Appellate Court and also this Court in second appeal. Taking a cue from this prior decision which took place inter-parties, the plaintiffs have sued the defendants/respondents in the present O.S.No. 630/2010 for their share. Narrating these aspects paragraphs 8 and 9 in the plaint, that is to say how they become a sharer in the property, they have valued the suit and paid the Court Fee under Section 37(2) of the Court Fee Act. Of course, in paragraph 8 of the

plaint, it is averred by the plaintiff that the income from the property are now being eaten by the 1st defendant himself. But that would not make that the plaintiffs are not in joint possession. [See **Neelavathi case** (supra) and **Virudambal case** (supra)]. For the purpose of Section 37(2) of the Court Fee Act that joint possession doesnot mean actual possession. In these circumstances, the view taken by the trial Court that the suit should have been valued under Section 37(1) of the Court Fees Act and Court Fee should have been paid accordingly, is not correct. The valuation of the suit under Section 37(2) of the Court Fees Act is correct.

16. In view of the above,

1. This Civil Revision Petition is allowed.
2. The order of the trial Court passed in I.A.No.17831 of 2010 in O.S.No. 630/2010 on 02.03.2011, is set aside. No costs.
3. A whole family is fighting in the suit of the year 2010. Still the 1st defendant has not filed his written statement. He will file his written statement within one month from today. Thereafter, the trial Court will expeditiously try and dispose of the suit uninfluenced by the observations in this order.

08.03.2017

Index: yes/no

kua

To

1. The Principal Judge,
Chennai.
2. VII Assistant Judge,
City Civil Court,
Chennai.
3. The Registrar,
City Civil Court,
Chennai.

Dr.P.DEVADASS,J

kua

C.R.P.(PD). No.2236 of 2011

08.3.2017

<http://www.judis.nic.in>