

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 01.03.2017

CORAM

THE HONOURABLE MR. JUSTICE S.NAGAMUTHU
and
THE HONOURABLE MR.JUSTICE N. AUTHINATHAN

A.S.No.280 of 2013
and MP Nos.1 and 2 of 2013
and
CRP (PD) Nos.3722, 3723, 3724 and 3725 of 2013

A.S.No.280 of 2013

J. Paulraj ... Appellant/1st Defendant

Vs

1.G. Suji Deepa ...1st Respondent/Plaintiff

2.S. Babitha ...2nd Respondent/2nd Defendant

CRP (PD) Nos.3722 of 2013 & 3724 of 2013

1. Janaki Seelan

2. G. Rathi Gunapandian ...Petitioners

VS

1. G. Suji Deepa

2. J. Paulraj

3. Babitha

...Respondents

CRP (PD) Nos.3723 and 3725 of 2013

1. P. Fifty Paulraj

2. E. Prema Ebenezer

3. S. Jikki Selurnloy

4..P. Bommi LathaPrabahar

...petitioners

vs

1. G. Suji Deepa
2. J. Paulraj
3. Babitha

...Respondents

Appeal No.280 of 2013 filed Under 96 read with Order 41 Rule 1 of Civil Procedure Code against the Judgment and decree of the learned Principal District Judge, Chengalpattu dated 17.06.2013 in O.S.No.22 of 2010.

C.R.P. (PD) No.3722 of 2013 filed under Article 227 of the Constitution of India against the fair and decretal order dated 17.06.2013 made in I.A.No.661 of 2011 in O.S.No.22 of 2010 on the file of Principal District Court, Chengalpattu.

C.R.P(PD)No.3723 of 2013 filed under Article 227 of the Constitution of India against the fair and decretal order dated 17.06.2013 made in I.A.No.658 of 2012 in O.S.No.22 of 2010 on the file of Principal District Court, Chengalpattu.

C.R.P (PD) No.3724 of 2013 filed under Article 227 of the Constitution of India against the fair and decretal order dated 17.06.2013 made in I.A.No.747 of 2012 in I.A.No.216 of 2012 in O.S.No.22 of 2010 on the file of Principal District Court, Chengalpattu.

C.R.P(PD) No.3725 of 2013 filed under Article 227 of the Constitution of India against the fair and decretal order dated 17.6.2013 made in I.A.No.748 of 2012 in I.A.No.216 of 2012 in O.S.No.22 of 2010 on the file of Principal District Court, Chengalpattu.

For Appellant in A.S. : Mr.V. Raghavachari

For R.1 in A.S. : Mr.A.L. Somayaji
& in all CRPs : Senior Counsel for
Mrs.Narmada Sampath

For R.2 in A.S.
& R3 in all CRPs : Mr.S. Manokaran

For Petitioner in
all CRPs : N.Manokaran

COMMON JUDGMENT

[Judgment of the court was delivered by N. AUTHINATHAN, J.]

As the Civil Revisions Petitions and the Appeal arose out of

the judgment and the orders passed in the suit in O.S.No.22 of 2010, they were heard together and they are disposed of by this Common Judgment.

2. The first defendant in O.S.No.22 of 2010 is the appellant. The first respondent G. Suji Deepa is the plaintiff. The second respondent/second defendant S. Babitha is the sister of the plaintiff. They are the daughters of one D. Rajendran. Rajendran and the appellant were the partners of a Firm. The Firm carries on textile business under the name and style of M/s Lata Textiles.

3. The plaint "A" schedule property was jointly purchased by Rajendran and the appellant under a Sale Deed dated 28.10.1976. The property was used for the partnership business. However, it is not a property of the Firm. Rajendran and the appellant dissolved the partnership Firm by a Memorandum Deed of Partnership Retirement Deed dated 21.01.2009. They have agreed to divide the plaint "A" schedule property equally and the western half of the property was to be taken by Rajendran (Plaint "B" schedule property). Rajendran executed a Will bequeathing his property including his share in the suit property in favour of the plaintiff under a Will dated 31.01.2004. The second defendant, who is the sister of the plaintiff, was unhappy with the said Will. The second defendant claimed equal share in all the properties including the suit property of Rajendran. She, in collusion with the appellant, fabricated a Will dated 02.08.2008 by forging the signature of Rajendran. Rajendran died on 19.05.2009. The dispute between the legal heirs of Rajendran cannot in any way stand in the way of partitioning the suit property. Since the second defendant has claimed right to the property, she is added as a necessary party to the suit. The first defendant has been using the property for his business and thereby caused a loss of Rs.5,00,000/- per month to the plaintiff. The suit has been filed for partition of the property and for allotment of the western half of the property ("B" schedule property) to the plaintiff. She has also prayed for a direction to the first defendant to pay Rs.5,00,000/- per month to her from 1.09.2009 by way of damages for use and occupation and costs.

4. The first defendant filed a written statement. He admitted the execution of Memorandum Deed of Partnership Retirement Deed. He has admitted that the western portion of the suit property ("B" Schedule Property) was to be taken by Rajendran. According to him, in view of the Memorandum Deed of Partnership Retirement Deed, the question of partition would not arise. He took all efforts to divide the property, however, he could not effect the actual partition as the plaintiff and the

second defendant did not cooperate. The plaintiff ought to have filed a suit for specific performance of the conditions stipulated in the Memorandum Deed of Partnership Retirement Deed. According to him, the suit has been undervalued and proper court fee has not been paid. He would further contend that he is not liable to pay damages. He has been in occupation of the property with the permission of Rajendran. He prayed for dismissal of the suit.

5. The second defendant /plaintiff's sister in her written statement claimed right to the suit property. She claimed that Rajendran executed a subsequent Will and probate proceedings are pending in respect of the same. She claims equal right in the properties of Rajendran. She has also prayed for dismissal of the suit.

6. Pending disposal of the suit, the plaintiff filed an application in I.A.No.216 of 2012 under Order 12 Rule 6 of the Civil Procedure Code to give judgment and preliminary decree allotting "B" schedule property to her. She relied on the admission of the appellant made in paragraph-3 of his counter in I.A.No.69 of 2010 and also the admission made in paragraph-16 of the written statement.

7. The appellant filed his counter. He has stated that the issue regarding partition of the property was already concluded by Memorandum Deed of Partnership Retirement Deed dated 21.01.2009. The plaintiff cannot seek relief of partition that too without adjudicating the issues between her and the second defendant. The appellant is willing to act upon in terms of Memorandum Deed of Partnership Retirement Deed. According to him, the plaintiff is not entitled to a decree in terms of Order 12 Rule 6 of the Civil Procedure Code.

8. The second respondent remained exparte in the said application.

9. Janaki Seelan and Rathi Guna Pandian, petitioners in CRP No.3722 of 2013 filed an application in I.A No.747 of 2012 and P. Fifty Paulraj, E. Prema Ebenezer, S. Jikki Selurnloy and P. Bommi Latha Prabhar, petitioners 1 to 4 in CRP No.3723 of 2013 filed application No.748 of 2012 to implead them as respondents in I.A.No.216 of 2012. The petitioners in C.R.P.No.3722 of 2013 filed an application in I.A.No.661 of 2012 and the petitioners 1 to 4 in CRP No.3723 of 2013 have filed an application in I.A No.658 of 2012 praying that they should be added as defendants in the suit in O.S.No.22 of 2010.

10. The trial Court, placing reliance of the averments made

in paragraph-16 of the written statement, allowed the petition and passed a preliminary decree in accordance with the order dated 17.06.2013. Aggrieved by the judgment and decree, the first defendant has come up with this appeal.

11. The learned counsel for the appellant would submit that the trial Judge could not have decreed the suit without adjudicating the maintainability issue raised by the appellant in his written statement; that the plaintiff has admitted the division of the suit property as per the Memorandum Deed of Partnership Retirement Deed and that therefore, a fresh suit for partition of the same property is not maintainable and that the averments made in the written statement regarding the earlier division of the suit property into half share could not be construed as admission of half share for yet another division of the suit property. He has also submitted that in the absence of the proof of the Will relied on by the plaintiff, a decree cannot be passed in favour of the plaintiff and that therefore, the judgment and the decree in O.S.No.22 of 2010 reliable to be set aside.

12. The learned Senior Counsel for the plaintiff would submit that the trial court was justified in granting a decree placing reliance on the clear admissions of facts made in the written statement of the appellant.

13. The following points arise for consideration in this appeal and Civil Revision Petitions:

(i) whether the trial court committed error in granting a preliminary decree in terms of Order 12 Rule 6 of the Civil Procedure Code?

(ii) whether the petitioners in CRP (PD) Nos.3722 to 3725 of 2013 are to be impleaded as parties to the suit in O.S.No.22 of 2010 and in I.A.No.216 of 2012.

14. The revision petitioners claimed that their suit property, in question, belonged to their father Durairaj Nadar and after his death, they are entitled to the property and they have filed a suit in O.S No.108 of 2011 on the file of District Court, Chengalpattu for partition. It is also their case that sale consideration was paid by their father and the property was purchased in the name of Rajendran and the appellant/first defendant. Therefore, according to them, they are proper and necessary parties to the suit as they are joint owners.

15. The plaintiff opposed the applications for impleadment.

16. The trial court dismissed the applications. Aggrieved by the order of dismissal, they have preferred the above Civil Revision Petitions.

17. As per the plaint in O.S.No.22 of 2010, the plaintiff claims exclusive title under a Will executed by Rajendran. It is alleged in the plaint that the property was purchased jointly by the said Rajendran and the first defendant. There is no allegation against the revision petitioners and no relief is claimed against them. The petitioners claimed right under Durairaj Nadar. Their rights, being independent in nature, it cannot be said that they are necessary or proper parties to the suit in O.S.No.22 of 2010. Therefore, we hold that the trial Court was right in rejecting their prayer for impleadment.

18. The suit has been filed for the following reliefs:

(a) directing partition of the property situate at Survey No.320/2, Tambarm Village, Covered by document No.716 of 1976 dated 28.10.1976, morefully described in Schedule -A hereunder by metes and bounds and allotment of the divided half share as mentioned in Schedule B hereunder to the plaintiff.

(b) directing the 1st defendant to pay Rs.5,00,000/- (Rupees five lakhs only) per month to the plaintiff by way of damages with effect from 01.09.2009, for the use and occupation of the plaintiff's property, until handing over possession of the Schedule B mentioned property to the plaintiff.

© directing the defendants to pay to the plaintiff the costs of the suit.

(d) pass such further order as this Hon'ble Court deem fit and proper in the circumstances of the case and thus render justice.

19. Admittedly, the suit property measuring 3250 sq.ft (east west 32 feet 6 inches on both sides and north south 100 feet on both sides) was jointly purchased by Rajendran and the appellant under a Deed dated 28.10.1976. It is also an admitted

fact that Rajendran and the appellant agreed to divide the property as per the terms of the deed dated 21.1.2009. Rajendran died on 19.05.2009 leaving behind his daughters viz., the plaintiff and the second defendant. The plaintiff claims exclusive title to the suit property under a Will dated 31.01.2004, said to have been executed by Rajendran.

20. The second defendant disputed the genuineness of the Will relied on by the plaintiff. According to the second defendant, Rajendran executed a Will subsequently and it was his last Will and in respect of the last Will, probate proceedings are pending. As per the plaint averments, the plaintiff claims exclusive title to the suit property. It is not as if she represented the interest of the second defendant also. She refuted the rights of the second defendant. The second defendant as per the plaint averments, is a necessary party to the suit.

21. The trial Court in paragraph 13 of its Order dated 17.06.2013 placed reliance on the following averments made in the written statement of the appellant

"It is further submitted that this defendant has already made all arrangements and mentally prepared to raise the partition wall and restrict his business activities only in the half share of the business that had become his due share..."

and gave judgment in favour of the plaintiff.

22. It is true that Order 12 Rule 6 of Civil Procedure Code empowers the Court to pronounce a judgment upon the admissions made by the parties without waiting for determination of any other questions between them. The Hon'ble Supreme Court in Balraj Taneja and another vs Sunil Madan and another (1999 (8) SCC 396) has held as follows:

"29. " the Court has not to act blindly upon the admission of a fact made by the defendant in his written statement nor should the Court proceed to pass judgment blindly merely because a written statement has not been filed by the defendant traversing the facts set out by the plaintiff in the plaint filed in the Court.

.....
But if the plaint itself indicates that there are disputed questions of fact involved in the case regarding which two different versions are set out in the

plaint itself, it would not be safe for the Court to pass a judgment without requiring the plaintiff to prove the facts so as to settle the factual controversy.

23. In Himani Allooys Ltd vs Tata Steel Ltd (2011 STPL (LE) 45613 SC, it has been held as follows:

Unless the admission is clear, unambiguous and unconditional, the discretion of the Court should not be exercised to deny the valuable right of a defendant to contest the claim A."

24. As per the dictum laid down by the Hon'ble Supreme Court the power to give judgment under Rule 6 of Order 12 of the Civil Procedure Code is discretionary and enabling in nature and the party cannot claim it as of right. If the Court is of the opinion that it is not safe to pass a judgment on admission or that a case involves questions which cannot be apparently dealt with and decided on the basis of admission, it may in the exercise of discretion, refuses to pass a judgment and may insist upon clear proof of even admitted facts. The question whether there is clear admission or not is essentially a question of fact and the decision of this question depends on the facts of the case.

25. A careful reading of the written statement in its entirety, would reveal that the appellant has admitted the execution of the Memorandum Deed of Partnership Retirement Deed dated 21.01.2009. However, he has raised the question of maintainability of the suit in view of the terms and conditions of the Memorandum Deed of Partnership Retirement Deed. According to him, only a suit for specific performance of the condition stipulated in the Memorandum Deed of Partnership Retirement Deed, ought to have been filed by the plaintiff. The learned counsel for the appellant would contend that in view of the clear admission in the plaint that the suit property has already been divided between the appellant and Rajendran, a fresh suit for partition is not maintainable. The question of maintainability of the suit cannot be gone into at this stage.

26. As already noticed the plaintiff claims exclusive title to the property under a Will dated 31.01.2004. The genuineness of the Will was disputed by her sister, the second defendant. It is not the case of the plaintiff that the second defendant in her pleadings admitted her (plaintiff's) exclusive right to the suit property. The trial Court has also not pointed out that the second defendant admitted the exclusive right of

the plaintiff. Admittedly at this stage, there is no material to prove the execution and attestation of the Will, under which the plaintiff claimed exclusive right. In the absence of such proof, it cannot be said that the trial Court was right in granting the impugned decree.

27. The allegations made in the pleadings would show that the parties are at issue on question of law and facts. Therefore, we are of the considered view that it is not a fit case to give a judgment in terms of Order 12 Rule 6 of Civil Procedure Code. The trial Court, in view of the orders passed in I.A.No.216 of 2012 dated 17.06.2013 has given the impugned judgment and decree. Therefore, we hold that the judgment and decree passed by the trial Court are liable to be set aside.

28. The judgment and decree are traceable to the order passed in I.A.No.216 of 2012. The impugned judgment and decree do not exist independent of the order in I.A.No.216 of 2012. In view of the appeal being allowed, the order passed in I.A.No.216 of 2012 will stand annulled.

29. In the result, the judgment and decree passed by the learned Principal District Judge, Chengalpattu are set aside. The appeal is allowed. No costs. The Civil Revision Petitions are dismissed. The Trial Court is directed to readmit the suit, frame issues and proceed to determine the suit in accordance with law. No costs. Consequently, connected MPs are closed.

Sd/-
Assistant Registrar(CS III)

//True Copy//

sr

Sub Assistant Registrar

To

The Principal District Court,
Chengalpattu

+1cc to Mr.V.Raghavachari, Advocate, S.R.No.13470
+1cc to Ms.Narmadha Sampath, Advocate, S.R.No.13459
+1cc to Mr.N.S.Manokaran, Advocate, S.R.No.14060
+4cc to Ms.N.Manokaran , Advocate, S.R.No.13454,13453,13457,13455

TM(CO)
RS(21/03/2017)

A.S.No.280 of 2013 and CRP (PD)
Nos.3722 to 3725 of 2013