

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23.01.2017

CORAM :

THE HONOURABLE Mrs.JUSTICE PUSHPA SATHYANARAYANA

**C.M.S.A.No.29 of 2013
and M.P.No.1 of 2013**

N.Mani

... Petitioner

(For himself and as the Manager of
the family)

Vs.

1. Anandayee Ammal
2. Indra Gandhi

...Respondents

Civil Miscellaneous Second Appeal under Section 100 of Code of Civil Procedure against the decree and the judgment dated 09.11.2012 rendered in A.S.No.35 of 2011 on the file of the Subordinate Judge, Gingee, reversing the fair and decretal order dated 06.01.2011 passed in E.A.No.56 of 2009 in E.P.No.154 of 1994 in O.S.No.235 of 1981 on the file of the Principal District Munsif, Gingee.

For Petitioner : Mr.S.Subbiah

For Respondent : Mr.A.Murugan

O R D E R

The above Civil Miscellaneous Appeal is filed by the claimant in an application under Order XXI Rule 58 in E.A.No.56 of 2009 in E.P.No.154 of 1994 in O.S.No.235 of 1981 on the file of the Principal District Munsif, Gingee.

2. The appellant is the claim petitioner. It is stated that he is managing the suit properties in the capacity of 'Karthi'. The properties originally belonged to one Arunachala Gounder. His wife is Myli Ammal and the said Arunachala Gounder had four sons and three daughters. The respondents are wife and daughter of one of the sons of Arunachala Gounder, namely, Subramani. It is stated that on 22.08.1974, there was a partition between Myli Ammal, Ranganathan and Natarajan, who are the

wife and sons respectively of Arunachala Gounder. As per the said partition, 'A' schedule property fell to the share of the second respondent, 'B' schedule property to the share of Natarajan and 'C' schedule property in favour of Myli Ammal and they have been enjoying it accordingly. The said 'B' schedule property has been managed and enjoyed by the claim petitioner, who is the son of Natarajan. While so, including all the properties, a suit in O.S.No.235 of 1981 was filed for partition by the respondents and a preliminary decree was passed on 01.10.1981 and a final decree was passed on 30.08.1991. The execution petition for delivery of possession was filed in E.P.No.154 of 1994, in which, the above claim petition was filed by the appellant.

3. The appellant had further stated that a suit in O.S.No.365 of 2002 for declaration and injunction, was filed by him and he obtained decree on 05.01.2005. Therefore, the claim

petition has been filed under Order XXI Rule 58 C.P.C on the ground that the properties covered under the decree for partition, are not available and the decree obtained is not binding on the claim petitioner / appellant.

4. The respondents objected to the claim. It is stated that the said Arunachala Gounder died in the year 1967 without making arrangements. The first respondent's husband Subramani also died and the respondents are the legal heirs of the said Subramani. After driving away the legal heirs of Subramani, Ex.A1-partition was made between Ranganathan, Natarajan and Myli Ammal. As the respondents were not party to the said partition, it is stated that the same is not binding on them. The claimant's father Natarajan has been a party in all proceedings and the said claim petition itself is filed only at the instance and instigation of the said Natarajan. The trial Court allowed the application and on Appeal in A.S.No.35 of 2011, the same was

reversed. Aggrieved by the same, the above Civil Miscellaneous Appeal has been filed.

5. At the time of admission, only notice was ordered.

6. The only question that arises for consideration is as to whether the claim petition filed by the appellant is maintainable.

7. Heard both sides.

8. The respondents had filed O.S.No.235 of 1981 for partition and obtained preliminary decree, followed by final decree. Thereafter, E.P.No.154 of 1994 filed for recovery of possession. The claim of the appellant that he had filed O.S.No.365 of 2002 for declaration and injunction and obtained a decree and that the properties which are subject matter of the suit, cannot be included in the execution petition, may not hold

good, as the second suit is subsequent to the partition suit. In the said partition suit in O.S.No.235 of 1981, the father of the claimant / appellant was a party. As the second suit is with respect to the same property, strictly it is barred by *res judicata* and the same is not binding on the respondents. The other documents produced by the appellant herein, namely Ex.A.4 is the patta standing in the name of his father. The kist receipts in Exs.A5, A7, A8 and A9 are also standing in the name of appellant's father. The appellant also has not filed any piece of evidence to establish his possession of the suit property. First of all, when the father was alive, it is not known as to how the appellant is claiming that he is the Kartha of the family. In the partition suit, all the legal heirs of Arunachala Gounder was made a party and as none of them appeared in the suit, it was decreed ex-parte. In the final decree, an Advocate Commissioner was appointed and a report was filed. Even at that stage, no claim was made. Now the present application was filed by the claimant only to delay

the final decree proceedings. The claimant also has not established his any independent right or title over the suit property other than the documents filed by him, which are standing in the name of his father. The said fact itself clearly establish that the application is filed only at the instance of his father to defeat the legitimate rights of the respondents. Unless the claimant establishes his individual interest and right over the property, his application cannot be maintained. There is no evidence also to show that the claimant was in possession of the properties. Already in the suit, the father of the claimant was a party and the right of the claimant is only based on the father's title. While so, the claimant does not have any independent right to maintain the claim petition. Having failed to appear in the suit before passing the final decree and at the time of final decree, the father of the claim petitioner has deliberately allowed his son to file the claim petition to thwart the entire proceedings, which is not maintainable.

9. As per Order XXI Rule 58 C.P.C, only when there is a claim or objection to an attachment to the property in execution of a decree, an adjudication is possible. No claim can be preferred under Rule 58, when the property is not under any attachment. If at all the objector wants to file the objection claiming the property of his own, he can only object under Order XXI Rule 97 C.P.C, in which case, the Court should proceed to adjudicate the claim under the subsequent Rules. Order XXI Rule 97(1)C.P.C is attracted only when holder of a decree of possession is obstructed in recovering possession in execution of a decree for possession.

10. When the appellant has not established his title over the suit property independently of his father, there is no question of law, much less, substantial question of law arises for consideration, in this appeal.

11. In the result, the Civil Miscellaneous Appeal is dismissed. No costs. Consequently, Connected Miscellaneous Petition is closed.

23.01.2017

Index:Yes/No
Internet:Yes/No
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To

1. The Subordinate Judge, Gingee
2. The Principal District Munsif, Gingee.

PUSHPA SATHYANARAYANA.J

srn

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