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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 25.10.2018

CORAM :

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

CRP (PD) (MD) Nos.1575 & 1576 of 2018
and
CMP(MD) Nos.6916 & 6917 of 2018

Krishnasamy

... Petitioner in both cases

Vs.

1.Valliammal

2.Ambujam

3.Kasthuri Bai

4.Rukmoni

5.Sajeec @ Satheesh

6.Nalini

... Respondents
in both cases

Prayer in CRP(MD) No.1575 of 2018 : This Civil Revision Petition is filed under Article 227 of the Constitution of India, to call for the records relating to the impugned order passed by the learned Subordinate Judge, Padmanabhapuram in I.A SR No.524 of 2018 in O.S No.238 of 2011 dated 30.01.2018 and set aside the same.

Prayer in CRP(MD) No.1576 of 2018 : This Civil Revision Petition is filed under Article 227 of the Constitution of India, to call for the records relating to the impugned order passed by the learned Subordinate Judge, Padmanabhapuram in O.S SR.No.6259 of 2017 dated 15.11.2017 and set aside the same and number the plaint.

In both cases :

For Petitioner : Mr.N.Dilpkumar

For Respondents : Mr.R.Vijayakumar for R1

Mr.Ramesh for Mr.P.Prabhu for R4

R2 - No appearance

COMMON ORDER

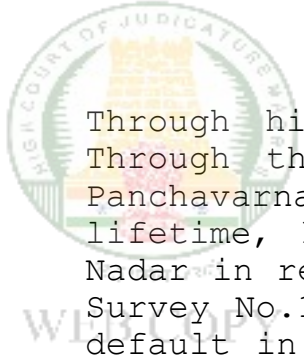
The revision petitioner claims that he is the absolute owner of an extent of 16 cents of land comprised in R.S No.728/11 D of Eraniel Village and the residential building bearing Door.No.21-49/25A 1 of Nullivilai Panchayat. His apprehension is that he may be dispossessed at the instance of the parties in O.S No.238 of 2011 on the file of the Sub Court, Padmanabhapuram in which a preliminary decree had already been passed on 04.09.2012. The revision petitioner filed I.A SR No.524 of 2018 to get himself impleaded in the final decree proceedings in I.A No.172 of 2013. The said I.A was dismissed on 30.01.2018. Questioning the same, CRP(MD)No.1575 of 2018 has been filed.

2.When the matter was taken up for disposal, it was submitted by the learned counsel appearing for the contesting respondents that final decree has since been passed in the said partition suit. The learned counsel appearing for the revision petitioner however contended that the passing of the final decree though on the same day was subsequent to the rejection of I.A SR No.524 of 2018 filed by him. In the event of allowing of the CRP, the final decree proceedings will have to be necessarily re-opened and the mere passing of a final decree will not render the CRP infructuous.

3.No doubt, the learned counsel appearing for the revision petitioner is right in his contention. But, he is right only in a technical sense. The partition suit was filed on 29.09.2011. The property of the revision petitioner had earlier stood in the name of his mother Rukmoni. The said Rukmoni had settled the property in question in favour of the revision petitioner on 10.08.2010. It is true that the revision petitioner was not made a party to the suit proceedings. But then, the revision petitioner's mother was shown as the third defendant. Preliminary decree was passed as early as 04.09.2012. Application for passing final decree was filed in the year 2013 itself in I.A No.172 of 2013. An Advocate Commissioner was appointed. Only on 25.01.2018, I.A SR No.524 of 2018 came to be filed. It was rejected on 30.01.2018 within five days thereafter. But, on the same day final decree was also passed. It is not the case of the revision petitioner that his mother acted adverse to his interest.

4.In these circumstances, the learned trial Judge was wholly justified in rejecting the impleading application filed by the revision petitioner. This Court therefore holds that the order impugned in CRP(MD)No.1575 of 2018 does not warrant any interference. However, the Civil Revision Petition cannot be closed as infructuous. The learned counsel appearing for the revision petitioner was at great pains to marshal the entire sequence of events.

5.It is the case of either parties that the property in question originally formed part of a larger extent and that it belonged to Deivanayagam Nadar. Deivanayagam Nadar had two wives.



Through his first wife, he had a son by name Vaikundan Nadar. Through the second wife, he had five daughters namely, Selvam, Panchavarnam, Valliammal, Ambujam and Kasthur Bai. During his lifetime, he executed a mortgage deed in favour of one Sivaraman Nadar in respect of the western extent of 67 cents (23 cents in Old Survey No.1553 & 44 cents in Old Survey No.1556). Since there was default in re-payment of the mortgage deed, O.S No.514 of 1962 was filed by Sivaraman Nadar against Deivanayagam Nadar and Vaikundan Nadar.

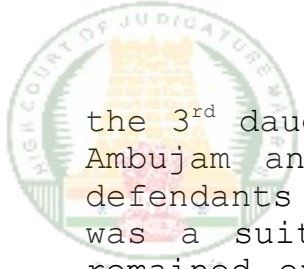
6.The suit was decreed and the property was brought for court auction sale on 15.09.1965. One Padmanabha Pillai purchased the property and the sale was confirmed on 16.10.1965 and sale certificate was issued on 25.10.1965. Later, the said Padmanabhapillai purchased the superstructure standing on the said land from Vaikundan Nadar vide sale deed dated 20.02.1967 (Document No.411/1967). The learned counsel for the revision petitioner would draw the attention of this Court to the recitals set out in the sale deed dated 20.02.1967. According to the learned counsel, the sale certificate as well as sale deed have not been challenged till date and that they have become final.

7.Deivanayagam Nadar had two wives. Dispute arose between the two branches. He executed a gift deed on 28.05.1963 in favour of his five daughters born through the second wife. He later cancelled the same on 27.09.1963 and executed a new gift deed in favour of Vaikundan Nadar. That was challenged by the daughters in O.S No.60 of 1994. Both Deivanayagam Nadar and Vaikundan Nadar were shown as defendants in the said suit filed before the District Munsif Court, Padmanabhapuram. The suit was decreed on 22.09.1965. A.S No.193 of 1966 filed by the Vaikundan Nadar challenging the said judgment and decree dated 22.09.1965 was dismissed.

8.There was a partition among the family members of Mr.Padmanabhapillai on 12.01.1972. It was reduced into writing and registered as a document No.153 of 1972. The western extent of 67 cents (23 cents in Old S.No.1553 & 44 cents in Old S.No.1556) was also included in the partition. In the said deed of partition, the eastern side of 17 cents and 500 square links of the western extent of 23 cents in Old Survey No.1553 was allotted to the share of Padmanabhapillai. The said Padmanabhapillai sold the same on 19.11.1973 in favour of Rukmoni vide a registered document. In other words, Padmanabhapillai, the original court auction purchaser sold what was allotted to him in the partition dated 12.01.1972 in favour of Rukmoni, the mother of the revision petitioner herein. The said Rukmoni settled 16 cents of land in favour of the revision petitioner herein on 10.08.2010 vide document No.3213 of 2010. According to the revision petitioner, he is in possession and enjoyment of the property and the revenue records were mutated in long back.

<https://hcservices.ecourts.gov.in/hcservices/>

9.In the meanwhile, O.S No.238 of 2011 was filed by Valliammal,



the 3rd daughter of Deivanayagam Nadar born through his second wife. Ambujam and Kasthuribai, the 4th and 5th daughters were shown as defendants 1 and 2. Rukmoni was shown as the third defendant. It was a suit for partition. Defendants 3 to 5 in the said suit remained exparte for reasons best known. Defendants 1 and 2, the sisters of the plaintiff Valliammal consented to passing of the decree and accordingly, preliminary decree for partition was passed on 04.09.2012. I.A No.172 of 2013 was filed for passing of a final decree and it was ordered on 11.10.2017. An Advocate Commissioner was appointed to divide the property by metes and bounds. It appears that when the exercise of locating the property was undertaken, the property under the enjoyment of the revision petitioner was also included. Apprehending that he will be dispossessed when the final decree is put to execution, the revision petitioner filed an application for impleading himself in the final decree proceedings and also filed an independent suit. The court below rejected both. Questioning the rejection of plaint in O.S SR.No.6259 of 2017, CRP (PD) (MD)No.1576 of 2018 has been filed.

10.As rightly contended by the learned counsel appearing for the contesting respondents, an order rejecting the plaint will amount to a decree and that therefore, only a regular appeal has to be filed and the Civil Revision Petition is clearly not maintainable. There can be no answer to this submission. I have already sustained the objections of the learned counsel appearing for the respondents that CRP (PD) (MD)No.1575 of 2018 will have to be closed because final decree has since been passed and since the application to implead was filed virtually at the last moment.

11.This Court had a look at the suit schedule in O.S No.238 of 2011 on the file of the Sub court, Padmanabhapuram. It is confined only to 23 cents on the eastern side of 46 cents in Old Survey No.1553. Though the re-survey number has been substantially subdivided, the undivided re-survey number alone namely 728/11 has been given. Probably it is this that has given rise to confusion. At this stage, the learned counsel for the revision petitioner highlights that the resurvey number was carved out of two survey numbers namely, (23 cents in Old Survey No.1553 & 44 cents in Old Survey No.1556). However, the four boundaries have been given. Therefore, it is obvious that the parties in O.S No.238 of 2011 are not making any claim on what legitimately belongs to the revision petitioner. The property that is the subject matter of partition suit is on the eastern side. The property that belongs to the revision petitioner is on the western side. That is why, the revision petitioner's mother Rukmoni chose to keep quiet. If the revision petitioner's mother had informed the trial court that she had already executed a registered settlement deed in the year 2010 itself in favour of the revision petitioner, then much of the confusion could have been avoided. The revision petitioner or his mother could have taken effective part in the final decree proceedings so as to ensure that the respective properties of the parties are rightly identified and located. The revision



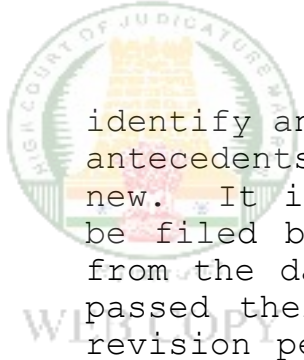
petitioner's mother did not do so. This Court is unable to believe that the revision petitioner was not aware of the institution of O.S No.238 of 2011. Be that as it may, the rights of the revision petitioner deserve to be fully protected.

12. Any person aggrieved by the passing of a decree can file an appeal under Section 96 of CPC. In this case, the partition suit was instituted in O.S No.238 of 2011. This Court has already given a finding that the suit schedule in O.S No.238 of 2011 is different from what belongs to the revision petitioner. Deivanayagam Nadar owned a certain extent of land. What was mortgaged by him was only the western extent. The eastern extent was retained by him. It appears that the superstructure was put up and the same was sold by Vaikundan Nadar. It is not known as of now as to whether the superstructure that was sold by Vaikundan Nadar on 20.02.1967 lies on the mortgaged land which is on the western side.

13. In view of execution of settlement deed on 10.08.2010 by Rukmoni, the revision petitioner's mother, in favour of the revision petitioner, he has become the absolute owner over 16 cents on the western side. Admittedly, he was not made as a party to the suit proceedings in O.S No.238 of 2011. Therefore, the decree passed therein will not affect the rights of the revision petitioner. The revision petitioner is entitled to file an appeal questioning the final decree passed in the said suit. If such a first appeal is filed by the revision petitioner within a period of four weeks from the date of receipt of a copy of this order, the first appellate court is directed to entertain the same without reference to limitation.

14. The learned counsel appearing for the contesting respondents also submitted that if the revision petitioner takes out an application for appointment of an Advocate Commissioner for identifying the properties in question, the same will not be opposed. This Court is clearly of the view that the first appellate court has to allow any application for appointment of an Advocate Commissioner to be filed by the revision petitioner herein in the first appeal. Only if a proper exercise of identification is undertaken with reference to the survey records, the issue on hand can be resolved. The learned counsel for the revision petitioner made a fervent plea that such an exercise can be directed to be undertaken at this stage itself. I am of the view that it is only proper that such an exercise is to be undertaken by the first appellate court. This is because the first appeal is a continuation of the original suit proceedings.

15. This Court has sufficiently protected the rights of the revision petitioner. It has given him liberty to file first appeal to question the final decree passed in O.S No.238 of 2011 on the file of the sub court, Padmanabhapuram. It has given him liberty to take out an application for appointing an Advocate Commissioner to



identify and measure the properties of both the parties based on the antecedents title documents and the revenue records both old and new. It is obvious that till the disposal of such first appeal to be filed by the revision petitioner within a period of four weeks from the date of receipt of a copy of this order, the final decree passed therein will not put to execution to the prejudice of the revision petitioner. Of course, the final decree can be executed so far as it does not affect the rights of the revision petitioner. The findings in the impugned orders that are adverse to the petitioner stand vacated.

16. With these observations, liberty and directions, CRP(MD) No.1575 of 2018 is disposed of and CRP(MD) No.1576 of 2018 is dismissed. No costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-

Assistant Registrar(CS-II)

/True Copy/

Sub Assistant Registrar(CS-III)

Skm

To

The Sub Judge, Padmanabhapuram.

+2cc to Mr.N.Dilip Kumar, Advocate in SR No.92274

+1cc to Mr.R.Vijaya Kumar, Advocate in SR No.92090

CRP (PD) (MD) Nos.1575 & 1576 of 2018
and
CMP(MD) Nos.6916 & 6917 of 2018

NM/SV/SAR III/27.11.2018/6P/5C.