

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.08.2019

CORAM:

THE HONOURABLE MRS.JUSTICE R.HEMALATHA

CRP.NPD.No.3953 of 2011

and

MP.No.1 of 2011

Devaki Amma @ Malu Amma

... Petitioner

Vs.

1. Shobana
2. Rukmani
3. K.Rajan
4. K.Venugopal
5. Unnikirshnan
6. Nirmala
7. Chandra Mohan
8. Geethanjali
9. Valsala
10. Kunhu Moidu Hajee
11. A.Santhakumari

... Respondents

PRAYER: Civil Revision Petition filed under Section 115 of the Code of Civil Procedure against the fair and decretal orders dated 20.09.2011 passed in E.P.No.10 of 2007 in O.S.No.162 of 1998 on the file of the District Munsif, Gudalur.

For Petitioner : Mr.T.P.Manoharan
for Mr. Muthumani Doraisami
For Respondents : Mr.V.Rajesh for R1
No appearance for R2 to R11

ORDER

The civil revision petitioner is the Judgment debtor in EP.No.10 of 2007 in O.S.No.162 of 1998 on the file of the District Munsif, Gudalore.

2. The first respondent filed a suit in OS.No.162 of 1998 before the District Munsif, Gudalore for partition of the suit property into ten equal shares and to allot one such share to her. The said suit was decreed exparte on 15.10.2001. Subsequently, the first respondent / decree holder filed a petition in IA.No.272 of 2003 for passing of final decree in OS.No.162 of 1998. The respondent did not enter appearance and subsequently, an Advocate Commissioner was appointed for division of the suit property. The learned Advocate Commissioner filed his report and plan and thereafter, final decree was passed in OS.No.162 of 1998 on 22.01.2007.

3. The first respondent / decree holder subsequently filed EP.No.10 of 2007 before the District Munsif, Gudalore for taking delivery of the property allotted to her as per the Advocate Commissioner's report. The

present civil revision petitioner filed her counter in the Execution Petition. The learned District Munsif, Gudalore after analysing the evidence on record, allowed the Execution Petition and passed an order for delivery of property vide his fair and decreetal orders dated 20.09.2011. Aggrieved over the same, the present Civil Revision Petition is filed.

4. Mr.T.P.Manoharan, learned senior counsel appearing for the civil revision petitioner / first respondent contended that the decree passed in O.S.No.162 of 1998 cannot be executed for the following reasons:

(i) The decree passed in O.S.No.162 of 1998 is an exparte decree and no speaking order was passed by the District Munsif, Gudalore, while decreeing the suit.

(ii) The property was originally owned by the husband of the revision petitioner and he executed a Will in favour of the revision petitioner bequeathing the entire property belonging to him and therefore, the plaintiff cannot seek for a partition of the suit property.

(iii) The Executing Court mainly allowed the Execution Petition on the ground that "the Executing Court cannot traverse beyond the decree".

(iv) When the decree itself is a nullity, the same cannot be executed.

5. Mr.T.P.Manoharan, learned senior counsel appearing for the civil revision petitioner / first respondent drew the attention of this court to the Judgment passed in O.S.No.162/1998 which reads thus.

" PW1 examined. Ex.A1 to Ex.A12 marked. Claim proved. Suit is decreed as prayed for with costs. Preliminary decree passed."

6. He also relied on the decision in ***C.N.Ramappa Gowda Vs. C.C.Chandregowda (dead) by LRS and another*** reported in **(2012) 5 SCC 265** and contended that mere assertion of certain facts in the plaint is not sufficient to decree the suit and the burden always lies on the plaintiff to prove all her contentions. His specific contention is that since on the date of filing of the suit, some of the properties were sold and the husband of the revision petitioner (father of the plaintiff in O.S.No.162 of 1998) bequeathed his properties through a Will in favour of the revision petitioner, the decree passed in OS.No.162 of 1998 is null and void.

7. *Per contra*, the learned counsel appearing for the respondents contended that the suit in OS.No.162 of 1998 was decreed exparte in the year 2001 and the first respondent filed a petition for passing of final

decree only during the year 2004 and final decree was passed in the year 2007. He would further contend that the defendants in the suit in OS.No.162 of 1998 never challenged the decree passed in the suit either by way of filing a petition under Order IX Rule 13 of the Code of Civil Procedure or by way of filing an appeal. He also contended that the civil revision petitioner though was actually aware of the entire proceedings in OS.162 of 1998 did not choose to contest the suit and therefore, the suit was decreed exparte. His specific contention is that the suit property originally belonged to the father of the first respondent / plaintiff and since it is a self acquired property, the plaintiff and the defendants in OS.No.162 of 1998 are each entitled to 1/10th share. His next contention is that though the revision petitioner contends that her husband had executed a Will in her favour, no such Will was produced till date and therefore, the Civil Revision Petition is liable to be dismissed.

8. No doubt, it is true that the decree passed in OS.No.162 of 1998 is an exparte decree and the learned District Munsif, Gudalore has merely decreed the suit by holding that the claim made by the plaintiff is proved by way of his evidence as PW1 and by marking the documents Exhibit A1 to A12. However, the present civil revision petitioner and the other

defendants in O.S.No.162 of 1998 did not file any petition under Order IX Rule 13 of the Code of Civil Procedure to set aside the exparte decree passed against them. In fact, the learned counsel appearing for the civil revision petitioner contended that such an application was filed by the present civil revision petitioner and the same was subsequently withdrawn as there was a panchayat in the suit village and in the said panchayat, certain decisions were taken. According to him, while the civil revision petitioner withdrew the application filed by her under Order IX Rule 13 of the Code of Civil Procedure as per the decision taken in panchayat, the first respondent / plaintiff did not withdraw the Execution Petition in EP.No.10 of 2007 filed by her.

9. It is pertinent to point out that the arguments advanced by the learned senior counsel appearing for the civil revision petitioner do not find place in EP.No.10 of 2007. It is also seen that the preliminary decree for partition was passed on 15.10.2001 and the first respondent / decree holder filed I.A.No.272 of 2003 in O.S.No.162 of 1998 for passing final decree in accordance with the preliminary decree. Even in the final decree proceedings, the present civil revision petitioner did not file her counter and therefore, an advocate commissioner was appointed to divide the suit

property in accordance with the preliminary decree passed by the court. The learned Advocate Commissioner also filed his report and plan. The present civil revision petitioner did not raise any objection to the report and plan filed by the Advocate Commissioner and final decree also came to be passed on 22.01.2007. Thereafter, the first respondent / decree holder filed E.P.No.10 of 2007. Though it is contended that the husband of the civil revision petitioner executed a Will in her favour, the said Will has not been filed till date. The revision petitioner also did not file any petition to set aside the exparte decree passed against her in O.S.No.162 of 1998.

10. In the decision in **C.N.Ramappa Gowda Vs. C.C.Chandregowda (dead) by LRS and others** reported in (2012) 5 SCC 265 at paragraph No.28 and 29, the Honourable Supreme Court held thus:

"28. When we examined the instant matter on the anvil of what has been stated above, we have noticed that the trial court has decreed the suit without assigning any reason how the plaintiff is entitled for half share in the property. The same is absolutely cryptic in nature wherein the trial court has not critically examined as to how the affidavit filed by the plaintiff in support of his plea of jointness of the family was proved on relying upon Ex.P1 to Ex.p10 without even discussing the nature of the document indicating that the

suit property was a joint property. Ex.P1 to Ex.P10 are the preliminary records viz. atlas, tipni book, R.R.pakka book, settlement akarband, sale deeds, etc. The trial court although relied upon these documents, it has not elaborated critically as to why these documents have been believed without indicating as to how it proves the plea that the property always remained joint in nature and had never been partitioned between the parties. Even as if the trial court relied upon these documents to infer that the property was joint in nature, it failed to record any reason as to whether the property was never partitioned among the coparceners.

29. It is a well-acknowledged legal dictum that assertion is no proof and hence, the burden lay on the plaintiff to prove that the property had not been partitioned in the past even if there was no written statement to the contrary or any evidence of rebuttal. The trial court in our view clearly adopted an erroneous approach by inferring that merely because there was no evidence of denial or rebuttal, the plaintiff's case could be held to have been proved. The trial court, therefore, while accepting the plea of the appellant-plaintiff ought to have recorded reasons even if it were based on *exparte* evidence that the

plaintiff had succeeded in proving the jointness of the suit property on the basis of which a decree of partition could be passed in his favour."

11. In the instant case, since the civil revision petitioner did not challenge the decree passed in OS.No.162 of 1998, she cannot now contend that the decree passed in O.S.No.162 of 1998 is a nullity. It is an admitted case of both the parties that the suit property belonged to the husband of the revision petitioner (father of the first respondent/plaintiff) and it is his self acquisition. As already observed, the civil revision petitioner did not produce the Will allegedly executed by her husband in her favour. Therefore, the decision in **C.N.Ramappa Gowda Vs. C.C.Chandregowda (dead)** by LRS and others reported in (2012) 5 SCC 265 cannot be applied to the facts of the present case. In the facts and circumstances, the orders passed by the Executing Court does not warrant any interference by this court.

12. In the result,

(i) The civil revision petition is dismissed. No costs.

Consequently, the connected Miscellaneous Petition is closed.

(ii) The orders dated 20.09.2011 passed in E.P.No.10 of 2007 in O.S.No.162 of 1998 by the learned District Munsif, Gudalur is upheld.

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Index: Yes/No
Speaking/non-speaking order

To

The District Munsif,
Gudalore.

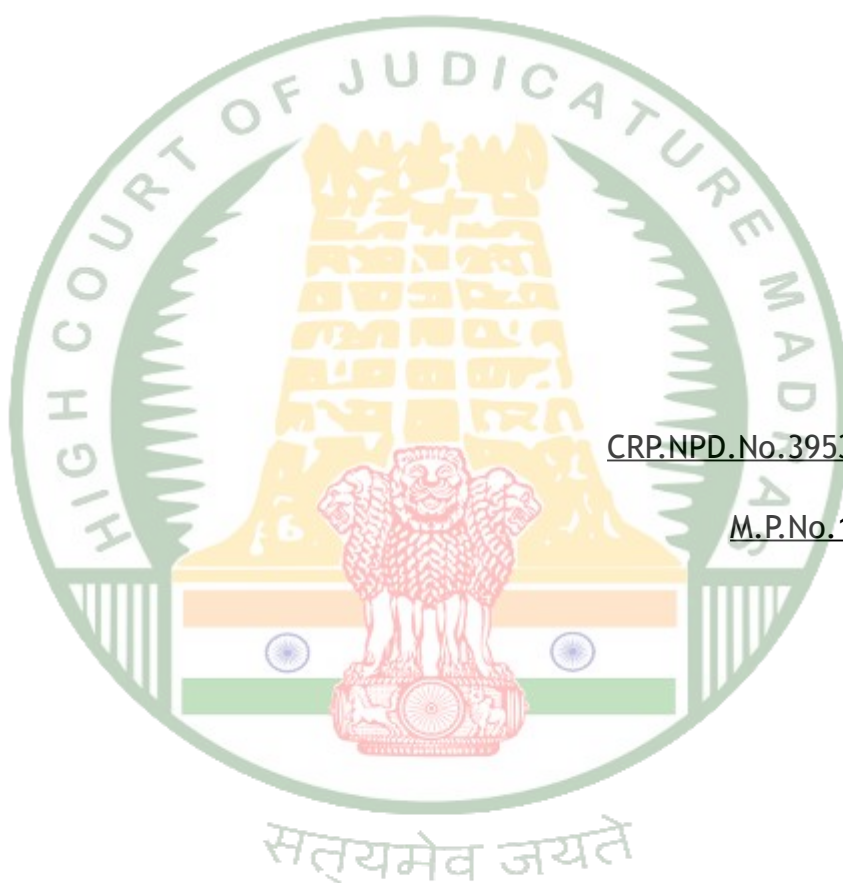


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