

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 13.02.2019

Coram:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

C.R.P.(PD)Nos.510 and 514 of 2019 and
C.M.P.No.3349 of 2019

1.S.Mahendhiran
2.M.Sri Hariharan
3.Minor M.Sarvesh Raj
Rep.by Guardian Father
S.Mahendhiran
all are residing at
Door No.1194, Sukrawarpet,
Coimbatore - 641 001.

Petitioner
[in both CRPs]

versus

S.Velmurugan

Respondent
[in both CRPs]

COMMON PRAYER: Civil Revision Petitions have been filed under Article 227 of the Constitution of India, against the fair and decreetal orders dated 17.12.2018 made in I.A.Nos.358 and 359 of 2017 in O.S.No.234 of 2016 respectively on the file of the learned I Additional District Judge, Coimbatore.

For Petitioners
[in both CRPs]

: Mr.S.Mukunth
for M/s.Sarvabhauman Associates

For Caveator
[in both CRPs]

: Mr.C.Vigneswaran

COMMON ORDER

These Civil Revision Petitions have been filed against the orders dated 17.12.2018 made in I.A.Nos.358 and 359 of 2017 in O.S.No.234 of 2016 respectively on the file of the learned Additional District Judge, Coimbatore.

2. The Interlocutory Applications in I.A.Nos.358 and 359 of 2017 were filed by the revision petitioners, seeking the orders to frame additional issues and also to decide the preliminary issue with regard to the Court fee.

3. The suit has been filed by the plaintiff for partition to allot 2/4th share in item No.1 and 1/4th share in item 2 in the property. The plaintiff is the younger brother of one Bhuvaneswari. She married one Rajagopal. The first defendant is the brother of Rajagopal and defendants 2 and 3 are the children of the first defendant and defendants 4 and 5 are the tenants in the suit property.

4. The suit has been laid for partition on the basis of the Will said to have been executed by Bhuvaneswari during her life time on 03.11.2014 in favour of the plaintiff. The first defendant has denied the execution of the Will

by the said Bhuvaneswari and it is specifically contended that the Will is a fabricated one and created only for the purpose of grabbing the properties. The suit has been filed on the ground that the plaintiff is in the joint possession of the suit property and the Court fee has been paid under Section 37(2) of The Tamil Nadu Court-Fees and Suits Valuation Act, 1955 [hereinafter referred to as "the Act"]. Therefore, the defendants have filed an application in I.A.No.358 of 2017 to decide the preliminary issue as to the payment of Court fee. According to the defendants, the Court fee has not been paid as per Section 37 (1) of the said Act.

5. Similarly, the defendants have filed another application in I.A.No.359 of 2017 to frame the following additional issues.

"1. Whether the plaintiff is in joint possession of the properties as claimed by him ?

2. Whether the valuation of the suit property by the plaintiff under Section 37(2) of the Tamilnadu Court Fees Act and consequent payment of court fee is proper, plaintiff is proper ?

3. Whether the suit is bad for non joinder of necessary parties ?"

6. The trial Court dismissed both the applications holding that the issues were already framed and there is no need to frame further additional issues. Further held that, since the plaintiff is claiming a right under the Will executed by his sister, he is deemed to be in possession of the property. Therefore, the trial Court held that the Court fee paid under Section 37(2) of the Act is correct and thereby, dismissed both the applications. Aggrieved over the same, the revision petitioners are before this Court with these present Revisions.

7. Heard the learned counsel appearing for the petitioners as well as the learned counsel appearing for the respondent and also perused the materials available on record.

8. The learned counsel appearing for the revision petitioners would contend that the plaintiff is admittedly a stranger to the family, he claims the partition only based on the alleged Will said to have been executed by her sister Bhuvaneswari, till the Will is proved, he cannot claim any right over the property. Merely because the unregistered Will is said to have been executed, he cannot claim that he is in joint possession of the property.

Hence, the Court below has not taken into consideration this fact and erroneously dismissed the application to decide the Court fee issue. Further, it is the contention of the revision petitioners that the additional issues ought to have been framed by the trial Court. Admittedly, a specific pleading taken by the defendant with regard to the possession of the plaintiff, the additional issues ought to have been framed based on the pleadings of the parties but the trial Court has simply dismissed the above application. Hence, the learned counsel prayed for allowing these applications.

9. The learned counsel appearing for the respondent would submit that the respondent has filed a suit to claim the partition on the basis of the Will executed by his sister. Admittedly, the sister is in joint possession of the suit property. Therefore, as a legate of the Will, he is also deemed to be in joint possession and filed a suit and paid Court fee under Section 37(2) of the Act. Therefore, submitted that the order of the trial Court does not require any interference. Similarly, the trial Court has also taken note that necessary issues already framed, there is no additional issues required. In support of his submissions, the learned counsel has placed reliance on the judgment of the Honourable Apex Court in **MANGAL SINGH & OTHERS vs. SHRIMATI RATTNO & ANOTHER** reported in **1967 AIR 1786**. The plaintiff has

filed a suit for claiming partition on the strength of the unregistered Will said to have been executed by his sister Bhuvaneswari on 03.11.2014. According to the plaintiff, he is in joint possession of the suit property. Hence, the Court fee paid under Section 37(2) of the Act is correct.

10. On perusal of the entire pleadings, except claiming right on the basis of the Will, there is no pleadings that the plaintiff was ever in possession at any point of time in the suit property. Though the execution of the Will is by any member of family, who have right in a joint family property in respect of his/her share in the property permissible. The legate of such Will is entitled share in the property on the basis of such Will, provided the Will has been properly proved in the manner known to law. Mere execution of the Will by any member of the family to stranger to the family, based on such Will, one cannot claim as he is in joint possession of the property. No doubt the Will gives right to claim a share in the suit property on proper proof of the same before the Court in the manner known to law. The Will has been seriously disputed in this case. Therefore, until the Will is proved in the manner known to law, I am of the view that the plaintiff cannot contend that he is in joint possession of the property. In this regard, the Honourable Apex Court in a judgment in

MANGAL

SINGH & OTHERS vs. SHRIMATI RATTNO & ANOTHER

reported in **1967 AIR 1786** has held as follows:

"The dispute in the case has arisen, because this section confers the right of full ownership on a Hindu female only in respect of property possessed by her, whether acquired before or after the commencement of the Act; and, in the present case, admittedly, the plaintiff had been dispossessed in the year 1954 and was not able to recover possession from the defendants-appellants until her death in the year 1958. It was urged on behalf of the appellants that, in order to attract the provisions of S.14 (1) of the Act, it must be shown that the female Hindu was either in actual physical possession, or constructive possession of the disputed property. On the other side, it was urged that, even if a female Hindu be, in fact, out of actual possession, the property must be held to be possessed by her, if her ownership rights in that property still exist and, in exercise of those ownership rights, she is capable of obtaining actual possession of it. It appears to us that, on the language used in s.14(1) of the Act, the latter interpretation must be accepted.

It is significant that the Legislature begins s.14(1) with the words "any property possessed by a female

Hindu" and not "any property in possession of a female Hindu". If the expression used had been "in possession of" instead of "possessed by", the proper interpretation would probably have been to hold that, in order to apply this provision, the property must be such as is either in actual possession of the female Hindu or in her constructive possession. The constructive possession maybe through a lessee, mortgagee, licensee, etc. The use of the expression "possessed by" instead of the expression "in possession of", in our opinion, was intended to enlarge the meaning of this expression. It is commonly known in English language that a property is said to be possessed by a person, if he is its owner, even though he may, for the time being, be out of actual possession or even constructive possession. The expression "possessed by" is quite frequently used in testamentary documents, where the method of expressing the property, which is to pass to the legatee, often adopted is to say that "all property I die possessed of shall pass to..... In such documents, wills, etc., where this language is used, it is clear that whatever rights the testator had in the property would pass to the legatee, even though, at the time when the will is executed or when the will becomes effective, the testator might not be in actual, physical or constructive possession

of it. The legate will, in such a case, succeed to the right to recover possession of that property in the same manner in which the testator could have done. Stroud in his Judicial Dictionary of Words and Phrases, Vol. 3, at p. 2238, has brought out this aspect when defining the scope of the words "possess" and "Possessed". When dealing with the meaning of the word "possession", Stroud defines "possession" as being in two ways, either actual possession or possession in law.

11. Above case suit was filed for recovery of possession after the female was dispossessed from the property in the year 1954 before that in 1956 the Hindu Succession Act came into force. During the pendency of the suit, her daughter substituted as a legal representative. Only when the suit was filed for recovery of possession by the female, the Honourable Apex Court has interpreted Section 14 of the Hindu Succession Act and held that the property of the female, in her constructive possession. In the above judgment right of stranger to the family, who claims the right on the basis of such Will to claim the joint possession of the property was never an issue. Therefore, the judgment cited by the learned counsel appearing for the respondent is not applicable to the facts of this case.

12. It is relevant to refer Section 37 of The Tamil Nadu Court-Fees and Suits Valuation Act, 1955, which reads as follows:

37.Partition suits.-(1) In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.

[(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the following rates:-

When the plaint is presented to -

(i) a District Munsif's Court.	Rupees one hundred
(ii) the City Civil Court, Chennai or a Sub-Court or a District Court.	Rupees one hundred, if the value of plaintiffs share is rupees thirty thousand or less; rupees five hundred, if it is above rupees thirty thousand but below rupees one lakh; and rupees seven hundred and fifty, if the value is rupees one lakh and above.
(iii) The High Court.	Rupees one thousand].

13. On careful perusal of the above Section makes it clear that when the plaintiff is not in possession of the property, he has to pay the Court fee on the market value of the plaintiff's share. Admittedly, he has not paid

the Court fee as per Section 37 of the Court Fee Act but he has paid Court fee only under Section 37(2) of the Court Fee Act. Therefore, this Court is of the view that till the disputed Will is established, a stranger to the family cannot claim joint possession and he has to necessarily pay the Court fee under Section 37(1) of the Court Fee Act. The trial Court has not considered this aspect and therefore, the order of the trial Court dated 17.12.2018 in I.A.No.358 of 2017 is hereby set aside. The plaintiff is directed to pay the Court fee under Section 37(1) of the Act on the market value of his share, within a period of two months from the date of receipt of a copy of this order.

14. As far as the other application is concerned, the order of the trial Court dismissing the application for framing additional issues, this Court is of the view that such order is liable to be interfered for the simple reason that, the plaintiff assert certain facts and the defendants denied the same in their written statements. Therefore, there arise a issue with regard to the joint possession and the payment of Court fee and other aspects. The trial Court while framing issues have not taken into consideration of the contention of the parties and simply dismissed the application for framing additional issues, without following the proper procedure as contemplated under order XIV of the Code of Civil Procedure, this Court is of the view that it is not according to law.

15. The trial Court has to frame the issues on the materials. Admittedly, in this case, there are allegations made by both sides with regard to the possession of the plaintiff in the property. Therefore, there must be necessary issues in that aspect, the trial Court has failed to take into consideration of the above aspects. Hence, the order of the trial Court dated 17.12.2018 in I.A.No.359 of 2017 is set aside and the trial Court is directed to frame additional issues. It is also made clear that the trial Court shall decide the suit independently based on the evidence of the parties, without influence of the observation made by this Court in this revision.

16. With these observations, both the Civil Revision Petitions are allowed. Consequently, connected Miscellaneous Petition is closed. No costs.

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Speaking Order/Non Speaking Order

Index : Yes / No

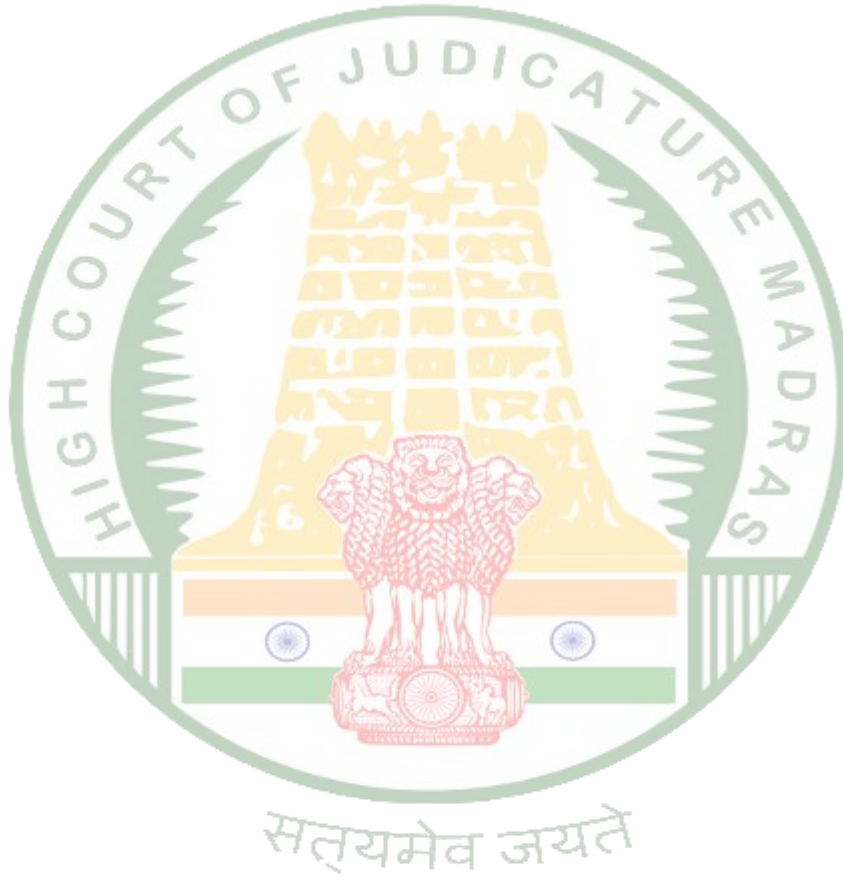
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To

The I Additional District Judge,
Coimbatore.



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N.SATHISH KUMAR, J.,
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