

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26.07.2019

CORAM:

THE HONOURABLE MRS.JUSTICE R. HEMALATHA

CRP.PD.No.320 of 2012
and
MP.No.1 of 2012

Malayammal

... Petitioner

vs.

1.Vasanthi

2.Minor Yuvapriya

Rep. by her next friend and guardian

Mother Vasanthi

... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal orders dated 16.11.2011 in IA.No.953 of 2011 in OS.No.4 of 2010 on the file of the I Additional Subordinate Court, Erode.

For Petitioner : Mr.K.Venkatasubban

For Respondent : Mr.K.S.Kesavan for R1

No appearance for R2

ORDER

The civil revision petitioner is the first defendant in OS.No.4 of 2010 on the file of the I Additional Subordinate Court, Erode. The respondents / plaintiffs filed the suit for the following reliefs:

- "a) directing the 3rd defendant to pay a sum of Rs.2,500.00 to the 1st plaintiff towards maintenance till her life time;
- b) directing the 3rd defendant to pay a sum of Rs.2,500.00 to the 2nd plaintiff towards maintenance till her marriage;
- c) creating charge over the suit properties for the due and proper payment of maintenance;
- d) directing the division of the suit properties into 18 equal shares by metes and bounds with reference to good and bad soil and allot 4 such equal shares in items 1, 4 to 6, two such shares in the 2nd item and one such share in the 3rd item of the suit properties continuously to the 2nd plaintiff;

e) appointing a Commissioner to effect division of the suit properties in the aforesaid manner;

f) granting a permanent injunction restraining the defendants from alienating or encumbering the suit properties till final partition takes place"

2. The defendants filed their written statement and both the parties went for trial. The plaintiffs' evidence is closed and the suit is now posted for examination of witness on the side of the defendants. At this juncture, the first defendant filed a petition under Order XXVI Rule 10(1) and Section 151 of the Code of Civil Procedure in IA.No.953 of 2011 praying to appoint an Advocate Commissioner to record her evidence. The main contention of the first defendant is that she is suffering from cancer and had undergone Chemotherapy for five times and therefore she is unable to go over to the court and give evidence. She therefore prayed for appointing an Advocate Commissioner to record her evidence.

3. The learned I Additional Subordinate Judge, Erode after analysing the evidence on record, dismissed the petition vide his fair and decreetal orders dated 16.11.2011. The main observation made by the trial

court Judge is that the certificate (Ex.P1) does not show that the first defendant is advised to take bed rest and that the other defendants who are conversant with the facts of the case can adduce evidence. Aggrieved over the orders passed by the trial court, the present Civil Revision Petition is filed by the first defendant under Article 227 of the Constitution of India.

4. Mr.K.Venkatasubban, learned counsel appearing for the civil revision petitioner / first defendant contended that though in the certificate (Ex.P1) issued by the doctor it is stated that the civil revision petitioner is suffering from cancer and had undergone Chemotherapy for five times, the learned I Additional Subordinate Judge, Erode has dismissed the application merely on the ground that in the certificate (Ex.P1), the civil revision petitioner has not been advised to take bed rest. He would also contend that the trial court Judge is wrong in observing that since the other defendants are conversant with the facts of the case, they can adduce evidence before the court. His specific contention is that when the civil revision petitioner wants to depose, an opportunity should have been given to her by the court by appointing an Advocate Commissioner to record her evidence.

5. *Per contra*, Mr.K.S.Kesavan, learned counsel appearing for the first respondent contended that the written statement was filed by all the defendants and the defendants 2 and 3 can give evidence on behalf of their mother, the first defendant and therefore the application for appointment of an Advocate Commissioner to record the evidence of the civil revision petitioner/ first defendant is not necessary.

6. A perusal of the records shows that the first defendant is also a main contesting party in the suit in OS.No.4 of 2010 on the file of the I Additional Subordinate Court, Erode and the suit was filed by the plaintiffs for various reliefs including the relief of partition of the suit properties. In such circumstances, the evidence of the first defendant may also be important to decide the case. The trial court Judge had dismissed the application by observing that Dr.P.Sudakar who has issued Certificate (Ex.P1) did not advise the civil revision petitioner to take bed rest. When it is admitted that the civil revision petitioner is suffering from cancer and has also undergone five times of Chemotherapy as evidenced by the certificate

(Ex.P1), the learned I Additional Subordinate Judge, Erode should have allowed the application filed under Order XXVI Rule 10(1) of the Code of Civil Procedure filed by the first defendant to appoint an Advocate Commissioner to record her evidence. The learned I Additional Subordinate Judge, Erode in his order dated 16.11.2011 has observed thus:

"Defendants 2 and 3 are the sons of the petitioner / first defendant and deceased Kandasamy. The petitioner / first defendant and her two sons, the defendants 2 and 3 have engaged the same counsel and filed together written statement which has been signed by the defendants 1 to 3. It appears from their written statement that the defendants 2 and 3 are also well aware of the facts of the case. So there is no impediment for them to depose in this case on their behalf and on behalf of their mother, the first defendant. It is not the averment of the petitioner that she is alone conversant with the facts of the case. Her only contention was that she had been advised bed rest. But Ex.P1 did not support her version. So the reason stated by the petitioner is not acceptable and has no merits. The contention by the respondents that this petition has been filed only to delay the proceedings is acceptable."

The above findings recorded by the learned I Additional Subordinate Judge, Erode cannot be sustained and the same is liable to be set aside. Therefore, the Civil Revision Petition is allowed. No costs. Consequently, the connected Miscellaneous Petition is closed.

7. Since the suit is of the year 2010, the learned I Additional Subordinate Judge, Erode is directed to dispose of the suit in OS.No.4 of 2010 within a period of three months from the date of receipt of a copy of this order.

26.07.2019

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Index : Yes/No

To

The I Additional Subordinate Court,
Erode.

R.HEMALATHA, J.

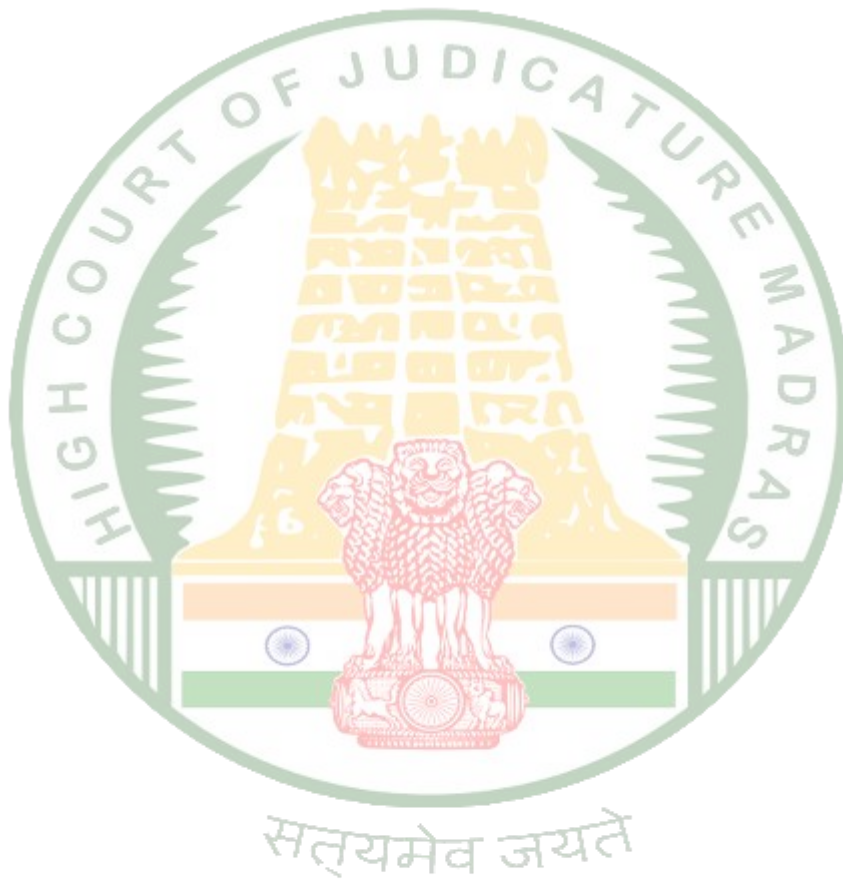
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