

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 31.01.2019

Pronounced on : 28.02.2019

CORAM :

THE HONOURABLE MR. JUSTICE M.S.RAMESH

CRP.(PD).No.1345 of 2016

and

C.M.P.No.7570 of 2016

K.Gopalasamy

.. Petitioner

V.

1.Govindammal

2.Mylathal

3.Palaniammal

4.Murugathal

5.Thulasiammal

6.Maragatham

7.Krithika

8.Minor Manimegalai
rep. by mother and natural
guardian Maragatham

9.Ajith Kumar

.. Respondents

PRAYER: Civil Revision Petition is filed under Article 227 of the Constitution of India, to strike off the plaint filed in O.S.No.734 of 2012 pending on the file of the learned Additional District Munsif,

Coimbatore.

For Petitioner : Mr.M.S.Krishnan, Sr. counsel
for Mrs.T.Kokilavane

For Respondent-1 : Mr.G.Ethirajulu
for Mr.Pitty Parthasarathy

For Respondent-9 : Mr.P.Kumaresan

For Respondent : No Appearance
Nos.2 to 8

ORDER

Heard Mr.M.S.Krishnan, learned Senior counsel for the petitioner and Mr.G.Ethirajulu, learned counsel for the first respondent as well as Mr.P.Kumaresan, learned counsel for the ninth respondent.

2.The brief facts leading to the filing of the present Civil Revision Petition are as follows:

The first respondent herein had filed the suit in O.S.No.734 of 2012 seeking for the relief of partition of the properties comprised in Survey No.110 in Pichanur Village, Coimbatore South Taluk and District, measuring acres 12.28. The revision petitioner herein was arrayed as the second defendant in the said suit. The revision petitioner had filed an application in I.A.No.1986 of 2012 under

Order 7 Rule 11 of the Civil Procedure Code, seeking for rejection of the plaint on the ground that the first respondent/sixth defendant was a party to an earlier partition suit in O.S.No.1180 of 2004 and therefore, the present suit instituted by the same sixth defendant for the relief of partition is barred under the provisions of Section 11 of CPC., and would also amount to an abuse of process of law. While the application was pending before the trial Court, the present revision has been filed by invoking the provisions of Article 227 of the Constitution of India, to strike off the plaint in O.S.No.734 of 2012.

3.Mr.M.S.Krishnan, learned Senior counsel for the petitioner submitted that the suit property was originally allotted in favour of one Krishnaswamy in the year 1973 through a joint family partition. On 27.10.1999, the two daughters of Krishnaswamy had filed a suit in O.S.No.2471 of 1996, seeking for partition of their 2/5th share, which suit came to be decreed. Since the other three daughters were married prior to 25.03.1989, they were not made as parties. Pursuant to the preliminary decree passed, a Partition Deed came to be executed on 16.07.2002 and thereafter, the defendants 6 to 8 had sold the property to the ninth defendant on 06.09.2002. The second respondent herein had then filed a suit in O.S.No.1180 of 2004, seeking for the relief of partition, in which, the first

respondent herein was arrayed as a defendant. The suit came to be dismissed on 25.01.2010, wherein the claim of the sixth defendant/first respondent herein was negated, as she was unable to prove that she got married after 25.03.1989 and the same has become final. Therefore, the present suit in O.S.No.734 of 2012 filed by the first respondent herein amounts to re-litigation, since she deemed to be a plaintiff in the earlier suit in O.S.No.1180 of 2004, wherein her claim for a share was negated. According to the learned Senior counsel, such re-litigation amounts to an abuse of process of law and therefore, the plaint in the subsequent suit is liable to be struck off.

4.Mr.G.Ethirajulu, learned counsel for the first respondent, on the other hand submitted that, after the amendment of the Hindu Succession Amendment Act, married women have been given rights in the co-parcenary property and in view of the decision in ***Danamma @ Suman Surpur and another V. Amar and others*** reported in **2018 [1] CTC 788**, the first respondent/plaintiff's rights have been subsequently recognised, with a retro-active effect, which gives rights to a new cause of action for the plaintiff to file the subsequent suit. As such, he would submit that he has triable issue to be addressed before the Court below and therefore, striking of the plaint at the threshold itself, is improper.

5.Mr.P.Kumaresan, learned counsel for the ninth defendant submitted that decree in O.S.No.1180 of 2004 was passed on 25.01.2010 and thereafter, he had purchased the suit property. Since there was no encumbrance over the suit property when the ninth defendant had purchased it, the present suit after a period of two years after the decree, which has also become final, is an abuse of process of law. He further submitted that he had also filed an application under Order 7 Rule 11 of CPC., seeking for rejection of the plaint, which is pending.

6.I have given careful consideration to the submissions made by the respective counsels.

7.The core question to be addressed in the present revision is as to whether the plaint in O.S.No.734 of 2012 would amount to re-litigation in view of the earlier judgment and decree in O.S.No.1180 of 2004, wherein the plaintiff in the subsequent suit was arrayed as the sixth defendant.

8.On a prima facie appreciation of the submissions of the learned Senior counsel for the petitioner, the second suit, in normal circumstances, would amount to re-litigation. It is settled

proposition of law that in a partition suit, a defendant is deemed to be the plaintiff and vice-versa. As such, the relief claimed in the earlier suit in O.S.No.1180 of 2004 as well as the relief claimed in O.S.No.734 of 2012 and considering that the parties in both the suits, as well as the suit property being one and the same, gives an impression that the plaint in the subsequent suit, is barred in view of the provisions of Section 11 of CPC.

9. However, the first respondent herein, has raised a moot question that in view of the decision of the Hon'ble Apex Court in **2018 [1] CTC 788**, which came to be pronounced on 01.02.2018, the first respondent/plaintiff has a new cause of action for filing the second suit for partition. As pointed out by the learned counsel for the first respondent, when the earlier suit in O.S.No.1180 of 2004 was filed, the decision of the Hon'ble Apex Court in **Danamma's case** was not available. In view of the said decision of the Hon'ble Apex Court, extending the rights of daughters in Co-parcenary property, with a retro-active effect, a fresh cause of action has arisen to the first respondent to maintain the suit. For proper appreciation of the decision in **Danamma's case**, the following passages are extracted hereunder:

*"24. Section 6, as amended, stipulates that
on and from the commencement of the amended*

Act, 2005, the daughter of a co-parcener shall by birth become a co-parcener in her own right in the same manner as the son. It is apparent that the status conferred upon sons under the old section and the old Hindu Law was to treat them as coparceners since birth. The amended provision now statutorily recognizes the rights of coparceners of daughters as well since birth. The section uses the words in the same manner as the son. It should therefore be apparent that both the sons and the daughters of a coparcener have been conferred the right of becoming coparceners by birth. It is the very factum of birth in a coparcenary that creates the coparcenary, therefore the sons and daughters of a coparcener become coparceners by virtue of birth. Devolution of coparcenary property is the later stage of and a consequence of death of a coparcener. The first stage of a coparcenary is obviously its creation as explained above, and as is well recognized. One of the incidents of coparcenary is the right of a coparcener to seek a severance of status. Hence, the rights of coparceners emanate and flow from birth (now including daughters) as is evident from sub-s (1)(a) and (b).

26) Hence, it is clear that the right to partition has not been abrogated.

7 AIR 1969 SC 1330.

The right is inherent and can be availed of by any coparcener, now even a daughter who is a coparcener.

27) *In the present case, no doubt, suit for partition was filed in the year 2002. However, during the pendency of this suit, [Section 6](#) of the Act was amended as the decree was passed by the trial court only in the year 2007. Thus, the rights of the appellants got crystallised in the year 2005 and this event should have been kept in mind by the trial court as well as by the High Court. This Court in [Ganduri Koteshwaramma & Anr. v. Chakiri Yanadi & Anr.](#)⁸ held that the rights of daughters in coparcenary property as per the amended [S. 6](#) are not lost merely because a preliminary decree has been passed in a partition suit. So far as partition suits are concerned, the partition becomes final only on the passing of a final decree. Where such situation arises, the preliminary decree would have to be amended taking into account the change in the law by the amendment of 2005.*

28) *On facts, there is no dispute that the property which was the subject matter of partition suit belongs to joint family and Gurulingappa Savadi was propositus of the said joint family property. In view of our aforesaid discussion, in the said partition suit, share will devolve upon the appellants as well. Since, Savadi died leaving behind two sons, two*

daughters and a widow, both the appellants would be entitled to 1/5 th 8 (2011) 9 SCC 788 share each in the said property. Plaintiff (respondent No.1) is son of Arun Kumar (defendant No.1). Since, Arun Kumar will have 1/5 th share, it would be divided into five shares on partition i.e. between defendant No.1 Arun Kumar, his wife defendant No.2, his two daughters defendant Nos.3 and 4 and son/plaintiff (respondent No.1). In this manner, the plaintiff/respondent No.1 would be entitled to 1/25 th share in the property.

From the above findings, it can be construed that the retrospective application of daughter's rights in co-parcenary property was not available when the earlier suit in O.S.No.1180 of 2004 came to be decreed and therefore, the first respondent herein/plaintiff may be justified in filing the subsequent suit.

10. In view of the above said findings, it would not be proper to strike off the plaint at this stage on the ground that it is barred under the provisions of Section 11 of CPC., and therefore amounts to an abuse of the process of law.

11. The ninth defendant claims to be a bona-fide purchaser of the property after the preliminary decree came to be passed. He also claims to have filed an application to reject the plaint before the

trial Court which is pending. Since this Court has held that a fresh cause of action has arisen for the first respondent herein/plaintiff to file the subsequent suit, in view of the decision of the Hon'ble Apex Court in **Danamma's case**, striking off the plaint at the instance of the ninth defendant by stating that he is a bona-fide purchaser, may not also be appropriate. If at all, the ninth defendant is aggrieved, it would be open to him to put forth all his legal grounds in the application filed by him before the trial Court under Order 7 Rule 11 of CPC., failing which, he can establish his case during the course of trial.

12. For all the foregoing reasons, I do not wish to interfere with the suit proceedings at this juncture. Hence, the Civil Revision Petition stands dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

28.02.2019

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Index : Yes

Order : Speaking

DP

To

The Additional District Munsif Court,
Coimbatore.



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M.S.RAMESH, J.

DP



Order made in

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