

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 22.04.2019

CORAM

THE HONOURABLE **Ms.JUSTICE P.T.ASHA**

CRP.(PD).No. 1296 of 2019

and

C.M.P.No. 8459 of 2019

M.Nanjappan

..Petitioner/Plaintiff

Vs

D.Devaraj

..Respondent/defendant

This Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decreetal order in I.A.No.1 of 2019 in O.S.No. 130 of 2018, on the file of the learned Subordinate Judge at Mettupalayam, dated 18.02.2019.

For Petitioner : Mr.K.Myilsamy

ORDER

सत्यमेव जयते

The above Civil Revision Petition is filed challenging the order passed by the learned Subordinate Judge at Mettupalayam, in dismissing I.A.No.1 of 2019 in O.S.No.130 of 2018, which was an application filed by the revision petitioner/plaintiff to order the defendant to commence evidence in order to prove his plea of oral agreement.

2 The brief facts necessary to dispose of the above Civil Revision Petition are as follows:

The plaintiff has filed a suit for various reliefs, which included the relief of declaration, to declare that he is the absolute owner of the Item-I of the suit properties and for a permanent injunction restraining the defendant from in any way interfering with the plaintiff usage of the suit cart track by tampering with it or by trying to obliterate the same and in any other way interfering with the plaintiff right to use the water channel and water pipe line either by tampering with it or by trying to obliterate the same.

3 The plaintiff would trace his right to one Kuppusamy Chettiar from whom the plaintiff along with his two brothers and mother had purchased first item of the suit property along with other items.

4 It is the case of the plaintiff that thereafter he and his family members had entered into a registered Partition Deed dated 22.05.1985 and under the Partition Deed the suit property was allotted to him along with other properties and from the date of the Partition Deed, he is in possession and enjoyment of the same as an absolute owner. Thereafter under the Sale Deed dated 21.06.1991, the plaintiff had purchased an extent of 2.42 acres in S.F.No. 760 of

Sikkathasampalayam Village and this land is abutting the public road on the west.

5 The plaintiff would submit that he, the defendant and their vendors had been enjoying the suit cart track and common Well. The defendants and his family members had sold a portion of the property in S.F.No. 760 to the plaintiffs under a registered Sale Deed dated 21.06.1991. The defendants were trying to force the plaintiffs to sell the lands in S.F.No. 761/1 to them, which was resisted by the plaintiff and therefore, there was an interference in enjoyment by the plaintiff, which prompted the plaintiff to file the above suit.

6 The defendant had resisted the above suit inter alia contending that the Well in question was a common Well and that belongs exclusively to the defendant and that the plaintiff had no right to use of the cart track leading to the lands of the defendant and the rough plan which has been filed along with the plaint is totally erroneous. The defendant had also pleaded that there was an exchange of property between his family viz; Dasappa Gowder and Venkattappa Gowder and by reason of the Will of the Venkattappa Gowder in favour of the Dasappa Gowder, the said Dasappa Gowder had become the owner and he had later given the property by way of

a Settlement Deed dated 14.12.2016 to the defendant.

7 When the matter was posted for trial, the plaintiff came forward with the petition, which is the subject matter of the revision. In the affidavit filed in support of the above application, the revision petitioner has stated as follows:

"3. The Respondent/defendant had filed his written statement and he has chosen to come with the defence that oral agreement in exchange was arrived between the petitioner and respondent's father Dasappa Gowder in respect of suit properties and the petitioner was given his right in the suit properties to the respondent's father, hence the petitioner not have any right in the suit properties.

4. I submit that the burden to prove the issue framed relating to the oral agreement is only with the Respondent/defendant. As such the suit may be posted for evidence of the defendant, who has to let into evidence for proving his claim of oral agreement. So, the above case may be posted for Trail. After the defendant side evidences are over, then only I have to let my rebuttal evidence, if necessary."

This petition was resisted by defendant, inter alia contending that the plaintiff has to first prove his case and he cannot direct defendant to commence the arguments and thereafter fill up lacunae in his case.

Therefore, he sought for dismissal of the above petition. The learned Subordinate Judge, Mettupalayam, by his order dated 18.02.2019 was pleased to dismiss the said petition stating that the provisions of Order 18 Rule 1 of the Code of Civil Procedure did not give a right to the plaintiff to compel the defendant to commence the trial. The provision only deals with the right and not with liability. It is for the defendant to exercise his right to commence the trial first, if he so desires and the plaintiff cannot compel. Challenging the same, the plaintiff is before this Court.

8 Heard Mr.K.Myilsamy, the learned counsel for the revision petitioner, he would argue that the entire suit hinges only upon veracity of the Exchange Deed, which has been entered into between the father of the defendant and once this proved, then a major portion of the evidence can be done away with. He would rely upon the Judgment reported in **AIR 1954 Vindhya Pradesh 53 – [Ratti Lal Panchhor Chawra Applicant Vs. Raghu and other]** in particular to paragraph No. 6 and **AIR 2014 Bombay 26 – [Sandip Sankarlal Kedia Vs. Smt. Pooja Sandip Kedia]** relying upon paragraph No. 16 therein.

10 Heard the counsel and perused the papers.

11 Order 18 Rule 1 of the Code of Civil Procedure, reads as follows:

"The plaintiff has the right to begin unless the defendant admits that facts alleged by the plaintiff and contends that either in point of law or on some additional facts alleged by the defendant the plaintiff is not entitled to any part of the relief which he seeks, in which case the defendant has the right to begin."

12 From a reading of the Order 18 Rule 1, it would clearly establish that the right to begin is always with the plaintiff and the exception being a case where the defendant had admitted the facts put forward by the plaintiff and has denied only a part of it. Order 18 Rule 3 reads as follows:

"Where there are several issues, the burden of proving some of which lies on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of answer to the evidence produced by the other party; and, in the latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case."

13 In the instant case as rightly pointed out by

learned Judge, the issue regarding the exchange is only one such

issue and in the event the plaintiff is able to prove his right to the property in his evidence, there is no necessity for the defendant to adduce evidence first. Further, it is always open to the plaintiff to exercise rights given to him under the provisions of Order 18 Rule 3 of the Code of Civil Procedure. I find no infirmity in the order passed by the learned Judge.

14 In the result, the Civil Revision Petition stands dismissed and order passed in I.A.No. 1 of 2019 in O.S.No. 10 of 2018, by the learned Subordinate Judge, Mettupalayam is confirmed. No costs. Consequently, connected miscellaneous petition is also closed.

22.04.2019

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Index: Yes/No

Internet: Yes/No

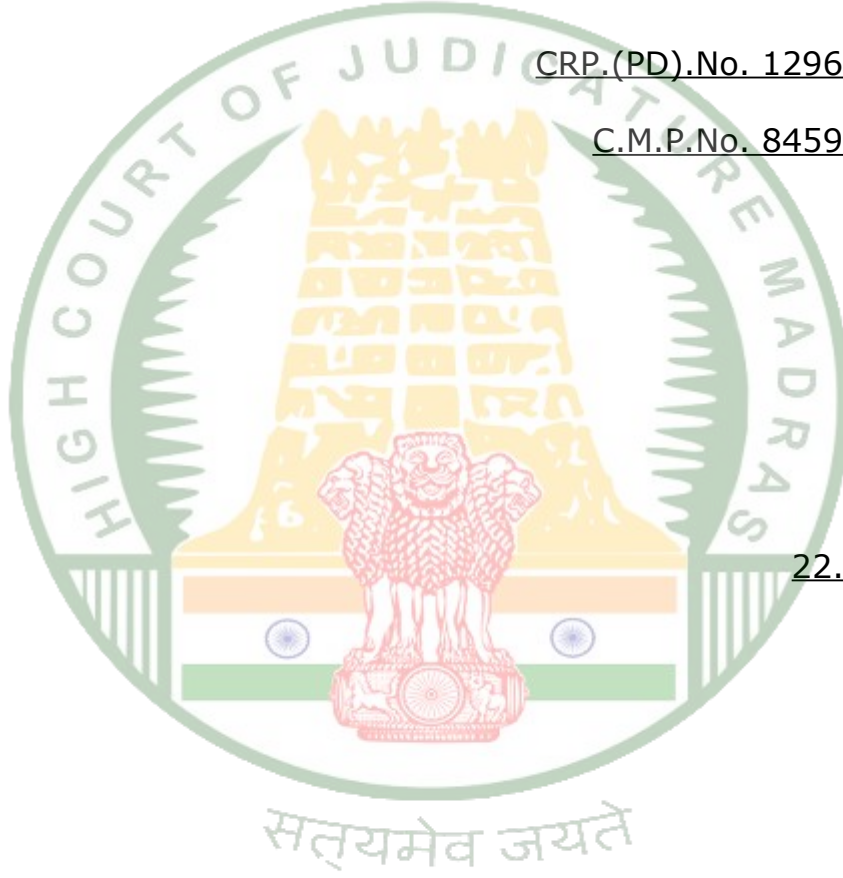
Speaking order / Non-speaking order

To

The District Munsif Court,
Rasipuram.

P.T.ASHA, J.

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