

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 19.09.2019

CORAM:

THE HONOURABLE Mr. JUSTICE R. SURESH KUMAR

C.R.P. (NPD) No. 1669 of 2019

V. Kotteeswari (Deceased)

D. Kalaivani ... Petitioner

Vs.

1. V. Kalaivannan

2. V. Kalaingarasi ... Respondents

Prayer : Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 26.03.2019 passed in E.A. No. 149 of 2019 in E.P. No. 149 of 2015 in O.S. No. 305 of 2009 on the file of learned Sub-ordinate Judge, Tambaram.

For Petitioner : Mr. K. Boopalan

For Respondents : Mr. M. Nallathambi

ORDER

This Civil Revision Petition has been filed against the fair and decretal order passed in E.A. No. 149 of 2019 in E.P. No. 149 of 2015 in

O.S. No. 305 of 2009 on the file of learned Sub-ordinate Judge, Tambaram, by order dated 26.03.2019.

2. The revision petitioner was the plaintiff, i.e., second plaintiff before the trial Court who filed a suit in O.S. No. 305 of 2009. The suit was filed originally before the learned Sub Judge, Tambaram as O.S. No. 358 of 2007 and subsequently renumbered as O.S. No. 305 of 2009. The institution of the suit is during the year 2007, even though the number of the suit is O.S. No. 305 of 2009 as it stands.

3. The said suit was filed for partition of the suit schedule property seeking half share of the plaintiffs and for possession of the same.

4. The preliminary decree was passed, thereafter, Advocate Commissioner was appointed to measure the property and after identifying the boundaries. Even though it was claimed by the plaintiffs that the extent of the suit property approximately was 8½ cents, after having identified the four boundaries, the Advocate Commissioner was

able to find out the extent of the property which comes around 4,440 sq.ft. The said findings, it is to be noted that, has not been objected by any parties and pursuant to which, Advocate Commissioner filed a report, based on which, final decree has been passed, therefore, in order to execute the same, the plaintiff filed a petition in E.P. No. 149 of 2015.

5. In the said E.P., the respondent one Kalaivanan has filed a petition in E.A. No. 149 of 2019, seeking permission from the Execution Court to file certain documents and to bring certain additional facts by way of proof affidavit, in order to adjudicate the issue in the E.P.

6. Though the said application seems to have been filed by quoting wrong provision under Order 8 Rule 3 of Civil Procedure Code and the same has also been mentioned in the impugned order passed by the Court below, it can be construed as an application within meaning of Section 47 of Civil Procedure Code.

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7. The said E.A. No. 149 of 2019 was allowed by the Execution Court by order dated 26.03.2019, aggrieved over the said order, the decree holder, i.e., revision petitioner herein has preferred this revision.

8. I have heard Mr. K. Boopalan, learned counsel appearing for the revision petitioner as well as Mr. M. Nallathambi, learned counsel appearing for the respondents.

9. The learned counsel appearing for the revision petitioner has submitted that, though it has been mentioned in the original sale deed, pertaining to the suit property, from which, the title of the suit property is being traced by the parties to the suit, that the extent of the property is 8½ cents, since it is a Natham land and had been in a possession and enjoyment of the father of the second plaintiff and defendants, one Velu, who is the original owner of the land in question, at the time of measuring the property, after identifying the four boundaries by the Advocate Commissioner, the Advocate Commissioner was able to find that within the four identified boundaries, the suit property was having the extent of 4,440 sq.ft.

10. However, the impression which both plaintiffs and the defendants were having during the trial of the suit and even prior to appointing an Advocate Commissioner before passing the final decree was that, the suit property would have an extent of 3703 sq.ft., which is according to them, approximately equal to 8½ cents.

11. However the fact remains that, the suit property is having an extent of 4,440 sq.ft., therefore, after having identified the boundaries which has not been objected by any parties including the defendants, the Advocate Commissioner has divided an extent of 4,440 sq.ft. in two equal shares as per the preliminary decree, as preliminary decree was passed declaring the entitlement of the plaintiffs ½ share of the suit property.

12. Based on the said division made by the Advocate Commissioner and pursuant to his report to that effect, the trial Court has passed the final decree and accordingly, the partition suit was decided.

13. In order to execute the said final decree to get possession of half share of the suit schedule property i.e., equivalent to 2220 sq.ft., the E.P has been filed by the decree holder.

14. In this context, it is to be noted that, one of the defendant namely Kalaiarasi, who is none other than the sister of the present first respondent, had filed E.A. 67 of 2018 in the very same E.P. No. 149 of 2015 in O.S. No. 305 of 2009 before the learned Subordinate Judge, Tambaram.

15. The said E.A. was filed under Section 47 of Civil Procedure Code, where the similar issue was raised and that has been raised in the subsequent application also as an issue raised by her brother Kalaivanan.

16. The said Section 47 application i.e., E.A. No. 67 of 2018 was dismissed by the Execution Court by order dated 20.11.2018, aggrieved over the said order, the said Kalaiarasi who is the second respondent herein, who is one of the defendant in the suit had filed a revision

before this Court in C.R.P. No. 4354 of 2018. The said Civil Revision Petition after having been heard was decided by the learned Judge of this Court by order dated 25.03.2019.

17. The said order has been heavily relied upon by the learned counsel appearing for the revision petitioner, therefore, the entirety of the order has been gone through by this Court.

18. After having gone through the order passed by the learned Judge made in C.R.P. No. 4354 of 2018, dated 25.03.2019, the following un controverted facts have emerged.

"(i) That Mr. Velu who was the head of the family was having a wife called Kotteswari i.e., first plaintiff, through her, he has a daughter Kalaivani ie., second plaintiff. The very said Mr. Velu is having second wife which has been described by the learned Judge in the said order of the Civil Revision Petition as concubine, through her there were two children born namely Kalaivannan and Kalaiarasi who are the first and second respondents herein and defendants in the suit.

(ii) In that context, the Kalaivannan and Kalaiarasi i.e., children through the second wife filed a suit in O.S.

No. 926 of 1993 along with their mother namely Savithiri, who stood as third defendant in the suit to declare that, they are legal heirs of the said Velu. It seems that, the said suit was decreed declaring the first and second plaintiffs and the first and second defendants are legal heirs of the said Velu. However, the trial Court rejected the legal heirship claimed by the Savithiri i.e., third defendant, who is the second wife of Velu as legal heir of him.

(iii) With the strength of the said declarative decree, after the demise of the said Velu on 16.09.1985, since the plaintiffs i.e, first wife and her daughter, who were not been permitted to enjoy the suit property, which had been in possession of the defendants, it seems, directed to file the said suit i.e., C.S. No. 305 of 2009 (as renumbered) for partition of half share of the suit property and for possession."

19. The said suit was decreed as has been discussed above, only pursuant to which, the E.P. was filed, where the said E.A. No. 67 of 2018 was filed by one of the defendant namely Kalaiarasi, who is the second respondent herein and the said E.A. since was dismissed, as against which, C.R.P. No. 4534 of 2018 was filed and that was rejected by this Court by order dated 25.03.2019, where the learned Judge has traced all this history.

20. Before this Court in the said Civil Revision Petition, which was the case of the second respondent herein i.e., Kalaiarasi, that during the life time of the third defendant viz., Savithiri i.e., mother of the said Kalaiarasi, she has bequeathed the said property to an extent of 1200 sq.ft., to in favour of one Arumugam a third party from whom the Kalaiarasi claimed to have purchased the said property, therefore, i.e., about 1200 sq.ft., of the suit property since has been purchased by the said Kalaiarasi, she claimed that her possession is on the exclusive portion and clubbing the same along with the suit property it was identified by the Advocate Commissioner to the extent of 4440 sq.ft., after identifying four boundaries of the suit property, hence it was questioned.

21. However, the learned Judge after having gone through the entirety of the issue has given a clear finding. In order to appreciate the same, the relevant portion of the Judgment of the learned Judge in C.R.P. No. 4354 of 2018 dated 25.03.2018 is extracted here under:-

"11. It is seen that none of the children of M.V. Velu, both the second plaintiff as well as defendants 1 and 2 are not parties to the said sale deed.

The subsequent sale deed under which, the second defendant has purchased the property is in the year 2009, after the suit in O.S. No. 305 of 2009 was filed. (The suit in O.S. No. 305 of 2009 was earlier instituted on the file of the Sub Judge, Tambaram, as O.S.No.358 of 2007). Therefore, the property had been purchased by the second defendant during the pendency of the suit. This petition was dismissed by the learned Sub Judge, Tambaram, holding that there has been no protest on the side of the second defendant, when the Advocate Commissioner had measured and demarcated the two portions and even thereafter, there was no objection and having accepted the Advocate Commissioner's Report as it is, the second defendant could not challenge the same, at this juncture.

12. The said order is the subject matter of challenge before this Court. The only argument put forward by the learned counsel for the revision petitioner was that the Advocate Commissioner's Report states that an excess land over and above 8 ½ cents is available at site and this has been partitioned between the plaintiffs and the defendants whereas this excess land is the exclusive property of the second defendant, she having purchased the same from Arumugam under the sale deed dated 02.04.2009.

13. *The learned counsel for the petitioner Mr.M.Md. Ibrahim Ali contented that the Commissioner has measured the property by taking into account the boundaries and therefore, even though excess belongs to the plaintiff as well as defendants 1 and 2. The defendants have come forward originally with the case that the suit property measuring an extent of 8 ½ cents belongs to them exclusively, and that the plaintiffs do not have any right over it. It is only now, after the delivery was ordered, that this new defence has been taken by the defendants. The counsel would also question the very application filed under Section 47 stating that the relief claimed does not come within the purview of the provisions of Section 47.*

17. *Therefore, the reading of the said provisions would clearly show that the very prayer sought for under Section 47, is not maintainable. Coming to the merits of the application, it is seen that the Advocate Commissioner has measured the property as available within the four boundaries that is being described in the plaint namely, North by Venkatasamy Reddy Street, South by site belonging to Indrani Ammal, East by Kalaivani Street and West by house site belonging to Varadachary. The defendants cannot take advantage of this difference in the measurement, since it is an axiomatic principle of law that*

the boundaries will prevail over measurement especially when no objection was taken to the Advocate Commissioner's report. Further Savithri, under whom the defendants trace title to the excess land had sold the said extent claiming to be the wife of Velu and stating that it is an ancestral property. In the earlier proceedings it has been held that she is not the wife of Velu and being an ancestral property the plaintiff and defendants are entitled to equal shares in the said extent.

18. Considering the above, I do not find any infirmity in the order passed by the learned Sub Judge, Tambaram in O.S. No. 305 of 2009. The Civil Revision Petition is dismissed and the order passed in E.A. No. 67 of 2018, stands confirmed. No costs. Consequently, connected Miscellaneous Petition is closed."

22. Therefore, the learned Judge has concluded it that, already declarative decree has been passed in O.S. No. 926 of 1993, whereby the defendant viz., Savithiri was declared not to be legal heir of the deceased Velu. That Savithiri who is none other than the mother of the respondents herein, who have bequeathed the suit property, to the third party called Arumugam. Therefore, the claim made by the respondents that, they purchased the said portion of the property from the said Arumugam cannot be accepted and therefore, consequential

claim for the partition of the suit property belong to them exclusively also cannot be accepted.

23. The learned Judge has further given a reason for rejecting the said Civil Revision Petition that, assuming the sale has been taken place between the third defendant viz., Savithiri, and third party Arumugam in the year 2009 whereas, the present suit was filed originally as O.S. No. 358 of 2007, subsequently renumbered as O.S. No. 305 of 2009 and therefore, during the pendency of the suit, which is for the partition, if any transaction is taken place, it is nothing but *lis pendency* that will not bind the parties.

24. Also the learned Judge had rejected the said Civil Revision Petition on yet another ground to state that, it is axiomatic principle of law that the boundaries prevail over the measurement established. When no objection was taken to the Advocate Commissioner's report and here in the case, since the boundaries have been identified, therefore within the boundaries if the suit property extent is available that shall be taken in to account as the extent of the property provided,

if no objection to that effect has been made by the parties. Therefore on that ground also, the learned Judge rejected the Civil Revision Petition by holding that the extent identified by the Advocate Commissioner shall be extent of the suit property as the defendants cannot claim any exclusive right of any peace of the land on the sale said to have been made by any one in favour of Arumugam who claimed to have purchased from mother of the defendants in the year 2009 for the reasons discussed above.

25. For all these reasons, the learned Judge since has rejected the Civil Revision Petition and relevant portion of the judgment of this Court has been extracted herein above, it is clear that, the present issue is nothing but a repetition of the very same issue already been decided and concluded. Therefore, what has been concluded in the said Civil Revision Petition still to be binding on the parties in the very same issue which was once again attempted to be raised before the Execution Court. However erroneously, the Execution Court without considering all these factors, has allowed the said E.A., i.e E.A. No. 149 of 2019, through the impugned order, thereby permitting the second

respondent to file documents to raise the issue once again. Therefore, the said order, in the considered opinion of this Court shall be, in the context of the detailed findings given by the learned Judge in C.R.P. No. 4354 of 2018 dated 25.03.2019, absolutely unjustifiable and unsustainable.

26. In that view of the matter, the impugned order cannot be sustained as it requires interference from this Court. Accordingly, the impugned order is set aside and the Civil Revision Petition is allowed. No costs.

19.09.2019

Index: Yes / No

Speaking order / Non speaking order

vji

To

The learned Sub-ordinate Judge,
Tambaram.

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R.SURESH KUMAR, J.

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