

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 14.06.2018

Pronounced on : 15.04.2019

CORAM

THE HONOURABLE **MR.JUSTICE P.VELMURUGAN**

CRP.(NPD).Nos.4382 and 4396 of 2017

1. Neelamegam

....Petitioner/Petitioner/4th Judgment Debtor
/4th Defendant
in C.R.P.No.4382 of 2017

2. Sivaraj

....Petitioner/6th Judgment
Debtor/6th Defendant
in C.R.P.No.4396 of 2017

versus

1. E.Davamani
2. E.Gunamani
3. E.Jagadeesan
4. E.Lakshmi Sekar
5. E.Saroja
6. E.Jayaseelan
7. E. Rani Ethiraj @ E.Rani
8. E. Amudha
9. E.Bhaskar
- 10.E.Sridhar
- 11.E.Arul
- 12.E.Devatha
- 13.E.Karnal
- 14.E.Ebi
- 15.E.Chandra
- 16.E.Rajan
- 17.E.Ponmudi

All are Rep. by their Power of Attorney E.Karnal

.. Respondents/DH/Plaintiffs/
Respondents (in both petitions)

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Prayer in C.R.P.No.4382 of 2017:- Civil Revision Petition filed under Article 227 of the Constitution of India praying to set aside the judgment and decree dated 11.10.2017 passed in E.A.No.980 of 2016 in E.P.No.1247 of 2015 in O.S.No.4747 of 1977 on the file of the learned IX Assistant City Civil Court, Chennai.

Prayer in C.R.P.No.4396 of 2017:- Civil Revision Petition filed under Article 227 of the Constitution of India praying to set aside the fair and decreetal order dated 11.10.2017 passed in E.A.No.1189 of 2017 in E.P.No.1247 of 2015 in O.S.No.4747 of 1977 on the file of the learned learned IX Assistant City Civil Court, Chennai.

For Petitioner : Mr. C.Jagadish in CRP.No.4382 of 2017
 Mr. R.Subramanian in CRP.No.4396 of 2017
 For Respondents : Mr.V.Raghavachari
 for Mr.V.Balakrishnan
 For R13, R1 to R12 and R14 to R17
 (in CRP. No.4382 of 2017)
 For R1 to R17 (in CRP. No.4396 of 2017)

COMMON ORDER

The respondents have filed a petition in E.P.No.1247 of 2015 for execution of the decree passed in O.S.No.4747 of 1977. When execution proceedings is pending, the revision petitioners herein filed the application under Section 47 of C.P.C. In E.A.N.1189 of 2017 stating that the decree was not covered in T.S.No.71/1. The decree passed only with regard to T.S.Nos.71/2 and 71/S not for 71/1. T.S.No.71/1 is in the enjoyment of the revision petitioners family.

Therefore, the delivery of possession of the petition mentioned property cannot be effected. Therefore, the execution petition has to be dismissed.

2. The petitioners have stated that the plaint in O.S.No.530 of 1948, filed by his father one Gurunathan. The petitioner/J.D.4 is the son of the said late Gurunathan. One Ethirajan is the joint patta holder of T.S.No.71/2 filed for the subject matter of the suit in O.S.No.4747 of 1977 for partition and separate possession of his alleged half share in respect of T.S.Nos.71/2. The entire extent measured 7½ in Paimash No.972 which is equivalent to T.S.No.71 later 71 was sub-divided as 71/1 and 71/2, due to the decree passed in O.S.No. 404 of 1957.

3. The late Ethirajan instead of filing the suit as against the Nagandhi Ammal he has cited the father of this petitioner as defendant in the suit and claimed equal share in T.S.No.71/2. The father of the petitioner objected to the same and he died on 09.06.1979 pending the suit and all the legal heirs were brought on record.

4. The petitioners herein and other legal heirs are substituted in the place of the original defendants. The suit was continued on the

basis of the written statement filed by his father late Gurnathan. A preliminary decree for partition was passed in favour of said late Ethirajan on 18.07.1993. The petitioner and other legal heirs of the said late Gurnathan filed first appeal in A.S.No.384 of 1984 against the same, which came to be dismissed. As against the said judgment, they filed second appeal No.649 of 1987 before this Court and the same also allowed. Against which the said Ethirajan approached the Apex Court in C.A.No.8720 of 1997 and the same was allowed.

5. The said Ethirajan filed the petition for passing final decree, which came to be passed on 12.09.2007. The appeal filed by the purchasers from the legal heirs of the said Gurnathan in A.S.No.519 of 2008 was allowed on 11.08.2011. As against the said A.S.No.519 of 2008, the second appeal was filed in S.A.No.714 of 2012 and the same was dismissed 13.11.2014.

6. The petitioners along with other legal heirs of the said late Gurnathan filed the Special Leave Petition and withdrawn the same. Since they have already filed for review of the judgment and decree passed by this Court on 13.11.2014 in S.A.No.714 of 2012, the Advocate Commissioner has measured the property in T.S.No.71/1 by

wrongly identified it with door No.96. The petitioners and other legal heirs of the said late Gurunathan objected for the measurement of the door No.96 which is located in T.S.No.71/1 which was not considered by the Advocate Commissioner. This Court recognised the purchaser of the land from the revision petitioners and his family members has allowed to enjoy all the portions of the property covered in T.S.No.71/1. Therefore, the decree cannot be executed against the revision petitioners. Since the subject property is situated in T.S.No.71/1 and not the R.T.S.No.71/2. Since the decree in the subject matter of the suit was not covered in T.S.Nos.71/2 and 71/S. The trial Court failed to consider all these aspects. Therefore, they filed the petitions under Section 47 of C.P.C. and the house in Door No.96 situated in T.S.No.71/1 cannot be executed since it is not covered in the decree. The trial Court has not considered these aspects and simply dismissed the petitions. Against which the petitioners have preferred the present revisions before this Court.

7. The case of the respondents is that regarding the discrepancy in S.No.71/2 and 71/S already the legal heirs of original defendant, the said Gurunathan including the present petitioners have raised the same objection by filing the applications in I.A.No.8458 and

8459 of 2015 before the trial Court to reopen the enquiry for the purpose of issuing subpoenae regarding the oral evidence and to issue subpoenae summons to Tahsildar, Purasaiwalkam Taluk for the purpose of production of documents and for giving oral evidence on the document were dismissed by the trial Court on 09.08.2005. As against the order, the petitioners have filed a petition in C.R.P.Nos.1286, 1287 of 2005 which were also dismissed on 22.12.2006 by observing that the preliminary decree was confirmed by the Hon'ble Supreme Court cannot be reopened. Against which the legal heirs of the said Gurnathan including the present revision petitioners preferred the Special Leave Petition to Appeal (Civil) Nos. CC.Nos.10291 and 10292 of 2007 which were also dismissed on 22.09.2007 and it has become final. In the petition filed for passing of the final decree, the Advocate Commissioner has also filed report on 04.03.1993 stating that the subject property is situated within its four boundaries. So, the properties covered under the decree in O.S.No.4747 of 1977 the subject matter went up to the Supreme Court and the Supreme Court has also confirmed the preliminary decree. Subsequently, the decree holder filed the final decrees and even in that they filed the other petition which also went up to the Supreme Court. Therefore, both the decrees have been also confirmed. Therefore, during the execution

proceedings, he cannot reopen the very same dispute which was already agitated and decided by the competent Court. The execution Court cannot go behind the decree and also beyond the scope of Section 47 of C.P.C. and the trial Court has also rightly discussed and dismissed the petition. Therefore, no need to interfere with the

8. Heard both sides and perused the materials available on record.

9. On a perusal of the records, shows that there was a dispute between the father of the petitioners and the Ethirajan and subsequently, the Ethirajan has also filed the suit for partition and preliminary decree was passed, the said preliminary decree was finally confirmed by the Supreme Court. During pendency of the suit, the original plaintiff Ethirajan died, legal heirs of deceased Ethirajan have been impleaded. Therefore, they filed a petition for passing of final decree in which, Advocate Commissioner was also appointed subsequently the final decree was also passed. During the pendency of the suit, the petitioners family sold the property to one venkatesan, he has also filed the appeal before the Supreme Court and the same was allowed and his right was ensured. However, based on the final

decree, the decree holder filed the execution petition before the Civil Court. During the pendency, the revision petitioners herein filed applications under section 47 of C.P.C and the same were dismissed. Challenging the order, the petitioners have filed the present revisions before this Court.

10. Admittedly, in the suit filed by one Ethirajan, against the father of the petitioners preliminary decree was passed. During the pendency of the suit, since his father Gurunathan died. Therefore, the petitioners and other legal heirs of the said Gurunathan were impleaded in the suit and they have also participated in the suit proceedings and challenged the preliminary decree and it went upto Supreme Court and the Supreme Court has also confirmed the preliminary decree. Thereafter, the decree holder filed a petition for passing of final decree and the purchaser of the legal heirs of the Gurunathan has also filed an appeal and which was decided in favour of the purchasers.

11. Whatever the points taken by the revision petitioners were already decided by the competent Court. Now they cannot reopen and re-agitate the very same settled issues. The trial Court has

also observed that the learned Advocate Commissioner has also identified the property.

12. Though the learned counsel for the petitioners would submit that when the decree was passed in respect of T.S.No.71/2 and 71/S and the execution cannot be in respect of T.S.No.71/1 and none of the documents filed by the petitioners were considered by the executing Court in petitions filed under Section 47 of C.P.C. Therefore, the order of the execution Court is liable to be set aside.

13. In fact, the evidence of RW1, it is admitted that A10 and A13, there is a reference only to S.No.71/2 and 71/S and further it is admitted that the amendment petition filed by them was dismissed. The Advocate Commissioner, in his report, has mentioned that the Door Number 96 is situated only in S.No.71/1 and not in plaint schedule, it is different from the door number mentioned in the commissioner's report. As against the judgement and decree in S.A.No.714/2012, the appellants have filed review petition in Rev. Appln. Nos.141 and 142 of 2017 and the same were dismissed by this Court by an order dated 01.11.2018.

14. While deciding the Civil Revision Petitions No.1286 and 1287 of 2005 dated 22.12.2006 which were confirmed by the Supreme Court cannot be re-opened and if any interference regarding the reopening of the preliminary decree will amount to rejudicata under Section 11 of C.P.C.

15. The contention raised by the petitioners is not acceptable. When the Advocate Commissioner has clearly identified the property and mentioned the door number and also boundaries. It is settled law that the boundaries and the door number will prevail over the extent and survey numbers. But in this case, when the Advocate Commissioner identified and filed the report based on that final decree was also passed. This Court has also confirmed the final decree. When they filed an appeal before the Supreme Court, the same was withdrawn by the petitioners. The revision applications filed by the petitioners also dismissed. Now they cannot say that the door No.66 in S.No.71/1 and not 71/2. The decree covered only 71/2 and not in S.No. 71/1 the same cannot be executed is not acceptable and also the execution Court cannot travel beyond the decree and the scope of section 47 CPC is not acceptable.

16. Under these circumstances, this Court finds that the execution Court rightly dismissed the petitions filed by the petitioners under Section 47 CP.C. This Court does not find any perversity in the order passed by the execution Court and finds there is no merit in the revisions.

17. In the result, these Civil Revision Petitions are dismissed.

15.04.2019

Index:Yes/No

Speaking order/Non speaking order

rli

To

The IX Assistant City Civil Court, Chennai.

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P.VELMURUGAN, J.,

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Pre-Delivery order in
CRP.(NPD).Nos.4382
and 4396 of 2017

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