

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :25.03.2019

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

C.R.P.No.4354 of 2018

and

C.M.P.No.23809 of 2018

G.Kalairasi

... Petitioner

-vs-

V.Kotteswari (Deceased)

1.D.Kalaivani

2.V.Kalaivanan

3.S.James Ponraj

... Respondents

PRAYER: Civil Revision Petition filed under Section 115 of Civil Procedure Code, against the order No.E.A.No.67 of 2018 in E.P.No.149 of 2015 in O.S.No.305 of 2009 dated 20.11.2018 on the file of the Sub-Ordinate Judge at Tambaram.

For Petitioner : Mr.M.Md. Ibrahim Ali

For R1 : Mr.J.R.K.Bhavanantham

O R D E R

The above Civil Revision Petition is filed challenging the Section 47 application, which is filed by the second defendant/second Judgement Debtor in E.A.No.67 of 2018 in E.P.No.149 of 2015 in O.S.No.305 of 2009 on the file of the learned Subordinate Judge, Tambaram.

2.The brief facts necessary to dispose of the above civil revision petition are as follows:

3.The deceased first plaintiff Kotteswari and the second plaintiff Kalaivani had filed the suit in O.S.No.358 of 2007 on the file of the learned Subordinate Judge, Chengalpattu against

Kalaivanan, Kalaiarasi and Savithri, who seems to be dead, claiming partition and separate possession of their half share in the suit schedule property.

4. In the plaint, the plaintiffs would submit that the first plaintiff is the legally wedded wife of M.V.Velu @ M.Vajiravel. The second plaintiff is the daughter born to them. The third defendant Savithri was the concubine of the father through whom first and second defendants namely, Kalaivanan and Kalaiarasi are born. They had filed the suit in O.S.No.926 of 1993, on the file of District Munsif Court, Tambaram, for a declaration that they are the legal heirs of the deceased M.V.Velu. By a decree dated 07.12.1995, the District Munsif Court, Tambaram, held that the plaintiffs 1 and 2 and defendants 1 and 2 are the legal heirs of M.V.Velu @ M.Vajiravelu and the request of the third defendant Savithri, to be declared as legal heir, was rejected.

5. The property in question is a self-acquired property of the said M.V.Velu. On his passing away on 16.09.1985, the property devolved on the plaintiffs and defendants one and two. The plaintiffs would submit that defendants 1 and 2 are residing in a portion of the suit property and they had let out the remaining property and enjoying the rental incomes from the property and they were not allowing the plaintiffs to have a share of the rental income from the suit property and therefore, the suit for partition has been filed.

6. The suit was filed with reference to the house ground and premises situated at No.2, Kalaivani Street, Peerankaranai Village, comprised in S.No.69/2, measuring an extent of 8½ cents, situated within the specified boundaries.

7. The first defendant had filed a written statement which was adopted by the second defendant in which, they would contend that the property in question is a Gramanatham and the father had constructed a house on the said land and lived therein with their mother, who was the legally wedded wife of the father. They would submit that except for them, none other was enjoying the said property and the plaintiffs had no right to the same. The first defendant would feign ignorance about the earlier suit in O.S.No.926 of 1993. The preliminary decree dated 29.04.2011 is passed in the suit granting a half share to the plaintiffs. Thereafter, the plaintiffs had filed final decree proceedings in I.A.No.1 of 2012. The final decree is also decreed on 28.09.2012.

8. The Commissioner, who was appointed to divide that properties, has submitted his report on 28.09.2012, suggesting the mode of division. The Commissioner has clearly observed that though the suit schedule and the preliminary decree would show the measurement as 8 ½ cents. However, on site, there was an extent of 4440 sq.ft. available, but the boundaries are the same as the boundaries for the 8 ½ cents. Therefore, the Advocate Commissioner had taken an extent of 4440 sq.ft as the total

extent and granted a half share of 2220 sq.ft each for both the parties.

9.Since, the defendants had failed to deliver possession of their half share, the decree holders filed E.P.No.149 of 2015 seeking delivery of their portion. Thereafter, the present impugned petition in E.A.No.67 of 2018 has been taken out only by the second defendant/second Judgement Debtor. Section 47 application has been filed for the following relief:

"Under these circumstances if this court passed any orders to favour of decree holders in the present E.P., it put irreparable loss and hardship to the JD1 and JD2, therefore it is prayed that this Hon'ble Court may be pleased to reject the E.P and set aside the Advocate Commissioner report dated 12.09.2012 and further declare the preliminary and final decrees passed by this Court dated 29.04.2011 and 28.09.2012 is null and void and unenforceable and thus render justice."

10.The basis on which the Section 47 application has been filed is that the excess land over and above 8 ½ cents belongs to the second defendant, she having purchased the same from one Arumugam, who inturn had purchased the said property from Savithri, the second defendant's mother under sale deed dated 04.09.1995. A perusal of the said sale deed would indicate that Savithri, the deceased third defendant had sold the property to an extent of 1638 sq.ft to Arumugam stating that she is the wife of M.V.Velu and the property is the ancestral property of M.V.Velu.

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.

14. Heard both counsels and perused the material available on record.

15. As rightly pointed out by the learned counsel for the respondents, the relief that is sought for in the impugned petition does not conform to the provisions of Section 47.

16. Section 47 of the Civil Procedure Code reads as follows:

"Questions to be determined by the Court executing decree.-(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be determined by the Court executing the decree and not by a separate suit

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

[Explanation I.-For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II.-(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction

of the decree within the meaning of this Section.]”

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.

Sd/-  
Assistant Registrar(CO)

//True copy//

Sub Assistant Registrar

smv/hvk

To

The Sub Judge, Tambaram.

+2cc to Mr.JRK.Bhavanantham, Advocate SR.No.27842

+1cc to Mr.M.MD.Ibrahim Ali, Advocate SR.No.28168

C.R.P.No.4354 of 2018  
and  
C.M.P.No.23809 of 2018

PMS (CO)  
GMY (26/04/2019)