



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT
RESERVED ON: 11.03.2019
DELIVERED ON : 16.04.2019
CORAM

WEB COPY

THE HONOURABLE MRS. JUSTICE R. THARANI
C.R.P. (PD) (MD) No.1079 of 2016

Sundari

.. Petitioner/Petitioner/Plaintiff

Vs.

1.Alagurani
2.Neelamegam
3.Ganesan

.. Respondents /Respondents/Defendants

Prayer: This Civil revision petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order passed by the 3rd Additional Sub Court, Madurai in I.A.No.27 of 2015 in O.S.No.431 of 2009 on 14.03.2016 and permit the petitioner/plaintiff to withdraw the suit in O.S.No.431 of 2009.

For Petitioner	: Mr.T.S.R.Venkataramana
For 1 st Respondent	: Ms.Jessi Jeeva Priya
	For Mr.G.Aravinthan
For Respondents 2 and 3	: No Appearance

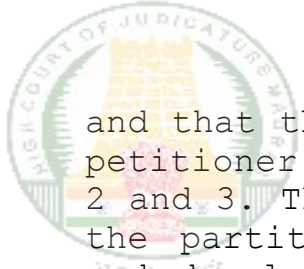
ORDER

Heard Mr.T.S.R.Venkataramana, learned counsel appearing for the petitioner and Ms.Jessi Jeeva Priya, learned counsel appearing for the first respondent.

2.This Civil Revision Petition has been filed against the order passed in I.A.No.27 of 2015 in O.S.No.431 of 2009 dated 14.03.2016 on the file of the learned III Additional Sub Judge, Madurai.

3.The petitioner herein is the plaintiff and the respondents are the defendants in the suit. The petitioner herein has filed a suit in O.S.No.431 of 2009 for a prayer of declaration and for injunction. In that suit, the petitioner herein has filed a petition in I.A.No.27 of 2015 under Order 23 Rule 3 for permission to withdraw the suit and to file a fresh suit. That petition was dismissed by the trial Court. Against the dismissal order, the petitioner has come forward with this revision petition.

4.On the side of the petitioner, it is stated that the first respondent is the daughter of the second respondent and the second respondent is the son of the second respondent and there is one more daughter for the second respondent by name Muthu Kamatchi



and that the first respondent was unmarried. It is stated that the petitioner purchased 2/3th share of the property of the respondents 2 and 3. The third respondent did not inform about the pendency of the partition suit. After the petitioner purchased the property and developed the property, a compromise decree was entered into between the respondents and Police protection was ordered and the Ameena and Police knocked the door and then only the petitioner came to know about the partition suit and that the petitioner's advocate filed an obstruction memo before the trial Court and then he filed C.R.P.(MD)No.927 of 2009 before this Court and the petition was disposed of with a direction to approach the Civil Court.

5. On the side of the petitioner, it is stated that the petitioner purchased a joint family property and the first respondent filed a partition suit against her father and brother. In the partition suit, it is stated that the father has mortgaged the property for the marriage of the first daughter stating that the first daughter is not entitled for the share. But in the compromise decree, a share was given to the first daughter and the first respondent got the entire suit property and the father and son were not given any share in the property. On the side of the petitioner, it is stated that during the trial, the respondents 2 and 3 filed an additional written statement stating that the first respondent has cheated the respondents 2 and 3 and they admitted the sale of the property to the petitioner herein and that the trial Court refused to receive the additional written statement.

6. On the side of the petitioner, it is stated that instead of filing a suit for partition, the advocate for the petitioner wrongly filed a suit for declaration. Though in the written statement filed by the respondents, it is stated that the petitioner has to file a suit to set aside the decree, the advocate for the petitioner fail to file such a suit. Then the petitioner was advised to file a petition to withdraw the suit for filing a fresh suit. The learned Sub Judge dismissed the petition stating that to set aside the earlier decree, three years period is over, though other side did not raise any such plea. Under Article 59 of the Limitation Act, the date of limitation starts from the date of knowledge. The petitioner came to know about the compromise decree only when the Ameena and the Police knocked the door of the petitioner and hence the suit is within the time limit.

7. On the side of the petitioner, it is further stated that the petitioner is not a party in the partition suit and the petitioner is not a party in the E.P. proceedings. When there is a compromise decree between family members, there is no necessity

<https://hcservices.courts.gov.in/hcservices/> E.P. petition. Three years after the compromise decree, E.P. was filed within that period, the petitioner has constructed a house and the respondents vacated the petitioner

from his house with Police help.

8. On the side of the petitioner, it is stated that the petitioner is not a lis pendence buyer and that this petitioner step into the shoes of the father and Section 59 is not applicable to the partition suit and is applicable only to a mortgage suit. The earlier decree is against the vendor of the petitioner who colluded with his daughter and has entered into a compromise. Section 52 of the Transfer of Property Act, 1882, states that "during the pendency in any Court having authority of suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose". The decree in that suit is a collusive decree which does not affect the right of the plaintiff. The respondents may not have any objection as they have suggested for filing a suit for setting aside the decree.

9. On the side of the petitioner, it is stated that the petitioner should not suffer for the fault of the lawyer. Under Order 23 Rule (1)(3), a suit can be withdrawn to file a fresh suit and there is sufficient ground for withdrawal. The suit cannot be amended as almost the entire pleadings are to be changed. The second respondent colluded with the first respondent after executing a sale deed in favour of the petitioner. The first respondent will not be any way prejudice as the petitioner has purchased only 2/3th share of the property not the 1/3th of the share that belonged to the first respondent. The petitioner has not denied the right of the first respondent in her 1/3th share and prayed the petition to be allowed.

10. On the side of the respondents, it is stated that the first respondent has filed a suit for partition in O.S.No.1180 of 1993 claiming the 1/3th share in the property and the petitioner has purchased the property from the respondents 2 and 3 and that case was transferred from the III Additional District Judge to the Principal District Judge and was taken on file as O.S.No.1949 of 2006 and that the case ended in a compromise on 26.06.2006 and the suit property was allotted to the share of the first respondent and other properties are allotted to the respondents 2 and 3. When the first respondent filed E.P. petition for delivery of possession, this petitioner filed a petition under Order 21 Rule 97 on 13.07.2009 and the petition was dismissed by the trial Court. Against which, the petitioner has filed C.R.P.(MD)NO.977 of 2009 before this Court and the petition was dismissed by this Court on 30.07.2009. The first respondent is in possession and the sale deed obtained by the petitioner is lis pendence and it would not affect the rights of the respondents.



11. On the side of the respondents, it is stated that the trial has commenced and the plaintiff side arguments was over and at the stage of arguments on the side of the respondent, the petitioner has filed a petition to permit him to file an amendment petition. After enquiry both the I.A. were dismissed and the case was posted again for arguments. It is true that this Court has given an opportunity for the petitioner to file a suit. Having advantage of the observation, the petitioner is going on filing civil suits against the respondents. The first respondent is fighting for her share in the suit property from the year 1993 onwards. Though the first respondent has stated in her written statement that without seeking for a prayer of cancellation of the earlier decree, the suit is not maintainable, the petitioner has not come forward to file petition to amend the prayer. On the side of the respondents, it is stated that the petitioner cannot pressurise the respondents with another suit. If needed, the petitioner can make amendment in the suit pleadings.

12. A perusal of the records reveals that the petitioner is not claiming any right over the share of the first respondent. The petitioner has not purchased the 1/3rd share of the first respondent in the joint property. In the written statement filed by the respondents, it is stated that no consideration was paid by the plaintiff and only as a counter blast for the partition suit filed by the first respondent, the respondents 2 and 3 have executed a nominal sale deed in favour of the plaintiff and that no title or ownership was transferred through the sale deed.

13. It is seen that the first respondent is the daughter of the second respondent and the third respondent is the son of the second respondent. The first respondent filed a suit for partition against the respondents 2 and 3 in O.S.No.1180 of 1993. During the pendency of that suit, the respondents 2 and 3 sold the property to the petitioner and the petitioner is said to have developed the property and constructed a building. Subsequently the respondents 2 and 3 entered into compromise with the first respondent and a compromise decree was passed on 26.06.2006. The contention of the petitioner is that the pendency of the suit was not brought to the knowledge of the petitioner at the time of purchase of the property. It is stated that the petitioner came to know about the compromise decree only when the Ameena came to the house with the Police for delivery of possession. On the side of the petitioner, it is stated that the petitioner should not be prejudiced by the fraudulent act of the respondents

14. It is stated that the petitioner has filed a suit for declaration and injunction instead of filing a suit for partition ~~and~~ aside the earlier suit. The contention of the petitioner is that the petitioner has to amend almost the entire plaint except the cause title. Instead of carrying out all the



amendments, the petitioner may be given an opportunity to file a fresh suit on the same cause of action and that the 1/3th share of the first respondent will not be in any way affected. The contention of the petitioner is that the petitioner has filed the petition within three years from the date of knowledge. As per Article 59 of Limitation Act, steps has to be taken within three years from the date of decree. The contention of the petitioner is that the petitioner is not aware of the decree till the Ameena knocked his door.

15.It is seen that the respondents 2 and 3 executed a sale deed in favour of the petitioner and subsequently entered into a compromise decree with the first respondent and allot the property sold to the petitioner to the share of the first respondent. The respondents 2 and 3 after the execution of the sale deed have entered into a compromise against the rights of the petitioner.

16.In the above circumstances, an opportunity for the petitioner is to be given to put forth his case. Amending the suit will cause further delay in the disposal of the suit. Instead of amending the pleadings, it will be easy for the Court to appreciate a new suit.

17.In the above circumstances, this Civil Revision Petition is allowed and the order passed in I.A.No.27 of 2015 in O.S.No.431 of 2009 dated 14.03.2016 on the file of the learned III Additional Sub Judge, Madurai is set aside. The petitioner is permitted to withdraw the suit with liberty to file a fresh suit on the same cause of action. No Costs.

Sd/-

Assistant Registrar (CS-II)

// True Copy //

Sub Assistant Registrar(CS)

To

The III Additional Sub Judge, Madurai.

+1 CC to M/s.T.S.R.VENKAT RAMANA, Advocate (SR-61390[F] dated 16/04/2019)

+1 CC to M/s.P.JESSI JEEVA PRIYA, Advocate (SR-61396[F] dated 16/04/2019)

MRN

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