

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 06.07.2021

Pronounced on : 30.07.2021

CORAM

THE HONOURABLE MR. JUSTICE C.V.KARTHIKEYAN

C.R.P.(PD).No.1705 of 2020

and

C.M.P.No.10702 of 2020

V.Radhakrishnan

...2nd Defendant / Revision Petitioner

Vs.

1.V.Chandrasekar

2.V.Rangarajan

3.Chithra Balakrishnan

4.Arthi @ Vaishnavi Balakrishnan

... Respondents 1 & 3 / Respondents 1 & 2

... Plaintiffs / Respondents 3 & 4

Prayer:- This petition filed under Article 227 of the Constitution of India, to set aside the Docket order dated 19.11.2019 in Memo in O.S.No.5499 of 2019 on the file of the City Civil Court, Chennai.

For Petitioner : Mr.N.Suresh

For R1 : Mr.K.V.Anantha Krushnan

For R2 : Mr.S.Elambharathi

For R3 : Mr.R.Subramanian

ORDER

This Revision Petition has been filed under Article 227 of the Constitution of India by the 2nd defendant in O.S.No.5499 of 2019, now pending on the file of the III Additional City Civil Court, Chennai, to set aside a docket order dated 19.11.2019 in a memo filed by the revision petitioner.

2.The suit in O.S.No.5499 of 2019 and another suit in O.S.No.5500 of 2019 are now pending before the III Additional District Court, Chennai. The trial in both the suits are being conducted independently and there is no joint trial.

3.A brief description of the parties would be instructive. The plaintiffs in O.S.No.5499 of 2019 are the widow and daughter of late V.Balakrishnan. The 1st, 2nd and 3rd defendants are the brothers of V.Balakrishnan. The suit had been originally instituted in the Original Side of the Madras High Court as C.S.No.848 of 2014 and had been subsequently transferred to the City Civil Court, Chennai.

4.The suit had been instituted seeking partition and separate possession of 714 sq.ft by dividing the suit property by metes and bounds and for permanent injunction restraining the defendants from alienating the property and for costs.

5.The suit property is building and premises at old door No.25, new door No.25-56, 4th Main Road, Gandhi Nagar, Chennai – 600 020.

6.The 1st defendant had filed a written statement and he claimed that he is in possession of the 1st floor of the said building. He also claimed that he is not a necessary party to the suit proceedings. The 2nd defendant has also filed a written statement and also a counter claim seeking a preliminary decree for partition, allotment and separate possession of 60% namely, 5148 sq.ft of the schedule property by dividing the property by metes and bounds. The 3rd defendant had also filed a written statement seeking partition and separate possession of 40% of the undivided share of land, namely 3432 sq.ft and also seeking a maximum dwelling area in the 40% be allotted to him.

7.It is thus seen that the parties to the suit are litigating rights over the property either seeking a right of title by way of partition and separate possession or a right to remain in possession of a portion of the said property.

8.Independent of this suit, O.S.No.5500 of 2019 is also pending before the III Additional City Civil Court, Chennai, that suit had been filed by V.Chandrasekar/1st defendant in O.S.No.5499 of 2019. He had instituted the said suit with respect to the very same property namely, old door No.25, new door No.25-56, 4th Main Road, Gandhi Nagar, Chennai – 600 020 and he had sought the relief of permanent injunction restraining the 1st, 2nd and 3rd defendants therein / 2nd and 3rd defendants in O.S.No.5499 of 2019 and another sister, from dealing with the said property without the knowledge and concurrence of the 4th and 5th defendants / plaintiffs in O.S.No.5499 of 2019 and for permanent injunction restraining the 1st, 2nd and 3rd defendants from interfering with the plaintiffs' peaceful possession and enjoyment of the said suit property and for costs of the suit.

9.It is thus seen that again, the 1st defendant in O.S.No5499 of 2019/plaintiff in O.S.No.5500 of 2019 has claimed a right to be in possession of the said property.

10.The said property had been purchased by V.Veerasamy, the father of the 1st, 2nd and 3rd defendants and the late husband of the 1st plaintiff in O.S.No.5499 of 2019. There are claims and counter claims of oral partition with respect to the said property and with respect to another property at Trichy. A suit has also been filed with respect to the property at Trichy.

11.It may not be appropriate on my part to examine the rival contentions in detail since trial is in progress in O.S.No.5499 of 2019 and the pleadings and the evidence adduced will have to be analysed only by the Trial Judge namely, the learned III Additional Judge City Civil Court, Chennai.

12.Be that as it may even though it may appear that the 1st defendant in the suit is claiming only possessory rights, still such right is adverse to the interest of the 2nd and 3rd defendants in the suit. That is very significant because, the 2nd defendant, as a matter of fact, filed a counter claim seeking partition and separate possession and the 3rd defendant has also sought partition and separate possession. The 2nd

defendant claims 60% of the undivided share and the 3rd defendant claims the remaining 40%. Therefore, they both claim the entire property to the exclusion of the plaintiffs and the 1st defendant.

13. It is also to be mentioned that in a suit for partition where one of the defendants either pay necessary court fees namely, one half of the court fees as paid by the plaintiff or when one of the defendants file counter claim, they stand in the same footing as that of the plaintiff. They have a right to claim partition and separate possession. They have a right to file an application seeking to pass final decree on the passing of a preliminary decree. These are unique features in a suit for partition and separate possession.

14. In this case, the 2nd defendant has filed a counter claim which in effect would mean that he can at any point of time, if he feel so, seek to transpose himself as plaintiff. Of course the existing plaintiffs are the dominus litis to the suit and if for any reason the 2nd defendant is of the opinion that the plaintiffs would not prosecute the suit, then the 2nd defendant may seek to transpose himself as a plaintiff. Even when he remains as a 2nd defendant there is an adverse interest as between him and the 1st defendant and not just between him and the plaintiffs. There is also an adverse interest between him and the 3rd defendant as to the

particular portion in the premises to be allotted to them.

15.This reasoning is significant. The issues in the suit had been framed and the parties had been invited to graze the witness box. The plaintiffs have been examined. The 2nd defendant has also adduced chief examination. He has been cross-examined by the plaintiffs. The 2nd defendant, at that stage filed a memo stating that he should not be cross-examined by the 1st defendant.

16.It is the contention of the 2nd defendant that the 1st defendant is not adverse to the interest of the plaintiffs and as a matter of fact had stated that he is an unnecessary party to the suit and therefore, he should not be permitted to cross-examine him / 2nd defendant.

17.The said memo had been rejected by the III Additional District Judge, City Civil Court, Chennai, leading to the filing of the present Revision Petition.

18.In the order on the memo, the learned III Additional District Judge, City Civil Court Chennai, had stated that as a party to the suit, the 1st defendant should be given an opportunity to cross the 2nd defendant.

19. That reasoning is correct, but the woods had been missed for the trees. In actuality there is direct adverse interest as between the 1st and 2nd defendants. The 2nd defendant claims 60% of the undivided share in the property. The 3rd defendant claims the remaining 40% of the undivided share. The suit had however been laid seeking 714 sq.ft by dividing the property by metes and bounds. The 1st defendant, might have a common interest with the plaintiff, but he has adverse interests to that of the 2nd and 3rd defendants. In a suit for partition, as stated, each parties stand independently and claim their respective shares.

20. Viewed from that angle, since the 1st defendant claims to be in possession and he had also instituted a suit that the property should be neither be encumbered nor his possession should be disturbed, his interest is certainly adverse to that of the 2nd and 3rd defendants, who claim just that particular right of partition and to be put in separate possession of such property as is allotted to them. Therefore, there is an existing right of the 1st defendant to cross-examine the 2nd and 3rd defendants when they adduce evidence in chief.

21.The learned counsel for the Revision Petitioner relied on ***CDJ 2002 Cal HC 236, State of West Bengal V. Rama Devi and Others.*** In that case it had been held that a proforma defendant cannot have any right to examine any of the witness of the plaintiff. The evidence of the plaintiff had been concluded and the 3rd defendant who was a proforma defendant sought cross-examination of the said witness of the plaintiff. That was not permitted as it was claimed that the 3rd defendant did not have any adverse interest to that of the plaintiff.

22.Here, the 1st defendant has direct adverse interests as against the 2nd defendant. The 2nd defendant has paid necessary court fees and has also filed a counter claim seeking partition and separate possession. This claim for partition and separate possession is opposed by the 1st defendant. Naturally, the 2nd defendant will have to subject himself to be cross-examined by the 1st defendant. The judgment cited is based on entirely different set of facts.

23.The learned counsel for the revision petitioner then relied on ***CDJ 2008 MHC 874, Vijaya V.Saraswathi & Others.*** In that case again, two separate suits came up for trial namely O.S.No.7 of 2006 and

O.S.No.4 of 2005. The plaintiff in O.S.No.7 of 2006 was examined as PW-1. A request was made by the 2nd, 3rd and 4th defendants in O.S.No.4 of 2005 to cross-examine PW-1. That request was rejected by the Trial Court. A Revision was filed. The 4th defendant claimed a right through PW-1 namely, the plaintiff. In those circumstances, it was held that the 4th defendant did not have any adverse interest to that of the plaintiff. Permission to cross-examine was correctly denied. The order was upheld by the High Court.

24. Here to repeat, it is an issue between the 1st and 2nd defendants alone which is to be adjudicated on conclusion of chief examination of the 2nd defendant. The 1st defendant has an adverse interest as against the 2nd defendant. The 1st defendant has an adverse interest as against the 3rd defendant. The mere fact that the 2nd defendant has filed a counter claim to the case of the plaintiff would show that the 1st defendant who supports the case of the plaintiff also has a direct adverse interest against the counter claim raised by the 2nd defendant. Therefore, the 1st defendant has every right to cross-examine the 2nd defendant. The judgment cited again is different on facts and cannot be applied to the facts of the present case.

25. The learned counsel for the revision petitioner also relied on

CJD 2019 MHC 1222, Quintessential Designs India Pvt. Ltd., Represented by its CEO Syed Layak Ali, Chennai & Another V. Puma Sports India (Pvt.) Ltd., Bengaluru & Another. The discussion in that particular judgment was with respect to summoning of a witness in a Subpoena application. The said witness may either be examined as a witness for the plaintiff witness or as a defendant witness. The adversary namely, the plaintiff or the defendant would have an opportunity to cross-examine the witness so summoned.

26. In this case, there is a conflict of interest of the 1st defendant with the 2nd defendant. This conflict of interest had arisen by the very written statement and the counter claim filed by the 2nd defendant. He had questioned the right of the plaintiffs to seek partition and separate possession and has claimed 60% of the land and building and the 3rd defendant has claimed the remaining 40% of the property. Both of them seek to exclude the plaintiffs and 1st defendant from any share.

27. The 1st defendant who supports the case of the plaintiff has a direct adverse interest as against the 2nd and 3rd defendants and naturally his right to cross-examine subsists once the 2nd and 3rd defendants graze the witness box. Their evidence will necessarily have to be tested through cross-examination and the 1st defendant has every right to test their

evidence.

28. In view of these reasons, the Civil Revision Petition is dismissed. It has been filed out of desperation and is an exercise in futility. To reiterate, the 1st defendant has an adverse interest as against the 2nd defendant and therefore when the 2nd defendant has been examined as DW-1, the 1st defendant has every right to cross-examine the said witness. Consequently, the connected Civil Miscellaneous Petition is also closed. No Costs.

29. The order in the memo is upheld for the additional reasons stated above. The parties are directed to go back to the Trial Court and the learned III Additional District Judge, City Civil Court, Chennai, is directed to proceed further with the trial and it is hoped that sense would prevail on the respective parties to ensure that a quick conclusion is reached with respect to the issues raised in the suit. At any rate, the trial should be concluded on or before 31.12.2021.

WEB COPY

30.07.2021

smv

Index : Yes / No

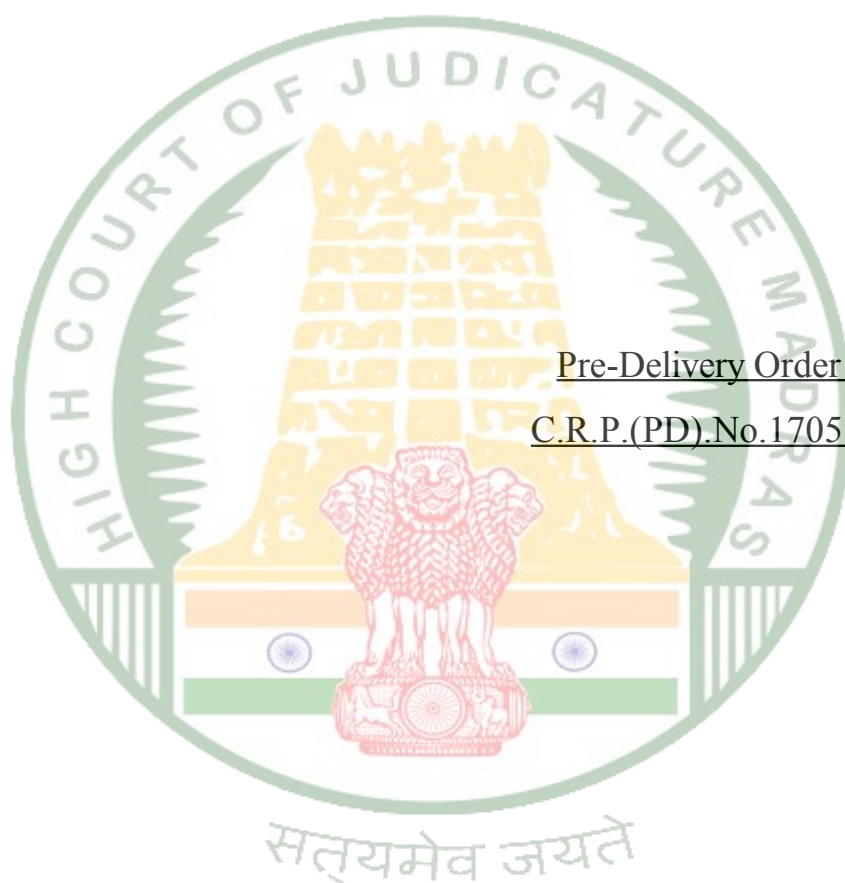
Internet : Yes / No

Speaking order : Yes / No

C.V.KARTHIKEYAN, J.,

smv

To,
The III Additional City Civil Court, Chennai.



Pre-Delivery Order made in
C.R.P.(PD).No.1705 of 2020

WEB COPY 30.07.2021