

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.06.2021

CORAM:

THE HONOURABLE MR. JUSTICE G.K.ILANTHIRAIYAN

C.R.P.(P.D).No.781 of 2018
and CMP No.4317 of 2018

Lurduraj

...Petitioner

Vs

1.Jansirani

2.Kavitha

...Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India to set aside the fair and decreetal order dated 02.11.2017 made in I.A.No.79 of 2014 in O.S.No.23 of 2013 on the file of the District Judge, Nagapattinam.

For Petitioner : Mr.S.Kothandaraman

For Respondents : Mr.S.Parthasarathy

ORDER

This Civil Revision Petition is directed as against the fair and decreetal order dated 02.11.2017 made in I.A.No.79 of 2014 in O.S.No.23 of 2013 on the file of the District Judge, Nagapattinam, thereby dismissing the petition to decide the issue in respect of the court fee as preliminary issue.

2. The petitioner is the 24th defendant in the suit filed by the

respondents herein. The respondents filed a suit in O.S.No.23 of 2013 for partition. In the plaint, they categorically stated that the entire suit properties were ancestral properties and while being so, on 16.04.2002, their father died. The respondents got married on 13.07.1996 and 15.12.2008 respectively. Till their marriage, they were in possession and enjoyment of the suit property. After their marriage, they were living separately. Thereafter, the entire suit property was in possession and was controlled by the first defendant i.e., one of their brother. Thereafter, he sold the suit property in favour of the defendants 6 to 32 in the suit. However, in the next paragraph of the plaint, the petitioner stated that even then, after death of their father, the first and second defendants are alone in possession and enjoyment of the suit property and there are enjoying the profit from the suit property. It is nothing but sufficient contradictory statement. सत्यमेव जयते

3. The learned counsel for the petitioner would submit that as per Section 12(2) of Tamil Nadu Court Fee & Suit Valuation Act the issue in respect of the Court fee has to be decided first before going to the other issues. The respondents are not in possession in the suit

property. Therefore, they cannot claim construction possession of the suit property and the suit ought to have been valued under Section 37(1) of Tamil Nadu Court Fee & Suit Valuation Act.

4. Per contra, the learned counsel for the respondents would submit that till the marriage of the respondents, they were in possession and enjoyment of the suit property. The Court Fees Act never stated that at the time of filing the suit, the parties should be in possession and enjoyment of the suit property and valued the suit under Section 37(2) of the Tamil Nadu Court Fee & Suit Valuation Act. He further submitted that the issue raised by the petitioner is mixed question of facts and law and it can be decided only after adducing evidence. Therefore, the Court below rightly dismissed the petition. In support of his contention, he relied upon a judgment reported in **2007 (1) SCC 694** in the case of **Jagannath Amin Vs. Seetharama (dead) by LRs and others**.

5. Heard, the learned counsel for the petitioner as well as the learned counsel for the respondents and perused the materials available on record.

6. The only point for consideration is that whether the value

of the suit under Section 37(2) of the Tamil Nadu Court Fee & Suit Valuation Act is correct or not ?.

7. Admittedly, the respondents are daughters and after their marriage i.e., 13.07.1996 and 15.12.2008 respectively, they were living in their husband's house. At the time of filing of the suit, there are not in joint possession of the suit schedule property and the other family members. In fact, after demise of their father on 16.04.2002, the suit properties were sold out to the defendants 6 to 32. Therefore, the other legal heirs i.e., their brothers are also not in possession and enjoyment of the suit property. Therefore, the petitioner raised the issue in the written statement specifically stated that the suit under Section 37(2) of the Tamil Nadu Court Fee & Suit Valuation Act is not valued and the suit is liable to be valued under Section 37(1) of CPC. Therefore, the petitioner filed a petition under Section 12(2) of the Tamil Nadu Court Fee & Suit Valuation Act to take up the issue with regard to the Court Fee as preliminary issue and to decide the suit.

8. It is relevant to extract the provision under Section 37(2) of the Tamil Nadu Court Fee & Suit Valuation Act, which is as follows :

(2) In a suit for partition and separate

possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the rates prescribed.'

It is clear that in a suit for partition and separate possession of joint family property by the plaintiff who is in joint possession of the said property, the suit shall be valued under Section 37(2) of the Tamil Nadu Court Fee & Suit Valuation Act.

9. It is relevant to extract under Section 12(2) of the Tamil Nadu Court Fee & Suit Valuation Act, which is as follows :-

" 12. Decision as to proper fee in other Courts :- (2) Any defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim but, subject to the next succeeding sub-section, not later, plead that the subject matter of the suit has not been properly valued or that the fee paid is not sufficient. All questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. If the Court decided that the subject matter of the suit has not been properly valued or that the fee paid is not sufficient, the Court shall fix a date before which the plaint shall be

amended in accordance with the Court's decision and the deficit fee shall be paid. If the plaint be not amended or if the deficit fee be not paid within the time allowed, the plaint shall be rejected and the Court shall pass such order as it deems just regarding costs of the suit. ”

It says that if the defendant raised specific plea that the suit is not been valued properly or not, the court fee paid is not sufficient, such plea shall be heard before evidence is recorded on affecting such defendant on merits of the claim.

10. The learned counsel for the respondents relied upon a judgment reported in **2007 (1) SCC 694** in the case of **Jagannath Amin Vs. Seetharama (dead) by LRs and others**, the relevant portion is extracted here under :-

9. Reference was also made to the decision in Neelavathi v. N. Natarajan [(1980) 2 SCC 247 : AIR 1980 SC 691 : (1980) 1 Kant LJ (SN) Item 126] . In para 8 this Court while considering the identical provision of the Tamil Nadu Court Fees and Suits Valuation Act, 1955 stated as follows: (SCC p. 252)

“8. Section 37 of the Tamil Nadu Court Fees and Suits Valuation Act relates to partition suits. Section 37 provides as follows:

‘37. (1) In a suit for partition and separate possession of a share of joint family property or of

property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.

(2) In a suit for partition and separate possession of joint family property or property owned, jointly or in common, by a plaintiff who is in joint possession of such property, fee shall be paid at the rates prescribed.'

It will be seen that the court fee is payable under Section 37(1) if the plaintiff is 'excluded' from possession of the property. The plaintiffs who are sisters of the defendants, claimed to be members of the joint family, and prayed for partition alleging that they are in joint possession. Under the proviso to Section 6 of the Hindu Succession Act, 1956 (Act 30 of 1956) the plaintiffs being the daughters of the male Hindu who died after the commencement of the Act, having at the time of the death an interest in the Mitakshara coparcenary property, acquired an interest by devolution under the Act. It is not in dispute that the plaintiffs are entitled to a share. The property to which the plaintiffs are entitled is undivided 'joint family property' though not in the strict sense of the term. The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved. To continue to be in joint possession in law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property. Equally it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession. Before the plaintiffs could be called upon to pay court fee

under Section 37(1) of the Act on the ground that they had been excluded from possession, it is necessary that on a reading of the plaint, there should be a clear and specific averment in the plaint that they had been 'excluded' from joint possession to which they are entitled in law. The averments in the plaint that the plaintiffs could not remain in joint possession as they were not given any income from the joint family property would not amount to their exclusion from possession. We are unable to read into the plaint a clear and specific admission that the plaintiffs had been excluded from possession."

The above judgment is not applicable to the case on hand for the reason admittedly that the respondents are not in joint possession and enjoyment of the suit property, since even on their pleadings they categorically stated that after their marriage they are living separately with their husband. After demise of their father, the suit property was sold out to the defendants 6 to 32.

11. On perusal of the plaint as well as the written statement, it is clear that at the time of filing the suit, the respondents are not in joint possession of the suit schedule property. Therefore, the Court below ought to have decided the issue with regard to court fee as preliminary issue.

12. Accordingly, the order passed in I.A.No.79 of 2014 in

O.S.No.23 of 2013, dated 02.11.2017, on the file of the District Judge,
Nagapattinam, is set aside and the Civil Revision Petition is allowed.
Consequently, connected miscellaneous petition is closed. No costs.

18.06.2021

Index: Yes/No
Internet: Yes/No
Speaking Order: Yes/No

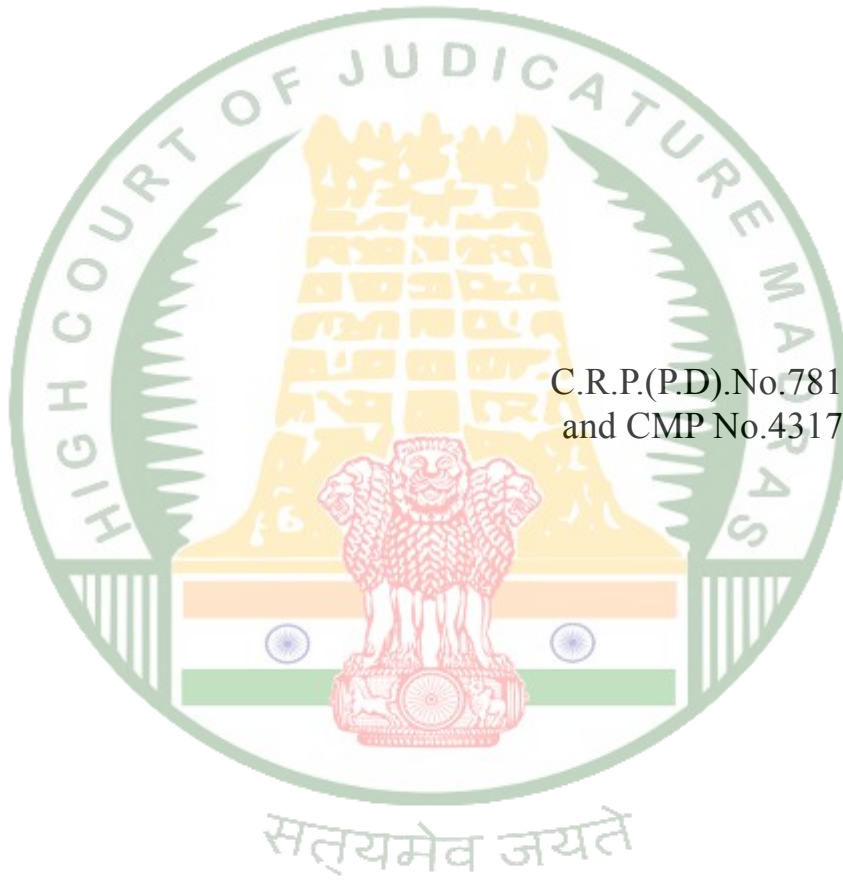
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To
The District Judge,
Nagapattinam.



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