

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 08.01.2021

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.R.P.No.2293 of 2020 and

C.M.P.No.14370 of 2020

V.Seerangan

... Appellant

Vs.

1. P.Subramani
2. Rathinam
3. Shanthi
4. Murugesan
5. Mahadevan
6. Mohan
7. Chinnathayee
8. Perumal
9. Govindammal

.... Respondents

Civil Revision Petition is filed under Article 227 of the Constitution of India to set aside the order and decretal order dated 06.01.2020 passed by the learned III Additional District Judge, Salem made in unnumbered I.A.No.. of 2019 in A.S.No.32 of 2019.

For Petitioner : Ms.S.Sasikala

O R D E R

The Revision Petitioner, who is the plaintiff has filed the suit in O.S.No.46 of 2016 before the learned Principal Subordinate Judge, Salem with a prayer to direct the respondents / defendants to divide the suit properties into four equal shares by metes and bounds and allot one such share to the petitioner / plaintiff by passing preliminary decree for partition and to appoint an advocate commissioner to divide the suit properties by metes and bounds as per the preliminary decree and allot the plaintiff's share by passing the final decree.

2. The suit was contested by the petitioner / plaintiff and the respondents / defendants and judgment was rendered on 05.01.2019, wherein the said suit was dismissed stating that one

Sengodan, brother of the petitioner / plaintiff has sold his share to the mother of the respondents 1 and 2 / defendants 1 and 2, namely Perumayee under the Ex.B.2, Sale deed. The plaintiff has not questioned the said Ex.B.2 executed by the said Sengodan. It is also not the case of the plaintiff that the said Sengodan has executed the Ex.B2 in respect of the undivided joint family property. Hence it is evident that after the oral partition as admitted by P.W.1 between Erusa Gounder and Valliya Gounder, there was a partition between the sons of Valliya Gounder, namely Sengodan and the plaintiff on the basis of which the said Sengodan has executed Ex.B2, sale deed in respect of his share to the said Perumayee. The plaintiff has not denied the Ex.X1, Revenue Records in his name in respect of some of the sub divisions in the suit S.No.11/6. Absolutely there is no reasonable explanation on the part of the petitioner / plaintiff for getting the Ex.X1, revenue records in his name in respect of some of the sub divisions in the suit survey number. Hence plaintiff has filed a false case, as if there was no division among the said Erusa Gounder and Valliya Gounder during their life time and thereby held that the plaintiff was not entitled to the relief of partition.

3. In consequence, aggrieved against the same, an appeal was filed by the petitioner / plaintiff and the same was numbered as A.S.No.32 of 2019. When the said suit was pending before the learned III Additional District Judge, Salem, the petitioner / plaintiff has taken out a unnumbered I.A. stating that without appreciating the oral and documentary evidence, the trial court had proceeded to dismiss the suit. The respondents had created documents at the time of updating patta and if the suit property was orally partitioned, the documents would show the pathway and the way to reach the other end of the property of the shares and the same will show that the respondents have managed to get revenue records during updating patta, which is not valid in law. Further, the petitioner prayed for appointment of Advocate Commissioner to note down the physical features in the suit property and to file his report drawn to scale before the said Court.

4. Further, the learned III Additional District Judge, Salem, without even numbering the said petition has rejected the same and the said order is reproduced hereunder:-

"Heard the petitioner side. This petitioner side seeking appointment of commissioner to visit the suit property and note down the physical features of the same on this appeal. On perusal of records the petitioner side failed to state any reason for not filing this application before the trial court. Further, the suit is filed for partition with other prayer. In this situation, the petitioner side without stating any reason or without filing any application

under Order 41 Rule 27 CPC, directly filed this application for inspecting the suit property by the commissioner. In this situation, the petitioner side relied upon the guidelines of Hon'ble Supreme Court of India reported in 2008 (8) SCC 671 in Haryana Waqf Board V. Shanti Sarup and Others in which the appellant therein filed application for commission before the trial court as well as appellate court for appointment of commissioner to demarcation of suit land. But above said situation not available on this matter on hand. In considering the above circumstances seeking appointment of commissioner by the petitioner is no way acceptable and hence it is decided to reject this application."

5. The learned counsel for the petitioner submitted that the decision of the lower Court in unnumbered Interlocutory Application is based on the technicality, wherein the petitioner / plaintiff has filed the petition under Order 26 Rule 9 Civil Procedure Code to appoint an advocate commissioner to visit the suit property and note down the physical features instead of filing an application under Order 41 Rule 27 CPC. Further, the petitioner wanted to assist the Court by stating that there is no pathway to reach the property on the rear side and only the report of the advocate commissioner would throw light on the typography on the said land. The learned counsel would further submit that one more chance may be given to the petitioner / plaintiff to file a fresh application under the correct provision.

6. Heard the learned counsel for the petitioner and perused the documents placed on record.

7. For ready reference, Order 41 Rule 27 (1) (b) of the Code of Civil Procedure Code is quoted herein: -
Order 41 Rule 27 of Code of Civil Procedure :

27. Production of Additional Evidence in Appellate Court

(1) (b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

8. Though this Court is not intending to delve deep into the merits of the case, this Court is of the view that citing a wrong provision by the advocate should not cause undue hardship to the client.

9. In any event, the court below after going through all the materials placed before it, has observed that the petitioner / plaintiff has approached the said court by filing

petition under Order 26 Rule 9 and Section 151 CPC without filing any application under Order 41, Rule 27 CPC, hence considering the facts and circumstances of the case, this Court is not inclined to interfere with the order and findings of the court below passed in Unnumbered I.A. /2019 in A.S.No.32 of 2019 dated 06.1.2020. However, taking note of the fact that the appeal suit is also pending for adjudication, it is left open to the petitioner to approach the concerned appellate court in accordance with law.

In the result, the present Civil Revision Petition is dismissed. Consequently, connected miscellaneous petition is also closed. No costs.

Sd/-

Assistant Registrar (CS)

//True Copy//

Sub Assistant Registrar

ssd
To

The learned III Additional District Judge, Salem.

+1cc to Mr.V.Bhiman Advocate SR.NO.1153

C.R.P.No.2293 of 2020 and
C.M.P.No.14370 of 2020

ssd
SDR 12/02/2021

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