

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[ORDERS RESERVED ON : 09.12.2020]

[ORDERS PRONOUNCED ON : 29.01.2021]

CORAM

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

CRP (NPD).No.2115 of 2020

and

C.M.P.No.13370 of 2020

V.kalaivanan

....Petitioner

...Vs...

V.Kotteswari (Died)

1. D.Kalaivani

....1st respondent

2. V.Kalaiarasi

....2nd respondent

PRAYER: Petition filed under Section 115 of C.P.C, against the fair and decretal order dated 02.11.2020 and made in E.P.No.149 of 2015 in O.S.No.305 of 2009 on the file of the Subordinate Judge at Tambararm.

For Petitioner

: Mr.A.C.Kumaragurubaran

For R1

: Mr.J.R.K.Bhavanantham

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ORDER

Heard Mr.L.Gavaskar, learned counsel for Caveator/R2.

2. This Civil Revision Petition has been filed by the Judgment Debtor-1/the first defendant and by consent of both the parties the main C.R.P itself taken up for final disposal.

3. The brief facts of this case is as follows:-

(i) The 1st respondent herein and her deceased mother Kokkteswari filed a suit in O.S.No.305 of 2009 on the file of the Subordinate Judge, Tambaram seeking partition and separate possession of their half share in the suit schedule property wherein the learned Subordinate Judge passed a preliminary decree dated 29.04.2011 granting half share to them and in pursuance of the same an application in I.A.No.5 of 2012 for passing of final decree was filed by the 1st respondent and her deceased mother wherein an Advocate Commissioner was appointed who filed a report dividing the share of the plaintiffs along with a rough sketch by approximate measurements extending the area to an extent of 4,440 sq.ft., though in the preliminary decree, the extent mentioned therein 8 1/2 Cents and relying the same a final decree was passed on 28.09.2012 and to execute the same, the 1st respondent herein filed an execution petition in E.P.No.149/2015 before the learned Subordinate Judge, Tambaram against the petitioner and his sister, the 2nd respondent herein.

(ii) The petitioner filed affidavit therein inter alia contended that the Execution Petition filed by the petitioner is not maintainable and the same now executable and correct particulars, more particularly in column No.12 were not given and in the schedule there is no "A" schedule in the decree passed by the trial Court and moreover the final decree passed is not in compliance with the preliminary decree in respect of the measurements etc., and that no rectification was carried out by way of amendment to execute the decree for such extended area of land and none furnishing of details of encumbrance details in respect of the subject property in the execution petition. Besides, the pendency of the appeal in A.S.No.20/2019 on the file of the Principal District Judge at Chengalpattu (filed as against the preliminary decree dated 29.04.2011) and hence, on above grounds has prayed to dismiss the E.P and the petition was dismissed and hence, this Civil Revision Petition filed by the petitioner.

4. The learned counsel for the petitioner could contend that:-

(i) the final decree passed in the suit was not in conformity with the preliminary decree i.e., in the preliminary decree the measurement stated therein is only 8 1/2 cents (3703 sq.ft) but in the final decree the decree holder claims 4440 sq.ft by filing a memo relying on the Commissioner's Report and sought delivery of an extent of 2,230 sq.ft., which is impermissible in law.

(ii) The final decree was passed contrary to the preliminary decree as such the final decree is nullity and a null and void and hence decree is in executable in law.

(iii) In the Execution Petition filed by the decree holder, it was sought for an order of delivery of possession of the "A" schedule property allotted to the plaintiffs in the final decree dated 28.09.2012, however neither in the schedule to the plaint or in preliminary decree or in the memo filed by the plaintiffs prior to passing of final decree for the schedule to the execution petition there is no such schedule "A" property was mentioned as claimed by the decree holder in column No.12 of the E.P.

(iv) Subsequent to the filing of the execution petition, an appeal was preferred by the petitioner herein challenging the preliminary decree was numbered and taken on file by the learned Principal District Judge, Chengalpattu in A.S.No.20 of 2019 and the respondent/decreed holder had also entered appearance and the same is pending.

(v) In the schedule to the execution petition, the full extent of the suit property was shown as 8 1/2 cents (3703 sq.ft.) yet the alleged half share allotted was 2230 sq.ft., clarifying the same, the memo filed by the decree holder which is without following the procedure contemplated under Order 6 Rule 17 of C.P.C., as such the final decree is nullity and without

jurisdiction.

(vi) The appeal filed as against preliminary decree is pending as such, the lis was not finally decided and no prejudice will be caused to the decree holder if the E.P is dismissed/closed with the liberty to file a fresh E.P after disposal of the First Appeal pending before the learned Principal Judge, Chengalpattu as the decree to be passed in the appeal will be merged with the decree of the lower Court and no hardship will be caused to the decree holders when such recourse be taken.

5. The learned Caveator has made submissions in support of the order of the Execution Court.

6. After hearing the rival submissions and after going through the final decree passed in I.A.5/2012 dated 28.09.2012 and memo filed by the plaintiff on 19.12.2012 along with the Advocate Commissioner's Report with sketch dated 28.09.2012.

7. It is seen that earlier the very same petitioner/first defendant filed an Application under Section 47 of C.P.C in the execution proceedings, wherein the petition has been dismissed and hence she has filed C.R.P.No.1669/2019 and it is observed that, "in order to appreciate the same, the relevant portion of the judgment of the learned Judge in C.R.P.No.4354 of 2018 dated 25.03.2018 is extracted hereunder:-

"11. It is seen that none of the children of M.V.Velu, both the second plaintiff as well as the 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 1/2 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 contended 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 1/2 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.

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".

8. Again on the second round of litigation in the C.R.P.No.1669 of 2019, this Court has passed the following order:

"It is axiomatic principle of law that the boundaries prevail over the measurement established. When no objection was taken to the Advocate Commissioner's Report and here in the case, since the boundaries have been identified, therefore within the boundaries if the suit property extent is available that shall be taken into account as the extent of the property provided, if no objection to that effect has been made by the parties. Therefore on that ground also, the learned Judge rejected the Civil Revision Petition by holding that the extent identified by the Advocate Commissioner shall be extent of the suit property as the defendants cannot claim any exclusive right of any peace of the land on the sale said to have been made by anyone in favour of Arumugam who claimed to have purchased from mother of the defendants in the year 2009 for the reasons discussed above."

9. Therefore it is clear that the present issue is nothing but a repetition of the very same issue already been decided and concluded. Therefore, what has been concluded in the said Civil Revision Petition still to be binding on the parties in the very same issue which was once again attempted to be raised before the Execution Court.

10. Based Upon the above two directions and the finding given by this Court in the above referred C.R.P it appears that the Execution Court has formulated the point for determination as to whether the petitioner/plaintiff is entitled to allotment of 'A' schedule property from the judgment debtors/defendant as per the final decree proceedings. Taking into the consideration, the finding rendered by this Court in the above two C.R.P.Nos.4354 of 2018 and 1669 of 2019, the Execution Court has rightly come to the conclusion that all the points raised by the petitioner before the Execution Court are "Nothing to repetition of very same issues has already been decided and concluded". सत्यमेव जयते

11. After going through the decision rendered in the said two round of litigation in the above two C.R.Ps, I find all the points raised by the learned counsel for the revision petitioners are already been duly covered, after due contest and concluded and hence I have no hesitation to hold that the points now raised viz as (i) (ii) (iii) (v), as summarized supra, are noting but another repetition in respect of the issue already settled.

12. Admittedly, the learned counsel for the petitioner could contend that he has filed an appeal A.S.No.20/2009 before the learned Principal District Judge, Chengalpattu and the same is pending and hence wants to an order of closure of execution petition.

13. According to the petitioner, the appeal has filed against the preliminary decree is pending. As such the lis is not finally decided and wants to close of E.P, this Court was anxious consideration of the said contention.

14. (a) Admittedly, as observed earlier preliminary decree was passed on 29.04.2011 and final decree proceedings has initiated in the year 2012 and passed the appointment of Advocate Commissioner and Advocate Commissioner also filed a report on 28.09.2012.

(b) After observing the due formalities final decree was passed in I.A.No.5/12 on 28.09.2012. Thereafter, memo was also filed and the execution petition was filed only after lapse of 3 years namely on 29.01.2015 execution petition was filed in E.P No.149/2015.

(c) After the disposal of the two round of litigation as stated supra in C.R.P.No.4354/2018 dated 25.03.2019 and C.R.P.No.1669/2019 dated 19.09.2019.

(d). It appears that the defendant has preferred the regular appeal in A.S.No.20/09 after condonation of delay in filing Regular Appeal. It does

not in dispute the final decree has been passed in the year 2012 itself and there is no appeal has been filed against the final decree of the year 2012 also assumes significance.

15. Hence, I find that all the points raised by the learned counsel for the petitioner as extracted supra are found to be duly decided in the earlier two rounds of litigation in the above stated C.R.P.No.4354/2018 and C.R.P.No.1669/2019 and when that being the case, this Court no hesitation to reject those contentions in respect of the plea that there is a appeal is pending against the preliminary decree.

16. Admittedly, as against the final decree no appeal has been preferred sofar for the reasons best known to the revision petitioner/defendant. Furthermore, even in the said appeal, there is no stay in the Appellate Court. The trial Court has rightly relied upon the decision reported in 2018 SCC Online Mani 53 [Huidrom Ningolakpa Singh Vs.Lunguiba Thangal) "In absence of stay or injunction in the appeal, the party who succeeds in the litigation should be entitled to enjoy the fruits of the decree unless there is a restraint order by the appellate forum".

17. On the facts and circumstances of the case and also taking note of the fact that all the points raised by the revision petitioner/first defendant has been duly covered in the earlier two round of litigation and also there is a positive direction of this Court to dispose of the E.P within a period of six

months as early as on 2018 and in the absence of any stay in the first appeal against the final decree and in the absence of any appeal as against the final decree sofar, I am of the considered view that the C.R.P within is yet another attempt to prevent the plaintiff to enjoy the fruits of the partition decree.

18. In this view of the matter, I find that none of the points raised by the learned counsel for the petitioner deserves any consideration and the same is devoid of merits and liable to be dismissed.

19. In the result, this Civil Revision Petition is dismissed. No costs. Consequently, connected C.M.P is closed.

29.01.2021

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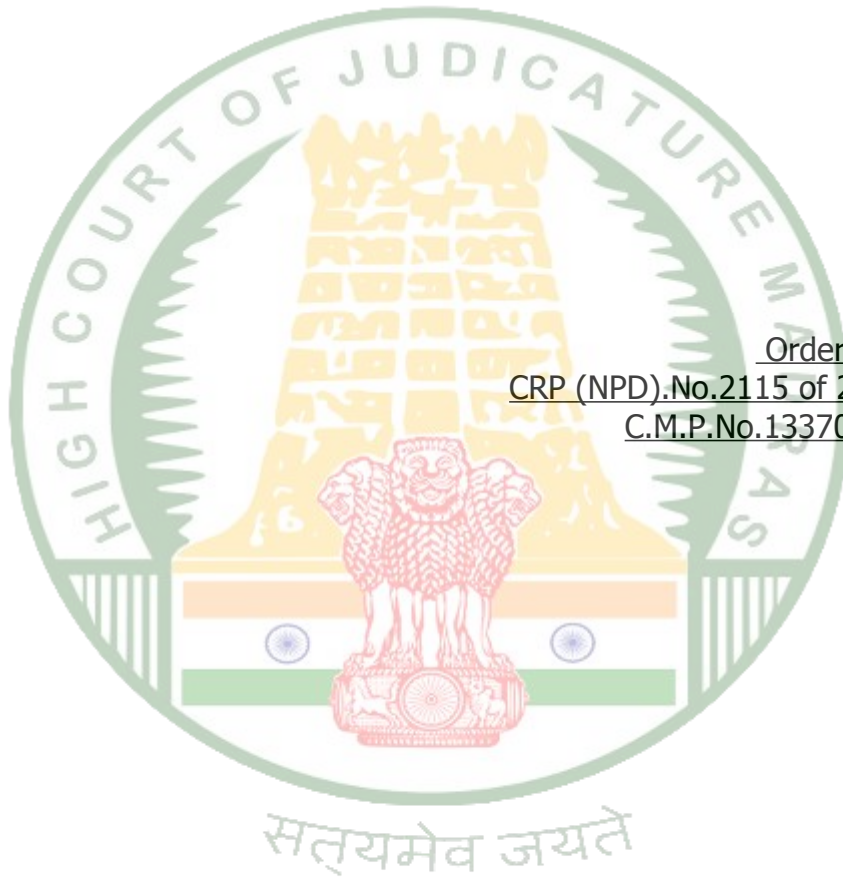
The Subordinate Judge at Tambaram.

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RMT.TEEKAA RAMAN, J.

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