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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.09.2021

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

A.S.No.689 of 2019
and
C.M.P.No.20756 of 2019

K. Kanimozhi ...Appellant/Obstruction Petitioner/
Third Party
Vs.

1.K.Ganapathy ...1st Respondent/1st Respondent/
Kandasamy (died) Decree Holder/Plaintiff

2.Ponnammal

3.P.K. Palanisamy ...Respondents 2&3/Respondents 2&3
Judgment Debtors 2& 3/
Defendants 2 & 3

PRAYER: Appeal Suit filed under Order 41 Rule 1 read with Order 21 Rule 103 of the Code of Civil Procedure against the Judgment and Decree dated 02.08.2019 made in E.A.(SR).No.709 of 2019 in E.P.No.34 of 2018 in E.P.No.68 of 2014 in O.S.No.55 of 2012 on the file of the learned Additional District Judge, Dharmapuri.

For Appellant : Mr.N. Manoharan

For Respondents : Mr.J. Bharathi Raja for R1
R2 and R3 - Served
No appearance

JUDGMENT

The appellant whose petition filed under the provisions of Order XXI Rules 97 and 99 of the Code of Civil Procedure had been dismissed by the learned Additional District Judge, Dharmapuri, without even registering the said petition is before this Court challenging the said order.

2.The facts in brief which are necessary for disposing of this appeal are as follows:



The 1st respondent had filed a suit O.S.No.55 of 2012 on the file of the learned Principal District Judge, Dharmapuri, for Specific Performance of the Agreement dated 23.08.2012 entered into between himself and the respondents 1 to 3 herein.

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3. In the said suit, the 2nd respondent herein had filed a Written Statement, which has been adopted by the said Kandasamy and the 3rd respondent herein, in which they had referred to a suit O.S.No.89 of 2014 filed by the appellant herein before the learned Subordinate Judge, Arur seeking partition of the properties, which are the subject matter of the instant suit in O.S.No.550 of 2012.

4. The learned Additional District Judge, Dharmapuri after trial had proceeded to decree the suit as prayed for by her Judgment and Decree dated 20.08.2015. Pursuant to the said Judgment and Decree in the above suit, the 1st respondent had filed R.E.P.No.68 of 2014 for execution of the Sale Deed in his favour. The said execution proceedings were dismissed for default on 14.07.2015 and thereafter, the 1st respondent had filed E.P.No.34 of 2018 for the very same relief. In the said execution proceedings, the appellant herein had filed the impugned petition in EA.S.R.No.709 of 2019. It is her case that the property in question was an ancestral joint family property in which the petitioner had a 1/5th share. It is also her case that she had issued a Legal Notice dated 09.08.2014 to the said Kandasamy and respondents 2 and 3 seeking a partition of her 1/5th share. Since there was no response to the above notice she had proceeded to file the suit O.S.No.89 of 2014 for a partition and separate possession of her 1/5th share. It is also her contention that despite the learned Additional District Judge, Dharmapuri, being informed about the said proceedings, the learned Judge had neither framed an issue with reference to the above nor taken into consideration the said defence but had decreed the suit on 05.10.2015 as prayed for. It is therefore her contention that till such time as her share in the property is divided by metes and bounds the possession of the property cannot be handed over to the 1st respondent/Decree holder.

5. The learned Additional District Judge, Dharmapuri, without numbering and ordering notice to the respondents proceeded to dismiss the said application on merits. Challenging the said Judgment and Decree the appellant is before this Court.

6. On hearing the submissions of both the counsels the following point arises for consideration in the above First Appeal:



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"Whether the learned Additional District Judge, Dharampuri was right in disposing of the petition on merits without numbering the said application and issuing notice to the respondents?"

7.Mr. N.Manokaran, learned Advocate appearing on behalf of the appellant would submit that the appellant has got a Decree for partition in her favour in and by which she is entitled to a share in the suit property. The appellant is yet to file a Final Decree proceedings in and by which her share in the suit property could be demarcated by metes and bounds. In the suit for partition, once the finding has been rendered that the appellant is entitled to 1/5th share in the ancestral property, the 1st respondent herein can seek to have a Sale Deed executed only with reference to the remaining 4/5th share and the possession can be handed only after the share of the appellant and the respondents demarcated and allotted in the final decree proceedings. He would further submit that the procedure adopted by the learned Judge in dismissing the application at the CFR stage is contrary to the dicta laid down time and again by this Court as well as the Hon'ble Supreme Court.

8.The learned counsel for the respondents would submit that the learned Judge has considered the application on merits and has passed a very detailed order to which no exception can be taken and therefore, the appeal deserves to be dismissed.

9.Heard the learned counsels appearing on either side and perused the papers.

10.The learned Additional District Judge, Dharmapuri, before whom the impugned petition was filed under the provisions of Order XXI Rules 97 and 99 of the Code of Civil Procedure has dismissed the petition without numbering and ordering notice to the respondents after considering the said application on merits in detail. The learned Judge has observed that the Judgment and Decree has been passed in O.S.No.55 of 2012 after a detailed consideration of the defence raised by the respondents 2 and 3 and late Kandasamy. The learned Judge has further observed that the respondents 2 and 3 have not filed the documents pertaining to the suit O.S.No.89 of 2014 which had decreed in favour of the appellant herein. Once it has been brought to the notice of the Court that a claim has been made by a person in whose favour a decree has been passed in respect of the very same property, subject matter of the Execution Proceedings, such a person ought to be given an opportunity to make their submissions and after hearing both parties should pass orders. This can be done only



after the application has been numbered and notice directed to the respondents. The learned Judge has further overlooked the fact that an application under Order XXI Rules 97 and 99 of CPC has to be determined by the Court as if it is dealing with a suit since the provisions of Order XXI Rule 101 clearly emphasize that all questions including right, title or interest to a property arising between the parties in a proceeding under Order XXI Rules 97 and 99 of CPC has to be determined by the Court without relegating parties to a separate suit. The appellant has rightly invoked the said provisions and the learned Judge ought to have numbered the application and considered the petition on merits instead of dismissing it at the CFR stage.

11. In the result, this First Appeal is allowed. The petition in question is remanded back to the learned Additional District Judge, Dharampuri with a direction to number the same and hear the petition on merits. The said exercise shall be completed within a period of 3 months from the date of receipt of the copy of the Judgment and Decree of this Court. There shall be no order as to costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-

Assistant Registrar (CS-IV)

//True Copy//

Sub Assistant Registrar

Mps
To

1. The Additional District Judge,
Dharmapuri.

2. The Section Officer,
VR Section,
High Court, Madras.

+lcc to Mr. N. Manokaran, Advocate SR.No.50421

+lcc to Mr. J. Bharathiraja, Advocate SR.No.50792

A.S.No.689 of 2019
and
C.M.P.No.20756 of 2019

GP (CO)
GN (17/02/2022)