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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 20.10.2021

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THE HON'BLE MR.JUSTICE **A.D.JAGADISH CHANDIRA**

C.R.P (MD) No. 2622 of 2014

and CMP (MD) No.1 of 2014

1. Sithika Begam
2. Rabeeka Begam ... Petitioners/Respondents/Plaintiffs

Vs.

1. Mohammed Yusuf ... 1st Respondent/Petitioner/1st Defendant
2. Shurfudeen
3. Habibullah
4. Basheer Mohamed ... Respondents 2 to 4/Respondents 3 to 5/
 Defendants 2 to 4

PRAYER : Civil Revision Petition filed under Article 227 of Constitution of India, to set aside the fair and decreetal order dated 05.07.2014 in I.A.No.96 of 2014 in O.S.No. 10 of 2012 on the file of the III Additional District Court, Tiruchirapalli.

For Petitioners : Mr.H. Lakshmi Shankar

For Respondents :
No.1 : Mr.R.Devaraj
No.2 to 4 : Mr.P.Ramani

O R D E R

The Civil Revision Petition has been filed against the order of the Trial Court directing amendment of plaint and including two properties in the suit.

2. The brief facts of the case are as follows:

The revision petitioners are the plaintiffs in O.S.No.10 of 2012 on the file of the III Additional District Judge, seeking for partition of the properties of their father Mohamed Ismail. The first defendant, brother of the revision petitioner/plaintiff had filed petition under Order 6 Rule 17 of the Code of Civil Procedure contending that the properties left by the mother of the parties is an estate left by the ancestors which is also to be alleviated and divided among the heirs in accordance with the Muslim Law, thereby the present petition has been filed to include the properties which were in the name of the mother also for partition.



3. The revision petitioners/plaintiff had filed counter contending that the suit for partition was filed in respect of the property left by the deceased/father of the parties to the suit and that the properties which were sought to be included in the suit were exclusive properties of their mother Fathima Beevi which have been already settled in favour of the revision petitioners/plaintiff by two separate settlement deeds dated 19.05.2007 and that they could not be included in the suit for partition in respect of properties belonging to their father. The Trial Court by an impugned order dated 05.07.2014 allowed the petition seeking for amendment and against which the present revision has been filed.

4. The learned counsel for the revision petitioners/plaintiffs would submit that suit in O.S. No. 10 of 2012 was filed in respect of partition of the property belonging to the father of the parties and the parties which were sought to be included in the present suit by defendants by way of amendment of plaint are exclusive properties of the mother which have been already settled in favour of the revision petitioners/plaintiff and they cannot be brought in for partition. The Trial Court without rendering any finding whether the properties are available for partition has directed to include those properties in the present suit for partition to the detriment to the interest of the petitioners. He would reiterate that the properties sought to be included are the self acquired properties of the mother and that they have been settled in favour of the revision petitioner by way of settlement deed and that the defendants other than the respondents have admitted the settlement deed and in such event it would amount to altering the nature of the suit, thereby he would seek to set aside the order.

5. Per contra, the learned counsel for the respondent/first defendant would submit that the respondent/first defendant is physically handicapped person and the properties in the name of their mother were ancestral properties and that in lieu of the other properties those two properties were given to the revision petitioners/plaintiffs and the properties being ancestral properties they have to be necessarily included and brought in the plaint, whereas the revision petitioners/plaintiffs have conveniently avoided the same. He would submit that in a suit for partition though the respondent is the defendant he is entitled to seek for amendment and the Trial Court rightly finding that it is a suit for partition and in order to avoid multiplicity of proceedings had allowed the petition. In view of the same, there is no error or infirmity in the order passed by the Court below.

6. Heard the learned counsel appearing on either side and perused the materials available on record.



7. Admittedly it is a suit for partition. In **Solavaiammal and others vs. Ezhumalai Goundar and others** reported in **2012 (1) CTC 159** the Division Bench of this Court has held that in a suit for partition application for amendment of plaint at the instance of either parties to the suit is maintainable under Order 6 Rule 17 of the Code of Civil Procedure. However if there is a dispute over the inclusion of properties by contending that those properties are not available for partition the Court has to *prima facie* satisfy itself as to whether the properties sought to be included are available for partition or not. When there is dispute over the inclusion of the parties that those properties are not available for partition the only course available for defendants is to file a separate suit for partition by including the properties and the Court has only to reject the application for amendment on that ground.

8. A perusal of the impugned order shows that the Trial Court has not returned any finding with regard to the issue whether the properties sought to be included in the suit are available for partition or not.

9. In such circumstances this Court is of the opinion that the matter has to be remitted back to the Trial Court to render a finding as to the issue whether the properties sought to be included in the suit are available for partition or not as a preliminary issue.

10. In view of the above, the Civil Revision Petition stands allowed and the order passed in I.A.No.96 of 2014 in O.S.No. 10 of 2012 on the file of the III Additional District Court, Tiruchirapalli stands set aside and the matter is remitted back to the Trial Court. The Trial Court shall conduct enquiry and decide and return a finding whether the properties sought to be included in the suit by way of amendment to the plaint is available for partition or not. Other points are left open to be decided by the Trial Court. No costs. Consequently connected miscellaneous petition is closed.

Sd/-

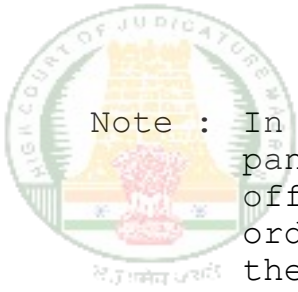
Assistant Registrar(CS-II)

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Sub Assistant Registrar(CS)

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The III Additional District Court, Tiruchirapalli.

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The Section Officer, V.R. Section,
Madurai Bench of Madras High Court, Madurai. (2 copies)

+1 CC to M/s.R.DEVARAJ, Advocate (SR-32102[F] dated 21/10/2021)

+1 CC to M/s.H. LAKSHMI SHANKAR, Advocate (SR-32043[F] dated 20/10/2021)

C.R.P (MD) No. 2622 of 2014
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VR (CO)
TR/JGP(16.11.2021) 4P 6C