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CRP.PD.No.834/2019 & CMP.No.5460/2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.01.2022

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

CRP.PD.No.834/2019 & CMP.No.5460/2019

[Virtual Mode]

G.Ramesh

.. Petitioner /
Defendant

Vs.

1.G.Ravichandran
2.G.Saravanan
3.Tamilselvi

.. Respondents
/ Plaintiffs

Prayer:- Civil Revision Petition filed under Article 227 of the Constitution of India against the order and decretal order in IA.No.228/2017 in OS.No.54/2015 on the file of the learned Subordinate Judge, Tiruvallur dated 19.02.2018 thereby dismissing the petition filed for rejection of plaint.

For Petitioner : Mr.V.Lakshminarayanan

For Respondents : Mr.D.S.Ramesh



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ORDER

- (1) This Civil Revision Petition is directed against the order of the learned Subordinate Judge, Tiruvallur, in IA.No.228/2017 in OS.No.54/2015, dismissing the application filed under Order 7 Rule 11 of CPC to reject the plaint.
- (2) The revision petitioner herein is the defendant in the suit in OS.No.54/2015.
- (3) It is necessary to narrate the factual background for proper appreciation of the respective contentions of the learned counsels.
- (4) The revision petitioner earlier as plaintiff, filed a suit in OS.No.233/2003 on the file of the Sub Court, Tiruvallur, for partition of 1/4th share in all the suit properties. The suit properties consist of 11 items in Pudumavilangai Village, Tiruvallur Taluk and District. Item No.7 of the suit properties is an extent of 0.44.0 Hectares [1.09 acres] in S.No.71 and the same is the subject matter of O.S.No.54/2015. The property has been described as a wet land and valued at Rs.21,800/-. Respondents 1 to 3 in the Civil



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Revision Petition are defendants 1, 2 and 4 in the suit in OS.No.233/2003. Defendants 1 and 2 in the previous suit who are respondents 1 and 2 herein contested the suit on the ground that the parties had already divided the suit properties as per the document styled as "Koor Chit" [dated 17.11.2000, marked as Ex.B1] and that therefore, the suit for partition is not maintainable. However, the Trial Court rejected the contention of defendants that there was a partition as per Koor Chit.

- (5) The suit in OS.No.233/2003 was decreed by granting a preliminary decree dated 13.11.2007. The revision petitioner herein was given 1/4th share in all the suit properties as per the preliminary decree. A direction was also given by the learned Judge for appointment of an Advocate Commissioner for division of properties after proper valuation and other aspects. It is admitted that the revision petitioner filed an application in IA.No.182/2009 in OS.No.233/2003 for appointment of an Advocate Commissioner to divide the property as per the preliminary decree.



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- (6) It is stated by the revision petitioner that the said application was contested by the defendants herein. Thereafter, the revision petitioner filed IA.No.157/2011 to pass a final decree in terms of the family arrangement dated 22.11.2009. It is admitted by the respondents herein that an exparte order in IA.No.157/2011 was passed on 10.06.2011. It is the contention of the respondents that the Lower Court had erroneously endorsed that "no counter is filed" and ordered the interlocutory application.
- (7) The 1st respondent herein thereafter filed IA.No.74/2013 in OS.No.233/2003 under Section 47 read with Section 151 of CPC to delete Item No.7 of the suit properties from the description of properties as per the preliminary decree. In the affidavit filed in support of the interlocutory application, the applicant therein pleaded that there was a family arrangement in respect of the suit properties before the suit for partition and that the said document was not accepted as the document was insufficiently stamped and not registered. It is further stated that after the preliminary decree, there were negotiations among the parties and several mediations



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had taken place.

- (8) It is the specific case of the 1st respondent herein that the property described in Serial No.7 of the suit properties was agreed to be the property exclusively belonged to the 1st respondent herein. It is admitted that the said application in IA.No.74/2013 was contested by revision petitioner and dismissed by the Trial Court vide order dated 10.10.2013. Aggrieved by the same, the 1st respondent herein filed a Civil Revision Petition before this Court in CRP.No.3201/2014 and this Court vide order dated 08.09.2014 dismissed the Civil Revision Petition confirming the order of the Lower Court.
- (9) While dismissing the Civil Revision Petition, this Court has observed that the preliminary decree that was passed on 13.11.2007 has become final and that the 1st respondent herein cannot maintain an application under Section 47 CPC without challenging the preliminary decree. It is pertinent to mention that the 1st respondent has not raised any valid ground to invalidate the preliminary decree in the suit. After taking note of the fact that the



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final decree application in IA.No.157/2011 was also allowed, this Court observed that the application filed under Section 47 CPC is not maintainable.

- (10) Before IA.No.157/2011 was allowed on 10.06.2011 as stated earlier, the revision petitioner filed an application in IA.No.182/2009 for appointment of the Advocate Commissioner to divide the suit properties in accordance with the preliminary decree dated 13.11.2007 in OS.No.233/2003. The application in IA.No.182/2009 was also allowed vide order dated 26.06.2011, just few days after the application in IA.No.157/2011 filed by the revision petitioner for passing of final decree in terms of compromise was ordered. Therefore, the revision petitioner herein challenged the order in IA.No.182/2009 by filing CRP.No.2737/2015.
- (11) This Court, after taking note of the fact that the preliminary decree passed in the suit has become final and the application filed by the revision petitioner herein for passing of final decree was also ordered, allowed the Civil Revision Petition.



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(12) The operative portion of the order passed by this Court in CRP.No.2737/2015 is extracted below:

"9.The Trial Court earlier allowed the application in IA.No.157 of 2011, which was filed on the strength of the family arrangement dated 22.11.2009. the said order has become final. There is no question of taking up the application in IA.No.182 of 2009 thereafter, for appointing Advocate Commissioner to pass a final decree. Since there was no challenge made to the order in IA.No.157/2011, the learned Subordinate Judge, Thiruvallur, was not correct in appointing the Advocate Commissioner in IA.No.182 of 2009. The entire controversy has arisen on account of the action of the petitioner in prosecuting IA.No.182 of 2009 even after passing the order in IA.No.157 of 2011. In view of the order in IA.No.157 of 2011, the Trial Court was not correct in passing the impugned order. I am therefore, constrained to set aside the impugned order in IA.No.182 of 2009."

(13) Thereafter, the 1st respondent herein filed the suit in OS.No.54/2015 for declaration of his exclusive title over the property which is described as Item No.7 in the suit in



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OS.No.233/2003. The further relief prayed in the suit is to declare the decree in OS.No.233/2003 as null and void.

- (14) After filing written statement, the revision petitioner herein filed an interlocutory application in IA.No.228/2017 under Order 7 Rule 11 of CPC to reject the plaint on the ground that the plaint does not disclose any cause of action and it is barred by the principle of *res judicata*. The said interlocutory application was dismissed by the Court below mainly on the ground that the issue whether the suit is barred by *res judicata* cannot be decided in the application filed under Order 7 Rule 11 CPC and that a fair opportunity should be given to the plaintiffs/respondents herein to prove their case. The Lower Court was also of the view that no ground was made out by the revision petitioner herein as contemplated under Order 7 Rule 11 CPC to reject the plaint. Aggrieved by the same, the present Civil Revision Petition is filed by the defendant in the suit in OS.No.54/2015.

- (15) Mr.V.Lakshminarayanan, learned counsel for the revision petitioner/defendant referring to the facts, submitted that the suit in



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OS.No.54/2015 is without a cause of action and such a suit is nothing but re-litigation and is an abuse of process of law. Referring to the fact that the preliminary decree passed in OS.No.233/2003 has become final and that the revision petitioner's contention claiming exclusive title in respect of one of the items of the suit property cannot be reagitated in the second suit by adding a relief to declare the judgment and decree of the earlier suit as void. Learned counsel submitted that the final decree application filed by the revision petitioner was allowed on 10.06.2011 in IA.No.157/2011. When the preliminary decree and the final decree have become final, it is not open to the respondents to file a fresh suit on the same cause of action with a prayer to nullify the judgment and decree of the Lower Court in the previous suit. By referring to few paragraphs in the plaint in OS.No.54/2015, the learned counsel for the revision petitioner submitted that the respondents/plaintiffs have not even pleaded fraud as a reason to set aside the judgment and decree of the earlier suit in OS.No.233/2003 and that his contention that their counsel had



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mistakenly did not plead the exclusive title of the 1st respondent in the previous suit cannot be a reason to file the second suit to set aside a valid decree which was passed after contest. Learned counsel also relied upon a few judgments of the Hon'ble Supreme Court of India wherein it has been observed that it is the duty of the Court to nip such frivolous suits in its bud. Stating that the present suit is nothing but an attempt to re-litigate, the learned counsel for the revision petitioner prayed that the Courts should never encourage such suits and prayed for allowing of this Revision.

- (16) **Per contra,** the learned counsel appearing for the respondents/plaintiffs submitted that the preliminary decree and the final decree in OS.No.233/2003 are obtained by playing fraud. Primarily, the learned counsel submitted that no final decree has been passed so far even though the application in IA.No.157/2011 was allowed on the basis of an erroneous endorsement. The learned counsel then submitted that he has filed a petition to set aside the order passed in IA.No.157/2011 and therefore, the Court cannot consider the application by relying upon the final decree



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that was stated to have been passed in OS.No.233/2003.

- (17) The learned counsel for the respondents submitted that the earlier application filed by the 1st respondent under Section 47 CPC was dismissed not on merits, but on a technical ground that it is not maintainable. He therefore, submitted that the revision petitioner's right under the Common Law to set aside the judgment and decree passed in the earlier suit for partition cannot be curtailed by entertaining the petition under Order 7 Rule 11 CPC without giving an opportunity to the plaintiffs/respondents to establish their case. Although the learned counsel for the respondents admit that the order of this Court in CRP.NPD.No.2737/2015 dated 09.06.2017 has become final, he submitted that the said order would only preclude the revision petitioner herein from filing an application to pass a final decree as the revision petitioner contended that a final decree application in terms of a later family arrangement was already allowed. It is stated that the order in the revision petition in CRP.No.2737/2015 will not operate as *res judicata* as no issues relating to their exclusive title or right is decided by this Court in



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the said Civil Revision Petition. Lastly, the learned counsel for the respondents submitted that the preliminary decree and the final decree have been obtained by the revision petitioner by playing fraud as the revision petitioner has suppressed material facts. Learned counsel then went on describing the term fraud and tried to expand its meaning to seek the relief of declaration that the preliminary decree in the earlier suit in OS.No.233/2003 is vitiated by fraud.

- (18) This Court has considered the rival submissions of the learned counsels on either side and the admitted facts.
- (19) Though the learned counsel for the respondents/plaintiffs repeatedly placed his submissions on the ground of fraud, this Court is unable to find any factual background for the allegation of fraud.
- (20) Under Order 6 Rule 4 CPC, specific plea or relief on the ground of fraud has to be raised. A perusal of the whole plaint in OS.No.54/2015 reveals that there is no specific plea of fraud. Not only that the word "fraud" or "misrepresentation" is not found in the



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plaint, the cause of action for the suit does not revolve around any fraud being played against the respondents. It is an admitted fact that the suit for partition was decreed by passing a preliminary decree on 13.11.2007. The decree specifically refers to the declaration of shares and the properties which are to be divided among the parties to the lis. Item No.7 of the suit schedule is the property in respect of which 1st respondent herein claim exclusive title after the preliminary decree.

- (21) The issue that has been finally decided in the suit in OS.No.223/2003 is that the suit properties including Item No.7 are to be divided by metes and bounds and that the revision petitioner is entitled to 1/4th share. Even if the issue whether item No.7 of previous suit is the exclusive property of 1st respondent is not raised or decided, by applying the principle of constructive *res judicata*, the 1st respondent can no more raise such issue in a subsequent suit. In the instant case, ignoring the preliminary decree which has become final and the binding judgment as regards the declaration of revision petitioner's 1/4th share in all the



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suit properties in the previous suit, the 1st respondent has come forward with the second suit for declaration of his exclusive title in respect of one of the items covered by the preliminary decree. Incidentally, the 1st respondent seeks a further declaration declaring the nullity of the decree not on the ground of fraud but on the ground that his counsel has miserably failed to bring it to the notice of the Court about the exclusive title of the 1st respondent herein. If this gives rise to a cause of action for filing a fresh suit to set aside the earlier decree, then it will lead to never ending litigations paving way for undesirable results which is against the settled principles of law and public policy.

- (22) Coming to the application filed by the revision petitioner under Order 7 Rule 11 CPC, this Court is convinced that the suit is filed without a cause of action. At least, this Court can certainly describe the suit as one where the cause of action is illusory.
- (23) Secondly, the suit is also barred by *res judicata*. It is true that the question whether the earlier suit will operate as *res judicata* or not has to be decided normally at the time of trial after giving an



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opportunity to the plaintiffs in the second suit. In the present case, the facts are not in dispute. It is true that the application under Order 7 Rule 11[d] CPC should be decided only on the basis of the averments in the plaint and not on the basis of the defence taken in the written statement or the contentions of the defendants in the application filed under Order 7 Rule 11 CPC. In the present case, the 1st respondent in the present revision has admitted the facts even in the plaint. The plaint certainly refers to the preliminary decree as well as the final decree in OS.No.233/2003.

- (24) The Cause of Action paragraph in the plaint in the suit in OS.No.54/2015 reads as follows:-

"10.The cause of action for the suit arose at Pudumavilangai Village, Kadambathur Firka, Tiruvallur Taluk, where the suit property situated on 13.12.1973 when the settlement deed was executed in favour of the 1st plaintiff who accepted and in possession and enjoyment of the same by paying kist and obtaining patta thereof, on when the counsel for the 2nd defendant gave his legal opinion in favour of the 1st plaintiff on 11.10.2013 when the petition under



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Section 47 CPC filed to delete the suit property from the description of the suit properties in OS.No.233/2003 the final decree was passed."

- (25) After the preliminary decree was passed in the earlier suit, the 1st respondent herein referred to the settlement that was executed on 13.12.1973 on the basis of the legal opinion given in favour of the 1st respondent herein. Therefore, the cause of action alleged is illusory. Fortunately, in this case, not even an effort is taken by the Lower court counsel to take care and try to project a cause of action by clever drafting.
- (26) As it has been observed by the Hon'ble Supreme Court in a few judgments, the Court should exercise its power under Order 7 Rule 11 of CPC if by a clever drafting, a litigant has created an illusion of a cause of action to nip such plaint in the bud.
- (27) In in the instant case, the second suit filed by the respondents herein in OS.No.54/2015 is an abuse of process of Court as it is nothing but a re-litigation. It is against public policy to entertain such suits as it is also important to protect judiciary from unnecessary litigations.



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(28) In view of the above discussion, this Court has no hesitation to hold that the plaint in OS.No.54/2015 is liable to be rejected under Order 7 Rule 11 CPC. Added feature is that the suit is also an abuse of process of law. Hence, this Court is inclined to allow this Revision.

(29) In the result, the Civil Revision Petition is **allowed** and the order dated 19.02.2018 in IA.No.228/2017 in OS.No.54/2015 passed by the learned Subordinate Judge, Tiruvallur, in dismissing the petition filed for rejection of plaint is **set aside** and the application in IA.No.228/2017 stands allowed. No costs. Consequently, connected miscellaneous petition is closed. However, it is open to the respondents to prosecute the application stated to have been filed to set aside the final decree in accordance with law.

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S.S.SUNDAR, J.,

AP

To
The Subordinate Judge,
Tiruvallur.

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