



C.R.P.No.1205 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on 19.06.2023	Delivered on 22.12.2023
-------------------------------	--------------------------------

CORAM:

THE HONOURABLE MR.JUSTICE SATHI KUMAR SUKUMARA

KURUP

C.R.P.No.1205 of 2021
and C.M.P.No.9313 of 2021

G.Jothi @ Sironmani

...Petitioner/2nd Defendant

K.Ganapathy (1st Defendant died)

-Vs-

1.P.Raman

...Respondent/Plaintiff

2.Pattathu Rani

...Respondent/3rd Defendant

Prayer:- Petition filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 11.12.2019 made in I.A.No.410 of 2018 in O.S.No.55 of 2015 on the file of the learned Subordinate Judge, Rasipuram.

For Petitioner : Mr.S.Vinoth Kumar
for Mr.G.Arul Murugan

For R1 : Mr.V.Vidyesh



C.R.P.No.1205 of 2021

for M/s.K.Ashwini Devi

For R2

: No appearance

ORDER

This Civil Revision Petition is filed by the 2nd Defendant in O.S.No.55 of 2015 pending before the learned Subordinate Judge, Rasipuram, who is the Revision Petitioner herein.

2.Brief facts which are relevant to decide this Civil Revision Petition are as follows:-

- a) O.S.No.55 of 2015 had been filed by the Plaintiff against his brother as the 1st Defendant. The 2nd Defendant was the wife of the 1st Defendant. There is also a 3rd Defendant.
- b) The suit was filed for relief of partition of the properties mentioned in the schedule of the plaint and also for declaration that a settlement deed executed by the mother of the 1st Defendant in favour of the 1st Defendant and a subsequent settlement deed executed by the 1st Defendant in favour of the 2nd Defendant are null and void and not binding on the Plaintiff.
- c) Pending the suit, the 1st Defendant died. The 2nd Defendant as wife of



WEB COPY



C.R.P.No.1205 of 2021

the 1st Defendant, as a legal heir filed a memo stating that there is a son who also has to be impleaded as a party. The memo was recorded by the learned Subordinate Judge, Rasipuram. The Plaintiff, instead of filing a Petition to implead the son of the 1st Defendant as a Defendant in the suit, had ignored the son who was mentioned in the memo and had filed only an Amendment Petition to amend the plaint by including the word (1st Defendant died). The 2nd Defendant being his wife was already on record. The Petition in I.A.No.410 of 2018 in O.S.No.55 of 2015 filed by the Plaintiff under Order VI, Rule 17 of CPC, seeking to record the death of the 1st Defendant and to recognize the 2nd Defendant as his legal heir was resisted by the 2nd Defendant stating the reasons mentioned in the memo. Therefore, an enquiry was conducted.

- d) In the enquiry, two witnesses were examined in support of the 2nd Defendant as R.W.1 and R.W.2. R.W.1 was Thiru.Ponnusamy, a neighbour and R.W.2 was Thiru.Rajasekaran, they were subjected to cross-examination. In the cross-examination, they did not know the names of the parents of the 2nd Defendant. Both the witnesses had stated that the 2nd Defendant has a son by name G.Sujith Kumar.



WEB COPY

They were confronted with the details of the date of marriage of the 2nd Defendant with the 1st Defendant. Those witnesses, R.W.1 and R.W.2, had gone to the parents house of the 2nd Defendant, whether they were aware of the 2nd Defendant and they had claimed ignorance of those details.

- e) In the light of that enquiry, the learned Subordinate Judge, Rasipuram, had allowed the Petition in I.A.No.410 of 2018 in O.S.No.55 of 2015, under Order VI, Rule 17 of CPC, thereby permitting the Plaintiff to amend the plaint to include the words (1st Defendant died) and to include the words 2nd Defendant wife of 1st Defendant was already on record.
- f) Against the order allowing amendment, the above Civil Revision Petition had been filed by the 2nd Defendant, seeking to include her son, G.Sujith Kumar also as Defendant in the suit.
- g) The learned Trial Judge rejected the contention of the 2nd Defendant, stating that she had not filed the legal heir certificate or birth certificate of G.Sujith Kumar to implead him as the legal representative of the deceased 1st Defendant. The order passed by the learned Subordinate Judge, Rasipuram, rejecting the contention of



C.R.P.No.1205 of 2021

WEB COPY

the 2nd Defendant to include her son as Defendant in the suit is found unacceptable and unreasonable under the provisions of Order XXII, Rule 4 of CPC. It is stated as legal representatives of the Defendants that it does not state legal heir in the strict terms of the word legal heir. It is only stated as legal representative to be brought on record. It is for the 2nd Defendant to prove it during the trial, which is not at the stage of this Petition. Therefore, the 2nd Defendant had filed this Revision Petition seeking to set aside the order permitting the Plaintiff only to amend the Petition under Order VI, Rule 17 of CPC and not file a Petition under Order XXII, Rule 4 of CPC, to implead the legal representatives of the 1st Defendant as per the memo.

3.Learned Counsel for the 1st Respondent vehemently objected to the submission of the learned Counsel for the Revision Petitioner stating that the 2nd Defendant was a school teacher, she retired as a District Educational Officer and she had not availed maternity leave during her service in the Education Department. Two witnesses were examined in support of the contention of the 2nd Defendant, who were examined as R.W.1 and R.W.2 in I.A.No.410 of 2018 in O.S.No.55 of 2015. In the cross-examination,



both witnesses were unable to give the details of the family of the 2nd Defendant i.e., her parents and her details. Therefore, they were found to be supporting the contention of the 2nd Defendant on her instructions. Therefore, the learned Subordinate Judge, Rasipuram, has rightly rejected the contention of the 2nd Defendant to include the name of one G.Sujith Kumar as her son. The order passed by the learned Subordinate Judge, Rasipuram, permitting the Plaintiff only to amend the plaint as already the wife of 1st Defendant was a party to the suit as 2nd Defendant. Therefore, only to include the word (1st Defendant died) and to include the word 2nd Defendant already on record as legal representatives of the 1st Defendant. Therefore, the order passed by the learned Subordinate Judge, Rasipuram, does not warrant any interference by this Court and therefore this Revision Petition is to be dismissed.

4. Point for consideration:

Whether the order passed by the learned Subordinate Judge, Rasipuram rejecting the contention of the 2nd Defendant to include the name of her son as legal representatives of the deceased 1st Defendant in the suit in O.S.No.55 of 2015 and instead allowing the Petition filed by the Plaintiff in I.A.No.410 of 2018 in O.S.No.55 of 2015 is to be set aside?



WEB COPY

5.On perusal of the affidavit filed by the Plaintiff in I.A.No.410 of 2018, memo filed by the 2nd Defendant in O.S.No.55 of 2015 and the counter filed in I.A.No.410 of 2018 by the 2nd Defendant. The affidavit of the witnesses are R.W.1 and R.W.2 in I.A.No.410 of 2018 in O.S.No.55 of 2015 dated 11.12.2019 and the cross-examination of R.W.1 and R.W.2, and the order passed by the learned Subordinate Judge, Rasipuram, in I.A.No.410 of 2018 in O.S.No.55 of 2015 dated 11.12.2019 and the provisions of Order XXI of CPC and the order passed by the learned Subordinate Judge, Rasipuram, cannot at all be accepted as reasonable in the light of the Order XXII of CPC.

6.Order XXII, Rule 4 of CPC, which is extracted as follows:-

“4. Procedure in case of death of one of several defendants or of sole defendant.—(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendants to be made a party and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal



representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

1 [(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where—

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefore in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application with the period specified in the said Act,

the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved.]”

7.While so, the memo filed by the 2nd Defendant ought to have been recorded and the learned Subordinate Judge, Rasipuram, ought to have directed the Plaintiff to file a Petition under Order XXII, Rule 4 of CPC. Instead, the learned Judge had failed to exercise the discretion vested in



C.R.P.No.1205 of 2021

him and had allowed the Plaintiff to dictate terms to the Court, thereby ignoring the memo and allowing the Petition under Order VI, Rule 17 of CPC, thereby bypassing Order XXII, Rule 4 of CPC.

8. Whether the claim of the 2nd Defendant to include G.Sujith Kumar as her son need not be gone into in detail in the enquiry in I.A.No.410 of 2018 in O.S.No.55 of 2015 it is only a summary proceeding. While so, the Plaintiff vehemently objected to include G.Sujith Kumar need not be considered by the Court which can be dealt with by the Court during trial whether G.Sujith Kumar was a son born to Defendants 1 and 2 and need not be taken up in an enquiry under Order XXII, Rule 4 of CPC. The enquiry held in Order VI, Rule 17 of CPC by the learned Subordinate Judge, Rasipuram, is found unacceptable. Therefore, the order passed by the learned Subordinate Judge, Rasipuram, holding enquiry under Order VI, Rule 17 of CPC. Whether G.Sujith Kumar is the son of Defendants 1 and 2 is unwarranted at the stage of Order XXII, Rule 4 of CPC. Usually when a party to the proceeding dies, the learned Counsel for the party either the Plaintiff or the Defendants files a memo giving out the details of the legal representatives of the deceased. That memo is recorded by the



C.R.P.No.1205 of 2021

WEB COPY

Court and based on that the Presiding Judge of the Trial Court directs the Plaintiff to file an appropriate Petition either under Order XXII, Rule 1 of CPC, recording death of the Plaintiff or under Order XXII Rule 4 of CPC, to bring on record the legal representative of the deceased 1st Defendant. Instead, the learned Subordinate Judge, Rasipuram, had conducted roving enquiry under Order VI, Rule 17 of CPC, to direct the Plaintiff to file the Petition under Order XXII, Rule 4 of CPC.

9.Once the learned Counsel for the 2nd Defendant filed a memo reporting the death of 1st Defendant and giving out the details of the legal representative of the 1st Defendant. The memo is recorded by the Court and accordingly, direction is given to the Plaintiff to file an appropriate Petition under Order XXII of CPC to bring on record the legal representative of the deceased 1st Defendant to proceed with the suit.

10.Whether the list contains any member who is not the legal representative, it is not for the Plaintiff to decide the status of the parties concerned. It can be considered or raised at a later stage at the time of trial and not at the initial stage in a Petition under Order XXII of CPC. Here,



C.R.P.No.1205 of 2021

WEB COPY

instead of filing a Petition under Order XXII, Rule 4 of CPC, as per the direction of the Court, the Court had conducted a roving enquiry, thereby preventing the Defendants from including the son of the 2nd Defendant.

11.As per G.O. Ms. No.73, Employment Services Department, dated 26.10.1983 and G.O.Ms.No.2899, Labour and Employment Department dated 23.12.1988, the couple who are childless are permitted by the Government to adopt a child and the name of the adopted child is included in the service register of the Government servants. In case of the death of Government servants during their life time, the adopted children are also given jobs on compassionate grounds. Therefore, the contention of the learned Counsel for the Plaintiff before the Trial Court that the 2nd Defendant had not furnished birth certificate or legal heir certificate obtained by her from the authorities concerned or the contention of the learned Counsel for the Plaintiff that the 2nd Defendant who had been a teacher in Government Service, who holds the decree in M.Sc B.Ed and had retired as District Educational Officer, had not availed maternity leave is of no consequence in a Petition under Order VI, Rule 17 of CPC, and has to be rejected.



WEB COPY

12. Even if the contention of the Plaintiff is accepted. The name of G.Sujith Kumar is found as an adopted son of Defendants 1 and 2. He has a right to succeed to the property of Defendants 1 and 2. The Plaintiff cannot prevent the succession of said G.Sujith Kumar. Considering that the suit is for partition, the Plaintiff has ulterior motive in preventing G.Sujith Kumar to be a party to the proceeding in the suit. Therefore, if the memo filed by the 2nd Defendant had been refused by the learned Subordinate Judge, Rasipuram, the learned Judge is preventing the 2nd Defendant to protect her right in the property and passing on that right to her adopted son or natural son, as the case may be accepting the objection of the Plaintiff not to permit the son of Defendants 1 and 2 as a party to the proceeding, which would result in miscarriage of justice. The order passed by the learned Subordinate Judge, Rasipuram, had caused miscarriage of justice to Defendants 1 and 2 by accepting the objection of the Plaintiff, which is unreasonable as per the provisions of Order XXII of CPC regarding the impleading of the legal representatives of the deceased party to the proceeding either the Plaintiff or the Defendants. The word used in



C.R.P.No.1205 of 2021

WEB COPY

Order XXII of CPC is legal representative and not legal heir. Therefore, the order passed by the learned Subordinate Judge, Rasipuram, is found unreasonable and unacceptable as per the provisions of Order XXII of CPC and bypassing Order XXII of CPC and allowing Order VI, Rule 17 of CPC straightaway. Therefore, the Civil Revision Petition is to be allowed.

13.In the light of the above discussion, the point for consideration is answered in favour of the Revision Petitioner/2nd Defendant and against the Respondent/Plaintiff. The order passed by the learned Subordinate Judge, Rasipuram, allowing Order VI, Rule 17 of CPC in I.A.No.410 of 2018 in O.S.No.55 of 2015 is to be set aside.

14.The learned Judge is directed to pass orders directing the Plaintiff to file a Petition under Order XXII, Rule 4 of CPC, as per the memo of the 2nd Defendant. The enquiry regarding the status of G.Sujith Kumar can be considered during the trial regarding partition, whether he is a natural son or whether he is an adopted son, whether the birth certificate is available, whether legal heir certificate was obtained by the 2nd Defendant after the death of the 1st Defendant, whether the service register of the 2nd Defendant



C.R.P.No.1205 of 2021

and the 1st Defendant contained the name of G.Sujith Kumar as their son as per G.O. Ms. No.73, Employment Services Department, dated 26.10.1983 and G.O.Ms.No.2899, Labour and Employment Department dated 23.12.1988,

15.In the result, the above **Civil Revision Petition stands allowed.**

The order passed by the learned Subordinate Judge, Rasipuram, allowing Order VI, Rule 17 of CPC in I.A.No.410 of 2018 in O.S.No.55 of 2015 is set aside. No costs. Consequently, the connected Miscellaneous Petition is closed.

22.12.2023

cda

Index : Yes/No

Speaking/Non-speaking order

Neutral Citation : Yes/No



WEB COPY



C.R.P.No.1205 of 2021

To

1. The Subordinate Judge, Rasipuram.
2. The Section Officer, VR Records,
High Court, Chennai.



WEB COPY



C.R.P.No.1205 of 2021

SATHI KUMAR SUKUMARA KURUP, J.,

cda

**Order made in
C.R.P.No.1205 of 2021**

22.12.2023