



C.R.P.(MD).No.1344 of 2021

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on	17.08.2023
Pronounced on	20.12.2023

CORAM

THE HON'BLE MRS. JUSTICE K.GOVINDARAJAN THILAKAVADI

C.R.P.(MD) No.1344 of 2021

and

C.M.P.(MD) No.7715 of 2021

1.P.Pandi

2.Jegadeeswaran

3.Chittu

4.Sasikumar

5.Thamaraiselvi

6.Kamalam

...Petitioners

Versus

1.Pannerselvam

2.Anguthai

3.Muthumuniyandi

... Respondents

Prayer: The Civil Revision Petition is filed under Article 227 of Constitution of India to set aside the order of the Learned District Munsif, Theni in I.A.No.02 of 2021 in O.S.No.63 of 2020 dated 10.08.2021.



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For Petitioners : Mr.S.Madhavan
For Respondents :
For R1 and R2 : Mr.R.Surianarayanan
For R3 : No Appearance

ORDER

This Civil Revision Petition is preferred against the order passed in I.A.No.02 of 2021 in O.S.No.63 of 2020 dated 10.08.2021 by the District Munsif Court, Theni.

2. According to the revision petitioners, the wife of the 1st petitioner namely Thangathai, who is the mother of the 2nd petitioner filed a suit in O.S.No.86 of 2001 before the District Munsif, Periyakulam for partition in which a preliminary decree was passed on 26.06.2003 granting 1/5th share to the plaintiff and granting injunction restraining the defendants in the above suit from making any alienations in the suit property. The appeal preferred by the defendants in the above suit in A.S.No.96 of 2003 was partly allowed, against which, Second Appeal was filed before this Court in S.A.(MD)No. 253 of 2009, and the same was dismissed confirming the decree and judgement of the first Appellate Court, by judgement dated 31.10.2017.



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3. While so, the 1st and 2nd respondents herein as plaintiffs filed the present suit in O.S.No.63 of 2020 in respect of the property in S.No.353/2 which is mentioned as Item No.1. The said property is the subject matter in the previous suit and in the present suit. Hence, this present suit is hit by Order II Rule 2 and Section 11 of Code of Civil Procedure, 1908. The present suit is clear abuse of process of law. The present plaintiffs do not have any title over the property and therefore, they do not have any locus standi to file the above suit. The plaintiffs have filed the present suit for injunction without having any title and possession over it. Hence, the petitioners filed a petition under Order VII Rule 11 of CPC in I.A.No.2 of 2021 for rejecting the plaint. However, the trial Court without observing the scope and ambit of Order II Rule 2 of CPC and not properly understanding the provisions under Order VII Rule 11 of CPC, erroneously dismissed the above application. The trial Court erred in understanding the suppression of material facts regarding the earlier litigation pertaining to same property and between the same persons. Hence, the order passed by the trial Court in I.A.No.2 of 2021 is liable to set aside.



4. The learned Counsel appearing for the revision petitioners would submit that the trial Court has failed to see that the matter in issue was directly in issue and finally decided in a previous suit and therefore, the present suit is an abuse of process of law and re-litigation. He would further contend that the plaint filed by the respondents for permanent injunction without being in possession of the suit property is against law and there is no cause of action for filing the suit. He would further submit that the plaint based on the sale deed was hit by *lis pendens*. The same was not considered by the trial Court. Hence, he prays for setting aside the order.

5. On the other hand, the learned Counsel appearing for the respondents would contend that Order VII Rule 11 (d) CPC has limited application. For invoking Order VII Rule 11 (d) CPC, no amount of evidence can be looked into. It has to be shown that the suit is barred under any law. The principles of *res judicata* is a mixed question of law and fact which require not only examination of the plaint, but also other evidence and therefore, the order passed in the earlier suit may be taken up either as preliminary issue or at the final hearing. Therefore, the said question cannot



be determined at the stage of proceedings under Order VII Rule 11 (d) of CPC. Therefore, the trial Court was proper in dismissing the petition filed under Order VII Rule 11 (d) CPC. He would further contend that the applicability of bar of *res judicata* cannot be determined at the stage of rejection of plaint. The same can only be determined only at the trial of the suit.

6. To support his contention, the learned counsel relied upon the following decisions reported in

1. Srihari Hanumandas Totala Vs. Hemant [(2021) 9 SCC 99]

2. Kamala and Ors. Vs. K.T. Eshwara S A [(2008) 12 SCC 661]

7. Heard learned counsels on both sides and perused the materials on record.

8. The 1st respondent/plaintiff filed the suit in O.S.No.63 of 2020 for partition claiming 1/5th share in the suit properties and for consequential relief of permanent injunction. According to the revision petitioners, the wife of the 1st petitioner, who is the mother of the 2nd petitioner filed a suit in O.S.No.86 of 2001 before the District Munsif Court, Periyakulam for



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partition, in which a decree was passed on 26.06.2003 granting 1/5th share in the suit properties, against which an appeal was filed and the same was partly allowed. In the Second Appeal, this Court has confirmed the decree and judgment passed by the first Appellate Court. The contention of the petitioners herein is that the property in the previous suit situated in S.No. 353/2 is mentioned as 1st item in the present suit. Since the right of the property was finally decided in the previous suit in respect of above property, the present suit is only an abuse of process of law and re-litigation.

9. However, a perusal of Order VII Rule 11 of CPC makes it clear that the relevant facts which need to be looked into for deciding an application thereunder are the averments in the plaint. The trial Court can exercise the power under Order VII Rule 11 of CPC at any stage of the suit, either before registering the plaint or after issuing summons to the defendants at any time before the conclusion of the trial. For the purpose of deciding an application under clauses (a) and (d) of Rule 11 of Order VII CPC, the averments in the plaint are germane; the pleas taken by the defendants in the written statement would be wholly irrelevant at that stage vide decision of the Hon'ble Supreme Court in *Saleem Bhai Vs. State of Maharashtra*



[(2003) 1 SCC 557]

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10. The only contention raised before the trial Court was the applicability of the principles of *res judicata*. Even for the said purpose, question of facts cannot be gone into. What can only be seen are the averments made in the plaint. Further, whether the properties mentioned in the plaint are available for partition is essentially a question of fact and whether the suit would be maintainable is a question, which can be taken as a preliminary issue.

11. Though the revision petitioners have mentioned about the earlier suit which was filed by the wife of the 1st petitioner, who is the mother of the 2nd petitioner and obtained a preliminary decree in her favour, they can easily demonstrate their contention by filing the proceedings of the earlier suit before the trial Court. Though the recourse to Order VII Rule 11 of CPC by the revision petitioners was not appropriate, at the same time, the trial Court may, frame the issues and take up the issues pertaining to the maintainability of the suit and decide the same in the first instance.



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12. Since an adjudication of the plea of *res judicata* requires consideration of the pleadings, issues and decisions in the previous suit, such a plea will be beyond the scope of Order VII Rule 11 (d), where only the statements in the plaint will have to be perused. For the above reasons, the plaint is not liable to be rejected under Order VII Rule 11 (d) and thus, this Court affirm the findings of the trial Court. It is also clarified that no opinion is expressed as to whether the subsequent suit is barred by the principles of *res judicata*.

13. Liberty is granted to the revision petitioners to raise the issue of maintainability of the suit before the trial Court. The trial Court shall consider whether the preliminary issue should be framed and if so, decide it within a period of three months of raising the preliminary issue.

14. For the above reasons, the Civil Revision Petitions is dismissed and the order passed by the trial Court is confirmed. There shall be no order of costs. Consequently, connected miscellaneous petition is also closed.



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Index:Yes/No

Speaking Order : Yes/No



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K.GOVINDARAJAN THILAKAVADI,J.

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Copy to

The District Munsif Court, Theni.

order made in

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