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C.M.A. No.218 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.07.2024

CORAM:

THE HON'BLE MR. JUSTICE ABDUL QUDDHOSE

C.M.A. No.218 of 2021

and

C.M.P. No.1462 of 2021

B. Chitra

.... Appellant

vs.

1. K.E. Venkatraj

2. V. Nirmalraj

.... Respondents

Prayer : Civil Miscellaneous Appeal filed under Section 43 Rule 1 of CPC against the fair and decretal order passed in I.A. No.175 of 2014 in O.S. No.19 of 2011 on the file of the learned IV Additional District Judge, Thiruvallur at Ponneri District, dated 22.09.2015.

For Appellant : Mr.R. Raman Laal

For Respondents : Mr.R. Munusamy for R1
No appearance for R2

JUDGMENT

This appeal has been filed challenging the order dated 22.09.2015 passed by IV Additional District Court, Thiruvallur, Ponneri District in I.A. No.175 of 2014 in O.S. No.19 of 2011.



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2. The appellant before this Court is the 2nd defendant in the suit O.S. No.19 of 2011. The 1st respondent is the plaintiff and the 2nd respondent is the 1st defendant in the said suit.

3. Heard Mr.R. Raman Laal, learned counsel for the appellant and Mr.R. Munusamy, learned counsel for the 1st respondent. Despite service of notice, there is no representation on the side of the 2nd respondent.

4. In the forthcoming paragraphs, the parties are described as per their litigative status in the suit :-

5. The 1st respondent / plaintiff is the father of the appellant and the 2nd respondent / 1st defendant is her brother. The suit was filed for partition. The suit was withdrawn by the plaintiff as not pressed on 17.11.2014. An application was filed under Order 9 Rule 13, CPC by the 2nd defendant in the suit, who is the appellant herein, seeking to set aside the ex-parte decree of dismissing the suit as not pressed on 17.11.2014.

6. By the impugned order, the Trial Court has dismissed I.A. No.175 of 2014 in O.S. No.19 of 2011 on the ground that the order dated 17.11.2014 passed by the Trial Court dismissing the suit as not pressed based on a Memo filed by the plaintiff is not an ex-parte decree and it



cannot be set aside through an application viz., I.A. No.175 of 2014, filed by the appellant under Order 9 Rule 13 CPC. The Trial Court has also observed in the impugned order that if the appellant wants to get a share in the suit property, she can file a separate suit and get her share declared and allotted. Therefore, the Trial Court has held that an application under Order 9 Rule 13, CPC filed by the appellant / applicant in I.A. No.175 of 2014 is not maintainable and accordingly dismissed the application.

7. The following are the undisputed facts :-

a) The appellant / 2nd defendant though may plead that along with the Written Statement Court fees was paid by her, seeking for the relief of partition, the said Court fees was paid even according to the learned counsel for the appellant is only Rs.750/- as the appellant had claimed that she is in joint possession of the suit schedule property.

b) The appropriate application to be filed in cases, where the plaintiff desires to withdraw the suit is for the appellant / 2nd defendant to file an application seeking to transpose herself as the plaintiff in the suit. Instead the



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appellant / 2nd defendant has filed an application under Order 9 Rule 13, CPC, which will not apply to an application seeking to transpose the defendant in the suit as one of the plaintiffs in the suit.

c) The Trial Court has granted liberty to the appellant / 2nd defendant to file a separate suit and get her share declared but instead of exercising that option, the appellant / 2nd defendant has filed this appeal. Till date, no suit has also been filed by the 2nd defendant seeking for the relief of partition, as claimed in the Written Statement filed by her in O.S. No.19 of 2011 on the file of the IV Additional District Court, Thiruvallur, Ponneri District.

8. This Court is of the considered view that the Trial Court has rightly dismissed the application filed by the appellant / 2nd defendant / applicant in I.A. No.19 of 2011 in O.S. No.19 of 2011 on the ground that an application under Order 9 Rule 13, CPC is not maintainable as the order, dated 17.11.2014 passed by the Trial Court dismissing the suit as not pressed is not an ex-parte decree. There is no infirmity in the impugned order. Accordingly this Civil Miscellaneous Appeal stands



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dismissed. However, it is made clear that as directed by the Trial Court under the impugned order, the appellant / 2nd defendant is always having the liberty to file a suit for partition for the allotment of her share in the suit schedule property, as pleaded in the Written Statement filed in O.S. No.19 of 2011. No costs. Consequently, connected miscellaneous petition is closed.

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Index: Yes/No
Internet: Yes/No
Speaking Order/Non-Speaking Order
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ABDUL QUDDHOSE, J.

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To

1. The IV Additional District Judge,
Thiruvallur,
Ponneri District.

2. The Section Officer,
V.R. Section, High Court of Madras,
Chennai – 104.

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