

(1985) 03 MAD CK 0026

In the Madras High Court

Case No : Civil Revision Petition No. 867 of 1985

A. Jayaraj

APPELLANT

Vs

A. Kumaravel and Others

RESPONDENT

Date of Decision : 21-03-1985

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 20 Rule 18, 151

Citation : AIR 1986 Mad 367 : (1985) 98 LW 859

Hon'ble Judges : Shanmukham, J

Bench : Single Bench

Advocate : S. Shanmughavelayutham, for the Appellant;

Judgement

1. This revision is directed against the order made in I.A. No. 299 of 1984 in O.S. No. 82 of 1975 on the file of Subordinate Judge's Court,

Tirunelveli.

2. The following facts are necessary for appreciating the point that was raised by the learned counsel for the petitioner:- O.S. No. 82 of 1975 is an

action for partition. The preliminary decree came to be passed on 25th July 1979 declaring that the plaintiffs 1 to 3 are entitled to 3/5th share in

items I to 17 and 20 to 24 of the plaint first schedule, second schedule, and third schedule properties directing division of the said items into five

equal shares and allotting three such shares to the plaintiffs 1 to 3. Cl. 4 provides that while dividing the third schedule business concerns,

endeavour shall be made to allot one or more such concerns to plaintiffs 1 to 3 and defendants 1 and 2. After the passing of the preliminary decree,

the first plaintiff found his interest coming into conflict with that of other plaintiffs. Therefore I.A. No. 299 of 1984 was taken out by the first plaintiff

to transpose himself as fifth defendant in the action. The learned subordinate Judge allowed the said application. It is this order that is sought to be revised in this revision.

3. Mr. M. Srinivasan, learned senior counsel submitted that after that decree, there is an appeal pending in this Court as against the decree made in

O.S. No. 82 of 1975 and therefore the appropriate forum to maintain an application is this Court but not the trial Court which passed the decree.

The second objection is that after a preliminary decree was passed, there is no question of transposition and that any transposition would alter cl. 4

in the decree and that except in the appeal there can be no alteration of a preliminary decree passed in this suit. In this connection, the learned

counsel referred to O. 1 R. 10 CPC and decisions viz., Ghulam Mohammed v. Ahad Sheikh, AIR 1952 J & K 33 and Rajammal Vs. Kanniyan

Muthuraj and Others, .

4. In my anxious consideration, none of the contentions is acceptable. As long as there is no stay granted pending the appeal, the rights of parties in

this suit have to be worked out in the Court of the first instance. Mere pendency of an appeal would not bar the Court of the first instance to

entertain any application after the passing of the preliminary, decree. I am unable to agree that the application would in any way effect any

alteration to the preliminary decree that was passed by the Court below. For in the preliminary decree, what was decided are the determination of

shares of everyone of the parties to the partition action and the property in respect of which partition is decreed. So far as these two findings are

concerned, these are covered by cls. 1 and 2 in the preliminary decree. Cl. 4 is almost an execution of cls. 1 and 2 in the decree. The law, is well

settled that even after the preliminary decree is passed, anyone of the plaintiffs or anyone of the defendants can ask for separation from the others,

except that he shall pay Court-fee as provided under the Tamil Nadu Act 14 of 1955. It is equally well settled that the rights of the parties in a

partition action should be settled in that action only and none of them should be driven to a different action. What was granted by the impugned

order in I.A. No. 299 of 1984 in O.S. No. 82 of 1975 is to permit the first plaintiff to seek to his share separated from two other plaintiffs. Such a

course is permissible in law particularly in a partition action. In that event

naturally cl. 4 has to be amended suitably. There is no need for that purpose to take the matter in appeal. So long as cls. 1 and 2 are kept intact, the rights arising therefrom have to be agitated in the Court of the first instance notwithstanding certain directions are found in the preliminary decree.

5. Again I am unable to agree with the learned counsel for the petitioner that it is O. 1 R. 10, CP.C alone applicable. The trial Court has got inherent jurisdiction under S. 151, CPC to make the order transposing the parties. In partition action everybody has a right to transpose himself from the rank of the plaintiff to that of a defendant and vice versa and to request allotment of his share individually. No doubt in the decision of Jammu and Kashmir High Court, it was laid down that in a suit for partition and accounts, when the Court passed a decree in terms of the compromise entered into between the plaintiff and some of the defendants, the Court has no jurisdiction thereafter to transpose the remaining defendants who also claim a share in the property as plaintiffs and the plaintiff as defendant and that it is open to these defendants to file a separate suit to enforce their rights. A careful reading of the decision will reveal that question did not arise for consideration before the learned Judge. On the other hand what was considered by the learned Judge was that after a preliminary decree, the plaintiff shall not be permitted to withdraw the suit for the obvious reason that the rights declared in favour of the defendants under the preliminary decree would be rendered nugatory if the suit should simply be dismissed. For the said proposition of law, the learned Judge has relied on a decision of this Court in Seethai Achi Vs. Meyappa Chettiar and Others, . Therefore the said decision would not help the learned counsel for the petitioner. The other decision rendered by this Court did not consider whether the Court of the first instance under S. 151, CPC possesses inherent jurisdiction to order transposition of the party. The learned Judge there was concerned only with O. 1 R. 10, CPC. Further the learned Judge did confirm the order passed by the Court below where transposition was ordered. While so he has pointed out certain principles which have to be followed before O. 1 R. 10, CPC is applied. As long as the Court has got inherent jurisdiction under S. 151, CPC to make an order of transposition, this decision as such will not render any assistance to the learned counsel for the petitioner.

6. Thus both these points fail and this Civil Revision Petition is dismissed in limine.

7. Petition dismissed.