

(2011) 07 MAD CK 0043

In the Madras High Court

Case No : Civil Revision Petition (P.D.) No. 3659 of 2007 and M.P. No. 1 of 2007

A.K. Yarabjan and Haji A.K. Mubarak Ali

APPELLANT

Vs

Hussainajan and Others

RESPONDENT

Date of Decision : 28-07-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 10

Citation : (2011) 07 MAD CK 0043

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : P. Haribabu, for the Appellant; T.M. Hariharan, for R1 to R5, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—The Revision Petitioners/Petitioners/D-1 and D-2 have filed the present Civil Revision Petition as against the order dated

28.08.2007 in I.A. No. 384 of 2007 in O.S. No. 338 of 2004 passed by the learned Additional Subordinate Judge, Salem.

2. The trial Court, while passing orders in I.A. No. 384 of 2007 dated 28.08.2007, has among other things observed that, "as per the the

Petitioners" contention the issue involves in this suit is directly and substantially in issue in Second Appeal pending before the Hon"ble High Court.

But there is No. such pleading was raised till the examination of the parties. As per the Respondents" contention, in respect of mesne profits only,

the Second Appeal proceedings are pending, which is not denied by the Petitioners. Nor the Petitioners proved that the issue involved in the

Second Appeal is directly and substantially in issue in the suit... etc." and resultantly dismissed the application without costs.

3. It is the contention of the Learned Counsel for the Revision Petitioners/D-1 and D-2 that the trial Court has committed an error in dismissing the

I.A. No. 384 of 2007 in O.S. No. 338 of 2004, filed for stay of the trial u/s 10 of the Code of Civil Procedure.

4. According to the Learned Counsel for the Revision Petitioners, the trial Court has not appreciated the fact that as between the same parties,

earlier a Partition Suit has been filed in O.S. No. 653 of 1992, wherein Respondents 1 to 5 have relinquished their shares in favour of the Revision

Petitioners/D-1 and D-2 and that a Preliminary Decree has been passed as early as on 30.09.1994.

5. The Learned Counsel for the Revision Petitioners submits that an Appeal is a continuation of proceedings of the Original Suit, and this legal

principle has not been borne in mind by the trial Court while dismissing the I.A. No. 384 of 2007 on 28.08.2007.

6. The Learned Counsel for the Revision Petitioners/D-1 and D-2 strenuously contends that the issue involved in the present Suit, O.S. No. 338 of

2004 and in earlier Suit, O.S. No. 653 of 1992 are directly and substantially the same, as a result of which, S.A. No. 270 of 2007 has been filed

before this Court. Therefore, the trial Court has passed an erroneous order in dismissing the I.A. No. 384 of 2007, dated 28.08.2007, by not

appreciating the factual and legal position of the subject matter in issue.

7. In the earlier Suit, O.A. No. 653 of 1992, on the file of the learned Subordinate Judge, Salem, one A.K. Yarabjan has figured as the first

Plaintiff. The second Plaintiff in that Suit, Hajee A.K. Mubarak Ali and the first Plaintiff therein are the present Defendants 1 and 2 in O.S. No.

338 of 2004 on the file of the learned Subordinate Judge, Salem. In fact, O.S. No. 653 of 1992 has been filed by the present Revision Petitioners

as Plaintiffs 1 and 2 against the Defendants therein, A.K. Syed Ali and K.Kamal Basha. The said Suit has been filed for partition for dividing the

suit properties into 104 shares with all equities and allotting 76 separate shares in favour of the Plaintiffs 1 and 2 therein.

8. As already stated, the Plaintiffs 1 and 2 in O.S. No. 653 of 1992 are the Defendants in O.S. No. 338 of 2004, viz., the Revision Petitioners.

Admittedly, a preliminary Decree in O.S. No. 653 of 1992 was passed on 30.09.1994. I.A. No. 99 of 1995 in O.S. No. 653 of 1992 has been

filed by the present Revision Petitioners/Defendants as Plaintiffs along with others in that suit. On 30.12.2002, a final Decree has been passed

based on the Commissioner's Report mentioning that the Petitioners/Plaintiffs therein have been allotted the entire house measuring 775 sq.ft.

marked in rose colour in Plan No. 6 annexed to the Commissioner's Report, to the effect the Petitioners/Plaintiffs have been allotted the portion

marked as ""A"" and coloured in rose pencil in Plan No. 7 annexed to the Commissioner's report measuring 42 feet 6 inches east west on the north;

measuring 45 feet 3 inches east west on the south; measuring 13 feet 3 inches north to south on the east; and measuring 12 feet 6 inches north to

south on the west, totally measuring 566 1/2 sq.ft. and that the Respondents/Defendants have been allotted 496 1/2 sq.ft. vacant land as shown in

Commissioner's Plan No. 7 and marked as ""B"" in violet colour, viz., extent of the vacant land measuring east west 40 feet 3 inches on the north;

measuring 42 feet 6 inches east west on the south; and measuring 12 feet north south on both sides.

9. As against the Final Decree passed in I.A. No. 99 of 1995 in O.S. No. 653 of 1992, dated 30.12.2002, No. First Appeal has been projected

before the competent Court, in the manner known to law. Hence, the Final Decree passed in I.A. No. 99 of 1995 in O.S. No. 653 of 1992, dated

30.12.2002, has become final, conclusive and binding between the parties inter se.

10. It transpires from the typed set of papers that I.A. No. 572 of 1996 in O.S. No. 653 of 1992 on the file of the learned Principal Subordinate

Judge, Salem, has been filed by the Defendants in O.S. No. 653 of 1992 as Petitioners praying for the relief under Order XX Rule 12 and Section

151 of Code of Civil Procedure, in directing the Commissioner to be appointed in the Final Decree proceedings to hold an enquiry into the income

from the suit properties and also to direct the Plaintiffs 1 and 2 to furnish true accounts for the income and provide for the payment of the

Petitioners' 28/104 share in the income by the Respondents while passing Final Decree. Ultimately, the Court has allowed I.A. No. 572 of 1996

and directed that the Petitioners/Defendants therein are entitled to mesne profits from Item No. I of the suit property and fixed the same as Rs.

800/-per month and the mesne profits for Item No. II of the suit property was determined at Rs. 950/-per month and the same being payable from

the date of suit till the date of delivery of possession of their shares in the suit properties allotted to them.

11. Only as against the order dated 30.12.2002 in I.A. No. 572 of 1996 in O.S. No. 653 of 1992, A.S. No. 128 of 2004 has been filed by the

Appellants therein (Revision Petitioners in the present Civil Revision Petition) on the file of the learned First Additional District Judge, Salem. After

contest, judgment has been delivered in A.S. No. 128 of 2004 on 31.01.2006, allowing the Appeal and setting aside the Fair and Decretal Order

of the trial Court in I.A. No. 572 of 1996 in O.S. No. 653 of 1992, dated 30.12.2002. Only as against the said judgment and Decree in A.S. No.

128 of 2004, S.A. No. 270 of 2007 has been filed by the Defendants in O.S. No. 653 of 1992 and the same is pending before this Court.

12. To attract Section 10 of the Code of Civil Procedure, firstly, the matter in issue in the present suit must be directly and substantially in issue in a

previous suit instituted between the parties. Also the subject matter of the suit must be one and the same between the parties. Generally, if there are

two suits between the parties, the latest suit will have to be stayed and not the previous one. The purpose of Section 10 of the CPC relating to stay

of suit is to protect a litigant from plurality of proceedings between the same parties. As a matter of fact, Section 10 of CPC is a restrictive provision

and not a permissive one, in the considered opinion of this Court.

13. In deed, the ingredients of Section 10 of CPC are not to be applied in order to make the second suit filed as a maintainable one. It cannot be

forgotten that the tenure of Section 10 of CPC is to protract the litigants from being vexed twice for the trial of the same cause of action and to fulfil

the public policy that there ought to be an end of litigation. Likewise, Section 11 of CPC was the trial of a suit or an issue in which the matter

directly and substantially in issue has already been decided in an earlier suit.

14. As far as the present case is concerned, the present suit, O.S. No. 338 of 2004 though it has been filed for partition, certainly the same differs

materially and substantially from that of the matter pending in S.A. No. 270 of 2007. In respect of mesne profits in O.S. No. 653 of 1992, former

suit, the trial Court has quantified the income and directed the parties to pay the same to all the parties. As against the said order, A.S. No. 128 of

2004 has been filed and after contest, a judgment has been delivered in the said

Appeal on 31.01.2006. Only as against the said judgment and Decree made by the First Appellate Court in A.S. No. 128 of 2004, S.A. No. 270 of 2007 is pending before this Court. To put it precisely, in S.A. No. 270 of 2007, the share of the income of the properties alone is in controversy/dispute between the parties to the litigation. Since the present suit, O.S. No. 338 of 2004 is different from that of the subject matter in S.A. No. 270 of 2007, this Court comes to an irresistible conclusion that the Petitioners have not made out a prima facie case to the satisfaction of this Court that they are entitled to get the relief of stay of suit as per Section 10 of the Code of Civil Procedure. Viewed from that perspective, the Civil Revision Petition fails.

15. In the result, the Civil Revision Petition is dismissed leaving the parties to bear their own costs. Consequently, the order passed by the trial Court in I.A. No. 384 of 2007 in O.S. No. 338 of 2004, dated 28.12.2007, is confirmed for the reasons assigned in this Civil Revision Petition.

Further, it is brought to the notice of this Court that the pleadings in O.S. No. 338 of 2004 on the file of the Subordinate Court, Salem, have been completed. In the circumstances, the trial Court is directed to frame necessary issues on the basis of the pleadings projected by the parties (if not framed already) and to list the matter either in the list or in the special list and to dispose of the suit in the manner known to law and in accordance with law at an early date after providing due opportunities to both parties. Connected M.P. is closed.