
(2012) 08 MAD CK 0063

In the Madras High Court

Case No : C.R.P. (PD) . No. 775 of 2012 and M.P. No's. 1 to 3 of 2012

C.T. Sampath

APPELLANT

Vs

Mary Manohari and Others

RESPONDENT

Date of Decision : 03-08-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 2 Rule 2, Order 7 Rule 11(d), 11, 12, 151

Citation : (2012) 08 MAD CK 0063

Hon'ble Judges : V. Dhanapalan, J

Bench : Single Bench

Advocate : S. Raj Mahesh for M/s. Srinath Sridevan, for the Appellant;
Venkateswaran for Mr. M. Pari for RR-1 to 5 and Mr. M. Guruprasad for RR-6 to 8,
for the Respondent

Judgement

Honourable Mr. Justice, V. Dhanapalan

1. This Civil Revision Petition is filed challenging the order dated 12.12.2011 in I.A.No.148 of 2011 in O.S.No.124 of 2008 on the file of the Additional District Judge (Fast Track Court No.1), Chengalpattu. The revision petitioner is the first defendant in the suit. The respondents 1 to 5/plaintiffs filed the suit for declaration that the partition deed created by the first defendant dated 3.8.2006 in document No.10173, is null and void and not acted upon; to pass an usual preliminary decree for partition of the plaintiff No.1's 1/5th share in the suit properties by dividing the suit properties into 5 equal shares and to allot one such share to the plaintiffs by metes and bounds and to pass a final decree and be prepared to carry out separate possession of the joint family properties suit properties in favour of the first plaintiff in pursuance of the preliminary decree that may be passed in the above suit and separate possession of the same be delivered to the plaintiffs. The defendants filed written statement and contested the suit. The trial Court, after framing issues and additional issues, proceeded with the trial and it has commenced trial on 1.7.2010. The first plaintiff filed her proof affidavit and examined herself as P.W.1 in chief in part on 1.7.2010 itself

and it was further posted for further examination in chief of P.W.1 on 21.10.2010. At that stage, the petitioner/first defendant filed an interlocutory application under Order 2 Rule 2, Order 7 Rule 11(d) and Sections 11, 12 and 151 C.P.C. to take up the preliminary issues, viz., (i) whether the suit is maintainable in view of the decree of dismissal as not pressed, dated 12.12.2006 in O.S.No.396 of 2005 on the file of the Principal District Court, Chengalpattu and (ii) whether the plaintiffs are entitled to any relief in view of the registered partition deed dated 3.8.2006 already effected and to decide the same to reject the plaint and dismiss the suit as barred by the principles of res-judicata. The said application was contested by filing counter affidavit by respondents 1 to 5/plaintiffs. The trial Court, on a consideration of the case of the parties, dismissed the said interlocutory application, against which, the present C.R.P. is filed by the petitioner/first defendant.

2. Mr. S.Raj Mahesh, learned counsel appearing for the petitioner contended that without deciding the preliminary issues, the trial Court cannot be allowed to proceed with the trial in the light of the earlier decree of the Court dated 12.12.2006. He also assailed the impugned order on the ground that there was settlement on the endorsement made by the plaintiffs in the earlier suit and therefore, the preliminary issue has to be decided in the present suit first and then only, if the trial Court has reason to proceed, it can be allowed to proceed for trial.

3. On the other hand, Mr. Venkateswaran, learned counsel representing Mr. Pari, learned counsel appearing for respondents 1 to 5 submitted that the trial has commenced in view of the memo filed by the petitioner/first defendant stating that the first plaintiff is aged about 70 years and is a cancer patient and after having given notice to the defendants' side, the suit was taken up for trial and the additional issues can be decided during trial and therefore, when the trial Court has commenced and P.W.1 was in the witness box, the petitioner/first defendant made the said application to drag on the proceedings.

4. This Court also heard Mr. M.Guruprasad, learned counsel for the respondents 6 to 8 on the above aspects.

5. Admittedly, the petitioner is the first defendant in the suit. The suit was filed by the respondents 1 to 5/plaintiffs for declaration and to pass preliminary decree and then final decree, as quoted above. The suit has been contested by the defendants by filing written statement. Issues and additional issues were framed. The suit was taken up for trial.

6. It is seen that a memo was filed by the learned counsel for the plaintiffs praying the trial Court to take up the suit for trial on the ground that the first plaintiff is aged about 70 years and is a cancer patient and having given notice to the defendants' side, the suit was taken up for trial on 1.7.2010, on which date, the first plaintiff was examined in chief in part and it was further proceeded for examination in chief of P.W.1 on 21.10.2010. At that stage, the petitioner/first

defendant made an application to decide the preliminary issues, viz., (i) whether the suit is maintainable in view of the decree of dismissal as not pressed, dated 12.12.2006 in O.S.No.396 of 2005 on the file of the Principal District Court, Chengalpattu and (ii) whether the plaintiffs are entitled to any relief in view of the registered partition deed dated 3.8.2006 already effected and to decide the same to reject the plaint and dismiss the suit as barred by the principles of res-judicata.

7. The trial Court, on a consideration of the case of the respective parties and the contentions of the respective counsel, looked into the pleadings of the petitioner/first defendant that there was already a partition deed of properties among them on 3.8.2006, which was duly executed by all the parties and registered and conceded in the plaint that there was a registered partition deed dated 3.8.2006. The first plaintiff also earlier filed suit in O.S.No.396 of 2005 on the file of the Principal District Court, Chengalpattu against the petitioner praying for the relief of partition and the said suit was dismissed as not pressed, which contention of the petitioner has been resisted by the respondents by filing counter affidavit in the I.A., stating that the first respondent/plaintiff No.1 was completely diverted by the petitioner for his own benefit of getting higher share and to cheat the other sharers, and the petitioner/first defendant took the first respondent to his house and forced her to sign the said partition deed and made the suit as not pressed and therefore, the earlier suit was filed through her son, who was appointed as her Power Agent and when the Power Agent is there, the petitioner/first defendant has no right to deal with the first respondent/first plaintiff alone. There is no res-judicata and therefore, the preliminary issues need not be decided first.

8. The trial Court, on a consideration of the case of the parties, came to the conclusion that the partition of the properties was by way of registered partition dated 3.8.2006 by referring the case to Lok Adalat, and there was settlement of dispute and dismissal of the suit as not pressed and in view of the abovesaid settlement of dispute etc., the same can be decided in the main suit itself and it cannot be disputed that the controversial issues such as plea of res-judicata and issue of territorial and pecuniary jurisdiction can be taken as a preliminary issue even prior to commencement of the trial in the suit. As far as the case is concerned, the trial has already commenced on 1.7.2010 itself and the first plaintiff examined herself as P.W.1 in chief on the same day itself in part and the suit was further posted for further examination in chief of P.W.1 on 21.10.2010. At that stage, in order to drag on the matter, the petitioner/first defendant filed the present I.A. to decide the preliminary issues, as there was a commencement of trial in view of the memo filed by the learned counsel for the plaintiffs praying the trial Court to take up the suit for trial on the ground that the first plaintiff is aged about 70 years and is a cancer patient and after giving notice to the defendants' side, the suit was taken up for trial. It is also the view of the trial Court that when the additional issue can be decided along with the other issues in the suit, the contention of the petitioner for deciding the additional issue as a

preliminary issue at first, appears to be unreasonable and the same is devoid of merits and therefore, the trial Court dismissed the I.A.

9. It is the settled principle of law that when the issues are framed and thereafter additional issues are also framed, it is for the trial Court to decide which issue is to be taken up first and the party insisted upon for taking the additional issue as the preliminary issue and after taking up of the trial, the trial Court has come to the conclusion that the matter in question has to be examined with all the issues framed and the trial Court came to the further conclusion that the application was made by the petitioner to decide the preliminary issue first, and then only to proceed with the trial and at the stage of examination of P.W.1 in chief in part and that too on the memo filed by the plaintiffs which has been endorsed by the defendants, the trial was taken up thereafter. It is for the trial Court to decide which issue has to be decided first as per law and proceed with the trial. In my considered opinion, the findings of the trial Court do not in any way is legally infirmed and the view taken up by the trial Court is found to be correct and there is no warranting circumstance to interfere with such findings of the trial Court. The C.R.P. deserves no merit consideration and it is accordingly dismissed. However, it is open for the parties to contest the matter in trial and all the issues are left open to be decided during trial. No costs. The Miscellaneous Petitions are closed.