
(2012) 02 MAD CK 0159

In the Madras High Court

Case No : Civil Miscellaneous Appeal No. 3507 of 2011 and M.P. No. 1 of 2011

Mohana and Kavitha

APPELLANT

Vs

Nirmaladevi and Others

RESPONDENT

Date of Decision : 13-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 33 Rule 1, Order 33 Rule 15A, Order 33 Rule 2, Order 33 Rule 5

Citation : (2012) 3 CTC 507

Hon'ble Judges : S. Vimala, J; R. Banumathi, J

Bench : Division Bench

Advocate : T. Dhanyakumar, for the Appellant; C. Jagadeesh, For Respondents No. 2 and 4, Mr. K. Narasimhan For Respondents 3 and 5 and No Appearance For Respondents 1 and 6, for the Respondent

Final Decision : Dismissed

Judgement

R. Banumathi, J.—Challenge in this appeal is, the dismissal of Pauper O.P. No. 10 of 2010 on the file of Principal District Court,

Namakkal, whereby the trial Court declined to grant leave to sue as informa pauperis. The plaintiffs are the appellants. The appellants and the

respondents are related as under:

2. The case of appellants is that the appellant and 1st respondent's father - Chinnusamy lived as joint family and there was partition in the family on

26.10.1998. The father of appellants and 1st respondent became entitled to 1/4th share in the property. Father of appellants and 1st respondent

died due to electrocution and thereafter the appellants and their sister viz., the 1st respondent were under the control of respondents 2 to 4.

Respondents 2 to 4, being their father's brother and sons, were managing the affairs of the family. Further case of plaintiffs is that under the guise

of raising money for the marriage of the 1st appellant, on the request of respondents 2 to 4, on 23.8.2000, appellants and 1st respondent executed mortgage deed relating to B Schedule Item 1 of the property. Further, on the same date - 23.8.2000, the appellants and 1st respondent were asked to execute mortgage to raise loan for the marriage expenses of the 2nd appellant. Again, on 25.2.2004, the appellants were taken to Paramathi Registrar's office to execute mortgage relating to B Schedule Items 2 to 4 of the property. Appellants/plaintiffs further alleged that the mortgaged amount of Rs. 2,00,000/- and a sum of Rs. 4,00,000/- was deposited in the Savings Bank Account and later respondents 2 to 4 have withdrawn the amount for the marriage expenses of the 2nd appellant. In the plaint, the appellants have further averred that the respondents 2 to 4 have taken the appellants to the Registrar's Office on various dates - 23.02.2004, 25.02.2004, 29.08.2008 and 07.09.2009 and obtained the sale deeds in respect of items 1 to 4 of B Schedule property. The plaintiffs alleged that all the documents dated 23.02.2004, 25.04.2004 and 29.05.2008 and 07.09.2009 are null and void. Alleging that those documents are not binding upon the appellants and ignoring the said documents, the appellants have filed the suit for partition claiming 2/3rd share in the plaint schedule properties.

3. In the suit for partition, appellants/plaintiffs are to pay court fee a sum of Rs. 1,20,098/-. Stating that they have no means to pay the court fee and that they are to be declared as indigent persons and seeking leave to sue as *informa pauperis* plaintiffs have filed pauper O.P. No. 10 of 2010.

4. The said Petition was resisted by the respondents inter alia contending that the documents referred to in the plaint are true and validly executed for the purpose for which they have been vouched to be executed and that all the documents were executed for necessary and lawful purpose. The respondents have mainly contended that the appellants have means to pay the court fees. The appellants have several other properties not shown in the partition deed. It was further averred that the appellants are entitled to properties that are standing in the name of Kumarasamy, the other brother of 2nd defendant and therefore the appellants are entitled to the property. The appellants also own another property in Keezhl Sathampur village and the same has not been shown in the plaint. The 1st appellant's husband is working as Engineer in Public Works Department and the

2nd appellant's husband owns extensive lands and therefore the appellants have sufficient means to pay the court fee.

5. Before the trial Court, the appellants examined themselves as P.Ws. 1 and 2 and they were cross examined at length. Exs. P.1 and P.2

mortgage deeds were marked. Upon consideration of the oral and documentary evidence, the trial Court observed that the 1st appellant's

husband is working as Engineer in Public Works Department and the 2nd appellant's husband owns more than ten acres of land. Referring to the

evidence of P.Ws. 1 and 2, the learned trial Judge held that the appellants own jewels and that they have also separately mortgaged the properties

and on those factual findings held that the appellants have sufficient means to pay the court fee and dismissed the pauper O.P.

6. Challenging the impugned order, the learned counsel for the appellants contended that the question whether any person is an indigent person has

to be determined with reference to the property possessed by him. It was further submitted that the learned trial Judge failed to consider the

independent means and capacity of the plaintiffs to pay the court fees and erred in holding that the husband of 1st appellant is employed and the

Court is called upon to decide the capacity of the appellants/plaintiffs and not by their husbands or anybody, who is not suing as parties to the

proceedings. Taking us through the Rules, Order XXXIII Rules 1 and 2, the learned counsel would urge that the emphasis is ""on property

belonging to appellants"" and not by their husbands or other relatives and while so, the trial Court erred in misconstruing the oral evidence of P.Ws.

1 and 2. In support of his contentions, learned counsel placed reliance upon a decision of Delhi High Court in the case of Disha Sethi And Anotehr

v. Chander Mohan Sethi, (AIR 2008 DE 81).

7. Placing reliance upon decisions of this Court in Velu and Another Vs. Nagaraja Nattar and Others, and P.V. Chandrasekharan and Others Vs.

Thirumalai Chit Funds and Others, , the learned counsel for respondents 2 and 4 would contend that the person seeking leave to sue as indigent

person need not own property and it is only the capacity to raise the funds. It was further submitted that the 1st appellant's husband is working as

Engineer in Public Works Department and the 2nd appellant's husband owns more than ten acres and therefore both the appellants are capable of

raising funds to pay the requisite court fee. It was further submitted that since the appellants have sufficient means to pay the court fee, the trial

Judge rightly dismissed the pauper O.P., and the impugned order warrants no interference.

8. Mr. K. Narasimhan, learned counsel appearing for 3rd and 5th respondents has taken us through the evidence of P.Ws. 1 and 2 and submitted

that in the evidence it is clearly stated that only the husband of P.Ws. 1 and 2 are conducting the litigations. The appellants are possessed of

sufficient means and the appellants can raise sufficient funds and they are to be dealt with as per order XXXIII Rule 5 C.P.C directing them to pay

court fee.

9. Respondents 1 and 5 have not entered appearance. Their names have been printed in the cause list.

10. Even though much argument was advanced on the appellant's plea pertaining to the sale deeds (dated 23.02.2004, 25.02.2004 and

29.08.2008 and 07.09.2009), we are not concerned with the merits of the rival contentions of the parties pertaining to the validity or the otherwise

of those documents. The short points falling for consideration are: (i) whether the appellants have sufficient means to pay the court fee of Rs.

1,20,022/- ; and (ii) whether the learned trial judge was right in declining to grant leave to sue as *informa pauperis*.

11. The suit is for partition of appellants' 2/3rd share. The appellants indirectly challenges various sale deeds dated 23.02.2004, 25.02.2004 and

29.08.2008 and 07.09.2009, which were said to have been executed by them. Even though the appellants claimed that they have no sufficient

means and they have only two sarees and two blouses, it is pertinent to note that appellants are said to be owning properties. The appellants are

said to be owning properties in Keezh Sathampur village. It is seen that Ex. P.1 is the mortgage deed executed by the appellants and the 1st

respondents in favour of Uma for a sum of Rs. 3,00,000/- and Ex. P.2 (dated 23.08.2000) is the mortgage deed executed by the appellants and

the 1st respondent in favour of M. Balasubramani -3rd respondent for a sum of Rs. 3,00,000/-. In her evidence, P.W.1 has also admitted about

the mortgage deed executed by the sisters viz., appellants and the 1st respondent.

12. The learned counsel for appellants contended that the words in Explanation I ""if he is not possessed of sufficient means..... "" that the

petitioners/appellants have no property and that the expressions ""if he is not possessed of sufficient means"" is to be strictly construed. It was further

submitted that Court has to ascertain whether applicant has possessed of sufficient means for payment of court fee and not the property owned by the husband or other person.

13. ""Means"" means income, estate, wealth. Appellants-Plaintiffs 1 and 2 are said to be having properties of their own in Keezh Sathampur village.

Respondents have stated that Plaintiffs are entitled to the properties standing in the name of Komaragounder who is the other brother of the 2nd

Respondent. Appellants have not let in any evidence to disprove owning of properties in Keezh Sathampur village. Appellants are said to be

owning jewels each worth Rs. 10,00,000/-. Appellants deny possessing of any jewels each worth Rs. 10,00,000/-, however, no independent

evidence was adduced to prove that Appellants were not given any jewels.

14. In Velu and Another Vs. Nagaraja Nattar and Others, a single judge of this Court has held that the appellant, who was a coparcener in a

Mitakshara joint family, shall be held to be possessed of interest in the family property and held that he should be held to possess the means to pay

the court fees within the contemplation of Order 33 Rule 1 C.P.C. Holding that when the applicant was in joint possession of the properties, they

were in a position to command the requisite resources to provide themselves with fund for payment of court fee. In paragraph No. 10, the learned

Judge held as under:

10. I do not also accept the other argument of Mr. Padmanabhan that in reckoning a suitor's means and the sufficiency of such means for purposes

of O.33, R.1, the court shall take note only of that individual's property holdings and nothing else. I grant that the court cannot take note of a

man's borrowing capacity or other propensities or proclivities for gauging his means. But I cannot accept the suggestion in the argument of the

plaintiffs learned counsel that the test of paying capacity must be directly related to extent of the plaintiffs property holding. This is not in any case,

the intendment of O.33, R.1. Explanation (a) to the rule clearly refers to "means" and not property owning as the test of paying capacity. Means, in

my judgment, connotes a man's resources. If a man can command, as of right, resources even though he may not technically own the sources in

question himself, there can be no doubt that he would possess the means to pay court-fees within the contemplation of this rule.

(underlining added)

15. In P.V. Chandrasekharan and Others Vs. Thirumalai Chit Funds and Others, , another single Judge of this Court held that sufficient means

capacity to raise money to pay court fee and money can be raised over properties also. It is not that only if applicant is possessed of cash it can be

said that he is possessed of means to pay court fee.

16. The possession of sufficient means refers to the possession of sufficient realisable property, which will enable the plaintiff/appellant to pay court

fee on the plaint. The expression ""possession of sufficient means"" refers to capacity to raise money and not the actual possession of the property.

As pointed out earlier, the appellants, who are said to be owning the properties in Keezhl Sathampur village and also who have separately

mortgaged their share of properties are capable of raising funds. The appellants have lawful means to raise money to pay the court fee. The

conclusion of the trial Court that the appellants have sufficient means to pay the court fee does not suffer from any perversity warranting

interference. As per Order XXXIII Rule 15A, when the Court refuses permission to sue as informā pauperies, the Court has to grant the time for

payment of court fee and accordingly time is granted for payment of court fee. In the result, the order dated 6.6.2011 made in Pauper O.P. No.

10 of 2010 on the file of Principal District Judge, Namakkal is confirmed and the appeal is dismissed. Six weeks time is granted from today to the

appellants to pay court fee. Hoverer, there is no order as to costs in this appeal. Consequently, the connected miscellaneous petition is closed.