(2000) 03 MAD CK 0039

In the Madras High Court

Case No : Application No. 3509 of 1999 in C.S. No. 214 of 1996

Vasantha and Others APPELLANT

Vs

Smt. Kamalammal and Another RESPONDENT

Date of Decision : 01-03-2000

Acts Referred:
Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 35, 37(3)

Citation : AIR 2000 Mad 279

Hon'ble Judges : M. Karpagavinayagam, J

Bench : Single Bench

Advocate : T.V. Ramanujam, for T.V. Krishnamachari, for the Appellant; R. Thiagarajan, for the Respondent

Final Decision : Allowed

Judgement

M. Karpagavinayagam, J.—This application has been filed by the applicants/ defendants under Order XIV, Rule 8 of Original Side Rules

read with Sections 151 and 152 of C.P.C. praying this Court to pass an order amending the preliminary decree dated 22-1-1999 passed in C.S.

No. 214 of 1996 declaring that the applicants/defendants would be entitled to 82.502% in the Plaint Schedule Properties and for further directing

the office to amend the preliminary decree by including a clause for directing the plaintiffs to render a true and proper account for the rental income

from the suit properties and on ascertainment of the same, direct the respondents/ plaintiffs to pay the applicants/defendants their share of the rental

income.

2. This application is resisted through the counter-affidavit filed by the respondents/ plaintiffs.

3. On the basis of the grounds mentioned. Mr. T. V. Ramanujam, the learned

Senior Counsel appearing for the applicants/defendants and Mr. R.

Thiagarajan, learned counsel appearing for the respondents plaintiffs argued the matter at length and made their respective pleas.

4. I have given my anxious consideration to the rival contentions and carefully perused the affidavits of the parties and other records.

5. The respondents/plaintiffs filed C.S. No. 214 of 1996 claiming for partition and separate possession of the suit schedule properties bearing

Door Nos. 6 and 15, Meeran Sahib Street. Chennai in respect of their 17, 498% shares in the suit properties.

6. After recording the evidence and after hearing the parties, this Court by judgment and decree dated 22-1-99 granted preliminary decree for

partition and separate possession of the suit schedule properties in respect of the plaintiffs'' share of 17.498% in the same.

7. The applicants/defendants being the majority of the shareholders would be entitled to 82/502% shares in the suit properties. The applicants filed

Application No. 2052/99 for passing a final decree in consonance with the preliminary decree, allotting the plaintiffs'' share of 17-498%. Since the

applicants/defendants have not paid the requisite Court-fee for allocation of the balance share and declaration of their entitlement of 82/502% in

the suit properties and for rendition of accounts along with the written statement, they have now filed this application to amend the preliminary

decree, earlier passed, to the effect that the applicants/ defendants would be entitled to the balance share, namely. 82.502% and for rendition of

accounts in respect of the said share.

8. Along with this application, the applicants/defendants paid the Court-fee under Sections 37(3) and 35 of Tamil Nadu Court-fees and Suits

Valuation Act. 1955 (Rs. 150 + Rs. 750 = Rs. 900).

9. According to the learned Senior Counsel appearing for the applicants, if the respondents'' share is divided in consonance with the preliminary

decree, automatically, the applicants/defendants share would remain divided, as they are entitled to the balance share, namely, 82.502% in the suit

properties and underthose circumstances, it will be in the interests of justice to amend the preliminary decree declaring their shares also, especially

when the shares of the applicants were admitted and the shares of the respondent had already been determined.

10. Opposing the above submission, Mr. R. Thiagarajan, learned counsel appearing for the respondents/plaintiffs would contend that this

application seeking for declaration of applicants'' rights and entitlement in the suit schedule properties, without there being proper adjudication, is

not maintainable in law or on facts.

11. Learned counsel for the respondents/ plaintiffs, would also contend that the applicants, who are not in joint possession, have to necessarily file

separate applications for passing a decree for partition in their favour and the relief cannot be clubbed by all the applicants, since each one has a

separate right and that the rights of the parties have to be adjudicated independently.

12. The relevant section that is applicable to the present case is Section 37 of the Tamil Nadu Court-fees and Suits Valuation Act, 1955. Section

37(1) of the Act deals with the payment of Court-fee in a suit for partition and separate possession by a plaintiff who has been excluded from

possession of such property. Whereas Section 37(2) of the Act deals with the payment of Court-fee in a suit for partition and separate possession

by a plaintiff, who is in Joint possession of such property.

13. Section 37(3) of the Act indicates that if, at the time of filing the written statement, the defendant claims partition and separate possession of his

share of the property, then Court-fee becomes payable immediately, computed on half the market value of his share or at half the rate specified in

Section 37(2) of the Act depending upon whether such defendant has been excluded from possession or is in joint possession. Section 37(3) does

not however provide for a case to enable a defendant after the passing of the preliminary decree to ask for separation of his share; but when all the

parties are before the Court and the shares have not undergone any change and the matter has not proceeded to a final decree, there cannot be

any serious objection in principle, if a defendant, even after passing of the preliminary decree, is permitted to seek a separation of his share of the

properties by payment of the Court-fee. This is exactly the view of this Court expressed in the decision, reported in S.V. Muthu Vs. Veerammal,

, with which I respectfully agree.

14. Hon''ble Ratnam, J. (as he then was) would observe, in the said decision, as follows :--

It appears to me that Section 37(3) of the Act would apply even with reference to a case where a defendant seeks the partition and separate

possession of his share of the properties after the passing of the preliminary decree, but only so long as the final decree proceedings are pending.

This observation, in my considered opinion, would apply to the present case too.

15. Admittedly, in this case, neither in the written statement nor in the preliminary decree, there is reference about the exact shares allotted to the

applicants/defendants.

However, as laid down in the abovementioned decision, it is open to the applicants now to approach this Court to have the preliminary decree

amended in such a manner as to include a declaration of their rights as regards their shares in the properties as well, more particularly, when the

shares have been admitted by the respective parties.

16. Incidentally, it is contended by Mr. Thiagarajan, learned counsel for the respondents that the parties are not in joint possession of the

properties and the respondents are alone in possession. With regard to the said submission 1 do not find any material to accept the same.

17. In this context, the observation made by the Supreme Court in the decision, reported in Neelavathi and Others Vs. N. Natarajan and Others,

is quite relevant and the same is as follows :--

The general principle of law is that in the case of co-owners, the possession of one is in law possession of all, unless ouster or exclusion is proved.

To continue to be in Joint possession in law, it is not necessary that the plaintiff be in actual possession of the whole or part of the property. Equally

it is not necessary that he should be getting a share or some income from the property. So long as his right to a share and the nature of the property

as joint is not disputed the law presumes that he is in joint possession unless he is excluded from such possession. Before the plaintiffs could be

called upon to pay Court-fee u/s 37(1) of the Act on the ground that they had been excluded from possession, it is necessary that on a reading of

the plaint, there should be a clear and specific averment in the plaint that they had been ""excluded"" from joint possession to which they are entitled

in law. The averments in the plaint that the plaintiff could not remain in joint possession as he was not given any income from the joint family

property would not amount to his exclusion from possession.

18. As observed by the Supreme Court, unless there is a clear and specific averment in the plaint that the defendant had been excluded from the

joint possession, it cannot be contended that the respondents alone are in possession.

19. Under those circumstances, it is not necessary to direct the applicants/ defendants to file a separate application for seeking the relief of

declaration of shares.

20. In view of what is stated above, the application is allowed. No costs.

