

T.Suresh Vs. T.Sukumar

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Court : Chennai

Decided On : Nov-27-2013

Judge : S.Tamilvanan

Appellant : T.Suresh

Respondent : T.Sukumar

Judgement :

IN THE HIGH COURT OF JUDICATRE AT MADRAS DATED:

27. 11.2013 CORAM THE HONOURABLE MR. JUSTICE S.TAMILVANAN
C.R.P.(PD).No.2037 of 2013 & M.P.No.1 of 2013 1. T.Suresh 2. N.Sujatha ..
Petitioners vs.

1. T.Sukumar 2. S.Sathish Kumar .. Respondents Civil Revision Petition filed under Article 227 of the Constitution of India, against the fair and final order, dated 04.03.2013 made in I.A.No.156 of 2011 in O.S.No.649 of 2010 on the file of the III Additional District Court, Coimbatore. For Petitioners : Mr.D.Muthuselvam For Respondents : Mr.N.Anand Venkatesh

ORDER

This Civil Revision has been preferred under Article 227 of the Constitution of India, challenging the order, dated 04.03.2013 made in I.A.No.156 of 2011 in O.S.No.649 of 2010 on the file of the III Additional District Court, Coimbatore.

2. It is seen that the petitioners herein are the plaintiffs in the suit in O.S.No.649 of 2010 pending on the file of the III Additional District Court, Coimbatore. The petitioners / plaintiffs filed the suit, seeking Judgment and decree, dividing the suit property into three equal shares and allot two such shares in favour of the petitioners / plaintiffs and other consequential reliefs.

3. During the pendency of the suit, the respondents, who are defendants in the suit, filed the Interlocutory Application in I.A.No.156 of 2011 under Section 12 of Tamil Nadu Court Fees and Suit Valuation Act, 1965 r/w Section 151 CPC to decide whether there was payment of proper Court fee, as preliminary issue in the suit and pass appropriate orders. Counter was filed by the first respondent, that was adopted by the second respondent. After considering the petition, counter, all the material papers and also the arguments advanced by both sides, the Court below allowed the Interlocutory Application and directed the petitioners / plaintiffs to pay Court fee under Section 37 (1) of the Tamil Nadu Court Fee and Suit Valuation Act (herein after referred to as the Act) for item Nos.1 to 5 of the suit property, based on the market value on the date of filing of the suit. The Court below appointed an Advocate-Commissioner to decide the market value of the property by taking necessary assistance from the Revenue Department. Aggrieved by which, this Civil Revision has been preferred by the petitioners / plaintiffs.

4. As per the copy of the plaint, the value of the suit property, as stated by the petitioners / plaintiffs for the purpose of jurisdiction and Court fee is Rs.20,02,000/- and Court fee of Rs.901/- was paid thereon under Sections 37 (2), 27 (c) and Section 35 of the Act.

5. Learned counsel appearing for the petitioners / plaintiffs submitted that the suit schedule properties are joint family properties of the plaintiffs and other sharers, hence, the Court below could have construed that the properties are under the joint possession and enjoyment of the petitioners / plaintiffs and as such, they are entitled to value the suit property under Section 37 (2) of the Act. It is a well settled proposition of law, that to decide the correctness of payment of Court fee and valuation of the suit, entire averments made in the plaint should be taken into account. The contentions of the defendants cannot be taken into consideration at

the preliminary stage, however, according to the petitioners, the Court below has taken the view contrary to law and allowed the petition filed by the respondents /defendants, hence, the revision has been preferred.

6. Per contra, learned counsel appearing for the respondents / defendants submitted that the third defendant is the legally wedded wife of S.Thiyagarajan, father of Sukumar, who is the first defendant herein. The plaintiffs are son and daughter of the said Thiyagarajan, born through his second wife Kalaivani. The fourth defendant in the suit is the wife of the first respondent herein. Learned counsel for the respondents submitted that the first respondent is the son of said S.Thiyagarajan, born through his first wife, Pushpa, the third defendant and therefore, the petitioners / plaintiffs are not entitled to claim joint possession and enjoyment of the property and pay lesser Court fee, under Section 37 (2) of the Act, as per the alleged joint possession and enjoyment.

7. It is seen that I.A.No.156 of 2011 was filed by the respondents herein as defendants 1 & 2 in the suit under Section 12 of Tamil Nadu Court Fees and Suit Valuation Act, 1965 to decide the issue relating to Court fee as preliminary issue in the suit. The petitioners / plaintiffs filed their counter stating that it is a partition suit filed by them as co-sharers and the court fee was correctly valued under Section 37 (2) of the Act and they need not pay the court fee for the market value of the property, under Section 37 (1) of the Act, as stated by the respondents / defendants 1 and 2. Hence it is relevant to refer Section 37 (1) of the Tamil Nadu Court Fee and Suit Valuation Act, which reads as follows : ".In a suit for partition and separate possession of a share of joint family property or of property owned, jointly or in common, by a plaintiff who has been excluded from possession of such property, fee shall be computed on the market value of the plaintiff's share.".

8. In the accompanying affidavit, the petitioners herein have stated that the properties were owned by the deceased Thiagarajan as his self-acquired property. They have further stated that being the son and daughter of the said Thiagarajan, they are entitled to claim their share and according to them, they are in joint possession and enjoyment of the property. The respondents / defendants have contended that the petitioners are illegitimate children of the said Thiagarajan,

therefore, they are not in joint possession of the property and hence, they could have paid Court fee for the market value of the property, under Section 37 (1) of the Act.

9. It is seen that the Interlocutory Application was filed by the respondents / defendants 1 and 2, under Section 12 (2) of the Act before the Court below. Section 12 (2) of the Tamil Nadu Court Fee and Suit Valuation Act reads as follows : Any defendant may, by his written statement filed before the first hearing of the suit or before evidence is recorded on the merits of the claim but, subject to the next succeeding sub-section, not later, plead that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient. All questions arising on such pleas shall be heard and decided before evidence is recorded affecting such defendant, on the merits of the claim. If the Court decides that the subject-matter of the suit has not been properly valued or that the fee paid is not sufficient, the Court shall fix a date before which the plaint shall be amended in accordance with the Court's decision and the deficit fee shall be paid. If the plaint be not amended or if the deficit fee be not paid within the time allowed, the plaint shall be rejected and the Court shall pass such order as it deems just regarding costs of the suit."

10. In this regard, following catena of decisions were relied on by both the learned counsel :

1. Bharatha Matha v. R.Vijaya Renganathan, 2010 (3) CTC6542. Neelavathi v. Natarajan, 1980 (II) MLJ213. Lakshmi Ammal v. Madhavakrishnan, AIR 1978 SC16074. R.Sathiyamutrhi v. R.Munusamy, 2013 (2) CTC3425. Jayammal v. V.Kumar, (2009) 1 MLJ1046. Manivanna Gounder v. Pachiappa Gounder, 2006 (5) CTC6397. Virudambal v. Kandasamy, 2000 (II) CTC2638. Ramaiah Thevar v. Shanmugavel Thevar, 1979 (I) MLJ14211. Mr.Anand Venkatesh, learned counsel appearing for the respondents submitted that as per Section 112 of the Indian Evidence Act, 1872, presumption of child being legitimate could be established only by strong preponderance of evidence and not merely by balance of probabilities. According to him, the mother of the petitioners herein is not a legally wedded wife of late Thiagarajan, whereas the first respondent is the son of the

said Thiagarajan, born through his legally wedded wife and the second respondent is the son of the first respondent. On the aforesaid facts and circumstances, according to him, it could not be presumed that the petitioners are also jointly in possession and enjoyment of the property.

12. In *Bharatha Matha v. R.Vijaya Renganathan*, reported in 2010 (3) CTC654 the Hon'ble Supreme Court has held that a child born of void or voidable marriage is not entitled to claim inheritance in ancestral coparcenary property but is entitled only to claim share in self acquired properties of the father, as per Section 16 of Hindu Marriage Act, 1955 (25 of 1955).

13. In *Neelavathi v. Natarajan*, reported in 1980 (II) MLJ21 the Hon'ble Apex Court has held as follows :

6. .. It is settled law that the question of court-fee must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits. All the material allegations contained in the plaint should be construed and taken as a whole : vide *S.RM. AN. S. SP. Sathappa Chettiar v. S.RM. AR. RM. Ramanathan Chettiar*, 1958 S.C.J407..".

14. It has been categorically held by a three Judge Bench of the Hon'ble Apex Court that the question of court-fee must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either by the plea available in the written statement or by the final decision of the suit on merits. Hence, for deciding the correctness of court fee, the allegations contained in the plaint should be construed and taken as a whole.

15. In *Lakshmi Ammal v. Madhavakrishnan*, reported in AIR 1978 SC1607 another three Judge Bench of the Hon'ble Apex Court has held that Courts should be anxious to grapple with the real issues and not spend their energies on peripheral ones. The decision further reads as follows : ".3... We make it clear that our decision on the question of court-fee does not have any implications on the merits, including the validity or otherwise of the Will...".

16. In *Jayammal v. V.Kumar*, reported in (2009) 1 MLJ104 this Court (G.Rajasuria, J), held that under Section 16 (3) of Hindu Marriage Act (25 of 1925), illegitimate children are entitled to share in their father's property, either self-acquired property or share, which is available to the father, but cannot become co-parceners in the coparcenary between their father and brother and accordingly, cannot claim share in the ancestral property of their father, while he is alive, based on various decisions rendered by the Hon'ble Apex Court.

17. In the instant case, admittedly the petitioner's father died and according to them, as per the plaint pleadings, the suit properties are the self-acquired properties of the said Thiagarajan. Therefore, the aforesaid decisions are not applicable to the facts and circumstances of the case, to decide the correctness of payment of court fee, based on the plaint averments.

18. In *Virudambal v. Kandasamy*, reported in 2000 (II) CTC263 this Court (P.Sathasivam, J) has held thus : ".3... The court below on the basis of certain averments in the plaint, directed the plaintiffs to pay court-fee under Section 37 (1) of the Act. In view of the controversy, learned counsel appearing for the petitioners took me through the plaint averments. It is settled law that the question of court-fee must be considered in the light of the allegations made in the plaint and its decision cannot be influenced either by the pleas in the written statement or by the final decision of the suit on merits...".

19. Similarly, in *Mohamed Ismail v. Khadirsa Rowther*, reported in 1982 (II) MLJ367 a Division Bench of this Court has held as follows : ".9. Law is well-settled that mere possession however long cannot imply ouster. Equally it is well-settled that the mere non-participation in the income alone would not be enough to constitute ouster...". It has been held that mere possession for longer period cannot create a presumption of ouster against other sharers, unless it is pleaded and established by the person claiming ouster.

20. In *Neelavathi v. Natarajan*, reported in AIR 1980 SC691 a Full Bench of the Hon'ble Apex Court has ruled that general principal of law is that in the case of co-owners, the possession of one is the possession of all, co-owners, unless ouster or exclusion is proved against the others. To continue in joint possession, as per

law, it is not necessary that the plaintiff should be in actual possession of the whole or part of the property for filing a suit, seeking partition. Equally it is not necessary that he should be getting a share of the income of the property, so long as his right to share or the nature of the property is not disputed. The law presumes that he is in joint possession, unless a co-owner or co-sharer is excluded from such possession.

21. Here in the instant case, the respondents have not pleaded and established ouster of the rights of the petitioners herein, as held by the Hon'ble Apex Court. The plea of the respondents is that the petitioners are the children of late Thiagarajan, born through his legally wedded wife.

22. In *Manivanna Gounder v. Pachaiappa Gounder*, reported in 2006 (5) CTC639 this Court (K.Mohan Ram, J) held that the evidence of the plaintiff was not enough to inspire confidence and property was considered joint family property, on the ground it was purchased from joint family nucleus, based on the decisions rendered by the Hon'ble Supreme Court in *Thimmaiah v. Ningamma*, 2000 (7) SCC409 and *Nadar Kesavan Nadar, M v. Naryanan Nadar Kunjan Nadar*, 2000 (10) SCC244. 23. In *Ramaiah Thevar v. Shanmugavel Thevar*, reported in 1979 (I) MLJ142 this Court (S.Nainar Sundaram, J), has held that it is well accepted that in these matters the plaint allegations are the deciding factor. It has not been stated anywhere in the plaint that the plaintiff has been excluded from joint possession.

24. In *R.Sathiyamurthi v. R.Munusamy*, reported in 2013 (2) CTC342 this Court (S.Nagamuthu, J), held that there is a clear averments in the plaint that plaintiffs have been in joint possession along with defendant and that they have not been excluded from the possession, then it should be presumed as joint possession.

25. The catena of decisions relied on by both the learned counsel would make it clear that law is well settled that while deciding the issue of payment of Court fee under Section 37 (1) of the Act, the Court has to consider, in the light of the averments made in the plaint and its decision cannot be influenced either by the plea in the written statement or by the final decision of the courts on merits.

26. In the instant case, the petitioners / plaintiffs have stated in the plaint that they are the children of late Thiagarajan and the first respondent is also one of the legal heirs of the said deceased, being his son. The suit properties are the self-acquired properties of the said Thiagarajan and they are in joint possession and enjoyment of the properties along with the respondents / defendants. At this stage, it is clear that there is no plea of ouster of the rights claimed by the petitioners / plaintiffs and further, as held by the Hon'ble Apex Court in various decisions referred to above. The respondents / defendants have claimed that the first respondent is the son of the deceased Thiagarajan and it is not in dispute that the suit property is the self-acquired property of the said Thiagarajan, hence, the Court below cannot go beyond the averments and pleadings made in the plaint. Based on the written statement, the Court cannot decide the issue that the property is not in the joint possession and enjoyment of the petitioners, as they are co-sharers, as per the plaint averments. Similarly, the legal aspect relating to the legitimacy of the respondents could be gone into only at the time of trial, if it is relevant, based on the evidence and not at this stage.

27. On the death of Thiagarajan, as per the pleadings of the plaint, the petitioners and the first respondent herein were his legal heirs. The second respondent is the son of the first respondent and the suit schedule properties were the self-acquired properties of late Thiagarajan and the petitioners / plaintiffs, claim share as his legal heirs. There is no plea of ouster, based on the admission made by the petitioners / plaintiffs. The petitioners / plaintiffs have not stated as to how the wife of the deceased is not entitled to claim share as one of the legal heirs. However, that has to be decided by the trial court.

28. On the aforesaid circumstances, the Court below cannot decide that the petitioners / plaintiffs are not in joint possession of the property along with the defendants, as they are co-sharers of the property. The plaint allegations are the deciding factor and the petitioner / plaintiffs have not stated anywhere in the plaint that they have been ousted or excluded from the possession.

29. As held by the three Judge Bench of the Hon'ble Apex Court reported in AIR 1978 SC1607(cited supra), Courts should be anxious to deal with the real issues

and not to spend their energies on peripheral ones. The real issues involved in the suit is whether the petitioners / plaintiffs are entitled to seek shares of the legal heirs of the deceased Thiagrajan along with the defendants, wherein the respondents have raised a peripheral issue, based on their written statement that the plaintiffs are not in joint possession and enjoyment, on the ground that they are not legitimate children of the deceased Thiagarajan. The aforesaid plea of the respondents / defendants 1 and 2 could not be considered as a real issue to be decided in seeking an order to direct the petitioners / plaintiffs, to pay court fee, as per market value of the property, under Section 37 (1) of the Act, in the light of the decisions rendered by the Hon'ble Apex Court and this Court.

30. In the light of catena of decisions rendered by the Hon'ble Apex Court, referred to above, on the facts and circumstances, I am of the view that the order passed by the Court S.TAMILVANAN, J tsvn below is not in accordance with the settled proposition of law, hence, the same warrants interference by this Court under Article 227 of the Constitution of India.

31. In the result, this Civil Revision Petition is allowed the the impugned order, dated 04.03.2013 made in I.A.No.156 of 2011 in O.S.No.649 of 2010 on the file of the III Additional District Court, Coimbatore is set aside and the Court below is directed to proceed with the suit, according to law, uninfluenced by the findings of this Court, if any, in this order. Consequently, connected miscellaneous petition is closed. No costs. 27-11-2013 Index : Yes Internet : Yes tsvn To The III Additional District Court Coimbatore. Order in C.R.P.(PD).No.2037 of 2013

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