

Padmavathi Vs. Kaveriammal

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Court : Chennai

Decided On : Sep-09-2008

Reported in : 2009(1)CTC58

Judge : S. Palanivelu, J.

Acts : Code of Civil Procedure (CPC) - Sections 47 - Order 20, Rule 18 and 18(2)

Appeal No. : C.R.P. (NPD) No. 2506 of 2007 and M.P. No. 1 of 2007

Appellant : Padmavathi

Respondent : Kaveriammal

Advocate for Def. : T.R. Rajaraman, Adv.

Advocate for Pet/Ap. : P.T. Asha, Adv. for Sarvabhauman Associates

Disposition : Petition dismissed

Judgement :

S. Palanivelu, J.

1. The following are the allegations succinctly, as per the petition under Section 47 of C.P.C.:

1. (i) One Ammaniammal filed O.S. No. 1093 of 1990 against two sons by name Ponnusamy and Varadharajan and daughter Kavariammal, the respondent herein. The Trial Court viz., Sub Court, Coimbatore, passed a preliminary decree on 07.02.1995 for partition of the suit property into eight equal divisions and to allot 5 shares to the plaintiff Ammaniammal. The shares of Ammaniammal alone were declared. The respondent who was defendant in the suit, remained ex-parte and there was no allotment of share in her favour. Ammaniammal died on 28.1.1999. The respondent filed an application under Order 20, Rule 18(2) of C.P.C. for passing a final decree wherein the prayer is as per affidavit to allot 5/8 shares to her as per preliminary decree along with 1/4 of her alleged share in the suit property totalling 7/8th share in the suit property in her favour. The said prayer is in contravention to the declaration of shares in the preliminary decree. Since no share was declared for the respondent in the preliminary decree, the final decree should not have been passed in I.A. No. 23 of 1999.

1. (ii) The respondent claims share of her mother under a will dated 28.11.1995 allegedly executed in her favour by Ammaniammal. The law is very clear on this point that while the preliminary decree is not deciding the share of the party, she could not make any application for final decree. Final decree cannot amend or go behind preliminary decree on a matter determined by the Court in the preliminary decree proceedings. The fraud committed by the respondent vitiates every solemn act. Any order or decree obtained by practicing fraud is a nullity. It is also the law of land that any application under Section 47 of C.P.C. the question of nullity of order can be taken up. Since the final decree is nullity it is inexecutable under law.

1. (iii) The petitioner became major one year prior to passing of the final decree and was shown as respondent in the final decree proceedings to make the same to be ineffective. The respondent has totally suppressed non-declaration of share in the preliminary decree, being aware of the fact that she could not file any application for passing of final decree under Order 20 Rule 18 of C.P.C. She has misled the Court and by misrepresentation, by false representation and by suppression of material facts abused process of Court and obtained final decree. Consequently execution proceedings in E.P. No. 402 of 2005 is also unsustainable under law. The final decree passed in I.A. No. 23 of 1999 has to be declared as

null and void and the same cannot be executed legally.

2. The allegations in the counter may tersely be stated as follows:

2. (i) It is misleading to contend that only Ammaniammal's share was declared in the preliminary decree. In a partition suit, each of the parties is in the status of plaintiff. The will dated 28.11.1995 executed by Ammaniammal was proved in the final decree proceedings, in which the petitioner's mother and brother were contesting parties and also the legal heirs of varadarajan, second defendant in the suit. The petitioner was, at that time, a minor and represented by Court guardian Ms. R.T. Rani. It cannot be stated that in the final decree proceedings, the Court has travelled beyond the preliminary decree. There was no deprivation of share of any of the parties by such allotment. It is false to contend that the properties could not be partitioned without the preliminary decree being modified. The Court has not travelled beyond the preliminary decree. There is no abuse of process of court. This respondent is not guilty of fraud. Petition under Section 47 is not maintainable and the final decree is executable one.

2. (ii) During the pendency of final decree proceedings, the petitioner's father died and the petitioner and other legal heirs were made as parties. In E.P. No. 402 of 2005, after receiving summons, none of the parties to the proceedings appeared, they remained *ex parte* and delivery was ordered. The respondent filed an application and obtained police protection and permission to break open the building and for delivery of possession. The petitioner can only claim under her father. Her share has not been denied. Her position in the suit property has not been altered in any way. The petitioner filed suit in O.S. No. 345 of 2006 against this respondent, her brother, petitioner's mother and brother seeking to declare that the preliminary decree and the final decree as null and void. This respondent filed written statement. Adopting two different modes of assailing final decree is abuse of process of law. Petition is totally misconceived, which lacks *bona fides* and hence the petition may be dismissed.

3. The suit property is a group of houses bearing Door Nos. 82 to 87 situate in Singanallur, Coimbatore. It was purchased by Ammaniammal and her husband Karuppa Gounder. He died intestate in 1985 leaving behind Ammaniammal his

wife, his sons Ponnusamy and Varadharajan and his daughter Kaveri Ammal. Ammaniammal filed O.S. No. 1093 of 1990 on the file of Sub-Judge, Coimbatore for partition of 5/8th share in the suit property which was contested by the defendants. Originally Preliminary decree was passed on 7.02.1995, declaring 5/8th share in favour of to Ammani Ammal. Pursuant to the preliminary decree she filed an application for final decree in I.A. No. 1186 of 1995. Pending disposal of the said application, she executed will dated 29.11.1995 bequeathing her share in the suit property as per the preliminary decree in favour of this respondent. Ammaniammal died on 28.11.1997 and hence I.A. No. 1186 of 1995 became infructuous.

4. Even though this respondent remained ex-parte in the preliminary decree proceedings, she filed an application in I.A. No. 23 of 1999 on the file of the same court for passing a final decree, on the strength of the will executed by Ammaniammal. On scrutiny of the copy of the final order passed in I.A. No. 23 of 1999 it is seen that the will was produced and was proved in accordance with law. On the basis of proof of the will, the learned Sub-Judge passed final decree directing to allot 6/8th shares in the suit property to the respondent. During the pendency of the final decree petition, Varadarajan died and his legal heirs were brought on the array of the respondent in the final decree proceedings as 7 to 9 respondents, among whom 9th respondent is the present petitioner, who was minor at that time. The trial court appointed Court guardian Ms. R.T. Rani, Advocate to represent her. However, order passed in the final decree would show that 2, 7 to 9 respondents were defended by advocates M/s.N. Mohana Sundaram and R. Sundarraj. The allegation against the present petitioner is that one year prior to passing final decree, the petitioner became major. There is no allegation in the petition that the court guardian has not effectively contested the petition on behalf of the minor in the final decree proceedings.

5. Another ground raised by the petitioner is that inasmuch as the preliminary decree has not declared the share of the respondent, who remained ex-parte in the preliminary decree proceedings, now it is not permissible in law that the preliminary decree could not be amended or altered as to the share available to the respondent. In this connection Ms. P.T. Asha, learned Counsel for the

petitioner would garner support from the decision of the Apex Court reported in : AIR 1977 SC292 [Muthangi Ayyana v. Muthangi Jaggarao and Ors.] in which it has been held that final decree in a partition suit cannot amend or go behind the preliminary decree on a matter determined by the preliminary decree. She has also draws attention of this Court to a decision of this Court in AIR 1981 Mad 307 [S.V. Muthu v. Veerammal] in which it is observed as under:

.If the defendants' rights have not been declared in the preliminary decree, the aggrieved party can challenge the decree in appeal or can apply for review. But once the preliminary decree contains a declaration as to the defendants' share, they can, even after passing of the preliminary decree, apply for and have their share partitioned on payment of Court fee etc., as may be necessary under the law. Indeed, the Privy Council has pointed out in Lachmi Narain Marwary v. Balmukund Marwary AIR 1924 PC 198 that after decree it is open to any party to a suit to whose interest it is that further proceedings be taken to initiate the supplementary proceedings, but in the ordinary case it is the plaintiff who moves. If the preliminary decree already passed does not contain any declaration as to the rights of the defendants, their application for partition or separation of their share shall not be maintainable till they have the preliminary decree suitably modified, but when once the preliminary decree contains a declaration as to the defendant's share, they can, even after the passing of the preliminary decree, take steps for the actual separation of their share.

6. Learned Counsel also placed reliance upon another decision of this Court reported in : (2008)1MLJ454 [Haji M.A. Ahmed Sadakathullah Maraicair v. A. Mohideen Abdul Khader and Ors.] wherein it is held that unless a preliminary decree is passed declaring specific share claimed by the applicant, the share already in preliminary decree cannot be amended and passing of a fresh preliminary decree is required. It is well recognised proposition that unless the shares of a particular party in the partition suit are ascertained and declared in the preliminary decree, without due process in the preliminary decree, subsequently, the same could not be modified, altered or amended.

7. Section 47 of C.P.C. postulates that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree and not by a separate suit. It is an opportunity to executability of the decree. If the petitioner having allowed the orders to become final, it would not be open to him to raise contention thereafter. It is well settled that the executing Court cannot go behind the decree or step out from its powers, unless it is shown that it is passed by a court having inherent lack of jurisdiction which will make it a nullity. Want of jurisdiction must be apparent.

8. In : AIR 2003 SC3789 [Rafique Bibi v. Sayed Waliuddin] Their Lordships have held that a decree passed by a Court of competent jurisdiction cannot be denuded of its efficacy by any collateral attack or in incidental proceedings and lack of jurisdiction in the Court passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction, else the normal rule that an executing court cannot go behind the decree must prevail. It is further held as follows:

6. What is 'void' has to be clearly understood. A decree can be said to be without jurisdiction, and hence a nullity, if the court passing the decree has usurped a jurisdiction which it did not have; a mere wrong exercise of jurisdiction does not result in a nullity. The lack of jurisdiction in the court passing the decree must be patent on its face in order to enable the executing court to take cognizance of such a nullity based on want of jurisdiction, else the normal rule that an executing court cannot go behind the decree must prevail.

7. xxx xxx xxx xxx8. A distinction exists between a decree passed by a court having no jurisdiction and consequently being a nullity and not executable and a decree of the court which is merely illegal or not passed in accordance with the procedure laid down by law. A decree suffering from illegality or irregularity of procedure, cannot be termed inexecutable by the executing court; the remedy of a person aggrieved by such a decree is to have it set aside in a duly constituted legal proceedings or by a superior court failing which he must obey the command of the decree. A decree passed by a court of competent jurisdiction cannot be

denuded of its efficacy by any collateral attack or in incidental proceedings.

9. As for the facts of the present case, there is no allegation in the petition to the effect that the final decree was passed by the Court which has no jurisdiction. Further there is nothing in the pleading that the court which passed the decree has usurped jurisdiction which it did not have. Even if a decree is considered to be an illegal one, still it cannot be stated that it is unworkable and the remedy open to the party aggrieved is to prefer appeal or revision before the higher forum, in case if the same was passed by the Court of competent jurisdiction. A decree could not be allowed to starve for its execution.

10. It is no doubt true that the preliminary decree did not declare the share available to this respondent. The preliminary decree has declared that Ammaniammal was entitled for 5/8th share in the suit property. Registered will executed by Ammaniammal dated 29.11.1995 was proved before the Court and on the strength of the same final decree was passed. There is no legal impediment for the petitioner to challenge the final decree before the appellate forum if she is aggrieved the order of the court. It transpires that she filed a suit in O.S. No. 345 of 2006 on the file of the Sub-Judge, Coimbatore, against the respondent, her brother and petitioner's mother and her brother praying to declare that the preliminary decree as null and void.

11. As per the allegations in the petition, this respondent has misrepresented and misled the Court by practicing fraud upon the procedure and she has indulged in abuse of process of law. While the circumstances of the case are carefully scrutinized, it comes to light that every step initiated by the present respondent was brought to the knowledge of the respondents in the final decree petition including this petitioner. There is no suppression of material facts. The petitioner was duly represented in the final decree proceedings before the Court and she was not at all prejudiced on any account. In such a view of the matter, the petition under Section 47 of C.P.C. is not maintainable. In case, if the petitioner is aggrieved with the final decree passed by the Trial Court ignoring the provisions of law, she might have taken the matter before the appellate forum and agitate her claim in the presence of the parties to the final decree petition. It is also to be

noted here that excepting the respondent, other parties who contested before the trial court have not been impleaded. Still the right of the petitioner is not lost, since she has already filed suit for declaring the preliminary decree and final decree as null and void. The grounds raised in this petition are not legally sustainable. The petition is devoid of merits, which suffers dismissal.

In fine the petition is dismissed. Consequently, connected M.P. is also dismissed. No costs.

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