

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.02.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD)Nos.1843, 2346 and 3531 of 2013
M.P.Nos.1, 1 and 2 of 2013

Judgment reserved on 12.02.2018	Judgment pronounced on 27.02.2018
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Rajesh Lakshmi Chand

.. Petitioner in
all C.R.Ps.

Vs.

1.E.Maheswari
2.V.S.Velusamy Gounder

.. Respondents in
C.R.P.No.1843/2013

V.S.Velusamy Gounder

.. Respondent in
C.R.P.No.2346/2013

1.E.Maheswari
2.V.S.Velusamy Gounder
3.M.Shanthi Rani
4.M.Sivakami

.. Respondents in
C.R.P.No.3531/2013

PRAYER in C.R.P.No.1843/2013: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 06.04.2013 made in E.A.No.369 of 2009 in E.P.No.230 of 2008 in O.S.No.484 of 1984 on the file of the II Assistant Subordinate Court, Coimbatore.

PRAYER in C.R.P.No.2346/2013: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 06.04.2013 made in E.P.No.230 of 2008 in O.S.No.484 of 1984 on the file of the II Assistant Subordinate Court, Coimbatore.

PRAYER in C.R.P.No.3531/2013: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 26.11.2012 made in I.A.No.314 of 2011 in O.S.No.253 of 2007 on the file of the Additional District Court, Fast Tract Court-III, Coimbatore.

For Petitioner
(in all C.R.Ps.)

: Mr.T.V.Ramanujam
Senior Counsel

(In C.R.P.No.1843/2013)

For R1

: Mr.V.R.Shanmuganathan
for Mr.R.Bharath Kumar

For R2

: Mr.S.Kumaradevan

(In C.R.P.No.2346/2013)

For Respondent

: Mr.S.Kumaradevan

(In C.R.P.No.3531/2013)

For R1

: Mr.V.R.Shanmuganathan
for Mr.R.Bharath Kumar

For R2

: Mr.S.Kumaradevan

For R3 & R4

: Not ready in notice

COMMON ORDER

C.R.P.No.1843/2013 is filed against the fair and decretal order dated 06.04.2013 made in E.A.No.369 of 2009 in E.P.No.230 of 2008 in O.S.No.484 of 1984 on the file of the II Assistant Subordinate Court, Coimbatore.

C.R.P.No.2346/2013 is filed against the fair and decretal order dated 06.04.2013 made in E.P.No.230 of 2008 in O.S.No.484 of 1984 on the file of the II Assistant Subordinate Court, Coimbatore.

C.R.P.No.3531/2013 is filed against the fair and decretal order dated 26.11.2012 made in I.A.No.314 of 2011 in O.S.No.253 of 2007 on the file of the Additional District Court, Fast Tract Court-III, Coimbatore.

2. The issues involved in all the Civil Revision Petitions are interlinked and therefore, they are disposed of by this common order.

3. In C.R.P.No.1843 of 2013, the judgment debtor is the second respondent and his daughter/applicant in E.A.No.369 of

2009 is the first respondent. In C.R.P.No.2346 of 2013, the judgment debtor is the sole respondent. In C.R.P.No.3531 of 2013, the judgment debtor is the second respondent and his daughters are the respondents 1, 3 and 4. The parties are arrayed as per their rank in C.R.P.No.3531 of 2013.

4. The petitioner filed O.S.No.484 of 1984 on the file of the III Additional Subordinate Court, Coimbatore against the second respondent for specific performance of agreement of sale dated 30.08.1982. The said suit was decreed on 13.04.1989. The First Appeal, A.S.No.91 of 1989 and Second Appeal, S.A.No.1486 of 1991 filed by the second respondent were dismissed on 28.04.1990 and 13.09.2006 respectively. The petitioner filed E.P.No.230 of 2008 in O.S.No.484 of 1984 to direct the second respondent to execute the sale deed in his favour for schedule mentioned property, failing which the Court may execute the sale deed. The property involved in the suit is 86 cents in S.F.No.208 in Kurudampalayam village.

5. The first respondent filed E.A.No.369 of 2009 under Section 47 read with Section 151 of C.P.C to adjudicate her claim and for orders. According to the first respondent, she is the daughter of second respondent and as per State Amendment to Hindu

Succession Act, 1990, she became a co-parcener along with two other daughters of second respondent, who are the respondents 3 and 4 in C.R.P.No.3531 of 2013. According to the first respondent, she and respondents 3 and 4 were not married as on the date of amendment came into force, i.e., on 25.03.1989 and they have acquired 1/4th share in all the properties standing in the name of second respondent. According to the first respondent, all the properties in the name of the second respondent are ancestral properties. The first respondent filed O.S.No.253 of 2007 against the respondents 2 to 4, who are her father and sisters for partition and the same was pending when she filed E.A.No.369 of 2009. According to the first respondent, the petitioner can execute the decree only in respect of ¼ share in 86 cents in S.F.No.208 in Kurudampalayam Village.

6. The petitioner filed counter affidavit and contended that E.A.No.369 of 2009 filed by the first respondent is not maintainable. The second respondent/judgment debtor has instigated the first respondent, who is his daughter, to file O.S.No.253 of 2007 for partition after this Court by the judgment and decree dated 13.09.2006 dismissed S.A.No.1486 of 1991 filed by the second respondent and granting decree of specific performance in favour of

the petitioner in respect of entire 86 cents in S.F.No.208 in Kurudampalayam Village. The suit filed by the first respondent is collusive suit and prayed for dismissal of E.A.No.369 of 2009.

7. Before the learned Judge, the first respondent examined herself as P.W.1 and marked 13 documents as Exs.P1 to P13. No oral and documentary evidence was let in on behalf of the petitioner and respondents 2 to 4.

8. At the time when E.A.No.369 of 2009 was taken up for final hearing, a preliminary decree as well as final decree had been passed exparte in O.S.No.253 of 2007 by Additional District & Sessions Judge, Fast Tract Court No.III, Coimbatore. In final decree, all the respondents were granted $\frac{1}{4}$ share in all the properties, including the suit property. In view of the said final decree, the learned Judge, by the order dated 06.04.2013, allowed E.A.No.369 of 2009 and dismissed E.P.No.230 of 2008.

9. Against the order dated 06.04.2013 made in E.A.No.369 of 2009, the petitioner has come out with C.R.P.No.1843 of 2013. Against the order of dismissal dated 06.04.2013 made in E.P.No.230 of 2008, the petitioner has come out with C.R.P.No.2346 of 2013.

The petitioner also filed C.R.P.No.3531 of 2013, challenging the final decree dated 26.11.2012 made in I.A.No.314 of 2011 in O.S.No.253 of 2007.

10. The learned Senior Counsel for the petitioner contended that O.S.No.253 of 2007 filed by the first respondent is a collusive suit filed at the instigation of the second respondent after this Court on 13.09.2006, dismissed S.A.No.1486 of 1991 filed by the second respondent. The said suit is filed only to defeat and prevent the petitioner from enjoying the fruits of the decree of specific performance of agreement of sale in O.S.No.484 of 1984, as confirmed by this Court in S.A.No.1486 of 1991. The second respondent filed written statement in O.S.No.253 of 2007 on 11.10.2007. But did not contest the suit and exparte preliminary decree was passed. Again in final decree application, the respondents 2 to 4 remained exparte and all the respondents colluded together and got an exparte final decree, wherein the first respondent was allotted the suit schedule property in O.S.No.484 of 1984 along with other properties. Both the preliminary decree and final decree are nullity as the same are not in conformity with the definition of 'decree' in C.P.C. The Execution Court failed to consider the judgment and decree passed by this Court and carried away by

the final decree passed by the Additional District & Sessions Judge, Fast Tract Court No.III, Coimbatore.

10(a) The learned Senior Counsel further contended that the finding of the Executing Court that Additional District & Sessions Judge, Fast Track Court No.3, Coimbatore has given a specific finding in O.s.No.253 of 2007 that **"suit property and other properties are ancestral properties of respondents 1, 2, 3 & 4 and the first respondent is entitled to 1/4th share in the said property including the suit property"** is contrary to the preliminary decree of the Additional District & Sessions Judge, Fast Track Court No.3, Coimbatore in O.S.No.253 of 2007. The learned Additional District & Sessions Judge, Fast Track Court No.3, Coimbatore has not passed any reasoned judgment, has not marked any documents and has not referred to any of the documents. The learned Additional District & Sessions Judge, Fast Track Court No.3, Coimbatore has not given finding that the suit property is ancestral property. On the other hand, the learned Additional District & Sessions Judge, Fast Track Court No.3, Coimbatore has only said **"claim proved, preliminary decree is passed as prayed for with costs"**.

10(b) The total extent of the property in O.S.No.253 of 2007 filed by the first respondent for partition is more than 3.5 Acres and the first respondent is claiming 1/4th share. Even based on the claim of the first respondent in O.S.No.253 of 2007, the respondents are entitled to 87.5 cents each. In a final decree, the property involved in specific performance suit could have been easily allotted to the share of second respondent (Judgment Debtor in O.S.No.484 of 1984) and the respondents 1,3 & 4 could have been allotted share in other properties. On the other hand, the first respondent was allotted the property which is the subject matter of O.S.No.484 of 1984 filed by the petitioner for specific performance of agreement of sale. This clearly shows that the said suit is collusive suit and filed only to prevent the petitioner from enjoying the fruits of the decree. The learned Additional District & Sessions Judge, Fast Track Court No.3, Coimbatore has passed the final decree as prayed for. This is an erroneous decree and final decree has to be passed in consonance with preliminary decree and as per report of the Advocate Commissioner and Surveyor. The first respondent has filed suit for partition only at the instigation of second respondent and all the respondents colluded together, obtained exparte preliminary and final decree only to nullify the

decree of specific performance obtained by the petitioner in O.S.No.484 of 1984.

10(c) It is an admitted case that second respondent has purchased a portion of the property forming part of larger extent of 3.5 Acres from his brother and another portion from another brother. The first respondent has not produced any document in the suit filed by her to prove that properties are ancestral properties and that properties are purchased from and out of joint family nucleus. The first respondent has filed application under Section 47 CPC after exparte preliminary decree was passed but before final decree was passed. When application under Section 47 was filed, 86 cents which is the subject matter of specific performance suit O.S.No.484 of 1984 was not allotted to her. This shows collusive nature of the suit and fraud played by the respondents on the court. The Executing Court has not framed any point for consideration and failed to give any finding in the application filed under Section 47 CPC. Final decree was passed as per the plan given by the surveyor. There is nothing on record to show that there is any order directing the Advocate Commissioner to take the assistance of surveyor or whether the Advocate Commissioner took the assistance of surveyor or the respondents 1 & 2 have engaged the

surveyor and got the plan prepared by the surveyor. The petitioner is not a party to the final decree application. Had he been made as a party in the final decree proceedings, he would have objected the allotment of 86 cents in question to the share of the first respondent.

10(d) The learned Senior Counsel contended that the judgment of this court made in S.A.No.4186 of 1991 was confirmed by the Hon'ble Apex Court. In spite of the same, the first respondent has filed the suit for partition and fraudulently got the said property allotted to her. The learned Judge failed to see that the petitioner is not a party to O.S.No.253 of 2007 and therefore, the said decree is not binding on him.

11. The learned Senior counsel for the petitioner in support of his contentions relied on the following judgments -

(i) 2010 (8) SCC 383 (Meghmala and others Vs. G.Narasimha Reddy and others):

“28.It is settled proposition of law that where an applicant gets an order/office by making misrepresentation or playing fraud upon the competent authority, such order cannot be sustained in the eye of the law. “Fraud avoids all judicial acts,

ecclesiastical or temporal.” (vide S.P.Chengalvaraya Naidu Vs. Jagannath reported in (1994) 1 SCC 1) In Lazarus Estates Ltd. Vs. Beasley reported in (1956) 1 QB 702, the Court observed without equivocation that: (QB p.712) “No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything.

36.From the above, it is evident that even in judicial proceedings, once a Fraud is proved, all advantages gained by playing Fraud can be taken away. In such an eventuality the questions of non-executing of the statutory remedies or statutory bars like doctrine of *res judicata* are not attracted. Every court has an inherent power to recall its own order obtained by fraud as the order so obtained is nonest.”

(ii) 2012 (1) SCC 476 (Union of India and others Vs. Ramesh Gandhi):

“25.This Court on more than on occasion held that fraud vitiates everything including judicial acts. In *S.P.Chengalvaraya Naidu v.Jagannath* reported in (1994) 1 SCC 1, this Court observed as follows: (SCC p. 2, para 1)

"1. 'Fraud avoids all judicial acts, ecclesiastical or temporal' observed Chief Justice Edward Coke of England about three centuries ago. It is the settled proposition of law that a Judgment or decree obtained by playing fraud on the court is a nullity and non est in the eye of the law. Such a judgment/decree--by the first court or by the highest court--has to be treated as a nullity by every court, whether superior or inferior. It can be challenged in any court even in collateral proceedings."

26. Again in *A.V.Papayya Sastry v. Govt. of A.P.* reported in (2007) 4 SCC 221 : AIR 2007 SC 1546 this Court reviewed the law on this position and reiterated the principle. In paras 38 and 39 it was held as follows: (SCC pp. 236-37)

39. The above principle, however, is subject to exception of fraud. Once it is established that the order was obtained by a successful party by practising or playing fraud, it is vitiated. Such order cannot be held legal, valid or in consonance with law. It is non-existent and non est and cannot be allowed to stand. This is the fundamental principle of law and needs no further elaboration. Therefore, it has been said that a judgment, decree or order obtained by Fraud has to be treated as a nullity, whether by the court of first instance or by the final court. And it has to be treated as non est by every court, superior or inferior.”

(iii) 1994 (1) SCC 1 (S.P.Changalvaraya Naidu (dead) by legal heirs Vs. Jagannath (dead) by legal heirs and others):

“6.The facts of the present case leave no manner of doubt that Jagannath obtained the preliminary decree by playing fraud on the court. A Fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Jagannath was working as a clerk with Chunilal Sowcar. He purchased the property in the court auction on behalf of Chunilal Sowcar. He had, on his own volition, executed the registered release deed (Ex.B15) in favour of Chunilal Sowcar regarding the property in dispute. He knew that the appellants had paid the total decretal amount to his master Chunilal Sowcar. Without disclosing all these facts, he filed the suit for the partition of the property on the ground that he had purchased the property on

his own behalf and not on behalf of Chunilal Sowcar. Non-production and even non-mentioning of the release deed at the trial is tantamount to playing fraud on the court. We do not agree with the observations on the High Court that the appellants-defendants could have easily produced the certified registered copy of Ex.B15 and non-suited the plaintiff. A litigant, who approaches the Court, is bound to produce all the documents executed by him which are relevant to the litigation. If he withholds a vital document in order to gain advantage on the other side then he would be guilty of playing fraud on the court as well as on the opposite party.”

(iv) 2003 (8) SCC 319 (Ram Chandra Singh Vs. Savitri Devi and others) :

“A. Civil Procedure Code, 1908 – Ss.151, 47 and Or.26 Rr.13 & 14(2), Or.20 R.1892) and Ord.6 R.4 – partition suit – Application filed by an affected third party challenging the preliminary decree on the ground of having been obtained by practising fraud – Maintainability – Inherent power of court to grant relief – Creditor filing suit to recover the amount due and also for a preliminary decree in respect of mortgaged property – Mortgagor's sisters in the same suit claiming shares in the suit property on the basis of a preliminary decree passed in a partition suit – Court passing a preliminary decree of sale of the remaining part of the property i.e. The mortgagor's share only and later a final decree for sale of the mortgaged property – On creditor's execution application, part of mortgaged property put to auction-sale and ultimately executing court confirming the auction-sale in favour of appellant auction -purchaser who in turn depositing the bid amount – Moreover, executing court dismissing objections filed under S.47 C.P.C by morgagor's brother and thereafter under court's order the appellant auction-purchaser taking possession of the auctioned land-However, at the instance of the mortgagor and his sisters, the revisional court setting aside the auction sale – At this stage the appellant

auCTION-purchaser filing an application under Or.26 Rr.13 and 14(2) in the then pending partition suit for setting aside the preliminary decree on the ground that it was collusive and fraudulent – In that application, he stating the particulars of the alleged Fraud – such an application, held, maintainable – further held, the court has inherent jurisdiction to grant relief on such an application and principles of res judicata would not apply if the decree is found to have been obtained by fraud – Concept of fraud and its effect explained – words and phrases -- “Fraud”, “deceit”, “deception” -- Contract Act, 1872, S.17 – Penal Code, 1860, S.25 – Civil Procedure Code, 1908, S.11”

(v) 2001 (1) CTC 649 (Rajamani and another Vs. Somasundaram and 3 others)

“13.Merely going by the ipsi dixit oral version of D.W.1 and without any other supporting material, it is quite unsafe to hold that the suit schedule property was joint family property. When on the face of it, it was shown that Ex.B1 was brought into existence at the instance of the appellants herein with a view to stultify the claim of the first respondent, the Courts below rightly declined to rely upon the same to reach the conclusion about the nature of the property as a joint family property as claimed by the appellants. The very fact that the said suit came to be filed at the time when Ex A1 came into being and Ex.A6 came to be issued at the instance of the first respondent was sufficient to demonstrate that the whole purpose and intent of the appellants was to set at naught any legal proceedings that may be launched by the first respondent herein for the enforcement of his right under Ex.A1. It became more evident when the first defendant remained ex parte and thereby allowed the Court to pass a preliminary decree and also the subsequent conduct of the appellants as well as the first defendant in remaining silent without taking any further course of action by taking final decree

proceedings in O.S.No.306 of 1986 strengthened the position that the whole proceedings were initiated for the purpose of creating a make a belief affair to veto any relief that may be claimed in the proposed action of the first respondent herein pursuant to the Issuance of Ex.A6. The admission of D.W.1 to the effect that on the date when he gave evidence in Court he continued to live in a joint family would show that there was absolutely no cause of action for the appellants herein to move the suit in O.S.No.306 of 86 except for the purpose of creating a pseudo legal impediment for the first respondent to pursue his remedy by way of the present suit. It is also significant to note that neither the appellants nor the first defendant were prepared to come out openly even after obtaining the decree under Ex-B1 to disclose about the details of it in their written statement, apparently with a view to keep the first respondent in dark and thereby prevent him from taking any steps to demonstrate before the Court about he futile exercise of the appellants in their attempt to thwart the claim that the suit schedule property was a joint family property, nothing prevented them from joining the first respondent in the said suit and staked their claims by asking for a joint trial of both the suits.

(vi) 1998 (1) CTC 66 (Ranipet Municipality Rep. By its Corner and Special Officer, Ranipet Vs. M.Shamsheerkhan)

“11.In Sreedharan Vs. Seethala, 1988 (2) KLT 732 the Kerala High Court has an occasion to consider what is meant by abuse of the process of the Court and it was held as follows:

“The power of the court to make such order as are necessary to prevent abuse of the process of court is inherent in every court. The term “abuse of the process of the court” has not been defined. What then this terms means? Its meaning therefore has to be gathered from other sources. “A malicious abuse of legal process occurs where the party employees it for some

unlawful object, not the purpose which it is intended by the law to effect in other words a perversion of it. Yet another shade of meaning is this: "Abuse of process is the malicious and improper use of some regular legal proceeding to obtain some advantage over an opponent." This is a term generally used to proceeding which is wanting in bonafide and is frivolous, vexatious or oppressive. An abuse of the process of court can be committed by the court or by a party. It is therefore clear that where a court employed a procedure in doing something which it never intended to do, but resulted in miscarriage of justice, there is what is called an abuse of the process of the court. If a subordinate Court commits an abuse of the process of the court, a superior court has the power, nay the duty to prevent the said abuse becoming perpetual by interfering with the proceeding. What then is an abuse of the process of the court committed by a party to the proceedings? Instituting vexatious, obstructive or dilatory action in court of law is one instance; where a party should be held to be guilty of an abuse of the multiplicity of proceedings for one's own aggrandisement is yet another instance where a party could be said to have committed an abuse of the process of the court."

(vii) 2017 (5) SCC 3711 (Brakewel Automotive Components (India) Private Limited Vs.

P.R.Selvam Alagappan) :

"Civil Procedure Code, 1908 – S.47 and Or.21 – Execution of decree – powers of executing court under S.47 C.P.C – Nature and scope of – Unexecutability of a decree – when obtains – Principles summarised – Powers available under S.47 C.P.C, reiterated, are quite different and much narrower than those available in appeal/revision or review – Executing Court can neither travel behind decree nor sit in appeal over the same or pass any order jeopardising rights of parties thereunder.

-- Decree is unexecutable only on limited grounds where it suffers from jurisdictional error/infirmity or is void and a nullity, apart from the ground that decree is incapable of execution under the law, either because the same was passed in ignorance of such provision of law or law was promulgated making a decree unexecutable after its passing – An erroneous decree cannot be equalled with one which is a nullity.”

(viii) 2011 (3) CTC 168 (Meenakshisundaram Textiles Vs. Valliammal Textiles Ltd.)

“21. From the above discussions it is manifestly clear that even a judgment rendered ex parte and a decree is drawn on the basis of that judgment, it is appealable. In case that judgment and decree become final without there being any Appeal, the decree is executable. In that sense, there is no difference between a judgment and decree. In view of the above, in the event the Defendant is set ex parte, the Court should be extra careful in such case and it should consider the pleadings and evidence and arrive at a finding as to whether the plaintiff has made out a case for a decree. In this context, it may also be mentioned that though a detailed judgment is required contested matter, an ex parte judgment should show the application of the minimum requirement of consideration of the pleadings, issues, evidence and the relief sought for rendering such judgment.

22. If the above law is kept in mind, in our opinion, the judgment and decree dated 8.7.2009 passed by the Court below in O.S.No.16 of 2005 are not in conformity with the provisions of the Code of Civil Procedure and are liable to be set aside. For the same reason, the order and decretal order dated 26.08.2010 in I.A.No.1776 of 2009 in O.S.No.16 of 2005 passed by the Court below are also liable to be set aside. Accordingly, the order and decretal order challenged in this Appeal are set aside and the Suit in O.S.No.16 of 2005 is restored to file.

12. The learned counsel for the first respondent contended that all the properties are ancestral properties and as per amendment of the Hindu Succession Act which came into effect from 25.03.1989, the respondents 1, 3 & 4 became co-parceners alongwith second respondent. The second respondent is not absolute owner of 86 cents which is the subject matter of the suit for specific performance. Before the said suit was decreed, the respondents 1, 3 & 4 became co-parceners and became entitled to 1/4th share in 86 cents with effect from 25.03.1989. The second respondent is not the absolute owner of 86 cents. The decree passed in O.S.No.484 of 1984 and dismissal of A.S.No.91 of 1989, S.A.No.1486 of 1991 and SLP were after the respondents 1,3 & 4 became co-parceners alongwith second respondent.

12(a) The learned counsel for the first respondent further contended that the first respondent filed suit for partition on 26.04.2007, second respondent filed written statement on 11.10.2007 and preliminary decree was passed on 20.07.2009. The first respondent filed I.A.No.314 of 2011 on 14.03.2011 and Advocate Commissioner filed his report on 03.07.2012 and final decree was passed on 26.11.2012. The final decree was passed

after five years of filing of the suit and therefore it is not a collusive suit. The first respondent filed E.A.No.369 of 2009 under Section 47 CPC in E.P.No.230 of 2008 on 01.07.2009. The petitioner did not take any steps to get himself impleaded in the suit filed by the first respondent for partition even though he was aware of the said suit from 01.07.2009.

12(b) The learned counsel for the first respondent further contended that all the properties in the hands of the second respondent are ancestral properties, a portion of the property was allotted to the second respondent in the partition between his father, second respondent and two brothers. Subsequently, his father and brothers sold the property allotted to them to the second respondent and the second respondent exchanged a portion of the property with Meenakshiammal. The ancestral joint family character of the property never changed. The second respondent, in the written statement filed on 11.10.2007 mentioned about the decree in the suit in O.S.No.484 of 1984 filed for specific performance. The first respondent came to know about the decree of specific performance only in the year 2007 when the second respondent filed written statement. The suit for partition filed by the first respondent is not a collusive suit as per facts stated above.

12(c) It is not correct to state that the first respondent is not entitled to maintain an application under Section 47 CPC. On the other hand, all the questions relating to the executability of the decree can be raised by the first respondent. The second respondent did not have absolute right over the entire 86 cents and he is entitled only to 1/4th share of 86 cents and decree obtained by the petitioner can be executed only to that extent as per Section 12 (3) of Specific Relief Act. The first respondent never asked for allotment of this particular 86 cents. It is the Advocate Commissioner who has allotted 86 cents to the first respondent.

12(d) In support of his contentions, the learned counsel for the first respondent relied on the following judgments -

(i) **2015 (5) SCC 355 (Pemmada Prabhakar and others Vs Youngmen's Vysya Association and others)**

“29. The provisions of Section 17 of the Specific Relief Act in Categorical terms expressly state that a contract to sell or let any immovable property cannot be specifically enforced in favour of a vendor or lessor who does not have an absolute title and right upon the property. It is worthwhile to extract Section 17 of the Specific Relief Act, 1963 here:

"17. Contract to sell or let property by one who has no title, not specifically enforceable.--(1) A contract to sell or let any immovable property cannot

be specifically enforced in favour of a vendor or lessor-

(a) who, knowing not to have any title to the property, has contracted to sell or let the property;

(b) who, though he entered into the contract believing that he had a good title to the property, cannot at the time fixed by the parties or by the court for the completion of the sale or letting, give the purchaser or lessee a title free from reasonable doubt."

In view of the aforesaid provisions of the Specific Relief Act, the agreement of sale entered into between the plaintiffs and some of the Co-Sharers who do not have the absolute title to the suit schedule property is not enforceable in law. This aspect of the matter has not been properly appreciated and considered by both the first appellate court and the second appellate court. Therefore, the impugned judgment is vitiated in law."

(ii) **AIR 2013 SCC 3525 (Rohit Chauhan Vs. Surinder Singh and others):**

"Hindu Succession Act (30 of 1956), S.6, S.8- Devolution of coparcenary property-Suit for partition- Dismissal of -Validity-Plaintiff's father got property in partition -It is his separate property-But plaintiff after his birth however acquires interest in property as coparcener-order dismissing suit for partition treating plaintiff's father property as self acquired property therefore."

(iii) **2009 (4) CTC 440 (K.V.Ramasamy vs K.V.Rahgavan and 3 others)**

"48. The learned Senior Counsel appearing for the appellant/plaintiff in Appeal Suit No.176 of 2001 has also relied upon the decision reported in **Mrs.Bagirathi & 5 others vs S.Manivann & another**, 2006 (4) LW 798, wherein the Division

Bench of this Court has held that where ancestral property has been divided between several joint owners, there can be no doubt that if any of them have male issue at the time of partition, the share which falls to him will continue to be ancestral property in his hands as regards his male issue, for, their rights had already attached upon it and the partition only cuts off the claims of the dividing members.

49. It is an axiomatic principle of law that if ancestral properties have been divided between coparcener, the share of a coparcener is also ancestral property in his hands along with his male issues and at the same time, if a son has succeeded the separate estate of his father, the same would not be characterized as joint family property along with his son."

13. The learned counsel for the second respondent contended that suit for partition filed by the first respondent is not a collusive suit. The second respondent has stated the difficulties suffered by him in the written statement filed by him on 11.10.2007 in O.S.No.253 of 2007. The second respondent had not played any fraud on the court. All the materials were placed before the court and prayed for dismissal of the Civil Revision Petition.

14. Though notice was served on the respondents 3 and 4 in CRP (NPD) No.3531 of 2013 and their names have been printed in the cause list, there is no representation for them either in person or through counsel.

15. The learned Senior Counsel for the petitioner, in reply to the arguments of learned counsel for the first respondent contended that Section 12 (3) of Specific Relief Act is not applicable to the facts of the present case and the first respondent did not raise this plea before the Executing Court in her evidence. In her evidence, she has stated that in the year 2003, she came to know about the suit for specific performance, she has not taken any steps to get herself impleaded in the Second Appeal which was pending during that time and Second Appeal was dismissed only on 13.09.2006. After dismissal of Second Appeal, the first respondent filed suit for partition without impleading the petitioner on 26.04.2007.

16. Heard the learned Senior Counsel for the petitioner, learned counsel for the first respondent as well as second respondent and perused the materials available on record and the judgments relied on by the learned Senior Counsel for petitioner as well as the first respondent.

17. **Points for consideration** that arise in these Civil Revision Petitions are -

(i) whether the impugned orders of the Execution

Court allowing E.A.No.369 of 2009 and dismissing E.P.No.230 of 2008 are valid.

(ii) whether the preliminary decree dated 20.07.2009 and final decree passed by the District Judge in O.S.No.253 of 2007 are nullity.

18. The short facts that are necessary to decide all the three Civil Revision Petitions are as follows:

(i) Specific performance suit O.S.No.484 of 1984 filed by the petitioner against the second respondent to enforce Agreement of sale dated 30.08.1982 was decreed on 13.04.1989 and A.S.No.91 of 1989 and S.A.No.1486 of 1991 filed by the second respondent were dismissed on 28.04.1990 and 13.09.2006 respectively. The SLP filed by the second respondent was also dismissed.

(ii) By dismissing S.A.No.1486 of 1991 filed by the second respondent on 13.09.2006, this Court has confirmed that petitioner is entitled to specific performance of agreement of sale in respect of 86 cents in S.F.No.208 in Kurudampalayam village.

(iii) Immediately, after judgment of this Court, the first

respondent has filed O.S.No.253 of 2007 for partition against the respondents 2 to 4. The second respondent filed written statement in the said suit, but did not contest the same. The respondents 3 and 4 also remained exparte. An exparte preliminary decree was passed on 20.07.2009.

(iv) The first respondent filed I.A.No.314 of 2011 for passing of final decree against the respondents 2 to 4 and they remained exparte. An Advocate Commissioner was appointed and he has filed the report suggesting the way of division of properties mentioned in O.S.No.253 of 2007. An exparte final decree was passed on 26.11.2012, whereby the first respondent was allotted the suit schedule property in O.S.No.484 of 1984.

(v) On 30.08.1982, when second respondent and petitioner entered into an agreement of sale, second respondent was the absolute owner of all the properties.

19. The above facts clearly reveal that O.S.No.253 of 2007 is a collusive suit between the respondents, filed only with a view to defeat the decree passed by this Court in S.A.No.1486 of 1991 on 13.09.2006 dismissing the Second Appeal confirming the decree

passed in O.S.No.484 of 1984 in favour of the petitioner.

20. On the date of Agreement of sale, the second respondent was the absolute owner of all the properties. Respondents 1, 3 and 4 became co-parceners only on 25.03.1989. In such a situation, the Hon'ble Apex Court in the judgment dated 01.02.2018 in Civil Appeal Nos.188 and 189 of 2013 [@ SLP © Nos.10638 & 10639 of 2013] referred to judgment reported in **2016 (2) SCC 36 [Prakash & Ors. v. Phulavati & Ors.]** wherein in Para Nos.18 & 23 it has been held as follows -

18. The contention of the respondents that the amendment 5 AIR 2008 Ori 133: Pravat Chandra Pattnaik v. Sarat Chandra Pattnaik; ILR 2007 Kar 4790: Sugalabai v. Gundappa A. Maradi and 197 (2013) DLT 154: Rakhi Gupta v. Zahoor Ahmad 6 (2016) 2 SCC 36 14 should be read as retrospective being a piece of social legislation cannot be accepted. Even a social legislation cannot be given retrospective effect unless so provided for or so intended by the legislature. In the present case, the legislature has expressly made the amendment applicable on and from its commencement and only if death of the coparcener in question is after the amendment. Thus, no other interpretation is possible in view of the express language of the statute. The proviso keeping dispositions or alienations or partitions prior to 20-12-2004 unaffected can also not lead to the inference that the daughter could be a coparcener prior to the commencement of the Act. The proviso only means that the transactions not covered thereby will not affect the extent of coparcenary property which may be available when the main provision is applicable. Similarly, Explanation has to be read harmoniously with the

substantive provision of Section 6(5) by being limited to a transaction of partition effected after 20-12-2004. Notional partition, by its very nature, is not covered either under the proviso or under sub-section (5) or under the Explanation.

23. Accordingly, we hold that the rights under the amendment are applicable to living daughters of living coparceners as on 9-9-2005 irrespective of when such daughters are born. Disposition or alienation including partitions which may have taken place before 20-12-2004 as per law applicable prior to the said date will remain unaffected. Any transaction of partition effected thereafter will be governed by the Explanation.”

From the above judgment, it is clear that the respondents 1, 3 & 4 cannot challenge the validity of the agreement of sale entered into between the petitioner and second respondent.

21. From the averments in E.A.No.369 of 2009 filed by the first respondent, it is seen that apart from his share in the ancestral properties, the second respondent has purchased the share of his father and two brothers. He has also exchanged certain portion of the properties with Meenakshiammal by Exchange deed dated 19.06.1982. In such circumstances, it is for the first respondent to prove that all the properties in the hands of her father, the second respondent are all ancestral properties and not self-acquired property and she is entitled to 1/4th share in all the properties. In the suit filed by the petitioner, the second respondent did not

contend that the suit property is ancestral property. Further, on the date when the second respondent entered into an Agreement of sale, he was absolute owner of the same and respondents 1, 3 and 4 were not co-parceners.

22. The learned Additional District Court, Fast Tract Court-III, Coimbatore, without considering the pleadings and documents filed by the first respondent, passed exparte preliminary decree on 20.07.2009, without assigning any reason as to how the first respondent has proved her claim in the said suit. The learned Judge has not referred to any of the documents. The said preliminary decree is a nullity as it does not confirm with the definition of 'decree' as contemplated in C.P.C. In view of the nullity of the said preliminary exparte decree, final decree passed in I.A.No.314 of 2011 on 26.11.2012 is also nullity. The suit O.S.No.253 of 2007 filed by the first respondent is abuse of process of law as well as court. The first respondent knowing fully well the decree obtained by the petitioner and execution petition filed by him, has deliberately did not implead him as defendant in the suit as well as in final decree application. The first respondent, in her oral evidence let in E.A.No.369 of 2009 admitted that she was aware of the suit filed by the petitioner in the year 2002 itself. The first

respondent did not take any steps to get herself and respondents 3 & 4 impleaded as parties in the suit or appeals. Respondents 1 and 2 obtained preliminary and final decrees by playing fraud on the court. The contention of the learned counsel for the first respondent that as per Section 12 (3) of Specific Relief Act, the decree obtained by the petitioner in O.S.No.484 of 1984 is inexecutable in respect of entire 86 cents and the same can be executed in respect of only 1/4th share of the second respondent in 86 cents is without merits.

22(a) In the suit for partition filed by the first respondent, the property involved is larger extent of 3.5 acres and the second respondent is entitled to 86 cents out of said larger extent. Therefore, the petitioner is entitled to execute the decree obtained by him in O.S.No.484 of 1984 in its entirety. The learned counsel for the first respondent contended that first respondent did not seek for any specific portion in the larger extent of 3.5 Acres and court only allotted the said portion to her share in the final decree. In such case, the first respondent cannot have any objection for 86 cents in S.No.208 being allotted to the share of second respondent so that the petitioner can take possession of the said property.

22(b) The contention of the learned counsel for the first

respondent that preliminary decree is not an exparte decree and the second respondent contested the suit is without merits. Even though the second respondent filed written statement, but subsequently, he did not contest the case and no trial was conducted. Based on the evidence of first respondent, preliminary decree was passed. It is only an exparte preliminary decree. Similarly, the second respondent did not participate in the final decree application and did not seek for allotment of the suit property in O.S.No.484 of 1984 filed for specific performance of agreement of sale. The said property was allotted to the share of the first respondent. The reasons given by the Executing Court for allowing the application filed by the first respondent under Section 47 CPC is erroneous and application is allowed without applying his mind.

22(c) The learned Additional District & Sessions Judge, Fast Tract Court No.III, Coimbatore, in the preliminary decree did not discuss and consider the averments made by the first respondent in her suit in O.S.No.253 of 2007 but simply decreed the suit without giving any reason for the same. The Additional District & Sessions Judge, Fast Tract Court No.III, Coimbatore did not hold in the preliminary decree that the suit property in the partition suit are

ancestral properties and there is nothing on record to show that the first respondent has proved that the said properties are ancestral properties. When the Additional District & Sessions Judge, Fast Tract Court No.III, Coimbatore has not given any finding that the properties are ancestral properties, the Executing Court has erroneously held that the District Judge has given a finding that **"the petition mentioned property and other properties are ancestral properties of respondents 1, 2, 3 & 4 and the first respondent is entitled to 1/4th share in the said property including the suit property"**. While considering an application under Section 47 CPC, a court can hold that a decree is inexecutable only when the said decree was passed by a court having no jurisdiction or void or nullity or is not executable under the law. None of these condition exists in the present case and learned Judge, without considering these facts erroneously allowed the application.

22(d) The Executing Court has committed an irregularity in not properly appreciating all the facts of the case and erroneously allowed E.A.No.369 of 2009 and dismissed E.P.No.230 of 2008. For the above reasons, the fair and decretal order dated 06.04.2013

made in E.A.No.369 of 2009 in E.P.No.230 of 2008 in O.S.No.484 of 1984 and fair and decretal order dated 06.04.2013 made in E.P.No.230 of 2008 in O.S.No.484 of 1984 are liable to be set aside and they are hereby set aside.

22(e) As far as CRP (NPD) No.3531 of 2013 is concerned, the Civil Revision Petition is allowed by exercising the power under Article 227 of the Constitution of India. The final decree dated 26.12.2012 made in I.A.No.314 of 2011 in O.S.No.253 of 2007 is a collusive decree and is hereby set aside. The petitioner is *suo moto* impleaded in the said application. The learned Additional District Judge, Fast Tract Court-III, Coimbatore is directed to appoint an Advocate Commissioner afresh to measure the property and file a report and the learned Additional District Judge, Fast Tract Court-III, Coimbatore is directed to allot 86 cents in S.No.208, the suit property in O.S.No.484 of 1984 to the share of the second respondent so that the petitioner can take possession of the said property by proceeding with E.P.No.230 of 2008.

23. With above direction, all the three Civil Revision Petitions are allowed. No costs. Consequently, connected Miscellaneous Petitions are closed.

27.02.2018

Index: Yes
Internet: Yes
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Note: Issue order copy by 28.02.2018

To

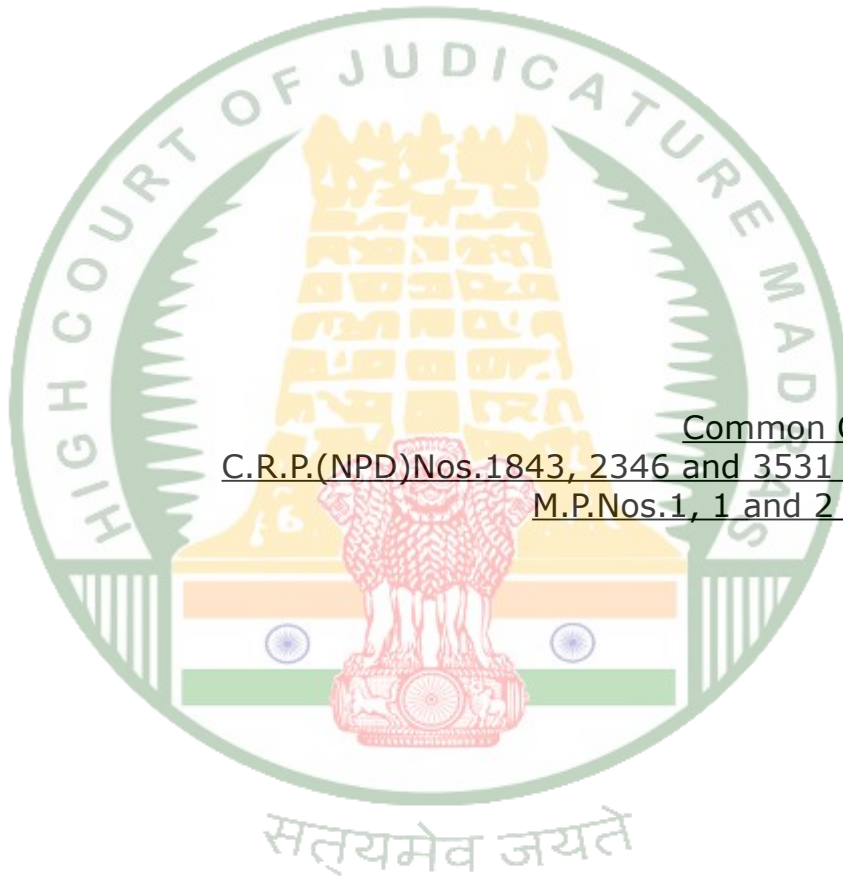
- 1.The II Assistant Subordinate Judge,
Coimbatore.
- 2.The Additional District & Sessions Judge,
Fast Tract Court-III, Coimbatore.



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V.M.VELUMANI, J.

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Common Order in
C.R.P.(NPD)Nos.1843, 2346 and 3531 of 2013
M.P.Nos.1, 1 and 2 of 2013

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