

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 12.04.2018

CORAM

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(PD) No.4293 of 2012
and M.P.No.1 of 2012

1.Ranganathan (died)
 2.K.Jayalakshmi
 3.R.Saravanan
 4.R.Rajkumar
 5.R.Senthilkumar
 6.R.Jayakumar

...

Petitioners

[Petitioners 2 to 6 brought on record
 as Lrs of the deceased sole petitioner
 vide court order dated 23.02.2018
 made in CMP No.17092 to 17094/2017
 in CRP No.4293/2012]

Vs

1.Chennammal

2.Janaki

...

Respondents

Civil Revision Petition is filed under Article 227 of the Constitution of India against the fair and decreetal orders of the learned District Munsif and Judicial Magistrate of Uthangarai dated 29.10.2012 in I.A.No.431 of 2011 in O.S.No.373 of 1995.

For Petitioners : Mr.Karthik Asath
 for M/s.V.Nicholas

For Respondents : Mr.T.R.Daveson for R1
 Not ready in notice
 Reg.R2

ORDER

This Civil Revision Petition is filed against the fair and decreetal orders of the learned District Munsif and Judicial Magistrate of Uthangarai dated 29.10.2012 in I.A.No.431 of 2011 in O.S.No.373 of 1995.

2. The petitioner is the third defendant, the first respondent is the plaintiff and the second respondent is the second defendant in the suit in O.S.No.373 of 1995 on the file of District Munsif and Judicial Magistrate Court, Uthangarai. Pending Civil Revision Petition, the sole petitioner died and petitioners 2 to 6 were brought on record as legalheirs of the sole petitioner. The first respondent filed the suit in O.S.No.173 of 1975 before District Munsif Court, Krishnagiri against her father Krishnasami Naidu, second respondent who is her sister, the first petitioner who is her brother and one G.Subramani for partition claiming 1/4th share in the suit property. An exparte preliminary decree was passed on 13.06.1975. The first defendant, father of the respondents and petitioner died on 22.07.1982 and hence the petitioner and respondents are entitled to 1/3rd share in the suit property as against 1/4th share. In the meantime, the suit was transferred to District Munsif Court,

Uthangarai and renumbered as O.S.No.373 of 1995. The first respondent filed I.A.No.344 of 1995 in O.S.No.373 of 1995 for passing of final decree for partition by appointment of a commissioner to divide the properties as directed by the preliminary decree in the suit.

2(a) The second respondent filed counter and contended that she has no objection for share being allotted as per the preliminary decree. The petitioner filed counter and contended that the application is barred by limitation as the same was filed after a period of 19 years of passing of preliminary decree and application for final decree ought to have been filed within a period of 12 years. The said application was dismissed on 10.11.1998. Thereafter, the first respondent filed I.A.No.431 of 2011 in O.S.No.373 of 1995 for passing of final decree by fixing 1/3rd share of the first respondent in the suit property by appointment of an Advocate Commissioner and to file a report with plan. The first petitioner has stated that particulars given about the suit properties are not correct and he has obtained title by adverse possession. The first petitioner sold the first item of the property to one Kasi Naidu and his wife who in turn sold the same to one Lokammal. After such sale, they are in possession and enjoyment of the property. The first petitioner, by

registered partition deed dated 08.09.2010 partitioned the property among his wife and sons, the petitioners 2 to 6 herein. As per the partition, the first petitioner and his wife did not retain any portion in the item No.1 & 2 of the suit property. The purchasers and petitioners 2 to 6 have obtained title by adverse possession. The sons and daughters of the first petitioner and Logakammal are necessary parties and prayed for dismissal of the application.

3. The learned Judge rejected the contention of the first petitioner and allowed the application in I.A.No.431 of 2011 in O.S.No.373 of 1995 appointing Mr.S.Murthi, Advocate as Commissioner to measure the property with the help of surveyor and divide the same into three equal shares and file a report and plan by allotting 1/3rd share to each of the parties.

4. Against the said order dated 29.10.2012 in I.A.No.431 of 2011 in O.S.No.373 of 1995, the present Civil Revision Petition is filed by the petitioners.

5. The learned counsel for the petitioner reiterated the averments in the counter filed in the present application and the contentions raised in the grounds of revision and further submitted

that the court below failed to see that the petition filed by the first respondent in I.A.No.344 of 1995 for passing of final decree by giving the description of the properties was dismissed on 10.11.1998 holding that the first respondent did not give the proper description and that after 13 years of date of dismissal of the said petition, the first respondent has filed the present petition in I.A.No.431 of 2011 for passing of final decree by appointing the commissioner giving the same description of the properties. The court below failed to see that having allowed the earlier order dated 10.11.1998 in I.A.No.344 of 1998 to become final, the first respondent could not file another petition for the very same relief with the same description in the present petition which is not maintainable. The first respondent cannot claim more share than what was allotted in preliminary decree. If shares are altered after the preliminary decree, another preliminary decree has to be passed modifying the earlier preliminary decree.

6. Per contra, the learned counsel for the first respondent submitted that after preliminary decree, the suit has not become final and is kept pending. There is no time limit for filing application for final decree. An application for final decree is maintainable even if the earlier application was dismissed. After passing preliminary

decree, if the quantum of share is altered, court has power to take into consideration the said change and pass final decree. There is no necessity to alter the preliminary decree.

7. The learned counsel for the respondent, in support of his contention, relied on the following judgments -

(i) AIR 1989 KER 289 [Laxmi and Ors. v. A.Sankappa Alwa and Ors.]

11. I have referred the above English decisions only to note that the doctrine of issue estoppel is not an absolute one and I am examining the application of the principle of res judicata in this case well informed of the above said precedential thinking on the principle of res judicata. I may say candidly that until I had occasion to refer to some English decisions, I had no doubt that the doctrine of issue estoppel was an absolute one though I was certain that it might be difficult to decide whether or not the earlier decision did expressly or impliedly decide the very issue sought to be litigated in the second action. I was certain that when once that had been demonstrated, a bar of res judicata necessarily arose.

12. In Venkata Reddy v. Pethi Reddy, AIR 1963 SC 992, reversing a decision of the Madras High Court in AIR 1956 Mad 413, Mudholkar, J. said (at p. 995) :

"A decision is said to be final when, so far as the Court rendering it is concerned, it is unalterable except by resort to such provisions of the Code of Civil Procedure as permit its reversal, modification or amendment. Similarly, a final decision would mean a decision which would operate as res judicata between the parties if it is not sought to be modified or reversed by preferring an appeal or a revision or a review application as is permitted by the Code. A

preliminary decree passed, whether it is in a mortgage suit or a partition suit, is not a tentative decree but must, insofar as the matters dealt with by it are concerned, be regarded as conclusive. No doubt, in suits which contemplate the making of two decrees -- a preliminary decree and a final decree -- the decree which would be executable would be the final decree: But the finality of a decree or a decision does not necessarily depend upon its being executable. The Legislature in its wisdom has thought that suits of certain types should be decided in stages and though the suit in such cases can be regarded as fully and completely decided only after a final decree is made, the decision of the Court arrived at the earlier stage also has a finality attached to it. Section 97, C.P.C. clearly indicates that as to the matters covered by it, a preliminary decree is regarded as embodying the final decision of the Court passing that decree."

14. The final result of the foregoing discussion is that the points decided in a preliminary judgment in a partition suit will estop the parties by the principle of res judicata from contending the same point in a later suit.

15. I turn to consider the question of obligation of the Court and the parties after a preliminary decree is given in a partition suit. I do not propose to discuss that matter elaborately. In my view a preliminary decree conclusively determines the rights and liabilities of the parties with regard to all or some of the matters in controversy in the suit although it does not completely dispose of the suit. Further proceedings await the suit to work out and adjust the rights of the parties. The Court cannot dismiss a suit for default when once a preliminary decree is passed in a partition suit. The parties to the suit have acquired rights or incurred liabilities under the decree. They are final, unless or until the decree is varied or set aside. The law being so, if the plaintiff does not take any steps after a preliminary decree is passed, the Court should adjourn the proceedings sine die with liberty to the parties concerned to end the torpor and suspended animation of the suit by activating it by taking appropriate proceedings. *In Thomas*

v. Bhavani Amma, 1969 Ker LT 729, Krishna Iyer, J. observed :

"It is correct law that in a suit for partition, after the passing of a preliminary decree it is the duty of the Court to pass a final decree and what is called an application for final decree is but a reminder to the Court of its duty. If so, it is the Court's duty to give notice to the parties."

(ii) Judgment of this Court dated 22.01.2016 in CRP (PD) No.117 of 2016 [N.Annamalai v. N.Kumaravelu]

3. The respondent herein as a plaintiff filed a suit in O.S.No.5607 for bare injunction. The defendant filed a written statement and contesting the same. Alongwith the suit, the plaintiff has also filed an application in I.A.No.15094 of 2014 for interim injunction, in which, the defendant/revision petitioner herein has filed a counter. During pendency of the same, the revision petitioner/defendant has filed an application in I.a.No.764 of 2015 under Order 26 Rule 9 CPC., for appointment of Advocate Commissioner. The trial Court has dismissed the application on the ground that description of the suit schedule property was not furnished. Thereafter, the revision petitioner/defendant has filed the present application in I.A.No.8005 of 2015 under Order 26 Rule 9 CPC for the same relief. The respondent/plaintiff has filed a detailed counter. The trial Court, after hearing both sides, dismissed the application, against which, the present revision has been preferred by the defendant.

7. It is well settled dictum of the Hon'ble Apex Court that no Advocate Commissioner can be appointed to collect the material evidence to prove the possession. In the case on hand, in the prayer itself, it is mentioned as call for the reports regarding as to who made the encroachments into the C and D

Schedule passage properties by constructions put up by the revision petitioner/defendant. Once the suit is for permanent injunction, it is the duty of the plaintiff/respondent to prove that he is having right over the suit properties and it is not the duty of the defendant to disprove the case. In such circumstances, the defendant/revision petitioner only with a view to collect the material evidence for future litigation, has filed the present application for appointment of Advocate Commissioner. The trial Court has held that the present application is barred under Section 11 of CPC., since the earlier order was dismissed as the revision petitioner has not challenged the same. Even though the present application is not hit by res judicata, the revision petitioner is not entitled to collect material evidence by way of appointing Advocate Commissioner. So the revision is dismissed as devoid of merits.

(iii) 2009 (8) MLJ 921 (SC) [Shub Karan Bubna @ Shub Karan Prasad Bubna v. Sita Saran Bubna and Ors.]

9.2) In regard to immovable properties (other than agricultural lands paying land revenue), that is buildings, plots etc. or movable properties:

(i) where the court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.

(ii) where the division by metes and bounds cannot be made without further inquiry, the court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed

(usually an Engineer, Draughtsman, Architect, or Lawyer) to physically examine the property to be divided and suggest the manner of division. The court then hears the parties on the report, and passes a final decree for division by metes and bounds.

The function of making a partition or separation according to the rights declared by the preliminary decree, (in regard to non-agricultural immovable properties and movables) is entrusted to a Commissioner, as it involves inspection of the property and examination of various alternatives with reference to practical utility and site conditions. When the Commissioner gives his report as to the manner of division, the proposals contained in the report are considered by the court; and after hearing objections to the report, if any, the court passes a final decree whereby the relief sought in the suit is granted by separating the property by metes and bounds. It is also possible that if the property is incapable of proper division, the court may direct sale thereof and distribution of the proceeds as per the shares declared.

9.3) As the declaration of rights or shares is only the first stage in a suit for partition, a preliminary decree does not have the effect of disposing of the suit. The suit continues to be pending until partition, that is division by metes and bounds, takes place by passing a final decree. An application requesting the court to take necessary steps to draw up a final decree effecting a division in terms of the preliminary decree, is neither an application for execution (falling under [Article 136](#) of the [Limitation Act](#)) nor an application seeking a fresh relief (falling under [Article 137](#) of [Limitation Act](#)). It is only a reminder to the court to do its duty to appoint a Commissioner, get a report, and draw a final decree in the pending suit so that the suit is taken to its logical conclusion.

8. Heard the learned counsel for the petitioners as well as first respondent and perused the materials available on record.

9. From the materials on record, it is seen that the first respondent filed the suit for partition claiming 1/4th share in the suit property. The suit was filed against her father, brother and sister. A preliminary decree was passed on 13.06.1975 allotting 1/4th share to the first respondent. The first petitioner and other defendants did not challenge the said preliminary decree. In view of the same, the preliminary decree has become final. The first defendant, father of the respondents and first petitioner died. The first petitioner and respondents are the only legal heirs of the deceased first defendant. They are equally entitled to share of the first defendant in the suit property. In view of the same, they are entitled to 1/3rd share in the suit property. There is no limitation for passing final decree as suit for partition will be pending till final decree is passed. Further, subsequent to passing of preliminary decree, another preliminary decree also can be passed varying share allotted in the earlier preliminary decree taking into account the subsequent event.

10. As far as sale of the first item of the property by the first petitioner in the year 1986 to Kasi Naidu and his wife and subsequent sale to one Yokammal on 11.03.1991 is concerned, the transactions are after the preliminary decree. Similarly, the partition dated 18.09.2010 between the first petitioner and his wife are also after the preliminary decree. In view of the same, both the transactions are not binding on the respondents.

11. As far as the contention of the learned counsel for the petitioner that earlier I.A.No.344 of 1995 filed by the first respondent for passing of final decree was dismissed and therefore present application is not maintainable is without merits. There is no time limit for passing of final decree. It is pertinent to note that earlier I.A.No.344 of 1995 was dismissed on the ground that the first respondent has not given proper description and extent of the suit property. The said application was not dismissed on merits. Hence, the present application is not hit by the principles of resjudicata. The learned Judge has considered all these aspects and held that the property sold by the first petitioner to Kasi Naidu and his wife and which is now in possession and enjoyment of one Lokammal who is the subsequent purchaser can be allotted to the

share of the first petitioner is by correct appreciation of facts and law.

12. In the present case, the first defendant died and his share devolved on the first petitioner and respondents. In view of the same, a preliminary decree can be passed allotting 1/3rd share each to the parties. It is well settled that subsequent to passing of the preliminary decree, another preliminary decree can also be passed, especially when due to death of any of the parties, the quantum of shares is varied. A final decree can be passed only based on the preliminary decree. When quantum of share as in preliminary decree is varied due to death of a party, necessary application has to be filed for passing another preliminary decree quantifying the share of the parties. The first respondent is not entitled to a final decree claiming 1/3rd share in the suit property without the earlier preliminary decree being varied allotting 1/3rd share to the first respondent on the death of her father. The learned Judge failed to consider this well settled judicial pronouncement. The learned Judge erred in appointing Advocate Commissioner to divide the property into three equal share. In view of the same, the order of the learned Judge is liable to be set aside and it is hereby set aside.

13. In the result, this Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed. It is open to the first respondent to file appropriate application for modifying of the preliminary decree dated 13.06.1975 claiming 1/3rd share in the suit property.

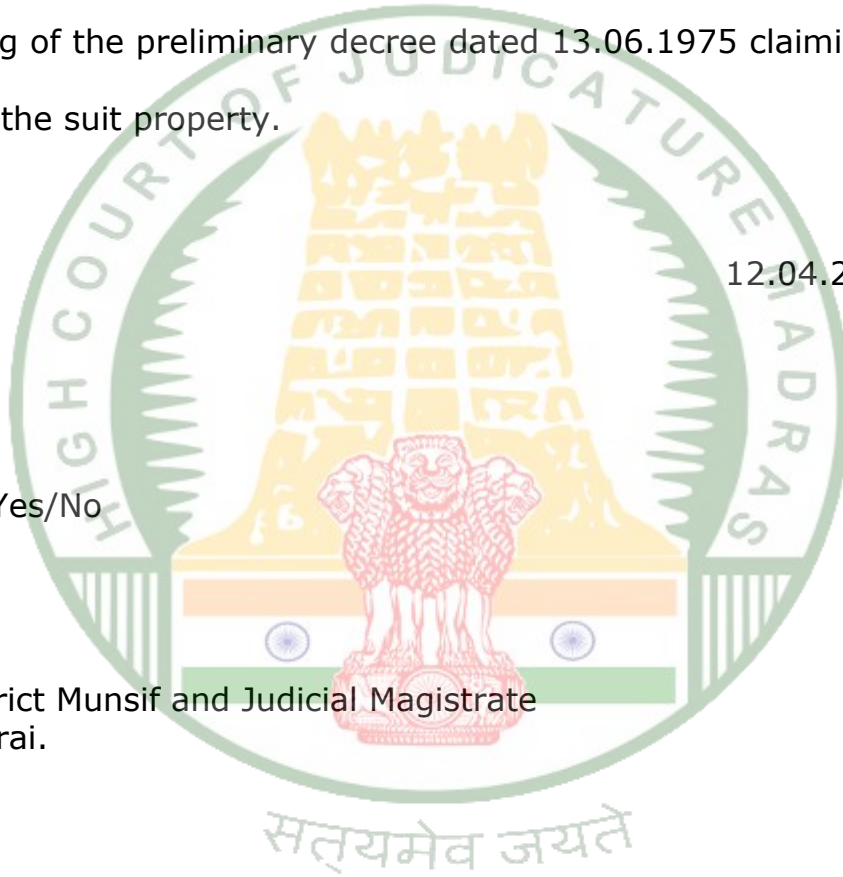
12.04.2018

rgr

Index : Yes/No

To

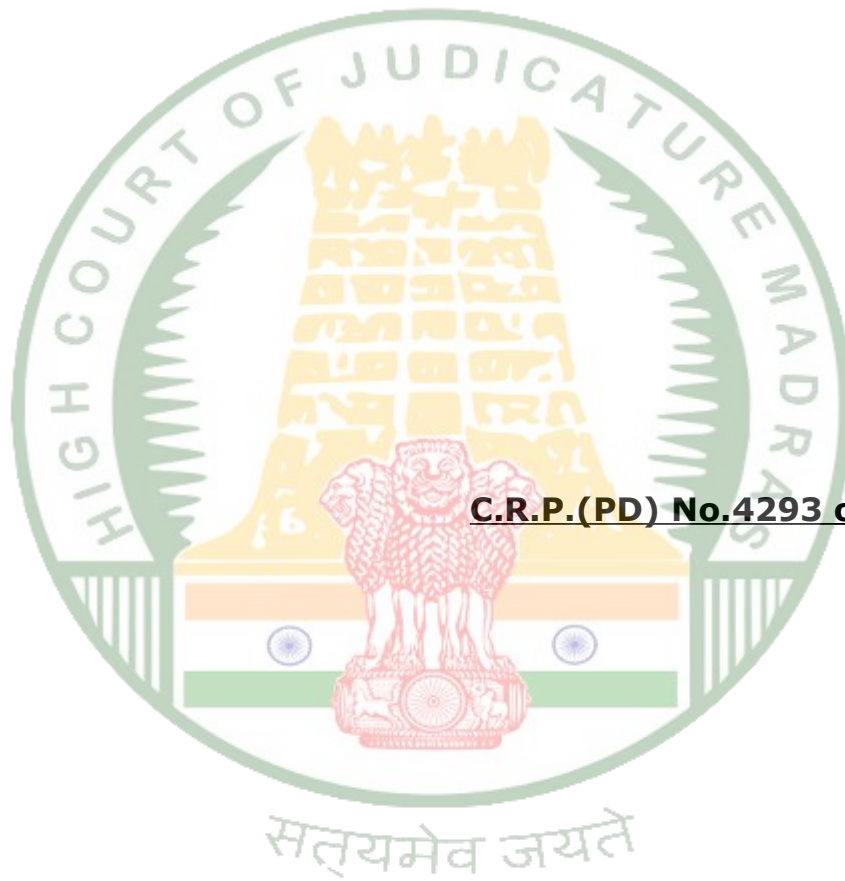
The District Munsif and Judicial Magistrate
Uthangarai.



WEB COPY

V.M.VELUMANI, J.

rgr



C.R.P.(PD) No.4293 of 2012

12.04.2018

WEB COPY