

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 05.03.2018

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD)No.4327 of 2012
and M.P.No.1 of 2012

K.Palanisamy

.. Petitioner

Vs.

1.K.Manickam
2.Krishnasamy Gounder (died)
3.K.Thangavel

.. Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 31.08.2012 made in I.A.No.1441 of 2011 in O.S.No.36 of 1983 on the file of the I Additional District Munsif, Coimbatore.

For Petitioner : Mr.S.Senthilkumar

For R1 : Mr.R.Selvakumar

For R2 : Died

For R3 : Not ready in notice

ORDER

This Civil Revision Petition has been filed to set aside the fair and decretal order dated 31.08.2012 made in I.A.No.1441 of 2011 in O.S.No.36 of 1983 on the file of the I Additional District Munsif, Coimbatore.

2.The petitioner is third defendant, first respondent is plaintiff and respondents 2 and 3 are the defendants 1 and 2 in O.S.No.36 of 1983 on the file of the I Additional District Munsif, Coimbatore. The first respondent filed suit for partition claiming 1/12 share in the suit property. A preliminary decree was passed on 02.12.1991, allotting 1/12 share to the first respondent. The first respondent filed I.A.No.1441 of 2011 under Order XXVI Rule 13 of C.P.C for passing final decree in terms of the preliminary decree dated 02.12.1991 for the division of the properties into 1/12 equal shares and ½ share of his father which was allotted to his father in the preliminary decree by appointing an Advocate Commissioner. According to the first respondent, First Appeal A.S.No.3 of 1992 on the file of the Subordinate Court, Coimbatore, filed by the petitioner challenging the preliminary decree dated 02.12.1991 was dismissed on 31.01.1995. The father of the respondents 1 and 3, who was the first defendant in the suit, died on 04.11.1995. Therefore, the first respondent is entitled to 1/2 share of his father also.

3.The petitioner filed counter affidavit and contended that final decree can be passed only as per preliminary decree. The first respondent has not impleaded all the legal heirs of the deceased first defendant and is not entitled to any final decree as prayed for.

4.The learned Judge extracting the averments made in the affidavit and counter affidavit, without deciding the objection raised by the petitioner, appointed an Advocate Commissioner to inspect the property and to divide the petition mentioned property in terms of preliminary decree dated 02.12.1991 for the division of the suit property into 1/12 shares and ½ share of 1/12 share of his father's property and allotted the share to the petitioner as prayed for in the final decree application.

5.Against the said order dated 31.08.2012 made in I.A.No.1441 of 2011 in O.S.No.36 of 1983, the present Civil Revision Petition is filed by the petitioner.

6.The contention of the learned counsel for the petitioner is that a final decree can be passed only as per preliminary decree. The first respondent has not impleaded all the legal heirs of the deceased first defendant. Without modifying the preliminary decree and without presence of the legal heirs of the deceased first defendant, the petitioner is not entitled to share as claimed in the application for final decree. The learned Judge erred in appointing the Advocate Commissioner without deciding the objection raised by the petitioner and thereby committed irregularity.

7.The learned counsel for the first respondent contended that after passing of preliminary decree, due to death of any one of the parties, the share mentioned in the preliminary decree can be varied. The respondents 1 and 3 alone are the legal heirs of the deceased first defendant and therefore, first respondent is entitled to 1/2 share of his father, the share, which was allotted to him in the preliminary decree.

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

9.From the materials available on record, it is seen that after passing of preliminary decree, the first defendant, who is the father of the respondents 1 and 3 died on 04.11.1995. The first respondent filed application I.A.No.1441 of 2011 for passing of final decree claiming 1/12 share allotted to him in the preliminary decree as well as 1/2 share of his father's share allotted to his father in the preliminary decree. The first respondent has not filed any application for passing of another preliminary decree allotting 1/2 of 1/12 share of his father, the deceased first defendant. Without a preliminary decree already passed being modified, varying the

shares allotted to the parties, first respondent is not entitled to $\frac{1}{2}$ of $\frac{1}{12}$ share in the shares allotted to his father. The first respondent has not given any reason for not accepting the claim of the petitioner that final decree can be passed only as per the preliminary decree and that all the legal heirs of the first defendant were not impleaded by the first respondent. In view of the same, order of the learned Judge is set aside and the Civil Revision Petition is liable to be allowed.

10. Accordingly, the Civil Revision Petition is allowed. No costs. Consequently, connected Miscellaneous Petition is closed. The application in I.A.No.1441 of 2011 is remanded back to the learned Judge for fresh consideration on merits and to dispose of the same within a period of three months from the date of receipt of a copy of this order.

Index :: Yes/No
gsa

To

The I Additional District Munsif,
Coimbatore.

05.03.2018

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V.M.VELUMANI,J.

gsa



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