

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON	DELIVERED ON
13~02~2019	04~03~2019

CORAM :THE HONOURABLE **MR. JUSTICE N.SATHISH KUMAR**

C.R.P.(NPD).No.3129 of 2013
and M.P.No.1 of 2013

1. Mathiyazhagan
2. Selvamani
3. D. Maharaja
4. D.Rabbert
5. Lillypushpam
6. D. Latha

... Revision Petitioners/Petitioners/
Defendants 1,2,3,5,6 & 8.

Versus

1. Suromani
2. D.Rajamani
3. D.Venila

... 1st Respondent/Plaintiff

... Respondents 2 & 3/Respondents 2 & 3/
Defendants 4 & 7

Civil Revision Petition filed under Section 115 of the Civil Procedure Code to set aside the fair and decretal order dated 30.03.2013 made in I.A.No.117 of 2010 in O.S.No.191 of 2007 on the file of the First Additional District Munsif Court, Bhavani by allowing the Civil Revision Petition.

For Revision Petitioners

.. Ms. R.Shase
for Mr.M.Guruprasad

For Respondents

.. Mr.P. Valliappan [for R1]
No appearance [for R2 & R3]

ORDER

This Revision Petitioner has been filed against the fair and final order passed by the First Additional District Munsif in I.A.No.117 of 2010 in O.S.No.191 of 2007 for Supplementary Preliminary Decree.

2. The application has been filed by the Revision Petitioners to pass a supplementary preliminary decree in the suit filed by the allotting 5/23 share to the Revision Petitioners 2, 3 and 5 each and to declare 2/27 share to the Revision Petitioners 1,4 and 6 each. This application has been filed on the ground that the First Respondent/Plaintiff has filed suit for partition and separate possession to divide the suit property into 9 equal shares and allot one such share to the First Respondent/Plaintiff.

3. In the plaint itself it has been specifically stated that one Mr.Deivasigamani the father of the parties is Christian. Therefore, the shares ought to have allotted under Section 33 of the Indian Succession Act. The suit was contested only by the Respondents 2 and 3 viz., 4th and 7th Defendants.

4. The trial Court passed a Preliminary Decree dividing the suit

property into 9 equal share and allotted one such share to the Plaintiff. The suit was decreed on 07.08.2008. Thereafter in the year 2010 an Application was filed for passing Supplementary Preliminary Decree by the Revision Petitioner on the ground that in the preliminary decree no share has been allotted to the Revision Petitioner and also Respondent Nos.2 and 3. Preliminary Decree passed in the Partition suit does not contain any declaration as to the rights of the Revision Petitioner who remained *exparte* in the suit. Therefore, the Revision Petitioner is entitled to seek for modification of preliminary decree. The shares have been allotted as per Indian Succession Act not under Hindu Succession Act. Hence sought to pass a Supplementary Preliminary Decree.

5. The respondents objected the above application on the ground that the decree is passed on 7.8.2008. The petitioners are not entitled to modify the preliminary decree. The trial court by its order dated 30.03.2013 after hearing both sides dismissed the application, against which the present revision is filed.

6. Learned counsel appearing for the Revision Petitioner submits that though the Revision Petitioner remained *exparte* in the

suit filed for partition, only the 4th and 7th defendants contested the suit. While passing the Preliminary Decree, the trial court has not declared the rights of the revision Petitioner as contemplated under Order 20 Rule 18 of C.P.C. Therefore, the Preliminary Decree can be modified and Supplementary Preliminary Decree can be passed enabling the parties to get their rights declaring the Preliminary Decree. It is the further contention of the learned counsel for the Revision Petitioner that the plaint pleading itself clearly shows that parties are Indian Christians. Therefore, the trial court while passing the Preliminary Decree ought to have granted a decree as per Indian succession Act, whereas the trial court granted equal shares. Hence, the Revision Petitioner is entitled to seek for modification of Preliminary Decree by passing Supplementary Preliminary Decree. In support of his contention he relied upon a Judgement reported in ***Ganduri Koteshwaramma and Another v. Chakiri Yanadi and Another [2011 (9) SCC 788]***.

7. Learned counsel appearing for the respondent on the other hand submitted that the preliminary decree passed in the year 2008 and the Application has been filed only in the year 2010 and the rights of the parties have been declared in the preliminary decree itself.

Without resorting the Appeal, they cannot challenge the Preliminary Decree on the ground that their shares have not been declared. The suit has not decided in exparte. In fact 4th and 7th Defendants filed written statement. Their written statement clearly shows that the question of religion itself is in issue. They have admitted to pass the preliminary decree as per Hindu Succession Act. Therefore, now it is far fetched the Revision petitioner to contend that the parties are Indian Christian and equal shares should not have been declared. Such triable issue cannot be gone into this application. The Revision petitioner all along remained exparte now cannot attack the decree on merits without filing any appeal. Hence, submitted that the preliminary decree normally can be amended or modified only after passing of preliminary decree considering events have taken place necessitating reassessment of shares as declared in the preliminary decree and not other circumstances. Hence, submitted that the Revision Petitioners if at all aggrieved by the Preliminary Decree they have to challenge only before the Appellate Court. After preliminary decree if there is any dispute in respect of the shares and there is a dispute with regard to such modification, such Preliminary Decree would be liable to appeal only and not by way of modification of Preliminary Decree.

8. I have perused the materials. As far as the first contention that the Preliminary Decree does not contain any declaration so as to the rights of the Defendants who remained *exparte* in the suit, the preliminary decree is liable to be amended. I have carefully perused the decree and judgement passed by the trial court. Though the plaintiff pleaded that they are Indian Christian, the Defendants No.4 and 7 in their written statement have not specifically admitted that the parties are Indian Christian alone. According to the Defendants 4 & 7 irrespective of fact that whether the deceased Mr.Deivasigamani is Hindu Joint Family or Indian Christian, all of the parties are entitled to equal shares. From the written statement of the 4th and 7th Defendants it can be seen that 4th and 7th Defendants claimed only equal shares. They have not admitted that parties are only Indian Christian. This Revision Petitioner remained *exparte* in the suit. The trial court passed Preliminary Decree for dividing the suit property into 9 equal shares; out of 9 equal shares one such share to the Plaintiff. The trial court passed preliminary decree for dividing the suit property for 9 equal shares itself clearly indicate that the rights of the defendants who have set *exparte* the suit is also declared in the Preliminary Decree. Therefore, it cannot be said that the revision petitioners rights have not been declared in the preliminary decree. As

long as the rights of all the parties declared in the Preliminary Decree and it is for the parties to workout their respective shares in the final decree proceedings or if any challenge to be made such preliminary decree such decree is liable for appeal unless after preliminary decree is passed subsequent events necessitating reassessment of shares took place modification of preliminary decree, supplementary preliminary decree cannot be passed.

9. No doubt, it is well settled that after passing Preliminary Decree before the final decree has been passed, the events and supervening circumstances occurred necessitating changes in the shares there is no impediment for the court to amend the Preliminary Decree or pass another Preliminary Decree redetermining the rights and interest of the parties having regard to the changed situation. The above position has been clearly held in the judgment reported in ***Ganduri Koteshwaramma's case*** (supra). But in the given case there is no subsequent event has been taken place necessitating modifying the shares. what the parties contend that the shares should have been allotted as per the Indian Succession Act and not under Hindu Succession Act. It is to be noted that it is not the exparte decree. 4th and 7th defendnats have contested the suit. In fact, in

their written statement they did not admit that parties are governed by Christians by religion. What was contended by 4th and 7th defendants is that irrespective of religion whether Hindu Joint Family or Christian they are only entitled to equal shares. When the very nature of the defence claiming equal share itself clearly indicate that there was a dispute with regard to the issue as to the religion itself. Therefore, such issue is necessarily in issue of fact. It should be decided on proper evidence. Therefore, when there is a triable issue, Preliminary Decree cannot be amended automatically. The issue has to be decided first.

10. It is useful to refer Three Judges Judgement of the Honourable Supreme Court reported in ***Phoolchand and another v. Gopal Lal* [AIR 1967 1470]** in which it is held as follows:

"7. We are of opinion that there is nothing in the Code of Civil Procedure which prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die and shares of other parties are thereby augmented. We have already said that it is not disputed that in partition suits the court can do so even after the preliminary decree is passed. It would in our opinion be convenient to the court and advantageous to the parties, specially in partition suits, to have disputed rights finally

settled and specification of shares in the preliminary decree varied before a final decree is prepared. If this is done, there is a clear determination of the rights of parties to the suit on the question in dispute and we see no difficulty in holding that in such cases there is a decree deciding these disputed rights; if so, there is no reason why a second preliminary decree correcting the shares in a partition suit cannot be passed by the court. So far therefore as partition suits are concerned we have no doubt that if an event transpires after the preliminary decree which necessitates a change in shares, the court can and should do so; and if there is a dispute in that behalf, the order of the court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal."

From the above judgment, it is very clear that preliminary decree can be amended for making variation in shares specified in the preliminary decree. If after the preliminary decree some events and circumstance took place which necessitates the modification of the shares etc., From the above judgment it can be safely held that only when subsequent events necessitates change in shares etc., the Preliminary Decree can be amended or Supplementary Preliminary Decree can be passed. Admittedly in this case no subsequent events which necessitates the modification of shares.

11. The revision petitioner now, by way of this application wants to establish that they are entitled to more shares and their share to be declared under Indian Succession Act. According to them the Court below while passing the Decree and Judgment not granted Decree as per Indian succession Act. 4th and 7th Defendants have already appeared before the trial Court and their stand also that they are entitled to equal shares in the property. There is a triable issue that whether the parties are governed by Christian Religion or Hindu Joint family. Therefore, now the Revision Petitioner cannot by way of this application to undo the decree which is passed in the year 2008. They ought to have filed an appeal challenging the Decree and Judgment. Even the trial court has passed a decree and the decree is considered to be bad in law, the remedy open to the party is to approach the higher forum. They not to challenge the decree by way of application to amend the decree. Admittedly the suit was decreed on 7.8.2008. They have not filed any appeal. Whereas this application has been filed only on 1.3.2010 almost after 2 years. Therefore, I am of the view that the Revision Petitioner is not entitled to seek for an amendment of decree. Hence, the Revision Petition is dismissed.

12. However taking into consideration of the specific pleadings

of the plaint and as the impact on the decree passed by the trial Court, if the plaintiff is found to be Indian Christian the mode of allotment of shares certainly affect the rights of the parties. Therefore liberty is granted to the Revision Petitioner to file an Appeal before the Appellate Court/Review before same Court with an application to condone the delay of 2 years. On such application, the Appellate Court/Court shall also take into consideration of pendency of this petition from the year 2010 till this date, such delay shall be excluded since the revision petitioners have bonafidely prosecuting this application without filing any appeal. Similarly delay in between date of judgment and date of filing, the appellate court also consider the same in the light of the substantial right of the parties particularly the pleadings of the Plaintiff in the suit and pass orders on merits. The Revision Petitioner shall file an appeal within a period of one month from the date of receipt of copy of this Order.

13. With the above observation, the Revision Petition is dismissed. Consequently, connected Miscellaneous Petition is closed. No costs.

04.03.2019

Index:Yes/No
Internet:Yes/No
Speaking order/Non-speaking order

ggs

N. SATHISH KUMAR, J.

ggs.

To

1. The First Additional District Munsif, Bhavani



order in:

C.R.P.(NPD)No.3129 of 2013

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04.03.2019