

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.07.2019

CORAM

THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

CRP (PD)No.2641 of 2014

and

MP No.1 of 2014

Narayanasamy (died)

1. Vasudevan
2. N. Poongodi
3. Kotteeswaran
4. Sarvanan
5. Thirumurugan
6. Bhuvaneswari
7. N. Nirmaladevi

... Petitioners

Vs

1. Senthilkumar @ Ramasamy
2. Rajendran
3. Venkatesan

... Respondents

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 29.04.2014 made in I.A. No.446 of 2012 in O.S. No.119 of 1985 on the file of the Sub Court, Sankari.

For Petitioners

:Mr.M.S.Palanisamy

for Mr.P.K.Shivakumar

For Respondents

:Mr.C.K.M.Appaji for R2

Mr.Tranquebar Doraivasu for R3

ORDER

The instant Civil Revision Petition has been filed under Article 227 of the Constitution of India, challenging the order dated 29.04.2014 passed by the Sub Court, Sankari in I.A. No.446 of 2012 in OS. No.119 of 1985.

**Brief facts leading to the filing of the instant Civil Revision
Petition under Article 227 of the Constitution of India**

2. Narayanasamy, who was impleaded as the second defendant in the suit O.S.No.119 of 1985 on the file of the Sub Court, Sankari purchased an extent of land in Survey Nos.146/1 and 146/2, which is the subject matter of the partition suit filed by the first respondent against the first defendant, who is his father. The suit schedule property included 5 items, out of which, the revision petitioner has purchased two items viz. Survey Nos.146/1 and 146/2. The suit filed by the first respondent in O.S.No.119 of 1985 was dismissed by the Trial Court on 10.12.1993. Aggrieved by the dismissal of the suit, the first respondent preferred an appeal before the District Court, Salem in A.S.No.160 of 1996. The appeal came to be allowed by judgment and decree dated 22.02.2002 and as per the Appellate Court judgment, the

relief sought for in the suit was granted in favour of the first respondent and half share each was allotted to the first respondent / plaintiff as well as second respondent / first defendant. The operative portion of the judgment passed in A.S. No.160 of 1996 is as follows :

24. As seen earlier admittedly the suit properties are the joint family properties of the plaintiff and the defendant. The sale deeds executed by the first defendant in favour of the defendants 2 to 4 are not shown to be valid and binding on the plaintiff with reference to his half share in the suit properties. Therefore, the plaintiff is entitled to seek the setting aside of the sale deeds dt. 8.6.82 and 29.8.82 in favour of the second defendant as claimed in the plaint. Therefore the plaintiff being entitled to obtain half share in the properties his right to claim partition in the suit properties cannot be negated, I therefore hold that the plaintiff is entitled to obtain the relief of setting aside of the sale deeds, dt. 8.6.82 and 29.8.82 executed by the first defendant in favour of the second defendant as not valid and binding on his and his half share in the suit properties. I therefore, hold that the plaintiff is entitled to obtain half share in the suit properties as claimed in the plaint. Accordingly, the point No.1 and 2 are answered.

Subsequent to the passing of the judgment, dated 22.02.2002 in A.S.No.160 of 1996, the first respondent filed I.A. No.446 of 2012 under Order 26 Rule 13 CPC read with 151 CPC for the appointment of an Advocate Commissioner, to divide the suit properties into two equal

shares, except Survey Nos.146/1 and 146/2 by metes and bounds and allot one such share to the first respondent / plaintiff.

3. A counter affidavit was also filed by the petitioners in I.A. No.446 of 2012, wherein they have stated that the application filed in I.A. No.446 of 2012 is not in accordance with the judgment and decree passed in A.S. No.160 of 1996. As per the said judgment and decree, nothing could be deleted or added from and out of the suit schedule properties. But, according to the revision petitioners in I.A. No.446 of 2012, the first respondent has desired to delete Survey Nos.146/1 and 146/2. By Order dated 29.04.2014, the learned Sub Judge, Sankari has made it clear that the learned Advocate Commissioner R.Ramasamy, appointed by the Court under the impugned order shall divide the properties in accordance with Preliminary decree, dated 22.02.2002 passed in A.S. No.160 of 1996. However, since in the previous paragraphs viz., in paragraphs 8 and 9, the learned Judge has made an observation that the prayer sought for in I.A. No.446 of 2012 to exclude Survey Nos. 146/1 and 146/2 can also be accepted is an incorrect finding. Therefore, it is the contention of the petitioners that though the operative portion of the impugned order is correct, the observation recorded by the Trial Court is incorrect. Aggrieved by the

order, dated 29.04.2014 in I.A. No.446 of 2012, the instant Civil Revision Petition has been filed.

4. Heard Mr.M.S.Palanisamy, learned counsel for the petitioner; Mr.C.K.M.Appaji, learned counsel for the 2nd respondent and Mr.Tranquebar Doraivasu, learned counsel for the 3rd respondent. Despite service of notice on the first respondent /plaintiff and his name having been printed in the cause list today, no one has entered appearance on his behalf in this proceedings.

5. The learned counsel for the petitioner submits that the application filed by the 1st respondent /plaintiff in I.A .No. 446 of 2012 to exclude Survey Nos.146/1 and 146/2 is not maintainable, since final decree has been passed, as per the judgment and decree dated 22.02.2002 in A.S. No.160 of 1996, which covers the entire suit schedule property inclusive of Survey Nos.146/1 and 146/2. Apart from submitting that the application is not maintainable, the learned counsel for the petitioner would further submit that despite giving the right finding by directing the Advocate Commissioner Mr.R.Ramaswamy to divide the suit schedule property as per the preliminary decree, dated 22.02.2002 passed in A.S. No.160 of 1996,

a clarification will have to be given by this Court, since in paragraph Nos. 8 and 9 of the impugned order, the Trial Court has observed that the relief sought for by the first respondent / plaintiff in I.A. No.446 of 2012 to exclude the Survey Nos. 146/1 and 146/2 from partition can be accepted. According to him, this observation will confuse the Advocate Commissioner from executing the Advocate Commissioner 's warrant.

6. This Court finds force in the submission made by the learned counsel for the petitioner. Accordingly, the following order is passed :

a) The impugned order dated 29.04.2014 in I.A. No.446 of 2012 in O.S. No.119 of 1985 is hereby confirmed. However, the observation recorded by the Trial Court in the impugned order that the relief sought for by the first respondent / plaintiff to exclude Survey Nos.146/1 and 146/2 can also be accepted is hereby expunged.

b) The Advocate Commissioner appointed by the Trial Court under the impugned order shall execute the Advocate Commissioner's warrant by dividing the suit schedule properties without excluding any item and allot shares to the first respondent / plaintiff as well as second respondent / 1st

defendant in accordance with preliminary decree, dated 22.02.2002, passed in A.S. No.446 of 2012. Further, the learned Advocate Commissioner Mr.R. Rangasamy appointed by the Trial Court under the impugned order, dated 29.04.2014, if presently not available, the first respondent/ plaintiff shall file a memo before the Trial Court seeking for an appointment of a new Advocate Commissioner to execute the Advocate Commissioner's warrant as per the preliminary decree dated 22.02.2002, passed in A.S. No.446 of 2012.

7. With the aforesaid directions, the Civil Revision Petition stands disposed of. No costs. Consequently, connected miscellaneous petition is closed.

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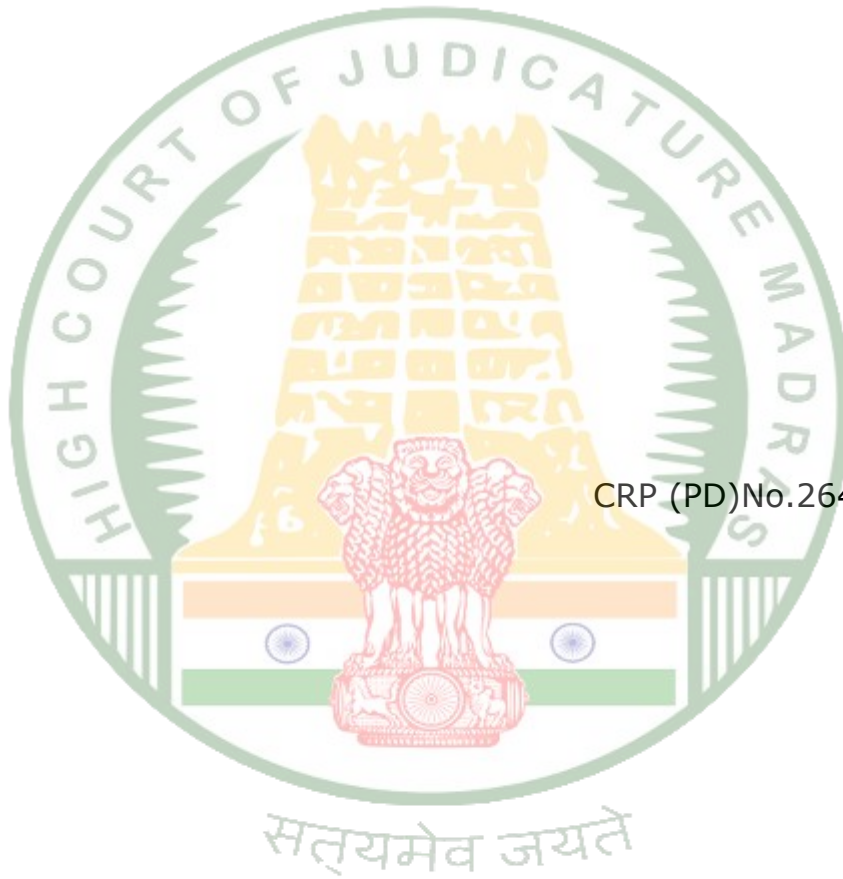
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ABDUL QUDDHOSE, J.

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To
The Sub Court,
Sankari.



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