

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.09.2020

CORAM:

THE HON'BLE MS.JUSTICE V.M.VELUMANI

C.R.P. (PD). No.499 of 2017
and C.M.P. No.2463 of 2017

1.Raman
2.Unnamalaiammal

... Petitioners

Vs

1.Chinnammal
2.Ramalingam

... Respondents

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decretal order dated 05.10.2016 made in I.A.No.465 of 2016 in I.A. No.1169 of 2010 in O.S. No.133 of 2006 on the file of the District Munsif Court, Sankari.

For Petitioner : Mr. P. Valliappan

For Respondent : Mr. N. Manoharan

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ORDER

This matter is heard through "Video Conferencing".

The present Civil Revision Petition is filed to set aside the fair and decretal order dated 05.10.2016 made in I.A.No.465 of 2016 in I.A. No.1169 of 2010 in O.S. No.133 of 2006 on the file of the District Munsif Court, Sankari.

2. The petitioners are plaintiffs and respondents are third parties in O.S.No.133 of 2006 on the file of the District Munsif Court, Sankari. The petitioners filed O.S.No.133 of 2006 against one Kuppan and 9 others for partition and separate possession. The defendants 6 and 7 were minors and a Court guardian was appointed for them, who filed a written statement. The other defendants remained exparte. By the judgment and decree dated 07.07.2010, a preliminary decree was passed. The petitioners filed I.A.No.1169 of 2010 for passing of final decree. The 1st defendant in the suit/1st respondent in I.A.No.1169 of 2010 filed for final decree, remained exparte and subsequently, died pending final decree proceedings. The respondents and one Mahalingam, who are the legal heirs of the said Kuppan/ 1st defendant were impleaded as respondents 11 to 13 in I.A.No.1169 of 2010,

filed for final decree proceedings. The respondents herein and the said Mahalingam filed counter affidavit in I.A.No.1169 of 2010, mentioning various averments with regard to preliminary decree and further stated that the preliminary decree was obtained by collusion. Subsequently, the respondents filed I.A.No.465 of 2016 for a permission to file additional counter affidavit in I.A.No.1169 of 2010. The petitioners opposed the same. The learned Judge considering the materials on record, allowed the said petition on condition that the respondents shall pay a sum of Rs.1,000/- as cost to the petitioners.

3. Against the said order dated 05.10.2016 made in I.A.No.465 of 2016 in I.A. No.1169 of 2010 in O.S. No.133 of 2006, the petitioners have come out with the present Civil Revision Petition.

4. Learned counsel appearing for the petitioners contended that the respondents did not challenge the preliminary decree and therefore, they are not entitled to question the preliminary decree indirectly in final decree proceedings. The 1st defendant was set exparte both in the suit as well as in

the final decree proceedings, thereby admitting the claim of the petitioners. The respondents who are the legal heirs of deceased 1st defendant cannot take a stand contrary to the stand taken by the 1st defendant. The respondents herein and the said Mahalingam filed counter affidavit in final decree proceedings and the learned Judge heard the arguments of counsel for petitioners in the final decree proceedings. After taking several adjournments, the respondents have filed the present I.A. only to drag on the proceedings by taking a fresh plea of non-joinder of necessary parties. The learned Judge failed to see that the plea of non-joinder of parties must be raised at the earliest point of time. The scope of final decree proceedings is very limited and only the shares as determined in the preliminary decree has to be divided and allotted to the petitioners. The present petition is filed only to drag on the proceedings in order to prevent the petitioners from enjoying the fruits of the decree passed in their favour.

5. The learned counsel appearing for the petitioners in support of his contention, relied on the following judgments:

(i) **2004-2-L.W. 614 (J. Vijaya Bhaskar and others Vs. J.**

Jayalakshmi and others):

“5. It is settled law that the persons, who are brought on record, as legal representatives of the deceased party, are not entitled to plead other than what has already been pleaded by the then existing party. The position would be different, if they are not brought on record as necessary or proper parties, as provided under O.1 Rule 10(2) CPC. In our case, the respondents are brought on record as the heirs and legal representatives of the deceased, defendant and therefore, the learned Advocate for the revision petitioners is absolutely correct in opposing the petition filed by the respondents that they should not be permitted to set up a new plea other than the one, which has already been pleaded by the then existing defendant. But, at the same time, the respondents are entitled to let in evidence based upon the pleadings, which have already been available before the Court and if any new matter is founded, on the basis of the records, they are also at liberty to put necessary and relevant questions to that effect. But, for that matter, the respondents cannot be permitted to file an additional written statement, setting up a new plea.”

(ii) 2015 (1) MWN (Civil) 739 (Selvamani and others Vs.

Chellammal and others):

“9. It is well settled proposition of law that a Preliminary Decree cannot be challenged in a Final Decree proceeding and the Court passing the Final Decree has to act, as per the Preliminary Decree, if it is not stayed or set aside by any Appellate forum. In this case, it is an admitted fact that while passing the Final Decree, the Preliminary Decree was not stayed or set aside by any Appellate Court. On the said circumstances, the Appellants cannot raise a plea, stating that the First Respondent, as guardian of the minor Second Respondent and on her own behalf had received Rs.1,100/- and relinquished their right in favour of his grand father and father of PW1 and such a plea would be nothing but challenging the Preliminary Decree in the Final Decree proceeding, which is not permissible under law.

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15. The said decision was relied upon in Gyarsi Bai and ors. v. Dhansukh Lal and ors., AIR 1965 SC 1055, wherein it was observed thus :

“It is true that a Preliminary Decree is final in respect of the matters to be decided

before it is made. It is indisputable that in a Mortgage Suit there will be two Decrees, namely Preliminary Decree and Final Decree, and that ordinarily the Preliminary Decree settles the rights of the parties and the Final Decree Works out those rights."

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17. It has been made clear that a distinction between a case in which an Appeal is filed against a Preliminary Decree and a case in which a Preliminary Decree is not appealed against and its correctness is not assailed, in the Appeal preferred against the Final Decree.

18. It is crystal clear that the Hon'ble Apex Court has ruled in various decisions that a Preliminary Decree is an appealable Decree, as per Section 97 of the Code of Civil Procedure. Aggrieved by any Preliminary Decree, Appeal could be preferred, however, Preliminary Decree cannot be challenged in the Final Decree proceeding."

6. Mr. N. Manoharan, learned counsel appearing for the respondents contended that the petitioners are not challenging the final decree, but challenging only the order allowing the I.A.No.465 of 2016, permitting the respondents to file additional counter affidavit in the final decree petition.

The contents in the counter affidavit can be heard and decided at the time of final decree proceedings. In the suit, except minor defendants 6 and 7 who are represented by the Court Guardian, others were set exparte. The suit for partition is not maintainable if necessary parties are not impleaded. Till the final decree is passed, the suit is pending and the Court holds the final decree. The final decree is not an appeal. The Hon'ble Apex Court has held that the additional written statement / counter affidavit can be filed at any time and the same cannot be rejected on the ground of appeal.

7. The learned counsel appearing for the respondents in support of his contention relied on the following judgments:

(i) **AIR 1965 SC 1055 (Gyarsi Bai and others. vs. Dhansukh Lal and others):**

“6. But the same cannot be said of the net receipts realized by mortgagee subsequent to the preliminary decree. None of the principles relied upon by the learned counsel for the appellants helps him in this regard. It is true that a preliminary decree is final in respect of the matters to be decided before it is made : see Venkata Reddy v. Pethi Reddy(1), and AIR 1963 SC 992 and S. 97 of the

Code of Civil Procedure. It is indisputable that in a mortgage suit there will be two decrees, namely, preliminary decree and final decree, and that ordinarily the preliminary decree settles the rights of the parties and the final decree works out those rights : see Talebali v. Abdul Aziz, ILR 57 Cal 1013: (AIR 1929 Cal 689 FB) and Kausalya v. Kauleshwar, ILR 25 Pat 305: (AIR 1947 Pat 113). It cannot also be disputed that mortgage merges in the preliminary decree and the rights of parties are thereafter governed by the said decree : see [Kusum Kumari v. Debi Prosad Dhandhanian](#), 63 Ind App 114: (AIR 1936 PC 63). But we do not see any relevancy of the said principles to the problem that arises in this case in regard to the liability of the mortgagee to account for the net receipts under S. 76(h) of the Transfer of Property Act. A preliminary decree is only concerned with disputes germane to the suit upto the date of the passing of the said decree. The net receipts of the mortgaged property by the mortgagee subsequent to the preliminary decree are outside the scope of the preliminary decree : they are analogous to amounts paid to a mortgagee by a mortgagor subsequent to the preliminary decree.”

(ii) (2009) 15 SCC 528 (Olympic Industries Vs. Mulla Hussainy

Bhai Mulla Akberally and others):

“10. So far as this ground is concerned, we do not find that delay is a ground for which the additional counter-statement could not be allowed, as it is well settled that mere delay is not sufficient to refuse to allow amendment of pleadings or filing of additional counter-statement. At the same time, delay is no ground for dismissal of an application under Order 8 Rule 9 of the Code of Civil Procedure where no prejudice was caused to the party opposing such amendment or acceptance of additional counter-statement which could easily be compensated by costs. That apart, the delay in filing the additional counter-statement has been properly explained by the appellant.

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14. In our view, this is also not a ground for which the High Court could interfere with the concurrent orders of the Rent Control Tribunal and reject the application for permission to file additional counter-statement. In our view, even by filing an amendment or additional counter-statement, it is open to the appellant to add a new ground of defence or substituting or altering the defence or even

taking inconsistent pleas in the counter-statement as long as the pleadings do not result in causing grave injustice and irretrievable prejudice to the plaintiff or displacing him completely. (See Usha Balashaheb Swami v. Kiran Appaso Swami, SCC p. 612, para 27.) Therefore, we are unable to agree with the High Court on this ground as well.

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16. As noted hereinafter, the only ground on which the High Court had rejected the acceptance of the additional counter-statement was (i) by filing of such additional counter-statement, the appellant was introducing a new case; and (ii) the entire trial was to be reopened causing great prejudice to the respondents whose examination was completed. It was also observed by the High Court that the appellant cannot be able (sic allowed) to take such inconsistent plea by filing additional counter-statement after cross-examination of the appellant. In our view, the High Court was in error in interfering with the concurrent orders of the Rent Control Tribunal, as from the fact stated we find that no prejudice was caused to the respondents and even if some prejudice was caused that could be compensated by costs.

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18. It is also well settled that while allowing the

additional counter-statement or refusing to accept the same, the Court should only see that if such additional counter-statement is not accepted, the real controversy between the parties could not be decided. As noted hereinafter, by filing an additional counter-statement in the present case, in our view, would not cause injustice or prejudice to the respondents but that would help the Court to decide the real controversy between the parties. In our view, the High Court was, therefore, not justified in rejecting the application for permission to file additional counter-statement as no prejudice could be caused to the respondent which would otherwise be compensated in terms of costs.”

(iii) (2009) 9 Supreme Court Cases 689 (Shub Karan Bubna Alias

Shub Karan Prasad Bubna Vs. Sita Saran Bubna and others):

“20. On the other hand, in a partition suit the preliminary decrees only decide a part of the suit and therefore an application for passing a final decree is only an application in a pending suit, seeking further progress. In partition suits, there can be a preliminary decree followed by a final decree, or there can be a decree which is a combination of preliminary decree and final decree or

there can be merely a single decree with certain further steps to be taken by the court. In fact, several applications for final decree are permissible in a partition suit. A decree in a partition suit enures to the benefit of all the co-owners and therefore, it is sometimes said that there is really no judgment-debtor in a partition decree.

21. A preliminary decree for partition only identifies the properties to be subjected to partition, defines and declares the shares/rights of the parties. That part of the prayer relating to actual division by metes and bounds and allotment is left for being completed under the final decree proceedings. Thus the application for final decree as and when made is considered to be an application in a pending suit for granting the relief of division by metes and bounds.”

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

9. The petitioners have filed the present Civil Revision Petition challenging the order allowing the I.A. to file additional counter affidavit by

the respondents. The respondents are the legal heirs of the deceased first defendant. The defendants in the suit except defendants 6 and 7, who are minors represented by the Court guardian, did not file written statement and preliminary decree for partition was passed. The petitioners filed I.A.No.1169 of 2010 for passing final decree. The 1st defendant did not file counter in the I.A. filed for final decree proceedings and he died pending petition. The respondents and one Mahalingam were impleaded as legal heirs of the deceased 1st defendant. They filed counter affidavit in I.A.No.1169 of 2010. Subsequently, they filed I.A.No.465 of 2016 for permission to file additional counter affidavit which was allowed. It is the contention of the learned counsel appearing for the petitioners that the legal heirs of the deceased 1st defendant is not entitled to take a stand contrary to the stand taken by the deceased 1st defendant. The further contention of the learned counsel appearing for the petitioners is that preliminary decree cannot be challenged in final decree proceedings.

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10.It is well settled that final decree proceedings is continuation of suit and the shares allotted to the parties have to be divided by metes and bounds

and allot specific properties to the parties. The Courts cannot go beyond the preliminary decree, modify or vary the share allotted to the parties in the preliminary decree. The judgment reported in **2015 (1) MWN (Civil) 739, [Selvamani and others Vs. Chellammal and others]** cited supra relied on by the learned counsel appearing for the petitioners is squarely applicable to the facts of the present case.

11. The contention of the learned counsel appearing for the respondents that petition for permission to file additional counter must be considered liberally and delay in seeking such permission is not a ground to dismiss the said petition. According to the learned counsel appearing for the respondents, the respondents can take new grounds substituting or altering earlier stand and also can take contrary stand. The learned counsel appearing for the respondents relied on the judgment of the Hon'ble Apex Court reported in **(2009) 15 SCC 528, [Olympic Industries Vs. Mulla Hussainy Bhai Mulla Akberally and others]** in support of his contention. The said judgment does not advance the case of the respondents. In the said judgment, the Hon'ble Apex Court has held that the application for additional counter must be

considered generously than the amendment of the plaint of the suit. At the same time, in the very same judgment, the Hon'ble Apex Court has held that if grave injustice is caused or an irretrievable prejudice displacing other side completely is caused, the permission to file additional counter should not be granted.

12. In the present case, the respondents are seeking to file additional counter affidavit challenging the preliminary decree itself relying on certain documents alleged to have come to their knowledge. The 1st defendant or the respondents herein have not challenged the preliminary decree. The preliminary decree has become final. This Court in the judgment reported in **2015 (1) MWN (Civil) 739, [Selvamani and others Vs. Chellammal and others]**, cited supra relied on by the learned counsel appearing for the petitioners has categorically held that preliminary decree cannot be challenged in final decree proceedings. However, the Hon'ble Apex Court in the judgment reported in **(2009) 15 SCC 528, [Olympic Industries Vs. Mulla Hussainy Bhai Mulla Akberally and others]**, cited supra relied on by the learned counsel appearing for the respondents, has held that if grave injustice

is done or other side is prejudiced displacing him completely, permission to file additional counter cannot be granted. In as much as the respondents are trying to set aside the preliminary decree, which will completely displace the petitioners, the respondents are not entitled to file additional counter. The learned Judge failed to consider the above facts and erroneously allowed the petition granting permission to file additional counter affidavit. The order of the learned Judge is erroneous and the learned Judge has committed irregularity and illegality. Therefore, the order of the learned Judge is liable to be set aside and it is hereby set aside and I.A.No.465 of 2016 filed by the respondents is dismissed.

13.In the result, the Civil Revision Petition is allowed. Consequently the connected Miscellaneous Petition is closed. No costs.

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Index: Yes

Speaking Order/ Non-speaking order

V.M.VELUMANI,J.

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To

The District Munsif,
Sankari.



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