

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.03.2021

PRONOUNCED ON : 23.04.2021
CORAM

THE HON'BLE Mr. JUSTICE **G.K.ILANTHIRAIYAN**

C.R.P.(N.P.D) No.3078 of 2015
and CMP No.1 of 2015

- 1.Douglas (died)
- 2.Melki
- 3.Sahayaraj
- 4.Fathima Mary
- 5.Rozoria

[1st petitioner died. Recorded as per the memo dated 14.12.2020 (SR.19997) and vide Court order dated 17.12.2020 made in CRP.3078/15 (PRMJ)]

... Petitioners

Vs.

- 1.Parimala Merry
- 2.Beula Sagayamary
- 3.Harry Bernad
- 4.Edwin Lobo
- 5.Josephine Mary
- 6.Uthirai Mary
- 7.Paulin Mary
- 8.Priya Thomas
- 9.Francis Thomas
- 10.Moala
- 11.Renot

(The respondents 5 to 11 herein are given up in this CRP)

... Respondents

Prayer :- Civil Revision Petition is filed under Article 227 of the Constitution of India, to strike down the execution petition in E.P.No.787 of 2012 in O.S.No.7828 of 1993 on the file of the IX Assistant Judge, City Civil Court, Chennai.

For Petitioners : Mr.S.Subbiah, Senior Counsel
for Elizabeth
For R1 to R4 : Mr.L.Dhamodaran
For R5 to R11 : Given up

ORDER

This Civil Revision Petition has been filed to strike down the execution petition in E.P.No.787 of 2012 in O.S.No.7828 of 1993 on the file of the IX Assistant Judge, City Civil Court, Chennai.

2. The learned Senior Counsel submitted that the petitioners are the defendants 5 to 9 in the suit filed by the father of the respondents 1 to 4 herein for partition and separate possession along with a direction directing the second defendant in the suit to render a true and correct account in respect of the suit property. The suit was dismissed by the Judgment and Decree dated 29.08.2002. Aggrieved by the same, the respondents 1 to 4 filed an Appeal Suit in A.S.No.269 of 2005 and the same was allowed by the Judgment and Decree dated 08.07.2008. Aggrieved by the same, the petitioners preferred a Second Appeal before

this Court in S.A.No.926 of 2014. This Court partly allowed the appeal and modified the preliminary decree only to the extent of superstructure alone and in other aspects the decree passed by the First Appellate Court was confirmed. Thereafter, the respondents filed an application for final decree in I.A.No.10802 of 2009, which is pending. Without even passing any final decree, the respondents 1 to 4 filed an Execution Petition in E.P.No.787 of 2012 in respect of the decree for render of true and correct accounts of the income derived from the suit property from the year 1993 till the date of partition. He further submitted that the Execution Petition is not at all maintainable under Order 21 Rule 32 of CPC . The Order 21 Rule 32 is meant for the decree of specific performance, for restitution of conjugal rights and for injunction.

3. In the case on hand, the suit is for partition, in which directed to render accounts till partition. The Appellate Court decree is un-executable by levying Execution Petition enactments and no final decree having been passed insofar as mense profit as reflected in Sub Class IV of the Order 20 Rule 12 of CPC. In terms of the said provision in the final decree application, they have to conduct an enquiry regarding

mense profit and after determination of it subject to the objections if any, raised by any party and then pass a decree upon the payment of Court fee as determined thereon. Admittedly, the Execution Petition has been filed by the respondent with a prayer to pass an order to bring the petitioners for violation of the orders passed in the Appeal Suit arrest and detention. Therefore, the Execution Petition itself is not maintainable and it is liable to be strike off.

4. Per contra, the learned counsel for the respondents would submit that in the Appeal Suit, there is a categorical direction directing the petitioners to render true and correct accounts of the income derived from the suit property from the year 1993 till the date of partition. Though the direction was issued in a suit for partition, it can be executable under law. The second limb of the decree is used in Section 2 (2) of CPC. Therefore, it is executable one. The purpose for passing final decree is only in respect of the division of property alone in the partition suit by appointment of Advocate Commissioner. In respect of mense profit by rendering accounts statements for the suit property it has become final and it is very well executable. In support of his contention,

he relied upon an un-reported Judgment of this Court in CRP (NPD) No.2799 of 2014 dated 03.07.2019.

5. Heard Mr.S.Subbiah, learned Senior Counsel appearing for the petitioners and Mr.L.Dhamodaran, learned counsel appearing for the respondents 1 to 4.

6. The petitioners are the defendants 5 to 9 in the suit filed by the respondents 1 to 4 herein, for partition and separate possession of his 1/6th share in the suit property. He also prayed for direction directing the second defendant in the original suit and his legal heirs in the present Civil Revision Petition as petitioners to render a true and correct account of income derived from the suit property. The suit filed by the respondents 1 to 4 and the same was dismissed by the Judgment and Decree dated 29.08.2002. Aggrieved by the same, the respondents 1 to 4 filed an Appeal Suit in A.S.No.269 of 2005 and the same was allowed and allotted 1/6th share to the original deceased plaintiff. The petitioners are directed to render true and correct accounts of the income derived from the suit property from the year 1993 till the date of partition.

Aggrieved by the same, the petitioners filed a Second Appeal in S.A.No.926 of 2014 and the same was partly allowed with a modification of the Decree passed by the First Appellate Court as that there shall be a preliminary decree for partition only for leasehold right and for superstructure, thereby allotting 1/6th share to the respondents 1 to 4 herein. The respondents 1 to 4, on the strength of the decree passed by the First Appellate Court, filed an Execution Petition in E.P.No.787 of 2012 to arrest the petitioners herein for violation of the order passed by the First Appellate Court, thereby directed to render true and correct accounts of the income derived from the suit property from the year 1993. The petitioners have come forward with the present Civil Revision Petition to strike down the Execution Petition on the ground that it is not at all maintainable without passing any final decree.

7. When the suit is filed for partition it deemed to be pending till the final decree is passed and when the suit is deemed to be pending the present Execution Petition is abuse of process of Court. Therefore, the Execution Petition seeking arrest for non-rendering accounts under Order 21 Rule 32 is not at all maintainable. Without any decree as

contemplated under Section 2 (2) of CPC, the Execution Court cannot execute the decree as provided under Section 51 of the Civil Procedure Code.

8. Admittedly, the deceased plaintiff filed a suit for partition and direction to render accounts for the income derived from the suit property. Though the Trial Court has dismissed the suit, the First Appellate Court decreed the suit and allotted 1/6th share in the suit property and also decreed the suit for rendering accounts for the suit property from the year 1993 till the date of partition. However, it is modified by this Court as to the respondents are entitled to 1/6th share in the suit property only for leasehold right and for superstructure. Though, this Court did not render finding in respect of rendering accounts, the second limb of the decree passed by the First Appellate Court cannot be separated from the first limb of the decree, thereby allotting 1/6th share in the suit property. Therefore, in a suit for partition, the partition or separation cannot be conveniently made without further enquiry and passing a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required.

9. Thus, the Court has required to pass preliminary decree declaring the rights of several parties interested in the property. Therefore, the preliminary decree for partition is only a declaration of the rights of the parties and their shares. They are in the joint family or coparcener property, which is subject matter of the suit. The final decree should specify the division by metes and bounds and it metes to be engrossed in the stamp papers.

10. The learned counsel for the respondent relied upon a Judgement of this Court in CRP (NPD) No.2799 of 2014 in which, this Court relied upon the Judgement reported in **(1995) 3 SCC 413 [Shankar Balwant Lokhande V. Chandrakant Shanker Lokhande]**. The Hon'ble Supreme Court of India held that the final decree may be said to have become final in two ways. The relevant portion of the said judgment is extracted hereunder :-

"Both the decrees are in the same suit. Final decree may be said to become final in two ways : (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court ; (ii)

when, as regards the court passing the decree, the same stands completely disposed of. It is in the latter sense the word 'decree' is used in Section 2(2) CPC. The appealability of the decree will, therefore, not affect its character as final decree. The final decree merely carries into fulfilment the preliminary decree".

11. This Court relied upon the said Judgment and dismissed the Civil Revision Petition, questioning the execution of the part of the decree in respect of recovery of possession alone. In that case, the plaintiff filed a suit for recovery of possession in respect of "A" Schedule property and prays for partition in respect of "B" Schedule property. The suit was decreed and the same was also confirmed by the Hon'ble Supreme Court of India. Therefore, the plaintiff filed an Execution Petition in respect of recovery of possession alone from the defendants. The said proceedings was under challenge before this Court in the above Civil Revision Petition and this Court held that the prayer for recovery of possession can be executed and in respect of partition, the final decree should be passed and dismissed the Civil Revision Petition.

12. In the case on hand, the deceased plaintiff filed a suit for

partition and direction to render accounts for the suit property. Finally, the preliminary decree was passed and allotted 1/6th share in respect of the suit property only with regard to leasehold rights and the superstructure and also directed the petitioners to render accounts. Therefore, both the prayers are not separable one and without passing final decree, it cannot be executable one. Therefore, the above judgment cited by the counsel for the respondent is not helpful to the case on hand.

13. That apart, in the Judgment cited by this Court reported in **1995 (3) SCC 413 [Shankar Balwant Lokhande V. Chandrakant Shankar Lokhande]**, the Hon'ble Supreme Court had raised an issue as to when the limitation begins to run for filing an application to pass final decree on stamped papers. In fact, the Hon'ble Supreme Court of India held that in a partition suit without passing final decree it cannot be executed. The relevant portion of the Hon'ble Supreme Court of India held as follows:-

"3. Order 20 Rule 7 of CPC envisages that the decree "shall bear the day on which the judgment was pronounced, and, when the judge has satisfied himself that the decree has been drawn up in

accordance with the judgment, he shall sign the decree". Section 2(2) of CPC defines "decree" to mean "the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final". A preliminary decree is one which declares the rights and liabilities of the parties leaving the actual result to be worked out in further proceedings. Then, as a result of the further inquiries conducted pursuant to the preliminary decree, the rights of the parties are fully determined and a decree is passed in accordance with such determination which is final. Both the decrees are in the same suit. Final decree may be said to become final in two ways: (i) when the time for appeal has expired without any appeal being filed against the preliminary decree or the matter has been decided by the highest court; (ii) when, as regards the court passing the decree, the same stands completely disposed of. It is in the latter sense the word "decree" is used in, s.2(2) of CPC. The appealability of the decree will, therefore, not affect its character as a final decree. The final decree merely carries into fulfillment the preliminary decree.

4. Order 20 Rule 18 envisages passing of a decree for partition of property or for separate possession of a share therein. Sub-r. (2) is material which provides that "if and in so far as such decree relates to any other immovable property or to movable property, the Court may, if the partition or separation cannot be conveniently made without further inquiry, pass a preliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required". (Emphasis ours) Thus, it could be seen that where the decree relates to any immovable property and the partition or separation cannot be conveniently made without further inquiry, then the court is required to pass a preliminary decree declaring the rights of several parties interested in the property. The court is also empowered to give such further directions as may be required in this behalf. A preliminary decree in a partition action, is a step in the suit which continues until the final decree is passed. In a suit for partition by a coparcenar or cosharer, the court should not give a decree only for the plaintiffs share, it should consider shares of all the heirs after making them parties and then to pass a preliminary decree. The words "declaring the rights of the several parties

interested in the property" in sub-rule(2) would indicate that shares of the parties, other than the plaintiff(s), have to be taken into account while passing preliminary decree. Therefore, preliminary decree for partition is only a declaration of the rights of the parties and the shares they have in the joint family or coparcenary property, which is the subject-matter of the suit. The final decree should specify the division by metes and bounds and it needs to be engrossed on stamped paper."

Therefore, preliminary decree for partition is only a declaration of rights of the parties and the shares, they have in the joint family or coparcenary property, which is the subject matter of the suit. The final decree should specify the division by metes and bounds and it needs to be engrossed on stamp papers.

14. That apart, the Execution Court cannot execute the decree without a preliminary decree passed in terms of the provisions contemplated under Order 20 Rule 12 of CPC. Therefore, the impugned execution proceedings without final decree in the partition suit cannot be executed and it is liable to be strike down and the proceedings is hereby

struck off. Accordingly, this Civil Revision Petition is allowed. No costs.

Consequently, connected Miscellaneous Petition is closed.

23.04.2021

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Index: Yes/No

Internet: Yes/No

Speaking Order: Yes/No

To

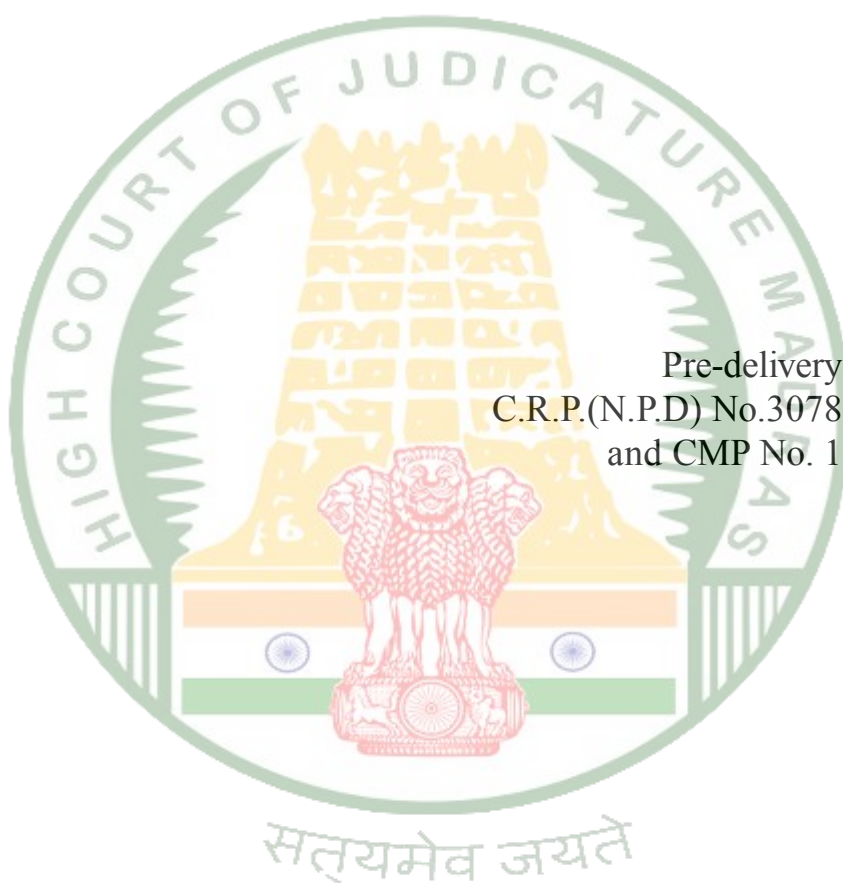
The IX Assistant Judge,
City Civil Court, Chennai.



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G.K.ILANTHIRAIYAN.J,

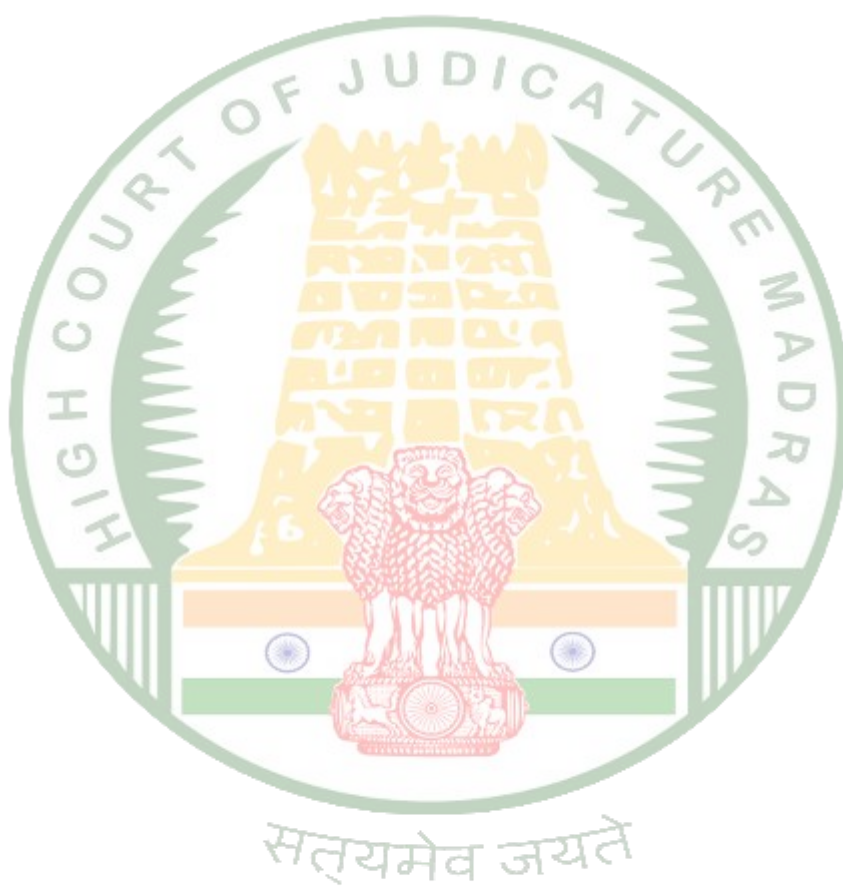
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