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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.11.2021

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

CRP.No.2841 of 2019

and

CMP.No.18597 of 2019

[Video Conferencing]

1.Mahaboob Bee (Died)

2.Babu

3.Firoz Khan (Died)

4.Lalan

5.Shahidha

6.Aabhidha

7.Faridha

....Petitioners/Petitioners/Respondents 4,5,6,7,8 & 9/
Defendants 4,6,7,8 & 9

Vs.

1.Amina Bee (Died)

2.M.Malik JanRespondents 1,2/Petitioners/Plaintiffs

3.Ameer Khan

4.Gaffar Khan @ Chan Badsha

5.Salem Fort East Street Masjid Committee
Represented by its Mutawalli

6.Shainshah

7.Abdul Supan



8.Abdul Rafiq

9.Rahamatulla

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..... Respondents 3,4,5,10,11 to 14/
Respondents 3,4,5,10,11 to 14/
Defendants 3,4,5,10,11 to 14

Prayer:- Civil Revision Petition filed under section 115 of CPC to set aside the judgment and decree in Un-numbered R.E.A.Sr.No.6838 of 2019, dated 16.08.2019 in R.E.P.No.44 of 2011 in I.A.No.306 of 2006 in O.S.No.468 of 1997, on the file of I Additional Subordinate Judge, Salem and direct the Court to number the R.E.A.Sr.No.6838 of 2019 in R.E.P.No.44 of 2011 on the file of I Additional Subordinate Judge, Salem and dispose the same on merits.

For Petitioners :S.Kousik

For Respondents :Mr.T.Murugamanickam,
Senior Counsel
for Ms.Zeenuth Begum, for R2

R1, RR3 & 4-Died
R5-Served-NA
RR6 to 9-Not ready notice

ORDER

The present Civil Revision Petition has been filed by the petitioners who are defendants 4, 6, 7, 8 and 9 in O.S.No.468 of 1997 on the file of the Ist Additional Subordinate Court, Salem.

2.The respondents 1 and 2 herein as plaintiffs filed the suit in O.S.No.468 of 1997 on the file of the Ist Additional Subordinate Court, Salem for partition of their 1/5th share in the suit property. The suit property was described in the plaint as a land measuring an extent of 1407 sq.ft along with a tiled building comprised in Old Town Survey No.949, New Town Survey No.38, bearing Old Door No.7/949 and New Door No.1/949, Salem Town, Fort, Ward G. Block No.14. The measurements and boundaries were also stated in the description of the property.

3.It is admitted that a preliminary decree was passed on 18.10.2004. It is also pertinent to mention that the preliminary decree was passed as the defendants 1 to 9 remained exparte. However, the judgment of the Trial Court granting 1/5th share to



the plaintiffs has become final as no one has challenged the preliminary decree.

4. Thereafter, the respondents 1 and 2 filed an application for passing of final decree after appointment of an Advocate Commissioner. Pursuant to the same, an Advocate Commissioner was appointed for division of the properties by metes and bounds. It is also admitted by the petitioners herein that the Advocate Commissioner filed a report to the effect that the property is not divisible as the total extent is meagre and that division of such small extent will not be in the interest of the parties. Nevertheless, the lower Court accepted the division as suggested by the Advocate Commissioner based on Plan I. The entire property lies on the southern side of the road known as Thuffail Ahamed Saheb street. Since the total length of the property is 52 feet and breadth is around 22 feet, the property was divided in blocks measuring approximately 9 to 10 feet on North-South and 22 to 23 feet on East-West.

5. Further, it is seen from Plan I which was accepted by the Trial Court for passing of the final decree, that the total extent allotted is around 1430 sq.ft. It is to be seen that the report filed by the Advocate Commissioner along with the plan also indicates that the total extent available and identified as suit property is 1430-1/4 sq.ft. Therefore, the extent of land available is not an issue. Further, it is pertinent to note that the measurements of the plan taken by the plaintiffs for suggesting a new division tally with the measurements of the plan of the Advocate Commissioner. Therefore, the plaintiffs submitted a memo raising objection as to the Commissioners report suggesting that the division of the suit property in 5 equal shares is not possible. Thereafter, the final decree application was taken up. None of the defendants who were shown as respondents turned up before the lower Court when the application for passing of final decree was taken up. The Trial Court passed the final decree accepting the plan filed by the plaintiffs, wherein a division was suggested giving almost equal share in value as distributed among all the sharers. Thus, the final decree was passed on 29.03.2010. Further, it is admitted that the revision petitioners had earlier made an attempt to set aside the exparte final decree proceedings. However, the said application was also dismissed on merits against which C.R.P.Nos.1257 and 1258 of 2014 were filed before this Court. The said Civil Revision Petitions were also dismissed by this Court.

6. Thereafter, the revision petitioners filed an application under Section 47 of CPC when the plaintiffs filed an



application in R.E.P.No.44 of 2011 for recovery of possession of the property which was allotted to the plaintiffs in the final decree. In the said application filed under Section 47 of the CPC, the revision petitioners after narrating the facts pointed out that the division of more extent i.e., taking the property as a land measuring an extent of 1430 sq.ft to pass final decree will amount to excessive execution and the the petition to execute the final decree should be dismissed in limine. Therefore, the prayer in the petition filed under Section 47 of CPC was to dismiss the Execution Petition. The said application was originally returned by the lower Court for some defects. When the petition filed by the revision petitioners was re-presented, the counsel appearing for the revision petitioners before the lower Court made the following endorsements:

"1.With regard to the return no.1, it is respectfully submitted that when the decree directs division only 1407 sq.ft, there cannot be an excess extent of 23 sq.ft. The self-serving plan of the plaintiff when is in complicit with the measurement mentioned in the decree, the executing court alone determine it.

1956 AIR 359,

(Para 25 is the precedent that is relied on for this proposition)

2.So far as return no.2 is concerned, out of the total extent of 1430 sq.ft, an extent of 260 sq.ft is set apart for common way as per plan no.1 and the remaining has been divided as A,B,C,D,R. This is again contrary to the total extent mentioned in the plaint. Preliminary decree and final decree.

3.The legal heirs of late Azeez Khan who are respondents 3 to 9 are entitled to 2/5 and the legal heirs of later Ameer Khan who are respondents 11 to 14 are entitled to 2/5 shares. Plaintiff has got 1/5 share. This share allotment has been admitted by the plaintiff himself.

4.The petitioners are parties to the E.P. The suit is one for partition. Petitioners, being co-owners, are entitled to the remaining 4/5 share.

5.Precedent Produced."

7.At this juncture, it would be appropriate to extract Section 47 CPC which reads as follows:

"47.Questions to be determined by the Court executing decree.-(1) All questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be



determined by the Court executing the decree and not by a separate suit.

(2).....

(3) Where a question arises as to whether any person is or is not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

2[Explanation 1.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed are parties to the suit.

Explanation II—(a) For the purposes of this section, a purchaser of property at a sale in execution of a decree shall be deemed to be a party to the suit in which the decree is passed; and

(b) all questions relating to the delivery of possession of such property to such purchaser or his representative shall be deemed to be questions relating to the execution, discharge or satisfaction of the decree within the meaning of this section.]”

A bare reading of the aforesaid provision would reveal that the all the issues raised between the parties in a suit relating to execution, discharge or satisfaction of the decree should be determined by the Court executing the decree. However, this Court is unable to find any merits in the application as the whole petition filed under Section 47 CPC is bereft of any particulars as to the genuine grievance of the petitioner in accepting the final decree as such.

8.It is to be noted that the Advocate Commissioner appointed had categorically given the total extent as 1430 sq.ft. In such circumstances, the allotment suggested by the respondents/plaintiffs was only in accordance with the report of the Advocate Commissioner which was not put to any challenge by the petitioners herein at any point of time. Though the Advocate Commissioner's report was objected by the plaintiffs themselves for getting the final decree, the petitioners herein have never expressed any grievance either about the Advocate Commissioner's report or about the allotment of shares in the suit property. Assuming that the petitioner is having any valid reason to challenge the final decree, his remedy is only to file an appeal. The defendants who have lost the suit and suffered the final decree cannot intentionally challenge the final decree in a collateral proceedings particularly by resorting to Section 47 of CPC.



9.The scope and object of Section 47 CPC is not to permit the defendants in the suit to come up with grievance one after the other without resorting to the remedy that is available under the law. In the present case, the application filed by the petitioners are not in relation to the execution or satisfaction of the decree. The final decree passed in this case determined the rights of the parties to specific area which was allotted or suggested in the decree. Once the final decree is passed, the allotment of share as per the final decree is only a formality. The Execution Petition is filed only to get possession as per the allotment made by the Court in the final decree.

10.In that view of the matter, this Court is of the view that there is no bonafide for the revision petitioners to file an application under Section 47 CPC. The attempt appears to stall the EP proceedings and delay the process of the Court. The respondents who got the decree in their favour in the year 2010 is unable to get possession of the property, even though the final decree was passed on 29.03.2010.

11.Having regard to the facts mentioned and admitted before this Court, this Court do not find any merits in the matter and this Court is of the view that the revision petitioners have come forward with the present petition only to drag on the proceedings and to prevent the respondents/plaintiffs from the enjoying the fruits of the decree without any bonafide grievance.

12.In fine, the Civil Revision is petition is dismissed with a cost of Rs.1000/-. Consequently, connected miscellaneous petition is also closed.

Sd/-

Assistant Registrar(CCC)

// True Copy //

Sub Assistant Registrar

pgp

To

The I Additional Subordinate Judge,
Salem



+1cc to Mrs.Zeenath Begum, Advocate SR.No.60070

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EV (CO)
CB (02/12/2021)

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