IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.10.2021

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD)No.2370 of 2017
and C.M.P.No.11175 of 2017

1.K.Shanmugam
2.K.Kesavamoorthy ... Petitioners

Vs.

1.A.Rajeswari
2.K.Gopalakrishnan
3.Antony Samy ... Respondents

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 28.03.2017 made in I.A.No.1029 of 2013 in O.S.No.234 of 2008 on the file of the III Additional Sub Court, Coimbatore.

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For Petitioner : Mr.Sayed
for Mr.R.Bharath Kumar

For R1 : Mr.Dineshkumar
for Mr.D.Ravichander

ORDER

Civil Revision Petition is filed against the fair and decretal order dated 28.03.2017 made in I.A.No.1029 of 2013 in O.S.No.234 of 2008 on the file of the III Additional Sub Court, Coimbatore.

2.The petitioners are defendants 2 and 4, 1st respondent is the plaintiff, the respondents 2 and 3 are defendants 3 and 5 in O.S.No.234 of 2008 on the file of the III Additional Sub Court, Coimbatore. The 1st respondent filed the said suit against her mother Sarojini as 1st defendant, petitioners and respondents 2 and 3 for partition of the suit property claiming 1/5th share in the suit property. In the said suit, a compromise was arrived and 1/5th share of 1st respondent was admitted. As per the

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compromise, the petitioners have agreed to purchase the 1/5th share of 1st respondent for a total sale consideration of Rs.8,00,000/-. Based on the compromise arrived, a preliminary decree was passed on 12.11.2010. As per the preliminary decree, the petitioners have deposited a sum of Rs.2,00,000/- in the Bank account of the 1st respondent and the petitioners have to pay the balance amount of Rs.6,00,000/- in four years equally on or before the year 2013. As per the preliminary decree, the 1st respondent must issue receipt for the payment received by her and copy of such receipt must be kept by her. On the payment of Rs.6,00,000/-, the 1st respondent must execute the sale deed of her 1/5th share in favour of the petitioners. If the petitioners have failed to pay the amounts as agreed upon, the 1st respondent can file final decree application for her share after depositing the amounts received by her.

सत्यमेव जयते

3.According to the 1st respondent, the petitioners did not pay any amounts as per the memo of compromise and pay the balance amount of Rs.6,00,000/- as per memo of compromise and preliminary decree. In

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view of the same, the 1st respondent after depositing Rs.2,00,000/- filed the present application in I.A.No.1029 of 2013 under Order XXVI Rule 96 read with Section 151 of C.P.C. for appointment of an Advocate Commissioner for passing of final decree. The 1st respondent has also stated that after passing preliminary decree, the mother of the parties, Sarojini/1st defendant died intestate and her 1/5th share devolved on the 1st respondent, petitioners and 2nd respondent and therefore, the 1st respondent is entitled to 1/4th share in the suit property and filed I.A.No.1029 of 2013 claiming 1/4th share in the suit property.

4.The petitioners and 2nd respondent filed counter affidavit and stated that the 1st petitioner has paid a sum of Rs.3,25,000/- and 2nd petitioner paid a sum of Rs.1,75,000/- on various dates to the 1st respondent by cash. The 1st respondent being the elder sister, they did not insist for formal receipts and they have note down the various payments made by them in their diary. When they offered to pay the balance sum of

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Rs.1,00,000/- and requested the 1st respondent to execute the sale deed, she refused to receive Rs.1,00,000/- and execute the sale deed in favour of the petitioners and also denied receipt of various payments. The petitioners have given complaint against the 1st respondent before the Crime Branch, Coimbatore, alleging fraud committed by the 1st respondent and the same is being investigated.

5.The 1st respondent filed reply affidavit and denied various averments made in the counter affidavit.

6.The petitioners filed additional counter affidavit reiterating the very same averments made in the counter affidavit filed by them.

7.Before the learned Judge, the petitioners examined themselves as R.W.1 and R.W.2, marked diary as Ex.R1, 1st petitioner's Bank Passbook as Ex.R2, examined one P.Suseendran as R.W.3, who deposed that complaint given by the petitioners was closed and marked Ex.R3,

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examined one Krishnakumari as R.W.4 and marked four other documents.

8.The learned Judge considering the averments made in the affidavit, counter affidavit, both oral and documentary evidence and memo of compromise entered into between the petitioners and 1st respondent, rejected the contention of the petitioners holding that the petitioners have not produced proof for payment as per the preliminary decree, appointed an Advocate as Commissioner for division of the property.

9.Against the said fair and decretal order dated 28.03.2017 made in I.A.No.1029 of 2013 in O.S.No.234 of 2008, the petitioners have come out with the present Civil Revision Petition.

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10.The learned counsel appearing for the petitioners contended that the learned Judge has committed an error in appointing an Advocate

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Commissioner in I.A.No.1029 of 2013 to measure the suit property in a case where the parties to the dispute settled the differences amicably by way of compromise. The learned Judge failed to see that the 1st respondent did not subject herself for being examined and being cross-examined with regard to veracity of the stand taken by her. In the absence of the evidence, the learned Judge ought to have taken adverse inference against the 1st respondent. The learned Judge ought to have considered the attitude of the 1st respondent denying receipt of amount as per the compromise decree. By receipt of part of amount as per the compromise decree, the said decree was acted upon and the 1st respondent is not entitled to file application for final decree. The learned Judge atleast ought to have directed the petitioners to deposit the disputed amount with reasonable interest to decide the issue and prayed for allowing this Civil Revision Petition.

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11.Per contra, the learned counsel appearing for the 1st respondent contended that after preliminary decree, the petitioners did not pay any

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amount and have come out with false case that they have paid Rs.5,00,000/- on various dates by cash. As per the memo of compromise, the 1st respondent must issue receipt for the amounts received and copy must be kept with her and also filed in the Court. Inspite of specific terms of the memo of compromise, the statement of the petitioners that they believed and trusted the 1st respondent, who is their elder sister, did not insist for formal receipt, is unacceptable. The learned Judge considering all the materials, rejected the contention of the petitioners by giving cogent and valid reasons and prayed for dismissal of the Civil Revision Petition.

12.Heard the learned counsel appearing for the petitioners as well as the learned counsel appearing for the 1st respondent, who is appearing before this Court physically and perused the entire materials on record.

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13.From the materials on record, it is seen that the suit property belonged to Kandasamy, father of the petitioners, respondents 1 and 2

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and the same is his self-acquired property. He died intestate leaving behind the petitioners, respondents 1 and 2 and his wife Sarojini. The petitioners and respondents 1 and 2 are sons and daughter of said Kandasamy. The 1st respondent filed suit in O.S.No.234 of 2008 against her mother Sarojini as 1st defendant, the petitioners as defendants 2 and 4, 2nd respondent as 3rd defendant and one Antonysamy as 5th defendant for partition of suit property and to allot 1/5th share in the suit property to her. The parties have settled the matter, entered memo of compromise and as per the memo of compromise, 1/5th share of 1st respondent was admitted by the petitioners and 2nd respondent. The petitioners have agreed to purchase 1/5th share of 1st respondent for total sale consideration of Rs.8,00,000/-. They deposited Rs.2,00,000/- in the Bank account of the 1st respondent at the time of memo of compromise and agreed to pay the balance sum of Rs.6,00,000/- in yearly instalment of Rs.1,50,000/- (Rs.75,000/- each by petitioners 1 and 2) and complete the payment before 2013. It was agreed that if the petitioners pay balance sum of Rs.6,00,000/- within the time limit, the 1st respondent will convey

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her 1/5th share to the petitioners by executing and registering the sale deed. If the petitioners have failed to pay the said amount, the 1st respondent was given liberty to initiate final decree proceedings after depositing Rs.2,00,000/- received by her for partition of her share. In the said memo of compromise, as per Clause (9), the 1st respondent has to issue receipt for all the amounts received by her, keeping a copy of the receipt. This clause is incorporated with a view to avoid any ambiguity or dispute with regard to the amounts paid by the petitioners. According to the petitioners, 1st petitioner has paid a sum of Rs.3,25,000/- and 2nd petitioner paid a sum of Rs.1,75,000/- on various dates to the 1st respondent, totally a sum of Rs.5,00,000/-. According to the petitioners, they have paid these amounts by cash directly to the 1st respondent and made entries in the diary maintained by them, which was marked as Ex.R1. The petitioners have not obtained any receipt from the 1st respondent, even though there was a specific clause in the memo of compromise that the 1st respondent has to issue receipt for payments made by the petitioners. The petitioners relied on the entries made in the

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diary marked as Ex.R1. Even in the said entries made by the petitioners, they have not obtained any acknowledgment from the 1st respondent. They have also admitted in cross-examination that there is a specific clause in the memo of compromise with regard to receipts for payment made by them and there is no witness for the entries made by them in the diary. According to the petitioners, they did not obtain receipt or acknowledgment from the 1st respondent as she is their elder sister and due to the cordial relationship between the 1st respondent, they did not obtain. According to the petitioners, they trusted 1st respondent.

14.From the materials on record, it is seen that the petitioners have deposited initial sum of Rs.2,00,000/- in the Bank account of the 1st respondent. If there was a cordial relationship between the petitioners and 1st respondent, there is no necessity for the 1st respondent to file the suit claiming her 1/5th share. Further, if the petitioners trusted the 1st respondent, there is no necessity to incorporate a specific clause in the memo of compromise that 1st respondent to issue receipt for the payments

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made by the petitioners. When the petitioners have come out with a specific case that they have paid total sum of Rs.5,00,000/-, it is for them to prove by acceptable evidence of payment. The petitioners have miserably failed to do so. In view of the same, the contention of the learned counsel for the petitioners that the learned Judge ought to have taken adverse inference for her failure to let in evidence and subject her to cross-examine by the petitioners is without any merits. The petitioners examined one Krishnakumari as R.W.4 to prove the payments made by them to the 1st respondent. According to R.W.4, the 1st respondent herself told her that when R.W.4 met 1st respondent in a marriage and she received payment of Rs.5,000/-, Rs.50,000/- and Rs.50,000/- from the petitioners for the medical expenses of her son, R.W.4 could not mention the details like place, date of marriage and the person whose marriage both the 1st respondent and R.W.4 attended. R.W.4 in the proof affidavit has stated that she was present when the petitioners made payment to the 1st respondent. But in the cross-examination, she admitted that proof affidavit was prepared by the petitioners' Advocate and she did not tell

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that she was present when the payments were made. The learned Judge considering the evidence of R.W.4, did not accept her evidence and rejected the same as unbelievable witness.

15.Further contention of the petitioners is that the 1st respondent committed fraud on them and they gave complaint to the Crime Branch and the same is being investigated. To prove the same, they examined R.W.3/Inspector of Police. R.W.3/Inspector of Police deposed that the complaint given by the petitioners were enquired, closed the same as the suit is pending and advised them to settle the issue before the Civil Court. R.W.3 also filed closure report, which was marked as Ex.R3. The learned Judge considering all the above materials, memo of compromise and preliminary decree, appointed an Advocate Commissioner to complete the final decree proceedings. There is no error in the reasoning of the learned Judge warranting interference by this Court, especially inspite of clause (9) of memo of compromise that the 1st respondent has to issue receipt for payments made by the petitioners and the petitioners failed to prove the payments made by them as per the compromise.

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16.For the above reasons, the Civil Revision Petition is liable to be dismissed and is hereby dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

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Index : Yes/No
Internet: Yes/No
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Note:At request of the learned counsel appearing for the petitioners, post this matter on 20.10.2021 for furnishing details of deposit of Rs.2,00,000/- by the 1st respondent.

To

III Additional Subordinate Judge
Coimbatore.

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V.M.VELUMANI,J.

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V.M.VELUMANI, J.

The learned counsel appearing for the petitioners submitted that this Court by order dated 07.10.2021 dismissed the Civil Revision Petition filed by the petitioners and at his request, this case was posted today for furnishing the details of deposit of Rs.2,00,000/- (Rupees Two Lakhs Only) by the 1st respondent.

2.Today, when the matter is taken up for hearing, the learned counsel appearing for the 1st respondent submitted that a sum of Rs.2,00,000/- (Rupees Two Lakhs Only) was deposited by the 1st respondent herein on 25.11.2013 to the credit of final decree application in I.A.No.1029 of 2013 in O.S.No.234 of 2008 on the file of the III Additional Sub Court, Coimbatore.

3.The above said submission of the learned counsel for the 1st respondent is recorded and hence, no further order is necessary in this Civil Revision Petition.

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