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C.R.P(NPD).No.165 of 2015

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :	28.02.2022
PRONOUNCED ON :	29.03.2022

CORAM:

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.R.P(NPD) No.165 of 2015
and C.M.P.No.3774 of 2016

A.Subramani(Deceased)

A.Gnanasundaram (Deceased)

A.Sambandam (Deceased)

Vedavalli Thayarammal @ Rajee (deceased)

Subbbulakshmi (Deceased)

1) Vijayalakshmi

2) Kanni Kumar
{Petitioners 1 & 2 are the legal heirs of
A.Gnanasundaram (Deceased) }

S.Dhandapani (Deceased)

3) S.Sababathy
{Petitioner 3 is the legal
heir of A.Subramani)}

4) S.Raman



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5) S.Lakshmanan

6) S. Soundararajan

7) S.Rajasekar

8) S.Mahalakshmi

9) S.Ashok Kumar

{Petitioners 4 to 9 are legal heirs
of A.Sambandam (Deceased)}

10) Sakunthala

11) Latha

12) Shanmugam

{Petitioners 10 to 12 are
legal heirs of Vedavalli
Thayarammal @ Rajee (deceased)}

...Petitioners/
Petitioners 6,7 & 9
to 18/ Plaintiffs

vs.

Balambal (Deceased)

1) Nirmala

2) Vimala

Bakthavachalam (Deceased)

3) Balakrishnan

4) Rajendren

5) Umabai



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6) Jaya

Vadivelu Mudaliar (Deceased)

Venugopal Mudaliar (Deceased)

7) Kousalya {(Legal heir of
Vadivelu Mudaliar (Deceased)}

8) Shanmugam

9) Sundaresan

10) Kanchana
{Respondents 8 to 10 are legal heirs of
Venugopal Mudaliar (Deceased)}

11) Uma Rani

12) Naveen Kumar

13) Radhika
{ Respondents 11 to 13 are legal
heirs of Bakthavachalam (Deceased)}

... Respondents/
RR2,3,5 to 8, 11 to 17/
Defendants

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decretal order dated 16.12.2013 in I.A.No.1772 of 2013 in O.S.No.7053 of 1981 passed by the learned V Asst. City Court, Chennai insofar as dismissing the above I.A. filed under Order XXVI Rule 13 r/w Section 151 of C.P.C. to pass a final decree in terms of Preliminary decree passed in O.S.No.7053 of 1981 dated 30.09.1982 by appointing an Advocate Commissioner and divide the properties in terms of Preliminary Decree dated 30.09.1982 and allot 3/10th share in the property mentioned in the Schedule 'A'



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of the Plaintiff to the Petitioners/ Plaintiffs herein with all metes and bounds and put the plaintiffs in possession of their share of the suit property.

For Petitioners : Mr.N.Murali Kumaran
For Mcgan Law Firm

For RR 3,4 & 6 : Mr.T.Gowthaman
For Mr.S.Sivapandi

ORDER

This Civil Revision Petition has been filed challenging the order passed in I.A.No.1772/2013 filed under Order 26 Rule 13 of the Civil Procedure Code, to pass a final decree in terms of Preliminary Decree passed in O.S.No.7053/1981 dated 30.09.1982, by appointing an Advocate Commissioner, and divide the properties in terms of Preliminary Decree dated 30.09.1982, and allot 3/10th share in the property mentioned in the Schedule A of the plaint to the petitioners'/Plaintiffs herein.

2. The above application was dismissed by the Court below on the objections raised by the respondents 1 to 8 and 15 to 17 therein. The counter affidavit filed in the above I.A.No.1772/2013 was sworn in by the 5th respondent in the said I.A. The respondents 1 to 8 are admittedly the legal heirs of the branch belonging to Narayanaswamy Mudaliar.



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3. The facts of the case are as under:-

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3.1. The suit property which was purchased under Ex.BI dated 6.2.1935 in the name of Krishnaswamy, Narayanaswamy and Muthuraman. Krishnaswamy executed a Release Deed, dated 27.2.1935 vide Ex.B2 in favour of Muthuraman Mudaliar and Narayanaswamy Mudaliar and thus, Narayanaswamy Mudaliar and Muthuraman Mudaliar were entitled to equal undivided $\frac{1}{2}$ share in the suit property. After the death of Muthuraman Mudaliar and his wife Alamelu, the share of Muthuraman Mudaliar devolved on his two sisters, Ammakanama and Papathiammal, as Muthuraman Mudaliar and his wife were issue-less.

3.2. The plaintiffs in the above suit are the sons of Ammakanama. The 9th and 10th defendants are the sons of Papathiammal. Narayanaswamy Mudaliar's wife was made as the 1st defendant, his sons and daughters were made as the defendants 2 to 8. The respondents in the Interlocutory Application in I.A No.1772 of 2013, 15 to 16 are the legal heirs of the 4th defendant viz., one Bakthavachalam and accordingly, the respondents 1 to 8 and the respondents 15 to 17, belong to the branch of Narayanaswamy Mudaliar and thus, the 5th respondent in I.A.No.1772/2013, namely,



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Mr. Balakrishnan, being the son of Narayanaswamy Mudaliar, filed the counter affidavit on behalf of the other members of the branch, seeking for the dismissal of the final decree application, in view of the preliminary decree passed in O.S.No.5296 of 1997, filed by one Pushpabai Ammal. Sustaining the said objection, the trial Court dismissed the I.A. No.1772/2013, stating that the plaintiffs in the present suit in O.S.No.7053 of 1981 can go and file a final decree application in O.S.No.5296 of 1997.

3.3. The learned counsel for the petitioners assailed the dismissal of the said final Decree in I.A.No.1772/2013 as perverse, pointing out that the preliminary decree in the suit in O.S.No.7053 of 1981 was passed on 30.09.1982, allotting 3/10th of the share to the Plaintiffs, which approximately works out to 7 grounds (16,800 sq. ft), out of the 28 grounds (67,200 sq.ft) but the suit in O.S. No.5296 of 1997 was admittedly filed by Pushpabai Ammal for a partition of 3 grounds and 75 sq. Ft., (7225 sq. ft.) claiming in the same 1/12th share which approximately works out to 606 sq.ft.

3.4. According to the learned counsel for the petitioner, not only the suit schedule differs but also the extent differs. It is contended that Pushpabai Ammal claims as the legal heir of one Palani who she claims to be the other



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son of Papathiammal. Admittedly, the share of Papathiammal in O.S.No.7053 of 1981 was allotted to the 9th & 10th defendants viz., Vadivelu and Venugopal and therefore, even if there is another son of Papathiammal, only the shares of Vadivelu and Venugopal will get reorganized and that will not have any effect on the allotment of shares to the plaintiffs who are from the branch of Ammakanama.

3.5. According to the petitioners, no final decree application was filed by anybody in the suit in O.S.No.5296 of 1997, nor till date any final decree has been passed. Also, at any event, the objection to I.A.No.1772/2013, was not raised by Pushpabai Ammal. The objection was raised only by the branch of Narayanaswamy Mudaliar, who not only have any locus to make the objection, but also has suffered the preliminary decree and also suffered an order of dismissal passed by the Division Bench of this Court in A.S.No.728 of 1983, which confirmed the preliminary decree by dismissing the appeal preferred by them.

3.6. Apart from the same, it is also seen that the branch of Narayanaswamy Mudaliar also challenged a similar application for passing final decree filed by the plaintiffs in I.A.No.10145 of 1996, by filing a Civil



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Revision Petition in C.R.P.No.2945 of 1996, which was dismissed by this Court vide order dated 13.12.1997. On the same lines of oral submissions, written arguments were also filed. The learned counsel appearing for the respondents 3, 4 & 5, argued and also filed written arguments.

4. There is no dispute with regard to the aforementioned facts. The argument that was advanced by the learned counsel appearing for the respondents 3, 4, & 5, who admittedly was representing the branch of Narayanaswamy Mudaliar, argued that since there was a preliminary decree passed in the suit filed by Pushpabai Ammal in O.S.No.5296 of 1997 in the year 2006 seeking for a partition of 3 grounds and 75 sq.ft (7275 sq.ft) in which the plaintiffs therein claimed 1/12th share, the preliminary decree in the partition suit in O.S.No.7053 of 1981 should not be allowed to be culminated in a final decree. The learned counsel appearing for the respondents 3, 4 and 6, has also filed a memo stating that the 1st petitioner, 2nd petitioner, 10th petitioner and the 7th respondent in the Civil Revision Petition have died.

5. In a suit for partition where a preliminary decree has been passed in the year 1982, and admittedly there are various instances of the Defendants/Respondents alienating and encumbering the suit property, even



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after the preliminary decree is passed, with a view to defeat the legitimate claim of the plaintiffs, the action of the defendants, in one way or another protracting the proceedings without allowing the Court to pass a final decree even after 40 years, is a clear abuse of process of law. The Supreme Court in the recent decision in the case of **M. Chinnamuthu (Deceased) vs. Kamalesan @ Shanmugam (Deceased)** in Special Leave to Appeal (C) No(s). 2198/2022 dated 18.02.2022 has held,

"It is very unfortunate that even after a period of 33 years, the judgment-creditor in whose favour the order is passed in the year 1989 is not able to enjoy the fruit of the litigation and the decree passed in his favour. It is rightly said that in our justice delivery system, the real litigation starts only after the decree is passed and the judgment-creditor has to wait for number of years or enjoying the fruit of the decree and the litigation. If such a delayed tactics is permitted, the litigant would lose the confidence in the justice delivery system. Every litigation has to put to an end at a particular time. The judgment-creditor is entitled to enjoy the fruit of the litigation within a reasonable time. As observed herein above, this is a clear example of the abuse of the process of law and the Court and not permitting the judgment-creditor to get the benefit under the decree which is passed in his favour in the year 1989."



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"It is also to be noted that even before the original judgment-creditor enjoy the fruit of the decree in his favour, unfortunately he died. During his lifetime, he could not enjoy the fruit of the decree. Even the original respondent has also died during the pendency of the proceedings. The present Special Leave Petitions stand dismissed with cost which is quantified at Rs.25.000/- (Twenty Five Thousand only) to be paid by the petitioner(s) with the Tamil Nadu State Legal Services Authority, Chennai within a period of four weeks from today."

"The Executing Court is directed to finally decide and dispose of the execution proceedings within a period of six months from the date of receipt of the present order. All concerned are directed to cooperate with the learned Executing Court to finally decide and dispose of the execution proceedings at the earliest and within the time as stated herein above."

Therefore, any further delay in the execution of the preliminary decree for non-compliance of procedural formalities would defeat the ends of justice.

6. It is always open for both the plaintiffs and the defendants to bring on record the legal heirs of the defendants in the application to pass the final decree which would protect the interest of the legal heirs of the deceased, if



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any. But that cannot be the cause for keeping the proceedings pending and protracting, the passing of the final decree for nearly 40 years. Also, on the date of final hearing, the act of the counsel for the respondents 3, 4 & 6 filing a memo in the open Court without furnishing details as to the date of death or the legal heirs of the persons who have said to have been died during the pendency of the Civil Revision Petition, is nothing but a dilatory tactic. After passing of the preliminary decree, if the proceedings are kept pending for 40 years, for the passing of the final decree, naturally many persons would have died and all that is necessary once the rights of the parties are determined in the preliminary decree, is to include the legal heirs of the deceased, before the passing of the final decree and to allot them their respective shares which devolved on them. Therefore, the trial Court is directed to implead the legal heirs of the deceased persons before passing the final decree.

7. It is an admitted fact that the branch of Narayanaswamy Mudaliar were selling the joint family properties both before the filing of the partition suit, as well as after filing of the partition suit. The Division Bench of this Court upholding the preliminary decree by dismissing the First Appeal preferred by the Defendants in A.S. No.728 of 1983 by the judgment dated



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14.06.1994 observing that,

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"10).... It is recited therein that the first vendor, the first defendant herein agreed that she will get sanction from the Court for sale in favour of the purchasers within a period of one year at her cost. There is nothing on record to show that sanction was obtained by the first defendant from the court after the said argument. No doubt, in her oral evidence, the first defendants asserts that she had obtained permission from the Court. But unless a record is produced here, the version cannot be accepted. We have sent for the records in O.P. No. 212 of 1963. We do not find any application therein for sanction of sale of the suit property or any portion thereof. We hold that no permission was obtained by the first defendant or any of the other defendants or any of the other defendants to sell any portion of the suit property."

"15) Consequently, the decree granted by the Trial Court for 3/10 share in the 'A' Schedule Property is correct but the extent of 'A' Schedule property should be agreed as I Kani and 4 grounds excluding the extent of 14 grounds already sold by Narayanasami Mudaliar and Muthurama Mudaliar to M/s. Binay & Co...

"16).... The Plaintiffs will be entitled only to 3/10 share in the



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said extent of properties viz., 1 Kani and 4 grounds. After the sale of different portions in the said property by the defendants, what remains now and available for division is only a smaller extent. The Commissioner appointed by the trial court in the final decree proceedings has measured the said property and filed a report giving measurements. If that property is in excess of 3/10 share of the plaintiffs the total extent of 1 Kani and 4 grounds, the Plaintiffs will be allotted only the share that they are entitled to and the remaining property will be taken by the defendants. If on the other hand, the property now available is less than the share of the plaintiffs in the total extent of property, the plaintiff will be entitled to take the entirety of the available property."

"16. Learned counsel for the appellants contends that the alienese of various portions of the properties not having been made parties to the suit, it is bad for non-joinder and on that ground, the entire suit should have been dismissed. There is no substance in this contention. The case of the plaintiffs is that when the defendants were making alienation. They approached the defendants and raised objections. But the defendants, according to the plaintiffs, told them that they were selling only their shares in the properties. It is now seen that the defendants have sold several portions and if these allegations are not challenged



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by the plaintiffs to implead the alienees as parties to the suit. The Plaintiffs want only their share in the property to be allotted to them. Hence, it is sufficient for the plaintiffs to have impleaded the other sharers. That they have done in the present case. Hence, the division will be effected only between the plaintiffs and the defendants who are co-sharers. if the portions purchased by the alienees have to be allotted to the share of the defendants, the plaintiffs do not seek to disturb those alienations. In the results, the plaintiffs will be getting their share in the total property from out of the property now available with the co-sharers as found by the Commissioner in the Final proceedings."

8. It is also on record that the Advocate Commissioners appointed, after the passing of the preliminary decree has to return the warrant un-executed, inspite of police-aid, which is also found recorded in the order passed by this Court in C.R.P.No.2945 of 1996 dated 13.12.1997, wherein the Civil Revision Petition preferred by the branch of Narayanaswamy Mudaliar was dismissed, by observing that,

"2. The admission of the above revision is opposed on the ground that pursuant to the preliminary decree passed and on the basis of the observations made by the High Court in the first appeal, the warrant of commission has been



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remitted for execution, of course with the help of police and that therefore there exists no need to admit this revision as it requires no legal position or legal sanctity to be revised."

"3)If the learned Commissioner pursuant to the remittance of the warrant is not able to execute the warrant for any reason above referred to, it is for the trial Court to pass suitable orders and as such, under the circumstances, the present revision is necessary and it does not have any merit and accordingly, I am not inclined to admit the same and consequently, the revision petition is dismissed."

9. Though the learned counsel for the petitioners, had made submissions referring to the following decisions:-

- i. **Jugeshwar Singh v. Rijhan Singh**, reported in AIR 1938 Pat 104;
- ii. **Venkata Reddy v. Pethi Reddy**, reported in 1963 SC 992 (para no. 6);
- iii. **Uma Kant Jha v. Shital Thakur**, reported in 1995 SCC OnLine Pat 113;
- iv. **Mool Chand v. Director, Consolidation** reported in (1995) 5 SCC (para no. 27, 28, 29);
- v. **Venkatrao Anantdeo Joshi v. Malatibai** reported in (2003) 1 SCC 722;
- vi. **Kurapati Radhakrishna and Anr., Kurapati**



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Satyanarayana and Ors., reported in AIR 1949 Mad 173

(para no. 25);

vii. **Nabisha Begum u. Arumuga Thevar**, AIR 1966 Mad 111 (pg. 413, para 5) and

viii. **M. Chinnamuthu (Dead) vs Kamaleshan@ Shanmugam (Dead)** reported in 2022 LiveLaw (SC) 209.

The above said judgments need not be further discussed as they are settled propositions of law.

10. Once the preliminary decree has been passed and challenged and has become final and also the appointment of Advocate Commissioner for passing of the final decree has been challenged by filing a Civil Revision Petition earlier and the same being dismissed, the order of the Trial Court, dismissing the subsequent application filed under Order 26 Rule 13 for passing of the final decree amounts to *in terrorem*. The Privy Council in the decision reported in AIR 1924 PC 198 @ pg. 200 has held,

"...After a decree has once been made in a suit, the suit cannot be dismissed unless the decree is reversed on appeal. The parties have, on the making of the decree, acquired rights or incurred liabilities which are fixed, unless or until the decree is varied or set aside. After a decree any party can (as already stated) apply to have it



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enforced."

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11. The trial Court has completely misdirected itself in dismissing the application for appointment of an Advocate Commissioner for passing of the final decree, without even taking into consideration the basic facts, that the objection pointing out a preliminary decree passed in the other suit was not even raised by the plaintiff in the other suit (Pushpabai Ammal), but only by the defendants in the present suit who had already suffered by the preliminary decree which was upheld by the Division bench of this Court by dismissing the Appeal. Therefore, this Court does not have the slightest hesitation to repeat the words of his Lordship Justice V. Krishna Iyer, (in the judgement of *Arivanandam vs Satyapal* reported in AIR 1977 SC 2421), that the action of the defendants is to be condemned for the gross abuse of process of law repeatedly and unrepentantly resorted to. Even during the pendency of this Civil Revision Petition, time and again, the plaintiffs have brought to the attention of this Court about the alienations and encumbrances done by the branch of Narayanaswamy Mudaliar, which has necessitated appointment of Advocate Commissioner, who by his report dated 06.04.2017 has stated that,

*“Out of which constructions mentioned by the
Petitioners Counsel, some are mentioned as purchases*



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effected and constructed after initiation of the suit, some as encroachment and many as occupation by the defendants in the suit."

12. Again in an order in the Contempt Application dated 19.04.2018 in Cont.A.No.1287 of 2017 and Sub Appl.Nos.234 to 242 of 2017, arising out of an interim order passed in the C.R.P, the third party's undertaking, who have purchased through the legal heirs of Narayanaswamy Mudaliar, has been recorded.

"The learned counsel appearing for respondents 2 and 3 has given an undertaking that in the event of the petitioner succeeding in the Civil Revision Petition, respondents 2 and 3 will claim the cost of land and building from the vendors and not from the petitioner. Endorsement has also been made by the learned counsel respondents 2 and 3. The said undertaking given by the learned counsel for the respondents 2 and 3 is recorded."

13. It was also placed on record by way of an affidavit dated 21.02.2022 by pointing out that, inspite of the restraint order passed by this Court on 25.11.2019, restraining the Registration Department from making any registrations, further encumbrances and alienation in the suit property has been



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"....both sides made allegation and counter allegation stating that, despite the preliminary decree passed in this suit, respective parties have been engaging in creating a third party right in respect of some of the properties in their respective shares, unless and until that menace is restricted, the very purpose of passing a preliminary decree by the Court long years back to execute it by way of final decree in the suit, will not be served.

2. Hence, the learned counsel seek indulgence of this Court to make some interim arrangement.

3. Considering the said submission made by both sides, this Court is inclined to pass an interim order restraining all parties in this revision petition from alienating or creating any encumbrance or third party interest in any of the suit property without the leave of this Court. This order shall be in effect till the disposal of the revision petition. Once this order is produced, the same shall be executed by the authorities concerned and a copy of this order shall be communicated to the concerned Sub-Registrar Office (SRO) where the suit properties are situated for due information and compliance."

14. The above contentions made by the petitioners were not denied by the learned counsel for the respondents 3, 4 & 6, but stated that it was only due



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to the respondents 11 to 13, who are the legal heirs of Bakthavatchalam.

Admittedly, Bakthavatchalam is the son of Narayanaswamy Mudaliar.

Therefore, it is a clear case of dilatory tactics adopted to delay and defeat the legitimate claim of the plaintiffs. It is also a well settled law that the appointment of Advocate Commissioner under Order 26 Rule 13 of the Civil Procedure Code, pursuant to passing of preliminary decree in partition suit, cannot be objected, even before the report is filed, as it is always open to the parties to object the Advocate Commissioner's report after the same is filed.

15. Therefore, this Civil Revision Petition is Allowed. The trial court is directed to pass the Decree within a period of 6 months from the date of receipt of a copy of this order, after impleading the legal heirs of the deceased, if any. The order passed by this Court dated 19.04.2018, restraining the Registration Department from making any registrations, encumbering and alienating the suit property by the parties in the suit will continue till passing of the final decree. No costs. Consequently, connected miscellaneous petition is closed.

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Index : Yes / No

Internet : Yes



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To:

The V Asst. City Court,
Chennai.



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J.NISHA BANU, J.,

sts

Order made in
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Dated:
29.03.2022