



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on: 24.01.2022	Delivered on: 14.02.2022
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CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

C.R.P.(NPD).No.2711 of 2013
and M.P.No.1 of 2013

1.S.V.Nageswaran (died)
2.N.Ganga Bagirathi
3.S.N.Balaji
(Petitioners 2 and 3 and respondents 3 and 4
brought on record as legal heirs of the
deceased sole petitioner vide order of
Court dated 10.09.2014 made in M.P.Nos.
1 to 3 of 2014 in CRP(NPD)No.2711 of 2013)

.. Petitioners

Vs.

1.R.T.Gurumoorthy
2.T.M.Thilagavathy
3.S.N.Lalitha
4.S.N.Gayathri

.. Respondents

Prayer: This Civil Revision Petition is filed under Section 115 of Civil Procedure Code, against the order dated 07.06.2013 in E.A.No.1557 of 2012 in E.P.No.2324 of 2009 in O.S.No.2395 of 1966 passed by the X Assistant City Civil Court, Chennai.



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C.R.P. (NPD) .No.2711 of 20



For Petitioners : M/s.S.Conscious Ilango
For Respondents : Mr.S.Senthilnathan (For R1 & R2)
M/s.V.Kasinatha Bharathi (For R3)
Mr.R.Venkataraman (For R4)

ORDER

(The matter is heard through “Video Conferencing”)

This Civil Revision Petition is filed against the order dated 07.06.2013 made in E.A.No.1557 of 2012 in E.P.No.2324 of 2009 in O.S.No.2395 of 1966 on the file of the X Assistant City Civil Court, Chennai.

2.The 1st petitioner filed E.A.No.1557 of 2012 in E.P.No.2324 of 2009 in O.S.No.2395 of 1966. The father of respondents 1 & 2 viz., R.V.Thirunavukkarasu Mudaliar filed suit in O.S.No.2395 of 1966 against six defendants for partition, possession, mense profits and costs. In the said suit, a preliminary decree was passed on 29.12.1969 in favour of father of respondents 1 & 2. The 6th defendant / S.V.Pattu Sastry filed A.S.No.351 of 1970 challenging the said preliminary decree passed in the said suit in



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O.S.No.2395 of 1966. By the judgment and decree dated 29.02.1972, the First Appeal was allowed reversing the preliminary decree passed by the Trial Court. The plaintiff viz., R.V.Thirunavukkarasu Mudaliar filed Second Appeal in S.A.No.523 of 1973 challenging the said judgment and decree passed in the First Appeal. By the judgment and decree dated 09.02.1976, this Court allowed the Second Appeal by setting aside the judgment and decree of the First Appellate Court and modified the preliminary decree directing the Trial Court to allot the share of Kuppaswami Naicker to the plaintiff R.V.Thirunavukkarasu Mudaliar, father of respondents 1 & 2 from whom the plaintiff purchased the property. This Court directed the Trial Court to allot the South-Western corner of suit property in equity. The said R.V.Thirunavukkarasu Mudaliar filed I.A.No.18030 of 1978 for passing of final decree. On 29.09.1984, a final decree was passed allotting the property to the said R.V.Thirunavukkarasu Mudaliar and directed him to pay a sum of Rs.15,000/- being the cost of construction put up in the suit property. The legal heirs of R.V.Thirunavukkarasu Mudaliar, the respondents 1 & 2 and their mother filed A.S.No.640 of 1987 challenging the award of cost of Rs.15,000/-. The said S.V.Pattu Sastry filed Cross Objection and C.M.P.No.30 of 1988 and by the judgment and decree dated 28.02.1989, the



said First Appeal in A.S.No.640 of 1987 was allowed by setting aside the order of the Trial Court for payment of Rs.15,000/- to the said S.V.Pattu Sastry and in other aspect, the order of the Lower Court was confirmed and Cross Objection and C.M.P.No.30 of 1988 were also dismissed. The said S.V.Pattu Sastry filed Second Appeal in S.A.No.1442 of 1989 challenging the said judgment and decree passed in A.S.No.640 of 1987. Pending S.A.No.1442 of 1989, the said S.V.Pattu Sastry died and the 1st petitioner was impleaded as 2nd appellant and Meenakshi Engineering Works represented by its Managing Director S.V.Nageswaran, was impleaded as 3rd appellant as per the order of this Court dated 18.10.2001 made in C.M.P.Nos.11111 to 11113 of 1998. The said S.A.No.1442 of 1989 was dismissed on 21.01.2003. S.L.P.No.7479 of 2003 filed by the 1st petitioner was dismissed. The respondents 1 & 2 filed E.P.No.2324 of 2009. The 1st petitioner filed objection stating that the legal heirs of T.Lakshmi Ammal, wife of R.V.Thirunavukkarasu Mudaliar was not impleaded and there are certain corrections in the schedule of property. The objection was rejected by Executing Court. The 1st petitioner filed C.R.P.(NPD).No.2199 of 2010 challenging the order and decree dated 21.06.2010 made in E.P.No.2324 of 2009 in O.S.No.2395 of 1966 on the file of the X Assistant City Civil Court,



Chennai. This Court by the order dated 30.01.2012 dismissed the said
C.R.P.(NPD).No.2199 of 2010.

3.Subsequently, the 1st petitioner filed the present E.A.No.1557 of 2012 under Section 47 of the Code of Civil Procedure to dismiss the E.P.No.2324 of 2009 in O.S.No.2395 of 1966. The respondents 1 & 2 filed counter affidavit. The learned Judge by the order dated 07.06.2013, dismissed the said E.A.No.1557 of 2012.

4.Challenging the said order dated 07.06.2013 made in E.A.No.1557 of 2012, the present Civil Revision Petition is filed.

5.The learned counsel appearing for the petitioners submitted that the final decree passed by the learned Judge is nullity and without jurisdiction. The executability of final decree can be challenged in final decree and as held by the Hon'ble Apex Court, the Executing Court has to decide the objection as to the nullity of the decree even at the stage of execution. The learned Judge failed to note that while executing a decree, it is the duty of the Court to activate itself to decide the question of nullity and the executability of the



decree, irrespective of the question whether the parties have raised the pleading of nullity or their eligibility to raise the same. The petitioners cannot waive off mandate granted in preliminary decree and the learned Judge erred in holding that petitioners waived allotment of share.

5(a). The Executing Court failed to note that the final decree passed by the Trial Court in violation of the judgment and decree in S.A.No.523 of 1973 is nullity and the same is in-executable. The Trial Court without fixing the share of the Kuppusamy Naicker, erred in passing final decree, which is nullity and the same cannot be executed. The order passed in final decree application in violation of judgment of this Court in S.A.No.523 of 1973, would amount to perpetuating the illegality in disobeying the judgment of this Court. The Executing Court ought to have refused to execute the final decree allotting an extent of 2000 Sq.Ft which does not have the support of any preliminary decree. The Executing Court has failed to note that when the preliminary decree was modified by this Court, the final decree shall be drawn up only in accordance with the decree as modified by this Court. The order for delivery of possession passed in E.P.No.2324 of 2009 is without jurisdiction



and beyond the scope of the final decree and the same is null and void.

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5(b). The Executing Court failed to see that no further order was passed for delivery of property even though they have specifically pleaded for delivery, when decree for delivery is not granted it amounts to rejection of grant of relief of delivery. The relief of partition can be granted only against co-owner and the 1st petitioner is third party. The allotment of 2000 sq.ft is more than the share of vendor of the plaintiff. The final decree passed based on the Advocate Commissioner's report is in violation of the judgment and decree passed in S.A.No.523 of 1973 and order passed in final decree is nullity and the same is inexecutable.

5(c). In support of his contentions, the learned counsel appearing for the petitioners relied on the following judgments:

(i) (1990) 1 SCC 193 [Sushil Kumar Mehta Vs. Gobind Ram Bohra (dead) through his Lrs];

(ii) CDJ 2001 Cal HC 125 [Hindusthan Magcobar Chemicals Ltd Vs. O.P.Rajgarhia];

(iii) 1967 AIR (SC) 1236 [Sital Prashad and another Vs. Kishori



Lal];

WEB COPY (iv) AIR 1995 SC 1211 [Shankar Balwant Lokhande (dead) by Lrs

Vs. Chandrakant Shankar Lokhande and another];

(v) CDJ 2003 MHC 1808 [V.Sumathi and another Vs. D.Vedagiri and others];

(vi) CDJ 2018 MHC 2959 [Ranganathan (died), K.Jayalakshmi and others Vs. Chennammal and another];

(vii) CDJ 1967 SC 306 [Mulraj Vs. Murti Raghonathji Maharaj];

(viii) CDJ 2007 Cal HC 300 [Pallav Kumar Banerjee Vs. State of West Bengal];

(ix) CDJ 2008 SC 1008 [Arjan Singh Vs. Punit Ahluwalia and others];

(x) AIR 1997 Allahabad 358 [Amar Nath Misra and another Vs. The District Inspector of Schools, Ballia and others] and

(xi) CDJ 2011 MHC 1260 [A.Murugesan Vs. The Sale Officer and others].

6.The learned counsel appearing for the respondents 1 & 2 reiterated the averments in the counter statement filed in E.A. In addition to that the



learned counsel appearing for the respondents 1 & 2 submitted that final decree passed allotting the property measuring 2000 sq.ft at South-West corner has become final as First Appeal, Second Appeal and SLP filed by the 1st petitioner challenging the said final decree were dismissed. Final decree was passed by a Court having jurisdiction and in consonance with judgment of this Court dated 09.02.1976 made in S.A.No.523 of 1973. The Executing Court has considered all the previous legal proceedings and dismissed the E.A. by giving cogent and valid reasons. The E.A. filed by the 1st petitioner is frivolous and is abuse of process of Court and Law. In the suit in O.S.No.2395 of 1966 filed by the father of the respondents 1 & 2, a preliminary decree was passed on 29.12.1969 in favour of father of respondents 1 & 2. The 6th defendant / S.V.Pattu Sastry filed A.S.No.351 of 1970 and the same was allowed reversing the judgment and decree granting preliminary decree. The father of the respondents 1 & 2 filed S.A.No.523 of 1973 before this Court and this Court allowed the S.A.No.523 of 1973 by setting aside the judgment and decree of First Appellate Court and restored the preliminary decree passed by the Trial Court. The 1st petitioner has not made out any case for interfering with the impugned order and prayed for dismissal of the Civil Revision Petition.



WEB COPY 7. The learned counsel appearing for the 4th respondent filed written arguments and contended that

(i) There is a flagrant violation of procedure in dismissing the application filed under Section 47 of the Code of Civil Procedure and therefore, the Civil Revision Petition filed by the 1st petitioner has to be considered under Section 151 of the Code of Civil Procedure and Article 227 of the Constitution of India.

(ii) The earlier suit in O.S.No.1363 of 1958 filed by R.V.Thirunavukkarasu Mudaliar was dismissed and appeal also dismissed. Thereafter, he did not proceed further.

(iii) The present suit in O.S.No.2395 of 1966 for partition is not maintainable between two strangers who purchased the properties. A partition suit is maintainable only between co-sharers or between co-parceners.

(iv) The final decree passed is contrary to the judgment of this Court in S.A.No.523 of 1973, which modified the preliminary decree passed by the Trial Court. Without passing a preliminary decree as per order of this Court in S.A.No.523 of 1973, the final decree has been passed by this Court, which is



a nullity.

WEB COPY (v) Special Leave Petition filed was also dismissed at the admission stage itself, without giving detailed reason and thus, the same does not constitute any declaration of law or a binding precedent.

(vi) The Courts have not passed any decree for delivery of property to R.V.Thirunavukkarasu Mudaliar and E.P. for delivery is not maintainable. A partition suit by purchasers without declaration is not maintainable.

(vii) The said S.V.Pattu Sastry and his legal heirs are in possession of suit property for more than 60 years. The 1st petitioner's son filed C.S.No.689 of 2019 on the file of this Court for declaration and the said proceedings is subject matter of OSA to be numbered and prayed for allowing the Civil Revision Petition.

7(a).The learned counsel appearing for the 4th respondent relied on the following judgments:

(i) 2008 (6) CTC 237 [Anathula Sudhakar Vs. P.Buchi Reddy (dead) by Lrs and others]



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(ii) **2018 (4) CTC 366 [D.Rajini Sukumar Vs. Pushpa Kumari];**

(iii) **2019 (4) CTC 356 [Khoday Distilleries Ltd., Vs. Sri Mahadeshwara Sahakara Sakkare Karkhane Ltd., Kollegal];**

(iv) **AIR 1951 Pat 526 [Tejpal Saraogi and others Vs. Mahadeo Lal and others];**

(v) **Judgment dated 08.07.2011 made in A.S.No.918 of 2010 [T.Bai Ammal and others Vs. T.Sampath] and**

(vi) **AIR 1956 Pat 143 [Mukha Singh and others Vs. Ramchariter Singh and others].**

8.Heard the learned counsel appearing for the petitioners, respondents 1 & 2, 3rd respondent as well as the 4th respondent and perused the entire materials available on record.

9.The necessary facts for deciding the issue in the Civil Revision Petition has been elaborately discussed above. From the above materials, it is seen that the preliminary decree passed in partition suit and final decree passed after confirmation of preliminary decree by the Hon'ble Apex Court also become final, as appeal proceedings initiated by the petitioners upto



Hon'ble Apex Court were dismissed. The respondents 1 and 2 filed E.P. for delivery of property as per the final decree, based on Commissioner's report.

The petitioners' father filed E.A.No.1557 of 2012 under Section 47 of C.P.C., contending that the final decree is inexecutable. For easy reference, Section 47 of C.P.C., is extracted hereunder:

“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.

***[Sub-section (2) omitted by Code of Civil Procedure (Amendment) Act, 1976, Sec.20]*

(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.

[Explanation I.—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.]

10.As per Section 47 of C.P.C., all questions arising with regard to execution, discharge or satisfaction of the decree has to be determined by the Executing Court and not by a separate suit. The Executing Court does not have any power to go beyond the decree. When all the objections raised by the 1st petitioner to the validity of the final decree were rejected and when final decree has become final, the 1st petitioner is not entitled to raise objections with regard to executability of decree in Execution Petition. The petitioners 2 and 3 and respondents 3 and 4, who are the legal heirs of the 1st petitioner, are not entitled to object to executability of decree. The 1st petitioner in Civil Revision Petition has raised the executability of decree by filing said E.A. under Section 47 of C.P.C. Therefore, objections raised by the 1st petitioner have to be considered as per the Scope of Section 47 of C.P.C. When an



application is filed under Section 47 of C.P.C., it is for the applicant to show that decree is *ex facie* nullity. When such a plea is taken, the Court is precluded from making an in depth scrutiny with regard to its claim with reference to defence set up by him in the suit and appeal proceedings. The judgment of the Trial Court cannot be reopened and correctness of said judgment cannot be questioned in E.A. In the present case, both the preliminary decree as well as the final decree were confirmed by the Hon'ble Apex Court. The Executing Court can hold that decree is not executable only when the Court which passed the decree did not have jurisdiction and decree is *void ab-initio* and nullity. The Executing Court, in an application under Section 47 of C.P.C., cannot adjudicate upon the legality or correctness of the decree, unless the decree is *void ab-initio* and nullity. In the present case, the final decree is passed by a competent Court having jurisdiction. Further, the final decree is in consonance with the judgment of this Court dated 09.02.1976 made in S.A.No.523 of 1973. The relevant portion of the said judgment is extracted hereunder:

“Consequently, the appeal is allowed and the judgment and decree of the learned I Additional Judge, City Civil Court, Madras are set aside and the decree of



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the learned VIII Assistant Judge, City Civil Court, Madras, will stand modified by providing for a preliminary decree for partition of the suit property and allotment of Kuppuswami Naicker's share to the appellant herein, to the extent to which the appellant has purchased from Kuppuswami Naicker under Ex.A1. Since the appellant purchased the property in the south-western corner of the suit property, on the ground of equity, the same will be allotted towards the share of Kuppuswami Naicker and therefore, to the appellant herein in the final decree proceedings.”

10(a).This Court has directed the Trial Court to allot share of Kuppusamy Naicker's property to R.V.Thirunavukkarasu Mudaliar, the father of respondents 1 and 2, in the South West corner of suit property, since father of the respondents 1 and 2 purchased the property from Kuppusamy Naicker, as per Ex.A1 and this Court also directed the Trial Court to allot the portion in the South West corner of the property to R.V.Thirunavukkarasu Mudaliar, father of the respondents 1 and 2, in final decree proceedings. This judgment was confirmed by the Hon'ble Apex Court, by the order dated 15.04.2005 made in S.L.P.No.7479 of 2003. The 1st petitioner, by filing E.A., is re-



agitating the issue which was confirmed by the Hon'ble Apex Court in two proceedings challenging the preliminary decree and final decree. The decree holder obtained preliminary decree in his favour in the year 1969 and final decree on 29.09.1984. E.P. filed for possession on 24.11.2008 is still pending. From the materials on record, referred to above, it is clear that final decree has been passed by the Court having jurisdiction and in consonance with judgment dated 09.02.1976 made in S.A.No.523 of 1973. The objections raised by the 1st petitioner that preliminary decree is not in consonance with the judgment of this Court in the Second Appeal and final decree is nullity and inexecutable is without merits and abuse of process of Court. The 4th respondent, who is supporting the claim of the petitioners has contended that there is flagrant violation of procedure in dismissing the application of the 1st petitioner and therefore, the Civil Revision Petition now filed has to be considered as per Section 151 of C.P.C and Article 227 of the Constitution of India, is without merits. The learned Judge has considered the claim of the 1st petitioner made in E.A. and in view of the earlier proceedings challenging both preliminary decree and final decree which have been confirmed by the Hon'ble Apex Court, dismissed the E.A. filed by the 1st petitioner. The contention of the 4th respondent that the Hon'ble Apex Court dismissed the



S.L.P. at the admission stage itself without giving any reason and therefore, the said order does not constitute any declaration of law, is not acceptable.

When preliminary decree was challenged by the 1st petitioner by way of First Appeal, Second Appeal and S.L.P., the Hon'ble Apex Court dismissed the S.L.P., confirming the judgment in the Second Appeal and judgment of the Trial Judge. It is not open to the 4th respondent to contend that judgment of the Hon'ble Apex Court dismissing the S.L.P. is not binding on the learned Judge and the learned Judge has committed flagrant violation of procedure, are frivolous and vexatious. The Hon'ble Apex Court considered the grounds raised by the 1st petitioner in S.L.P., challenging the orders of this Court and lower Court order and dismissed the S.L.P. The learned Judge has considered the judgment of this Court in Second Appeal and order in S.L.P. and materials placed and dismissed the E.A. The learned Judge has not made out any flagrant violation of procedure as alleged by the 4th respondent. The judgments relied on by the learned counsel for the petitioners and 4th respondent are not applicable to the facts of the present case and do not advance the case of the petitioners and 4th respondent. The learned Judge has considered all the materials placed before him and by giving cogent and valid reason, dismissed E.A.No.1557 of 2012. There is no error in the said order of the learned Judge



warranting interference by this Court. The Executing Court is directed to dispose E.P.No.2324 of 2009.

11.In the result, the Civil Revision Petition is dismissed. No costs.

Consequently, connected Miscellaneous Petition is closed.

14.02.2022

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Index : Yes/No

Internet : Yes/No

To

X Assistant Judge
City Civil Court, Chennai.



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V.M.VELUMANI, J.

gsa/krk

Pre-delivery order made in
C.R.P.(NPD).No.2711 of 2013

14.02.2022
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