



S.A.(MD) No.427 of 2006

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Reserved on : 30.11.2022

Pronounced on : .12.2022

CORAM : JUSTICE N.SESHASAYEE

S.A.(MD) No.427 of 2006

and

M.P.(MD) No.3 of 2009

1.Saraswathi
2.Prathap
3.Magesh
4.Dhinesh
5.Rama

... Appellants/Appellants/
LRs of 2nd Defendant

Vs

1.Thangaraj Nadar (Died)
2.Selvaraj

Johnson (Died)

3.Sushila
4.Subbaiyan
5.Renganathan
6.Ramayan (Died)

Kollappan Nadar (Died)

7.Rajaiyan

Gabriel (Died)



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8.Selvamani (Died)
9.Chelladurai
10.Mohanan

Pushbam (Died)

11.Geetha
12.Kali Prasath
13.Somasundaram
14.Sundararaj
15.Vijaykumari
16.Rengabai
17.Sundarlal
18.Vasanthakumari
19.Chandramohan
20.Thangabai
21.Vasantha Kumari
22.Rajan
23.Kamalam
24.Gomathy
25.Johnson
26.Vijaya Kumar
27.Ravindrakumar (Died)
28.Balammal
29.Mohana Kumar
30.Sundaraj

... Respondents 1 to 30/Respondents/
Plaintiffs 2, 3 and
Defendants 3, 5, 8, 9, 11, 13 to 17,
19, 21 to 24 and 26 to 34

31.R.Chellamma
32.R.Sukumaran
33.R.Sasi
34.R.Deson
35.Sareena
36.Minor. Pooja
37.Minor. Sunitha
38.Santham

... Respondents 31 to 38



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*[Respondents 36 and 37 are represented by their mother and guardian R35]
[R31 to R38 were brought on record as LR's of the deceased R6 vide order dated 07.07.2010 made in M.P.(MD) No.1 of 2010 in S.A.(MD) No.427 of 2006]*

39.Chandramathi Bai

40.Ezhil Raj

41.Abeal Raj

... Respondents 39 to 41

[R39 to R41 were brought on record as LR's of the deceased 1st respondent vide order dated 18.10.2022 made in C.M.P.(MD) Nos.8551, 8552 & 8555 of 2022 in S.A.(MD) No.427 of 2006]

42.P.S.Raj

43.P.S.Sivaraja

44.P.S.James Raj

45.Vimalabai

46.Rani

47.Selvakumari

48.Alphonsa

49.Alfinraj

50.P.Punitha

... Respondents 42 to 50

[R42 to R50 were brought on record as LR's of the deceased 8th respondent vide order dated 03.11.2022 made in C.M.P.(MD) Nos.8558 to 8560 of 2022 in S.A.(MD) No.427 of 2006]

51.Chandra

52.Benwhilesan

53.Berlin Berssia

... Respondents 51 to 53

[R51 to R53 were brought on record as LR's of the deceased 27th respondent vide order dated 03.11.2022 made in C.M.P.(MD) Nos.10115, 10118 & 10119 of 2022 in S.A.(MD) No.427 of 2006]

Prayer:- Appeal filed under Section 100 of Civil Procedure Code to set aside the judgment and decree dated 17.02.2006 made in A.S.No.80 of 2002 on the file of the Sub Court, Kuzhithurai, confirming the judgment and decree



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dated 06.02.1997 made in O.S.No.373 of 1979 on the file of the
II Additional District Munsif's Court, Kuzhithurai.

For Appellants : Mrs.N.Krishnaveni
Senior Counsel
assisted by Mr.P.Thiagarajan

For Respondents : Ms.J.Anandhavali for RR2 & 39 to 41
: Mr.K.Vamanan for RR6, 7, 12, 13, 17,
19 to 22, 27 to 38 & 42 to 53

JUDGMENT

The legal heirs of the 2nd defendant challenge the preliminary decree for partition dated 06.02.1997 passed in O.S.No.373 of 1979 on the file of the II Additional District Munsiff Court, Kuzhithurai. The suit was laid for partitioning 34 cents out of a total extent of 1.76 acres in S.No.355 of Nattalam Village, Vilavancode Taluk, Kanyakumari District. The 2nd defendant was set ex-parte by the trial Court.

2. This appeal arises out of an unusual set of facts. For narrative convenience, the parties would be referred to by their rank before the trial Court.

- The plaintiffs have come with a straight forward case. Plaintiffs 2



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and 3 are the sons of the 1st plaintiff. The 1st plaintiff had purchased a total extent of 25 cents covered under Ext.A.1 and Ext.A.3 respectively dated 22.08.1124 M.E.(1949) and 14.11.1956. They are in Malayalam and their Tamil transliterated copies are Ext.A.2 and Ext.A.4 respectively. On 08.07.1965, the 2nd plaintiff had purchased 9 cents under Ext.A.5-sale deed. This document is also in Malayalam, and its Tamil transliteration is Ext.A.6. They claim partition of their combined extent of 34 cents covered by these three sale deeds from and out of an extent of 1.76 acres in S.No.355.

- The suit was laid against as many as 34 defendants. In this appeal, this Court is concerned with the 2nd defendant. Defendants 2 to 4 are the sons of the first defendant. Denying the title of the vendors of the plaintiffs to convey the property that they claim, these defendants allege in their joint written statement as below:
 - The property in Sy.No.355 and the property in Sy.No.510 lie as a single block of land with a combined total extent of 2.12 acres. This block of land originally belonged to the family of Uthiyanoor Matom. From this family, the 1st defendant had



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purchased a total extent of 1.43 acres under three sale deeds, which are respectively dated 01.10.1121 M.E. (1946), 18.04.1122 M.E. (1947) and 03.10.1122 M.E. (1947). This apart, the 1st defendant's wife (mother of defendants 2 and 3) also has 18 cents in this block of property.

- The suit should have been laid for partition of both Sy.Nos: 355 and 510. Indeed, the plaintiffs had also purchased properties in S.No.510 besides properties in Sy.No 355 as could be seen from Ext.A.1 and Ext.A.3.
- The suit was laid on 19.07.1979. The trial however, opened on 06.02.1995, some 16 years after the institution of the suit. P.W. 1 was examined on 06.02.1995, 16.02.1995, 22.02.1995. On 05.06.1995, P.W.1's evidence was closed. In between, the Court could not function due to Advocates' boycott etc. It is also seen from the diary/notes paper of the trial court that some defendants too had passed away in the meantime. After completing the formalities of impleading the legal representatives, on 27.11.1996, the son of the 13th defendant was examined as D.W.1. On 05.12.1996, D.W.1 was cross



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examined by the plaintiffs, and on the same day, a bunch of defendants came to be set exparte, and this included defendants 2 and 3. It may be stated that the 1st defendant had died by then, and this Court is informed that he died some time in 1986.

- On 06.02.1997, the trial Court passed a preliminary decree for partition. Thereafter, the plaintiffs filed I.A.No.481 of 1998 for passing a final decree in terms of the preliminary decree. Notice was ordered on this application to the second defendant as well, but by then the second defendant had died. Indeed, he died in 1999. Therefore, the legal representatives of the second defendant came before the Court with an application for setting aside the ex-parte preliminary decree dated 06-02-1997 passed against them under Order IX Rule 13 C.P.C along with an application to condone the delay in filing it. This application was received by the trial court in C.F.No.4313 of 2000 but even before it was taken on record, it was dismissed by the trial Court on 07.07.2000. On the same day, the trial Court also passed the final decree in I.A.No.481 of 1998. Aggrieved by the dismissal of C.F.No.4313 of 2000, the appellants herein



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preferred CRP (PD) No.2764 of 2000.

- During the pendency of CRP (PD) No.2764 of 2000 referred to above, the appellants had also preferred a regular first appeal under Section 96 C.P.C before the first appellate Court along with an application in I.A.No.372 of 2001 for condoning the delay in filing the first appeal. This application was allowed by the first appellate Court. Aggrieved by the same, the plaintiffs came in revision in C.R.P. No.1597 of 2002. This Court vide its order dated 07.01.2003 dismissed the said Civil Revision Petition. In particular, it had observed that:

“3. Admittedly, the second defendant, whose legal representatives are present respondents 1 to 5, was set exparte on 05.12.1996 and a preliminary decree against him had come to be passed on 06.02.1997 and he died on 05.08.1999 after the preliminary decree. The affidavit filed in support of the present application before the Lower Court shows that the third defendant was the brother of the second defendant and having confidence and reposing faith in him, the second defendant had entrusted to him the handling of the case on his behalf as well. It is not as though the petitioners were sleeping over the rights all through, since admittedly they have filed an application after passing of the



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preliminary decree some time in the year 2000 to set aside the preliminary decree and that application had come to be dismissed in a manner not authorised by law and the learned trial Judge appears to have been in a great hurry in passing the final decree on the same day on which he rejected the application filed to set aside the preliminary decree, even at the unnumbered stage. The petitioners in that application are before this Court in C.R.P.No. 2764 of 2000. The affidavit shows that as their lawyer advised them now, they filed an appeal against the preliminary decree as well. Two remedies are open to persons like respondents 1 to 5 in a given situation, namely, (1) to have the ex-parte preliminary decree set aside and/or (2) to file an appeal as well. Respondents 1 to 5 have definitely taken steps to have the preliminary decree set aside and having lost in that application, they were before this court. The other remedy is to be filed a regular appeal which was now advised to be filed (as per the affidavit filed before the lower court). It may be true that after the final decree was passed on 07.07.2000, the respondents 1 to 5 had not taken any steps till they filed an application to condone the delay in filing the appeal on 14.09.2001. As already stated the Lower Appellate Court in my opinion, has done substantial justice to the parties.”

- After the disposal of the above mentioned revision petition, the earlier revision filed in CRP (PD) No.2764 of 2000 came to be dismissed on 19.03.2005. The principal ground for the dismissal



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of this revision is that the decree was not an ex-parte decree as the other defendants had contested the same, and hence the heirs of the second defendant would not have the right to have the decree set aside (This is contrary to the judgment of the Hon'ble Supreme Court of India in ***Bank of India vs. M/s.Mehta Brothers and others***, [2009 (1) LW 439] that was delivered subsequently)

- The dismissal of the first revision on 19.09.2005 did not impact the right of the appellants much, as their first appeal had since been taken on record by the first appellate court in A.S.80 of 2002. In the appeal memorandum, the appellants herein have taken up a plea that the second defendant was represented by his counsel late Royappan, and that at the relevant time when the matter was taken up for trial on 06.02.1995, he had stopped his practice, and hence the second defendant did not know about the commencement of the trial and prayed for remand of the suit.

3. The first appellate Court found the ground adduced by the appellants herein as unsatisfactory, and dismissed the appeal vide its judgement dated



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17.02.2006. Hence this second appeal, at the instance of the heirs of the 2nd defendant. The second appeal was admitted for considering the following substantial questions of law:

(i) Whether the plaintiffs in a suit for partition are entitled to a decree, when the suit property is not properly described and there is no evidence to prove the suit claim?

(ii) Whether the lower appellate Court is correct in law in refusing to remand the matter, especially when grounds as envisaged under Order XLI Rule 23-A of the Code of Civil Procedure, exist for passing an order of remand?

(iii) Whether the appellants, who are the legal representatives of the deceased second defendant, are entitled to contest the matter, notwithstanding the fact that they were set exparte, in the interest of justice?

(iv) When the description of the suit property is not sufficient enough to identify it in accordance with Order VII Rule 3 of the Code of Civil Procedure, whether a decree can be passed?

(v) Whether the first appellate court being the final Court on facts, is not required to independently consider the matter in accordance with Section 96 of the Code of Civil Procedure?



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4. The learned counsel for the appellants submitted:

- The suit was laid some time in 1979 and the trial admittedly had commenced only in 1995, after about 16 years. When the trial began on 06.02.1995, the first defendant had died, and the second defendant was not in the best of health. Indeed, he died in 1999, a couple of years later after the commencement of trial, without knowing that the suit he was contesting had been decided without he ever having an opportunity of knowing it.
- Contrary to what has been reasoned in the order of this Court in C.R.P.No.2764 of 2000, the preliminary decree passed is not a contested decree but a consented decree. Indeed, in paragraph No.10 of the judgment of the trial Court dated 06.02.1997, the trial Court has recorded that both the plaintiffs and the defendants have filed a joint statement about the shares that they have, and they had made a mutual statement that neither object to the share of the others. In other words, the decree on its face is either a consent-decree or it can even be a collusive decree, since the defendants 2 and 3 who were contesting the suit were not before the Court. Interestingly enough



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while there was no issue which the Court is now required to resolve, the learned trial Judge discusses something under the caption 'issues' to decide on a non-issue as between the parties then before it.

- When the matter went to the first appellate Court, the first appellate Court rejected the plea of the appellants that the second defendant was not informed about the commencement of trial by his counsel late Royappan, as he had stopped his legal practice. In arriving at its finding, the first appellate Court appeared to have misconstrued Ext.A.10, order of this Court in C.R.P.No.1579 of 2002 (the second revision referred to above, which the plaintiffs had produced before it). In that order, this Court has granted an injunction in favour of the plaintiffs to protect the possession of the property that they have obtained under the final decree dated 07.07.2000, till the rights of the appellants are finally adjudicated. The first appellate Court however, appeared to have believed that this is a direction given by this Court to the first appellate court.



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- On merit, the defendants are particularly aggrieved by the passing of the final decree because while the defendants claim title to 1.41 acres under three sale deeds plus another 18 cents that belong to the 18th defendant, the wife of the first defendant, what was left un-allotted under the final decree is a plot measuring 46 cents.

Reliance was placed on the dictum in *M/s.Meenakshisundaram Textiles Rep.by its Managing Director vs. M/s.Valliammal Textiles Limited, Tiruppur* [(2011) 3 CTC 168].

5. Per contra, the learned counsel appearing for the plaintiffs/respondents took this court to few dates and events tabulated below and argued:

Dates	Events
17.08.1979	Mr.Royappan filed vakalat for defendants 1 to 3
14.12.1979	Written statement of defendants 1 to 3 came to be filed
22.01.1980	Issues were framed and documents were directed to be produced in two weeks.
In their written statement, defendants 1 to 3 have pleaded that the wife of the 1 st defendant (mother of defendants 2 and 3) was entitled to some 18 cents and hence, she came to be impleaded by the plaintiff vide order in I.A.No.419 of 1980, dated 24.01.1980.	
21.11.1980	18 th defendant filed her written statement
Some time in 1984, the 18 th defendant died and defendants 2 and 3 came to be recorded as her legal representatives.	
The 1 st defendant died some time in 1986 and the exercise followed	



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- The core contention of the appellants' plea is fraud in law since the duty is on the client to seek the counsel and not vice versa. Therefore, the defendants ought to have known whether his counsel was still in active practice or otherwise.
- There is no material available to indicate that Mr. Royappan had stopped practice when the trial commenced on 06.02.1995. Indeed the appellants had taken up a position that when they filed an application to condone the delay in filing the appeal, they averred in the affidavit filed in support of it that the 2nd defendant had entrusted the matter with his brother, the 3rd defendant, and attributed to the state of affairs which they now face to the negligence of the 3rd defendant. This also finds a mentioning in the order of this Court dated 07.01.2003, in the second CRP No.1579 of 2002. The conduct put on display by the appellants would indicate that the defendants 2 and 3 took wobbling stands as to why they did not participate in the trial of the suit, and today, they blame their counsel, who is now dead and cannot defend himself. It was brought out solely by the negligence of the appellants or their predecessor in title as they chose



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to squander the opportunity they had in law by not participating in the trial of the suit.

- So far as deflecting the blame on the 3rd defendant goes, pending the suit he died, and his legal heirs were brought on record as D21 and D22. Even though the date of death of the 3rd defendant could not be ascertained, still, the death of the 3rd defendant is within the knowledge of the 2nd defendant or his legal heirs/appellants, and no explanation is offered as to why the 2nd defendant or the present appellants have not taken steps to follow the suit.
- It is relevant to state that when the appellants filed their application for setting aside the exparte order in 2000, the Commissioner's had already filed his report in the final decree proceedings. The records would show that the Commissioner had visited the property on 04.12.1999 and 05.12.1999 and the Commissioner's report was filed on 02.03.2000. This would show that these appellants are not even keen to do their homework fully and correctly, and now intend to upset something which has been done by the Court legally with a set of allegations that they cannot sustain.



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- The ground alleged before the first appellate Court was essentially the same ground which might be useful to the appellants for having the *exparte* decree set aside, but in a regular first appeal, they have to challenge the preliminary decree on its merit and not on the ground for non-appearance as under Order IX Rule 13. Inasmuch as the preliminary decree was not challenged on merit, they cannot have the said decree set aside.
- It is not that the trial Court hurried to set the defendants 2 and 3 *exparte*. The trial commenced on 06.02.1995 and P.W.1's examination was concluded on 22.02.1995. Thereafter, on 05.06.1995, the plaintiffs' side evidence was closed and D.W.1 was examined only on 27.11.1996. Indeed defendants 2 and 3 were set *exparte* almost after 20 months since the commencement of the trial on 06.02.1995. In law, it is the duty of the client to seek the counsel and not *vice versa*. Indeed D9, D11, D23, D26 to D28 who were set *exparte* along with defendants 2 and 3, had filed an application to have the order set aside and had participated in the trial, as could be seen from the notes paper of the trial Court for the date 20.12.1996. On 14.12.1979, the defendants 1 to 3 had filed their written statement. On 22.01.1980, the



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trial court framed the issues and directed the parties to produce documents within two weeks. Right from then till trial commenced on 06.02.1995, defendants 1 to 3 had not filed any documents. Indeed they have not filed any documents even before the first appellate Court, and have filed few documents only before this Court vide CMP No.3/2009. Were then these defendants serious about contesting the suit?

- Defendants 1 to 3 claim a combined total extent of 1.33 acres in S.Nos.355 and 510, of them two of the documents so relied on are sale deeds in favour of the first defendant dated 03.12.1946 and 17.05.1947. The documents which are now produced show that they are executed by one Kandarū Vasudevarū and it recites that the properties were under lease to third parties even in 1053 M.E. In this regard, Ext.B.18 is relevant, which is a lease deed executed by Udhayanoor Matom in favour of some 9 persons some time in 10.06.1095 M.E. (1920). The combined total extent is 90 cents and if this is detected, what is available is 41 cents, out of which 4 cents has been sold by them to the 16th defendant, and the balance would be 37 cents and even if some right which the 18th defendant claims is added,



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it cannot be more than 15 and odd cents. Now what is left unallotted is 48 cents. Today, not only the final decree had been passed, but even possession of the property had been duly taken in execution of the final decree. Indeed in the final decree, a plot measuring about 43 cents has still been left for other sharers, and if at all the appellants are interested, they need to workout their remedy within the plot now left unallotted in the final decree. Indeed in their written statement, defendants 1 to 3 have mentioned that they have a house in the property they had purchased and the 'J' plot, which was left unallotted, the house referred to by defendants 1 to 3 is there. In other words, the final decree was passed only after a careful appreciation of the contention canvassed by the defendants, and that it did not match that the extent that these defendants' claim did not merit consideration now.

- If really the owner of the property was a Brahmin, and the defendants had purchased the property from him, there is no need to get sale deeds from others.
- The only contention raised by the appellants before the first appellate Court was that the property in S.No.355 and S.No.510 lie together



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and hence, the suit for partition of S.No.355 alone is not maintainable, but this is belied by the Commissioner's report filed prior to trial. Contrary to the contentions of defendants 1 to 3, in their written statement, the Commissioner had found that S.No.355 and S.No.510 lie as two separate block of property with a channel dividing them.

- In the final decree proceedings, commissioner has visited the property. Since the appellants claim possession of the property they had purchased, it follows that they were aware of the suit and the status of the proceedings, yet they did not want to participate in the final decree proceedings. If really they are in possession of the property as alleged, they would have opposed the Commissioner's report and plan in the final decree, they being parties to the proceedings.
- On merits, as per Jenmi Kudiyan Regulation of 1061 M.E., Regulation 5 speaks about the enfranchisement of land to kudiyan (lessee) and vesting of ownership in Kudiyan. In Ext.B18, which is also by Brahmin, there is a reference to 1053 Pattom, which means as per the said Regulation, Kudiyan has become the owner of the



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property. Even though this aspect does not form part of the pleadings, the same has been narrated only to the limited extent that Uthianoor Matom could not be the owner of the property. It may be relevant here to mention that the appellants themselves have purchased from some of the Kudiyan, and hence they cannot press into service both the documents in support of their claim as it is too late for them to prove against the consequences of Jenmi Kudiyan Regulation. It may be stated that both the plaintiffs and the defendants have purchased from the successors of the lessees who have become the owner of the suit properties by virtue of *pattom* (lease) executed under Ex.B18, the tamil translation is Ex.B19. Under Ex.B19 there is a reference about kanom document of the year 1053 ME (1878). This could also be inferred from the fact that the 4th defendant in his written statement stated that the family of 1st defendant is entitled only to 40.5 cents.

- Indeed, the 4th defendant has filed his independent written statement wherein he claims that he along with defendants 1 to 3 are entitled to 42 cents and a house, and that he had laid a suit in O.S.51 of 1979 for partition against them. D21 and D22 are legal heirs of D4. However,



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none of the defendants 1 to 3, more particularly the 2nd defendant, did not file any additional pleadings against the allegations made by the 4th defendant. This apart, the defendants 1 to 3 have not opposed other defendants claiming some fractional right in the suit property. In the absence of any explanation as to what happened to O.S.No.51 of 1979, to which the appellants are parties and that is also a suit for partition, the appellants cannot agitate their right in the suit property based on the additional documents.

- The defendants 1 to 3 alleged that the wife of the first defendant owned some 18 cents and hence she was impleaded vide order dated 25.4.1980 in I.A.NO.419/1980. But she did not file any written statement. She died sometime in 1984, and defendants 2 & 3 were recorded as her Legal heirs vide Order dated 21.01.1985 in I.A.No. 1219 of 1984. Even they did not file any written statement, defending the alleged right of the 18th defendant.
- The trial of the suit commenced on 06.02.1995. But the defendants 2 and 3 and 18 were watching the proceedings. They are aware of the stage of the suit. But they having prayed for decreeing the suit as in the plaint, have chosen not to contest the suit. Only the heirs of the



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second defendant now attempt to raise an issue which their father was not interested in contesting. And notwithstanding the fact that 18th defendant was stated to have some claim in the suit property, her counsel too did not cross examine.

- Further, the appellants have included 18th defendant's document of title in the application for reception of additional evidence. When there is no pleading by the 18th defendant, there cannot be any evidence. On impleading the 18th defendant, the allegation of non-joinder of necessary party might go, (in the absence of written statement of D18) still the second defendant cannot rely on the title of D18.
- The appellants as LR's of the 2nd defendant intend to contest only the right of the 2nd defendant, and do not stake any claim to defend the right which the 18th defendant projected.
- The appellants are bound by the order in C.R.P. No.2764 of 2000, wherein their request for an opportunity had been negatived. There is no bonafide in the conduct of the appellants inasmuch as they suppressed the order passed in C.R.P. No.1579 of 2002 while



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C.R.P. No.2764 of 2000 was heard and suppressed the order passed in C.R.P. No.2764 of 2000 before the lower appellate Court, particularly when they chose to file the order passed in C.R.P. 1579 of 2002 in the first appeal.

- The final decree was passed and execution also had taken place. Pending C.R.P.2764 of 2000, as per their averment they filed an appeal against the preliminary decree with an application for condonation of delay in filing the same. The said application in I.A. 372 of 2001 was allowed and confirmed by this Hon'ble court in C.R.P.No.1579 of 2002 by an order dated 07.01.2003. Thus, the appellants have given up their remedy in prosecuting the application to set aside the exparte preliminary decree and proceeded to challenge the same on merits.

Reliance was placed on the authorities of the Hon'ble Supreme Court in *Rasiklal Manichand Dhariwal and another v. M.S.S.Food Products* [(2012) 2 SCC 196] ; *Bhanu Kumar Jain v. Archana Kumar and another* [(2005) 1 SCC 787]; *Vidhyadhar v. Manikrao and Another* [(1999) 3 SCC 573] and the judgment of this Court in M.P.Nos.1 & 2 of 2011 in CMA.No. 2148 of 2008



Of Discussion and Decision

6. The point required to be probed is not so much on the merit of their defence and their own claim to a portion of the suit property and another property, but whether the second defendant was denied a fair opportunity of defending the suit, or did he squander the opportunity that was available to him.

7. The grievance projected by the appellants as the heirs of the second defendant is that the second defendant did not know about the commencement of trial as his counsel late. Royappan had retired from active legal practice, and hence he did not know about the commencement of the trial to help himself with an opportunity to prove his defence that he had raised along with his father, the first defendant, and his brother, the third defendant in the written statement. And this Court finds that contrary to the finding in the order of this Court in CRP (PD) 2754 of 2000, the preliminary decree passed on 06.02.1997 was not a contested decree at least as regards those defendants who participated in the trial, but is a consented decree – a decree passed by all those who participated in the trial agreeing to take what they wanted to take, but all in the absence of the 2nd defendant.



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And a scrutiny of the events narrated earlier in paragraph 2 shows that the appellants herein as the heirs of the 2nd defendant appeared to have come to know about the preliminary decree passed much later, after the demise of the 2nd defendant in 1999.

8. The appellants did what they could do in procedure – to approach the trial court with an application to set aside the exparte preliminary decree passed against the 2nd defendant along with an application for condonation of delay in filing the said application in CF No. 4313 of 2000. It may have to be noted that at that relevant point of time the final decree was yet to be passed. And, it was passed only about 24 to 30 months since the preliminary decree was passed. The trial court should have at least shown minimum courtesy to the litigant and received the application for condonation of delay on record, heard on the cause adduced by the appellants for the non appearance of the 2nd defendant during trial and the reason for delay etc. Sadly, very sadly, the presiding officer of the Court did not feel it a duty to even to take this application on record, threw it with her left hand, and passed the final decree through her right hand, all on the same day, on 07.07.2000.



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9. The Code is sensitive to the realities of life that visit a litigant, and hence it has provided for every contingency that may affect the right to litigate or to defend a litigation. In that sense, Order XI Rule 7 or 9 or 13 CPC are not cosmetic provision with zero value, nor do they encourage the Court to exercise their discretion in a manner that could hamstring the course of justice. And, in the context of the present case, if only the trial court had realised it 22 years back when the appellants were before it with their application, this situation possibly might have been averted. Instead it refused a hearing to the appellants without even receiving the application filed by the appellants on record, and dismissed it with disdain. There is little doubt in the assessment of this Court that the attitude of the trial Judge, the one who had passed both the preliminary decree and also the final decree, was a display on how a Judge possibly might not act. And, this Court has not ignored to note that this Judge had passed a preliminary decree on consent, but made her judgement appear as if it was a judgement delivered on contest. This implied that there is an organised pattern to the judicial impropriety which this trial Judge had revelled in engaging. (And, this Court is informed that this Judge has since retired from service and has



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passed away too).

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10. When their application for condonation of delay for filing their application under Order XI Rule 13 CPC was rejected, the appellants were driven to challenge this order in CRP (PD) 2764 of 2000. But they appeared not to take any more chances with the procedure, and hence have also filed a regular first appeal against the decree with a prayer for remand. And they informed the first appellate court about the circumstances in which the second defendant could not participate in the trial. The first appellate court's judgement nowhere indicate that the allegation of the appellants that Thiru. Royappan, the counsel of the second defendant, had retired from active legal practice at the time when the suit was taken up for trial was false, but only holds that this reason is not satisfactory. This takes the issue to revisit a basic question in legal practice on the permissibility of a litigant coming up with an explanation for seeking a hearing or a re-hearing on the ground that he/she was not intimated the date of hearing of the case.



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11. On this point, this Court is aware of few authoritative pronouncements of this Court which required the litigant to seek the advocate and not vice versa. This would therefore mean that, want of information from the counsel about the posting of a case will not aid a litigant to explain his or her absence in the court on the date of posting of a case. But it needs to be instantly underscored that these pronouncements are not scientific or formulae to have universal application, unlimited by time and unrestricted by circumstances, and hence they have to be appreciated in the contextual setting in which they are pronounced. After all, life of law is not logic but experience, and hence Courts should not strive to achieve uniformity in application of procedural law and infuse rigidity to its application. Every case is a story untold till it is finally concluded, and the Courts must not assume a role of a disciplinarian, unless it is satisfied that the litigant has misused or abused the judicial process. After all, the Code of Civil Procedure is not a rule book of discipline but a rule book on fairness. The point is whether the second defendant enjoyed a fair deal in procedure?

12. Let the material events be replayed. The suit was laid in 1979. The defendants 1 to 3, the father-sons trio had filed their written statement in



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time, and issues too were framed on 22.01.1980. But the trial commenced on 06.02.1995, some 16 years since the suit was instituted, and about 15 years since issues were framed. The diary of the court discloses that between 23.03.1985 and 21.03.1991, for about six years, on all the dates on which the case was posted, the presiding officer of the Court was on leave. What a terrible coincidence! Then it was taken up on 11.06.1992, and thereafter for the next 15 months, to be precise, till 16.09.1993, on all the dates on which the case was posted, the Judge was again on leave. In effect, between 23.03.1985 and 16.09.1993, barring a solitary instance, on all the dates of posting of the case, the judge was on leave. This has consumed a whopping eight and half years. From then to the commencement of trial on 06.02.1995, the case was posted a couple of times, and during this period the judge was on leave at least on one occasion.

13. In a case in which issues were framed in January, 1980, the case proceeded without a judge to hear it for several years. If the ordinary course of human conduct is considered as integral to appreciating the facts, and if the reasonable man of law is to provide the guidance based on it,



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will not any litigant become tired of following a case which is in hibernation for nine years? Life's pursuit is not all about pursuing a litigation, and if it is to be considered otherwise then it will limit a citizen's right to life to the confines of a litigation and the court room. That will be a shame on his right to life, and insult to his existence under the Constitution. Therefore, unless the legal system of the country can assure a litigant of its ability in delivering justice within a reasonable time-frame, a litigant cannot be blamed for not tracking the date of posting of the case, more so, in a case stuck at the same stage for close to a decade. It is therefore natural for the litigant to wait for the information from his or her counsel.

14. This now makes prominent the role of the Advocates. They are there to follow a litigation and inform their clients. Sadly, in the case at hand, the appellants allege that Thiru. Royappan, the counsel of the second defendant, had stopped his practice by the time the trial had commenced. This fact is not pointedly disputed by the plaintiffs/ respondents 1 & 2, but what this Court heard was that the appellants are assuming a wobbling stands, as they had alleged in their affidavit filed in support of their



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application for condonation of delay in filing the first appeal against the preliminary decree and about the retirement of the advocate from the legal practice at another place. Now, with the third defendant now dead, and with the appellants not shown to have known about the litigation before the death of their father, re-creating the facts cannot be meticulously done. And at this distant point of time, this court essentially needs to look to how parties have conducted their affairs broadly.

15. From the point of view of the second defendant, misfortune appears to be shadowing his litigious pursuit. For several years there was no Judge to hear his case, and when the Judge finally arrived, his counsel had retired from active legal practice. Does it not indicate that this litigant is stranded in an inopportune whirlpool of processual justice? Should this Court continue to reject a cry for a fair hearing from his heirs? To state it differently does the Court exist to crown a plaintiff with a decree without a fair hearing to the defendant when he cannot be considered as a defaulter in procedure?



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16. And, whether the rule of fairness has been extended to a litigant cannot be straight jacketed as it varies with the facts and circumstances of each case. It needs to be emphasised that Courts ought to realise that pursuing a litigation is but one of the responsibility of a citizen, and not the only responsibility. Hence when a litigant, who having missed an opportunity not entirely due to his fault, but again appears and seeks an opportunity to hear him, it is mandatory for the Courts to appreciate the cause adduced for his non appearance earlier humanely and with pragmatism.

17.1 If the numerous contentions which the plaintiffs/ respondents 1 and 2 have taken up to resist the plea of the appellants for a trial on their defence are scanned, most of them are on the merit of the case. And this includes the impact of the Jenmi Kudiyan Act on the rights acquired by the second defendant. They do not worry this court now, for this court would be required to speculate a few things then, all in the absence of the proof of the case of the appellants, and if attempted this Court will end up doing the same mistake which the trial court or the first appellate court have committed. To repeat, at this stage this Court is not concerned with the merit of the case, but is only trying to understand rather posthumously if the



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second defendant can be considered a defaulter in procedure that his right to prove his defence could be forfeited to his heirs.

17.2 If the reminder of the plaintiffs' contentions are scanned, they are essentially border on hyper-technical pleas available in procedure. But the unbreachable procedure that this court knows of is in ensuring that the litigant is granted a fair deal in procedure to prove his case and that it is not banished when he cannot be blamed entirely.

18.1 On a careful perusal of the facts and circumstances of case presented by the appellants, this Court considers that the second defendant was not granted a fair deal by the trial court nor were the appellants. They have to be heard on their defence. Necessarily, the preliminary decree passed by the trial Court has to be set aside vis-a-vis the second defendant.

18.2 Heard. This Court perused the ratio declared in few authorities cited by the counsel for the plaintiffs / 2nd respondent, and they may not be useful for finding a solution to the controversy before this Court. As stated earlier, law of procedure cannot assume constancy in its application



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and it has to be weighed and applied to meet the situation which every case presents before the Court.

19. In fine, this appeal is allowed, the preliminary decree is set aside and the matter is remanded to the trial Court, and the appellants are given an opportunity to prove their defence. And inasmuch as the preliminary decree now passed is a consent, every other parties who are likely to be affected by the opportunity now granted to the appellants herein, will also have the right to adduce evidence in support of their case. This Court, however makes it clear that inasmuch as the parties have taken delivery of the property, pursuant to the final decree dated 07.07.2000, they can continue to hold on to the portions that they occupy, till the preliminary decree to be passed by the trial Court becomes final. The trial Court shall strive to complete the process within a period of six months, on a day to day basis, excluding all intervening vacations and holidays. Parties are directed to appear before the trial Court on **19.01.2023**. There shall be no order as to costs.

20. The documents now sought to be produced by the appellants in M.P.No. 3 of 2009 are directed to be returned to the appellants and they are directed



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to produce the same before the trial Court pursuant to the order of remand

now made. Accordingly, this miscellaneous petition is closed.

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Index : Yes / No

Internet : Yes / No

Speaking order / Non-speaking order
abr/ssb



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To

- 1.The Sub Judge,
Kuzhithurai.
- 2.The II Additional District Munsif,
Kuzhithurai.
- 3.The Section Officer, VR Section,
Madurai Bench of Madras High Court,
Madurai.



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N.SESHASAYEE, J.

abr/ssb

Pre-delivery Judgment made in
S.A.(MD) No.427 of 2006

23.12.2022