



C.M.A.No.2503 of 2003

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.10.2023

C O R A M

THE HONOURABLE MR.JUSTICE M.DHANDAPANI

C.M.A.No.2503 of 2003

- 1.Mahalingam (Died)
- 2.Vedalingam
- 3.Viswalingam
- 4.Anbarasi
- 5.Velvizhi
- 6.Sekaran
- 7.Balamurugan
- 8.Krithika

(Appellant – 1 (Died) Appellants 4 to 6 brought on record as Legal heirs of the deceased A-1 Mahalingam vide Court order dated 14.06.2023 made in CMP.Nos.9255 & 9257 of 2019 & C.M.P.No.12497 of 2021 in CMA.No.2503 of 2003)

... Appellants

Vs

- 1.Krishna Pillai (Died)
- 2.Govindaammal
- 3.Seppapillai
- 4.Saravanan
- 5.Sathiya Sugamar
- 6.Amirthavali
- 7.Sundarakumar

(Sole Respondent Died. Respondents 2 to 7 brought on record as Legal heirs of the deceased Sole Respondent Viz., Krishna Pillai vide Court order dated 14.06.2023 made in CMP.Nos.9255 & 9257 of 2019 & C.M.P.No.12497 of 2021 in CMA.No.2503 of 2003)

... Respondents



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PRAYER: Civil Miscellaneous Appeal filed under Order 43 R 1(d) of Civil Procedure Code against the Fair and Decreetal Orders dated 22.07.2003 in I.A.No.115/2003 in I.A.No.141/1997 in O.S.No.179/1994 on the file of the Principal Sub Court, Nagapattinam.

For Appellant ... M/s.R.Meenal

For Respondents ... R1 Died (Steps taken)
... Mr.T.Girish for R2 to R7

J U D G M E N T

Challenging the decreetal Order dated 22.07.2003 in I.A.No.115/2003 in I.A.No.141/1997 in O.S.No.179/1994 on the file of the Principal Sub Court, Nagapattinam, the appellant has filed the present appeal.

2. It is the case of the appellant that the 1st respondent/plaintiff filed a suit for partition in O.S.No.179 of 2019 claiming 1/5th of the share in the property owned by the family consisting of the 1st respondent/plaintiff, the appellant and their brothers who are arrayed as defendants 1 to 5 therein in which the ex-parte decree was passed on 11.01.1995. Subsequently, the Advocate commissioner was appointed to measure the plaintiff's share of the



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property in question to allot the same in favour of the 1st respondent/plaintiff in terms of preliminary decree dated 11.01.1995. The Advocate Commissioner after visiting the properties, had filed a report before the trial court based on which, a final decree dated 20.12.2002 was passed in the suit. Subsequently, the appellant filed IA.No.115 of 2003 in IA.No.141 of 1997 in O.S.No.179/1994 on the file of the Principal Sub Court, Nagapattinam to set aside the ex-parte decree dated 20.12.2002 on the ground that there was a customary partition in respect of the properties which was enjoyed by all the family members, however, the trial court had erroneously dismissed the IA.No.115 of 2003 filed by the appellant. Aggrieved by which, the present appeal has been filed.

3. Learned counsel appearing for the appellant fairly submits that there was a customary partition in respect of the property in question and the said property has to be divided based on the customary partition in terms of the preliminary decree however, the appellant had no opportunity to putforth his case before the trial court and that the Trial Court had mechanically rejected



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the application which is a clear violation of principles of natural justice.

Therefore, this Court may direct the Trial Court to pass the final decree proceedings within the time frame that may be stipulated by this Court, after affording an opportunity of personal hearing to the family members who enjoyed the property as per the customary partition.

4. Learned counsel appearing for the Respondents 2 to 4 submits that admittedly, the ex-parte preliminary decree was passed in the year 1995 in O.S.No.174/1994 pursuant to which, the Advocate Commissioner was appointed who had visited the property and after hearing the parties had submitted the final report before the trial court, based on the said report the final decree dated 20.12.2002 was passed. Though the appellants were aware of the preliminary decree, they have not chosen to file any application at the relevant point of time. However, subsequently, in order to defeat the legitimate right of the respondents/plaintiff in the final decree proceedings, have intentionally filed IA.No.115 of 2003 to set aside the final decree passed in O.S.No.179 of 1994 and after elaborately considering the said issue, the trial



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court had dismissed the IA.No.115 of 2003. Though it is claimed by the appellants that there was a customary partition in respect of the subject properties, no material evidence has been placed by the appellant even before the trial court to substantiate the said claim. In the absence of any material evidence, the trial court has rightly rejected the application filed to set aside the final decree passed in O.S.No.179 of 1994 which cannot be found fault with. Accordingly, he prays for dismissal of this appeal.

5. This Court heard the learned counsel appearing for the appellants and the respondents 2 to 7 and perused the materials available on record.

6. The facts of the present case are not in dispute. Admittedly, learned counsel appearing for the appellants fairly conceded that the 1st respondent is entitled to 1/5th share of the subject property which was enjoyed by the appellant and other family members including the respondent/plaintiff. It is equally undisputed that the final decree was passed on 20.12.2002. Though, it is the claim of the appellants that there was a customary partition among the



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the family members based on which the said properties were enjoyed by the respective family members, the said facts were not putforth before the trial court. Further, there is no material to show that there was a customary partition in respect of the properties which are said to have been enjoyed by the family members of the appellant. It is the further case of the appellant that he was not aware of the preliminary decree passed by the trial court in O.S.No.179 of 1994 and only after the advocate commissioner visited the property he came to know about the preliminary decree and, therefore, had filed the application to set aside the said ex parte order at the time when the final decree was passed on 20.12.2002, which is within a period of four months. There is not much delay for filing the application to set aside ex-parte preliminary decree and hence without providing an opportunity to the appellant final decree was passed. Further, the respective appellants admitted that the 1st respondent is entitled for 1/5 th of the share of the property.

7. The above stand of the appellants is not disputed. However, the respondent claims that only to defeat his rights the present application has



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been filed to set aside the order. It is to be borne in mind that there is a clear admission as to 1/5th share of the respondent in the property. That being the case, necessarily, the appellants have to be heard before final decree is passed. However, without hearing the appellants, final decree has been passed, which is clear violation of principles of natural justice and necessarily the said order deserves to be set aside and the matter has to be remanded to the trial court.

8. Accordingly, the Civil Miscellaneous Appeal is allowed and the impugned final decree dated 20.12.2002 is set aside. In view of the same, the order passed in I.A.No.115 of 2003 will not subsist and the matter is remanded to the court below to further, grant an opportunity of hearing to the appellants as well as the plaintiffs and pass final decree within a period of six months from the date of receipt of a copy of this order. There shall be no orders as to costs in this Appeal.

16.10.2023

Index : Yes / No
Speaking Order / Non-speaking order
Neutral Citation Case : Yes / No

NHS



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WEB COPY

To

- 1.The Principal Sub Court,
Nagapattinam
- 2.The Section Officer,
V.R. Section,
High Court, Madras.



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M.DHANDAPANI, J

NHS

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