



CRP No.1297 of 2016

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.01.2023

CORAM

THE HON'BLE MR. JUSTICE **G.K.ILANTHIRAIYAN**

CRP.No.1297 of 2016
and CMP.No.7254 of 2016

1.Rajkumaran
2.Chandrabose

..Petitioners

Vs.

1.Kaliyaperumal
2.Karunanithi

..Respondents

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, to set aside the order and decreetal order made in E.A.No.33 of 2010 in E.P.No.55 of 2009 in O.S.No.49 of 1997 passed by the Subordinate Judge, Panruti, and allow the civil revision petition.

For Petitioners : Mr.S.Ganesh

For Respondents

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

For R2 : No appearance

ORDER

The civil revision petition has been filed as against the fair and decreetal order dated 11.01.2016 passed in E.A.No.33 of 2010 in E.P.No.55 of 2009 in



O.S.No.49 of 1997 on the file of the Subordinate Judge, Panruti, thereby dismissing the petition filed under Section 47 of CPC seeking to enquire into the matter and determine the question of executability of the decree and adjudicate upon the claim of the petitioners.

2. The first respondent herein filed a suit for partition claiming 1/5th share in respect of the suit properties. The said suit was decreed in favour of the first respondent. As against the preliminary decree no one has filed any appeal suit. On the strength of the preliminary decree, the first respondent filed an application for final decree in I.A.No.398 of 2000. In the final decree application, an Advocate Commissioner was appointed and he inspected the property and submitted his report. In his report, the extent of the property in respect of item No.7 of the suit schedule property was wrongly mentioned as 1.25 acres instead of 20 cents out of 45 cents. As per the Advocate Commissioner's report, the final decree was passed. The said final decree was challenged by the petitioner herein before this Court in appeal suit and the same was dismissed and confirmed the final decree passed by the Trial Court. On the basis, the first respondent herein filed an Execution Petition in E.P.No.11 of 2002. Pending the Execution Petition, the petitioner herein filed an application under Section 47 of CPC in E.A.No.33 of 2010 to enquire into the matter and



determine the question of executability of the decree and adjudicate upon the claim of the petitioner. It was dismissed. Aggrieved by the same, the present civil revision petition.

3. The learned counsel for the petitioner would submit that the petitioner has no objection in respect of the allotment of 1/5th share in favour of each party. Even according to the first respondent, the item No.7 of the suit schedule property comprised in New Survey No.236/2 Old Survey No.256/11 is an extent of ad-measuring 20 cents out of 45 cents. Accordingly, the preliminary decree was passed whereas the Advocate Commissioner had wrongly mentioned the extent of the property as 1.25 acres instead of 20 cents out of 45 cents. Therefore, the total extent of the suit properties were wrongly calculated as 11.16 $\frac{1}{4}$ acres instead of 10.21 $\frac{1}{4}$ acres. The total suit property was valued at Rs.36,28,500/- in which the Advocate Commissioner divided the properties as five shares and the first respondent was allotted for 2.92 $\frac{1}{2}$ acres as 1/5th share. The extent of item No.7 of the property was correctly mentioned, it would only be 10.21 $\frac{1}{4}$ acres, in which the 1/5th share would be less than 2.92 $\frac{1}{2}$ acres. However, the Court below dismissed the application on the ground that the petitioner failed to raise objections to the Advocate Commissioner's report and had never raised this ground before this Court in Appeal Suit.



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4. Per contra, the learned counsel for the first respondent would submit that on receipt of the Advocate Commissioner's report, the petitioner failed to raise any objections. In this regard, aggrieved by the same, the petitioner also preferred an appeal in A.S.No.46 of 2002 and the same was also dismissed and confirmed the final decree passed by the Court below. Therefore, by way of a petition filed under Section 47 of CPC, the judgment and decree passed by this Court cannot be upset. As per the final decree, the first respondent was allotted 1/5th share in respect of the item 2 to 16 of the suit schedule properties. The value also equally divided into five shares. Accordingly, he was allotted item Nos.2 to 16 in the suit schedule property. Further, the petitioner never raised any objections on receipt of the Advocate Commissioner's report and did not even raise any ground before this Court while challenging the final decree in A.S.No.46 of 2002. Therefore, the Court below rightly dismissed the application and it does not warrant any interference by this Court.

5. Heard the learned counsel appearing for the petitioners and the learned counsel appearing for the first respondent and perused the materials available on record.



6. Admittedly, the first respondent filed a suit for partition and the same was decreed in O.S.No.49 of 1997. The preliminary decree was not challenged by any of the parties. On the strength of the preliminary decree, the first respondent filed an application in I.A.No.398 of 2000. In the final decree application, an Advocate Commissioner was appointed and he filed his report on 06.08.2001.

7. On perusal of Advocate Commissioner's report revealed that he had wrongly mentioned the extent of the item No.7 of the suit schedule property as 1.25 acres instead of 20 cents out of 45 cents. There are totally 17 items in the property he mentioned total extent as 11.16 $\frac{1}{4}$ acres and valued at Rs.36,28,500/-. He divided the property into five shares and one share equivalent to Rs.7,25,700/- and accordingly, the first respondent was allotted item Nos.2 to 16 of the suit schedule properties. Though the petitioner failed to raise any objections in this regard on receipt of the Advocate Commissioner's report and failed to raise any grounds before this Court, he filed a petition under Section 47 of CPC. The only objection raised was that in the Advocate Commissioner's report there was discrepancies in respect of the item No.7 of the property. He has no objection in respect of 1/5th share allotted to each party. If it was rightly calculated as 20 cents out of 1.25 acres, the total extent of the



property would come to 10.21 $\frac{1}{4}$ acres. If the total extent is 10.21 $\frac{1}{4}$ acres, the first respondent is entitled to have $\frac{1}{5}$ th share as 2.02 $\frac{1}{4}$ acres, whereas he was allotted 2.92 $\frac{1}{2}$ cents. Therefore, the other sharers will get less property though they were allotted $\frac{1}{5}$ th share.

8. The learned counsel for the first respondent vehemently contented that the petitioner having failed to raise objection on receipt of the Advocate Commissioner's report and failed to raise any ground in the Appeal Suit filed against the final decree, cannot raise a ground under Section 47 of CPC.

9. It is relevant to extract the provision under Section 47 of CPC as follows;-

“ All the 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 have to be determined by the Court executing the decree and not by a separate suit.”

Thus, it is clear that if the decree holder takes that in execution land not included in the decree, or in excess of the decree, the judgment debtor must



invoke the provision under Section 47 of CPC for the recovery of such land, and a separate suit for that purpose need not be filed.

10. Further, the Hon'ble Supreme Court of India held that in the case of ***Bhavan Vaja and Others Vs. Solanki Hanuji Khodaji Mansang and Another*** reported in (1973) 2 SCC 40, held that the executing Court cannot go behind the decree under execution. But that does not mean that it has no duty to find out the true effect of that decree. For construing a decree it can and in appropriate cases, it ought to take into consideration the pleadings as well as the proceedings leading up to the decree. In order to find out the meaning of the words employed in a decree the Court often has to ascertain the circumstances under which those words came to be used. That is the plain duty of the execution Court and if that Court fails to discharge that duty it has plainly failed to exercise the jurisdiction vested in it. The jurisdiction of execution Court does not begin and end with merely looking at the decree as it is finally drafted. Therefore, the execution Court can very well own to the decree.

11. Admittedly, the Advocate Commissioner had wrongly mentioned the extent of land in respect of the item No.7 of the suit schedule property as 1.25 acres instead of 20 cents out of 45 cents. Therefore, the first respondent was



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allotted more extent of the property though he was allotted 1/5th share.

Therefore, this Court finds infirmity or illegality in the orders passed by the Courts below and it is liable to be set aside.

12. Accordingly, the order passed by the Subordinate Judge, Panruti, in E.A.No.33 of 2010 in E.P.No.55 of 2009 in O.S.No.49 of 1997 is hereby set aside and the matter is remitted back to the execution Court for fresh consideration in the line of observation made by this Court.

13. In the result, the civil revision petition stands allowed. The trial Court is directed to dispose of the application within a period of two months from the date of receipt of a copy of this order. There shall be no order as to costs. Consequently, connected miscellaneous petition is closed.

03.01.2023

Speaking/Non-speaking order

Index : Yes/No

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G.K.ILANTHIRAIYAN.J.

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To

The Subordinate Judge, Punruti.

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