



C.R.P.No.2790 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.09.2023

CORAM:

THE HONOURABLE MR.JUSTICE V.LAKSHMINARAYANAN

C.R.P.No.2790 of 2019

and

C.M.P.No.18287 of 2019

1. Periyammal
2. Palaniammal
3. Vedakkal
4. Chinnathayee

... Petitioners

Vs.

Ammasi

... Respondent

Prayer: Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the judgment and decree dated 27.03.2019 made in CMA.No.13 of 2018 on the file of the Subordinate Judge, Sankari which confirmed the order passed in I.A.No.636 of 2017 in I.A.No.228 of 2014 in O.S.No.104 of 1994 on the file of District Munsif Court, Sankari.

For Petitioners : Ms.Monalisa
for R. Marudhachalamurthy



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ORDER

WEB COPY This Civil Revision Petition has been filed to set aside the judgment and decree dated 27.03.2019 made in C.M.A.No.13 of 2018 on the file of the Subordinate Judge, Sankari confirming the order passed in I.A.No.636 of 2017 in I.A.No.228 of 2014 in O.S.No.104 of 1994 on the file of District Munsif Court, Sankari.

2. The suit in O.S.No.104 of 1994 is filed for partition. The said partition suit ended in a decree on 25.08.2000. The second defendant aggrieved by the same, preferred an appeal in A.S.No.22 of 2001 and the same was partly allowed granting a variation in the preliminary decree. The plaintiff put the preliminary decree into operation by filing an application for final decree in I.A.No.228 of 2014.

2.2 In the meantime, the second defendant passed away and her legal representatives were brought on record. After being brought on record, they remained ex parte. Therefore, to set aside the ex parte order in I.A.No.228 of 2014, they filed an application in I.A.No.636 of 2017 under Order 9 Rule 7 of Code of Civil Procedure. The said application was dismissed by an



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order of the learned trial Judge dated 21.06.2018. Instead of filing a revision, an appeal seems to have been presented before the Subordinate Judge, Sankari in C.M.A.No.13 of 2018. The same was dismissed on 27.03.2019, against which the present civil revision petition has been filed.

3. Heard the learned counsel for the petitioner. I have carefully gone through the records and perused the orders of the Courts below.

4. At the outset, I have to state that an appeal against Order 9 Rule 7 of CPC is not maintainable at all. An appeal is maintainable only against the dismissal of an application under Order 9 Rule 13 of CPC. If an application under Order 9 Rule 7 of CPC is dismissed, the remedy is only by way of a revision. Unfortunately, it seems that the Court below had entertained the appeal, and had dismissed it. I do not want to non suit the defendant only on the ground that they had preferred an appeal in a case where appeal is not maintainable. Such an order will only prolong the litigation enabling the petitioner to challenge the order passed in I.A.No.636 of 2017.



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5. Taking into consideration the long pendency of the suit and also the final decree proceedings, I am of the view that this revision be converted as a revision against the order passed in I.A.No.636 of 2017.

6. The Court, while interpreting Order 9 Rule 7 of CPC, has to give a much more liberal interpretation than at the time of treating an application under Order 9 Rule 13 of CPC. Here is a case, where the defendant has passed away and the legal heirs are litigating for a share to be allotted in their favour. At this stage, if they are asked to leave the Court proceedings, then there is a possibility that the division might not be fair. An opportunity should be granted to the petitioners to agitate as to the fair manner of division. At the same time, the Court below should be cautious that the petitioners do not place submissions which would tend to reopen the preliminary decree. The preliminary decree having been appealed against in A.S.No.22 of 2001 and the said judgment and decree, dated 07.09.2004 having attained finality, the petitioners will not be permitted to make submissions on the validity of the preliminary decree. However, I feel the petitioners should be given an opportunity in order to agitate as to whether



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the manner of division that might be suggested by the Advocate

Commissioner is fair and equitable.

7. Taking that into consideration-

(i) The Civil Revision Petition is allowed.

(ii) The order passed in C.M.A.No.13 of 2018 on the file of Subordinate Court, Sankari is set aside on the ground of it is a nullity since the appeal is not maintainable.

(iii) The order passed in I.A.No.636 of 2017, dated 21.06.2018 is set aside.

(iv) The Court below shall grant an opportunity to the petitioners to file their objections to the Advocate Commissioner's Report and make submissions on the manner of division alone and to state whether the same is fair and equitable.

(v) The entire exercise must be completed on or before 28.02.2024 and a report should be submitted before this Court.

(vi) Consequently connected miscellaneous petition is closed. No costs.

07.09.2023

Index: Yes/No
Neutral Citation: Yes/No
AT/MKN-II



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V.LAKSHMINARAYANAN,J.

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To

1. The Subordinate Judge,
Sankari.
2. The District Munsif Court,
Sankari.

C.R.P.No.2790 of 2019 and
C.M.P.No.18287 of 2019

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