



THE HIGH COURT OF JUD ICATURE AT MADRAS

DATED: 19.10.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE N.SENTHILKUMAR

A.S.No.678 of 2017
and
C.M.P.No.18925 of 2023

1.Abdul Jalal

2.Sakheela Bee

...Appellants

Vs.

Mohammed Idris

...Respondent

Prayer: First Appeal filed under Section 96 of C.P.C., r/w. Order 41 Rule 1 of C.P.C., against the order and final decretal order passed by the I-Additional District and Sessions Judge (Fast Track-II), Cuddalore in I.A.No.110 of 2012 in O.S.No.136 of 2009 on 11.08.2017.

For Appellants : Mrs.Chitra Sampath, Senior Counsel
for Mr.C.Prasanna Venkatesh

For Respondent : Mr.R.Agilesh



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J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

This Civil Miscellaneous Petition in C.M.P.No.18925 of 2023 has been filed seeking amendment of the schedule of property in the preliminary decree dated 20.03.2012 as confirmed in A.S.No.913 of 2012 by this Court in its judgment dated 08.06.2016. This appeal is against the final decree passed by the Trial Court pursuant to the preliminary decree referred to above.

2.The respondent sued for partition of his 1/2 share of the suit "A" schedule property, measuring about 9,135 Sq.ft, which houses a Kalyana Mandapam. The respondent had pleaded in the plaint that he along with the 1st appellant had purchased an extent of 4,360 Sq.ft. (10 cents) under a sale deed dated 30.04.2023. After the said purchase, the property belonging to the family, which was situate on the Western side of the property purchased under Ex.A1, sale deed referred to supra was merged and a Kalyana Mandapam was constructed in both the properties. Specifically pleading that the property purchased under Ex.A1, sale deed and the Family property, which was used for construction of the Kalyana Mandabam became the joint



property of the plaintiff and the 1st defendant by purchase **and by treatment**, the plaintiff sought for 1/2 share in the entire "A" schedule property measuring about 9,135 Sq.ft.

3.The said suit was resisted by the defendants, who are husband and wife contending that the plaintiff never contributed anything either for purchase of the land or construction of the Kalyana Mandabam and he was only a name lender therefore, he is not entitled to a share. Considerable reliance was placed on Ex.B1, an alleged release executed by the plaintiff, acknowledging the title of the defendant.

4.The Trial Court on the above pleadings framed the following issues in the suit:-

"i) Whether the plaintiff and the defendant are joint owners of the suit properties.

ii) Whether the plaintiff is entitled to 1/2 share in the suit properties.

iii) To what relief the plaintiff is entitled to.



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The issues were recast on 07.03.2012 by adding the following issue:-

iv) Whether the suit is barred by Order 2 Rule 2 of C.P.C.

5. After trial, the Trial Court recorded a finding that the suit "A" schedule property belongs to the plaintiff and the 1st defendant. Ex-B1 release cannot be looked into for want of registration. However, on the said finding, the learned Trial Judge while granting a decree in respect of "A" schedule property, declaring 1/2 share of the plaintiff, dismissed the suit in respect of the "B" schedule movables. Aggrieved by the said judgment and decree, the defendants preferred an appeal in A.S.No.913 of 2012 before this Court. This Court proceeded on the assumption that the land that was jointly purchased under Ex.A1, sale deed alone was the subject matter of the suit. It however, agree with the findings of the Trial Court and dismissed the appeal by confirming the judgment and decree of the Trial Court. There was no further appeal.



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6. After the disposal of the appeal on 08.06.2016, the plaintiff filed I.A.No.110 of 2012 on the file of the I-Additional District and Sessions Judge, Cuddalore, seeking a final decree. A Commissioner was appointed and he filed a report suggesting division of the property by drawing a line in the middle of the property running from North to South and dividing the property into two halves namely Eastern and Western half. The defendants objected to the division suggested by the Commissioner. It was specifically pointed out that the existing building itself is totally ignored by the Commissioner and the division is not just and proper. It was contended that major portion of the building is on the Eastern portion and only a minor portion of the building is in the Western portion and therefore, the division as suggested by the Commissioner will not be just and equitable.

7. It was also contended that the preliminary decree itself is erroneous in as much as it includes, large extent of land that is owned by the 1st defendant himself. Reliance was placed on the description of property in Ex.A1, sale deed, which specifically refers to western boundary as the property belonging to the 1st defendant to contend that the Trial Court was not right in granting a preliminary decree for the entire "A" schedule



property.

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8.An application under Section 153 of C.P.C., was also filed before the Trial Court, seeking an amendment of the preliminary decree in I.A.No.110 of 2017. The said application came to be dismissed by the Trial Court. However, the final decree application was allowed and the Trial Court directed a final decree as per the report of the Commissioner. Unfortunately, the Trial Court did not go into the question as to the division of the building. Aggrieved by the final decree, the defendants are on appeal. In this appeal, an application has been filed, as pointed out earlier, seeking amendment of the preliminary decree.

9.We have heard Mrs.Chitra Sampath, learned Senior Counsel appearing for the appellants and Mr.R.Agilesh, learned counsel appearing for the respondents.

10.Mrs.Chitra Sampath, learned Senior Counsel appearing for the appellants would vehemently contend that both the Courts at the Trial stage had not considered the question of ownership of the Western side property



and they had gone by sale deed, Ex.A1, which stands in the name of both the brothers namely, the plaintiff and the 1st defendant. The fact that the property belonging to the 1st defendant, which was purchased by him under sale deed dated 22.09.1997 was also made a subject matter of the suit was realized only when the Commissioner went to measure the property.

11.The learned Senior Counsel appearing for the appellants would submit that final decree proceeding being continuation of the suit and the partition suit is deemed to be pending till the final decree is passed, we have all powers to amend the schedule of property in the preliminary decree in this appeal also. She would also refer the language of the Section 153 of C.P.C., which reads as follows:-

"153.General power to amend.- The Court may, at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding."



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12. Relying on the above Section, the learned counsel would contend that wide powers are conferred on the Courts to amend whenever there is an error or defect that is found in the records of the Court. She would also rely upon the judgment of the Calcutta High Court in ***Hemangini Patra Vs. Gopi Krishna Patra*** reported in ***2009 SCC Online Cal 1921*** wherein, the Calcutta High Court has held that even after the preliminary decree, the Court has power to amend the plaint under Order 6, Rule 17 of the Code of Civil Procedure.

13.Touching upon the merits of the appeal, the learned Senior Counsel would also point out that there is no suggestion for division of the building, which is admittedly, a Kalyana Mandapam earning revenue, by the Commissioner therefore, the Additional District Judge was not right in accepting the report of the Commissioner and passing a final decree as suggested by the Commissioner.

14.Contending contra, Mr.R.Agilesh, learned counsel appearing for the respondent would submit that a specific plea had been raised by the plaintiff as to the nature of the property. There is no direct denial of the



same in the written statement. All that the defendants had pleaded was the plaintiff did not contribute anything for purchase and he is only a name lender so, he is not entitled to any share in the property.

15.The Trial Court was rendered a categorical finding that the suit property belongs to the plaintiff and the defendants jointly. Once such a finding is rendered by the Trial Court and the said finding having been confirmed by this Court in appeal, in an appeal against a final decree, we cannot amend the preliminary decree or the plaint, which would amount to us tinkering with the preliminary decree.

16.The learned counsel for the respondent would also further point out that the issues framed in the suit would show that there was no dispute regarding the title of the plaintiff and the defendant to the entire "A" schedule property. We have considered the rival submissions.

17.We shall first dispose of the Civil Miscellaneous Petition that has been filed seeking amendment of the preliminary decree. The petition has been filed under Section 153 of C.P.C. Section 153 of C.P.C., has been



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extracted above. The power to amend under Section 153 though wide, can be exercised only where the circumstances provided under such section exists. Section 153 of C.P.C., confers a power on the Court to amend any defect or error in any proceeding in a suit and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding. So, in order to seek relief under Section 153, the petitioner should show that there is a defect or error in a proceeding in a suit and such amendment is required for determining the real question or issue raised by or depending on such proceeding.

18.As we had already pointed out, no issue relating to title to the portion of the land on the Western side was raised before the Trial Court. Though there are some stray statements in the written statement, there was no specific claim based on the sale deed dated 22.09.1997, which was projected for the first time in the final decree proceedings, that too, while filing objections to the Commissioner's report. In the absence of any issue having been framed and finding having been recorded by the Courts, which could be shown as erroneous, we do not think that Section 153 can be invoked.



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19. Mrs. Chitra Sampath, learned Senior Counsel would however, seek to rely upon the judgment of the Calcutta High Court in ***Hemangini Patra Vs. Gopi Krishna Patra*** reported in ***2009 SCC Online Cal 1921***.

That was the case where, by an accidental slip, a dot was placed before the extent of the land which taken as a mark of decimal resulting in reduction of the area in the schedule to the plaint. This was carried out in the decree also and when it was sought to be corrected, the Court upheld the power of the Court to correct such an error.

20. The case on hand, is completely different. By seeking to amend the preliminary decree. The petitioner now wants deletion of a major portion of the land from the purview of the suit. As already pointed out, the Trial Court in its judgment declaring the shares (preliminary decree) had categorically held that the entire "A" schedule property belongs to the plaintiff and to the defendants. If we are to tinker with the measurements of the "A" schedule property now, as required by the petitioner namely, the defendant in the suit, we will be re-writing the judgment in the preliminary decree stage. We do not think, the power under Section 153 is intended for that purpose. No doubt, a Court has all the powers to undo injustice but, at



the same time, the Court cannot re-write a judgment, which has otherwise become final in a collateral proceeding unless it is shown that such judgment or finding was obtained by fraud or undue influence as laid by the Hon'ble Supreme Court in *S.P.Chengalvarayala Naidu Vs. Jagannath* reported in *1993 (1) SCC 1*.

21.We are therefore, of the considered opinion that this petition cannot be entertained by us. Hence, this Civil Miscellaneous Petition in C.M.P.No.18925 of 2023 is dismissed.

22.Adverting to the appeal, we find that the Trial Court has mechanically accepted Commissioner's report. Admittedly, suit "A" schedule property consists of vacant land with a building namely, Kalyana Mandapam. We are unable to see from the plan attached to the final decree as to the exact location of the building in the large extent of the land. It is contended by the learned Senior Counsel for the appellant that the major portion of the building is on the Eastern side of the property and it is only a minor portion which is on the Western side. The learned District Judge has also not adverted to this issue.



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23.The preliminary decree declares 1/2 share of the plaintiff in the land and the building so, the Commissioner should have ensured that the plaintiff gets 1/2 share of the building as well as the land. The defendant can also project the ground that he would also be entitled to 1/2 share in the building but, the report of the Commissioner and the plan filed does not deal with the building at all and unfortunately, this has escaped the attention of the learned Addl. District Judge. Hence, we find that the final decree itself is flawed. Therefore, we have no other option and set aside the final decree and remit the matter to the Trial Court with a direction to the Trial Court to appoint new Commissioner with a direction to the Commissioner to suggest division of the building as well as the land in question as per the preliminary decree.

24.In view of the above discussion, the appeal is allowed, the Judgment and decree of the trial court in I.A.No:110 of 2012 are set-aside and the said Application is remitted to the trial Court to be disposed off in accordance with law subject to the directions supra. Considering the relationship between the parties, there will be no order as to costs. The parties are directed to appear before the Trial court on 04/12/2023.



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25.The dismissal of the petition under Section 153 will not anyhow bar the petitioner therein from seeking any relief, as he may be advised.

(R.S.M.,J.) (N.S.,J.)
19.10.2023

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Internet:Yes

Index:Yes

Speaking

Nuetral Citation : Yes



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The I-Additional District and Sessions Court,
Cuddalore.



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R.SUBRAMANIAN, J.
and
N.SENTHILKUMAR, J.

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