



CRP No.4021 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 05.01.2023

CORAM

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

CRP.No.4021 of 2017

Sreekant S.Mehta (Died)

1.Nipun Navnitbhai Mehta
2.Kumar Kantilal Mehta
3.D.Venkatesh Prasad

..Petitioner

[The petitioners 1 to 3 are
impleaded vide order dated
05.01.2023 passed in
C.M.P.No.22515 of 2022]

Vs.

1.Daicy Manogari
2.Guna David

..Respondents

Prayer: Civil Revision Petition filed under Article 227 of Constitution of India, praying to set aside the collusive preliminary decree 7.4.2017 passed in O.S.No.39 of 2017 on the file of the III Additional District Court, Salem, and allow this civil revision petition.

For Petitioner : Mr.V.Nishanth
for Mr.P.Sivakumar

For Respondents : Mr.S.John Josh
for Mr.R.Muniyappan



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ORDER

The civil revision petition has been filed as against preliminary decree dated 07.04.2017 passed in O.S.No.39 of 2017 on the file of the III Additional District Judge, Salem, thereby set aside the collusive preliminary decree.

2. The petitioner is the third party in the suit filed by the second respondent herein in O.S.No.39 of 2017 for partition as against the first respondent herein.

3. The first and second respondents are sister and brother. Both originally filed a suit for permanent injunction in respect of the very same suit schedule property in O.S.No.1203 of 2010 as against the deceased petitioner. Their case is that they were born to Yesunesan and Gnanadeepam, they were the absolute owners of the suit schedule property and they were in possession and enjoyment of the same. The said suit property was bequeathed in favour of the Yesunesan by one William Borthwick. The said Yesunesan and Gnanadeepam were working as Driver and Cook for the said William Borthwick therefore, he executed a Will in favour of the Yesunesan and bequeathed the schedule mentioned property on 05.11.1969. On the strength of



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the said Will, the respondents father became absolute owner of the suit property. After demise of their father and mother, the respondents became absolute owners of the suit property since other children already had executed a Release Deed in favour of them by a Release Deed dated 29.09.2010 and 11.10.2010 respectively thereby relinquished their share in the suit property.

4. The case of the petitioner, since deceased is that the respondents have no right or title over the suit schedule property. The petitioner is the original owner of the suit property and originally the said property belonged to one William Borthwick. By an registered Sale Deed dated 04.04.1950, the said William Borthwick sold away the properties except the suit property to one Devanesan. The suit property was bequeathed in favour of Yesunesan by a registered Will dated 05.11.1969. The said Yesunesan is none other than the son of Devanesan. After demise of the said Devanesan, all the legal heirs of the said Devanesan including the respondents' father namely Yesunesan, sold out the entire property including the suit schedule property in favour of Navnit S.Mehta, Harshkhan S.Mehta and Anitha S.Mehta by a registered sale deed dated 11.07.1981.



5. Thereafter, the said Navnit S.Mehta died on 06.01.1987 leaving a Will in favour of his sons namely Nipum N.Mehta and Hariharan S.Mehta.

Thereafter, by a registered Partition Deed dated 29.07.1994, the said property was allotted in favour of Anitha S.Mehta. She died on 21.12.2000 leaving behind her husband namely the deceased petitioner herein. Even while the father of the respondents herein was alive, he never challenged those things in the manner known to law. The respondents claimed the suit property only through a Will dated 05.11.1969 whereas the suit property was sold out by the said William Borthwick as early as on 04.04.1950 in favour of the said Devanesan. The said suit was dismissed by the Principal District Munsif, Salem, by a judgment and decree dated 09.10.2014.

6. A perusal of the said judgment and decree also revealed that when the deceased petitioner raised a cloud over the property, the respondents filed a petition seeking amendment of plaint to include the prayer of declaration in respect of the suit schedule property. However, it was dismissed and confirmed by this Court. Aggrieved by the same, the respondents also preferred an appeal suit in A.S.No.5 of 2015 and the same was also dismissed by the Principal Subordinate Court, Salem, by a judgment and decree dated 08.04.2015. Aggrieved by the same, they also filed second appeal before this Court in



S.A.No.270 of 2016 and the same was also dismissed by a judgment and decree dated 18.07.2016. After dismissal of the second appeal, the respondents, suppressing the entire facts, had collusively filed a suit for partition in respect of the very same property among themselves.

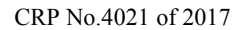
7. The second respondent is the plaintiff and the first respondent is the defendant in the present suit filed in O.S.No.39 of 2017 for partition. It is nothing but a collusive suit in respect of the very same property. On perusal of counter affidavit filed by the respondents in this civil revision petition revealed that again they had taken very same stand as taken in the earlier suit for injunction in O.S.No.1203 of 2010. Further revealed that the deceased petitioner was not the party to the suit for partition and he was a third party to the suit. Aggrieved by the judgment and decree passed in partition suit in O.S.No.39 of 2017, he ought to have filed an appeal suit. When there is appeal remedy available he cannot invoke Article 227 of Constitution of India. Normally, it is true that when there is an appeal remedy available, the party cannot invoke Article 227 of Constitution of India. Wherever there is abuse of process of law, this Court can exercise its power under Article 227 of Constitution of India.



8. In this regard, it is relevant to rely upon the Judgment reported in **(2022) 1 CTC 505** in the case of ***Rt.Rev.Timothy Ravinder Dev Pradeep Vs. Rev. Charles Samraj and other.,*** and this Court, after analysing the various Judgments of the Hon'ble Supreme Court of India, held that the availability of appeal remedy is not a blanket bar or total bar for invoking the constitutional remedy under Article 226 and 227 of Constitution of India.

9. Further in another Judgment reported in **(2019) 9 SCC 538** in the case of ***Virudhunagar Hindu Nadargal Dharma Paribalana Sabai and others Vs. Tuticorin Educational Society and others.,*** the Hon'ble Supreme Court of India held that the availability of appeal remedy in terms of the provisions of CPC, may have to be construed as a near total bar. In the case of ***L.Chandrakumar Vs. Union of India*** reported in **(1994) 2 SCC 401**, the Hon'ble Supreme Court of India held that Article 226 and 227 form part of the basic structure of the Constitution and the power of High Court under them cannot be abrogated even by a Constitutional Amendment.

10. Further, this Court also held that the jurisdiction under Article 227 of the Constitution of India is far more wider than the jurisdiction under Article 226 of the Constitution of India and the power of superintendence for the High



11. Therefore, in the case on hand as stated supra the respondents completely suppressed the facts that they had already filed a suit for injunction and the same was dismissed and confirmed by this Court in O.S.No.1203 of 2010 and filed the present suit for partition as if they are the owners of the property. It is nothing but a collusive suit and as such, the judgment decree cannot be sustainable in respect of the suit property. Though they have not approached the Court with clean hands as having been sold the entire suit properties by a registered Sale Deed dated 11.07.1981 the legal heirs of the said Yesunesan. The respondents herein have no right or title over the property. That apart, the other legal heirs of the said Yesunesan namely Billy Sunday and Eval Rani had executed a Release Deed dated 29.09.2010 thereby relinquished their shares in respect of the suit property also non-est in the eyes of law since they have also no title or right over the suit property. On the strength of the said Release Deed the respondents collusively filed the present suit for partition in respect of very same subject property and obtained decree behind the back of



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the deceased petitioner. Therefore, the orders obtained by misusing the machinery of the Court of law, to obtain unlawful gain, it would lead to serious miscarriage of justice.

12. In view of the above, the collusive preliminary decree passed by the III Additional District Judge, Salem, cannot be sustained and it is liable to be set aside. Accordingly, the judgment and decree dated 07.04.2017 passed in O.S.No.39 of 2017 on the file of the III Additional District Judge, Salem, is hereby set aside.

13. In fine, the civil revision petition stands allowed. There shall be no order as to costs.

05.01.2023
(2/2)

Speaking/Non-speaking order

Index : Yes/No

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To

1.The III Additional District Judge,
Salem, Salem District.



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