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C.R.P (NPD).No.3822 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 29.09.2023
PRONOUNCED ON : 20.10.2023

CORAM:

THE HON'BLE MR. JUSTICE V.LAKSHMINARAYANAN

**C.R.P (NPD).No.3822 of 2018 &
CMP.No.21233 of 2018**

- 1.Rajaram (Died)
 - 2.Shanthakumari (Died)
 - 3.Ezhilarasi
 - 4.Vani
 - 5.Bharathi
 - 6.Vijayalakshmi
- ... Petitioners

(Petitioners 3 to 6 & R13 are recorded as LR's of the deceased first and second petitioners vide Court order dated 20.09.2019 made in C.M.P.No.19023 of 2019 in C.R.P.No.3822 of 2019)

vs.

- 1.Kanniga Parameswari
 - 2.Thirugnanasambandan
 - 3.N.Banumathi
 - 4.R.Ganesan
 - 5.G.Karthikeyan
 - 6.G.Vijayakumar
 - 7.G.Srinivasan
 - 8.G.S.Saraswathy
 - 9.G.Sudhalakshmi
 - 10.Rajeswari
 - 11.K.Lakshmanan (minor)
 - 12.K.Tamilselvan (minor)
- (Respondents 11 & 12 are



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represented by their mother and
guardian Rajeswari)

13. Anandakumar

... Respondents

Prayer : Civil Revision Petition filed under Section 115 of Code of Civil Procedure against the fair and decreetal order dated 12.10.2018 and made in CMA.No.3 of 2017 on the file of the District Judge, District Court No.II, Kancheepuram confirming the order and decree dated 03.01.2017 and made in I.A.No.608 of 2015 in O.S.No.8 of 1996 on the file of the Subordinate Judge, Kancheepuram.

For petitioners : Mr.V.Balasubramanian

For respondents

1, 4, 6 to 12: Mr.R.Kannan

For respondent 13 : Mr.Gajendra M.Upadyaya

For respondent 3 : Mr.M.S.Subramaniam

For respondent 5 : No appearance

For respondent 2 – Not ready in notice

ORDER

This revision arises against an order passed in C.M.A.No.3 of 2017 on the file of the learned District Judge at Kancheepuram, dismissing the appeal on 12.10.2018. The appeal came up before the learned District Judge from and out of the fair and decreetal order passed by the learned Subordinate Judge at Kancheepuram in I.A.No.608 of 2015 in O.S.No.8



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of 1996 dated 03.01.2017.

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2. O.S.No.8 of 1996 is a suit for partition and separate possession. The first plaintiff is the mother of the plaintiffs 2 to 6 and the defendant. The suit schedule mentioned properly belonged to the father of the plaintiffs 2 to 6 and the sole defendant. The first plaintiff is the wife of one Somasundara Mudaliyar. Somasundara Mudaliyar had died 5 decades ago, leaving behind the parties to the suit as his legal heirs. Since pending the suit, the first plaintiff died, the fifth plaintiff claimed her share as the first plaintiff had left behind a Will dated 15.04.1954 in her favour.

3. The plaintiffs had issued a notice to the defendant calling upon him to effect division of the schedule mentioned properties and since there was no response, they filed a suit for partition claiming 6/7th share in the properties left behind by Somasundara Mudaliar. There is no dispute that the plaintiffs were served in the proceedings and an exparte preliminary decree was passed on 12.01.1999. On recovery, the petitioners filed an application to set aside the exparte decree along with the condonation of delay of 908 days to set aside the exparte decree.



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This was an application in I.A.No.799 of 2001.

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4. In the meantime, the pecuniary jurisdiction of the Court was amended and therefore, the suit stood transferred from the file of the Principal District Court to the file of the Subordinate Court at Kancheepuram. Consequent to that transfer, I.A.No.799 of 2001 was re-numbered as I.A.No.324 of 2004. It is a specific case of the petitioners that after the transfer from the Principal District Court at Chengalpattu to the Subordinate Court at Kancheepuram, no notice was served on the first petitioner/defendant. Later on they allege that the first petitioner/defendant contacted his counsel at Chengalpattu who informed him that his application in I.A.No.324 of 2004 had been dismissed for default on 09.08.2005. Therefore, the first petitioner filed an application under Order 9 Rule 9 of CPC to restore the application in I.A.No. 324 of 2004. This application was transferred to the file of the Fast Track Court-II at Kancheepuram and thereafter, to the file of the Subordinate Court at Kancheepuram.

5. On transfer to the Subordinate Court, the application was renumbered as I.A.No.946 of 2011. The petitioners state that the transfer



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from the Fast Track Court to the Subordinate Court at Kancheepuram was also without notice to the first petitioner. I.A.No.946 of 2011 came to be dismissed for default with liberty to reopen if legally eligible. The said dismissal was on 02.07.2012. The petitioners state that the first petitioner had contacted his counsel who had informed him that he will receive the notice from the Court intimating the transfer and at that stage, he could appear before the Court.

6. While these applications to condone the delay in setting aside the exparte preliminary decree and to restore the said application were pending, the plaintiffs filed I.A.No.44 of 2008 seeking for passing of final decree. In the said final decree application, the first petitioner was set exparte on 26.03.2008. The final decree application also stood transferred to the Subordinate Court from the District Court and was renumbered as I.A.No.945 of 2011. This final decree application was dismissed on 02.07.2012. On the very next day, it transpires, an application was filed in I.A.No.427 of 2012 and without notice to the first petitioner, the same came to be restored. The dismissal was on 02.07.2012. The restoration application was filed on 03.07.2012 and the order restoring the final decree application was passed on 04.07.2012.



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7. The petitioners state that the first petitioner suffered from multiple diseases like:

- (1) Heart ailment
- (2) Kidney Failure
- (3) Low sugar and
- (4) Piles.

Therefore, he was not in a position to contest the proceedings. Alleging that the procedure followed by the court is fundamentally flawed, he moved an application to restore I.A.No.946 of 2011 which had been dismissed for default. This application was contested by the plaintiffs stating that the first petitioner had remained exparte in the final decree proceeding also and the Court had appointed an Advocate Commissioner to issue notice to all the parties and to submit a report.

8. The respondents stated that the first petitioner received the notice from the Advocate Commissioner on 31.08.2012, but did not raise any objection. They further pleaded that the Advocate Commissioner had submitted his report and on that basis, the court passed the final decree



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on 17.01.2013. They would further state that on the strength of the final decree, an Execution Petition was filed in E.P.No.134 of 2013 and the petitioner had appeared in the said proceedings and had taken time and thereafter, filed an application to restore I.A.No.946 of 2011 only on 06.08.2015.

9. The specific plea of the respondents is that the real intention of the first petitioner was to deprive his sisters from the fruits of the decree. They would state that there is no valid explanation for the delay and the first petitioner does not deserve any consideration. By an order dated 03.11.2017, the learned Subordinate Judge dismissed the application filed to restore I.A.No.946 of 2011. He took a view that it is not the duty of the transferee Court to inform the parties about the transfer and therefore, since the first petitioner had not followed up the case, it does not require any consideration. The court further held that much water has flown under the bridge and valuable rights having accrued to the respondents, the application need not be considered. Consequently, the learned Subordinate Judge dismissed the application to restore I.A.No.945 of 2011.

10. It is pertinent to point out here that the first petitioner entered



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the witness box and deposed as PW1 and marked as many as Ex.P1 to Ex.P13, substantiating his medical condition. This order dismissing the application to restore I.A.No.945 of 2011 was taken on Appeal before the District Court at Kancheepuram and the learned judge was pleased to concur with the findings of the trial court and dismissed the appeal on 12.10.2018. Against which the present civil revision petition

11. I heard Mr.V.Balasubramanian, the learned counsel for the petitioners, Mr.R.Kannan, learned counsel for the respondents 1, 4, 6 to 12, Mr.Gajendra M.Upadyaya, learned counsel for the respondent 13 and Mr.M.S.Subramaniam, learned counsel for the third respondent. The counsels reiterated their respective submissions that they made before the trial court and the lower appellate court.

12. Mr.V.Balasubramanian, learned counsel for the petitioners submitted that no notice was served by the transferee court to the first petitioner, though the court had issued notice for service. Pending the service, the final decree application came to be dismissed and it was restored without notice to him.



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13. Mr.M.S.Subramaniam, the learned counsel for the third respondent would submit that this revision being against an order refusing to restore the application which has been dismissed for default, this court should not go into that fact. He would state that private notice had been ordered and it had been served on the party. He would further state that as per the circular issued by the Madras High Court, there is no necessity for the court to serve notice on a litigant on transfer of the suit. Finally, he pointed out that pursuant to the final decree, properties have been sold and purchased by the third parties and if the exparte final decree is set aside, it will cause prejudice to the purchasers.

14. In this regard, Mr.M.S.Subramaniam, learned counsel referred to the judgements of this Court viz., *Krishnammal and another vs. Arulmughu Madanagopalaswamy Temple rep. By its Executive Officer, Perambalur* reported in (1997) 1 LW 276 and *Mannariah & Sons (P) Ltd., and others vs. M.M.Sankaranarayanan* reported in (2006) 2 LW 99. The circular issued by the High Court was based on the judgement of this court in the case of *Ellapuram Panchayat Union vs Shri Bhavani Amman Devasthanam* reported in AIR 1981 MAD 248.

Mr. Justice Ratnam (as his Lordship then was) felt that it is imperative



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that some provisions be made, so that principles of natural justice are complied with. The relevant portion of the judgement is as follows:

“ It would be a very salutary practice if even in cases of appeals transferred from one Sub Court to another owing to exigencies of workload, a notice to that effect should be given to the parties informing them that the appeal which was pending before one Court has since been transferred to another Court. No provision to this effect either under the C.P.C. or under the Civil Rules of Practice and Circular Orders has been brought to the notice of the Court by the counsel on either side. Since a party to a litigation before any Court should know where it is pending and when it is likely to be taken up, it is essential that parties must be informed by the transferee Court in order to enable them to appear before the transferee Court: and contest the proceedings so transferred by engaging other counsel and taking necessary steps in that regard. In the absence of any provision to that effect either under the C.P.C., or under the Civil Rules of Practice and Circular Orders, every effort should be made by Courts to put the litigants on notice of the transfer of pending litigation, be it the trial Court or the appellate Court as the case may be. It is very necessary and desirable—nay, even imperative till such time as provision in this regard is made either under the C.P.C. or under the Civil Rules of Practice and



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Circular Orders that there should be an inflexible adherence to this requirement regarding notice; as otherwise, Courts cannot adjudicate upon the rival claims of the litigants before It after giving an effective and adequate hearing to both sides, which is the bedrock of our system of administration of justice.”

15. Pursuant to the aforesaid judgement, the matter was taken up on the administrative side of this Court and separate proceedings were issued in Roc No. 193-A/81.R.R. in July 1981. The said circular reads as follows:

“(i) When suits, appeals or other proceedings are transferred from one court to another court, the transferor court shall post before it, the cases to a particular date and take endorsement of the Advocate, who have already entered appearance for the parties that they are aware of the suits, appeals or other proceedings being transferred to a particular court and only thereafter forward the papers to the transferee court.

(ii) In cases where parties have not already been served, notice or fresh notice (as the case may be) shall



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be issued by the transferee court.

That circular will also apply only to a transfer by courts. It is seen from the first instruction that it is for the transferor court to make the parties aware of the proceedings of transfer. The second instruction applies to cases where the parties have not already been served. With regard to those cases the instruction was that a notice or fresh notice, as the case may be, shall be issued by the transferee court. Hence, the circular does not contemplate a fresh notice or summons by a transferee court in a case where summons had been served duly on parties when the proceedings were pending in the transferor court. In the present case summons had been served duly on the respondent when the matter was pending in this Court and no question of fresh notice to the respondent arises when the matter was transferred to the City Civil Court. The City Civil Court was under no obligation to issue notice to the respondent about the transfer. It was for the respondent to inform himself about the proceedings and appear before the court. Hence, the respondent cannot place any reliance on the circumstance that he was not served with summons or notice in the suit after it was taken on file in the City Civil Court.



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16. The procedure that has been contemplated by the rule shows that it is the duty of the transferor court to take an endorsement from the advocates who have entered appearance before it, specifying the date and thereafter only, forward the papers to the transferee court. The duty, therefore falls on the transferor court to take an endorsement and fix a date for hearing. This is in line with the view expressed by Mr. Justice Ratnam that the parties be informed the proceedings which have been pending before it, now stand transferred to the other court.

17. In order to satisfy myself as to whether such an endorsement was taken from the counsels who appeared for the parties, I called for the entire back records from the file of the Court in Kancheepuram. The records have been placed before me and I find that no such endorsement had been taken in the proceedings.

18. I went through the adjudications recorded in IA.No.945 of 2011. I.A.No.945 of 2011 seems to have been originally presented as I.A.No.44 of 2008. The matter seems to have been pending before the Principal District Court at Kancheepuram till 01.04.2010. The following adjudications become essential.



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On 01.04.2010, there seems to be no endorsement on the bundle

that the suits were transferred to the file of the District Judge at Kancheepuram. On the contrary, the recordings are as follows:

“01.04.2010 Received by transfer from the Principal District Court, Chengalpattu in D.No.2/2010 dated 04.01.2010 and assigned as OS.8 /1996.

Notice to both parties to appear on 17.06.2010

signed

District Judge, Kancheepuram

17.06.2010

Court notice. Hearing dated 16.07.2010.

31.08.2010 Suo motu hearing advanced today and transferred to Sub Court, Kancheepuram as per the Act 19 of 2010 and the proceedings of Principal District Judge, Chengalpattu in D.No.4858/A/2754/2010 dated 16.08.2010.

Disposed according to Law.

Signed

District and Sessions Judge-II,
Kancheepuram.”

19. It shows that though notice was ordered on two occasions by the learned District and Sessions Judge-II at Kancheepuram for the hearing dates 17.06.2010 and 16.07.2010, notice had not been served on the parties. Apart from that, the hearing date was suo motu advanced by



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the Court and directed to be listed before the Subordinate judge,

Kancheepuram. On transfer to the Subordinate Judge, Kancheepuram, the

final decree application in I.A.No.44/2008 was renumbered as

I.A.No.945/2011. The endorsement are as follows:

“04.11.2011 Received by transfer from District Judge II,
Kancheepuram. Court notice to both parties
by 08.12.2011.

Signed

Subordinate Judge

08.12.2011 Court notice to both parties. Hearing date on
23.01.2012.

Signed

Subordinate Judge

23.01.2012 Court notice to both parties
Judge on causal leave
re-posted to 08.03.2012.

08.03.2012

Judge on medical leave.
Re-posted to 19.04.2012.

19.04.2012

Court notice to both parties.
Hearing date on 02.07.2012.

02.07.2012

Both parties not present.



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Batta not paid. No progress.

Long pending petition.

Dismissed for default with liberty
to reopen if legally eligible.

04.07.2012

Restored as per order in I.A.No.427 of 2012
dated 04.07.2012. Court notice to both parties
for hearing date 21.08.2012

21.08.2012

Heard. Records perused. Respondent already set
exparte.

Mr.T.Parthasarathy, Advocate is appointed as
Advocate Commissioner for the purpose of division
of the suit property as per the preliminary decree with
the help of the Revenue records and revenue officials.
The commissioner fee of Rs.5,000/- is fixed. For
deposit of commissioner fee by 10.09.2012.

10.09.2012

For deposit of commissioner fee by 24.09.2012.

24.09.2012

For deposit of commissioner fee.

Commissioner report by 15.10.2012.

15.10.2012

Commissioner report by 21.11.2012

21.11.2012

Commissioner report finally by 11.01.2013



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11.01.2012

Commissioner report filed. No objection reported. Arguments heard orders by 17.01.2013

17.01.2013

In the result, this petition is allowed and the final decree is passed in favour of the petitioners.”

20. A perusal of the aforesaid records would show that at no point of time, after the proceedings were transferred from the Court of Principal District Judge at Chengalpattu to the file of the Fast Track Court-II, District Judge, Kancheepuram, and thereafter, to the file of the Subordinate Judge at Kancheepuram, notice had been served on the respondents. The final decree petition also does not disclose that no endorsement was taken from the counsel as per the circular issued by this Court. This is not only an infraction of the order passed by this Court in ***Ellapuram Panchayat Union vs Shri Bhavani Amman Devasthanam*** reported in ***AIR 1981 MAD 248***, but also of the binding circular issued by this Court in the month of July 1981.

21. The transferor courts namely the court of Principal District



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Judge, Chengalpattu and the Fast Track Court-2, Kancheepuram did not take any endorsement as aforesaid. Even if I ignore these aspects, there is yet another looming defect in the nature of procedure that has been followed by the trial court.

22. It is relevant to point out that the final decree petition had been dismissed for default on 02.07.2012. When the final decree petition is dismissed for default and an application was filed to restore the same, Order 9 Rule 9 of the Code of Civil Procedure demands that notice must be served in the said restoration application on the respondent. There is no provision to restore the application dismissed for default suo motu or without notice to the other side. An application has been filed to restore the final decree petition in I.A.No.427/2012.

23. The proceedings in I.A.No.427 of 2012 reads as follows:

“I.A.No.427 of 2012
O.S.8 of 2006
I.A.No.945/2011
under section 151 of CPC

By the petition, prays to reopen I.A.No.945/2011 to
dismissed on 02.07.2012.



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Heard for fair disposal. Court feels to allow this petition *Suo Motu* as per the order passed in I.A.No.945/2011.

Signed

Subordinate Judge
04.07.2012”

24. It is here, I have to extract the provision of Order 9 Rule 9 of CPC.

“9.Decree against plaintiff by default bars fresh suit.- (1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.”

Clause 2 of Order 9 Rule 9 makes it abundantly clear that no proceedings which have been dismissed for default by the court can be restored by the



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court without serving notice of the application on the opposite party.

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25. A perusal of I.A.No.427/2012 in I.A.No.945/2011 in O.S.No.8 of 1996 does not disclose any notice that had been served on the party. In fact, the parties were aware that the proceedings were pending from the stage of service of notice on the respondents as seen from the dates set forth above. That is why, the advocate clerk of the plaintiff had specifically stated as follows:

“ In the meantime, in view of the change of pecuniary jurisdiction of courts, the above I.A.No.945/2011 was transferred to this Hon'ble Court. The I.A. was posted to 2.7.2012 for issuance of notice to the respondents by the court. This Hon'ble Court dismissed the above I.A. yesterday (2.7.2012). There is nothing to be done by the petitioners in the above I.A. They already paid batta in the petition and the respondents are duly served and set exparte. An Advocate Commissioner has to be appointed for dividing the properties.”

26. The affidavit specifically states that the matter had been posted for service on notice on the respondents and on that stage, I.A. came to be dismissed as there was no representation on either side.



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27. I agree with Mr.M.S.Subramaniam, learned counsel for the third respondent that it is posted for service of notice and his clients has nothing to do with that stage. However, the records of the court shows that the notice had not been served as per the previous order and there was no representation on the side of the petitioners as well as the respondents. The final decree application having been dismissed, it ought not to have been restored without notice to the other side. It is here, i recollect the judgment of this Court in the case of ***The Manager Personal Banking Division State Bank of India, Madras main Branch, Madras 600 001 & 2 Others*** vs. **P.S.Maragatham** reported in **2003 (1) LW 247**. This court was pleased to hold that the restoration of the suit without notice to the opposite party is an illegal act. The learned Single Judge was pleased to held as follows:

“10. Order IX, Rule 9(2), CPC referred to above, makes it clear that the notice of an application for restoration to the opposite party is mandatory. To verify the fact whether notice was given by the plaintiff to the defendants in I.A.No.18390 of 1990 for restoring the suit which was dismissed for default on 13.07.1990, this Court directed the Registry to call for the entire original



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records, and the records were produced before this Court accordingly.

11. A perusal of the records relating to the suit clearly shows that no notice of the application in I.A.No.18390 of 1990 was served on the defendants before restoring the suit on 27.2.1992. If that be so, no order shall be made in I.A.No.18390 of 1990 to restore the suit which was dismissed for default on 13.7.1990, as per Order IX, Rule 9(2), CPC. Therefore, I am of the considered opinion that the order of restoration dated 27.2.1992 is illegal and contrary to Order IX, Rule 9(2), CPC. Consequently, question of passing an ex parte decree in the suit on 29.1.1993 itself does not arise. Hence, the ex parte decree dated 29.1.1993 made in O.S.No.4223 of 1987 is also liable to be set aside. Both the revision and the appeal are, therefore, allowed.”

28. This judgment answers the later submission of Mr.M.S.Subramaniam that much water has flown, after the final decree has been passed. Therefore, the Court should not interfere. The entire proceedings which had taken place after the order passed on 04.07.2012 is based on an order contrary to the Code of Civil Procedure. The factum that the parties have subsequently sold the property does not ratify nor can it add legality to the order passed on 04.07.2012.



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29. While sitting in Revision under Article 227 of Constitution of India, I cannot close my eyes to an illegal order and confirm the same, merely because, subsequently on the basis of the illegal order, a final decree proceeding had been finalised and EP had been filed and terminated. As held by the learned judge in the case of ***The Manager Personal Banking Division State Bank of India, Madras main Branch, Madras 600 001 & 2 Others*** vs. **P.S.Maragatham** reported in **2003 (1) LW 247**, if the restoration itself is bad, the exparte decree that has been passed deserves interference with the hands of this Court.

30. However, I have to balance the interest of the plaintiffs. The relationship between the parties having been admitted and the suit being a partition suit and finding no procedural irregularity at the stage of passing of the preliminary decree, I am not interfering with the stage of passing of preliminary decree. The parties are only put back to the stage of passing of final decree.

31. The Code of Civil Procedure is a code of fairness. The reason



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for engrafting Order 9 Rule 9 (2) is because when the suit or proceeding is dismissed for default, if the restoration is not known to the opposing party, then it might lead to a situation, as I face in the present case namely of an ex parte decree being passed. Fairness and natural justice requires that notice be served, before the court enters upon any proceedings.

32. I have found more than one infraction in the procedure that had been followed in this case leading to violation of principles of natural justice. The first infraction being notice not been served by the Principal District Judge, Chengalpattu while transferring the suit to the court of the Fast Track Court in Kancheepuram, secondly, notice not been served by the Fast Track Court, Kancheepuram while transferring the case to the Subordinate Court at Kancheepuram and thirdly, notice not been served by the Subordinate Court, Kancheepuram, despite a specific endorsement stating that notice must be served on the parties and above all, restoring the application which had been dismissed for default, yet again without notice to the petitioners.

33. If I were to take into consideration the subsequent events and



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turn a Nelson's eye to all these procedural infractions which vitally affect the right of the civil revision petitioners and confined myself only to the impugned orders passed in the present proceedings, I will only be compounding the injustice that has been rendered to a party. The powers vested on this Court under Article 227 of the Constitution of India is not dependent on any application that has been filed by the parties. It is the duty of this Court to ensure that the court subordinate to it work within the bounds of law that is prescribed for them.

34. In this case, I found violations of judgments of this Court, circular issued by this Court as well as the parliamentary mandate under the Code of Civil Procedure. Hence, I am constrained to interfere with the proceedings.

35. In view of the above, **I am allowing this civil revision petition** with the following orders:

- (i) preliminary decree passed in O.S.No.8 of 1996 on 12.01.1999 stands unaltered.
- (ii) The exparte final decree is set aside.
- (iii) I.A.No. 945/2011 (final decree petition) is restored on the file of the Subordinate Judge at Kancheepuram.



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(iv) The Subordinate Judge is requested to take up the final decree application and appoint an Advocate Commissioner afresh for whom the charges will be borne by the defendant (petitioners).

(v) On receipt of the Advocate Commissioner's report and objections from the parties, a fresh final decree will be passed by the Court within a period of four months from the date of receipt of a copy of this Order.

(vi) The civil revision petitioners having contributed to the delay in the proceeding, they shall pay a cost of Rs,10,000/- to each of the plaintiffs 2 to 6 within a period of eight weeks from the date of receipt of a copy of this order.

36. In case, if the cost is not paid or deposited, the Civil Revision Petition will stand dismissed. No costs. Consequently, connected miscellaneous petition is closed.

20.10.2023

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Index: Yes/No

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Speaking Order/Non-Speaking Order



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To

1. The District Judge, District Court No.II, Kancheepuram
2. The Subordinate Judge, Kancheepuram



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V.LAKSHMINARAYANAN, J.

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