



C.R.P.(MD).No.833 of 2012

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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RESERVED ON: 03.02.2023

DELIVERED ON: 09 .02.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.R.P.(MD).No.833 of 2012

1.Mary Paneer Selvam

2.Francis Roy @ Robi

...Petitioners

Vs

1.Victorial

2.Esthack

Maria Arputham (died)

3.Loordhu

4.Ronickam

5.Selvamony

6.Joseph

7.Stanislas

8.Sobia Margarate

1/17



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9.Syed Ali

10.Sukumaran

11.Chellathangam

12.Francis

13.Rajappan

14.Robi

...Respondents

PRAYER: Civil Revision Case is filed under Section 115 of C.P.C, to allow the Civil Revision Petition and set aside the order and decreetal made in I.A.No.938 of 2011 in O.S.No.142 of 2000 on the file of the Additional District Munsif Court, Padmanabhapuram, dated 29.02.2012.

For Petitioners : Mr.V.M.Balamohan Thambi

For R1 : Mr.G.Cenil

For R2, R3 and R8 : Mr.K.N.Thambi

ORDER

The present civil revision petition has been filed by the 9th and 15th defendants in O.S.No.142 of 2000 on the file of the Additional District Munsif Court, Padmanabhapuram challenging an order passed in I.A.No. 938 of 2011 wherein the prayer of the petitioners for condoning of delay of 2629 days in setting aside the exparte decree was dismissed.

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Factual Background:

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2. One B. Victorial had filed O.S.No.142 of 2000 on the file of the Additional District Munsif Court, Padmanabhapuram for the relief of partition by metes and bounds of her share of 14 cents 666 sq.links out of the suit property with building. According to the plaintiff, the parties are Christians and the suit property originally belonged to one Soosai who had passed away in the year 1958 leaving behind his wife Mariammal and two sons namely defendants 1 and 2 and two daughters namely 4th defendant and the plaintiff. The 9th defendant is the wife of the 2nd defendant.

3. In the said suit, the plaintiff had contended that her mother Mariammal who got 1/3rd share as per the Indian Succession Act (22.666 cents) had executed a gift deed in favour of the plaintiff on 23.12.1983 and she also got possession of the same. In the said property, she has put up construction and she is residing there. She had further contended that her mother Mariammal had executed another gift deed in favour of Micalial regarding another 5 cents and she has also got possession of the same. After death of Soosai, the 5th defendant and her sons Defendants 6 and 7 are in enjoyment of the property. Therefore, according to the plaintiff, she



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has got 1/9th share in the whole of the suit property which comes to around 7 cents 555 sq.links, another 5 cents by way of gift from her mother and 2 cents 111 sq.links by way of inheritance from her mother Mariammal. Thus, the plaintiff claims 14 cents 666 sq.links in the suit property.

4.The plaintiff had further contended that the Defendants 1 to 4 are each entitled to 1/9th share which comes to around 7 cents 555 sq.links by way inheritance by their father and 2 cents 111 sq.links by way of inheritance from their mother. Thus on the whole, Defendants 1 to 4 are entitled to 9 cents 666 sq.links in the suit property. On the basis of the above said pleadings, she prayed for a preliminary decree.

5.A few months after filing of the suit, the 2nd defendant (who is the husband of the 9th defendant and the father of the 15th defendant) had passed away on 25.12.2020. One of the legal heirs of the 2nd defendant namely 9th defendant was already on record. 15th defendant was later impleaded as one of the legal heirs of the 2nd defendant.

6.It is pertinent to point out that neither the 2nd defendant nor the 9th defendant had filed any written statement and they were set exparte.



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7.The records indicate that the 15th defendant who was impleaded on 09.04.2001 also remained exparte. Thereafter, the plaintiff and the other defendants (excluding the Defendants 9 and 15) had entered into a compromise and they filed a compromise sketch as Exhibit A1 before the trial Court. The trial Court after recording the evidence of the plaintiff as PW1, had passed a preliminary decree in consonance with the said compromise sketch. As per the said compromise, the suit property was divided into 6 Plots. Plot Nos. 1 and 4 were allotted to the plaintiff; Plot Nos.1A and 5 were jointly allotted to the defendants 9 and 15; Plot No.2 was allotted to the 1st defendant; 3rd Plot was allotted to the 8th defendant and 6th Plot was allotted to the 7th defendant.

8.The 9th defendant who had remained exparte had filed I.A.No. 938 of 2011 to condone the delay of 2629 days in filing an application to set aside the exparte decree. The said application was filed by the 15th defendant on behalf of his mother 9th Defendant. As per the contention in the said affidavit, he was a minor when he was impleaded and his mother was a Vegetable seller and she was illiterate and she could not appear before the Court.



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9.It was further contended that the preliminary decree has been passed only as against the property of the Defendants 9 and 15. There was a registered partition in the family among the grand mother and her two sons by way of a registered document dated 08.08.1986 in which the suit schedule property was allotted to his father, 2nd defendant. Therefore, the suit for partition targeting the property allotted to the 2nd Defendant is not maintainable. Along with the said application, a joint written statement was also filed by the Defendants 9 and 15.

10.A counter affidavit was filed on behalf of the respondents specifically disputing the fact that 15th defendant was not a minor at the time when he was impleaded in a suit. It was further contended that no valid ground has been made out for condoning such a huge delay. That apart, even during the preliminary decree proceedings, the commissioner had visited the property on several occasions and the petitioner has got knowledge about the pendency of the suit and therefore, the plea of ignorance of the pendency of the suit is not legally sustainable.

11.After hearing both parties, the trial Judge arrived at a finding that the suit summons were served upon the 9th defendant on 04.05.2000.



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Since she had not appeared, she was called absent and set exparte on 17.04.2002. The trial Court further found that the 15th defendant was also served with summon and due to non appearance, the 15th defendant was also set exparte. After the petitioners were set exparte, the plaintiff and the contesting defendants entered into a compromise. In the said compromise, Plot Nos.1A and 5 have been allotted to the share of the Defendant 9 and 15.

12.The trial Court further found that after having received summon and set exparte during the pendency of the suit, the petitioners/ defendants 9 and 15 had remained exparte without any reasonable cause. The plea that the 9th defendant is a Vegetable vendor and 15th defendant was a minor at that point of time, is not an acceptable reason for condoning the delay. Though the petitioners were very well aware of the exparte decree, they had remained exparte on their own and hence, the delay of more than 10 years is not bonafide. With the said findings, the trial Court had dismissed the application. Challenging the same, the present revision petition has been filed.



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Contentions of the Parties:

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13.The learned counsel for the revision petitioners had contended that though 9th defendant was a party right from inception, she being the Vegetable vendor and lost her husband, she could not defend the suit properly. After death of the 2nd defendant, 15th defendant was impleaded by an order dated 09.04.2001. When such an application was allowed, 15th defendant was a minor as per the School records. No guardian was appointed and hence, the entire proceedings as against the 15th defendant is null and void. He had further contended that the plaintiff and the other defendants excluding the defendants 9 and 15 have presented a compromise sketch before the trial Court. Based upon which, a decree has been passed. Admittedly, the defendants 9 and 15 were not parties to the said compromise sketch. Therefore, the decree is not on merits but based upon a compromise sketch. In such an event, the decree is not binding upon the revision petitioners herein who were not parties to the said compromise.

14.The learned counsel for the petitioners had further contended that there was a registered partition in the family on 08.08.1986. In the



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said partition deed, the entire suit schedule property has been allotted to the share of the 2nd defendant. Hence, without setting aside the said partition deed, the present suit for partition is not maintainable. According to the learned counsel for the petitioners, the present suit has been filed targeting the property that is allotted to the 2nd defendant (husband of the 9th defendant and father of the 15th defendant).

15.The learned counsel for the petitioner had further contended that only when the Advocate Commissioner visited the suit schedule property during the final decree proceedings, they came to know about the exparte preliminary decree and therefore, immediately filed an application was filed to condone the delay in setting aside the exparte preliminary decree. Hence, there is no delay in approaching the Court after having knowledge about the exparte decree. Unless the exparte decree is set aside and the suit is restored, the petitioners would not be able to place the legal defence before the trial Court. Hence, he prayed for allowing the revision petition.

16.Per contra, the learned counsel appearing for the respondents had contended that the 9th defendant who is the wife of the 2nd defendant



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was a party to the proceedings right from the inception. She has also engaged a Counsel, but did not file a written statement and she was set exparte. The 9th defendant was very well aware of the suit proceedings and she has chosen to remain exparte and she cannot now contend that she is a Vegetable vendor and hence, she could not contact her Advocate in order to defend the suit. He had further contended that in the compromise sketch presented before the Court as Exhibit A1, properties have been allotted to the Defendants 9 and 15 also. Out of these properties, one of the properties is facing road in a prime location. Hence, the petitioners could not contend that the decree was passed behind their back without considering their share in the property.

17.The learned counsel for the respondents had further contended that the partition deed that was registered on 08.08.1986 is only between the sons excluding the daughters. Hence, the said partition would not be binding upon the daughters. Therefore, there is no question of setting aside the said partition deed in order to seek a fresh partition.

18.The learned counsel had further contended that the 15th defendant alone had filed an affidavit to condone the delay in setting aside



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the exparte decree which was filed on behalf of his mother namely the 9th defendant. The 15th defendant had claimed that he was a minor at that point of time. This fact was strongly disputed in the counter. However, no document was placed before the trial Court to prove that the 15th defendant was a minor at the time when he impleaded in the suit.

19.The learned counsel for the respondents had further contended that the plaintiff had filed I.A.No.285 of 2011 for passing a final decree. The petitioners herein were served with notice and they have also appeared in the final decree proceedings. A final decree was passed on 28.11.2019. According to the learned counsel, once a final decree has been passed, the question of setting aside the preliminary decree would not arise. He had further contended that there are no records to establish that the defendants 9 and 15 have chosen to challenge the final decree proceedings. In such an event, the question of setting aside the trial Court decree has not arisen after passing of the final decree. Hence, he prayed for dismissal of the revision petition.

20.I have considered the submissions made on either side and perused the materials available on record.



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Discussion:

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21.The suit for partition has been laid by one B.Victorial on 12.04.2000 in which the husband of the 9th defendant and father of the 15th defendant was shown as the 2nd defendant. The 9th defendant is a party to the suit right from the date of inception of the suit. The 2nd defendant had passed away on 25.12.2000 and the 15th defendant has been impleaded as one of the legal heirs of the 2nd defendant by way of an order dated 09.04.2001 in I.A.No.235 of 2001. Therefore, it is clear that the 9th defendant had received the summons, but remained exparte right from the beginning. It could be seen that she had remained exparte not by chance but by way of her own choice. Therefore, the 15th defendant could never contend that something had happened behind her back.

22.As far as the case of the 15th defendant is concerned, he claims to be a minor on the date when he was impleaded in the suit. This fact has been strongly disputed in the counter filed by the respondents before the trial Court. However, no documents have been placed before the trial Court to establish that he was a minor on the date when he was impleaded. After the 15th defendant was impleaded, the suit was pending



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for 3 years and thereafter, an exparte decree has been passed by the trial Court on 11.06.2004.

23.It could be seen from the records that defendants 9 and 15 are mother and son who are residing under the same roof. In fact, an application to condone the delay in setting aside the exparte decree has been filed jointly by the defendants 9 and 15. Therefore, the case of the 15th defendant that he was not aware of the proceedings or he was a minor at that point of time, is not legally sustainable. That apart, the contentions relating to his minority have not been proved before the trial Court by placing the documents. As rightly contended by the learned counsel for the respondents, a xerox copy of the transfer certificate issued by the School cannot be placed across the Bar before the revision Court without any formal application for reception of additional evidence. Therefore, this Court not in a position to consider the said document on merits.

24.A perusal of the preliminary decree passed by the trial Court indicates that it is based upon a compromise sketch which is marked as Exhibit A1. No doubt, it is true that defendants 9 and 15 are not signatory



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to the said compromise sketch. However Plot Nos.1A and 5 have been allotted to them in the said compromise sketch and a preliminary decree has also been passed on the basis of the said sketch. According to the learned counsel appearing for the respondents, more extent than what the 2nd defendant is legally entitled to, has been allotted to the legal heirs of the 2nd defendant namely the defendants 9 and 15 in the said compromise.

25.The learned counsel for the petitioners had contended that the property in which the 2nd defendant had put up construction and was residing has been allotted to a different sharer and mere prime properties have been allotted to the other sharers.

26.Per contra, the learned counsel appearing for the respondents had contended that one of the properties that is allotted to the defendants 9 and 15 is a road facing property in a prime location. Therefore, the grievance of the revision petitioners seems to be with regard to the allotment of the specific plots in certain prime location. This issue could be resolved in the final decree proceedings and there is no necessity to disturb the preliminary decree, especially when this Court has arrived at a



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finding that the defendants 9 and 15 have remained exparte out of their own choice and had filed an application to condone the delay after a period of 9 years.

27.As could be seen from the records, the final decree in the suit has been passed on 28.11.2019 after a period of 8 years from the date of filing of the final decree application. According to the learned counsel for the revision petitioners, the said final decree passed by the Additional District Munsif Court, Padmanabhapuram has been challenged before the Subordinate Court, Padmanabhapuram and it is yet to be numbered. Therefore, it is clear that the petitioners have chosen to challenge the final decree proceedings in a manner known to law. As discussed earlier, the only remedy that is open to the revision petitioners is to agitate their claim before the Appellate Court in the appeal challenging the final decree proceedings.

28.In view of the above said discussions, this Court is inclined to pass the following orders:

- (i).The revision petition is dismissed.
- (ii).The extent of property that was allotted to the Defendants 9



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and 15 in the exparte preliminary decree by the trial Court shall not be disturbed by the First Appellate Court in the final decree proceedings.

(iii). Defendants 9 and 15 are entitled to ventilate their grievance only with regard to the location of the property allotted to them in the final decree proceedings.

29. With the above said observations, this Civil Revision Petition stands dismissed. No costs.

09.02.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To
1. The Additional District Munsif
Padmanabhapuram

2. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR, J

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Pre-delivery order made in
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