



C.R.P(MD)No.2632 of 2014

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 30.03.2023

DELIVERED ON : 21.04.2023

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.R.P(MD)No.2632 of 2014

and

M.P(MD)No.1 of 2014

Ponnangan

... Petitioner

Vs.

1.K.G.Nesan
Thangaraju (Died)

2.Muthulakshmi
3.Manickam
4.Balachandar
5.Muthayyan
6.Padmavathi
7.Irulandi
8.Maniammal
9.Sundarambal
10.Pitchai
11.Arjunan
12.Rengaraj
13.Jegadhambal
14.Thirulogasundar
15.Mala

... Respondents



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PRAYER : Civil Revision Petition is filed under Article 227 of the Constitution of India, to set aside the fair and decreetal order dated 03.07.2013 passed in I.A.No.936 of 2012 in O.S.No.72 of 2005 on the file of the III Additional District Munsif Court, Tiruchirappalli.

For Petitioner : M/s.J.Anandhavalli

For R-1 : Mr.H.Lakshmi Shankar

For R-2 to R-4,
R-6 to R-8,
R-14 & R-15 : No appearance

For R-5 & R-13 : Died

For R-9 to R-12 : Given up

ORDER

This Civil Revision Petition is preferred as against the fair and decreetal order passed by the learned III Additional District Munsif Court, Tiruchirappalli in I.A.No.936 of 2012 dated 03.07.2013.

2. I.A.No.936 of 2012 in O.S.No.72 of 2005 was filed by the petitioner / 16th defendant under Order XVIII, Rule 17 and Section 151 of the Code of Civil Procedure, 1908, seeking to recall all the witnesses examined on the side of the plaintiff for cross-examination of them by the



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petitioner / 16th defendant. The learned Trial Court allowed the said petition.

As against the same, this Civil Revision Petition is filed by the first respondent / plaintiff. For the sake of convenience, the parties are mentioned herein as arrayed in the I.A.No.936 of 2012.

3. At the very outset, this Civil Revision Petition has been filed as against the order passed by the learned Trial Court in an application filed under Order XVIII, Rule 17 and Section 151 of the Code of Civil Procedure, 1908, **in a remanded suit.**

4. The first respondent / plaintiff had filed the original suit in O.S.No. 108 of 1988 on the file of the Subordinate Judge's Court at Tiruchirappalli and the same was a suit for partition. The said partition suit was dismissed for non-joinder of necessary parties, without going into the merits of the case on 05.08.1999 by the Subordinate Judge's Court, Tiruchirappalli. As against the same, the first respondent / plaintiff preferred an appeal in A.S.No.319 of 1999, on the file of the II Additional District Judge (PCR), Tiruchirappalli on 04.09.2001.



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5. The first Appellate Court setting aside the judgment and decree of the lower Court passed in O.S.No.108 of 1988, remanded the appeal back to the Trial Court, directing to give opportunity to the first respondent / plaintiff in O.S.No.108 of 1988 to implead all the necessary parties and to proceed further in accordance with law. Thereafter the parties were directed to appear before the lower Court on 10.09.2001. The remanded suit was re-numbered as O.S.No.72 of 2005 on the file of the District Munsif Court, Tiruchirappalli. The learned District Munsif, Tiruchirappalli allowed various parties to be impleaded as the defendants.

6. One K.G.Nesan filed a petition, seeking to implead himself as the 16th defendant in I.A.No.628 of 2006 and the same was allowed by the order dated 21.03.2007. Thereafter, the plaint was amended and the said Mr.K.G.Nesan was made the 16th defendant and he filed his written statement on 28.10.2008. After framing issues afresh, the trial of the suit commenced. In the meanwhile, on 10.09.2012, the petitioner / 16th defendant had filed I.A.No.936 of 2012 seeking to recall all the witnesses



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examined on the side of the plaintiff for cross-examination of them by the petitioner / 16th defendant. Since all the oral evidence had taken place before he was impleaded, it has become necessary to cross examine all the plaintiff's side witnesses after his filing of the written statement. This application was resisted strongly by the plaintiff. However, the said application was allowed.

7. This Civil Revision Petition was filed claiming that the petitioner / 16th defendant was a *pendente lite* purchaser, who purchased the plaint item No.2 of the plaint 'A' scheduled property from the second defendant on 13.04.2006 and therefore, he is bound by his vendor's pleadings and evidence and do not have any independent right of cross examination of evidence. It was further contended that the petitioner / 16th defendant is a party subsequently impleaded after the order of remand and allowing the said application by the lower Court will lead to miscarriage of justice in as much as the petitioner / 16th defendant is being given an opportunity after 17 years of filing of the suit by the plaintiff. Another ground taken by the first respondent / plaintiff is that the suit was remanded for the purpose of



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impleading some of the sharers, who remained *ex parte*. Hence the learned Trial Court, ought to have posted the case for arguments instead of evidence on the side of the petitioner / 16th defendant.

8. Heard the rival submissions made by the learned Counsels appearing for the petitioner as well as the first respondent.

9. The learned Counsel for the petitioner reiterated the various grounds raised in the Civil Revision Petition on the basis of the various documents filed along with the same. The learned Counsel for the first respondent vehemently refuted the various grounds raised by the petitioner's Counsel. Both the learned Counsels filed written submissions as well. I have perused the written submissions filed by both the parties and the various materials on record carefully. In the written submissions, the revision petitioner further relied upon the judgment of the ***Hon'ble High Court of Karnataka at Bengaluru in a writ petition in W.P.No.55266 of 2016 (Sri Narayanaswamy Vs. Sri Ramanjinappa and Others)*** dated **18.07.2022**, the relevant portion of which is derived as follows:



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“2.A pendent lite purchaser cannot contest the suit and his sale deed is subject to the determination of the share by the Trial Court. Therefore, I am of the view that a pendente lite purchaser is not at all a necessary party.”

10. Another judgment of the ***Hon’ble High Court of Jharkhand in Dilip Kumar @ Gagga @ Dilip Kumar Prasad Vs. Mostt.Urmila Devi, dated 27.08.2018***, the portion of the judgment relied by the revision petitioner is culled out as follows:

“6. The learned trial judge has rightly observed that since the saleable right, title and interest of the vendors have been transferred through the sale-deeds executed in favour the intervener-Republic Tractor Motor Private Limited, it needs to be impleaded as party defendant in the suit. The intervener-respondent no.8 has been permitted to file written statement, however, this permission to the respondent no.8 to file written statement, in the context of its rights flowing from the sale-deed, must remain confined to producing a copy of the sale-deed and leading evidence only to the extent that the sale-deeds have been executed by the plaintiff no.4 and defendant nos.6 and 7 in its favour, and not beyond this.”



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However, the judgment of the ***Hon'ble High Court of Karnataka in Kantabai, W/o.Shantaram Kattimani (Harijan) Vs. Kashibai W/o.Mohan Rajashree @ Harijan dated 21.09.2020*** relied by the revision petitioner is not applicable to the facts and circumstances of this case.

11. Per contra, the learned Counsel for the first respondent / petitioner / 16th defendant relied upon the judgment passed by the ***Hon'ble High Court of Orissa in Palia Bewa Vs. Parbati Kumari Mohapatra and Others reported in AIR 1986 Ori 62 dated 30.04.1985***, the the relevant portion of which is derived as follows:

“5. Once an order allowing an application under Order 1, Rule 10 of the Code is not challenged, the newly added party has all the rights to defend his case and so far as he is concerned, the case must be taken to have begun afresh. In that view of the matter, the limited prayer of defendant 12 to allow him to cross-examine the plaintiff cannot be said to be unjustified or illegal in any manner.....”

12. He further relied upon the judgment of the ***Hon'ble High Court of Orissa in Falcon Real Estate Private Limited and Others Vs. Janak Kumari Devi and Others reported in 2013(1) ILR-CUT 474 dated***



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27.11.2012, the relevant portion of which is derived as follows:

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“11. Keeping the above position in law in view, this Court is of the opinion that in view of the changed circumstances, as narrated above, under which the property is stated to have come to the hands of the petitioner – Falcon Real Estate Private Limited and the petitioners have already been impleaded as parties by allowing their applications under Order 1, Rule 10(2) C.P.C. and their written statements filed have been accepted, the learned trial Court should have construed that the suit is relegated to a position prior to passing the preliminary decree, where the defendants 3 and 4 entered appearance and filed their written statements. Hence, it was incumbent on the part of the learned trial Court to recast the issues under the changed circumstances and to recall the witnesses examined by the parties before the preliminary decree was drawn up for being cross-examined by the petitioners. On such cross-examination and on the evidence adduced by the petitioners, both oral and documentary, the learned trial Court was required to determine the issues recast to find out as to whether the property said to have been purchased by the defendant No.3 and thereafter, by the defendant No.4 from him, is to be excluded from the preliminary decree.”



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13. Now the short question to be decided is as to, whether the learned Trial Court is justified in holding that the petition moved by the petitioner / 16th defendant to recall all the P.W.s for cross-examination to substantiate his case as maintainable and that it is his paramount right to exercise the same for the ends of justice, because the suit cannot be decided effectively, without giving sufficient opportunity to the petitioner / 16th defendant?

14. Admittedly, the petitioner / 16th defendant is a *pendente lite* purchaser and he gets his alleged right in the year of 2006, when he purchased the subject property on 13.04.2006. Hence, it is necessary to adjudicate upon the point as to whether the petitioner / 16th defendant is a necessary party to this case and whether the impleadment of the petitioner / 16th defendant is hit by Section 52 of the Transfer of Property Act, 1882. The learned first Appellate Court remanded the appeal exclusively directing the Trial Court to implead all necessary parties as defendants. Obviously, I.A.No.628 of 2006 was allowed on 21.03.2007, permitting K.G.Nesan to implead himself as the 16th defendant in the suit, following which the plaint

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was amended and he was made the 16th defendant to the suit. No doubt, the Revision Petitioner, did not prefer an appeal as against the said order passed by the Trial Court, impleading the 16th defendant. Having not objected the impleadment of the 16th defendant by filing a revision petition as against the order passed by the Trial Court in I.A.No.628 of 2006, dated 21.03.2007, now in a later stage, the revision petitioner is not justified in taking a plea that the transferee pending suit is not entitled to be impleaded as a party as of right.

15. The provisions of Order I, Rules 10(4) and (5) of the Code of Civil Procedure, 1908, will be relevant in the instant situation, which is as follows:

“10(4). Where defendant added, plaint to be amended.- Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the [Indian Limitation Act, 1877



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(15 of 1877), Section 22], the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons.”

16. Having added the petitioner / 16th defendant in the suit and the plaint duly amended, the proceedings as against the petitioner / 16th defendant shall be deemed to have begun only on the service of summons, in terms of the provisions of Order I, Rules 10(4) and (5) of the Code of Civil Procedure, 1908. However, in this case, the impleading petition was filed by the petitioner / 16th defendant himself and hence, once the plaint was duly amended on the application for amendment being allowed, the proceedings as against the petitioner / 16th defendant shall be deemed to have begun on the date of allowing I.A.No.628 of 2006 on 21.03.2007. The ***Hon'ble Supreme Court of India in Udit Narain Singh Malpaharia Vs. Additional Member, Board of Revenue, Bihar reported in MANU/SC/0045/1962*** dated 19.10.1962 in paragraph Nos.10 and 11 has held as follows:



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“10.A party whose interests are directly affected

is, therefore, a necessary party.

11. In addition, there may be parties who may be **described as proper parties**, that is parties whose presence is not necessary for making an effective order but whose presence may facilitate the settling of all the questions that may be involved in the controversy. The question of making such a person as a party to a writ proceeding depends upon the judicial discretion of the High Court in the circumstances of each case. Either one of the parties to the proceeding may apply for the impleading of such a party **or such a party may suo motu approach the Court for being impleaded therein.**”

17. On that basis, the petitioner / 16th defendant is a proper party, whose presence would facilitate the settling of all the questions involved in the partition suit. Even without assuming that the petitioner / 16th defendant is a *bona fide* purchaser for value, since the sale in favour of him is covered by the doctrine of *lis pendens*, he can have only whatever rights, his transferor, that is, the second defendant has. Since the first respondent / plaintiff claim that the subject property is a joint family property, the



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petitioner / 16th defendant is entitled to work out the equity in his favour, both in the preliminary decree and in the final decree proceedings.

18. The Hon'ble Supreme Court in ***Dhanalakshmi and Others Vs. P.Mohan and Others reported in MANU/SC/7041/2007*** dated 17.01.2007 in paragraph No. 4 has held as under:

“4. Section 52 of the Transfer of Property Act reads thus:

“52. Transfer of property pending suit relating thereto -- During the pendency in any Court having authority within the limits of India excluding the State of Jammu and Kashmir or established beyond such limits by the Central Government of any suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

Explanation -- For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of



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competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force.”

Section 52 deals with a transfer of property pending suit. In the instant case, the appellants have admittedly purchased the undivided shares of the respondents Nos. 2, 3, 4 & 6. It is not in dispute that the first respondent P. Mohan has got an undivided share in the said suit property. Because of the purchase by the appellants of the undivided share in the suit property, the rights of the first respondent herein in the suit or proceeding will not affect his right in the suit property by enforcing a partition. Admittedly, the appellants, having purchased the property from the other co-sharers, in our opinion, are entitled to come on record in order to work out the equity in their favour in the final decree proceedings. In our opinion, the appellants are necessary and proper parties to the suit, which is now pending before the Trial Court.....”



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19. Now at this juncture, considering the aspects mentioned below:

(1) The admission of the petitioner / plaintiff as to the settlement deed in favour of the second defendant duly executed by the first defendant on 21.08.1962, with regard to the second item of the 'A' scheduled property in paragraph No.6 of the plaint and his negligence / omission to challenge the same for more than 25 years.

(2) The petitioner / 16th defendant in paragraph No.3 of his written statement has pleaded the existence of an agreement of sale dated 04.12.1985 in his favour, with respect to the subject property with the second defendant.

(3) The absence of any mention by the second defendant, as to the erstwhile Agreement of Sale dated 04.12.1985 in favour of the petitioner / 16th defendant, in the Sale Deed and the receipt of a sale consideration of Rs.6,400/- on 04.12.1985 in the Sale Deed bearing Doc.No.907 of 2006 dated 13.04.2006, casting ambiguity on the said document, I leave open all the above points discussed herein to be adjudicated by the learned Trial Court.



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20. In view of the above discussions, this court is of the considered view that, there is no illegality in allowing the I.A.No.936 of 2012 filed under Order XVIII, Rule 17 and Section 151 of the Code of Civil Procedure, 1908, filed by the petitioner / 16th defendant. This is a case which was remanded by the first Appellate Court for the reason that the Trial Court had dismissed the original suit on the grounds of non-joinder of necessary parties without going into the merits of the case, thereby directing the Trial Court to facilitate the plaintiff in impleading all the necessary parties. Admittedly, the petitioner / 16th defendant was impleaded by the Trial Court on his application to get impleaded in the suit. The Hon'ble Supreme Court in ***K.K.Velusamy Vs. Palanisamy reported in MANU/SC/0267/2011 dated 30.03.2011*** in paragraph Nos.8 and 9 has held as follows:

“8. Order 18 Rule 17 of the Code enables the court, at any stage of a suit, to recall any witness who has been examined (subject to the law of evidence for the time being in force) and put such questions to him as it thinks fit. The power to recall any witness under Order 18 Rule 17 can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit requesting the court to exercise the said



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power. The power is discretionary and should be used sparingly in appropriate cases to enable the court to clarify any doubts it may have in regard to the evidence led by the parties. The said power is not intended to be used to fill up omissions in the evidence of a witness who has already been examined. [Vide Vadiraj Naggappa Vernekar v. Sharadchandra Prabhakar Gogate MANU/SC/0448/2009 : 2009 (4) SCC 410. Order 18 Rule 17 of the Code is not a provision intended to enable the parties to recall any witnesses for their further examination-in-chief or cross-examination or to place additional material or evidence which could not be produced when the evidence was being recorded. Order 18 Rule 17 is primarily a provision enabling the court to clarify any issue or doubt, by recalling any witness either suo moto, or at the request of any party, so that the court itself can put questions and elicit answers. Once a witness is recalled for purposes of such clarification, it may, of course, permit the parties to assist it by putting some questions.

9. There is no specific provision in the Code enabling the parties to re-open the evidence for the purpose of further examination-in-chief or cross-examination. Section 151 of the Code provides that nothing in the Code shall be deemed to limit or otherwise affect the inherent powers of the Code to make such orders as may be necessary for the ends of justice or to prevent the abuse of the process of the court. In the absence of any



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provision providing for re-opening of evidence or recall of any witness for further examination or cross-examination, for purposes other than securing clarification required by the court, the inherent power under Section 151 of the Code, subject to its limitations, can be invoked in appropriate cases to re-open the evidence and/or recall witnesses for further examination. This inherent power of the court is not affected by the express power conferred upon the court under Order 18 Rule 17 of the Code to recall any witness to enable the court to put such question to elicit any clarifications.”

21. In the instant case, since the Trial Court has commenced adjudication afresh on being remanded by the first Appellate Court, there is no illegality in permitting the petitioner / 16th defendant to cross examine the P.W's. The Hon'ble Supreme Court in ***M/s. Bagai Construction Thr. Its Proprietor Mr.Lalit Bagai Vs. M/s. Gupta Building Material Store reported in MANU/SC/0195/2013 dated 22.02.2013*** in paragraph Nos.8, 9 and 10 has held as as follows:

“8. In Vadiraj Naggappa Vernekar (dead) through L.Rs. v. Sharadchandra Prabhakar Gogate MANU/SC/0448/2009 :



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(2009) 4 SCC 410, this Court had an occasion to consider similar claim, particularly, application filed under Order XVIII Rule 17 and held as under:

25. In our view, though the provisions of Order 18 Rule 17 Code of Civil Procedure have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

28. The power under the provisions of Order 18 Rule 17 Code of Civil Procedure is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 Code of Civil Procedure.

29. It is now well settled that the power to recall any witness under Order 18 Rule 17 Code of Civil Procedure can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have



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arisen during the course of his examination.

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31. Some of the principles akin to Order 47 Code of Civil Procedure may be applied when a party makes an application under the provisions of Order 18 Rule 17 Code of Civil Procedure, but it is ultimately within the court's discretion, if it deems fit, to allow such an application. In the present appeal, no such case has been made out.”

9. If we apply the principles enunciated in the above case and the limitation as explained with regard to the application under Order XVIII Rule 17, the applications filed by the Plaintiff have to be rejected. However, learned Counsel for the Respondent by placing heavy reliance on a subsequent decision, namely, K.K. Velusamy v. N. Palanisamy MANU/SC/0267/2011 : (2011) 11 SCC 275, submitted that with the aid of Section 151 Code of Civil Procedure, the Plaintiff may be given an opportunity to put additional evidence and to recall PW-1 to prove those documents and if need arises other side may be compensated. According to him, since the High Court has adopted the said course, there is no need to interfere with the same.

10. In Velusamy (supra) even after considering the principles laid down in Vadiraj Naggappa Vernekar (supra) and taking note of Section 151 Code of Civil Procedure, this Court concluded



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that in the interests of justice and to prevent abuse of the process of the Court, the trial Court is free to consider whether it was necessary to reopen the evidence and if so, in what manner and to what extent. Further, it is observed that the evidence should be permitted in exercise of its power Under Section 151 of the Code. The following principles laid down in that case are relevant:

“19. We may add a word of caution. The power Under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.”



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22. Since the petitioner / 16th defendant claims to be *a bona fide* purchaser for value on the strength of Sale Deed dated 13.04.2006 in his favour and Settlement Deed dated 21.08.1962, in favour of the second defendant, the Trial Court is directed to permit the petitioner / 16th defendant to cross examine the P.W's confining to the Sale Deed dated 13.04.2006, Settlement Deed dated 21.08.1962 and the Agreement of Sale dated 04.12.1985 and leading evidence only to the extent that the Sale Deed dated 13.04.2006 was executed by the second defendant in his favour, the Settlement Deed dated 21.08.1962 was executed by the first defendant in favour of the second defendant and Agreement of Sale dated 04.12.1985 was executed by the second defendant in his favour and the facts relevant to those documents alone, so as to work out his equity, since the evidence as to the true nature of the transaction is not inadmissible by virtue of the 6th proviso to Section 92 of the Indian Evidence Act, 1872.

23. In view of the above, this Court has no hesitation to uphold the order passed by the learned Trial Court in I.A.No.936 of 2012 in O.S.No.72 of 2005 dated 03.07.2013. In furtherance to the same, the Trial Court is



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directed to permit the petitioner / 16th defendant to cross examine all the P.W's in two consecutive days and further proceed with the examination in chief of his witnesses and conclude the trial of the case as expeditiously as possible within a period of three (3) months from the date of receipt of the copy of this order. In fine, this Civil Revision Petition stands dismissed. As a result, connected Miscellaneous Petition stands closed. There shall be no order as to costs.

21.04.2023

NCC : Yes
Index : Yes
Internet : Yes
BTR

To

- 1.The III Additional District Munsif Court,
Tiruchirappalli.
- 2.The Section Officer,
Vernacular Section,
Madurai Bench of Madras High Court,
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L.VICTORIA GOWRI, J.

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Order made in
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