



CMA.No.795 of 2024

In the High Court of Judicature at Madras

Reserved on : 02.4.2024	Delivered on : 04.4.2024
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Coram :

The Honourable Mr.Justice N.ANAND VENKATESH

Civil Miscellaneous Appeal No.795 of 2024
& CMP.No.7386 of 2024

1.Pachiammal
2.Gnanambal

...Appellants

Vs

Kandasamy Asari (died)

1.Manivasagam
2.Sidheswaran
3.Vadivel

...Respondents

APPEAL under Order XLIII Rule 1(u) of the Civil Procedure Code praying to set aside the order of remand dated 20.11.2023 passed in CMA.No.3 of 2023 on the file of the First Additional District Court, Namakkal setting aside the final decree dated 16.11.2022 passed in I.A.No.1 of 2020 in O.S.No.85 of 2010 on the file of the Subordinate Judge, Rasipuram by allowing this civil miscellaneous appeal.

For Appellants : Mr.S.Subbiah, SC for
Ms.Elizabeth Ravi
For R1/Caveator : Mr.V.Anthony Elangovan Raj for
Mr.M.Subash



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JUDGMENT

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This civil miscellaneous appeal has been filed by the appellants under Order XLIII Rule 1(u) of the Civil Procedure Code (for short, the Code) against the judgment dated 20.11.2023 rendered by the First Additional District Court, Namakkal (for brevity, the Court below) in C.M.A.No.3 of 2023 setting aside the final decree dated 16.11.2022 passed in I.A.No.1 of 2020 in O.S.No.85 of 2010 on the file of the Subordinate Court, Rasipuram (for short, the Trial Court).

2. The brief facts leading to filing of this appeal are as follows :

(i) The appellants filed a suit in O.S.No.85 of 2010 before the Trial Court against their father and step brothers seeking for the relief of partition and separate possession of 1/5th share each (originally) in the suit properties. After contest, the said suit came to be dismissed by judgment and decree dated 01.2.2013 and it was confirmed on appeal by the appellants vide judgment and decree dated 28.8.2014 in A.S.No.39 of 2013 on the file of the Principal District Court, Namakkal. Aggrieved by the judgment and decree of the First Appellate Court, the appellants filed a second appeal in S.A.No.922 of 2015 on the file of this Court.



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(ii) The said second appeal was allowed by judgment and decree dated 15.2.2017, the relevant portions of which are extracted as hereunder :

"5. As narrated earlier, the basic facts are not in dispute. Ex.A1 is a registered partition deed dated 05.05.1975 effected in the family of the first defendant between him and his brothers. Thus both the Courts have committed a fundamental error that the property acquired by a divided Hindu family son from the joint family shall become his absolute property. This proposition of law may be correct insofar as no children are born. If the children are born to him, they become co-parceners and the properties would become joint family properties. Unfortunately, this principle, though appears to be rudimentary, has been omitted to be looked into by the Courts below. The lower appellate Court concurred with the finding of the trial Court in one paragraph on a wrong legal premise. However, this Court does not find any error in the findings rendered by the Courts below insofar as the due execution of Ex.B1 is concerned. If that is the case, then the appellants/plaintiffs would be entitled for only 1/6 of the suit properties as against the claim of 1/5.

6. Accordingly, the judgment and decree of



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the Courts below are set aside and the second appeal is allowed. The substantial question of law is answered in favour of the appellants. It is hereby declared that the appellants are entitled for 1/6 share each."

(iii) Challenging the said judgment dated 15.2.2017 in S.A.No. 922 of 2015, the respondents filed a special leave petition in S.L.P. (Civil) No.14296 of 2017 before the Apex Court and it came to be dismissed by order dated 11.1.2019.

(iv) Thereafter, pursuant to the preliminary decree passed by this Court in the said second appeal by determining the shares of the appellants as 1/6th share each, the appellants filed an application seeking for final decree in I.A.No.1 of 2020 before the Trial Court. Further, an advocate commissioner was appointed during the pendency of the final decree proceedings in order to file his report suggesting an effective partition and possession of the respective shares of the appellants. The advocate commissioner also conducted an inspection of the suit properties and submitted a report. Based on the same, the Trial Court passed the final decree on 16.11.2022.

(v) Aggrieved by the final decree proceedings, the respondents filed an appeal in C.M.A.No.3 of 2023 before the Court below. This appeal was allowed by judgment dated 20.11.2023 remitting the



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matter back to the file of the Trial Court for fresh determination of the shares of all the sharers. As against the same, the above appeal is filed before this Court.

3. Heard the learned Senior Counsel appearing on behalf of the appellants and the learned counsel appearing for the first respondent/caveator.

4. The learned Senior Counsel appearing on behalf of the appellants submitted that the final decree that was passed by the Trial Court is a decree as defined under Section 2(2) of the Code and that therefore, only a regular appeal suit is maintainable under Section 96 read with Order XLI of the Code whereas the respondents filed a civil miscellaneous appeal before the Court below, which is not at all maintainable.

5. The learned Senior Counsel appearing on behalf of the appellants further submitted that the reason assigned by the Court below to divide the properties and grant 1/5th share each to all the sharers is contrary to the preliminary decree passed by this Court in



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the said second appeal, that apart from that, the advocate commissioner did not get the cooperation of the respondents, that the matter was intentionally delayed and that ultimately when the inspection was made, what was available on the ground was only an extent of 87.5 cents, which was divided into six shares.

6. The learned Senior Counsel appearing on behalf of the appellants also submitted that an extent of 92.5 cents was not available as observed by the Court below, that if at all any excess land is available apart from the extent of 87.5 cents, the appellants are willing to give it back in favour of the respondents. He further submitted that the appellants have been fighting for their right for nearly 14 years and that the respondents are only trying to drag on the proceedings one way or the other thereby denying the appellants their rightful claim of shares in the suit properties.

7. Per contra, the learned counsel appearing for the first respondent/caveator submitted that even though the respondents filed a civil miscellaneous appeal, it can be treated as a regular appeal suit and that the judgment rendered by the Court below



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should not be interfered on this technical ground. He further submitted that the Trial Court, while passing the final decree, did not care to determine the shares of the respondents and rather, there was a determination of shares only in so far as the appellants are concerned and that therefore, the Court below was perfectly right in remitting the matter back to the file of the Trial Court to re-consider the objections raised by the respondents and to properly allot shares to all the sharers as per the preliminary decree.

8. The learned counsel for the first respondent/caveator also submitted that the total extent of the suit properties is 92.5 cents, that what was measured by the advocate commissioner was only an extent of 87.5 cents and that having found out this discrepancy, the Court below was perfectly right in remitting the matter back to the Trial Court for inspecting the entire extent of the suit properties measuring an extent of 92.5 cents and to allot the respective shares to all the sharers. He further submitted that the finding rendered by the Court below as if each party would be entitled to 1/5th share is erroneous and that the respondents are taking steps to file a separate appeal against this finding rendered by the Court below. Ultimately,



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he sought for dismissal of this appeal and to fix a time limit for the Trial Court to complete the process and pass the final decree.

9. This Court carefully considered the submissions of the learned counsel on either side and perused the materials available on record.

10. Even at the inception, this Court must hold that the civil miscellaneous appeal that was filed by the respondents before the Court below is not maintainable in law.

11. Order XLIII of the Code deals with appeals from orders and this provision must be read along with Section 104 of the Code. Order XX Rule 18 deals with passing of the final decree. The preliminary decree declares the rights or shares of the parties to the partition. Once the shares have been declared, a further inquiry still remains to be done for actual partitioning of the suit properties and putting the parties in separate possession of the divided properties and such inquiry shall be held and pursuant to the result of the further inquiry, a final decree shall be passed.



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12. It must be borne in mind that both the preliminary decree as well as the final decree are considered to be decrees as defined under Section 2(2) of the Code. Section 96 of the Code specifically provides that an appeal will lie from every decree passed by any court exercising original jurisdiction to the court authorized to hear the appeals. The procedure for dealing with such appeal is provided under Order XLI of the Code.

13. Thus, there is a fundamental difference between a decree and an order. In the former, it results in regular appeal suit and in the latter, if such an order falls within any of the provisions of Order XLIII of the Code, civil miscellaneous appeals will lie against such orders. The final decree passed under Order XX Rule 18 of the Code certainly does not fall within any of the Clauses under Order XLIII of the Code. Therefore, technically, the civil miscellaneous appeal that was filed by the respondents before the Court below is not maintainable.

14. Curiously, when the civil miscellaneous appeal was filed by the respondents before the Court below, they filed it under Section 96



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read with Order XLI of the Code. Hence, this Court is inclined to treat the appeal filed by the respondents before the Court below as a regular appeal under Section 96 read with Order XLI of the Code. In other words, this Court does not want to interfere with the judgment rendered by the Court below going by the nomenclature that was given and this Court rather goes by the contents of the appeal and treat the judgment rendered by the Court below as if it was a judgment passed in a regular appeal suit filed under Section 96 read with Order XLI of the Code.

15. In view of the above, the judgment rendered by the Court below remitting the matter back to the Trial Court will fall under Order XLI Rule 23 of the Code and as against the same, a civil miscellaneous appeal is maintainable under Order XLIII Rule 1(u) of the Code.

16. There is yet another reason as to why this Court does not want to stand on technicalities. It is relevant to take note of the judgment of the Apex Court in the case of ***Kattukandi Edathil Krishnan Vs. Kattukandi Edathil Valsan [reported in 2022 (2)***



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MWN (Civil) 527] wherein the Apex Court was expressing its concern over the delay in passing the final decree after the preliminary decree was passed. In view of the same, the Apex Court gave a direction to the effect that once a preliminary decree is passed by the Trial Court, it should proceed with the case for drawing of the final decree suo motu even without expecting an application to be filed for passing a final decree. To make it even more clear, after passing of the preliminary decree, the trial courts were directed to take steps under Order XX Rule 18 of the Code and pass a final decree without waiting for the initiation of separate proceedings.

17. For proper appreciation, paragraph 33 of the said judgment of the Apex Court is extracted as hereunder :

"We are of the view that once a preliminary decree is passed by the Trial Court, the court should proceed with the case for drawing up the final decree suo motu. After passing of the preliminary decree, the Trial Court has to list the matter for taking steps Under Order XX Rule 18 of the Code of Civil Procedure. The courts should not adjourn the matter sine die, as has been done in the instant case. There is also no need to file a separate final decree proceedings. In the same



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suit, the court should allow the concerned party to file an appropriate application for drawing up the final decree. Needless to state that the suit comes to an end only when a final decree is drawn. Therefore, we direct the Trial Courts to list the matter for taking steps Under Order XX Rule 18 of the Code of Civil Procedure soon after passing of the preliminary decree for partition and separate possession of the property, suo motu and without requiring initiation of any separate proceedings."

18. In the case in hand, the partition suit was filed in the year 2010 and it is almost 14 years since the suit was instituted and therefore, this Court, considering the said judgment of the Apex Court, is inclined to deal with the case on merits instead of standing on technicalities and sending back the parties to agitate in a regular appeal suit.

19. The respondents filed the appeal before the Court below against the final decree passed by the Trial Court mainly on the ground that a review application has been filed by the respondents to review the judgment passed in the said second appeal, that the same



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is pending at the stage of delay condonation and that in spite of the same, the Trial Court passed the final decree.

20. It was further contended by the respondents before the Court below that the advocate commissioner left out 5 cents of property while conducting the inspection and filing the report, that the report was filed only in so far as an extent of 87.5 cents is concerned whereas the total extent of the suit properties is 92.5 cents and that therefore, the Trial Court ought not to have passed the final decree.

21. The Court below, while dealing with the grounds raised by the respondents, came to the conclusion that each sharer would be entitled to 1/5th share whereas 1/6th share has been allotted by the Trial Court to each of the appellants, which is unsustainable and that it had vitiated the final decree passed by the Trial Court. The above finding of the Court below, on the face of it, is unsustainable. The relevant portions of the judgment rendered in the said second appeal have been extracted supra.



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22. In the said judgment dated 15.2.2017 in S.A.No.922 of 2017, this Court assigned the reasons as to why each of the appellants would be entitled to only 1/6th share in the suit properties. In spite of this finding rendered by this Court, it is not known as to why the Court below had chosen to render a different finding in the impugned judgment and hold that each sharer would be entitled to 1/5th share in the suit properties.

23. The learned Senior Counsel appearing on behalf of the appellants submitted that there is no dispute with regard to the fact that the appellants would be entitled to only 1/6th share each in the suit properties and not 1/5th share as held by the Court below.

24. In view of the specific stand taken by the learned Senior Counsel appearing on behalf of the appellants, it is not necessary for this Court to wait for a separate appeal to be filed by the respondents to question this finding.

25. In the light of the above discussions, the finding rendered by the Court below as if the suit properties should have been divided



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by allotting 1/5th share each to the appellants is set aside.

26. The next finding that has been rendered by the Court below to interfere with the final decree passed by the Trial Court is that the total extent of the suit properties is 92.5 cents whereas the advocate commissioner had given the report and the plans only for an extent of 87.5 cents.

27. This Court had an opportunity to go through the report of the advocate commissioner and the plans submitted along with the report. The advocate commissioner had taken the assistance of the surveyor and the village administrative officer while surveying the property in S.F.No.92/1A75. What is available in the ground is only an extent of 87.5 cents. Hence, this extent has been divided into six shares and a plan has also been submitted along with the report.

28. Therefore, the complaint made by the respondents as if the advocate commissioner had only identified the shares of the appellants and the shares of the respondents were not determined is totally baseless. In fact, the advocate commissioner had submitted



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three plans by giving alternate options to divide the suit properties into six shares. The report and the plans submitted by the advocate commissioner were taken into consideration by the Trial Court and a final decree was passed in the following terms :

"1...

2. ஆணையர் அறிக்கை மற்றும் வரைபடங்கள் - 3 இதன் ஒருபாகமாக வாசித்துக் கொள்ள வேண்டியது என்று உத்திரவாணையிடப்படுகிறது.

3. தாவா சொத்தில் மனுதாரர்களுக்கு 6-ல் 2 பாகம் பாத்தியம் ஏற்பட்டுள்ளதால் பிளான் 1,2,3-ல் A.B. பாகம் மனுதாரர்களுக்கு ஒதுக்கீடு செய்து இறுதிநிலை தீர்ப்பாணை பிறப்பித்து உத்திரவாணையிடப்படுகிறது."

29. The learned Senior Counsel appearing on behalf of the appellants submitted that there was absolutely no cooperation on the side of the respondents when the advocate commissioner visited the spot and that with great difficulty, the inspection was conducted.

30. Considering the fact that the appellants have been struggling to get their shares for more than 14 years, the learned Senior Counsel appearing on behalf of the appellants made it clear that if at all there is any excess land available apart from the extent of 87.5 cents, the appellants do not have any objections in the



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respondents taking over the said excess portion of land.

31. However, the learned counsel appearing for the first respondent/caveator submitted that the appellants must execute a document by giving up their right with respect to the excess land.

32. It is not necessary for the appellants to execute any document and it is enough to record the submission of the learned Senior Counsel appearing on behalf of the appellants and make it clear through the order of court that any excess land found beyond the extent of 87.5 cents shall be enjoyed by the respondents and that the appellants will not make any claim over the same in future.

33. In the light of the above finding, the second reasoning given by the Court below as if the final decree passed by the Trial Court is vitiated since it did not cover the entire extent of 92.5 cents is also hereby set aside. Hence, there is no necessity to once again send the matter back to the Trial Court as the grounds, on which, the Court below wanted the matter to be remanded to the Trial Court, have been sufficiently answered in this appeal.



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34. The learned counsel appearing for the first respondent submitted that there are other grounds, on which, the respondents want to question the final decree passed by the Trial Court.

35. No such grounds have been raised before the Court below and it is too late in the day to raise some new grounds before this Court to justify the matter to be remanded to the Trial Court. The Court below has not remanded the matter to the Trial Court for any other reason except the reasons, which have been dealt with supra. Therefore, the respondents cannot ask for the remand of the case to the Trial Court on some new grounds. This attempt made by the respondents to once again get the matter remanded to the Trial Court is only with a view to protract the proceedings and it will cause delay to the appellants from getting their rightful share in the suit properties.

36. The applications filed by the third respondent herein before the Trial Court namely (i) I.A.No.5 of 2022 seeking to scrap the report of the advocate commissioner and the plans was dismissed for default on 02.9.2022 and (ii) I.A.No.6 of 2022 seeking to set aside



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the order of dismissal for default dated 02.9.2022 and to restore I.A.No.5 of 2022 was also dismissed even on 16.11.2022. The same have not been put to challenge and those orders also became final.



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37. In the result, the above civil miscellaneous appeal is allowed, the judgment dated 20.11.2023 rendered by the First Additional District Court, Namakkal in C.M.A.No.3 of 2023 is hereby set aside and the final decree dated 16.11.2022 passed by the Subordinate Court, Rasipuram in I.A.No.1 of 2020 is hereby confirmed. Consequently, the connected CMP is closed. Considering the relationship between the parties, there shall be no order as to costs.

04.4.2024

Index : Yes
Neutral Citation : Yes
Speaking Order : Yes

To
1.The First Additional District
Court, Namakkal.

2.The Subordinate Court,
Rasipuram.

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N.ANAND VENKATESH,J

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