



C.R.P.(MD)No.974 of 2021

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 22.07.2024

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THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.R.P.(MD)No.974 of 2021
and
C.M.P.(MD)No.5526 of 2021

A.Murugan	... Petitioner / Defendant / 4 th defendant
Vs.	
1.A.Sivagnanam	... Respondent / Petitioner / 3 rd defendant
2.Selvam	... Respondent / Respondent / Plaintiff
3.A.Duraipandi	
4.A.Kamudurai	
5.A.Manikandan	
6.A.Kumar	
7.M.Kannan	
8.M.Nithya	
9.M.Saroja	... Respondents / Defendants / Defendants 1, 2, 5 to 9



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(Cause title accepted vide Court order dated 25.06.2021 made in C.M.P.(MD)No.5119 of 2021 in C.R.P.(MD)SR.No.26958 of 2021)

(Memo filed on 02.07.2024 in USR No.22407 is recorded, to the effect that service of notice to the respondents 3 to 9 is dispensed with, vide Court order dated 04.07.2024 made in C.R.P.(MD)No.974 of 2021)

(Memo filed on 18.07.2024 in USR No.24819 is recorded, to the effect that service of notice to the 2nd respondent is dispensed with, vide Court order dated 22.07.2024 made in C.R.P.(MD)No.974 of 2021)

PRAYER : Civil Revision Petition is filed under Section 115 of C.P.C., to set aside the order dated 26.02.2021 made in I.A.No.4 of 2020 in O.S.No.63 of 2011 on the file of the learned Subordinate Judge, Theni.

For Petitioner : Mr.S.Jagadeesh

For R-1 : Mr.A.Mohan

For R-2 to R-9 : Dispensed with

ORDER

This Civil Revision Petition came to be filed to set aside the order dated 26.02.2021 made in I.A.No.4 of 2020 in O.S.No.63 of 2011 on the file of the learned Subordinate Judge, Theni.



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2. For the sake of convenience, the parties are referred herein as per their rank in the Original Suit.

3. The facts which led to the filing of this Civil Revision Petition is as follows:

3.1. The suit in O.S.No.63 of 2011 is one for partition filed by the sister of the defendants seeking 1/8th share in the various items of the plaint scheduled properties. In the said suit preliminary decree came to be passed on 19.02.2020. The said suit was set *ex parte* as against the defendants D-1, D-2 and D-6 to D-9. Only the defendants 3, 4 and 5 were contesting defendants. Interestingly, all the three contesting defendants in their written statement had placed on record their no objections as to the claim of the plaintiff with respect to her 1/8th share over the plaint schedule properties. Based on the pleadings of the contesting defendants, preliminary decree was passed by the learned Trial Court confirming the right of the plaintiff over their 1/8th share with respect to all the plaint schedule properties. Having not filed counter claim along with written statement seeking his 1/8th share with respect to the plaint schedule properties, the 3rd defendant filed a First Appeal before the learned District



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Judges Court at Theni in A.S.No.29 of 2020. The learned First Appellate Court had framed three issues and to be specific, the second issue, which is, as to whether the appellant 3rd defendant is entitled to challenge the preliminary decree passed by the learned Trial Court without seeking for a prayer by paying appropriate Court Fee.

3.2. On hearing the arguments of the contesting parties, the learned First Appellate Court proceeded to summarily dismiss the said appeal in terms of Order 41 Rule 11 of Code of Civil Procedure, 1908, without issuing notice to the respondents, however, giving liberty to the 3rd defendant to approach the appropriate forum with appropriate application if so advised. Following which, the 3rd defendant in O.S.No.63 of 2011 had filed I.A.No.4 of 2020 before the learned Trial Court seeking to pass a supplementary decree. It was pleaded in the said application that the same has been filed taking cue from the liberty given by the First Appellate Court in the order of dismissal of the First Appeal. The same came to be allowed by the order of the learned Trial Court dated 26.02.2021. Assailing the same, the present civil revision petition came to be filed.



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4. The learned counsel appearing for the petitioner vehemently contended that, the impugned order is bad in the eye of law for non joinder of necessary parties. He further vehemently contended that, the said petition for supplementary decree came to be filed by the 3rd defendant without paying the necessary Court Fee. A careful perusal of the impugned order throw light on the fact that the conspicuous absence of all the respondents in parties in the long cause title of the impugned order. Upon verifying, the fact which transpired is that, the 3rd defendant had filed a memo seeking dispensation of notice to all the respondents in I.A.No.4 of 2020 and the same was allowed by the learned Trial Court and on that basis the notice was dispensed with in I.A.No.4 of 2020 as against all the respondents and the plaintiff remained ex parte and on that basis, the impugned order came to be passed.

5. The learned counsel for the petitioner further vehemently submitted that, the 3rd defendant had already executed a power of attorney in favour of the wife of the 4th defendant (revision petitioner herein) and she in turn had sold her 1/8th share to the 3rd defendant with respect to the plaint schedule properties to which she is entitled to, in favour of their daughter, that is, the daughter of



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the revision petitioner. Having sold his rights over the plaint schedule properties suppressing the entire fact of the same as per the aforesaid power of attorney and the subsequent sale deed and the petition for supplementary decree came to be filed by the 3rd defendant that too without paying the appropriate Court Fee and on that basis setting aside the impugned order and allowing the Civil Revision Petition is necessary for the ends of justice.

6. The learned counsel for the respondent submitted that, the matter may be remanded back to the learned Trial Court with the precise direction to reopen the matter and issue notice to all the respondents in I.A.No.4 of 2020 afresh and thereafter, adjudicate I.A.No.4 of 2020 in accordance with law.

7. Heard the learned counsels on either sides. Carefully perused the materials available on record.

8. Memo dated 18.07.2024, in USR.No.24819 has been filed seeking to dispense with notice to the 2nd respondent. The said memo is recorded. Registry is directed to carry out the necessary amendments in the cause title.



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9. This Court is of the considered view that the First Appellate Court has framed three issues as far as the claim of the 3rd defendant seeking 1/8th share in the plaint scheduled properties and the same are as follows:

- i) Whether the appellant is aggrieved against the judgment in terms of Section 96 of CPC within the spectrum of Order 41 Rule 1 of CPC?
- ii) Whether the appellant is entitled to challenged the decree passed the Trial Court without seeking for a prayer by paying appropriate Court Fee?
- iii) Whether appeal deserves to be considered as an appeal falling within the scope and ambit of Order 41 Rule 11 of Code of Civil Procedure?

10. In view of the fact that, the 3rd respondent conceded to the claim of the plaintiff in the suit for partition at the first instance and have failed to pay appropriate Court Fee and make an application of counter claim seeking partition of his respective share in the original suit, the learned First Appellate Court felt that the appeal need to be summarily rejected. However, gave liberty to the 3rd defendant to make appropriate application before appropriate forum if so advised. Taking cue from the same, the 3rd defendant had filed I.A.No.4 of 2020 in a petition for supplementary decree claiming 1/8th share in the plaint



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scheduled properties. However, unfortunately, even this time, he did not pay the appropriate Court Fee for the same. That apart, the issuance of notice to all the parties has also been dispensed with in a claim for partition which is not legally sustainable. Hence, I am of the considered view that the only way out to the 3rd defendant is to file a fresh suit for partition. Accordingly, this Court hereby set aside the order passed dated 26.02.2021 passed by the learned Trial Court.

11. Accordingly, this Civil Revision Petition is allowed. There shall be no order as to costs. Consequently, connected civil miscellaneous petition is closed.

22.07.2024

NCC : Yes / No
Index : Yes / No
Internet : Yes
Sml



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To

1.The Subordinate Judge,
Theni.

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



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L.VICTORIA GOWRI, J.

Sml

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