

(2007) 12 MAD CK 0071

In the Madras High Court

Case No : Civil Revision Petition (NPD) No. 2490 of 2004 and C.M.P. No. 18729 of 2004

Haji M.A. Ahmed Sadakathullah Maraicair

APPELLANT

Vs

A. Mohideen Abdul Khader and Others

RESPONDENT

Date of Decision : 05-12-2007

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2008) 2 CTC 208 : (2008) 1 MLJ 454

Hon'ble Judges : A.C. Arumugaperumal Adityan, J

Bench : Single Bench

Advocate : Jemmy Vasanth, for the Appellant; Srinath Sridevan, for R1 and P. Valliappan, for R2, for the Respondent

Final Decision : Allowed

Judgement

A.C. Arumugaperumal Adityan, J.—The third plaintiff in O.S. No. 60 of 1981 on the file of the Principal Subordinate Judge, Nagapattinam

had challenged the order passed in in I.A. No. 314 of 2003 in I.A. No. 87 of 2002 in O.S. No. 60 of 1981. I.A. No. 314 of 2003 in I.A. No. 87

of 2002 in O.S. No. 60 of 1981 was filed by the 4th plaintiff in O.S. No. 60 of 1981. The plaintiffs have filed the suit in O.S. No. 60 of 1981 for

partition of the plaint schedule properties. After passing of the preliminary decree, final decree proceeding was initiated by the plaintiffs in I.A. No.

87 of 2002 in O.S. No. 60 of 1981. While the said final decree proceeding is pending before the Principal Subordinate Judge, Nagapattinam, the

4th plaintiff alone had filed I.A. No. 314 of 2003 under Order 6 Rule 17 of CPC to amend his share in the preliminary decree as 12/60 instead of

10/60 on the ground that his mother/4th defendant died, after passing of the

preliminary decree in whose favour a preliminary decree for 10/60th

share has been declared. According to the petitioner/4th plaintiff in I.A. No. 314 of 2003, after the death of his mother, he became entitled to

12/60th share in the suit property as one of the legal heirs of 4th defendant. The said application has been contested by one of the plaintiffs viz.,

Haji M.A. Ahmed Sadakathullah Maraicair/3rd plaintiff on the ground that the deceased mother of the 4th plaintiff had executed a settlement deed

dated 9.8.1982 conveying 15/60th share in favour of the third plaintiff. The learned Principal Subordinate Judge, Nagapattinam had allowed the

application filed by the 4th plaintiff which necessitated the third plaintiff to prefer this revision.

2. The learned Counsel appearing for the second respondent relying on the following decisions reported in Parashuram Rajaram Tiwari Vs. Hirabai

Rajaram Tiwari and Others, , Phoolchand and Another Vs. Gopal Lal, , Hanumantappa Dyamappa Jadar v. Mallavva AIR 1996 Karnataka 183,

Krishnabai, Saraswathy, N. Meena, S. Kamala, S. Jamuna, S. Vatchala and S. Rajesh Vs. K.A. Krishnamurthy, Jagadambal Ammal, Mallaiya @

Mohan and Basava, and K.K. Parmar and Others Vs. H.C. of Gujarat thr. Registrar and Others, contended that decree can be amended under

Order 6 Rules 17 and 18 and u/s 151 CPC. I am of the view that unless a preliminary decree is passed in respect of 12/60th share in favour of the

petitioner in I.A. No. 314 of 2003/4th plaintiff, the share already declared in the preliminary decree cannot be amended. It is pertinent to note that

there are five plaintiffs to the suit in O.S. No. 60 of 1981. The 4th plaintiff has admitted in I.A. No. 314 of 2003 itself that he is one of the heirs of

the deceased 4th respondent Haji Hameed Kathija Nachiar/5th plaintiff in O.S. No. 60 of 1981. If it is so, then the other plaintiffs who are the

other sons of 4th respondent Haji Hameed Kathija Nachiar/5th plaintiff in O.S. No. 60 of 1981 are also entitled to an equal share of 12/60th each

in the plaint schedule property. I am of the view that unless the petitioner/4th plaintiff's share is declared as 12/60 by way of passing of a

preliminary decree, the decree already passed in O.S. No. 60 of 1981 cannot be amended under Order 6 Rule 17 CPC. This settled proposition

of law has been reiterated in Phoolchand and Another Vs. Gopal Lal, , referred to above as follows:

So far as partition suits are concerned, if an event transpires after the preliminary decree which necessitates a change in shares, the Court can and should do so; and if there is a dispute in that behalf, the order of the Court deciding that dispute and making variation in shares specified in the preliminary decree already passed is a decree in itself which would be liable to appeal. However, this can only be done so long as the final decree has not been passed.

Admittedly, in this case also final decree is yet to be passed. The remedy open to the second respondent is to file a petition for passing another preliminary decree declaring his share along with other plaintiffs' share and then to proceed with the final decree proceedings.

3. The learned Counsel appearing for the second respondent relying on a decision reported in *Parashuram Rajaram Tiwari Vs. Hirabai Rajaram*

Tiwari and Others, V 44 C 25 Feb, referred to above, would contend that a preliminary decree in a suit for partition can be amended. The ratio

decidendi in the said suit is that after passing a preliminary decree for partition, the plaintiff applied to the Court on the ground of his father's death,

his share was augmented and the share which was $\frac{1}{8}$ th was increased to $\frac{1}{7}$ th. The said application was rejected and in an appeal it was held that

the plaintiff would not be required to pay upon the footing of his augmented share. No question of paying ad valorem court-fees arose. It was only

when a decree was passed in his favour increasing his share from $\frac{1}{8}$ th to $\frac{1}{7}$ th the plaintiff would be called upon to pay the amount of stamp duty

upon the difference between his increased share which was $\frac{1}{7}$ th and the $\frac{1}{8}$ th share which was awarded to him by the preliminary decree.

4. The learned Counsel for the second respondent at this juncture relying on a decision reported in *Nanja Naicken v. Rangammal* AIR 1972

Madras 384 and contended that a preliminary decree can be amended by way of a petition under Order 6 Rule 17 CPC. But the circumstances

under which the application filed under Order 6 Rule 17 CPC in that case was that while drafting the preliminary decree, the share of the 6th

defendant was omitted to be mentioned in the preliminary decree which was ordered to be rectified by way of a petition under Order 6 Rule 17 of

CPC. So the facts in *Nanja Naicken Vs. Rangammal*, is not applicable to the present facts of the case.

5. In fine, the revision petition is allowed and the order passed in I.A. No. 314 of 2003 in I.A. No. 87 of 2002 in O.S. No. 60 of 1981 is hereby set aside. The remedy open to the second respondent/4th plaintiff is to file necessary application, before the said Court wherein the final decree application in I.A. No. 87 of 2002 is pending to declare his share and the shares of the other plaintiffs for passing another preliminary decree before passing final decree. No costs. Consequently, connected C.M.P. No. 18729 of 2004 is closed.