

**(2004) 04 MAD CK 0215**

**In the Madras High Court**

**Case No :** Civil Revision Petition (NPD) No's. 3863 to 3865 of 2001 and C.M.P. No. 21446 of 2003

Mrs. Ranga, Mrs. C. Dharani, Mrs. N. Lakshmi, J. Kumar and  
J. Ramesh

**APPELLANT**

**Vs**

C. Jaganathan and Ramakrishnan alias Balakrishnan alias  
M.C. Balan

**RESPONDENT**

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**Date of Decision :** 05-04-2004

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 115

**Citation :** (2004) 04 MAD CK 0215

**Hon'ble Judges :** S. Sardar Zackria Hussain, J

**Bench :** Single Bench

**Advocate :** R. Thiagarajan, for the Appellant; T.R. Rajaraman, for R-2, for the Respondent

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**Judgement**

S. Sardar Zackria Hussain, J.—The defendants 3 to 7 in the suit O.S.No.2220 of 1981 on the file of the VIII Assistant Judge, City Civil Court, Madras are the revision petitioners in all the three Civil Revision Petitions.

2. These Civil Revision Petitions, viz., 3863 to 3865 of 2001 are filed against the dismissal of I.A.Nos.5069, 5068 and 6411 of 1998 as per common order dated 23.2.2001 respectively. I.A.No.5068 of 1998 was filed to set aside the final decree dated 13.3.1998 passed in I.A.No.3140 of 1988 in O.S.No.2220 of 1981; I.A.No.5069 of 1998 was filed to reopen the I.A.No.3140 of 1988 filed for passing of final decree and I.A.No.6411 of 1998 was filed for stay the operation of the ex parte final decree dated 13.3.1998 in I.A.No.3140 of 1988.

3. The first respondent herein filed the suit O.S.No.2220 of 1981 for partition of his 1/8th share in the suit property and for mesne profits stating that the plaintiff and the defendants 1 to 5 and 16 each are entitled to 1/8th share and the defendants 6 and 7 jointly entitled to 1/8th share. It appears the suit was dismissed after contest by the defendants 1 and 16 on 29.7.1985. In the appeal

A.S.No.304 of 1986 on the file of the VIII Additional Judge, City Civil Court, Madras, filed by the plaintiff, the first respondent herein, preliminary decree was passed as per judgment dated 31.7.1987 allotting 1/8th share to the plaintiff in the properties bearing door Nos.11 and 15 situated in Second Lane, Mandapam Street, Kilpauk and in the properties bearing old door No.1-B, New No.2, Ormes Road, Kilpauk, Madras 10 and directing to make necessary application for appointment of an advocate-commissioner for the purpose of dividing into 8 equal share and relegating the question of mesne profits at the final decree stage under Order 20 Rule 12 C.P.C.

4. As per the plaint, the plaintiff and the defendants 1, 3, 4, 5 and 16 are the sons and daughters of Chengalvarayan Pandithar and the second defendant is his widow. The defendants 6 and 7, the minor children, are the sons of the deceased Kasturi, who is the daughter of Chengalvarayan Pandithar. The defendants 8 to 15 are the tenants. It is further averred in the plaint that the plaintiff and the defendants 1 to 5 and 16 are each entitled to 1/8th share and the defendants 6 and 7 are together entitled to 1/8th share and as such, a clear case has been set out in the plaint. Pursuant to passing of the preliminary decree in the appeal A.S.No.304 of 1986 which judgment was not further challenged, it has become final.

5. The plaintiff filed I.A.No.3140 of 1988 for passing of final decree on 25.1.1988. Advocate-commissioner was appointed and it was adjourned time and again and when it was posted on 23.3.1998 for filing advocate-commissioner report, the said petition was advanced as per order dated 13.3.1998. The plaintiff and the first defendant filed memo of compromise dated 12.3.1998 for passing of final decree stating that the defendants 3 to 7 viz., the revision petitioners herein have along with one Saroja claimed the share on premises No.11, Mandapam Road, II Street, Kilpauk, Chennai 10, which is described as schedule II in the plaint and the plaintiff and the first defendant accorded consent and the daughters of Chengalvaraya Pandithar and their children took possession and sold the same as per the sale deed dated 13.12.1995 in favour of Sivakumar and Karthikeyan during the pendency of the suit. So, the defendants 3 to 7 have not joined in the said compromise memo, in that already a sale deed was executed by the defendants 3 to 7 in respect of the suit properties, viz., No.11, Mandapam Road, II Street, Kilpauk, Chennai-10. Therefore, as per the compromise memo the plaintiff and the first defendant consented for allotment of the house and ground bearing door No.2, Ormes Road, Kilpauk, Chennai-10, which is described as schedule I in the plaint, to the first defendant Ramakrishnan and the house and ground bearing Plot No.15, Mandapam Road, II Street, Kilpauk, Chennai-10, which is described as schedule II to the plaint, to the plaintiff and in respect of the mesne profits and all other reliefs, it appears they were not pressed. Pursuant to such compromise entered into between the plaintiff and the first defendant, final decree was passed on 13.3.1998. Challenging the said final decree, the revision petitioners, viz., the defendants 3 to 7 filed I.A.No.5068 of 1998 to set aside the ex parte final decree passed in

I.A.No.3140 of 1988, I.A.No.5069 of 1998 to reopen the final decree petition I.A.No.3140 of 1988 and I.A.No.6411 of 1998 to stay the operation of the ex parte final decree passed on 13.3.1998 in I.A.No.3140 of 1988. As per common order dated 23.2.2001 all the three petitions, viz., I.A.Nos.5068, 5069 and 6411 of 1998 were dismissed, though the trial judge observed that since the revision petitioners have not signed in the compromise entered into between the plaintiff and the first defendant, the final decree passed in terms of the said compromise memo filed by the plaintiff and the first defendant, is not binding on the revision petitioners by observing that since the revision petitioners are allotted together 4/8th share in the suit properties, it is open to them to file separate application for passing of final decree in respect of the remaining properties. Such common order is challenged in these Civil Revision Petitions.

6. The learned counsel for the revision petitioners/defendants 3 to 7 submits that despite the fact in I.A.No.3140 of 1988 filed for passing of final decree pursuant to the preliminary decree, the first defendant and the defendants 2 to 7 and 16 were also made parties by the plaintiff, the compromise memo was filed only by the plaintiff and the first defendant stating that the defendants 3 to 7 refused to sign in the compromise memo, since as per the agreement between them, the defendants 3 to 7 along with one Saroja claimed the share on the premises bearing door No.11, Mandapam Street, Second Lane and the plaintiff and the first defendant accorded consent and in fact, they sold the same as per the sale deed dated 13.12.1995 to Sivakumar and Karthikeyan during the pendency of the suit and accordingly final decree was passed allotting the house and ground bearing door No.2, Ormes Road, Kilpauk, Chennai-10, described as schedule I in the plaint, to the share of the first defendant and the house and ground bearing Plot No.15, Mandapam Road, Second Street, Kilpauk, Chennai-10, described as Schedule II in the plaint, to the share of the plaintiff, which is improper. The learned counsel further submitted that the defendants 3 to 7 came to know about the decree passed on 13.3.1998 only on 25.3.1998 and therefore such final decree passed in terms of the said compromise memo filed by the plaintiff and the first defendant allotting shares only to the plaintiff and the first defendant as stated above, is not proper and is to be set aside and by reopening the final decree proceedings, respective shares of the defendants 3 to 7 have to be allotted.

7. The learned counsel for the second respondent herein/first defendant submitted that inasmuch as the house and ground bearing door No.11, Mandapam Street, Second Lane, Kilpauk, Chennai-10, which is one item of the schedule II in the plaint, was given to the defendants 3 to 7 and in fact they also sold the same as per the sale deed dated 13.12.1995 to Sivakumar and Karthikeyan during the pendency of the suit, the memo of compromise was filed by the plaintiff and the first defendant and accordingly final decree was also passed and such final decree passed need not be set aside. The learned counsel further contended that since the house and ground bearing door No.11, Mandapam Road, II Street, Kilpauk, Chennai-10 was given to the share of the

defendants 3 to 7 and they also sold as per the sale deed dated 13.12.1995 and that the defendants 3 to 7 refused to sign in the compromise memo and it was presented only by the plaintiff and the first defendant though the defendants 3 to 7 were also made parties to the final decree proceedings in I.A.No3140 of 1988.

8. As stated above, the suit O.S.No.2220 of 1981 was filed for partition by the plaintiff, in which it is clearly admitted that the plaintiff and the first defendant are entitled to 1/8th share each and the defendants 2 to 5 and 16 are entitled to 1/8th share each and the defendants 6 and 7 are together entitled to 1/8th share. Though the suit was dismissed after contest by the defendants 1 and 16, in the appeal A.S.No.304 of 1986 filed by the plaintiff, preliminary decree was passed allotting 1/8th share to the plaintiff in the said suit. Therefore, it is clear that the defendants 1 to 7 and 16 are entitled to 7/8th share.

9. Though the plaintiff filed I.A.No.3140 of 1988 for passing final decree, in which the defendants 1 to 7 and 16 were also made parties, the final decree so passed pursuant to compromise memo filed only by the plaintiff and the first defendant, appears to be incorrect, in that as per the final decree pursuant to such compromise, the house and ground bearing door No.2, Ormes Road, Kilpauk, Chennai set out as item 1 in the schedule I to the plaint is allotted to the first defendant and the house and ground bearing Plot No.15, Mandapam Road, 2nd Street, Kilpauk, Chennai-10, which is described as schedule II in the plaint. Though it is stated in the compromise memo that the premises No.11, Mandapam Road, II Street, Kilpauk, Chennai-10 was given to the defendants 3 to 7 and in fact they also sold the said property to Sivakumar and Karthikeyan as per the sale deed dated 13.12.1995, the said sale deed has not been marked. Even assuming so, the defendants 3 to 7 and 16 ought to have been made as parties by filing necessary petition to record compromise and without doing so, by filing compromise memo as entered into between the plaintiff and the first defendant and on that basis the final decree passed cannot be said to be valid in law. The reasoning of the trial Court that the revision petitioners are allotted 4/8th share in the suit properties as per preliminary decree in respect of which the revision petitioners can file separate application for passing of final decree and as such, the petitions subject matter of the Civil Revision Petitions filed by them have to be dismissed, is incorrect. Therefore, the final decree passed allotting the house and ground bearing door No.2, Ormes Road, Kilpauk, Chennai-10 described as schedule I in the plaint to the first defendant and the house and ground bearing Plot No.15, Mandapam Road, 2nd Street, Kilpauk, Chennai-10, which is described as schedule II in the plaint, to the plaintiff pursuant to the compromise said to have been entered between the plaintiff and the first defendant alone is to be set aside.

10. In the result, all the three Civil Revision Petition Nos.3863 to 3865 of 2001 are allowed setting aside the common order dated 23.2.2001 made in I.A.Nos.5068, 5069 and 6411 of 1998 in I.A.No.3140 of 1988 in O.S.No.2220 of 1981 by the VIII Assistant Judge, City Civil Court, Madras. The trial Court is

directed to restore I.A.No.3140 of 1988 and dispose the same in accordance with law. Consequently, the petition C.M.P.No.21446 of 2003 is closed. No cost.