



S.A.(MD).No.395 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 07.11.2023

CORAM:

THE HONOURABLE MRS.JUSTICE S.SRIMATHY

S.A.(MD).No.395 of 2019
and
CMP(MD).No.7881 of 2019

Haja Mohideen (Died)

2.M.Dawood Fathima

3.H.Shaffrathul Jasmine

4.H.Dhadhabeer Shamusudeen

... Appellants

(A-2 to A-4 are brought on record as LRS of deceased sole petitioner vide Court Order dated 03.08.2020 made in CMP(MD).No.3464 of 2020 in S.A.(MD).No.395 of 2019)

/Vs./

1.Iynul Marjan

2.Mohammed Mariam Bibi

3.Murugesan Ambalam

4.Kamakshi Pillai

5.Murugesan

...Respondents



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PRAYER: Second Appeal filed under Section 100 of the Civil Procedure Code against the Judgment and Decree dated 18.09.2018 passed in the appeal in A.S.No.40 of 2014 on the file of the Principal District Court, Madurai confirming the judgment and final decree dated 27.02.2014 passed in I.A.No.525 of 2006 in O.S.No.135 of 1995 on the file of the Second Additional Subordinate Court, Madurai.

For Appellant : Mr.J.Barathan
For R-1 : No Appearance
For R-2 to R-5 : Given up vide Court Order
dated 29.08.2019

JUDGMENT

The Second Appeal has been filed against the Judgment and Decree dated 18.09.2018 passed in the appeal in A.S.No.40 of 2014 on the file of the Principal District Court, Madurai confirming the judgment and final decree dated 27.02.2014 passed in I.A.No.525 of 2006 in O.S.No.135 of 1995 on the file of the Second Additional Subordinate Court, Madurai.

2. The appellant herein Mr.Haja Mohideen is the 1st defendant in the suit. The first respondent herein Mrs.Iynul Marjan is the plaintiff in the suit. The plaintiff and the first defendant are sister and brother and



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the defendants 2 to 5 are tenants in the properties. The suit is filed for partition claiming $1/3^{\text{rd}}$ share in the properties. Both the plaintiff and the first defendant belonged to Muslim religion. As per Muslim law, the son is entitled to $2/3^{\text{rd}}$ share of the property and the daughter is entitled to $1/3^{\text{rd}}$ share of the property. Hence, it is not in dispute that the plaintiff is entitled to $1/3^{\text{rd}}$ share of the property. The plaintiff and the first defendant are not having any dispute regarding the nature of the property and the entitlement of the share.

3. The only dispute that was raised by the first defendant is that while dividing the properties, the Advocate Commissioner had erred in not taking the value of the property but divided the property in metes and bounds.

4. In the suit, the two schedules of properties were annexed. In the 'A' schedule property, there are eight items and in the 'B' scheduled property, there are two items. The first defendant and his wife are Doctors by profession and they are residing in Coimbatore. Therefore,



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the claim of the first defendant is that Item no.8 of the property in 'A' schedule is in Coimbatore. Therefore, he claims that the said property in the entirety may be allotted to the first defendant.

5. As far as Item Nos.5 and 6 of 'A' schedule is concerned, the first defendant has already sold the property. Likewise, Item No.2 in the 'B' schedule property was also sold by the first defendant. Item No.1 in the 'B' schedule property was sold by both the plaintiff and the first defendant. Therefore, the properties that are available for division is Item Nos.1, 2, 3, 4, 7 and 8 in 'A' schedule property.

6. The prayer of the first defendant is that in the above said items, Item No.8 alone may be allotted to the first defendant. The contention of the first defendant is that the Item Nos.1, 2, 3, 4 and 7 may be allotted to the plaintiff. The first defendant contended that the plaintiff is entitled to 1/3rd share. If all the four items in Item Nos.1, 2, 3 and 4 are taken together, the plaintiff's share of 1/3rd would be satisfied. Therefore, Item no.7 would be in excess. In spite of the same, the Item No.7 also may be



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allotted to the plaintiff, so that Item No.8 shall be allotted exclusively to the first defendant.

7. Further to substantiate the claim the first defendant had circulated a calculation memo which he had circulated before the Trial Court. The same is extracted hereunder:

“8) Total market value of all suit items except suit item B1 comes to --

Suit item A1 market value	Rs.4,37,250/-
Suit item A2 market value	Rs.1,67,750/-
Suit item A3 market value	Rs.89,450/-
Suit item A4 market value	Rs.12,200/-
Suit item A5 market value	Rs.52,500/-
Suit item A6 market value	Rs.67,600/-
Suit item A7 market value	Rs.98,800/-
Suit item A8 market value	Rs.4,34,150/-
Suit item B2 market value	Rs.5,08,400/-
Total	Rs.18,68,100/-



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8. In any partition, if the property can be divided for easy possession and enjoyment, then it has to be divided by taking into account the enjoyment and the possession of the property. It cannot be divided, where the parties cannot enjoy the property.

9. Since the first defendant is the resident of Coimbatore, he would not be in a position to enjoy the property which is situated Idaikattur Village Sivagangai District. Whereas the plaintiff is the resident of Paramakudi and it would take hardly 30 minutes to reach Idaikattur Village and hence there is easy accessibility to the plaintiff. Therefore, taking into account the resident of plaintiff and the first defendant as well as by taking the value of the properties, if the property is divided as stated supra, it will meet the ends of justice.

10. The first defendant had filed I.A.No.525 of 2006 and the plaintiff is the respondent in the said I.A. The plaintiff while deposing before the Court in I.A. has specifically deposed that she is not residing in Pollachi or Coimbatore. Further the plaintiffs had admitted that the



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first defendant (brother of plaintiff) and his wife are Doctors and they are residing in Pollachi and having a Clinic in Pollachi. Moreover, the plaintiff has specifically admitted that she is residing in Sivagangai District and she is having three daughters and none of them are residing in Coimbatore. The relevant portion of the cross examination is extracted hereunder:

“நானோ ஏன் மகள்களோ பொள்ளாச்சியிலோ, அல்லது கோயம்புத்தூர் மாவட்டத்திலோ குடியிருக்கவில்லை என்றால் சரிதான். என்னுடைய சகோதரர் 1ம் பிரதிவாதி ஒரு டாக்டர், அவருடைய மனைவியும் டாக்டர் என்றால் சரிதான். அவர்கள் இருவரும் பொள்ளாச்சியில் குடியிருந்துக்கொண்டு டாக்டர் தொழில்லை செய்து வருகிறார்கள் என்றால் சரிதான்.”

11. The contention of the plaintiff is that the item 8 has more value than the other properties and hence the same ought to be divided. In fact, this contention of the plaintiff was accepted by the Trial Court and the impugned judgment was passed. The Trial Court had held that the Item No.8 is near Highway and has more value and hence the plea of the first defendant cannot be accepted.

12. After hearing the rival submissions and after perusing the



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records this Court is the considered opinion that the plea of the first defendant ought to be accepted for more than one reasons. The first defendant is residing in Coimbatore and the first defendant is allotted any property at Sivagangai, then the purpose of partition would not be solved. Further even as per the plaintiff, she is residing in Paramakudi and all her three daughters are at Paramakudi. In such circumstances, the Coimbatore property cannot be enjoyed by the plaintiff.

13. Further the only contention of the plaintiff is that the first defendant would be getting more if valuation of the property is assessed. However, the first defendant had submitted even as per valuation if the property is divided as proposed supra, then the 1/3rd share of the plaintiff would be satisfied. The total value of all properties except B1, (since B1 was sold by both the plaintiff and the first defendant) is 18,68,100/-.

1/3rd of Rs.18,68,100/-: Rs.6,22,700/-

2/3rd of Rs.18,68,100/-: Rs.12,45,400/-



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14. The market value of items A1, A2, A3, A4 and A7 is Rs. 8,05,450/- (sum of Rs.4,37,250+1,67,750+89,450+12,200+98,9800). The market value of items A5, A6 and B2 (already sold by first defendant) and A8 is Rs.10,62,650/- (sum of Rs.52,500+67,600+5,08,400+4,34,150). Based on this calculation the plaintiff is getting Rs.8,05,450/- value of properties which is more than her 1/3rd share of Rs.6,22,700/-. Likewise, the first defendant is getting Rs.10,62,650/- which is less than the 2/3rd share of Rs.12,45,400/-. Even though the first defendant is getting less share, the first defendant is satisfied if the first defendant is granted exclusively possession of Item No. 8 alone. Therefore, this Court based on the convenient enjoyment of properties and also based on equitable share of properties is of the considered opinion that the first defendant is entitled to exclusively possession of Item A8.

15. Therefore, the judgment and final decree passed in I.A.No.525 of 2006 dated 27.02.2014 is set aside and the judgment decree dated 18.09.2018 passed in A.S.No.40 of 2014 is set aside. Hence, Item Nos. 1,



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2, 3, 4 and 7 of the 'A' schedule properties shall be allotted to the plaintiff. And Item Nos.5, 6 and 8 of the 'A' schedule property and Item No.2 of 'B' Schedule properties shall be allotted to the first defendant.

16. In view of the above, the Second Appeal is allowed in above terms. No costs. Consequently, connected miscellaneous petition is closed.

07.11.2023

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

Nsr

TO:

- 1.The Principal District Court,
Madurai.
- 2.The Second Additional Subordinate Court,
Madurai.
- 3.The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SRIMATHY, J.

Nsr

Judgment made in
S.A.(MD).No.395 of 2019

Dated:
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