

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11.07.2016

CORAM

THE HONOURABLE MR. JUSTICE K.RAVICHANDRABAABU

Second Appeal No.639 of 2015

and

MP No.1 of 2015

N.Velusami

... Appellant/1st Defendant

Vs.

1.Dhanalakshmi

2.Padmanaban

... Respondents/Plaintiff/ 2nd respondent

Prayer:- This second appeal has been filed under Section 100 C.P.C., against the Judgment and Decree of the learned II Additional District Judge, Erode dated 11.03.2015 made in A.S.No.69 of 2014 thereby confirming the order and final decree dated 03.04.2014 made in I.A.No.688 of 2012 in O.S.No.308 of 2004 on the file of the learned Principal Subordinate Judge, Erode.

For Appellant : Mr.D.Gopal

For Respondents : Mr.M.Guruprasad for R1

No Appearance for R2

J U D G M E N T

The first defendant is the appellant. The first respondent herein as the plaintiff filed the suit for partition by claiming that the plaintiff and the first defendant purchased the property jointly on 04.05.1990 under a registered sale deed; that they are in joint possession and enjoyment of the suit property; that she wanted to develop the suit property and thus, requested the defendant for partition of her half share which was postponed by the first defendant. The first defendant contended that the plaintiff and the first defendant jointly purchased the suit property as a vacant site and both of them decided to sell the same to third parties and accordingly, an agreement was entered with one M.Padmanaban, who was later arrayed as the second defendant.

2.The trial court passed a preliminary decree on 09.07.2012, after hearing both parties. The said judgment and decree of the trial court was not challenged by the defendant. Consequent upon such preliminary decree, final decree application was filed by the plaintiff in I.A.No.688 of 2012 and after hearing both parties, the

final decree was passed on 03.04.2014. Challenging the final decree passed in the above final proceedings, the defendant filed an appeal before the First Appellate Court in A.S.No.69 of 2014. The First Appellate Court, after considering the rival contentions of the parties, dismissed the appeal by holding that the plaintiff has proved her case for final decree in terms of the preliminary decree and that the defendant has failed to prove his contention.

3.The present appeal is filed against the concurrent findings rendered by the courts below in the final decree proceedings.

4.This matter is listed before me after ordering notice to the respondents before admission. Thus, this court has to see as to whether any substantial question of law arises for consideration to entertain this appeal for further hearing on such question of law.

5.Learned counsel appearing for the appellant submitted that only dispute between the parties is in respect of a 30 feet road shown by the Town Sub Inspector of Survey in between the properties divided and allotted to the plaintiff and the defendant as A, A1 and B, B1 respectively. According to the learned counsel, leaving the 30 feet road in between these two properties is not necessary, since no 40 feet road is existing on the southern side of the property as shown in the said plan submitted before the court below by the Town Sub Inspector of Survey. The crux of the contention of the learned counsel is that when there is no road having 40 feet width in existence the Surveyor has wrongly prepared the plan. I do not think that the said contention of the learned counsel for the appellant can be entertained by this court, when undoubtedly such issue is a factual aspects of the matter which both the courts below have concurrently gone into and passed the final decree based on the Advocate Commissioner's report as well the plan prepared by the said Government Official. Such factual aspects of the matter having been gone into by both the courts do not show the existence of any substantial question of law to entertain the second appeal. A perusal of the plan submitted before the court certainly indicates that the same was prepared by taking into consideration of the interest of both parties by leaving 30 feet road for them to have free access to their respective properties given in share under the final decree. When such course of action has been taken, I find that the present contention raised by the defendant is nothing but an attempt to prolong the proceedings one way or other.

6.Learned counsel appearing for the respondent/plaintiff submitted that in pursuant to the final decree passed on 03.04.2014, E.P. was filed and delivery was ordered on 18.04.2015 and consequently the property was also delivered to the plaintiff on 29.04.2015. Thus he submitted that when only delivery has to be recorded in the execution proceedings, filing of the present second appeal at that stage that too, after delivery of the property to the plaintiff, is nothing but an harassment to the plaintiff. I find substantial force in the above contentions made by the learned

counsel for the respondent/plaintiff. When it is stated that E.P. proceedings have already been commenced and ended in delivering the property also to the plaintiff, and that only recording of such delivery has to take place, I do not think that this second appeal can be entertained in the absence of any substantial question of law. Accordingly, the second appeal fails and the same is dismissed. No costs. The connected miscellaneous petition is also dismissed.

Sd/-
Asst.Registrar

/true copy/

Sub Asst. Registrar

To

1.The II Additional District Court,
Erode.

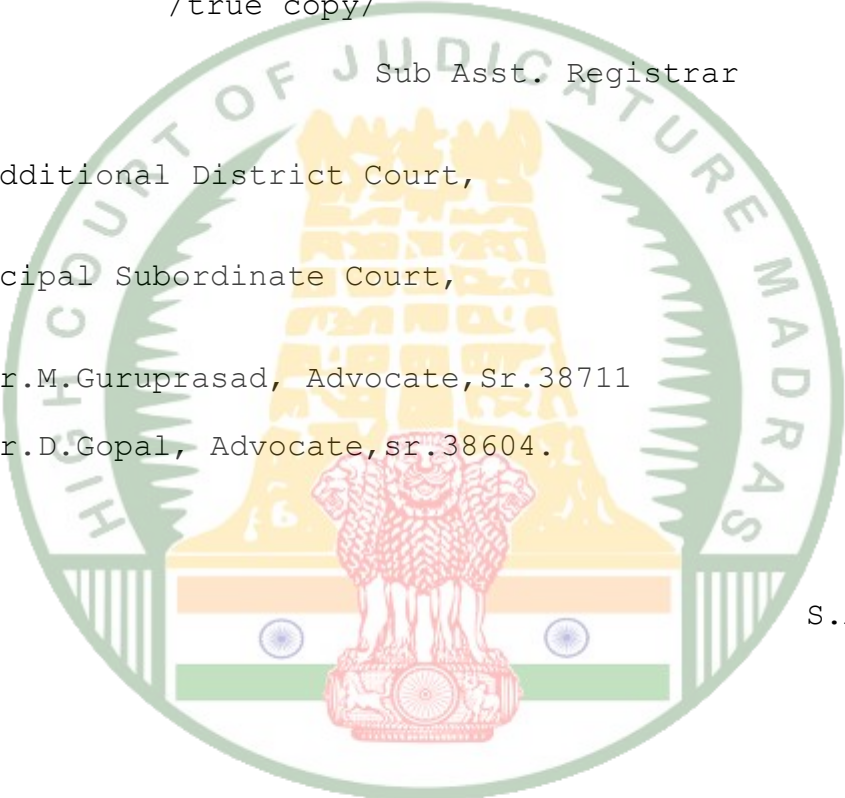
2.The Principal Subordinate Court,
Erode.

+1 cc to Mr.M.Guruprasad, Advocate,Sr.38711

+1 cc to Mr.D.Gopal, Advocate,sr.38604.

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krd 8/8

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