

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 27.06.2017

CORAM

THE HONOURABLE MR.JUSTICE M.SATHYANARAYANAN

SA.No.228 of 2017

A.D.Mohanraj

... Appellant/Appellant/1st
Defendant

Versus

1. A.D.Surendar

.... 1st Respondent/1st Respondent/
Plaintiff

2. Mrs.Prameela

.... 2nd Respondent/2nd Respondent/
2nd Defendant

Second Appeal filed under Section 100 of the Code of Civil Procedure against the judgment and decree passed in AS.No.178 of 2010, on the file of the II Additional Judge, City Civil Court at Chennai, dated 22.12.2015, in confirming the Judgment and decree in I.A.No.22747/2007 in OS.No.4153/1997 on the file of the XI Assistant Judge, City Civil Court, Chennai dated 29.01.2008.

For Appellant : Mr.M.Murali

For Respondents : Mr.M.Muruganantham for
M/s.V.Ragavachari for R2

JUDGMENT

By consent, the Second Appeal is taken up for final disposal, as the point / Substantial Questions of law in issue lies within a very narrow campus.

2. The 1st defendant, challenging the judgment and final decree passed in I.A.No.22747 of 2004 in O.S.No.4153 of 1997 by the XI Assistant Judge, City Civil Court at Chennai, had filed an appeal in A.S.No.178 of 2010 on the file of the learned II Additional Judge, City Civil Court at Chennai and vide Judgment and decree dated 22.12.2015, the said appeal was also dismissed and challenging the legality of the same, came forward to file this Second Appeal.

3. A perusal of the materials placed before this Court would indicate that the 1st respondent / plaintiff in this second appeal has filed O.S.No.4153 of 1997 against the appellant herein as well as the 2nd respondent on the file of the Court of XI Assistant, City Civil Court, Chennai praying for partition and separate possession of 1/3rd share both in "A" and "B" schedule properties and also for mesne profit. The suit after contest, has ended in preliminary decree which came to be passed on 02.07.2004 and thereafter, the plaintiff / 1st respondent herein filed an I.A.No.22747 of 2007 to pass a final decree in terms of the preliminary decree.

4. The 1st respondent / Plaintiff / decree holder also filed I.A.No.22748 of 2004, praying for appointment of an Advocate Commissioner to divide the properties by metes and bounds in terms of the preliminary decree and an Advocate Commissioner was also appointed. The Advocate Commissioner vide his report dated 25.08.2005 has indicated the properties and in so far as the 3rd item of the scheduled property is concerned, he noted that the 1st respondent/ plaintiff is in possession of the suit property and the same is in good condition and rest of the portion is in a dilapidated condition and so also the 3rd item is covered with Madras titles and it also in a bad condition and forwarded a report stating that the suit properties are not capable of division of 1/3 share by metes and bounds among the parties.

5. Subsequently, the 1st respondent / plaintiff once again filed I.A.No.1220/2006 praying for appointment of another Advocate Commissioner to divide the properties by metes and bounds in terms of the preliminary decree and the 2nd Advocate Commissioner, after putting the parties on notice, inspected the suit properties and submitted his report dated 24.04.2007. Insofar as the 3rd item of the property which is the subject matter of dispute, the 2nd Advocate Commissioner has noted that the superstructure admeasures to an extent of 725.81 Sq.ft and suggested the division of properties in respect of the 3rd item by means of the income derived from the said property and insofar as the alienation of the property is concerned, since the said item of the property is in dilapidated condition, it should be treated as vacant site/land and suggested that it should be allotted to the 2nd respondent/2nd defendant herein.

6. The Trial Court, after taking note of the mode of division suggested by the 2nd Advocate Commissioner, passed the final decree on 29.01.2008 in I.A.No.22747 of 2007. The appellant / 1st defendant aggrieved by the same, filed an appeal in A.S.No.178 of 2010 before the Court of II Additional City Civil Judge at Chennai.

7. The Lower Appellate Court has noted that in the final decree application, the appellant / 1st defendant has initially appeared through his counsel and filed counter also and subsequently engaged another counsel and when the matter was posted for arguments, neither the appellant / 1st defendant nor his counsel did appear before the Court to advance their arguments, despite being given sufficient opportunities and taking into consideration the submission made by the 2nd respondent / 2nd defendant, the Lower Appellate Court has passed a final decree.

8. The Lower Appellate Court has also noted that the 2nd Advocate Commissioner's report is marked as Ex.C1 and the commissioner's plan consisting of four plans were marked as Ex.C2, and observed that the arguments advanced on behalf of the appellant/1st defendant that the commissioner's report was not furnished, will not hold good and also recorded that sufficient opportunities have been given to appellant / 1st defendant before passing a final decree by the Trial Court.

9. The Lower Appellate Court, on going through Ex.C1 and Ex.C2/Reports filed by the Advocate Commissioner, has held in paragraph 23 of the impugned judgment that "even though sufficient opportunities were given to the appellant /1st respondent/ 1st defendant, the 1st defendant has not contest the final decree proceedings and not even filed any objection to the Commissioner's report. Hence the division of the properties is also of equal value and divided the property between the sharers." Ultimately the Lower Appellate Court held that the reasons assigned by the lower Court in granting final decree in terms of the Commissioner's report, is correct and accordingly, confirmed the Judgment and decree passed by the Trial Court and challenging the legality of the same, the appellant / 1st defendant has come forward to filed this Second Appeal.

10. In the Memorandum Grounds of Second Appeal, the following Substantial Questions of law are raised:-

- Whether the suit properties which are divided in equal with each other or not?
- Whether decree and judgment passed by the first appellate Court without appreciating the oral and documentary evidence produced before it is correct or not?

11. The learned counsel appearing for the appellant / 1st defendant would contend that admittedly, the 3rd item of the property is in possession and enjoyment of the appellant / 1st defendant and without correctly noting down the extent and value of the property, the Lower Appellate Court merely reached the

conclusion that the reasons assigned by the Trial Court is correct and since, it is inequitable distribution and also not in consonance with the preliminary decree, prays for interference.

12. Per contra, the learned counsel appearing for 2nd respondent has invited the attention of this Court to the Judgment rendered by Gauhati High Court reported in AIR 2004 Gau 27 [Tapan Kumar Bhattacharjee Vs. Ratan Kr. Bhattacharjee and Others] and would submit that in similar facts and circumstances the High Court of Gauhati has observed that based on the Commissioner's report, it is not open to the party to question the correctness or otherwise of the said report and also placed reliance upon the judgment rendered by the Hon'ble Supreme Court of India reported in Mool Chand and others vs. Deputy Director, Consolidation and others reported in AIR 1995 SSC 2493 equivalent (1995) 5 SCC 631 and prays for dismissal of the second appeal.

13. This Court has carefully considered the rival submissions and also perused the materials placed before it.

14. The 1st respondent / decree holder filed an application in I.A.22247 of 2004 for passing a final decree in terms of the preliminary decree. It is not in dispute that the preliminary decree has not been put to challenge and therefore, it has become final. The Advocate Commissioner was appointed at the instance of the 1st respondent / decree holder to divide the properties by metes and bounds in terms of the preliminary decree and the 1st Advocate Commissioner, in his report dated 25.08.2005, opined that the suit properties are incapable of division by 1/3 share by metes and bounds among the parties of the suit. Subsequently, the 1st respondent / decree holder took out another application seeking for appointment of another Advocate Commissioner and the said application after contest, has been ordered for appointment of 2nd Advocate commissioner by the appellant / 1st defendant. The 2nd Advocate Commissioner after putting the parties on notice, had inspected the suit properties and suggested the mode of division, in and by which he opined that the 3rd item of the suit property is in dilapidated condition and therefore, the superstructure situated therein, cannot be taken into consideration and it should be treated as vacant land and it should be allotted to the 2nd respondent herein.

15. The Appellant / 1st defendant who was arrayed as the party did not file any objection to the 2nd Advocate Commissioner's report dated 24.04.2007.

16. The Lower Appellate Court in terms of the

Commissioner's report has passed the final decree dated 29.01.2008 in I.A.No.22747 of 2007 and aggrieved by the same, the appellant / 1st defendant made a challenge to the final decree by filing an appeal in A.S.No.178 of 2010 on the file of the II Additional Judge, City Civil Court at Chennai. The Lower Appellate Court, has noted that despite sufficient opportunities given to the appellant / 1st defendant, he did not contest the final decree proceedings and not even filed any objection to the Commissioner's report and accordingly, confirmed the order of the Lower Court vide impugned order dated 22.12.2015.

17. Similar issue arose for consideration before the Single Bench of Gauhati High Court in [AIR 2004 Gau 27(cited supra)] and it is relevant to extract the following paragraphs of the said judgment :-

".....In phoolchand v Gopal Lal, reported in MANU/SC/0284/1967 the Hon'ble Apex Court while dealing with a case somewhat similar to the instant case somewhat similar to the instant case has observed as 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 dispute in that behalf, the order of the Court deciding that dispute and making variation in shares specified in the preliminary decree already passed in 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.

From the aforesaid observations of the Hon'ble Apex Court, there can be no doubt that nothing in the Code of Civil procedure prohibits the passing of more than one preliminary decree if circumstances justify the same and that it may be necessary to do so particularly in partition suits when after the preliminary decree some parties die or the nature of possession changes on among the parties thereby augmenting or discreasing (sic) the respective shares of the parties. In any case, it would be convenient to the Court and advantageous to the parties, in partition suit, to have disputed rights finally settled or specification of shares in the preliminary decree varied before the final decree is

prepared. However, the Hon'ble Apex Court unambiguously also points out that such second preliminary decree or disputed shares arising after the preliminary decree must be adjudicated upon the Trial Court before the final decree is prepared. In other words, once a final decree is passed, the dispute concerning variation in shares, on the basis of the report of the survey Commissioner, cannot be raised in appeal against the final decree.

- In the instant case, it is found from the materials on record that the report of the Survey Commissioner was made on 05.11.2002. The order dated 25.01.2003 reveals that no attempts was made by the appellant to file written objection against the report of the Survey Commissioner. From the written objection of the respondent No.1, it is evident that the Survey Commissioner submitted his report on 05.11.2002 and the learned Civil Judge adjourned the case from time to time i.e on 04.12.2002, 10.01.2002 and 25.01.2003 for enabling the appellant to file written objection against the report of the Survey Commissioner, but the appellant did not avail of this opportunity. This assertion of facts made by the respondent No.1 has not been controverted by the appellant. If the appellant had raised objection against or disputed the correctness of the report of the Survey Commissioner, the learned Civil Judge would have been duty bound to decide the said objection or dispute raised by the appellant and such a decision made by the learned Civil Judge, if prejudicial to him, would have been appealable in terms of law laid down by the Hon'ble Apex Court in Phoolchand Case (Supra). In the instant case, when the appellant consistently failed to make objection against the report of the Survey Commissioner, the learned Civil Judge after considering the report of the Survey Commissioner in view of law laid down by the Hon'ble Apex Court in Phoolchand case (Supra). Accordingly, I hold that the instant appeal is barred by Section 97 of CPC.

Ultimately, the Gauhati High Court held that the Second appeal is not maintainable and dismissed the Second Appeal.

18. In the considered opinion of the Court, the ratio laid down in the above cited decision is squarely applicable to the case on hand for the reason that the appellant / 1st defendant failed to file his objection to the 2nd Advocate Commissioner's report dated 24.04.2007 and in the said report, so far as the 3rd item of the suit property is concerned, he opined that it is in dilapidated condition and should be treated as vacant land and therefore, it is suggested to be allotted to the 2nd respondent herein. In the absence of any objection to the report and plan of the Advocate Commissioner in and by which a suggestion has been made for the 3rd item of the property is to be allotted to the 2nd respondent, the appellant / 1st defendant cannot raise any objection, in this second appeal. In fact, the Lower Appellate Court has elaborately dealt with the aspect and found that despite very many opportunities given, the appellant / 1st defendant has failed to file any objection to the Commissioner's report and even at the time of arguments in the final decree application neither the appellant / 1st defendant nor his counsel did participated in this proceedings.

19. This Court, on an independent application of mind to the entire materials, placed before it is of the considered view that the findings rendered by the Trial Court as well as the Lower Appellate Court in allotting the 3rd item of the property in favour of the 2nd respondent cannot be faulted with and finds no merits in this Second Appeal. There are no questions of law, leave alone the substantial questions of law arise for consideration in this Second Appeal.

20. In the result, the Second Appeal is dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

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To

1.The Judge,
XI Assistant City Civil Court,
Chennai.

2.The Judge,
II Additional City Civil Court,

Chennai.

Copy To

The Section Officer
VR Section,
High Court, Madras.

+lcc to Mr.V.Ragavachari, Advocate, S.R.No.44581
+lcc to Mr.P.Sivamani, Advocate, S.R.No.44836

S.A.No.228 of 2017

RSK(CO)
CA(03/08/2017)



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