

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.03.2017

CORAM

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

A.S.No.18 of 2011

Nadarajan

.. Appellant

Versus

1. Vedachalam
2.Pandurangam
3. Sundaram
4. Saroja @ Sundari
5. Krishnamoorthy
6. Radhakrishnan

.. Respondents

Appeal Suit filed under Section 96 of Civil Procedure Code and Order 41 Rule 1 and 2 of Civil Procedure Code against the order passed by the Principal Sub Judge at Pondicherry in I.A.No.4579 of 1988 in O.S.No.423 of 1982.

For Appellant

: Mr.R.Muralidharan

For Respondents

: Mr.T.Sathiyamoorthi
for RR1 and 2

JUDGMENT

Heard, the learned counsel for the appellant as well as the learned counsel for the respondents 1 and 2.

2. This appeal is filed against the order passed by the learned Principal Sub Judge at Pondicherry in I.A.No.4579 of 1988 in

O.S.No.423 of 1982 and by the report of the Advocate Commissioner was accepted and final decree was passed.

3. It is the contention of the learned counsel for the appellant that the trial court has not considered the report of the Advocate Commissioner wherein it is specifically stated that the appellant cannot conveniently enjoy the 1/5th share allotted to him. Further, the trial court erred in not considering the mode of division suggested by the advocate commissioner while passing the final decree. When a Commissioner was appointed who has also submitted his report leaving it to the discretion of the Court to allot shares, the learned trial Judge, without taking into consideration such report, has passed a cryptic order. The learned trial Judge has not considered the nature of enjoyment and equity and allotted share which cannot be enjoyed by the appellant. Therefore, the learned counsel for the appellant prayed for setting aside the order passed by the trial Court and to remand the matter to the trial court for fresh consideration of the petition.

4. Heard the learned counsel for the respondent. He has also admitted that trial judge has passed cryptic order without considering the objections and Commissioner's report.

5. Now the point arise for consideration is whether the learned Trial Judge is right in passing the final decree without proper appreciation of documents and law.

6. Aggrieved over the order passed by the learned Principal Sub Judge, Pondicherry in passing final decree, the present appeal came to be filed. Originally the suit was filed for partition in which a preliminary decree was passed dividing the suit property, which is a house bearing No.35, Thambu Naicker Street, Pondicherry into five equal shares and allotting $\frac{4}{5}$ shares in favour of the plaintiffs/respondents 1 and 2 herein. Subsequently, the final decree application was taken by the plaintiff in I.A.No.4579 of 1988 in O.S.No. 423 of 1982 in the above final decree application a Commissioner was appointed to divide the suit properties by metes and bounds and to file a report. The Commissioner after visiting the suit property and taking into consideration of the ground reality, filed his report along with a sketch containing A & B Schedule. In the sketch the commissioner has also identified $\frac{1}{5}$ th share of the appellant. He has also taken note of the guideline value of the property, calculated the square feet and filed a report. The Commissioner report also shows that the allotment suggested by him in favour of the plaintiffs/respondents 1 and 2 herein can be enjoyed

without any difficulty. However, the Commissioner has clearly mentioned that the 1/5th share suggested to be allotted to the appellant herein could not be conveniently enjoyed by him. As against the Commissioner report, the appellant has also filed his objections as could be seen from the records. However, without considering the objections and without assessing the mode of division suggested by the Commissioner, the learned trial Judge passed the following order :-

".....Today the petition came up for hearing. Orders pronounced. Final Decree is passed in accordance with the preliminary decree. The report of the Commissioner and the sketch shall form part of the decree . No costs."

7. The above order is challenged in this appeal. A perusal of the Order passed by the learned Principal Sub Judge makes it clear that the learned Principal Sub Judge, Pondicherry has not taken into consideration the indivisible character of the property. It is a house property. He has also not considered the objections of the appellant. In fact, the Commissioner has also suggested the mode of allotment in his report and also the sketch preferred by him stating that there will be difficulty in the appellant enjoying his 1/5th share. All these factors has not been taken into consideration by the learned Principal Sub Judge, Pondicherry. When the property itself is a house property which is indivisible in character, the learned Principal

Sub Judge ought not to have passed cryptic order without application of law. The learned Principal Sub Judge passed a cryptic order while passing the final decree. Therefore the order passed by the trial court is set aside, the matter is remanded back to the learned Principal Sub Judge, Pondicherry to pass final decree after taking into consideration the objections raised by the appellant and to determine the rights of the parties for allotment of the shares in accordance with law.

8. Accordingly, the Appeal Suit is allowed by setting aside the order passed by the Court below. No costs. Consequently, connected miscellaneous petitions, if any is closed.

9. The matter is remanded back to the learned Principal Sub Judge Court, Pondicherry for deciding the I.A. No.4579 of 1988 afresh. The learned Principal Sub Judge shall pass order within four months from the date of receipt of the copy of this order. The parties are directed to appear before the learned Principal Sub Judge Court, Pondicherry on 27.03.2017.

07.03.2017

vsi2

Note to office

The Registry is directed to send the Order copy immediately to the

Court below.

N. SATHISH KUMAR, J

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To

The Subordinate Judge
Pondicherry.

A.S.No.18 of 2011

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