

RESERVED ON : 12.04.2017
DELIVERED ON : 20 ..4..2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

CORAM

THE HONOURABLE MR. JUSTICE N. SATHISH KUMAR

A.S.No.572 of 2014

1.S.Ponnammal
2. K.Malliga
3. P.Dhanam
4. G.Kavitha

..Appellants/respondents/ defendants

Vs.

1.S.suganthi
2.Minor S.Geerthana
3.Minor S.Gunalakshmi
(Minors rep. by their Mother/R1)

..Respondents/petitioners/plaintiffs

Prayer:- This Appeal suit has been filed under Section 96 of CPC read with Order 41 Rule 1 of CPC, 1908 against the final decree in I.A.No.1088 of 2006 in O.S.No. 589 of 2004 on the file of the Additional District Judge, Kanchipuram dated 25.3.2013.

For Appellant : Ms.R.Sripriya
For R1 to R3 : Mr.Liagat Ali

J U D G M E N T

Aggrieved over the final decree dated 25.3.2013 made in I.A.No.1088 of 2006 in O.S.No. 589 of 2004, the present appeal came be filed by the respondents/defendants.

2. For the sake of convenience, the parties are referred to, as per their ranking before the trial Court.

3. Brief facts of the instant appeal are as follows:-

In a suit filed for partition in O.S.No. 589 of 2004, a preliminary decree was passed on 30.8.2006 for partition of the suit "A" and "B" schedule properties and for allotment of 1/5th share in the "A" schedule properties and 27/40 share in the "B" schedule property to the petitioners/plaintiffs. Pursuant to the aforesaid preliminary decree passed, an application, being I.A.No.1088 of 20016, has been taken out for passing of the final decree. The learned Additional District Judge, Kancheepuram at Chengalpet, had passed the final decree. As against which, the present appeal came to be filed.

4. The learned counsel for the appellants/respondents would vehemently contend that while passing final decree, the Trial court has not taken into consideration the objections filed by

the respondents/defendants with regard to the allotment of shares. It is the contention of the learned counsel that no opportunity was granted by the Trial Court to the appellants/respondents to establish their. It is submitted that the Trial court has simply followed the Commissioner's report and passed the final decree and it has failed to apply equity while allotting the shares. It is the contention of the learned counsel that the shares allotted to the parties are unequal. Hence, it is submitted that the final decree passed by the Trial court is not in accordance with law. Therefore, the learned counsel prayed for allowing the appeal. In support of his contention, the learned counsel has placed reliance on the judgment reported in 1996-2-L.W.112 (Tmt.Sathirathayammal v. I.Duraishamy Chettiar).

5. Whereas, it is the contention of the learned counsel for the respondents i.e petitioners/plaintiffs before the trial Court, that the petitioners/plaintiffs, who are the widow and minor children, have filed a suit for partition against the respondents/defendants in the year 2004, in which the property has been properly allotted to the parties. It is submitted that only in order to defeat the rights of the petitioners/plaintiffs, the present appeal has been filed. In fact, there was no serious objection, whatsoever, filed by the respondents/defendants to the commissioner's report. Hence, it is submitted that the allotment made by the Trial Court does not require any interference. Therefore, the learned counsel prayed for dismissal of the appeal.

6. In the light of the above submissions, the points that arise for consideration in this appeal are as follows:

(1) Whether the allotment made by the Trial Court to the respondents/defendants is not in accordance with law? and

(2) To what relief the respondents/defendants are entitled to?
Point Nos. 1 and 2:

7. It is not in dispute that originally, preliminary decree was passed on 30.8.2006 partitioning "A" and "B" schedule properties, in which petitioners/plaintiffs were allotted 1/5th share in respect of "A" schedule properties and 27/40 share in respect of "B" schedule properties. However, as against the said preliminary decree, an appeal was filed in A.S.No. 63 of 2007 on the file of this Court. This Court, while modifying the allotment of share in respect of "B" schedule properties, has held that the petitioners/plaintiffs are entitled to 18/40 share in the "B" schedule properties. Before the aforesaid modification order passed by this Court in A.S.No.63 of 2007, a final decree application, being I.A.No.1088 of 2006, was taken out, wherein, the Trial court appointed an Advocate Commissioner, who, in turn, had visited "A" and "B" schedule properties, pursuant to the warrant issued to him, and also measured the properties in the presence of both parties and their respective counsels. Thereafter, the Commissioner had

filed a report in Ex.C1 suggesting mode of allotment to the petitioners/plaintiffs, i.e. respondents herein with regard to an extent of 500 sq.ft. The Commissioner, taking note of the fact that newly constructed building is available in other area of the property, which stands in the name of the 1st respondent's/1st defendant's husband, had suggested that the respondents/defendants may be directed to pay amount in rupees equivalent to 1/5th share in the value of new superstructure to the petitioners/plaintiffs. Similarly, in respect of "B" schedule property, the Commissioner has again visited the suit properties and also measured the suit properties with the help of Taluk surveyor and filed a report suggesting mode of allotment. Based on the suggestion given by the Commissioner in his report, the Trial court, had passed the final decree.

8. This Court carefully perused the Commissioner's report along with plan appended with regard to "A" schedule property.

In the light of the arguments of the learned counsel for the appellants/respondents and the documents available before this Court, it is seen that the Commissioner, while noting down that "A" schedule property comprised of 2500 sq.ft in entirety, had earmarked 500 sq.ft. to the petitioners/ plaintiffs herein. The entire sketch and report would clearly show that the Commissioner has earmarked the portion allotted to the petitioners/plaintiffs as "B, Q, R, S, B" and coloured in blue. Besides, since a newly constructed house is available in other area, the Commissioner, taking into consideration the fact that access to the properties is very much available from the northern side, has earmarked 500 sq.ft. in the eastern side of the property.

9. On a careful perusal of the above sketch, this Court finds that except a damaged and unused hut, there will not be any difficulty for the parties in enjoying their respective shares and building constructed by the respondents/defendants was, in fact, allotted to them. Though the Commissioner has suggested that the respondents/defendants may be directed to pay the amount in rupees equivalent to the 1/5th share, the trial Court has not fixed the value of the building that was allotted to the respondents/defendants.

10. It is to be noted that in the final decree application, i.e., in I.A.No.1088 of 2006, the 1st respondent /1st defendant had filed a counter, which clearly shows that in "A" schedule property, only one terraced house available and there is no rental income from the said property and that, since the other property is only an old hut, the same could not be rented out. The Commissioner's report would also clearly show that "A" schedule property marked as "P O M N" is only a hut. The above property alone to be demolished for convenient enjoyment of the respondents/defendants. As such, the extent of 500 sq.ft, as suggested by the Commissioner, has been allotted to the petitioners/ plaintiffs. Therefore, this Court is of the view that the same would meet the ends of justice since both sides

have proper access from the northern side road and the respondent's/defendant's share will be separated from 500 sq.ft.

Mere inconvenience of other co-owners will not take away the right of the respondents/defendants to have a final decree in respect of their share as determined in the preliminary decree.

11. On a careful perusal of the entire plan of "A" schedule property, this Court does not find any irregularity in the mode adopted by the Trial Court. In fact, it is more convenient to the parties for enjoyment. Besides demolishing the unused hut in the "A" schedule property, the value of the property will have to be diminished for the convenience of the parties. Therefore, it is clear that as per such allotment, both the parties will have access from the northern side, i.e., 30 ft road. Hence, this Court is of the view that the allotment suggested by the Commissioner cannot be found fault with. The trial Court, after taking into consideration all the equities and other things, had rightly decreed the suit. The fact remains that except making formal objections, the respondents/defendants have not made any serious objections with regard to the Commissioner's report. The objections filed at first instance by the respondents/defendants to the Commissioner's report in I.A.No.1088 of 2006 reads as follows:

1. The learned Commissioner has allotted excess extent to the petitioners than what they entitled to as per Preliminary decree?
2. The Learned Commissioner allotted valuable place to the petitioners?
3. The Learned Commissioner has not at all considered the memo of objections given on behalf of respondent?
4. The measurement given by the Learned Commissioner is also correct?
5. The Learned Commissioner has not considered the oral representations made by the Respondents during execution.

12. The objections filed at second instance by the respondents/defendants to the Commissioner's report reads as follows:

1. The Learned Commissioner did not measure the property correctly.
2. The Learned Commissioner failed to note that the property available on earth is less than mentioned in suit.
3. The Learned Commissioner failed to note that the extent allotted to the Petitioners cannot be enjoyed separately
4. The Learned Commissioner ought to have mentioned the property cannot be divided and if divided not beneficial to the Petitioners/Plaintiffs.
5. The Learned Commissioner's report and sketch are not correct?

13. The above objections filed by the respondents / defendants to the commissioner's report on two occasions are only formal. No material circumstance, whatsoever, was pleaded with regard to the mode of allotment suggested by the Commissioner. On a perusal of the plan submitted by the Commissioner in respect of "A" schedule property, this Court does not find any infirmity in allotting the share by the Trial

court, except a direction to the respondents/defendants to pay 1/5th value of the building to the petitioners/ plaintiffs. As per the report, the above building is newly constructed one, which also stands in the name of the 1st respondent's /1st defendant's husband. It is not the case of the petitioners/plaintiffs that they constructed the above building. Having allowed the other co-owners to make improvements in one of the properties, the petitioners/plaintiffs now cannot claim any share in the improvements made by others. Even otherwise, the Trial court has not fixed the value of the building. Therefore, without fixing the value of the building, direction to pay 1/5th share of the building to the petitioners/ plaintiffs is not sustainable in law.

14. In any event, as already stated above, mere inconvenience to some of the co-owners cannot take away the right of the respondents/defendants in getting their share as per the preliminary decree. It is needless to say that inconvenience bound to occur while dividing the properties. Therefore, this Court is of the view that in the absence of any evidence in fixing the value of the building, a direction to pay 1/5th share to the petitioners/plaintiffs is not in accordance with law.

15. Further, though the parties have not adduced any evidence, the report filed by the Commissioner itself clearly shows that the building in question is newly constructed, which also stands in the name of the 1st defendant, and that the defendants are in occupation. In fact, the petitioners/plaintiffs have not made any contribution towards construction. Therefore, this Court is of the view that petitioners/plaintiffs cannot claim any share in the improvements made by the respondents/defendants. More so, the Trial court has not fixed the value of the building. As already pointed out, while effecting division of the properties, inconvenience bound to occur to any one of the parties. In view of the same, the judgment of the Trial court with regard to the allotment made in respect of "A" schedule property to an extent of 500 sq.ft in favour of respondents/ defendants is hereby confirmed.

16. Similarly, with regard to "B" schedule property, the Commissioner, taking into consideration the fact that both parties have proper access from the road, had suggested the aforesaid mode of allotment. On a perusal of the entire plan, it is seen that mode of suggestion by the Commissioner cannot be found fault with. As stated above, it is not the case of the petitioners/plaintiffs that the superstructure has been put up by them. Similarly, no objection has been made in the counter filed by the respondents/defendants with regard to the allotment of share. Since the objection, as extracted above, itself is very formal in nature and no circumstance, whatsoever, was pleaded, the same has no relevance at all. At the risk of repetition, it is pointed out that in a partition suit, some inconvenience bound to occur to any one of the parties.

Therefore, this Court does not find any infirmity in the allotment made by the Trial court.

17. Insofar as the judgment relied on by the learned counsel for the appellants/respondents is concerned, in the said judgment, this Court, taking into consideration the improvement made by the subsequent purchaser with the knowledge of the other co-sharers and who has been inducted into possession, while setting aside the final decree, remanded the matter for fresh consideration and for allotment of the properties on equity. Therefore, the said judgment is not applicable to the facts of the present case.

In the result, the final decree passed by the Trial Court allotting shares to the petitioners/plaintiffs, pursuant to the preliminary decree is hereby confirmed. However, the order of the Trial court directing the respondents/defendants to pay 1/5th value of the building in respect of "A" schedule property is hereby set aside. The appeal is disposed of accordingly. However, there shall be no order as to costs.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

ga

To

1. The Additional District Judge,
Kanchipuram.

2. The Section Officer, सतयमेव जयते
VR Section High Court, Madras.

+ 1 cc to Mr.M. Liagat Ali, Advocate SR.22205

+ 1 cc to Mr.V. Raghavachari, Advocate SR.23784

A.S.No.572 of 2014

VSN(CO)

Eu 4.5.17