

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :: 14-11-2017

CORAM

THE HONOURABLE MR.JUSTICE M.GOVINDARAJ

SECOND APPEAL No.61 OF 2008

Mani

...Appellant/Defendant

-vs-

Minor Deepan @ Damodharahn
rep.by mother and natural guardian
Selvi

...Respondent/Plaintiff

Appeal against the judgment and decree, dated 30.11.2006, passed in A.S.No.117 of 2005 on the file of Subordinate Court, Bhavani, as against the order, dated 30.07.2004, passed in I.A.No.39 of 2004 in O.S.No.238 of 2004, on the file of First Additional District Munsif, Bhavani.

For appellant : Mrs.J.Prithivi
For respondent : Mrs.P.Saritha
for Mr.V.Rajesh

JUDGMENT

Defendant is the appellant in this appeal. This appeal arises out of the final decree proceedings for dividing the properties by metes and bounds. While passing the final decree, the Court below amended the preliminary decree without any notice to the appellant.

2. Original Suit for partition was filed on behalf of the minor plaintiff, who is none other than the son of the defendant. Suit schedule properties are the landed properties. In item No.3, the appellant/defendant made some development by digging a borewell and fixing an underground pipeline in order to augment irrigation for the lands. It was the contention of the appellant/defendant that partition can be done after the minor attains majority, as the benefits of development would reach the minor plaintiff in full. However, the issue of development and the incurring of expenditure by securing loan were all pleaded in the written statement filed by the appellant/defendant. After considering all the issues, the trial Court decreed the suit for partition. Thereafter, against the preliminary decree, the appellant/defendant filed an appeal. The lower appellate Court has modified the decree of the trial Court

and awarded a sum of Rs.50,000/- towards expenditure incurred for the development made by the appellant/defendant. However, on second appeal, the order passed by the lower appellate Court was reversed and the decree of the trial Court confirmed. Thereafter, the respondent/plaintiff filed an application for appointment of a Commissioner for passing final decree. During the inspection, the Commissioner has found that there is a borewell and an underground pipeline. Considering the Commissioner's report, final decree was passed, conferring equal rights on the parties, thereby, the usage of borewell and irrigation shall be done on turn basis. In order to rectify the defects, the trial Court has amended the plaint, exercising the power conferred on it under Sections 151 and 152 of the Code of Civil Procedure. Amendment of the preliminary decree by the trial Court without notice to the appellant/defendant is the issue in this Second Appeal.

3. Mrs.J.Prithivi, learned counsel for the appellant/defendant, would vehemently contend that any amendment shall be made as per the procedure laid down under Order 6 Rule 17 CPC. According to her, before making any amendment, notice shall be given to other side. In so far as the development is made in the property, it is the exclusive right of the appellant/defendant, having incurred so much of money, and, therefore, such a right cannot be taken away by way of an amendment. The learned counsel would further contend that as per the judgment of the Hon'ble Apex Court in Poolchand v. Gopal Lal, AIR 1967 SC 1470, there can be any number of preliminary decrees. When the right over the property is raised, a second preliminary decree can be passed in partition suits, by which, the shares allotted in the preliminary decree already passed can be amended and, if there is a dispute between the surviving parties in that behalf and that dispute is decided, the decision amounts to a decree. Following the above decision of the Hon'ble Supreme Court, the High Court of Karnataka, in Janaki v. Lalitha, in W.P.No.44710 of 2012, by an order, dated 07.07.2015, held as under :

"11. The Hon'ble Patna High Court in the case of Sheo Pujan Rai and Ors. V. Ram Ekbal Rai and Ors. (AIR 2008 PATNA 50) has held that some properties which had been left out in a suit filed for relief of partition and separate possession and preliminary decree drawn therein could be included in the schedule of the final decree proceedings. If properties are covered under the same set of facts which have already been decided by the learned trial court at the time of passing of the preliminary decree. It is made clear that such inclusion would neither change the nature

of the suit nor it would take the other side by surprise and, on the other hand, such addition deems necessary to settle the controversy as a whole and prevent multiplicity of the suits and proceedings. Therefore, it is held that in such an event incorporation of the left out properties in the schedule appended to the final decree proceedings in terms of Order 6 Rule 17 of CPC is proper."

Therefore, the amendment of final decree should have been made following Order 6 Rule 17 CPC in the manner known to law. In so far as the procedure is not followed, according to the learned counsel, the order passed by the lower appellate Court is illegal and erroneous.

4. Per contra, Mrs.P.Saritha, learned counsel for the respondent, would contend that the fact of development was very much pleaded in the written statement and the issue was raised and considered by all the Courts up to High Court in Second Appeal. She would further contend that the lower appellate Court has taken an erroneous decision to award Rs.50,000/- towards costs incurred by the appellant for development of the property, and that the issue of partition is between father and son and the father is inclined to give the benefit to his son, provided, after he attains majority. By this time, according to the learned counsel, the respondent/plaintiff would have attained majority, as he was two years' old at the time of filing of the suit, way back in the year 1998; therefore, it is an empty formality, as either the nature of the property or the nature of the suit has not been changed; as such, it cannot be considered that the appellant is taken by surprise and, therefore, the appeal is liable to be dismissed.

5. I have heard the rival contentions.

6. Item No.3 of the suit schedule property describes the nature of the property as to the existence of a well and an electric motor, fitted for fetching water. It is the contention of the appellant that he has developed land by incurring much expenditure and that development shall be considered as his exclusive right to use the well, for irrigating the land. No doubt, 50% of the share is given to son. However, when the appellant has made development to the property, he is entitled to enjoy the said development, for irrigating the land allotted to him. This cannot be construed that the nature of the suit has changed or that the appellant is taken by surprise, as contended by the learned counsel for the respondent, by way of amendment. What is amended is the development in the property. Admittedly, the appellant has conscientiously raised an issue from the beginning ever since he filed written statement in the

suit and, in the appeal, against the finding of the trial Court. The issue has been finally decided in the Second Appeal, preferred against the preliminary decree. Therefore, the contention of the respondent that the amendment does not change the nature of the suit and it does not include new items in the property, which were left out at the time of filing of the suit, is tenable. It is only a development made to the land by the appellant and it is already pleaded and decided by the Courts below. When the matter is finally settled, it is only consequential action of division of property, while passing the final decree. In so far as the rights of the parties are concerned, it is confirmed by this High Court and there is no appeal against the same. In that event, this Court is of the opinion, that the rights of the appellant/defendant will not, in any way, be affected. The amendment, following Order 6 Rule 17, will be formulated and that will not confer any fresh right on the appellant/defendant. In the given situation, as held by the High Court of Patna in Sheo Pujan Rai's case, cited supra, inclusion of certain properties in the schedule of the final decree will not affect the rights of the parties and the appellant will not be taken by surprise, but, it will settle the controversy as a whole and prevent multiplicity of suits and proceedings.

7. In that view of the matter, I consider, that in order to give a quietus to the issue and prevent multiplicity of proceedings, the Courts below have rightly come to the conclusion, by following the procedure contemplated under Sections 151 and 152 of CPC, in the interest of justice. Therefore, the judgment and decree of the Courts below are based on sound reasoning and they do not require any interference by this Court.

8. Second Appeal stands dismissed. No costs. Consequently, the connected M.P.No.1 of 2008 also stands dismissed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

dixit

To

1.Subordinate Court,
Bhavani.

2.First Additional District Munsif,
Bhavani.

+1cc to M/s.V.Rajesh, Advocate Sr.No.80628

RK(CO)
sm:11.4.2018

S.A.No.61 OF 2008