

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.01.2017

Pronounced on : 19.01.2017

CORAM

THE HON'BLE DR. JUSTICE G.JAYACHANDRAN

Second Appeal No.939 of 2003

Sampathkumar

.. Appellant

versus

1. Ranganathan
2. Prahladan
3. K.Sadasivam
4. K.Rajeswari
5. K.Padmavathi
6. V.Jagannathan
7. V.Subramanian
8. P.Lakshmi
9. K.Vasanthakumari
10. Susindra Kumar
11. Lakshmi Narayanan
12. Balasubramanian
13. Rajakumari
14. Sarojini
15. R.Saraswathi
16. R.Maheswari
17. P.Vijayalakshmi
18. T.Sundaralakshmi
19. Saraswathi
20. Saranya
21. Balalakshmanan
22. M.Najumudeen (Deceased)
23. A.S.Sammal
24. Badhusa Mohideen
25. N.Haseena Rizwana
26. Minor N.Zubaitha Parveen
27. Minor N.Juvairiya Fathima

.. Respondents

(RR22 to 27 impleaded vide order of
Ct. Dt. 3.2.2015 in CMP.No.279/08
in S.A. 939/03)

Prayer:- Second Appeal filed under Section 100 of Civil Procedure Code against the judgement and decree in A.S.No.138 of 1998, on the file of II Additional District Judge, Erode, dated 30.10.2001, confirming the order in I.A.No.609 of 1995 in O.S.No.5 of 1982, on the file of Subordinate Judge, Dharapuram, dated 14.11.1995.

For Appellant :Mr.K.S.Jeyaganeshan

For Respondents:Mr.K.Srinivasan,
Senior Counsel for
M/s Swaraj Asso. For R1
Mr.B.Easwaran for R15 to R18
Mr.S.Saravanan for R23 to 27
No appearance for R2 to
R14, 19 to 21
R22 -died

J U D G E M E N T

This appeal is preferred against the order passed by the first Appellate Court in the final decree proceedings.

2. The brief facts leading to the appeal are as under:-

In the suit for partition, consent decree was passed on 25.09.1957 and thereafter, the Official Liquidator has sold out the share of the first respondent Raja L.Ramasamy Chettiyar in pursuant to the insolvency petition No.50/47. Therefore, taking note of the events subsequent to the preliminary decree, an application for final decree for division of the suit properties by metes and bounds was taken out by the plaintiffs in I.A.No.609 of 1995.

3. The trial court after tracing the Genology and based on the Advocate Commissioner's report, which are marked as Ex.C1 to C33, has passed a final decree allotting proportionate shares to each of the sharers. Wherever there was shortage, the same has been compensated with the value taking note of the Advocate Commissioner's report. Thus, each of the sharers were provided with properties as identified by the Advocate Commissioner and with requisite compensation for the shortage. The trial Court while allotting item No.5, 6 and 11 of the plaintiffs 1 to 4, has found that the value of the property allotted to them is excessive by Rs.1,98,483/-. Therefore, the plaintiff 1 to 4 have to deposit that money in the Court, which can be withdrawn by respondents 22, 25 and 26.

4. In the said proceedings, the 22nd respondent, who remained exparte after notice and engaging counsel, preferred an appeal on the ground that the final decree has been passed without impleading necessary parties and the apportionment of the properties by metes and bounds were not proper, hence, the final decree proceedings should be set aside. The main contention of the appellant was that during the final decree

proceedings, it was accepted by the parties that as far as possible, the properties, which are in possession of the respective parties will not be disturbed and division will be effected taking note of the respective possession. However, in respect of item No.5, though the appellant and his brothers have alienated it to the third parties, the trial Court failed to take note of the fact and allot the same to the plaintiffs. In the absence of possession, the trial Court ought not to have allotted item 5 to the plaintiffs. When the third parties are in possession of item No.5 of the suit property without impleading them in the final decree proceedings the order has been passed violating natural justice principle.

5. It was contended in the appeal that the allocation and division of the property is erroneous. If item Nos.5 and 6 of the suit property had been allotted to the appellants and item Nos.8 to 16 been allotted to the respondents/plaintiffs, necessity of paying compensation for the excess allotment would not have arisen. Since the trial Court has failed to consider these facts, the appellant had urged the first Appellate Court to take note of it and set aside the final decree proceedings.

6. After considering the rival plea, the first Appellate Court has allotted item No.5 of the suit property to the third parties, pending litigation and the impleading petition filed by the subsequent purchaser was not entertained by the Court instead of giving opportunity to participate in the final decree proceedings. The appellants have abstained themselves from participating and assisting the Court to divide the property by metes and bounds. While so, the trial Court has taken note of the Advocate Commissioners report, valuation of the property and has effected division of the property as far as

equitable to parties concerned. Further, the Advocate Commissioner has taken note of the fact that the suit for partition commenced in the year 1947 at Coimbatore and later transferred to Erode District, after a long time and suit had been kept pending for several decades. The appellant knowing well about the pendency of the case alienates these properties without leave of the Court but pending litigation it also voluntarily failed to participate in the final decree proceedings. Therefore, they have no reason to find fault with the final decree proceedings.

7. Aggrieved by the concurrent finding, the present second appeal is preferred canvassing the following Substantial Questions of Law:-

"1. The Courts below erred in passing final decree against the appellant and his brothers (respondents 22, 23 and 26 in I.A.No.609 of 1995 final decree petition) without issuing notice of hearing which affects the valuable right of the appellant and his brothers and against natural justice when the counsel reported "No instruction"?

2. While the Courts below accepted alienation of properties by the respondents to the respective alieness and the same was allotted to the respective alieness under equity, property alienated by the appellant to Nizamuddeen could have been allotted to the alienee on the principal of equity but ignored the representation of the alienation?

3. Whether the Courts below failed to consider that no prejudice would be caused to other respondents, if item No.8 allotted to the appellant and his brothers if re-allotted to respondents 1 to 4 (petitioners in the final decree petition) and item Nos.5 and 6 of the suit properties are re-allotted to the appellant and his brothers and it would be much beneficial to the respondents 1 to 4 who were not in possession and enjoyment of any of the suit properties?"

8. The learned counsel for the appellant submitted that while parties had a specific understanding that the properties, which are in possession of the respective parties, will be allotted as their share in the final decree proceedings, contrary to that understanding, item Nos.5 and 6 were allotted to the respondents instead of the appellant, who were in possession and subsequently alienated it to the third parties pending suit. This has caused hardship not only to the appellant but also to the subsequent purchaser, who was arrayed as 22nd respondent in this second appeal. Further, it was contended by the counsel for the appellant that if the properties shown under item Nos.5 and 6 were allotted to the appellant and if item No.8 was allotted to the respondents, it would have been beneficial to the respondents 1 to 4, who are not in possession and enjoyment of the any of the suit property.

9. In support of his contention, the learned counsel relied upon the judgment of the Hon'ble Supreme Court in Thomson Press (India) Ltd., vs. Nanak Builders & Investors P. Ltd & others, reported in 2013 (2) CTC 104, wherein para 24 reads as follows:-

"24. It is well settled that the Doctrine of lis pendens is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a Court in a suit should be binding not only on the litigating parties but on those who derive title pendente lite. The provision of this section does not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to a litigation. Discussing the Principles of lis pendens, the Privy Council in the case of Gouri Dutt Maharaj v. Sukur Mohammed & others, AIR 1948 35 PC 147, observed as under:

"The broad purpose of Section 52 is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The applicability of the Section cannot depend on matters of proof or the strength or weakness of the case on one side or the other in bonafide proceedings. To apply any such test is to misconceive the object of the enactment and in the view of the Board, the learned Subordinate Judge was in error in this respect in laying stress, as he did, on the fact that the Agreement of 8.6.1932, had not been registered. "

10. The counsel appearing for the respondents 23 to 25 contended that as a bonafide purchaser, by applying the principle of equity, their right has to be protected since their father purchased the property for adequate value and in possession since his purchase.

11. In support of his contention, the learned counsel for the subsequent purchaser relied upon the judgement of this Court in Good Shepherd Evangelical Mission Private Limited, Formerly known as "The Siloam Evangelical Mission Private Limited", rep. by its Chairman, Trichy-620 020 vs. Meenakshi Achi and others, reported in 2013 (3) MLJ 737, wherein paras 12 and 14 read as follows:-

"12. On the face of it, it is clear that the presence of the appellant is neither necessary for adjudication nor it is a proper party for arriving at a proper conclusion in the partition suit. It is not as if by not impleading the appellant, the appellant is left in the lurch. The contention raised by the

learned senior counsel for the appellant that the appellant has parted with huge amount of consideration in respect of the purchase and, therefore, it cannot be denied relief, even though appears to be attractive, in our considered opinion, is without substance. It would have been different if the appellant has paid the consideration to the sharers. Having paid consideration to the non-sharers in the joint family property, it is certainly not open to the appellant to make a hue and cry that enormous amount has been parted with. Even if some of the vendors of the appellant, being the relatives of the sharers, receive any share ultimately in the final decree to be passed in the partition suit, by virtue of inheritance due to the death of the sharers, the appellant can always proceed against their respective shares. Even in the absence of such shares having been received by the vendors of the appellant, there are other remedies available. If it is taken as a commission of cheating by a non-owner, the larger issue to be decided is as to whether the doctrine of caveat emptor will be applicable against the appellant.

12. After considering the rival claims of the respective parties this Court is of the opinion that in a final decree proceedings, the appellant herein was given opportunity to participate and put forth his submissions, which he has miserably failed to avail. Left with no other option, the trial court after giving due consideration on the reports of the Advocate Commissioner and relevant sketches marked as Exs.C1 to C33, has made equitable distribution of the property as per the entitlement. It is not correct to say that natural justice was violated while passing order in a final decree proceedings. In fact, the appellant had engaged a counsel but later failed to participate in the proceedings by giving adequate instructions to his counsel. For his fault, he cannot blame the respondents or the Court. Similarly the subsequent purchaser who claims to be a bonafide purchaser for value had knowledge of the pending litigation. He cannot have a better title or right than what his vendor is entitled.

13. Per contra, the counsel appearing for the first respondent submitted that the Courts below has given due consideration for the possession held by the respective parties and an detailed order has been passed by the trial Court taking note of entire facts and thereafter arrived at a conclusion to allot item Nos.5 and 6 to this respondents and item No.8 to the appellant. The contention of the appellant for re-allotting

item Nos.5 and 6 to the appellant and to get item No.8 instead of item Nos.5 and 6 is neither a bonafide offer nor a genuine request. The appellant herein, pending litigation, has alienated the properties. Even item No.8, which he offers now is not available in his possession. Since he had already alienated the property, such a proposal is not a bonafide proposal, but an attempt to protract the proceedings.

14. The contention of the appellant that if some other properties is allotted to the defendants instead of item Nos.5 and 6, which they have sold pending litigation, it would be a correct distribution of the shares has no force. More particularly item No.8, which the appellants offer in exchange of item No.5 and 6 is neither in their possession nor its equivalent to the value of item Nos.5 and 6. The trial Court has meticulously gone into the facts of the case, the value of the each properties, the possession of those properties and to the maximum possible extent without disturbing the possession and enjoyment of the properties had passed a final decree. This Court after going through the final decree proceedings is of the opinion that there could have been no better way of allocation than the way in which the trial Court has done in the final decree proceedings. It is also submitted by the counsel for the respondents that pursuant to the final decree proceedings they have already deposited the money to the tune of Rs.1,98,000/-. The fact being so, this Court finds it will be a greater ordeal to the respondents if the request of the appellant is accepted and re-allocation of the property is effected. The appellant by alienating the properties pending final decree proceedings had precipitated the issue at their own risk and they cannot take advantage of their own fault, that too at the cost of the respondents/plaintiff, who have not yet seen the colour of the decree even after 60 years of litigation.

15. For the above said reasons, the Second Appeal is dismissed. No costs.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

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To

1. II Additional District Judge, Erode.

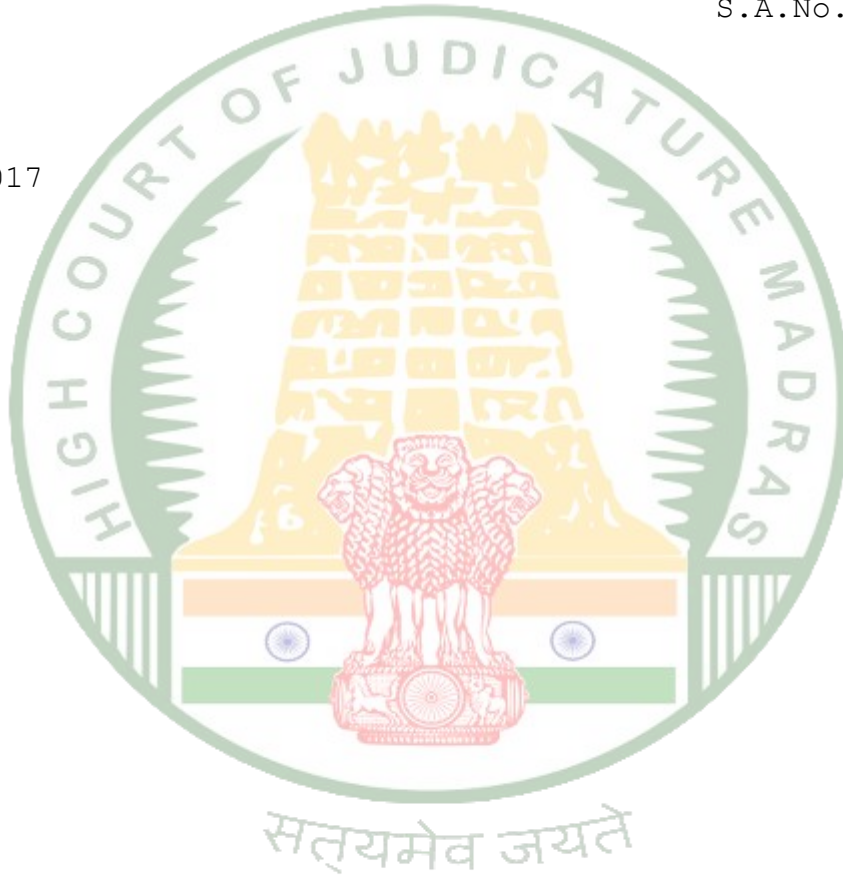
2. The Subordinate Judge, Dharapuram.

+1 cc to M/s.S.Saravanan Advocate sr 3870 dt:13/04/2017

+1 cc to M/s.K.S.Jeyaganeshan Advocate sr 3733 dt 13/04/2017

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