

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.10.2017
PRONOUNCED ON : 01.11.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

S. A.No.279 of 2001

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|-------------------|---------------------------------|
| 1. Mottaya Udayar | ..1st Appellant/2nd Appellant |
| 2. Ravi @ Mayavel | 3rd respondent/3rd Defendant |
| 3. Selvaraj | ..Appellants 2&3/Appellants 3&4 |

Vs.

- | | |
|--|---|
| 1. Arukkani Ammal | |
| 2. Santhanam | |
| 3. Minor Pavithra | |
| 4. Minor Sasidaran | |
| (respondents 3 and 4 are represented by father and guardian Santhanam) | |
| 5. Maragatham | |
| 6. Gunasekaran | |
| 7. Minor Sudakar | |
| (represented by father and guardian Narayanasami udayar) | |
| 8. Minor Vanitha | |
| (represented by father and guardian Narayanasami udayar) | |
| 9. Vasantha | |
| 10. Indhirani | ...Respondents/Respondents/
Legal heirs/Plaintiffs |

Prayer: Second Appeal filed under Section 100 of Civil Procedure Code, against the judgment and decree dated 24.03.1999 made in A.S.No.324 of 1996, on the file of the Subordinate Court, Kallakurichi, partly allowing the appeal and partly confirming the judgment and decree dated 12.01.1995 made in I.A.No.794 of 1998 in O.S.No.298 of 1997, on the file of the Principal District Munsif Court, Kallakurichi.

For Appellants : Mr.S.Parthasarathy, Senior Counsel
for M/s.Sarvabhauman Associates.

For Respondents: Mr.P.Tamilvel

JUDGMENT

Challenge in this second appeal is made to the judgment and decree dated 24.03.1999 made in A.S.No.324 of 1996, on the file of the Subordinate Court, Kallakurichi, partly allowing the

appeal and partly confirming the judgment and decree dated 12.01.1995, made in I.A.No.794 of 1998 in O.S.No.298 of 1997, on the file of the Principal District Munsif Court, Kallakurichi.

2. The parties are referred to as per their rankings in the trial Court.

3. It is seen that the plaintiff had laid the suit in O.S.No.298 of 1997, for the reliefs of declaration, possession and past and future mesne profits, as regards the A schedule properties or in the alternative, for the partition in respect of the B schedule properties, claiming that he is entitled to obtain 1/2 share in the B schedule properties and for profits. After contest, it is found that the plaintiff was granted the alternative relief of partition in respect of the B schedule properties alone and accordingly, he was held to be entitled to obtain 1/3rd share in the B schedule properties and accordingly, a preliminary decree had been granted in favour of the plaintiff as above stated, rejected the other reliefs sought for by the plaintiff. It is further found that the appeals preferred by the plaintiff as against the judgment and decree of the trial Court had been dismissed. It is thus found that the preliminary decree passed by the trial Court has become final and accordingly, it is seen that the plaintiff has preferred an application in I.A.No.794 of 1998 in O.S.No.298 of 1997, for the appointment of an Advocate Commissioner, seeking to divide the B schedule properties by metes and bounds and allot his 1/3rd share in the same, as determined by the Court and thereby pass a final decree in the suit. It is further found that the said application has been entertained and the Advocate Thiru. V.Rajendran, has been appointed as Advocate Commissioner and he, as per the directions of the Court, inspected the suit properties and accordingly suggested for the division of the suit properties by allotting 1/3rd share to the plaintiff and filed his reports and plan with reference to the same, which have come to be marked as Exs.C1 to C3.

4. The counter has been filed by the respondents/defendants contending that the mode of division suggested by the Advocate Commissioner dividing all the items of the suit properties for allotting the 1/3rd share to the plaintiff would cause serious hardship to the respondents and the northern portion of the suit properties are fertile and the southern portion of the suit properties are not fertile and accordingly, taking into consideration the nature of the properties, the commissioner should have made the division and further suggested that the respondents are already in possession and enjoyment of the eastern 2/3rd share in the properties concerned and the western 1/3rd share is in the possession and enjoyment of one Natesa udayar and the said share enjoyed by the Natesa udayar may be allotted to the plaintiff and accordingly, prayed for appropriate reliefs.

5. As seen from the impugned judgment and decree, it is found that the Courts below have taken note of the mode of division suggested by the Advocate Commissioner and held that the Advocate Commissioner has duly taken into account the convenient enjoyment of the properties concerned, while suggesting the division as per the preliminary decree and further finding that the division suggested by the Advocate Commissioner in the different survey numbers in the properties for allotting 1/3rd share to the plaintiff would be best way of allotting the shares in the matter, so that the parties could effectively and usefully enjoy their shares if the division is so made and accordingly, it is found that the trial Court in items 1 to 6 had allotted the northern portion of 1/3rd share to the plaintiff as detailed in its order and as regards the items 7 to 9 of the properties had allotted the eastern 1/3rd share to the plaintiff and accordingly, it is seen that the final decree has come to be passed by the trial Court and thus, it is found that the trial Court has taken into consideration of the above said factors and accordingly, accepted the division mode suggested by the Advocate commissioner so that the same would be beneficial for the convenient enjoyment of the respective sharers of the properties concerned.

6. However, aggrieved over the judgment and decree of the trial Court granting the final decree as aforesaid, it is found that the defendants 1 and 3 had preferred an appeal and in the first appellate court, it appears that the defendants 1 and 3 had made grievances that the Advocate commissioner had not allotted the pathway for taking their cattle and for reaching their respective shares/ properties and accordingly, taking into account the said factors and also holding that in other respects, the final decree passed by the trial Court does not call for any interference, accordingly, the first appellate court has modified the final decree passed by the trial Court, granting permission that the defendants 1 and 2 should have pathway right of 2 feet for taking their cattles in the properties as detailed in the judgment and thereby, to a limited extent modified the final decree passed by the trial Court. Not satisfied with the above said judgment and decree of the first appellate court, modifying the final decree passed by the trial Court, the present second appeal has been preferred.

7. At the time of the admission of the second appeal the following substantial questions of law were formulated for consideration.

1. Whether the lower appellate Court is correct in law in dividing the suit item no.7 in "B" schedule in such a way that the entire road frontage was allotted to the respondents and only interior portion was allotted to the appellants which results in injustice?

2. Whether the lower appellate Court is correct in law in not earmarking 12 feet passage to reach suit item nos.8 and 9 in schedule "B" without which the properties cannot be engaged by the appellants?
3. Whether the lower appellate Court is correct in law in not earmarking the channel to take water from suit item No.9 to suit item No.2?

8. The only contention put forth by the counsel for the defendants is that the courts below had not granted pathway to them for having access to their respective shares, while making the division of the suit properties and hence, this Court should interfere with the judgment and decree of the Courts below and accordingly, grant suitable pathway right to them for having access to their respective shares. Per contra, it is contended by the counsel for the plaintiffs that the Advocate Commissioner, while suggesting the mode of division of the suit properties concerned had taken into account various factors and considering the convenient enjoyment of the respective sharers of the properties concerned and accordingly, suggested the division of the properties which had been accepted by the Courts below and accordingly, their respective shares had been enjoyed by the parties all along for several years and it is further contended that the first appellate court has also confirmed the judgment and decree of the trial Court only modifying the same to the limited extent, granting path way right of 2 feet in the properties, for enabling the defendants to have access to their shares and in such view of the matter, first appellate court having taken into account the grievances of the defendants and accordingly, granted the pathway right as above stated, it is argued that the impugned judgment and decree do not call for any interference and hence, the second appeal is liable to be dismissed.

9. On a perusal of the materials placed, it is found that as rightly put forth by the counsel for the plaintiffs/respondents, it is seen that the Advocate Commissioner, nominated in this matter, for effecting the division of the suit properties as per the preliminary decree had taken into account, the nature of the properties involved and accordingly, taking into consideration, the convenient enjoyment of the respective sharers and duly suggested the mode of division of the several items of the properties concerned so that the parties be able to enjoy their respective shares peacefully and conveniently and accordingly, it is noted that the mode of division suggested by the Advocate Commissioner found acceptance by the Courts below and accordingly, it is found that the mode of division suggested by the Advocate Commissioner, in all the items of properties independently, taken into consideration and accordingly, the Courts below had allotted the shares of the respective parties

as per the decree passed in the suit. It is further found that as some grievances were projected before the first appellate court by the defendants concerned that they had not been granted the pathway right for having access to their respective shares, it is found that taking the same into consideration, the first appellate court has permitted the appellants to use 2 feet path way in the properties and accordingly, confirming the final decree passed by the trial Court, modified the same only to the above said limited extent. In such view of the matter, it is found that the Courts below have rightly thought it fit to divide the suit properties and allot the shares to the parties entitled to as per the decree passed in the matter and accordingly, in toto, had accepted the mode of division suggested by the Advocate commissioner. It is further found that the defendants were also given the path way right of 2 feet for having access to their allotted shares and in such view of the matter, the grievances further entertained by the defendants that they still do not have a larger path way for gaining access to their properties cannot be countenanced in any manner.

10. The grievances of the appellants is that the Courts below, particularly, the first appellate court had erred in granting only 2 feet pathway right as access to reach their lands and instead the first appellate court should have earmarked a larger pathway for their access. However, the above prayer of the defendants is stoutly resisted by the counsel for the respondents, who contended that the present appeal has been directed only to prevent the plaintiffs from enjoying their shares as per the decree passed in the suit one way or other and when, the first appellate court has already granted path way right of two feet to the defendants for having access to their respective shares, it is stated that the alternative mode now suggested by the appellants cannot be worked out and if the same is entertained, it would result in confusion in the allotment of the shares in the properties concerned and when the Courts below have rightly allotted the respective shares, as per the decree passed in this matter, taking into account, the convenient enjoyment of the properties concerned, it is stated that the second appeal does not merit acceptance and should be dismissed. Further it is contented that as regards the prayer now sought for a larger extent of pathway, it is argued by the counsel for the plaintiffs/respondents, such a ground had not been even taken by the defendants, in the first appellate court and in such view of the matter, it is stated that only for the purpose of prolonging the matter endlessly, the present second appeal has been preferred

11. On a perusal of the materials, particularly the grounds of appeal preferred in the first appellate court, it is seen that the defendants have not complained of not being provided with pathway for having access to their shares allotted to them. Still it is found that the first appellate court has, for the convenient enjoyment of their respective shares, had granted 2

feet path way right in the properties concerned and accordingly, modified the final decree passed by the trial Court. In such view of the matter, the prayer now sought for by the appellants for 12 feet passage for reaching their properties concerned cannot be acceded to, as the same would cause hardship and would render the division of the properties impossible as per the decree passed in the suit. In other words, it is noted that the Courts below have rightly allotted the shares of the respective parties in the properties concerned. If the request of the defendants' that they should be granted pathway right for having access to their shares in all the items of parties is entertained, the same would not be in the ends of justice, as by accepting such a mode of division of the properties, the division of the properties as per the preliminary decree would be rendered impossible and in such view of the matter, as rightly argued, the contention putforth by the counsel for the defendants for allotting a larger pathway measuring 12 feet as such cannot be acceded to.

12. In the light of the above discussions, I do not find valid reasons as such to interfere with the mode of division of the properties concerned, as determined by the Courts below and in such view of the matter, the substantial questions of law formulated in this second appeal are answered against the appellants and in favour of the respondents. Resultantly, the second appeal fails and dismissed with costs. Consequently, connected miscellaneous petitions, if any is closed.

Sd/-
Assistant Registrar (CS-V)

//True Copy//

Sub Assistant Registrar

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To

1. The Subordinate Judge, Kallakurichi,
2. The Principal District Munsif Court,
Kallakurichi.

+ 1 cc to Mr. P. Tamilavel, Advocate Sr.77108

S. A.No.279 of 2001

GJ(CO)
EU(02/01/2018)