

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 18.12.2017
PRONOUNCED ON: 04.01.2018

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A. No.238 of 2001

C.Shanmugam ... Appellant/Appellant/2nd
Respondent/Defendant

Vs.

1.C.Kumarasamy Pillai ... 1st Respondent/1st Respondent /
Petitioner/Plaintiff

2.Nagarajan

3.Dakshinamoorthi (Deceased)

4.Panchavarnam

[Memo in USR No.9976 of 2017 dated 31.10.2017 filed in respect of the deceased third respondent is recorded vide order of this court dated 28.11.2017 in S.A.No.238 of 2001. The legal representatives of the deceased third respondent namely, RR2 and 4 are already on record.]

... Respondents 2-4/Respondents 2-4
/Respondents 3-5

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree made in A.S.No.181 of 1999 dated 19.07.2000 on the file of the Additional Sub-ordinate Judge's Court, Nagapattinam, confirming the fair and decreetal order for final decree for partition in I.A.No.1240 of 1987 in O.S.No.289 of 1984 dated 21.04.1999 on the file of the District Munsif's Court, Nagapattinam.

For Appellant : Mr.T.A.Shahul Hameed

For RR1 : Mr.S.Saravanakumar
for M/s.R.Jaikumar

For R2 and R4 : No appearance - Set exparte

J U D G M E N T

In this second appeal, challenge is made to the judgment and decree dated 19.07.2000 passed in A.S.No.181 of 1999 on the file Additional Sub-ordinate Court, Nagapattinam, confirming the

fair and decreetal order dated 21.04.1999 passed in I.A.No.1240 of 1987 in O.S.No.289 of 1984 on the file of the District Munsif Court, Nagapattinam.

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

3.I.A.No.1240 of 1987 has been preferred for passing final decree for allotting the plaintiff's 1/3 share in the suit properties.

4.According to the plaintiff's case, the suit in O.S.No.289 of 1984 laid for partition ended in a preliminary decree declaring the plaintiff's 1/3 share on 03.07.1987 and accordingly, for claiming the allotment of the said share, it is the case of the plaintiff that he has laid the present application.

5.The case of the respondents in brief is that inasmuch as the appeal preferred against the preliminary decree is still pending in A.S.No.1 of 1988 the present application for passing final decree is not maintainable and liable to be dismissed and further according to them, Chidambarampillai had executed a settlement deed dated 29.11.1973 gifting the suit properties in favour of Jothi Ramalingam and hence the plaintiff cannot claim any share in the suit properties and thus the petition is liable to be dismissed.

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

(1)Whether the judgment and decree of the Courts below is sustainable in law on the teeth of a catena of judgment to the effect that the notice to be sent to the litigant on its Advocate reporting "no instruction" to the Court?

(2)Can a Civil court deal with final decree proceedings in a partition suit when admittedly no notice has been served on one of co-owners?

7. The suit in O.S.No.289 of 1984 laid by the plaintiff for partition declaring his 1/3 share ended in his favour by way of a preliminary decree dated 03.07.1987, seeking allotment of the said share, the present application has been laid for passing a final decree.

8.Two main issues are focused in this second appeal by the

defendants. One is that due notice has not been issued to the second defendant. However, on a perusal of the materials and the judgment and decree of the Courts below, it is seen that only after giving due notice to the parties concerned, the Advocate Commissioner has been appointed and it is further found that the Advocate Commissioner has also issued necessary notice to all the parties concerned before inspection of the properties and therefore the contention of the defendants that due notice has been issued to the second defendant as such, has been rightly rejected by the Courts below. It is found that the above said plea has been taken by the defendants only to delay the proceedings, one way or the other, hence, as such does not merit any acceptance.

9. After issuing due notice to the parties concerned, the Commissioner had been appointed in the matter for suggesting the mode of division, in consonance with the preliminary decree passed. It is further seen that the Advocate Commissioner so appointed had also issued notice to all the parties concerned and after the report having been submitted by the Advocate Commissioner, objections have been called for from the concerned parties, excepting the plaintiff, others have not preferred any objection to the report of the Advocate Commissioner. The Courts below have rightly found that even the objection of the plaintiff with reference to the value of trees does not merit acceptance, as the same is bereft of any valid material. It is further found that for adjusting the shares, the Courts below have directed the plaintiff to deposit a sum of Rs.4,270/- the excess value of the trees allotted to him. Therefore, it is found that, the Courts below have rightly rejected the contention of the second defendant that due notice has not been issued to him in the final decree proceedings and the same is not liable to be interfered with in any manner.

10. When the defendants have not made out any acceptable case that more palmyra trees are standing in the properties suggested to be allotted to the plaintiff, it is seen that the Courts below have rightly rejected the above said contention and accordingly held that no material defect is noted in the mode of division suggested by the Advocate Commissioner. It is seen that considering the number of palmyra saplings allotted to the shares of the respective parties, it is seen that there is no inequitable division of the properties concerned amongst the parties and therefore the findings of the Courts below allotting the 1/3 share of the plaintiff's share in the properties concerned, as determined by them, do not call for any interference.

11. In such view of this matter, it is found that due notice has been sent to all the parties including the second defendant

in the final decree proceedings and therefore the contention now raised that no due notice has been sent as such cannot be countenanced. No valid material is projected to sustain the substantial questions of law formulated. Accordingly, the substantial questions of law formulated in the second appeal are answered against the second defendant/appellant.

12. In conclusion the second appeal fails and is accordingly dismissed with costs. Connected miscellaneous petition, if any, is closed.

Sd/-

Assistant Registrar(CS III)

//True copy//

Sub Assistant Registrar

mfa

To

1.The Additional Sub-ordinate Court,
Nagapattinam.

2.The District Munsif's Court,
Nagapattinam.

Copy TO
The Section Officer,
VR Section, High Court,
Madras.

+1cc to Mr.T.A.Shagulhameed, Advocate SR.No.621

SSD(CO)
GN(19/02/2018)

S.A. No.238 of 2001

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