

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 06.02.2019
PRONOUNCED ON:12.02.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN

S.A.No.738 of 2005
and
C.M.P.No.10349 of 2005

A.Ravi UdaiyarAppellant/2nd Defendant
Vs.

1.Krishnammal

2.Minor Vasanthkumar

[Minor represented by mother
and natural guardian

1st respondent Krishnammal] ...Respondents/1 &2 plaintiffs

3.Anbu Udaiyar

4.Vanagamudi

5.Malar Ammal

...Respondents 3 to 5/ Defendants

Prayer:- Second Appeal filed under Section 100 of C.P.C., against the decree and judgment and decree of the Principal District Judge, Villupuram in A.S.No.57 of 2002 dated 06.11.2003 in confirming the judgement and decree of the Principal District Munsif, Tirukoilur in I.A.No.806 of 1997 in O.S.No.1063 of 1991 dated 25.07.2001.

For Appellant : Mrs.V.Srimathi
For RR1 and R2 : Mrs.A.L.Gandhimathi
R3 : Set exparte
vide order dated 06.02.2019

J U D G M E N T

Challenge in this Second Appeal is made to the judgment and decree dated 06.11.2003 passed in A.S.No.57 of 2002 on the file of the Principal District Court, Villupuram confirming the judgment and decree dated 25.07.2001 passed in I.A.No.806 of 1997 in O.S.No.1063 of 1991 on the file of the Principal District Munsif Court, Tirukoilur.

2. The Second Appeal is admitted on the following substantial question of law:

Whether the Courts below have not abdicated their function and essential duty in not deciding the rights and entitlement of the suitors independently of the Commissioner's report?

3. For the sake of convenience, the parties are referred to as per the rankings in the trial court.

4. Plaintiffs are laid the suit against the defendants for partition in O.S.No.1069 of 1999 on the file of the Principal District Munsif Court, Tirukoilyur. It is found that after contest, a preliminary decree has come to be passed in the above suit in favour of the plaintiffs on 14.11.1996 determining that they are entitled to obtain partition and separate possession of 2/12th share in the suit properties as set out in the plaint. It is informed that as against the preliminary decree passed in the suit abovestated, neither the plaintiffs nor the defendants have preferred any appeal. So, it is seen that the preliminary decree passed in the suit abovestated has become final.

5. Contending that the defendants have not come forward to effect an amicable partition of the share allotted to the plaintiffs in the preliminary decree by metes and bounds, accordingly, praying for the allotment of the shares as per the preliminary decree passed in the suit. The plaintiffs have come forward with an application in I.A.No.806 of 1997 for passing a final decree and accordingly prayed for the appointment of the Advocate Commissioner to inspect, divide and allot the shares to which the plaintiffs are entitled to in the plaint schedule properties.

6. It is found that only the second defendant had preferred objection to the abovesaid application preferred by the plaintiffs contending that the movable properties described in the 'B' schedule of the plaint schedule do not belong to the joint family and the Advocate Commissioner appointed in the matter after the institution of the suit has noted that the movable properties described in the plaint 'B' schedule are not available and with reference to the same, the plaintiffs have not put forth any objection and the Advocate Commissioner has noted the existence of only certain items of movables in his report and therefore, granting of 2/12th share in favour of the plaintiffs in respect of the movables as described in the plaint 'B' schedule is unsustainable and also contended that in the event of the suit properties being divided, as per preliminary decree passed in the suit put forth the case that to meet the marriage expenses of the 3rd respondent amounting to Rs.40,000/-, suitable allotment has to be done in respect of the family

properties and accordingly, prayed for the dismissal of the application preferred by the plaintiffs for passing the final decree.

7. It is noted that the Advocate Commissioner had been appointed by the Court to inspect and divide the plaint schedule properties and suggest the mode of division as per the preliminary decree passed in the suit and it has also noted that following the same, the Advocate Commissioner had inspected the suit properties after giving notice to all concerned and also suggested the division of the plaint schedule properties as per preliminary decree as detailed in his report and it is further noted that both the parties are filed to fresh objection to the Advocate Commissioner's report and plan. The trial court on a consideration of the Commissioner's report and plan as well as the objection put to the same by the respective parties and the submissions made by the parties concerned as well as on a consideration of the materials available on record was pleased to accept the Commissioner's report and in toto and accordingly passed the final decree in favour of the petitioners/plaintiffs, allotting their shares in the plaint schedule properties. Aggrieved over the same, it is noted that the second defendant had preferred the first appeal and the first appellate court, on a consideration of the materials placed on record and the submissions made was pleased to confirm the judgment and decree of the trial court. Aggrieved over the same, the second defendant has preferred the present Second Appeal.

8. As above noted, determining that the plaintiffs are entitled to 2/12th share in the plaint schedule properties, preliminary decree had come to be passed on 14.11.1996. As against the same, neither of the parties had preferred any challenge. Therefore, it is evident that preliminary decree passed in the suit as abovestated has become final.

9. Inasmuch as the defendants had not come forward to divide the suit properties and allot the shares of which the plaintiffs are entitled to as per the preliminary decree amicably. It is found that seeking for the partition, allotment of their shares in the plaint schedule properties, the plaintiffs had preferred an application in I.A.No.806 of 1997 for passing the final decree as abovenoted. The second defendant preferred objection to the abovesaid application preferred by the plaintiffs. Following the same, it is seen that the Advocate Commissioner had been appointed by the Court to suggest the mode of division of the plaint schedule properties in accordance with the preliminary decree passed in the suit. Consequently, the Advocate Commissioner is found to have given notice to all concerned and also inspect the plaint schedule properties in the presence of the parties concerned as well as the VAO present at the time of inspection and based on the available materials is

found to have suggested the division of the plaint schedule properties and the allotment of the plaintiffs' shares in respect of the same as detailed in his report and plan. No doubt, the plaintiffs as well as the third defendant has preferred objections to the Commissioner's report and plan. Considering the abovesaid materials as well as the submissions made by the parties, Courts below have accepting the Commissioner's report and plan had allotted the share to which the plaintiffs are entitled to in the plaint schedule properties as per the preliminary decree passed in the suit and consequently, passed the final decree in favour of the plaintiffs. Amounting the same, the second defendant has preferred the present Second Appeal.

10. It is mainly argued by the counsel appearing for the second defendant that the Courts below had mechanically and blindly accepted the Commissioner's report and plan in allotting the shares of the plaintiffs in the plaint schedule properties without deciding the rights and in respect of the respective parties independently and to that extent, according to her, the judgement and decree of the Courts below gets vitiated and undermined and liable to be set aside and accordingly prayed for appropriate orders in the matter.

11. On the other hand, counsel for the plaintiffs contended that considering the mode of division suggested by the Advocate Commissioner as detailed in his report and plan as well as the nature of the properties concerned and available for partition and also taking into account the convenience of the parties in the mode of enjoyment as well as the alienations made in respect of certain items pending lis put forth that the Commissioner's had taken in to consideration of the factors in the right perceptive and accordingly, rightly suggested the mode of division of the plaint schedule properties and allotted the due shares to the plaintiffs in the same and in such view of the matter, according to her, the Court below are fully justified and correct in accepting the Commissioner's report and plan and passing the final decree in the matter allotting due shares to the plaintiffs based on the same and therefore contended that no interference is called for with reference to the same and accordingly prayed for dismissal of the Second Appeal.

12. As above noted, only the third defendant has preferred the objections to the Commissioner's report and plan. In the objections preferred by the third defendant it is seen that, it has been mainly pointed out that the Advocate Commissioner has not taken into consideration the different items of the properties itself valued in the right perceptive and erred in allotting their lands to the defendants without any right in the well and also contended that the Advocate Commissioner had erred

in allotting items 7 and 8 in favour of the plaintiffs as regards the wet lands are concerned and put forth the case that the Advocate Commissioner should have divided each item of the plaint schedule properties independently and accordingly allotted the due share in which the plaintiffs are entitled as per the preliminary decree passed in the matter and further contended that the Advocate Commissioner has failed to take into consideration the real value of the house properties and erred in passing the division suggested by him as per the valuation certificate issued by the VAO and accordingly contended that the Commissioner's report and plan should not be relied upon.

13. The plaintiffs on their part put forth the objection to the Commissioner's report and plan contended that inasmuch as the preliminary decree does not stipulate the allotment of items 7 to 21 of the wet lands to the defendants on the premise that they have been sold to the 5th defendant by the defendants 1 to 3 pending lis, to that extent, according to them, Commissioner's report and plan is flawed and liable to be set aside.

14. On a consideration of the materials available on record, it is seen that the plaint schedule properties consist of 'A' and 'B' schedule properties. It is further noted that the items contained in 'A' schedule pertaining to dry lands, wet lands and house properties. The items contained in the B schedule pertaining to movable properties. As per the preliminary decree passed in the suit, the plaintiffs are entitled to be allotted 2/12th share in the plaint schedule properties both 'A' and 'B' schedule properties. All the items described in plaint 'A' schedule, it is noted that items 1 to 6 and 14 are dry lands and the total extent of dry lands measures 6 acres and 44 cents. As per the preliminary decree, the plaintiffs are entitled to 2/12 share which comes to 1 acre and 7 cents out of 6 acres and 44 cents as rightly determined by the Courts below. Considering the smaller extents of the properties comprised in items 1, 3 to 6 and 14 and considering the size of item No.2 of the properties to some extent of a larger size and accordingly inasmuch the plaintiffs are entitled to be allotted 1 acre and 7 cents in the dry lands as such, it is found that the Advocate Commissioner has suggested the allotment of the abovesaid extent of lands available in item 2 of the plaint 'A' schedule properties in favour of the plaintiffs with the right in the well located in the same survey number and the same has been shown in red colour in the Commissioner's plan. The abovesaid division suggested by the Advocate Commissioner found acceptance with the Courts below and accordingly Courts below had also noted that comparing item No.2, the other items of dry lands being of smaller extents noting that if the smaller extents of land are further divided, the parties would not be able to conveniently enjoy their respective shares to which they would be entitled to

as per the preliminary decree and considering the extent of item No.2 of the properties, some of them are larger in extent, accordingly it is found that the mode of division suggested by the Advocate Commissioner allotting the extent of 1 acre and 7 cents in the item No.2 in favour of the plaintiffs with the right in the well in the same survey number has been suggested. Taken into consideration the convenience and enjoyment of the parties in respect of dry lands and in such view of the matter, it is found that accordingly on that premise accepted the Commissioner's report and plan as regards the allotment of the plaintiffs' share in the dry land as above pointed. Considering the mode of division suggested by the Advocate Commissioner as regards the dry lands abovestated, as well as the reason given thereof and the analysis of the above said aspects by the Courts below being found to be in the right perceptive take into consideration the convenience of the parties in the enjoyment of the dry lands particularly the smaller extent of various items of dry lands in all it is seen that the Courts below are fully justified in upholding the mode of division suggested by the Advocate commissioner in the allotment of 1 acre and 7 cents in the item No.2 of the plaint A schedule properties in favour of the plaintiffs' right in the well located in the same survey number and has come to be seen from the contentions put forth by the plaintiffs in the matter when the plaintiffs have also no objection in the defendants' drawing water from the said well for their convenient enjoyment of their due shares in respect of the dry lands. In my considered opinion, no interference is called for in the allotment of the plaintiffs' shares insofar as the dry lands are concerned as determined by the Courts below.

15. As regards the wet lands are concerned comprised in items 8 to 13 and 17 to 21 of the plaint 'A' schedule properties, it is found that items 8 to 13 are located in Sirupannaiyur village and items 17 to 21 are located in Edaiyur village. The total extent of wet lands available in the two villages i.e., items 8 to 13 and items 17 to 21 measures 3 acres and 31 cents. As per the preliminary decree, the plaintiffs would be entitled to allot 2/12th share each comes to 0.55 cents. As rightly put forth by the Advocate Commissioner's report, in the usual course of division, the plaintiffs would be allotted their due shares in the wet lands located in the two villages. It is however noted that pending lis, the defendants 1 to 3 have sold items 17 to 21 lying in Edaiyur village to the 5th defendant and accordingly at the time of inspection of the suit properties by the Advocate Commissioner in the presence of the parties, it is found that the counsel appearing for the 5th defendant' had presented a memo of instructions to the Advocate Commissioner not to allot the items 17 to 21 to the plaintiffs' share and prayed for the allotment of the said items of the other defendants on the basis of equity. As rightly determined

by the first appellate court, even in the preliminary decree, the above factum of the defendants 1 to 3 having alienated items 17 to 21 of the wet lands to the 5th defendant had been taken into consideration and accordingly in the preliminary decree, it has been observed that the said position would be taken into consideration at the time of passing the final decree. Inasmuch as the items 17 to 21 had been alienated to the 5th defendant by the defendants 1 to 3 pending lis and the plaintiffs are to be allotted to 55 cents in the total extent of wet lands measures 3 acres and 31 cents based on equity as well as the convenient enjoyment of the respective parties, it is found that the Advocate Commissioner also taking into account, the lie of the lands in the two villages in all suggested the allotment of items 7 and 8 in favour of the plaintiffs located at Sirupannaiyur village towards their share and also held that though the two items in toto measures 59 cents, on the basis of the principles of equity, deemed it fit to allot the extent of 59 cents in favour of the plaintiffs so that the parties would be in a position to conveniently enjoy the same without any difficulty or hitch. The abovesaid mode of division suggested by the Advocate Commissioner found acceptance by the Courts below and accordingly taking into consideration, the principles of equity as well as the convenient enjoyment of the parties as regards the wet lands and also the existence of wet lands in two villages in all, it is found that the Courts below have rightly uphold the law in the abovesaid mode of division suggested by the Advocate Commissioner as regards the division of wet lands in the plaint 'A' schedule properties and in such view of the matter, in my considered opinion also, no interference is called for with reference to the same and accordingly the same is confirmed.

16. Though, it is put forth that the Advocate Commissioner should have suggested the mode of division in respect of each and every item of the suit properties independently, however as rightly put forth by the plaintiffs, the convenient enjoyment of the parties should also be taken into consideration, while effecting the division as well as the alienation made by the defendants 1 to 3 in favour of the 5th defendant pending lis and furthermore, when the defendants particularly the second defendant, who has preferred the second appeal has not placed any material to evidence that the shares allotted to the plaintiffs both as regards the dry lands and wet lands are more valuable than the other items of the plaint schedule properties. It is found that the mode of division suggested by the Advocate Commissioner as regards the dry lands and wet lands and as confirmed by the Courts below, it is found that the Courts below had analysed the rights and instrument of the respective parties in the abovesaid items of the properties qua their mode of enjoyment in all aspects and accordingly, rightly uphold

the mode of division of the same as suggested by the Advocate Commissioner. As regards the house properties comprised in item 15 and 16, it is found that the item 15 is the tiled house and item 16 is the thatched house as per the preliminary decree, however as it at present, it is a terraced house. As rightly put forth by the Advocate Commissioner, considering the nature of the house properties available, it may not be possible to divide the same as per preliminary decree passed in the suit as the same would not be convenient to the enjoyment of the parties concerned in a possible manner and accordingly, it is found that he had chosen to obtain the valuation of the abovesaid items of the house properties from the VAO concerned and it is found that the VAO concerned has issued the certificate determining that the item No.16 is valued at Rs.1,50,000/- and Item No.15 is valued at Rs.30,000/-. Insofar as the abovesaid valuation determined by the VAO, neither the plaintiffs nor the defendants have placed any material to hold that the value of the house properties abovestated are higher than the value determined by VAO. With reference to the same, no material is forthcoming from either of the parties concerned. Accordingly, it is seen that the total value of the two house properties amounting to Rs.1,80,000/- and the plaintiffs being in respect of the allotment of 2/12th share in the matter as per the preliminary decree, it is found that the value of the plaintiffs' share would come to Rs.30,000/-. In such view of the matter, item No.15 of the house properties being valued at Rs.30,000/- by the VAO concerned, the Advocate Commissioner had suggested the allotment of the abovesaid item of the house properties in favour of the plaintiffs as per the preliminary decree. Considering the abovesaid factors in toto in particular, neither of the parties had placed any material to hold that the value of the house properties are higher than the value fixed by the VAO and considering the instrument of the plaintiffs to the same, as per the preliminary decree, I do not find any reason to interfere with the allotment of item 15 of the house properties to the plaintiffs as per the preliminary decree as suggested by the Advocate Commissioner and as confirmed by the Courts below.

17. As regards the plaint 'B' schedule properties are concerned, they are movable properties and it is noted by the Advocate Commissioner that he is unable to trace the above movables as described in the plaint B schedule. However, considering the valuation given in the preliminary decree amounting to Rs.42,000/-, it is found that the Advocate Commissioner has suggested the plaintiffs are entitled to receive Rs.7,000/- towards their share allotted in their favour as per the preliminary decree and accordingly suggested the said mode of division. Though it is put forth in the objections of the third defendant that the movables as described in the B schedule are not available and do not belong to the joint family

and the Commissioner who had inspected the same had --- of the certain items of the movable properties, however as determined by the first appellate court, in particular, in the Advocate Commissioner's report, it has not been stated that the movables described in the plaint 'B' schedule properties are not available at all and in such view of the matter, when preliminary decree directs that the plaintiffs should be allotted to 2/12 share in the plaint 'B' schedule properties also and in such view of the matter, the mode of division suggested by the Advocate Commissioner as regards the movable properties in the allotment of Rs.7,000/- in favour of the plaintiffs is found to be rightly accepted by the Courts below. As determined by the first appellate court, if really the properties as described in the plaint B schedule do not belong to the joint family are not available, the defendants should have challenged the preliminary decree passed in the suit with reference to the same. On the other hand, the defendants have not thrown any challenge as regards the allotment of the plaintiffs' share qua the movable properties and in such view of the matter contended that the movable properties as described in the plaint B schedule are not available or do not belong to the joint family as such. I do not find merit acceptance and the same had been rightly rejected by the Courts below. I do not find any reason to interfere with the abovesaid determination of the Courts below.

18. Contention has been putforth by the second defendant that the sum of Rs.40,000/- should be earmarked to meet the marriage expenses of the third defendant and accordingly allotment of the plaint schedule properties should be made with reference to the same. However, as rightly determined by the Courts below, when there is no direction in the preliminary decree that a sum of Rs.40,000/- should be earmarked out of the plaint schedule for meeting the marriage expenses of the third defendant in particular the abovesaid contention put forth by the second defendant in particular, for resisting the final decree, application preferred by the plaintiffs do not merit acceptance and is found to have been rightly rejected by the Courts below.

19. In the light of the above discussion, the contention put forth by the counsel appearing for the second defendant that the Courts below had blindly and mechanically adopted the Commissioner's report and plan without independently determining the rights and instruments of respective parties qua the suit properties is found to be not acceptable. Considering the mode of division suggested by the Advocate Commissioner in his report and plan and the reasonings and conclusions of the Courts below made on an analysis of the same and when in toto the mode of division as suggested by the Advocate Commissioner and as

determined by the Courts below are found to have been done, taking into consideration the various factors as above discussed and also the convenient enjoyment of the parties concerned qua the plaint schedule properties involved in the matter and furthermore when the second defendant in particular or the other defendants have not placed any material contra to the mode of division suggested by the Advocate Commissioner and as confirmed by the Courts below by placing any material so show that the value of the properties allotted to the plaintiffs are on the higher side than the other items of the properties reserved for the defendants. In my considered opinion, the mode of division as suggested by the Advocate Commissioner and the acceptance of the same by the Courts below is found to be on proper reasonings and conclusions of the available materials on record as well as the contention put forth by the respective parties in the proper manner and accordingly, no interference is called for with reference to the same. The substantial question of law formulated in the second appeal is accordingly answered against the second defendant and in favour of the plaintiffs.

20. In support of his contentions, learned counsel for the second defendant placed reliance upon the decisions reported in

1. 1988 AIR (Kerala) 169 [Dr.P.Subramaniam Vs. K.S.E.Board and others]
2. 1962 AIR (SC) 1493 [R.N.S.S.Munnalal and others Vs. S.S.Rajkumar and others]
3. 1986 AIR (Orissa) 203 [Dhadi Barik and others Vs. Arjun Barik and others]

The principles of law outlined in the abovesaid decisions are taken into consideration and followed as applicable to the facts and circumstances of the case.

21. In conclusion, the second appeal fails and is accordingly dismissed with costs. Consequently, connected miscellaneous petition, if any, is closed.

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Sd/-

Assistant Registrar

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Sub Assistant Registrar

To

1. The Principal District Judge,
Villupuram

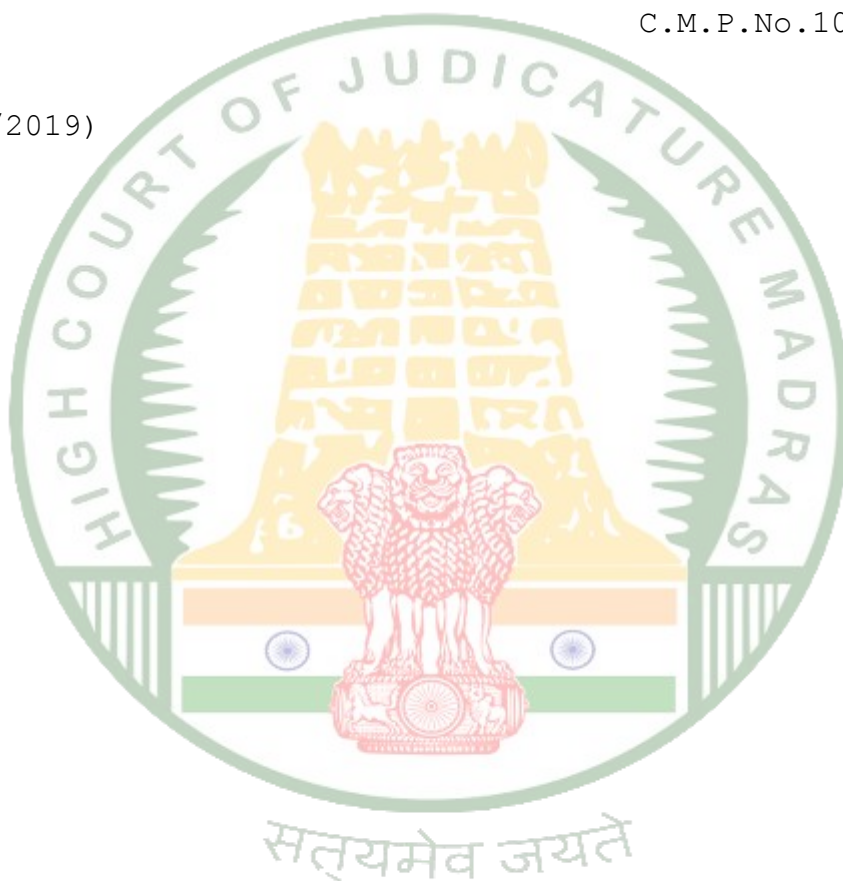
2. The Principal District Munsif,
Tirukoilur.

+1cc to Mrs.V.Srimathi, Advocate, SR.No.12117

+1cc to M/s.A.L.Gandhimathi, Advocate, SR.No.12665

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and
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