

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 21.06.2019

PRONOUNCED ON: 29.07.2019

CORAM:

THE HON'BLE MR.JUSTICE T.RAVINDRAN
S.A.No.88 of 2016
and
C.M.P.No.2202 of 2016

1.Ponniyammal

2.Murugan ... Appellants/ Defendants 1&2

Vs.

1. Pachiyammal @ Pavunayal

Muthayammal (person of unsound mind) (Died)

Pachiyannan (Died)

Minichi (Died)

2.Rangasamy

3.Pachamuthu

4.Muthu

5.Perumayee

... Respondents/Pliatniffs 1&2/ Defendants 3 to 8

Prayer: Second Appeal filed under Section 100 of C.P.C., against the judgment and Decree dated 07.03.2015 made in A.S.No.54 of 2014 on the file of the Sub Court, Bhavani, confirming the fair and final order dated 29.11.2013 made in I.A.No.100 of 2010 in O.S.No.20 of 1996 on the file of the I Additional District Munsif Court, Bhavani.

For Appellants : Mr.Kaithamalai Kumaran

For Respondents : No appearance

Set exparte

vide order dated 21.06.2019

J U D G M E N T

The Second Appeal is directed against the judgment and decree dated 07.03.2015 passed in A.S.No.54 of 2014 on the file of the Subordinate Court, Bhavani, confirming the fair and decreetal order dated 29.11.2013 passed in I.A.No.100 of 2010 in O.S.No.20 of 1996 on the file of the I Additional District Munsif Court, Bhavani.

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

(i) Whether the Courts below are justified in amending the suit properties for effecting partition without amending the suit schedule property in the preliminary decree?

(ii) Whether the final decree adding the properties not shown in the suit schedule of properties without amending the suit schedule properties is sustainable?

(iii) Whether the final decree in an agricultural property without the right of water channel is sustainable?

3. Considering the scope of the issues involved between the parties as regards the subject matter lying in a narrow compass, it is unnecessary to dwell into the facts of the case in detail.

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

5. Suffice to state that the suit has been laid by the plaintiffs against the defendants for the reliefs of declaration and possession or in the alternative for partition, past and future mense profits. The abovesaid suit has been contested by the defendants and the trial court, based on the appreciation of the materials placed on record by the respective parties and the submissions made,

determined that the plaintiffs are the owners of the suit properties and entitled to recover the possession of the same from the defendants and relegated the determination of the mense profits by way of a separate proceedings under Order 20 Rule 12 CPC and accordingly disposed of the plaintiffs' suit in favour of the plaintiffs and by way of the same, declined the alternative relief of partition prayed for by the plaintiffs in the suit. The defendants 1 and 2 impugned the judgment and decree of the trial court by way of preferring the first appeal and the first appellate court also 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. Impugning the judgment and decree of the first appellate court as well as the trial court, the defendants 1 and 2 preferred the second appeal in the High Court in S.A.No.1115 of 2002 and this Court after considering the submissions putforth by the respective parties and determining that inasmuch as, the parties are admitting that already partition had been effected between Chinna Perumal Gounder and his brother and the suit properties were allotted to Chinna Perumal and the same were in his exclusive possession and enjoyment, accordingly further determining that the suit properties cannot be said to be the joint family properties after such partition and thereby modified the judgment and decree of the Courts below to the effect that the plaintiffs altogether will be entitled to 2/3 share in the suit properties and the defendants 1 and 2 would be entitled to 1/3 share in the suit properties and accordingly granted the preliminary decree in the suit on the above terms and accordingly disposed of the Second Appeal. Following the judgment and decree of this Court in the abovesaid Second Appeal, the plaintiffs had preferred I.A.No.100 of 2010 in O.S.No.20 of 1996 before the trial court for passing the final decree in terms of the preliminary decree granted by the High Court. The defendants 1 and 2 contested the abovesaid final decree application preferred by the plaintiffs on various grounds and the trial court had appointed an Advocate Commissioner to suggest the mode of division of the suit properties as per the preliminary decree passed in the matter and the Advocate Commissioner also filing his report and plan with reference to the same and after receiving the objections putforth by the parties with reference to the same, the trial court accordingly determined the 2/3 shares to be allotted to the plaintiffs based on the same and accordingly passed the final decree in favour of the plaintiffs. Challenging the same, the defendants 1 and 2

had preferred the first appeal, and the first appellate court has also considering the resistance putforth by the defendants with reference to the said allotment of the shares to the parties concerned in respect of the suit properties by the trial court and considering the submissions made, concurred with the order of the trial court granting the final decree in favour of the plaintiffs. Challenging the same, the present second appeal has been preferred.

6. In this Second Appeal, the argument has been putforth by the defendants' counsel that there is no relationship whatsoever between the properties divided as per the preliminary decree and the properties described in the suit, both in respect of the survey numbers and extents and therefore according to him, on that ground alone, the grant of the final decree by the Courts below in favour of the plaintiffs is liable to be dismissed. However, as rightly found by the Courts below, it is found that the suit has come to be laid by the plaintiffs based on the materials available with them and thereafter as rightly found by the Courts below, the suit properties had been divided in the resurvey proceedings and accordingly the survey numbers and the corresponding extents as divided in the resurvey, had changed and in such view of the matter, it is found that it is only the suit properties which had come to be divided by way of the final decree proceedings and furthermore to buttress that the suit properties are involved in the final decree proceedings, it is found that the plaintiffs had also filed the A Register extracts as Exs.P1 to P10 in the final decree proceedings and considering the abovesaid documents in toto, as rightly found by the Courts below, it is seen that it is only the suit properties which had come to be divided by way of the final decree proceedings and therefore the contention putforth by the defendants' counsel that there is no relationship between the suit properties and the properties divided by way of the final decree proceedings has been rightly turned down by the Courts below and considering the reasonings and conclusions of the Courts below with reference to the same, in my considered opinion, no valid ground is made out to warrant any interference with the abovesaid determination.

7. Furthermore, the defendants' counsel also contended that the extent also varies with reference to the properties described in the plaint and the properties which had come to be divided by way of the final decree proceedings and further contended that in respect of

certain survey numbers, lesser extent had come to be divided and in respect of certain survey numbers, more extent had come to be divided and accordingly putforth the defence that the plaintiffs are endeavoring to divide the new properties that what had been described in the plaint by way of the final decree proceedings. However, as rightly found by the Courts below, it is seen that the Advocate Commissioner who had been appointed in the matter, had inspected the suit properties with the assistance of the surveyor and accordingly measured the same and found the actual extent available in the concerned suit survey numbers and in such view of the matter, when on ground the extent of the various survey numbers involved in the matter had been identified/measured and determined by the Advocate Commissioner with the assistance of the surveyor, in such view of the matter, the contention putforth by the defendants' counsel that the extents of the properties divided by way of the final decree proceedings and the extents shown with reference to the suit properties by the plaintiffs in the plaint differ cannot be accepted and accordingly, it is found that the Courts below had rightly appreciated the abovesaid objection putforth by the defendants and rejected the same.

8. The argument has also been putforth by the defendants' counsel that the Courts below had failed to ascertain whether the properties had been actually divided between Chinna Perumal Gounder and his brother and according to him, the share of Chinna Perumal Gounder in the suit properties had not determined so far till date and therefore the position being the above, the final decree should not have been passed by the Courts below. As rightly found by the Courts below, in respect of the abovesaid contention if at all, the share of Chinna Perumal Gounder had not been determined in the partition effected with his brother, the same should have been urged by the defendants before the High Court in the Second Appeal proceedings. On the other hand, the defendants having failed to substantiate the abovesaid contention before the High Court and when the High Court clearly held that the suit properties had been divided between Chinna Perumal Gounder and his brother and the suit properties had come to be allotted to Chinna Perumal Gounder, in such view of the matter, the abovesaid contention has been rightly rejected by the Courts below and I do not find any valid reason to warrant interference with the abovesaid determination of the Courts below.

9. The contention has also been put forth by the defendants that without ascertaining the right of Chinna Perumal Gounder in the well attached with 5HP motor, the well cannot be partitioned. However as rightly found by the Courts below, pending the final decree proceedings, the plaintiffs had established the right of Chinna Perumal Gounder in respect of the well in question and accordingly also effected necessary amendments for proceeding further in the final decree proceedings and as against the same, the defendants having not preferred any challenge in any manner and in such view of the matter, the defendants cannot be allowed to re-agitate the issue as if the well in question had been divided in the final decree proceedings without ascertaining the right of Chinna Perumal Gounder qua the same. Equally, the argument put forth that the amendment had been effected by the plaintiffs as regards the suit properties without amending the plaint schedule properties in the preliminary decree also cannot be accepted as such. Considering the fact that the parties are put on notice about the amendment effected during the course of final decree proceedings and when as per the preliminary decree passed in the suit, the plaintiffs are entitled to be allotted their shares in the suit properties, it is found that the abovesaid argument of the defendants' counsel, in my considered opinion, would not, as such, affect the decision of the Courts below in granting the final decree in favour of the plaintiffs as determined by them.

10. As rightly found by the courts below, one way or the other, the defendants had been resisting the plaintiffs' case, so as to deprive them from the enjoyment of the suit properties as per the decree granted in their favour by High Court. However, when the abovesaid contentions projected by the defendants had been rightly turned down by the Courts below and the reasonings and conclusions of the Courts below for rejecting them are not shown to be suffering from any illegality or perversity or irrationality in any manner, in such view of the matter, in my considered opinion, the Courts below had properly appreciated the materials available on record in the proper perspective and accordingly passed the final decree in favour of the plaintiffs and in such view of the matter, no substantial question of law is involved in this appeal. Be that as it may, the substantial questions of law formulated in the second appeal are accordingly answered in favour of the plaintiffs and against the defendants.

11.In conclusion, the second appeal fails and is accordingly dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar(CS VIII)

//True Copy//

Sub Assistant Registrar

mfa
To

1. The Subordinate Judge,
Sub Court,
Bhavani.

2.The Additional District Munsif,
Additional District Munsif Court,
Bhavani.

Copy to
The Section Officer,
VR Section,
High Court,
Chennai.

+1cc to Mr.Kaithamalai Kumaran , Advocate SR.No. 64544

S.A.No.88 of 2016
and
C.M.P.No.2202 of 2016

A.SK(03/10/2019)

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