

IN THE HIGH COURT OF JUDICATURE AT MADRAS

[JUDGMENT RESERVED ON : 12.07.2019]

[JUDGMENT PRONOUNCED ON : 15.10.2019]

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.No.812 of 2018

and

C.M.P.Nos.22549 of 2018

& C.M.P.No.4875 of 2019

1. D.N.Sundari Bai
2. D.N.Gayathri
3. Sri Priya
4. D.N.Logesh Appellants/Defendants 2 to 5

.. Vs ..

1. A.G.Nagammal Bai 1st Respondent/Plaintiff
- D.V. Narayana Sah (Deceased)
2. D.N.Kalavathi Bai
3. D.V.Vijaya Sankar Sah
4. K.Sharmila Respondents 2 to 4/Defendants 6 to 8

Prayer : Appeal is filed under Section 100 of the Civil Procedure Code against the judgment and decree dated 28.04.2018 made in A.S.No.2 of 2016 on the file of the learned District Judge, District Court No.II, Kancheepuram District, reversing the fair and decreetal order passed by the learned Subordinate Judge, Kancheepuram, in I.A.No.1121 of 1994, in OS No.57 of 1989 dated 10.07.2015.

For Appellants : Mr.S.Parthasarathy, Senior Counsel
for Mr.K.S.Navin Balaji

For R-1 : Mr.T.R.Rajagopalan, Senior Counsel
for Ms.P.Veena Suresh

For RR-2 & 3 : Mr.P.B.Balaji
For R-4 : No Appearance

JUDGMENT

By an administrative order of my Lord, The Hon'ble The Chief Justice, the matter was posted for disposal.

2. In view of the submissions made by the respective learned Senior Counsel that factual mistake has been committed by the Lower Appellate Court, by consent of all the parties, the Second Appeal itself is taken up for final disposal and final order is passed in the Second Appeal.

3. Mr.S.Parthasarathy, learned Senior Counsel representing Mr.K.S.Navin Balaji, learned counsel appearing for the appellants/stay petitioners in C.M.P.No.22549 of 2018 would submit that balance of convenience lies in favour of the observation made by this Court in the preliminary proceedings in A.S.No.786 of 1993 at paragraph No.72 regarding the non-sold properties and the sold properties, which have not been taken note of by the trial Court, while allotting the property. The learned Senior Counsel further submitted that the plaintiff has not filed any Second Appeal against the order made in A.S.No.786 of 1993.

4. Mr.T.R.Rajagopalan, learned Senior Counsel representing for M/s.P.Veena Suresh, learned counsel appearing for the first respondent gone into clause No.72 of the judgment in A.S.No.786 of 1993 and also produced a copy of the memo filed by the first respondent/plaintiff before the learned District Judge No.II, Kanchipuram in A.S.No.2 of 2016 and made a submission that after the disposal of the first round of litigation in A.S.No.2 of 2016 regarding the preliminary decree, the appellants herein were in the hope of selling the property, de hors the observation made therein and thereby, they have created the situation, which is now adversable to them and further, from the copy of the memo produced by the learned Senior Counsel, it appears that Item Nos.1 to 18, seems to have been sold during the final decree proceedings.

5. Mr.S.Parthasarathy, learned Senior Counsel appearing for the appellants has filed additional typed set of papers comprising an Encumbrance Certificate for the Survey numbers alleged to have been encumbered by the appellants.

6. Mr.T.R.Rajagopalan, learned Senior Counsel appearing for the first respondent would contend that the finding rendered by the Lower Appellate Court that the appellants had sold the property pending final decree proceedings is factually an error.

The learned Senior Counsel also brought to my notice that as far as allotment in the share of the appellants/defendants 2 to 5 is concerned, as already stated, they had sold entire properties. It is further submitted that on a perusal of the decree, it is seen that eight properties were sold even pendency of the suit. After passing of final decree and pendency of appeal before this Court until today, the appellants/defendants 2 to 5 sold the entire properties allotted to their share in the partition without caring about the court orders. Even after passing order by this Court, the appellants never stopped to sell the properties. But they are keeping the house properties till today without any alienation.

7. After hearing the learned counsel for the parties and taking note of the factual position as pointed out by the learned Senior Counsel Mr.T.R.Rajagopalan, and in view of the additional typed set of papers filed viz., the Encumbrance Certificate, it appears that the finding rendered by the Lower Appellate Court suffers from factual error.

8. Mr.S.Parthasarathy, learned Senior Counsel appearing for the appellants and Mr.T.R.Rajagopalan, learned Senior Counsel appearing for the first respondent have conceded the point that factual error has been committed by the Lower Appellate Court and hence, the matter has been re-argued before the Lower Appellate Court, the last Court for the factum of finding.

9. This Court perused the affidavit filed in C.M.P.No.22549 of 2018 and considered the rival submissions made by the learned Senior Counsel appearing for the appellants and the learned Senior Counsel appearing for the first respondent.

10. In the affidavit filed in support of the petition in C.M.P.No.22549 of 2018, it is stated as follows:-

[i] The first respondent herein/plaintiff has filed a suit in O.S.No.57 of 1989 on the file of the learned Subordinate Judge, Kancheepuram District for the relief of partition of 1/9th share of the suit schedule immovable property in Schedule 'A' and 1/3rd share of the movable property in Schedule 'B' therein in her favour.

[ii] The learned Subordinate Judge, Kancheepuram, decreed the said suit and passed a preliminary decree on 07.07.1993. Aggrieved by the said order of preliminary decree, the appellants herein/defendants 2 to 5 have preferred First Appeal in A.S.No.375 of 1995 before this Court.

[iii] It is pertinent to state that the first respondent

herein/plaintiff and respondents 2 to 4/defendants 6 to 8 have filed separate First Appeals in A.S.No.886 of 1993 and A.S.No.786 of 1993 respectively and by a common Judgment dated 26.09.2008, this Court has dismissed the Appeal in A.S.No.886 of 1993 filed by the plaintiff and partly allowed the appeals of the defendants namely, A.S.No.375 of 1995 and A.S.No.786 of 1993 thereby confirmed the preliminary decree dated 07.07.1993 in favour of the defendants.

[iv] This Court, while allowing the appeals, categorically held that while allotting shares to defendants parity be achieved by adjusting proportionately the value of the properties alienated by them in respect of their shares already allotted to them as per Ex.A.1.

[v] The first respondent/plaintiff has filed an Interlocutory Application in I.A.No.1121 of 1994 to pass a final decree in pursuance of the preliminary decree by appointing an Advocate Commissioner to divide the suit 'A' Schedule Properties into nine equal halves by metes and bounds and to allot one such share to the plaintiff. The learned Subordinate Judge had passed a Final decree dated 18.04.2001 allotting 1/9th share in Schedule 'A' property in pursuance of the report of the Advocate Commissioner.

[vi] Aggrieved by the order of the final decree dated 18.04.2011 passed by the learned Subordinate Judge, Kancheepuram, the appellants/defendants 2 to 5 have preferred First Appeal in A.S.No.13 of 2011 before the learned District Judge, District Court No.II, Kancheepuram. The respondents 2 to 4/defendants 6 to 8 have also filed an appeal in A.S.No.15 of 2011 against the final decree dated 18.04.2011 and the learned District Judge, after hearing all the parties, have passed a common judgment dated 03.01.2012 setting aside the Final Decree dated 18.04.2011 and also remanded the case to the trial Court.

[vii] Again, in the trial Court, the matter was contested afresh and after compliance of necessary formalities, the trial Court has once again passed final decree in I.A.No.1121 of 1994 on 10.07.2015 decreeing the suit in O.S.No.57 of 1989. As per the final decree dated 10.07.2015, the plaintiff was allotted 1/9th share of immovable property in Item Nos.1 to 11 of Schedule 'A' property to the suit as shown in lot 'B' and 'C' of the Advocate commissioner's report.

[viii] Against the order of final decree dated 10.07.2015, the respondents 2 to 4/defendants 6 to 8 have filed an First Appeal in A.S.No.2 of 2016 before the learned District Judge, District Court No.II, Kancheepuram. The learned District Judge,

District Court No.II, Kancheepuram, by its order dated 28.04.2018, set aside the Final Decree dated 10.07.2015 and made modifications in the allotment of shares to the plaintiff.

11. It is seen from the records that the Lower Appellate Court viz., District Court No.II, Kancheepuram, has held that the defendants 2 to 5/appellants herein had disobeyed the orders of the Court and in view of the above factual position, this Courts finds that the alienation appears not made by the appellants but however, the respondents 2 and 3 in the Second Appeal. Accordingly, the finding rendered by the Lower Appellate Court is hereby set aside.

12. In the result,

[i] The Second Appeal is allowed and the Judgment and decree passed by the Lower Appellate Court is hereby set aside.

[ii] The matter is remitted back to the Lower Appellate Court/District Court No.II, Kancheepuram, for fresh consideration, in the light of the encumbrance certificate which goes to show that the appellants/defendants 2 to 5 have not alienated any property and it is only other respondents 2 and 3 have effected alienation.

[iii] The Lower Appellate Court is directed to dispose of the appeal in accordance with law, as the suit is of the year 1989 and the matter pertaining to passing of Final Decree and the first respondent/plaintiff is 80 years old, it is a fit case to direct the Lower Appellate Court to dispose of the appeal, in accordance with law, within a period of twelve weeks from the date of receipt of copy of this judgement.

[iv] However, there shall be no order as to costs.

[v] The connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-IX)

//True copy//

Sub Assistant Registrar

Jrl

To

1. The District Judge, District Court No.II,
Kancheepuram District.

2. The Subordinate Judge, Kancheepuram District.

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

+1cc to Mr.T.R.Rajagopalan, Advocate SR.No.86206

+1cc to Mr.P.B.Ramanujam, Advocate SR.No.86368

+2cc to Mr.P.Dineshkumar, Advocate SR.No.86038

S.A.No.812 of 2018

SAI (CO)
GMY (17/10/2019)



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