



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATE: 05.12.2019

CORAM:

THE HONOURABLE MR.JUSTICE N.SATHISH KUMAR

S.A. (MD)No.575 of 2012

Kesavaperumal

.. Appellant / 1st Respondent/
Petitioner / 2nd Plaintiff

Vs.

1.Kulandai Nadar (Died)

.. 1st Respondent/Appellant/
1st Respondent/1st Defendant

2.Suyambu

.. 2nd Respondent/2nd Respondent /
2nd Respondent / 2nd defendant

3.V.Selva Saroja

4.K.Gayathri Devi

5.K.Palanivel Rajan

6.K.Kumaraguru Rajan

7.K.Lavanya Sathya Bama

.. Respondents 3 to 7

[RR 3 to 7 are brought on record as LR's of the deceased R1 vide order dated 13.06.2019, made in CMP(MD).Nos.2788 to 2790 of 2017]

(2nd Respondent set exparte in both the courts, hence notice to the 2nd respondent dispensed with)

PRAYER: This Second Appeal is filed under Section 100 of Civil Procedure Code, against the Judgment and Decree, dated 12.03.2012, made in A.S.No.33 of 2011, on the file of the learned III-Additional Subordinate Judge, Nagercoil, reversing the judgment and decree, dated 29.09.2010, made in I.A.No.35 of 2005 in O.S.No.1023 of 1989, on the file of the learned II-Additional District Munsif, Nagercoil.

For Appellant : Mr.M.P.Senthil

For Respondents : Mr.S.Ramesh

for R3 to R6

R1- died

R2- Exparte

R7- No appearance

JUDGMENT

Aggrieved over the judgment of the first Appellate Court, reversing the finding of the Trial Court, the present Second Appeal is filed.



2. After hearing the learned counsel for the appellant, the second appeal is admitted on the following Substantial Question of Law:

"Whether the first appellate Court is right in going on beyond the preliminary decree and invalidate the same, when the preliminary decree was already reached finality?"

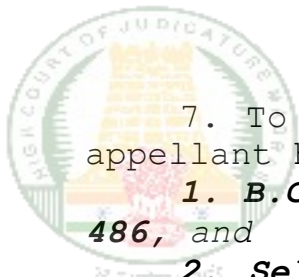
3. Heard the learned counsel for the appellant as well as the learned counsel for the respondents 3 to 6 and perused the materials available on record.

4. The facts leading to the filing of this suit are as follows:

The suit has been originally filed for demarcating the plaintiff's portion excluding the area sold by the plaintiff to her vendees defendants 18 to 30 and to evict the defendants, who are in possession of the plaintiff's share. Consequently, the mandatory injunction and permanent injunction are also sought in the above suit.

5. The suit was decreed exparte on 20.06.2003. However, the first defendant filed an application in I.A.No.33 of 2000 to set aside the exparte decree along with I.A.No.32 of 2005 to condone the delay in filing the application to set aside the exparte decree. The above applications are dismissed on 08.06.2007 as against which the revision was filed before this Court in C.R.P.(MD).No.1886 of 2011 and the same was dismissed on 16.03.2018. This fact is not disputed. As the preliminary decree reached finality, the plaintiff has filed an application in I.A.No.35 of 2005 in O.S.No.1023 of 1989, for passing the final decree. In the final decree proceedings, the advocate commissioner was appointed and he filed a report. Based on the above report, and also the fact that no objection whatsoever filed by the first defendant with regard to the commissioner's report and sketch, the final decree has been passed. The portion shown as B, C and H in the Commissioner's Report has been allotted to the plaintiff, as against which the appeal in A.S.No.33 of 2011 was filed before the learned III-Additional Subordinate Judge, Nagercoil, wherein the learned Judge has allowed the appeal on the ground that the preliminary decree is in-executable and there is no proper decree was passed by the trial Court. Aggrieved over the same, the present second appeal has been filed.

6. The learned counsel for the appellant vehemently contended that the approach of the first Appellate Court is against law. He further contended that at the time of deciding an appeal, the first Appellate Judge shall not set aside the preliminary decree, which has already reached finality. Such approach is erroneous and against the settled position of law.



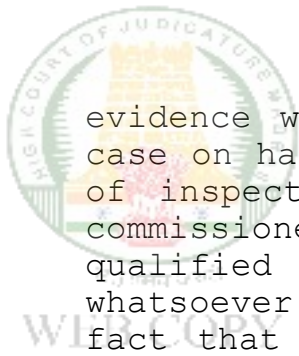
7. To substantiate his submission, the learned counsel for the appellant has relied upon the following judgments:

1. **B.Chitti Babu @ Devarajulu**, reported in **2019 (3) MWN (Civil) 486**, and
2. **Selvi vs. Gopalakrishnan Nair and others**, reported in **2018 (5) LW 530**.

8. It is the further contention of the learned counsel for the respondents 3 to 6 that in the preliminary decree, the extent has not been properly provided. Therefore, the first Appellate Court is right in holding that the decree is in-executable. He further submitted that the Court has not framed the preliminary decree and the same is not executable.

9. As the facts narrated above makes it very clear that the preliminary decree has been reached finality and the relief sought for in the preliminary decree is to divide the remaining properties in the northern side and eastern side equally, after the sale of settled properties. Since the above preliminary decree is reached finality, the appeal, filed by the first defendant also failed and the revision also dismissed. Thereafter, the Commissioner was appointed at the time of final decree proceedings and the commissioner, in fact visited the scheduled properties. The scheduled properties were measured in the presence of the first defendant with a qualified surveyor. The sketch has also been drawn and the report has been filed, identifying the properties, which are sought to be allotted to the plaintiff. Based on the above report, and also the fact that no objections whatsoever filed by the first defendant with regard to the commissioner's report, the first Appellate Court has passed the final decree in favour of the plaintiff. Since the plaintiff has paid the court fee, the final decree was passed in favour of the plaintiff. Whereas the first appellate Court has gone beyond the preliminary decree in appeal arising out of the final decree and set aside the preliminary decree itself which is certainly beyond the scope of the appeal filed as against the final decree.

10. It is also well settled that once the preliminary decree is reached finality, it is not open to the parties to question the same in the final decree proceedings. In this regard, this Court has passed a judgment in the case of **B.Chitti Babu @ Devarajulu**, reported in **2019 (3) MWN (Civil) 486**, wherein it has been held that as long as the preliminary decree reached the finality, the parties and defendants are restrained from questioning the validity of the decree. Further, in the case of **Selvi vs. Gopalakrishnan Nair and others**, reported in **2018 (5) LW 530**, the Hon'ble Apex court has held that when the second defendant has not filed an appeal challenging the correctness of the preliminary decree, when there are description of the property, the Court dealing with the final decree proceedings ought to have directed the parties to adduce



evidence with regard to the description of the properties. In the case on hand, the first defendant was very much present at the time of inspection and survey of the properties done by the advocate commissioner. In fact the first defendant has consented for the qualified surveyor to measure the properties. Besides no objection whatsoever filed before the Court, that itself clearly indicates the fact that there was no dispute with regard to description of the properties.

11. Hence, this Court is of the view that the findings of the first Appellate Court is certainly beyond the scope of the settled position of law. Accordingly, the same is set aside and the Substantial Question of Law is answered as above.

12. In the result, this Second appeal is allowed. No Costs.

Sd/-

Assistant Registrar (CS-I)

// True Copy //

/ /2020

Sub Assistant Registrar(CS)

PJL

To

1. The III-Additional Subordinate Judge,
Nagercoil.

2. The II-Additional District Munsif,
Nagercoil.

3.The Section Officer, (2 COPIES)
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.

+1 CC to M/s.V.RAGHAVACHARI, Advocate (SR-103711[F]

+1cc to M/S.M.P.Senthil, Advocate, Sr.No.103749

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SMA/22/01/2020/4P/7C