

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.02.2020

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

A.S.No.672 of 2006

B.R.Mohanlal

..Appellant/1st Defendant

Vs.

1.M.Pravin lal @ Prabhu ..1st Respondent/Plaintiff
2.B.G.Rajagopal [Died] ..2nd Respondent/2nd Defendant
3.M.B.Indirani ..3rd Respondent

[R1 declared as major vide order dated 06.11.2014 made in M.P.No.1 of 2011
R3 brought on record as L.R of the deceased R2 vide order dated 03/12/2019 made in C.M.P.Nos.4753 to 4755 of 2018 in A.S.No.672 of 2006]

Prayer : First Appeal filed under Section 96 of CPC against the Judgment & Decree dated 23.06.2005 passed in O.S.No.34 of 2003 on the file of the Additional District Judge, Fast Track Court No.I, Salem.

For Appellant :Mr.M.Sivavarthanan
For Respondents :Mr.D.Shivakumaran for R1
Mr.K.S.Karthick Raja for R3
R2-Died steps taken

J U D G M E N T

The final decree passed in O.S.No.34 of 2003 dated 23.06.2005, on the file of the Additional District Judge, Fast Track Court No.I, Salem, is under challenge in the present appeal suit.

2. The suit was instituted for partition and separate possession to direct the defendants for division of the suit properties by metes and bounds into four equal share and allot one such share to gather with possession to the minor plaintiff and make provision for appointing a commissioner for proper division of the suit properties by metes and bounds, considering the good and bad soil and its value and the right of passage, and for passing the final decree in accordance with the preliminary decree for allotment of such share in the plaintiff

and pass a decree for permanent injunction against the defendants and their men, agents, power holders, administrator, restraining them in any manner alienating or creating any encumbrance over the suit property till the final partition is effected and allotment of the share of the plaintiff is ordered with cost.

3. Preliminary decree was passed allotting shares to the plaintiff and accordingly, the rights of the parties were crystallized. An application was filed for passing final decree and the Trial Court appointed an Advocate Commissioner, who in turn, submitted a report on 07.01.2005. The contention of the appellant before this Court is that the property is indivisible. The Commissioner's report dated 07.01.2005 and 04.03.2005 clearly states that "the property is having its entrance facing the west and since the same is surrounded by the properties of the third parties on the east, north and south, the same cannot be divided from any other direction except the west. The width of the property (North-South) on the west inclusive the thickness of northern and southern walls is 14'.5". If it is divided from west to east into four equal shares, the width of each share would be 3'.10" to a length of 83'. 10". Even if it is so divided, the shares have to put up partition walls between their respective shares atleast with a thickness of 9" and even if such partition walls are put up as common partition walls, then the width of each share would be 3'.2". If division is effected as per the preliminary decree the width of each share would be 3'.2", if common partition are put up between the respective shares of the shares and if no such common partition walls are put up, the width of each share would be 3'.10". If the property is divided into four equal shares from west to east, the shares could not conveniently and effectively enjoy their respective shares and it would not also be beneficial for the shares". Accordingly, the Commissioner formed an opinion that the suit property is indivisible from west to east and it may not be divided from any other direction. Yet another report was filed, wherein the Commissioner has stated that the property is indivisible and partition cannot be effectively made, enabling the parties to enjoy the same.

4. This being the consistent finding of the Advocate Commissioner, the Trial Court took an exception and passed a decree stating that " (1) The northern portion in the ground floor of the suit property measuring on the north-south on the Eastern and Western side 7 feet and on east-west on the north and south measuring 83 feet and inches is allotted as the petitioner's share. (2) 5 inches of property between the petitioner's above said share of 7 feet X 83 feet 10 inches and the respondent's share on the southern side is allotted as common share for both the parties to construct a common wall."

5. The learned counsel appearing on behalf of the appellant reiterated that it is impracticable to divide the property in such manner as per the decree passed by the Trial Court. Thus, the decree is perverse and in violation of the Commissioner's report stating that the suit property is indivisible.

6. The learned counsel appearing on behalf of the respondents, though opposed the contention, unable to establish that the property is effectively divisible. The report of the commissioner is unambiguous that the property, in the event of such division cannot be enjoyed by any of the parties, therefore, arrived at a conclusion that it is indivisible. This being the factum, the Trial Court has not considered the findings of the Commissioner in his report and taken a contrary view and held that the property is to be divided and in the event of effecting the final decree, the party would not be in a position to enjoy the property and the property cannot be utilized for any other purpose.

7. This being the factum, this Court is of the opinion that the final decree passed by the Trial Court is perverse and impracticable and accordingly, the final decree dated 23.06.2005 passed in O.S.No.34 of 2003 is quashed. However, the Trial Court is directed to appoint an approved surveyor/valuer for the purpose of ascertaining the actual market value of the suit property in question and accordingly, permit the appellant to deposit the amount equivalent to the 1/4 share allotted to the first respondent/plaintiff in the credit of O.S.No.34 of 2003 and the first respondent/plaintiff is entitled to withdraw the said amount on deposit, by filling an appropriate application. The said exercise of fixing the market value and depositing the amount for 1/4 share allotted to the first respondent is to be done within a period of six months from the date of receipt of a copy of this Judgment. Accordingly, the first appeal stands allowed. No costs.

-s/d-
Assistant Registrar

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Sub-Assistant Registrar

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To

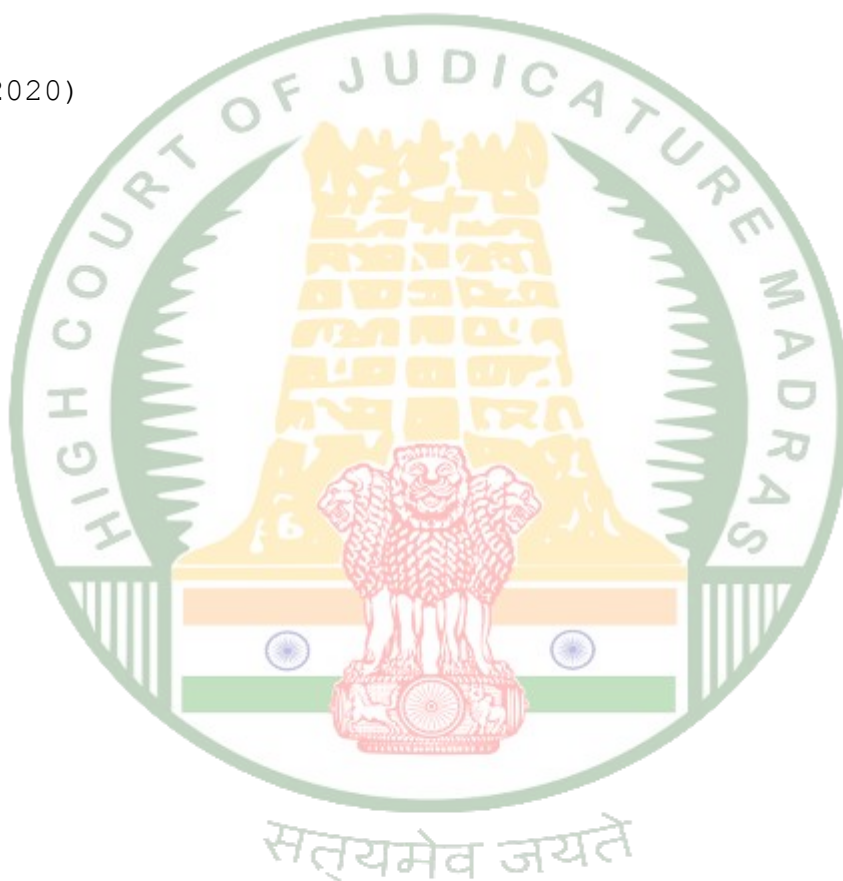
The Additional District Judge,
Fast Track Court No.I, Salem.

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The Section officer
VR Section
High Court, Madras 104.

+1 CC to Mr.D.Shivakumaran, Advocate sr 8748
+1 CC to Mr.M.Sivavarthan, Advocate sr 8450.

A.S.No.672 of 2006

KK(CO)
SP(12/08/2020)



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