

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on :17.12.2020

Pronounced on :21.12.2020

Coram:

THE HONOURABLE DR. JUSTICE G. JAYACHANDRAN

S.A.No.554 of 2013

and

M.P.No.1 of 2013

1.Vadivel
2.Sumathi
3.Sugantha

.. Appellants/Appellant/
defendants

/versus/

Saroja

.. Respondent /Respondent/
Plaintiff

Prayer: Second Appeal has been filed under Section 100 of the Civil Procedure Code against the judgment and decree of the Principal District and Sessions Court at Erode, dated 05.09.2012 in A.S.No.1 of 2012 confirming the judgment and decree of the I Additional Subordinate Judge's Court at Erode dated 31.01.2011 in I.A.No.982 of 2000 in O.S.No.105 of 1993.

For Appellants :Mr.P.Valliappan

For Respondent :Mr.P.B.Sampathkumar

JUDGMENT

(The case has been heard through video conference)

The second appeal is filed by the defendants in the suit filed for partition.

2.This appeal is filed against the final decree on the ground that the allotment of shares in the property has not been divided equitably and the Commissioner Report accepted by the Courts below is vitiated due to lopsided proposal.

3.This Court, at the time of admitting the second appeal, has formulated the following Substantial Questions of Law for consideration:

(a)Whether the Courts below are correct in law in passing a final decree on the basis of Exhibits C1 to C7 Commissioner's Report and plan which are clearly lopsided and against the

appellants?

(b) When the Commissioner has divided the property in such a manner that the valuable portions on the road side have been allotted to the respondent and the interior portions have been earmarked for the appellants, are the Courts below are correct in law in passing final decree on the basis of the said reports and plans which are clearly unfair?

4. Before answering the Substantial Questions of Law, it is appropriate to narrate the background of the case.

The dispute is over the property left behind by one M.Muthusamy gounder(Junior), who died in the month of September 1991. The litigants are the first wife of M.Muthusamy gounder and her daughter on one side as plaintiffs and his second wife, son and daughter on the other side as the defendants.

5. Plaintiffs 1 and 2 mother and daughter joined together and filed a suit for partition on the premises that items 1 to 3 of the suit property are the absolute property came into the exclusive possession of M.Muthusamy gounder(Junior) in terms of the family settlement between himself and his father K.Muthusamy (Senior), and his two sisters. Item 4 of the suit property is the ancestral property came into the hands of the said Muthusamy gounder(Junior). Item 5 of the suit property is purchased in the name of the 1st defendant Vadivel, Son of Muthusamy gounder (Junior) from out of the income derived from Items 1 to 4 of the suit property.

6. The first plaintiff, who is the mother of the second plaintiff died, pending suit. The Trial Court passed preliminary decree holding that the second plaintiff is entitled for $\frac{1}{2}$ share in the suit property. Liberty was granted to the second plaintiff to proceed against the first defendant for rendition of account and for mesne profits, as per Order 20, Rule 12 of the Civil Procedure Code. Pursuant to the preliminary decree I.A.No.982 of 2000 in O.S.No.105 of 1993 was filed for appointment of Advocate Commissioner to measure the suit land and divide it by metes and bounds. Accordingly, the Advocate Commissioner inspected the suit property, measured the suit land with the help of surveyor and submitted his report annexed with sketch of proposal for division. After receiving the objection from the parties, the trial Court has passed final decree on 31.1.2011.

7. Aggrieved over the final decree, the appellants/defendants herein preferred appeal before the first appellant Court. The first appellate Court confirmed the final decree passed by the trial Court.

8. Aggrieved by the judgment of the first appellate Court, the appellants/defendants have preferred this appeal on the ground that the lower appellate Court has failed to consider the possession and exclusive enjoyment of the house in the suit property in S.F.No.257 by the appellant and has allotted one plot to the respondent in it. In S.No.264 allotted the land abutting the road is allotted to the plaintiff and the interior portion is allotted to the respondent. While dividing 2.50 acres of land in S.F.No.31 want only the 0.16 ½ cents of land encroached by the third parties has been allotted to the appellants leading to unequitable distribution.

9. The lower appellate Court, after considering the grounds of appeal, has held that the appeal is filed only to drag the proceedings to delay the distribution of land to the plaintiff. It is found no infirmity in the judgment of the trial Court in allotting the shares between the parties and dismissed the appeal confirming the final decree passed by the trial Court.

10. The learned counsel appearing for the appellants/defendants, on drawing the attention of this Court to the sketch annexed to the decree and the manner in which, the property has been divided, submitted that as far as the first item of the property in S.No.264/3 concern, it is in triangle shape. While blue mark portion allotted to the 2nd plaintiff, she have access on southern and western side. Whereas, the land allotted to the appellants herein have access only on the western side and it is interior. Likewise, the house property in S.No.257, which was in exclusive possession of the appellants has been divided and the vacant portion has been allotted to the plaintiff and particularly, S.F.No.31, out of total extent of 2.50 acres, admittedly, 16 ½ cents of land on the southern portion is infested with encroachers. Having noted the encroachment, the Commissioner ought to have divided the remaining land available for division, instead he has taken entire 2.50 acres of land and divided 1.25 acres on the northern side to the plaintiff and 1.25 acres on the southern side to the defendants/appellants herein which includes the encroached portion.

11. The learned counsel appearing for the respondent/plaintiff submitted that the suit for partition filed in the year 1993. Deliberately, the lawful right has been protracted by one pretext or another. The daughter of the first wife is fighting for her ½ share since the death of her father. Till date could not see the fruits of the decree. The Commissioner's report, after much deliberation and inspections, has provided a fair and equitable division of the property left

by M.Muthusamy gounder which will be acceptable by any reasonable person. Unfortunately, on flimsy ground the appellants holding the entire property even after the preliminary decree and not inclined to give the due share to the respondent. The learned counsel also submitted that in respect of the encroached portion of 16 ½ cents in S.No.31, the appellants can any time evict the encroacher and for that reason, the division of the other properties need not be delayed.

12.Heard the learned counsel appearing for the appellants and the learned counsel appearing for the respondent. Perused the final decree along with the sketch annexed.

13.As far as the first item in S.No.264, no doubt the interior portion is allotted to the appellants. When there are five property in six different locations, the appellants in all the property cannot expect to get frontage. The disadvantage has been compensated while allotting the other property. For example, in S.No.257, the building premises is allotted to the appellants and vacant site is allotted to the respondent. Out of total extent of 0.56 cents in the said survey number, 115.0 sq.mts land(0.28 cents) with building allotted to the appellants and 0.115.0 sq.metre(0.28 cents) of vacant land alone is allotted to the respondent. The rice mill building in the said survey number is allotted to the appellants. In the other items of the properties the extent of the land has been equally divided among the parties. Now, the only point which causes concern is 16 ½ cents of land which is under encroachment in S.No.31. The said encroached portion is allotted to the appellants herein leaving to him to workout his own course of action to evict the encroachment. The appellants should not of the viewed that by such arrangement they are deprived of around 8 ¼ cents, they should be satisfied with the fact that they had been allotted the rice mill and the residential house in S.No.257 and only the vacant site allotted to the respondent in the said survey number. सत्यमेव जयते

14.The learned counsel appearing for the respondent submitted that if the appellants feel that out of 1.25 acres allotted in S.No.31, 6 ½ cents are infected with trespasser and being deprived of that extent, the respondent is ready to equally share the loss of land encroached.

15.After hearing the submissions, this Court finds that it has taken three years for the Advocate Commissioner to complete the assignment and he has done an admirable job by fairly dividing the property almost with scientific precession. The encroached portion of 16 ½ cents has also been noted by the Advocate Commissioner. Hoping that the appellants can recover

the land from encroachers the entire 2.50 acres is divided into 1.25 each. Unfortunately, the encroached portion has been allotted to the appellants and they based on this plead the entire division is lopsided. This cannot be a reason to delay the division any further and allow the appellants to enjoy fruits of the entire suit property. For nearly 27 years from the date of filing the suit, the entire land is in the possession of the appellants and they are liable to pay the mense profit to the respondent for all these years. Therefore, this Court holds that when the plaintiff/respondent herein file the petition for mesne profits under Order 20, Rule 12 of the Civil Procedure Code, 25% of the same shall be deducted as compensation for allotting 16 ½ cents of encroached land in 1.25 acres in S.No.31. Accordingly, this Court holds that the Courts below is right in passing the final decree based on the Commissioner's Report which is fair and equitable and cannot be faulted on any score. The averment the valuable portion is allotted to the plaintiff is baseless and contrary to facts.

16.In the result, this Second Appeal is dismissed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-

Assistant Registrar

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Sub-Assistant Registrar

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1.The Principal District and Sessions Erode,
Erode.

2.The I Additional Subordinate Court, Erode.

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The Section officer
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+1 cc to Mr.P.B.Sampath kumar Advocate sr42536

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