



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 21.02.2020

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

S.A.(MD) No.352 of 2015

and

M.P.(MD) Nos.1 and 2 of 2015

WEB COPY

- 1.Mathab Jan
- 2.Atthar Fatima
- 3.Sahira Raja
- 4.Prioz Akar
- 5.Vahitha Banu
- 6.Sarthaj Begum
- 7.Fathima
- 8.Sheik Mohammad
- 9.Riyaz Mohammed
- 10.Samsuna
- 11.Benazir

...Appellants/appellants/Respondents 6 to 16
vs.

- 1.A.Mothi Jan
- 2.Israth Begum @ Shaheen
- 3.Noorjehan (Died)
- 4.Mohamed Sheirf
- 5.A.K.J.Sabia Kathoon
- 6.A.K.J.Mohamed Askar
- 7.Gulabjohn Begum
- 8.Heera Jabeen
- 9.Fathima Nihar
- 10.Sareefa John

(R7 to R10 are Brought on record as LR's of the deceased
R3 as per order dated 29.04.2019 in
C.M.P.No.3059 of 2019)

...Respondents / Respondents / Petitioner and
Respondents 3 to 5, 17 & 18

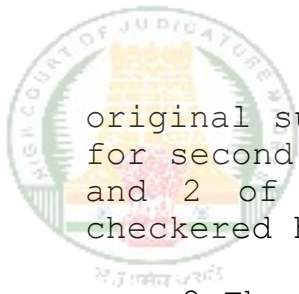
PRAYER: This Second Appeal filed under Section 100 of Civil Procedure Code, against the decree and judgment in A.S.No.62 of 2013 passed by the Principal District Judge, Tirunelveli dated 16.12.2014 confirming the fair and decretal order in I.A.No.243 of 2001 in O.S.No.9 of 1985 dated 01.07.2011 passed by the Principal Subordinate Judge, Tirunelveli.

For Appellant : Mr.Ananth C Rajesh
For R1 : Mr.R.Balakrishnan
For R3 : Died
For R2, R4, R7
to R10 : Mr.M.P.Senthil
For R5 and R6 : Mr.M.R.Sreenivasan

JUDGMENT

This appeal is directed against the second final decree passed in I.A.No.243 of 2001 in O.S.No.9 of 1985. The plaintiff in the

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original suit viz., the first respondent herein moved an application for second final decree seeking allotment of his share in item Nos.1 and 2 of the second schedule alone. This litigation has got a checkered history.

2.The original suit was laid as O.S.No.9 of 1985 seeking partition and separate possession of various shares of the plaintiff. The said suit was contested only by the second defendant and the other defendants had paid the Court Fee and sought for allotment of their shares. The suit was eventually decreed granting 8/64th shares to the plaintiff, 16/64th shares to the first defendant, 2/64th shares to the second defendant, 14/64th shares to the fifth defendant, 16/64th shares to the second defendant and 8/64th shares to the fourth defendant in the suit first and second schedule properties. The plaintiff was allotted 4/48th share, the first defendant was allotted 8/48th shares, the third defendant was allotted 3/48th shares, the fifth defendant was allotted 21/48th shares, the second defendant was allotted 8/48th shares and the fourth defendant was allotted 4/48th shares in the 3rd schedule properties. Though the second defendant was entitled to get 16/64th share in the suit schedule 1 and 2 and 8/48th shares in the third schedule, his shares were not declared, since he did not pay the Court fee and seek preliminary decree. This preliminary decree was challenged in A.S.No.727 of 1986 before this Court. In the stay petition, an interim order was passed granting stay of passing of final decree alone, in respect of item Nos.1,2 and 6 of the second schedule in O.S.No.9 of 1985. Consequent upon such order having been granted, the plaintiff filed I.A.No.491 of 1986 for passing of final decree in respect of other items of properties leaving out items 1, 2 and 6 of the second schedule. The said application came to be disposed of allotting various shares of the properties to the parties and it is not in dispute that some of them have sold their allotted shares. This final decree passed by the Court in I.A.No.491 of 200 on 20.08.1990 was also challenged in A.S.No.38 of 1991. The appeal against the preliminary decree in A.S.No.721 of 1986 and appeal against the final decree in O.S.No.38 of 1991 were taken up together and disposed of by this Court on 03.11.1999. While confirming both the preliminary and final decrees passed by the trial Court, this Court, pointed out that since the second defendant has not been allotted any share in the entire property his share should be allotted out of the items 1, 2 and 6 of the second schedule properties. This Court while doing so, observed as follows, "the Trial Court shall proceed with the final decree proceedings in respect of items 1, 2 and 6 of the second schedule and first allot the share due to the second defendant from and out of the the said items and from remaining property other sharers may be given their due share". This judgment of this Court has become final and all parties have accepted it. After the disposal of the appeal by this Court, the plaintiff has filed a second application of final decree in I.A.No.243 of 2001, which is the subject matter of this second application. The said application is restricted only to items 1 and 2 of the second

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defendant seeking supplementary preliminary decree declaring his share in items 1, 2 and 6 alone is also misconceived. The second defendant should have sought for supplementary preliminary decree in respect of all the properties and the second final decree application should also have been in respect of the items 1, 2 and 6 of the second schedule and the properties that were left unallotted in the earlier final decree. Admittedly, this was not done. Therefore, despite two final decrees having been passed certain properties viz., a portion of item 3 of the second schedule still remains undivided. Even while making the allotment in I.A.No.243 of 2001, the Courts below have not taken into account the properties that were allotted to the shares in the first final decree. Admittedly, the parties other than the second defendant were allotted certain portions of the properties in the suit fits schedule and items 3 and 4 of the second schedule in the first final decree that was passed in I.A.No.491 of 1986. The said allotment was confirmed by this Court in A.S.No.38 of 1991. Admittedly, the Courts below have not taken into account the said allotment that was made to the plaintiff and the other defendants, except the second defendant while passing the second final decree.

4.I have heard the learned counsels for the parties at length.

5.Upon hearing the counsels for the parties, the following questions of law are framed for consideration in the appeal:

"(i)Whether the Courts below were right in ignoring the earlier final decree passed, while allotting the shares to the parties in I.A.No.243 of 2001.

(ii)Whether the application for final decree without including the unallotted portions that remained if the first final decree is maintainable."

6.All the counsels appearing for the parties in unison would submit that the judgment of the lower appellate Court dismissing the appeal against the final decree passed in I.A.No.243 of 2001 does not comply with the directions made in the earlier remand order made by the first Additional District Judge, Tirunelveli. It is clear that the division of the properties as made by the Courts below is wholly unjust and impracticable. Admittedly, the second defendant was not allotted any property in the first final decree, while the plaintiff and the other defendants were allotted atleast the shares depending on the valuation done in the year 1988. Therefore, the plaintiff and the defendants 1, 3 to 5 would be entitled to a lesser share in the properties, which were left out in the first final decree. The Commissioner also overlooked the allotments made in the earlier final decree and allotted the shares to all the parties in items 1 and 2 of the second schedule. As per the entitlement of parties under the preliminary decree, the allotment made ignoring the previous allotment is clearly erroneous, more so, when all the parties have been allotted certain properties earlier in lieu of



allotments made earlier, while making the allotment afresh under the second final decree, unfortunately, this exercise has not been done. This makes the second final decree liable to be set aside. Therefore, the first question of law is answered in favour of the appellants.

7.On the second question of law, a perusal of I.A.No.243 of 2001 makes it clear that the second final decree has been sought for only with reference to the items 1 and 2 of the second schedule unallotted portions of the property that remained after passing of the first final decree in I.A.No.496 of 1986 were not included in the application for second final decree. This in my considered opinion would render the very application not maintainable. A final decree application must include all the properties. The direction of this Court made in A.S.No.729 of 1986 was also ignored by the Courts below. Therefore, the second question of law is also answered in favour of the appellants.

8.In fine, the second appeal is allowed and the judgment and decree of the lower Appellate Court confirming the order of the trial Court made in I.A.No.243 of 2001 is set aside. I.A.No.243 of 2001 is remitted back to the Trial Court with a direction to the petitioner therein to include the unallotted portions of the properties that remained after the passing of the first final decree and seek a final decree afresh. The appellant is also at liberty to seek a supplementary preliminary decree declaring of his share in all the properties. It is made clear that the direction of this Court made in A.S.No.727 of 1986 in its judgment dated 03.11.1999 should be strictly complied with by the trial Court, while making allotment of properties in future. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

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Sub Assistant Registrar(CS)

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To

- 1.The Principal District Judge,Tirunelveli.
- 2.The Principal Subordinate Judge, Tirunelveli.

Copy to:

The Section Officer,Vernacular Section, (2 copies)
Madurai Bench of Madras High Court,Madurai.

- +1 CC to M/s.M.S.JAWAHARLAL, Advocate (SR-7651[F]
- +1 CC to M/s.R.NANDAKUMAR, Advocate (SR-7887[F] dated 24/02/2020)
- +1 CC to M/s.M.P.SENTHIL, Advocate (SR-7751[F] dated 24/02/2020)
- +1 CC to M/s.R.BALAKRISHNAN, Advocate (SR-8474[F]

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