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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON: 22.03.2021

PRONOUNCED ON : 01.04.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAVINDRAN

S.A.No.1499 of 2008

1.Dhandapani Mudaliar
2.Kalyanasundara Mudaliar
3.Chinnattu alias Muthan
4.Chinnathotti

... Appellants/Defendants
1 to 4 in Trial Court

Vs.

1.Chinnaiyan
2.Gopal
3.Ayyakannu
4.Devaraj

... Respondents /Plaintiff and
Defendants 5 to 7 in Trial Court

Prayer :- Second Appeal has been filed under Section 100 of CPC against the Judgement and Decree dated 23.10.2007 passed in A.S.No.12 of 2007 on the file of the Principal Subordinate Court, Tiruvanamalai, confirming the fair and decreetal order dated 07.11.2005 passed in I.A.No.560 of 2004 in O.S.No.414 of 1990 on the file of the Additional District Munsif Court, Tiruvanamalai.

For Appellants : Mr.V.Raghavachari

Respondent No.1 : No appearance
Set exparte vide order
dated 22.03.2021

Respondent Nos.2 to 4: Exparte in Lower Appellate Court

JUDGMENT

Challenge in this second appeal is made to the Judgement and Decree dated 23.10.2007 passed in A.S.No.12 of 2007 on the file of the Principal Subordinate Court, Tiruvanamalai, confirming the fair and decreetal order dated 07.11.2005 passed in I.A.No.560 of 2004 in O.S.No.414 of 1990 on the file of the Additional District Munsif Court, Tiruvanamalai.



2. For the sake of convenience, the parties are referred to as per their rankings in the trial Court.

3. The defendants 1 to 4 in O.S.No.414 of 1990 are the appellants in the second appeal.

4. Suit for partition.

5. The second appeal has been admitted on the following substantial questions of law:

"1. Whether the Court dealing with the final decree application can refuse to allot shares in the property when the preliminary decree directs division of a property and allotment of shares in it also?

2. Whether the Courts below have not properly worked out the equity in allotting shares in the final decree in accordance with the preliminary decree?"

6. The plaintiff has laid the suit against the defendants for partition and separate possession of his 1/4 share in the plaint "A" schedule properties and 1/16th share in the plaint "B" & "C" schedule properties.

7. It is found that the abovesaid case of the plaintiff had been contested by the defendants and after full trial, based on the oral and documentary evidence adduced by the parties and the submissions put forth, the trial Court was pleased to declare that the plaintiff is entitled to 1/8th share in the plaint "A" schedule properties and 1/16th share in the plaint "B" & "C" schedule properties. As against the judgment and decree of the trial Court, it is found that no challenge has been put forth by any one including the defendants. Thereafter, the plaintiff has preferred an application in I.A.No.560 of 2004 in the original suit for passing a final decree in accordance with the preliminary decree passed in the suit by appointing the advocate commissioner so as to suggest the mode of division of the suit properties and the allotment of the plaintiff's share as determined in the preliminary decree. Accordingly, it is noted that one P.Anbalagan was appointed as the advocate commissioner and the advocate commissioner, after inspecting the properties, had filed his report with plans. It is noted that the trial Court had accepted the report submitted by the advocate commissioner and also the mode of division suggested by him and accordingly, allotted the shares to the plaintiff and passed the final decree in favour of the plaintiff.



8. Challenging the final decree passed by the trial Court, the matter had been taken by way of the appeal by the defendants and it is noted that the first appellate Court had also concurred with the allotment of the shares to the plaintiff in the plaint schedule properties as determined by the trial Court and consequently, dismissed the first appeal laid by the defendants. Impugning the same, the present second appeal has been laid.

9. It is also noted that the defendants had preferred the objections to the commissioner's Report and in the objections, they would only state that the commissioner had failed to note that the plaint schedule properties are not of the same quality and therefore, according to them, the allotment suggested by the advocate commissioner with reference to the properties to be allotted to the plaintiff are the prime properties and thereby, the defendants are deprived of the same and furthermore also put forth that the properties suggested to be allotted to the plaintiff had not been purchased by him and it exceeds his share and therefore, according to the defendants, the mode of division suggested by the advocate commissioner is not correct and he should be directed to divide the suit properties again properly.

10. Considering the materials placed on record, it is found that though in survey Nos. 43/5a, 43/5b, 43/5c the plaintiff is declared to be entitled to 1.68 cents as per the calculations made by the advocate Commissioner, inasmuch as the abovesaid properties do not stand either in the name of the plaintiff or in the name of the defendants, accordingly, it is found that, as suggested by the advocate commissioner, no property had been allotted to any of the parties in the abovesaid survey numbers. As against the abovesaid determination, no challenge, as such, has been made by either of the parties.

11. With reference to the other properties, it is found that the Courts below had accepted the Commissioner's report and plans in toto and accordingly, considering that the suit properties are of the same quality and contain the same features one way or the other, the Courts below had deemed it fit to allot 17.27 cents in survey No. 34/1 A as detailed by the advocate commissioner in his report and shown in blue colour in the second plan and accordingly, it is found that the Courts below had accepted the abovesaid allotment suggested by the advocate commissioner and allotted 17.21 cents as determined by it including 1/32 share in the Well and Kavalibari running in survey No. 34/1A. Similarly, the Courts below had also proceeded to allot 3.71 cents in survey No. 41/1 shown in blue colour in plan 3 of the advocate commissioner and accordingly, deemed it fit to allot the same to the plaintiff including right over the Well and the channel as determined by it.



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12. On the abovesaid determination, it is found that the final decree had been passed in the matter and challenging the same, the second appeal has been laid.

13. It is put forth by the defendants' counsel that the Courts below had erred in accepting the commissioner's report and plans in toto and according to him, the division of the plaint schedule properties should be fair and contended that the plaint schedule properties are not of the same quality and by way of the acceptance of the mode of division suggested by the advocate commissioner, the prime properties had come to be allotted to the plaintiff and the defendants had been deprived of the same and therefore, it is put forth that the Courts below had failed to take into consideration the objections raised by the defendants to the Commissioner's report and plans in the proper perspective and accordingly, sought for the remittance of the matter by giving a direction to the Courts below to redirect the advocate commissioner to inspect and divide the properties properly in accordance with the preliminarily decree passed in the matter.

14. However, considering the materials placed on record, even though the defendants are found to have filed objections to the commissioner's report and plans by contending that the plaint schedule properties shown in the three schedules are not of the same quality, however, with reference to the same, it is seen that no material has been placed by the defendants pointing to the same for the consideration of the Courts below. Equally though the defendants would put forth the objections that the properties suggested to be allotted to the plaintiff by the advocate commissioner and thereby, proceeded to be allotted to the plaintiff by the Courts below are the prime properties, however, when with reference to the same also, to evidence that the abovesaid properties alone are the prime properties and the remaining plaint schedule properties are not the valuable properties and they are of the inferior quality and lesser value, absolutely, there is no material forthcoming on the part of the defendants, even prima facie. The defendants have failed to substantiate the abovesaid objections put forth by them by way of convincing and acceptable materials. In such view of the matter, merely because some objections had been filed by the defendants to the commissioner's report one way or the other, when in the absence of any material to substantiate the same on the part of the defendants either by way of oral evidence or by way of documentary evidence, the Courts below are found to be justified in not countenancing the objections put forth by the defendants to the commissioner's report and plans. Mere filing of objections by the defendants to the commissioner's report and plans would not be sufficient. Unless the defendants also place reliable and



convincing materials to substantiate the same and when the defendants have failed to substantiate their objections and on the other hand, as rightly held by the Courts below, when the mode of division suggested by the advocate commissioner and the allotment of the properties to the plaintiff in the plaint schedule properties on that basis being found to be fair and equitable and accordingly, it is seen that the defendants had also not been able to substantiate that they had been given the shares of inferior quality and lesser value with acceptable evidence. In such view of the matter, I do not find any valid reason to interfere with the determination of the Courts below in allotting the shares to the plaintiff as suggested by the advocate commissioner in his report and plans.

15. In the light of the abovesaid discussions, the contentions put forth by the defendants that the Courts below had not properly worked out equity in allotting the share in the final decree proceedings, in terms of the preliminary decree cannot be countenanced and when the mode of division suggested by the advocate commissioner is found to be in accordance with the preliminary decree passed in the matter and accordingly, in my considered opinion, no substantial question of law is involved in this second appeal. Be that as it may, the substantial questions of law formulated in the second appeal are, for the reasons aforesaid, accordingly answered against the defendants and in favour of the plaintiff.

In conclusion, the Judgement and Decree dated 23.10.2007 passed in A.S.No.12 of 2007 on the file of the Principal Subordinate Court, Tiruvanamalai, confirming the fair and decreetal order dated 07.11.2005 passed in I.A.No.560 of 2004 in O.S.No.414 of 1990 on the file of the Additional District Munsif Court, Tiruvanamalai, are confirmed and resultantly, the second appeal is dismissed. No costs. Consequently, connected miscellaneous petition, if any, is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sms
To:

1. The Principal Subordinate Court,
Tiruvanamalai.



2.The Additional District Munsif Court,
Tiruvanamalai.

3.The Section Officer,
V.R.Section, High Court, Madras.

+1cc to Mr.V.Raghavachari, Advocate Sr.21735

S.A.No.1499 of 2008

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srg 06/10/2021