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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 02.02.2022

PRONOUNCED ON : 08.06.2022

CORAM:

THE HONOURABLE MR.JUSTICE A.A.NAKKIRAN

A.S.NO.978 OF 2012

Sasikala Udayakumar

... Appellant

.Vs.

1. Sujatha Selvakumar

2. A.S.Vijayakumari (Decd)

3. Girija Ethirajan

... Respondents

(RR2 and 3 given up in the present Appeal, the legal heirs of the deceased 2nd respondent were already on record as appellant, respondents 1 and 3)

(Cause title accepted vide order dated 02/08/2012 made in M.P.No.1 of 2012 in A.S.SR.No.88715 of 2011)

PRAYER:-

This Appeal Suit has been filed, under Section 96 CPC as against the judgment and decree dated 21.04.2006 made in I.A.No.59 of 2005 in O.S.No.7300 of 1998 by the learned Additional District Judge, Fast Track Court-II, Chennai.

For Appellant : Mr.S.Umapathy

For R1 : Mr.S.Senthil

For RR2 & 3 : Given up



JUDGMENT

(This case has been heard through Video Conferencing)

This appeal has been filed challenging the judgment and decree dated 21.04.2006 made in I.A.No.59 of 2005 in O.S.No.7300 of 1998 by the learned Additional District Judge, Fast Track Court-II, Chennai.

2. The appellant is the 3rd defendant and the 1st respondent is the plaintiff in I.A.No.59 of 2005 in O.S.No.7300 of 1998. The interlocutory application has been filed by the plaintiff praying to pass final decree by appointing an Advocate Commissioner to divide the suit property into two equal shares and allot half share in the suit property by definite metes and bounds in terms of the preliminary decree dated 30.04.2003.

3. For the sake of convenience, the parties herein after are referred to as they were arrayed in the suit.

4. Brief averments made in the affidavit filed in support of the petition is as follows:

The plaintiff filed the suit for partition and separate the possession of her half share in the plaint Schedule property namely Door No.35, Swaminathan Street, West Mambalam, Chennai-33 by metes and bounds and for mandatory injunction to demolish the unlawful construction put up by the 3rd defendant. After considering the oral and documentary evidence on records, the trial Court had passed a preliminary decree in respect of her half share in the suit property by Judgment and Decree dated 30.04.2003. in so far as the prayer for mandatory injunction was concerned the trial Court negative her claim for mandatory injunction holding at the time of division of the property the portion in the rear side could be allotted to the 3rd defendant as she had put up some pillars. Hence, he prays to appoint an Advocate Commissioner for division of suit property by metes and bounds in terms of the preliminary decree dated 30.04.2003.

5. Brief averments made in the counter affidavit filed by the 3rd respondent is as follows:

The petition is not maintainable because the petitioner has come forward with the same by suppressing some material fact. The 1st respondent is the mother of the parties, namely A.S.Vijayakumari who died on 18.06.2004. The petitioner who come forward with the present petition ought to have mentioned the said facts. Non-mentioning of the death of the 1st respondent in the above application is fatal and the present petition is liable to be dismissed on this sole ground. Admittedly, the



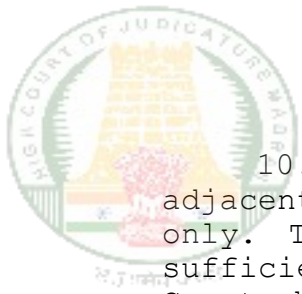
petitioner and the 3rd respondent are having half share in the schedule property. The suit property is measuring 35 x 96.06 sq.ft. The property can be divided into 17.5 x 96.6 equally and northern portion may be allotted to the petitioner. The trial Court has held that pillar construction put up by the 3rd respondent on northern side of the property need not be demolished since the 3rd respondent is entitled to half share, only if northern side of the property is allotted to the 3rd respondent, the construction portion came to his portion. The mode of division is correct and in accordance with the order of the court. Hence the present application is liable to be dismissed.

6. After considering the Advocate Commissioner's report, the Trial Court passed the final decree. Aggrieved over the same, the 3rd defendant preferred this appeal suit.

7. Heard the learned counsel for the appellant as well as the learned counsel for the 1st respondent and also perused the entire materials on record.

8. The learned counsel for the appellant submitted that, the appellant has got the property in Plot No.34 and constructed a small portion in that area. Therefore, if the property is divided horizontally, Western portion be allotted to 3rd respondent/3rd defendant leaving 10 feet passage on the Northern side for her ingress and egress and Eastern portion be allotted to the plaintiff. Whereas, the Advocate Commissioner had divided 9 feet passage instead of 10 feet passage and 9 feet passage allotted to the appellant to reach the property is not at all sufficient and she cannot comfortably enjoy the property allotted to her. The Trial Court failed to note that the major portion of the land allotted to the appellant is taken away by the passage, in that event the Trial Court ought to have allotted more sq.ft of land to the appellant, but it had failed to do so. The 1st respondent/plaintiff was allotted the property facing the road which has own its advantageous, while allotting the share to the appellant on the rear side, the same should have been compensated by way of excess land. The trial Court miserably failed to allot 10 feet passage to the appellant. Therefore, he prays to allow this appeal.

9. The learned counsel for the 1st respondent/plaintiff submitted that the Advocate Commissioner has properly measured the property and allotted the share to the appellant. Based on the report of the Advocate Commissioner, the trial Court had rightly passed the final decree by allotting 9 feet passage to the appellant/3rd defendant and the said 9 feet passage allotted to the 3rd defendant is sufficient and hence, he prays for dismissal of the appeal.



10. In this case, the 3rd defendant constructed a portion adjacent to the Plot No.34 for her exclusive use and convenience only. This 9 feet passage allotted to the appellant is more sufficient for the entrance of a big car. Therefore, the trial Court had properly considered the Commissioner's report and allotted 9 feet passage to the appellant. Therefore, the final decree passed by the trial Court does not warrant any interference by this Court and this appeal suit is liable to be dismissed.

11. In fine, this Appeal Suit is dismissed. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

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To

1. The Additional District Judge,
Fast Track Court - II,
Chennai.
2. The Section Officer,
V.R. Section,
Madras High Court.
Chennai.

+1cc to Mr.S.Senthil, Advocate, S.R.No.33961
+1cc to Mr.S.Umapathy, Advocate, S.R.No.33766

A.S.NO.978 OF 2012

SV-I (CO)
PBS/20/06/2022