



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.03.2022

CORAM:

THE HONOURABLE MR.JUSTICE S.S.SUNDAR

SA.No.236/2022 & CMP.No.4829/2022

M.A.Natarajan ...Appellant/Appellant/1st Defendant

Vs.

1.A.Venkatesan ...R1/1st Respondent/Plaintiff

2.Jayakumar

3.Mannivannan ...RR2&3/Respondents 2 & 3/Defendants 2 & 3

Prayer:- Second Appeal preferred under 100 of CPC against the judgment and decree dated 30.11.2021 passed by the learned Additional District Judge, Dharmapuri in AS.No.12/2021 partially upholding the judgment and decree dated 18.03.2021 in OS.No.290/2017 by the learned Subordinate Judge, Palacode.

For Appellant: Mr. A.K.Rajaraman

JUDGMENT

- (1) The unsuccessful 1st defendant in the suit in OS.No.290/2017 on the file of the Sub Court, Palacode, is the appellant before this Court in the above Second Appeal.
- (2) The 1st respondent herein, as plaintiff, filed the suit in OS.No.290/2017 for partition and separate possession of his 1/4th share in the suit properties and for appointment of an Advocate Commissioner for division of properties by metes and bounds. The suit is also for permanent injunction restraining the defendants from encumbering or alienating the suit properties in any manner.
- (3) The suit property is described under two schedules. Item No.1 is a commercial building measuring 16.5 X 37 feet along with building bearing Old Door Nos.183A, 183B, 183C and 183D and the suit property is comprised in S.No.89/17 in Chathiram Street, Marandahalli Town, Dharmapuri District.



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- (4) The case of the plaintiff is that the suit properties originally belonged to the father of plaintiff and defendants by name Adinarayana Chettiyar. It is admitted that the said Adinarayana Chettiyar executed a registered Will on 15.06.2006, bequeathing the suit properties in favour of all his four children equally. The 2nd item of the suit property is an extent of 12 cents which according to the plaintiff was also the property of their father and the defendants have not disputed the existence of the suit 2nd item or the right of plaintiff to 1/4th share.
- (5) The suit was contested by the 1st defendant by filing a written statement mainly on the ground that the suit 1st item is not divisible having regard to the measurements and the construction of small building therein. As regards the 2nd item of the suit properties, the 1st defendant has categorically admitted that he has no objection to divide the suit 2nd item into four equal shares by metes and bounds and to allot one such share to the 1st defendant. However, it is also stated in the written statement that the suit 2nd item is not properly described by the plaintiff in the plaint.
- (6) The Trial Court, after framing necessary issues and after considering the pleadings and evidence, found that there is a possibility of dividing the suit 1st item and therefore, the suit for partition is maintainable. The Trial Court also gave a finding that the 1st defendant has not proved that the 1st item of the suit property is not divisible. Considering the two judgments relied upon by the plaintiff, the Trial Court granted a preliminary decree for partition in respect of item Nos.1 and 2. From the issues framed by the Trial Court, the 1st defendant has not given much focus regarding any defect in the description of the property. However, the Trial Court held that the suit for partition in respect of suit 2nd item cannot be dismissed merely because the suit 2nd item has been described as two portions.
- (7) Aggrieved by the preliminary decree and judgment of the Trial Court, the 1st defendant filed an appeal in AS.No.12/2021 before the learned Additional District Judge, Dharmapuri, contending that the judgment and decree of the Trial Court is liable to be set aside as the parties are entitled to work out their remedy only as per Section 2 or Section 3 of the Partition Act. The argument



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of the appellant before the Lower Appellate Court is that the Trial Court miserably failed to see that the Partition Act can be invoked even at the preliminary decree stage to seek auction or sale of the indivisible property. Absolutely, there is no grievance expressed as regards the partition decree in respect of the suit 2nd item in the Memorandum of Grounds filed before the Lower Appellate Court.

- (8) The Lower Appellate Court also affirmed the judgment and decree of the Trial Court specifically holding that the suit is maintainable. It is further held that even if the property is not divisible, the grievance of the appellant can be considered at the time of final decree proceedings. Since the appellant and other defendants did not deny the right of plaintiff to seek partition, the Lower Appellate Court specifically observed that the question whether a division is feasible, cannot be determined at the stage of preliminary decree and that aspect can be gone into at the time of the final decree proceedings. Aggrieved by the judgments and decrees of the Courts below, the present Second Appeal is preferred.
- (9) The appellant has raised several grounds and the substantial questions of law as found in the Memorandum of Grounds of Appeal, are as follows:-
 - (1) Whether the judgment and decree of the Courts below is against well established principles of law, weight of evidence and all probabilities of the case?
 - (2) Whether the Courts below are right in deciding the question whether the suit property is indivisible or not, in a preliminary proceedings, when it is the established principle of law that in a preliminary decree proceedings only the question of entitlement of the parties to their respective share in the suit property can be decided and the question whether the property is divisible or not should be relegated to the final decree proceedings?
 - (3) Whether the Courts below exercised their power in accordance with the settled principles of law while decreeing suit?



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(4) Whether the Lower Appellate Court being final fact finding authority is right in dealing with appeal without formulating specific issue relating to finding of Trial Court regarding divisibility of property, as contemplated under Order 41 Rule 25 of CPC?''

(10) The learned counsel for the appellant relied upon the judgment of the Trial Court and contended that the Trial Court has given a specific finding that the suit property is divisible. Therefore, the finding will stand against him even when he agitate the case in the final decree proceedings. The learned counsel for the appellant then submitted that there is a defect in the description of the suit 2nd item. According to the learned counsel, the Trial Court has found that the property has not been properly described in the plaint. However, the relief has been given to the plaintiff irrespective of the defect in description in respect of suit 2nd item. The learned counsel further submitted that the suit is bad for partial partition. Since it is admitted that a well which is located adjoining the suit properties belonged to the plaintiff and 1st defendant, it is submitted by the learned counsel that the suit without claiming partition in respect of plaintiff's half share in the well, ought not to have been entertained. Quite contrary to the stand taken by the appellant before the Lower Court and the submission of the learned counsel for the appellant, the learned counsel for the appellant produced before this Court, an unreported judgment of the Hon'ble Supreme Court in the case of Shub Karan Bubna @ Shub Karan Prasad Bubna V. Sita Saran Bubna and Others in SLP [C] No.17932/2009 dated 21.08.2009.

(11) The Hon'ble Supreme Court, while dealing with the scope of preliminary decree and the issues that arise for consideration before passing of preliminary decree and the issues the Court can conveniently decide at the final decree proceedings, has held as follows:-

''9.The following principles emerge from the above discussion regarding partition suits:-

9.1 In regard to estates assessed to payment of revenue to the Government [agricultural land], this Court is required to pass only one decree declaring the rights of



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several parties interested in the suit property with a direction to the Collector [or his subordinate] to effect actual partition or separation in accordance with the declaration made by the Court in regard to the shares of various parties and deliver the respective portions to them, in accordance with Section 54 of Code. Such entrustment to the Collector under law was for two reasons. First is that Revenue Authorities are more conversant with matters relating to agricultural lands. Second is to safeguard the interests of Government in regard to revenue. [The 2nd reason, which was very important in the 19th Century and early 20th Century when the Code was made, has now virtually lost its relevance, as revenue from agricultural lands is negligible]. Where the Collector acts in terms of the decree, the matter does not come back to the Court at all. The Court will not interfere with the partitions by the Collector, except to the extent of any complaint of a third party affected thereby.

9.2 In regard to immovable properties [other than agricultural lands paying land revenue], that is buildings, plots etc., or movable properties:

- i. Where the Court can conveniently and without further enquiry make the division without the assistance of any Commissioner, or where parties agree upon the manner of division, the Court will pass a single decree comprising the preliminary decree declaring the rights of several parties and also a final decree dividing the suit properties by metes and bounds.
- ii. Where the division by metes and bounds cannot be made without further enquiry, the Court will pass a preliminary decree declaring the rights of the parties interested in the property and give further directions as may be required to effect the division. In such cases, normally a Commissioner is appointed [usually an Engineer, Draughtsman, Architect, or Lawyer] to physically examine the property to be divided and suggest the manner of division. The Court then hears the parties



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proceedings. The submissions of the learned counsel for the appellant referring to the findings of the Lower Court has no significance. The 2nd contention regarding the defect in description of the suit 2nd item is not supported by any valid ground raised in the Memorandum of Grounds.

- (13) First of all, the appellant has categorically admitted that he has no objection in the division of suit 2nd item in the written statement. Though there is a reference to small discrepancy in the description of the suit 2nd item, the appellant has not focussed about any grievance regarding identity of suit 2nd item. The suit 2nd item is also mentioned as the property in the Will executed by the father of the appellant. There is no dispute that the suit 2nd item is the property that was given to the parties under the Will.
- (14) Before this Court, the learned counsel for the appellant has not demonstrated how the property described in the suit 2nd item is different from the property that was bequeathed in favour of the appellant and the respondents by their father. Therefore, this Court finds no merit in the arguments of the learned counsel for the appellant.
- (15) The third ground that the suit is bad for partial partition, is not properly raised in the written statement. The appellant admits that there is no dispute that the suit properties are divisible among brothers in equal proportion. Learned counsel for the appellant refers to a common well which according to the appellant belonged to both appellant and 1st respondent herein. Stating that the plaintiff admits the existence of the well which is to be shared by him along with the appellant, the suit for partial partition is not maintainable. In other words, the contention of the learned counsel for the appellant that the suit is bad for partial partition rests on the factual position that the common well which is also available for partition, is not included in the suit schedule.
- (16) In the instant case, even according to the learned counsel for the appellant, the well is a common well to be shared by the plaintiff and the 1st defendant. There is no dispute with regard to the share of the appellant in the well. The well which is being enjoyed by two or more persons will be common for all of them. A share in the well only denotes a right to draw water from it without



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disturbing the rights of others who are also entitled to share the well. Therefore, no actual division by metes and bounds is required for the purpose of establishing one's right over a common well. Therefore, the principle that non-inclusion of one of the properties to be shared by members, will be fatal to the suit, cannot be applied especially when the well is not the common property of all the sharers who are parties to the present suit.

- (17) This Court, therefore finds no merit in the submissions of the learned counsel for the appellant. In view of the admitted facts and the reasons given above, this Court finds no substance in any of the substantial questions of law raised by the appellant. Since the main objection of the appellant appears to be based on the submission that the suit 1st item is not divisible, it is always open to the appellant to raise the issue at the time of final decree proceedings.
- (18) As it has been pointed out by the Hon'ble Supreme Court, the question whether the property is divisible or not, need not be decided before passing a preliminary decree. Learned counsel for the appellant is convinced that the parties can raise any objection regarding divisibility of the suit properties only at the time of final decree proceedings. Therefore, as pointed out by this Court, the appellant has every right to establish the nature or character of the property whether it is divisible or not and to invoke the provisions of Sections 2 and 3 of the Partition Act at the time of final decree proceedings.
- (19) In view of the foregoing reasons and discussions, this Court is of the view that the Second Appeal is liable to be dismissed for want of merits.
- (20) In fine, the Second Appeal is dismissed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

AP



To

1.The Additional District Judge
Dharmapuri District.

2.The Subordinate Judge
Palacode.

+1 CC to Mr.A.K. Rajaraman, Advocate sr 20238.

SA.No.236/2022

SR II (CO)
SP(18/04/2022)