



S.A.No.1176 of 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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DATED : 08.11.2022

CORAM

THE HONOURABLE MR.JUSTICE KRISHNAN RAMASAMY

S.A.No.1176 of 2011

M.R.Palanisamy

...Appellant

Versus

1.N.Krishnasamy
2.S.A.M.Jaffer Sadiq
3.S.A.M.Yusufdeen
4.S.A.M.Dhaka
5.Kumaralingam
6.S.A.Kudbhudeen
7.H.Nizar Ahamed
8.Balakrishnan
9.P.Selvaraj
10.N.Jothikrishnan
11.Anitha
12.C.Shanthi
13.A.Parimala
14.S.Rajalakshmi
15.Uma

...Respondents

Prayer: Second Appeal filed Under Section 100 of the Code of Civil Procedure against the Judgment and Decree dated 07.03.2011 made in A.S.No.57 of 2010 on the file of the Principal Subordinate Judge, Erode, confirming the Judgment and Decree dated 30.09.2009 made in I.A.No.611 of 2004 in O.S.No.741 of 2004 on the file of the First Additional District



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Munsif, Erode.

For Appellant	:	Mr.J.Prithivi for Mr.A.K.Kumarasamy
For R1	:	Mr.A.Sundaravadhanan
For R5 & R8	:	No Appearance

JUDGEMENT

This Second Appeal is preferred as against the Judgment and Decree dated 07.03.2011 made in A.S.No.57 of 2010 on the file of the Principal Subordinate Judge, Erode, confirming the Judgment and Decree dated 30.09.2009 made in I.A.No.611 of 2004 in O.S.No.741 of 2004 on the file of the First Additional District Munsif, Erode.

2.The appellant herein is the 8th defendant and the 1st respondent herein is the plaintiff in the suit.

3.For the sake of convenience, the parties are referred to as per their ranking before the Trial Court.

4.The suit was filed by the 1st respondent/plaintiff for partition against his father. However, the 1st respondent/plaintiff's father filed written statement



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stating that he sold his half share in Item No.1 of the schedule property to the petitioner herein. Thereafter, the petitioner herein and other defendants, who are non other than the purchasers of the suit property, were impleaded in the suit.

5.Before the Trial Court no witnesses were examined and no exhibits were marked on the side of both the plaintiff and the defendants in the final decree proceedings. Preliminary decree was passed on 31.07.2000.

6.The Trial Court after hearing both the parties, passed preliminary decree holding that the 1st respondent/plaintiff is entitled for 50% share and the plaintiff's father is entitled for other 50% share in the suit schedule properties. Thereafter, the plaintiff filed I.A.No.611 of 2004 in O.S.No.741 of 2004, seeking for final decree. The Court below appointed Advocate Commissioner and based on the report filed by the Advocate Commissioner, the Trial Court passed final decree holding 50% share in favour of the plaintiff and 50% share in favour of the 1st defendant/father of the plaintiff as suggested by the Commissioner. The plaintiff's father already sold his share



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measuring to an extent of 3.07 acres to the 8th defendant/appellant vide two sale deeds in Doc.No.3333 of 1997 dated 01.12.1997 and in Doc.No.1336 of 1998 dated 22.04.1998. However, the Trial Court has come to the conclusion that 8th defendant/appellant is not entitled for allotment of share in the suit property since the 8th defendant had not filed any document to prove his contention and thereby, refused to allot any share to the 8th defendant in the 1st defendant's property. Further, the Trial Court came to the conclusion that the 8th defendant herein had not paid any Court fee and rejected his claim.

7. Aggrieved over the said judgment and decree, the 8th defendant/appellant filed an appeal before the Principal Sub-Judge, Erode, in A.S.No.57 of 2010. The First Appellate Court after hearing both the parties, came to the conclusion that the 8th defendant has paid the Court fee and to that extent the judgment of the Trial Court was reversed. However, the First Appellate Court confirmed the judgment and decree of the Trial Court with regard to the failure of the 8th defendant to mark the document to prove his claim and therefore, it held that the 8th defendant does not entitled from any share from the 1st defendant's property.



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8. Feeling aggrieved over the said judgment and decree, the said

Second Appeal was filed and the same was admitted by this Court on

01.02.2022, on the following Substantial Questions of law:

“Are the Courts below justified in refusing to exercise equity of allotting the entire item I in favour of the appellant who had purchased the same from 1st defendant and the appellant had paid Court fees for allotment if his share in the final decree?”

9. Both the Courts below rejected the claim of the 8th defendant holding that he failed to file and mark the sale deeds said to have been purchased by him from the father of the plaintiff. Therefore, the civil miscellaneous petition in C.M.P.No.16631 of 2022 in S.A.No.1176 of 2011 has been filed before this Court seeking to mark said sale deeds dated 01.12.1997 and 22.04.1998.

10. Learned counsel appearing for the 1st respondent/plaintiff fairly admitted the sale deeds dated 01.12.1997 and 22.04.1998. Hence, the petition for marking the above said sale deeds is allowed and the Doc.No.3333 of 1997 dated 01.12.1997 is marked as Ex.R1 and



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Doc.No.1336 of 1998 dated 22.04.1998 is marked as Ex.R2.

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11.A perusal of the said sale deeds, it is very clear that the 8th defendant purchased the property to an extent of 3.07 acres from the father of the plaintiff vide two sale deeds/Exs.R1 & R2

12.Though the 8th defendant purchased 3.07 acres, but, as per the Advocate Commissioner's report the available extent is only 2.97 ½ acres. Both the Courts below came to the conclusion that the 8th defendant failed to furnish the sale deeds to prove his contention and therefore the 8th defendant is not entitled for any share. Now the sale deeds have been marked before this Court. Upon perusal of the sale deeds, it is clear that the 8th defendant had purchased the property from the 1st defendant and hence, this Court is of the view that the 8th defendant is entitled for 3.07 acres share in Item No.1 of the suit schedule property. With regard to the payment of the Court fee, the First Appellate Court has come to the conclusion that the 8th defendant has paid the Court fee in respect of the property measuring 3.07 acres.

13.Now the issue to be decided is with regard to the allotment of share.



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The Court below allotted equal share to the plaintiff and his father based on the Commissioner's report. The Advocate Commissioner divided Item No.1 of the suit property as A, B and C. 'A' portion was allotted as common pathway for B and C portions. 'B' portion was allotted to the plaintiff. However, 'C' portion was not allotted to any one since the father of the plaintiff passed away and he had sold the property to the 8th defendant. The legal heir of the 1st defendants i.e the plaintiff and the children born to the 1st defendant through his 2nd wife are entitled to the properties of his father whichever is left over after sale.

14.Both the Courts below have correctly rejected the entitlement of the 8th defendant in the suit properties due to unavailability of the sale deed. Before this Court, the 8th defendant has marked Exs.R1 and R2, admitted sale deeds which were filed by the contesting respondents. Now the appeal preferred against the order passed in the final decree proceedings. The challenge is only with regard to the apportionment of the suit schedule properties. The matter is pending from the year 2000 and nearly 22 years have been passed. Now with the available material this Court can easily allot



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the portions of the properties to the 8th defendant/appellant, who is the purchaser of properties from the father of the plaintiff. Accordingly this Court proceeds to allot the apportionments which are made available for the 8th defendant/appellant from the share of the father of the plaintiff, without remanding the matter to the Court below. Accordingly, the substantial question of law is answered in favour of the 8th defendant/appellant.

15. In the present case, the 1st defendant sold 3.07 acres to the 8th defendant as early as in the years 1997-1998 itself. Therefore, this Court is inclined to allot 1.49 acres to the 8th defendant and balance 1.54 ½ acres to the plaintiff in Item No. I of the suit schedule properties and to use the 'A' portion/common pathway jointly in S.No.63. Further, 50% share in Item 6, 7 & 8 i.e portion Nos. 8 to 14 was allotted to and in favour of the plaintiff. The remaining portions are kept open for the legal heirs of the 1st defendant as stated above since the 1st defendant's sold some extent of the properties. Therefore, this Court is inclined to allot the portion Nos. 1 to 5 in plan No.5 pertaining to S.Nos.66/3, 4 and 71/2-A to the 8th defendant.



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16.In view of the above, the allotment of share in final decree is modified as follows:

1) that the 'B' portion marked in green colour in the rough plan pertaining to the I item of the suit property is allotted to the plaintiff.

1(a) that 'C' portion marked in pink colour in the rough plan pertaining to the I item of suit property is allotted to the 8th defendant/appellant. With regard to the 'A' portion marked in rough plan pertaining to the I item, it is the common passage, therefore, both the plaintiff and the 8th defendant is entitled to use the passage jointly.

2) that the II item of the suit property is indivisible in nature and that therefore the same should be sold court auction and the sale price deducting the expenses shall be apportioned equally.

3) that the green marked portion in plan No.III/1 pertaining to R.S.No.87/3 is allotted to the plaintiff.

4) that the green marked portion in plan No.III/2 pertaining to



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R.S.No.86/2 is allotted to the plaintiff.

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5) that the green marked portion in plan No.III/3 pertaining to R.S.No.84/1 is allotted to the plaintiff.

6) that the portion Nos. 1 to 7 shown in plan No.4 pertaining to R.S.No.72/1 is allotted to the plaintiff.

7) that the portion Nos. 8 to 14 in plan No.5 pertaining to R.S.No.66/3, 4 and 71/2-A are allotted to the plaintiff.

7(a) that the portion Nos. 1 to 5 in plan No.5 pertaining to S.Nos.66/3, 4 and 71/2-A allotted to the 8th defendant.

17. Accordingly finally decree passed by the Trial Court in I.A.No.611 of 2044 in O.S.No.741 of 2044 is modified as stated above and substantial questions of law framed by this Court is answered.

18. In fine, the Second Appeal is allowed setting aside the judgment



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and decree passed by the First Appellate Court. No costs.

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Exhibits Marked:

R1	Sale deed dated 01.12.1997 executed in favour of the appellant in Doc.No.3333 of 1997 on the file of the Registrar Office, Erode.
R2	Sale deed dated 22.04.1998 executed in favour of the appellant in Doc.No.1336 of 1998 on the file of the Registrar Office, Erode.

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(2/2)

rst

Index : Yes / No

Internet : Yes / No

Speaking Order / Non Speaking Order

To:

1.The Principal Subordinate Judge,
Erode.

2.The First Additional District Munsif,
Erode.

KRISHNAN RAMASAMY, J.

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