IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on : 30.09.2022

Judgment delivered on : **10.10.2022**

CORAM :

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

A.S.No.473 of 2013

1. M.Alamin
2. F.Noornisha
3. N.Shakila Banu
4. Z.Bharakathunnisa
   (Represented by her Power Agent 2nd Appellant) .. Appellants

Versus

1. Shakila Banu
2. Minor Mohammed Thowbic Ali
3. Minor Mohammed Tharic Ali
   (Minor respondents 2 and 3 are represented by their Mother and Guardian 1st respondent)
4. K.Raja .. Respondents

Prayer: Appeal Suit filed under Order 41 read with Section 96 of the Code of Civil Procedure, to set aside the Final Decree with regard to the items 2, 3, 4 of the schedule mentioned property passed in I.A.No.34 of 2010 in O.S.No.4 of 2005, dated 27.02.2012 by the learned District Judge, Nagapattinam.

For Appellants : Mr.A.Abdul Ravoof

For Respondents : Mr.A.Muthu Kumar, for R4
R1 – Notice served
RR-2 and 3 – Minors rep. by R1

JUDGMENT

M.Alamin and three others filed a suit in O.S.No.4 of 2005 on the file of the learned District Judge, Nagapattinam against one *Shakila Banu* and minors *Thoufik Ali* and *Mohammed Tharic Ali* for partition and separate possession of 35/72 shares of the five items of suit schedule properties. Though the suit was resisted initially by filing a written statement, subsequently, the respondents/defendants remained exparte and a decree was passed on 25.07.2007 decreeing the suit as prayed for by passing a preliminary decree granting 35/72 shares in the suit properties to the appellants/plaintiffs and to divide the suit properties by appointing an Advocate Commissioner on the application of the appellants/plaintiffs and to allot 35/72 shares in the suit properties.

2. Thereafter, the appellants/plaintiffs filed I.A.No.34 of 2010 for passing of Final Decree by appointing an Advocate Commissioner. A Commissioner was appointed and after visiting the properties and considering the values thereof, on the basis of guideline values, the Commissioner filed a report suggesting that the first and third items of the properties along with 14 ares in R.S.No.45/3 comprising the fifth item of the property may be allotted to the appellants/plaintiffs.

3. During the pendency of the proceedings, one *K.Raja* was impleaded as the fourth respondent/defendant in the suit, who is the purchaser of the item No.3 of the suit schedule property. The respondents 1 to 3 sold the said

item in favour of one *Dinesh Kumar* and his wife *Renu Jain,* pending the suit. Thereafter, the said *Dinesh Kumar* and *Renu Jain* sold the property to the fourth respondent/defendant. He got himself impleaded in the final decree proceedings.

4. After considering the Commissioner's report and after taking into consideration of the overall equity, value of the properties and the rights of the parties, the Trial Court found that from the documents, all the properties were already sold and item Nos.3 and 4 were also sold pending the suit for partition and all the purchasers were not made as parties, except the fourth respondent/defendant, who got impleaded by himself. The Trial Court, after considering ***Ex.P-2***, concluded that the fourth respondent/defendant was bonafde purchaser for value. The Trial Court, therefore, allotted the appellants/plaintiffs an equal share in the first item of the suit property, namely 2.5 cents or 1090 Sq.ft and gave liberty to the appellants/plaintiffs

for recovery of possession of the 2.5 cents from the purchaser. The Trial Court also allotted 7.25 cents including 742.1/2 Sq.ft of constructed area in R.S.No.86 which is the item No.2 of the property. As far as the item No.3 of the property, considering the bonafide purchase of the fourth respondent/defendant, instead of granting a share in the item No.3 of the property, the Trial Court ordered a sum of Rs.4,44,614/- towards their share and in the event of failure of payment of the amount, the Trial Court held that the appellants/plaintiffs are entitled to an extent of 1090 Sq.ft. The same was arrived on the basis of the value arrived by the Commissioner by taking consideration the guideline value. The fourth item is allotted in favour of the appellants/plaintiffs which is also a house property by directing the appellants/plaintiffs to pay the purchaser the value as claimed by the appellants/plaintiffs by paying a sum of Rs.48,611/-. The fifth item of the property was also divided as per the shares to the appellants/plaintiffs and the respondents/defendants. Aggrieved by the same, the present Appeal Suit is filed by the appellants/plaintiffs.

5. Heard *Mr.A.Abdul Ravoof*, the learned Counsel appearing for the appellants/plaintiffs and *Mr.A.Muthu Kumar*, the learned Counsel appearing for the fourth respondent/defendant.

6. The only contention raised by the learned Counsel for the appellants/plaintiffs is that the Trial Court had thought it fit to allot the 35/72 shares in all the items of the suit property. However, in respect of item No.3 alone, ordering monetary payment instead of 35/72 shares, had resulted in miscarriage of justice. The Trial Court has taken the Commissioner's report which was only based on the guideline value. The actual value of the property was much more. As a matter of fact, in the year 2007, when the fourth respondent/defendant purchased the property, the market value is mentioned as Rs.19,75,000/-. The same would have increased manifold as

on the date of decree i.e., in the year 2012. Therefore, the learned Counsel would submit that firstly, the Trial Court erred in ordering monetary value instead of the actual extent. Secondly, even the monetary value has not been appropriately fixed by taking into account the actual market value, but, based on the guideline value. He would submit that the Commissioner had suggested allotment of individual items of property on the basis of guideline value. When the learned Judge has chosen not to follow the Commissioner's report and to allot equal extent of land in all the items of the property, the learned Judge ought to have awarded equal shares in the item No.3 also and following of the Commissioner's report for the purpose of value alone, that too based on guideline value, results in injustice. This apart, he would submit that the learned Judge has mentioned to allot only 1090 Sq.ft in the event of default, whereas, the actual extent of the third item of the property is 3048.50 Sq.ft and 35/72 shares will not be 1090 Sq.ft. The learned Judge has fixed the value by erroneously keeping the lesser extent in mind.

Therefore, the learned Counsel would submit that the final decree passed by the Trial Court may be modified in respect of the third item alone by allotting 35/72 shares in the said item also by giving liberty to appropriately divide and recover possession from the fourth respondent/defendant, the purchaser.

7. Per contra, *Mr.A.Muthu Kumar*, the learned Counsel appearing on behalf of the fourth respondent/defendant would submit that the learned Judge has done overall equities for the parties. Even though the fourth respondent/defendant, the subsequent purchaser is permitted to keep the possession of the third item of the property, essentially, the said equity works out in favour of the respondents/defendants 1 to 3 who are the original sellers. The learned Judge, in similar vein, has allotted item No.4 house property to the appellants/plaintiffs, that also by following market value as mentioned by the appellants/plaintiffs, being Rs.1,00,000/- and ordering

payment of a sum of Rs.48,611/- to the purchaser. Therefore, the plaintiffs' non-acceptance of the final decree in respect of the present property alone is unfair and any tinkering with the final decree, in respect of one item alone, will result in upsetting the overall fairness to the parties and thus, he would submit that this case does not require any interference by this Court.

8. Considering the facts and circumstances of the case and the limited scope of the Appeal Suit as argued on either side, this Court also adjourned the matter so as to facilitate both the sides learned Counsel to amicably resolve the issue, after hearing the matter in part. However, both the sides learned Counsel reported that no amicable resolution could be arrived at and thereafter, the matter is heard in full and the judgment was reserved.

9. It is seen that out of the five items of the property, in item Nos.1, 3 and 5, the Trial Court has ordered earmarking of shares as per the

preliminary decree i.e., in the ratio of 35/72. As far as the item No.3 of the suit schedule property is concerned, it found equity in favour of the subsequent purchaser, the 4th respondent/defendant in the suit and ordered payment of equivalent monetary compensation, while, in the same vein, it found equity in favour of the appellants/plaintiffs in respect of item No.4 and ordered payment of monetary compensation to the purchaser. Even looking as per the Trial Court's theme and tenor of the final decree, while the Trial Court has ordered compensation on the basis of the value as mentioned by the appellants/plaintiffs in respect of the item No.4, I find that the Trial Court has ordered compensation on the basis of guideline value as far as the item No.3 alone. Therefore, in my opinion, this amounts to contradiction and to that extent, results in prejudice/undue loss to the appellants/plaintiffs in terms of their share in the item No.3 to the schedule property. While equity may favour the fourth respondent/purchaser, being found to be a bonafide purchaser, to retain the property, which is house property in Sirkali

Town, and which is indivisible, it requires that appropriate market value as on the date of the decree, be ordered to be paid to the appellants/plaintiffs. The sum of Rs.4,44,614/-, even as per the learned Judge, is as per the guideline value, which is erroneous and cannot be accepted.

10. It is the appellants/plaintiffs' contention that the market value of the property, as of the year 2007, when it was purchased by the fourth respondent/defendant was Rs.19,75,000/- and it is their contention that it had increased manifold in the year 2012. Taking the said submission into consideration, taking judicial notice of the fact that the real estate value of the properties in the cities and towns of the State of Tamil Nadu, skyrocketed and increased considerably during the years 2004 to 2008 and in the subsequent years, there were marginal increases which can be roughly taken into account as 10% - 15% per year, since the value, at the time of purchase by the fourth respondent/defendant itself, was the peak value and

considering the marginal rise of 10% - 15% per year, I am of the view that it would be fair and would be justice to both the parties to arrive at Rs.35,00,000/- as the fair market value of the property as on date of the decree. The 35/72 shares would therefore be of Rs.17,01,389/-. Of the said sum, a sum of Rs.4,44,614/- is already deposited within the time granted by the Trial Court. Therefore, the appellants/plaintiffs will be entitled for the balance sum of Rs.12,56,775/- as on the date of final decree i.e., on 27.02.2012. Since the amount is to be deposited only hereafter, the appellants/plaintiffs will be entitled to 9% interest on the same and the fourth respondent/defendant is liable to pay the said amount along with the interest.

11. In the result, this Appeal Suit is partly allowed on the following terms:-

(i) The judgment and decree of the learned District Judge, Nagapattinam, dated 27.02.2012 in I.A.No.34 of 2010 in O.S.No.4 of 2005 is confirmed except in respect of the item No.3 of the suit schedule property;

(ii) The final decree in respect of the item No.3 of the property shall stand modified as follows:-

(a) The fourth respondent/defendant shall deposit the further sum of Rs.12,56,775/- along with interest at the rate of 9% per annum from 27.02.2012 till date of deposit to the credit of O.S.No.4 of 2005 on or before 31.01.2023;

(b) It is made clear that there shall be no further extension of time for deposit of the amount;

(c) The said sum so deposited and the already deposited sum of Rs.4,44,614/- along with accrued interest shall be paid out to the appellants/plaintiffs;

(d) If the fourth respondent/defendant fails to deposit the aforesaid sum of Rs.12,56,775/- within the time specified (i.e., on or before 31.01.2023), the appellants/plaintiffs shall be entitled to an extent of 1482 Sq.ft in the item No.3 of the suit schedule property and they will be at liberty to work out their remedy for division and separate possession of the same in accordance with law.

(iii) However, there shall be no order as to costs;

10.10.2022

Index : Yes/No
Speaking order/Non-speaking order
grs

To

The District Judge, Nagapattinam.

D.BHARATHA CHAKRAVARHY, J.

grs

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