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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 15.02.2022

Coram:

THE HONOURABLE Mr.JUSTICE N.ANAND VENKATESH

Second Appeal No.465 of 2013

and

M.P.No.1 of 2013

- 1.Fathima Beevi
- 2.Sheik Mohammed
- 3.Abdul Majeed
- 4.Noorudeen
- 5.Mohammed Ali Jinnah

..Defendants 2 to 6/Respondents 1 to 5/
Appellants

.Vs.

- 1.Haja Kamaludeen(Died)
- 2.Thirumeni
- 3.Govindaraj Chettiar
- 4.Palaniappan Chettiar
- 5.S.M.Abdul Wahab
- 6.Mohammed Abubakkar

(Since Respondents 3 to 6 remained exparte in the Lower Appellate Court notice may be dispense with)

7. H. Asmabeevi W/o. Late Hajakamaludeen
8. H. Sahabudeen S/o. Late Hajakamaludeen
9. N. Vahitha S/o.Late Hajakamaludeen
10. H. Jubair S/o.Late Hajakamaludeen
11. H. Najima D/o.Late Hajakamaludeen

(R7 to R11 LRs of the Deceased R1 Viz Hajakamaludeen vide Court order datd 23.02.2022 and 28.02.2022 made in C.M.P. Nos. 2716/2022, 2719 & 2720/2022 in S.A. No. 465/2013)

..Plaintiff & Defendants 7 to 11/
Appellant & Respondents 6 to 10/Respondents

Prayer: Second Appeal filed under Section 100 of the Code of Civil Procedure against the Judgment and Decree passed in A.S.No.1 of 2008 dated 07/11/2012 on the file of the Court of District and Sessions Judge, Thiruvarur, in reversing Judgment and Decree passed in O.S.No.124 of 2006 dated 12.06.2008 on the file of the Court of Subordinate Judge, Mannargudi.



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For Appellants : Mr.A.Muthukumar
For Respondents : Mr.E.P.Senniyangigi
for R 6

R1, R2 - notice served (No appearance)
R3 to R 5 exparte vide in EB

JUDGMENT

Defendants 2 to 6 are the appellants in this Second Appeal.

2.The 1st respondent/plaintiff filed a suit seeking for the relief of partition and for allotment of 7/24th share in the suit properties.

3.The case of the plaintiff is that the suit properties originally belonged to one Abdul Majeed Rowthar. He is the father of the plaintiff and the 6th defendant, husband of the 1st defendant, father-in-law of the 2nd defendant and the grandfather of defendants 3 to 5. The further case of the plaintiff is that the said Abdul Majeed Rowthar died intestate leaving behind the suit properties. The defendants were taking steps to dispose of the suit properties without giving a share to the plaintiff. Hence, the plaintiff filed the suit for partition and claimed for his share in the property.

4.The trial Court on considering the facts and circumstances of the case and on appreciation of oral and documentary evidence, dismissed the suit. Aggrieved by the same, the plaintiff filed an appeal before the District Court. The District Court on reappraisal of the facts and circumstances of the case and the oral and documentary evidence, found that the plaintiff is entitled for 7/24th share to an extent of 550 sq.ft., and accordingly, a preliminary decree was passed. Aggrieved by the same, defendants 2 to 6 have filed the present Second Appeal.

5.This Court framed the following substantial questions of law:

- (a) Whether the Lower Appellate Court was right in passing a preliminary decree in favour of the plaintiff by granting 7/24th share for an extent of 550 Sq.ft even without the plaintiff seeking for any amendment of the plaint?



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(b) Whether the Lower Appellate Court failed to appreciate the fact that the relief granted in favour of the plaintiff does not have any connection with the cause of action that was alleged in the plaint?

(c) Whether the Lower Appellate Court has given cogent reasons as mandated Order XLI Rule 31 of CPC before reversing the well considered judgement of the Trial Court?

(d) Whether the findings of the Lower Appellate Court can be termed as perverse due to improper appreciation of oral and documentary evidence available on record?

6. Heard Mr.A.Muthukumar, learned counsel for the appellants and Mr.E.P.Senniyangigi, learned counsel for the 6th respondent.

7. A careful reading of the judgments passed by both the Courts below reveals the fact that the total extent of the suit property is 2199 sq.ft., and out of this total extent, 1100 sq.ft., alone belonged to the deceased Abdul Majeed Rowthar. The said Abdul Majeed Rowthar executed a Settlement Deed [Ex.B-2] in favour of the 1st defendant and thereby, settled the entire property in favour of his wife. The 1st defendant in turn executed a Settlement Deed [Ex.B-3] in favour of the 6th defendant and her predeceased son Mohammed Yunus. A careful reading of Ex.B-3 shows that what was settled by the 1st defendant in favour of her sons was only half of the total extent of 1100 sq.ft., i.e., only 550 sq.ft., was settled by the 1st defendant.

8. Defendants 2 to 5 are the legal heirs of the predeceased son Mohammed Yunus. The 6th defendant filed a written statement by taking a defense that the entire property was settled in favour of the 1st defendant and in turn the 1st defendant had settled the property in favorur of the 6th defendant and the pre-deceased son Mohammed Yunus. A further plea was taken in the written statement to the effect that the plaintiff had been given in adoption to their paternal uncle and that he no longer belongs to this family and hence, he is not entitled for any share in the suit properties.

9. The lower Appellate Court on appreciation of evidence available on record came to a categoric conclusion that the 1st defendant had executed a Settlement Deed in favour of her



predeceased son and the 6th defendant only to the extent of 550 sq.ft., and therefore, came to a conclusion that the plaintiff will be entitled for 7/24th share in the remaining 550 sq.ft.

10.The main contention that was raised by the learned counsel for the appellant is that the lower Appellate Court ought not to have passed a preliminary decree in favour of the plaintiff by granting 7/24th share for an extent of 550 sq.ft., even without the plaintiff seeking for an amendment of the plaint. The learned counsel further submitted that the suit was filed with a particular cause of action and the relief that was granted by the lower Appellate Court is not in line with the cause of action that was pleaded in the plaint. The learned counsel further submitted that the lower Appellate Court even without framing proper points for determination, proceeded to partly allow the appeal and hence, the judgment is not sustainable.

11.In the considered view of this Court, the factual findings of the Appellate Court to the effect that the 1st defendant had settled only an extent of 550 sq.ft., in favour of the 6th defendant and the predeceased son, is unassailable. The lower Appellate Court has carefully considered the documents and has arrived at this conclusion. Hence, the remaining 550 sq.ft., is available for partition as among the legal heirs even after the execution of Ex.B-3. There is nothing in record to show that a remaining 550 sq.ft., has been dealt with or disposed off.

12.It must be borne in mind that the present suit filed is a suit for partition and for allotment of shares among the legal heirs. Therefore, even if there is no amendment to the plaint with regard to the description of the property in view of this specific findings of the Courts below, ultimately the defendants cannot deny the share of the plaintiff in the remaining 550 sq.ft. The plaintiff cannot be driven to file another suit seeking for a share for the remaining extent of 550 sq.ft. Even if such a suit is filed, the defendants will have no defense to deny the share in favour of the plaintiff. That apart, insofar as the suit for partition is concerned, it is a continuing cause of action and the plaintiff will be entitled to file yet another suit seeking for a share in the remaining 550 sq.ft. Therefore, instead of driving the plaintiff to file another suit and seek for his share, the allotment of share can as well be done in the present suit itself.



13. Insofar as the first substantial question of law is concerned, this Court holds that the plaintiff is entitled for 7/24th share for the remaining extent of 550 sq.ft., and there is no requirement for the plaintiff to seek for any amendment of plaint in this regard. The first question is answered accordingly.

14. Insofar as the second substantial question of law is concerned, the suit is for partition and the plaintiff filed the suit with a particular cause of action and the lower Appellate Court found that the plaintiff is only entitled for a limited relief of 7/24th share in the remaining extent of 550 sq.ft. This conclusion was arrived at by the lower Appellate Court on appreciation of facts and it is not necessary that it should be only in line with the cause of action pleaded by the plaintiff. The second question is answered accordingly.

15. Insofar as non-compliance of the mandate under Order XLI Rule 31 of CPC., is concerned, the judgment of the lower Appellate Court in substance has complied with this requirement and all the points have been discussed thoroughly in the judgment. The third question is answered accordingly.

16. Insofar as the fourth substantial question of law is concerned, this Court finds that the lower Appellate Court has properly appreciated the oral and documentary evidence and this Court does not find any perversity in the findings. Therefore, the findings of the lower Appellate Court does not warrant any interference.

17. In view of the above discussion, all the substantial questions of law are answered against the appellants and this Court does not find any ground to interfere with the judgment and decree of the lower Appellate Court.

18. In the result, this Second Appeal is dismissed. Considering the facts and circumstances of the case, the parties shall bear their own costs. Consequently, connected miscellaneous petition is closed.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar



KP
To

1.The District & Sessions Judge
Thiruvarur.

2.The Subordinate Judge,
Mannargudi

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

+1 CC to Mr.K.S. Govinda Prasad, Advocate sr 11872.

Second Appeal No.465 of 2013

SP(09/03/2022)