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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 28.03.2022

Pronounced on : 07.04.2022

CORAM:

THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN

A.S.No. 232 of 2021

And

C.M.P.No. 11352 of 2021

A.Ulaganathan

... Appellant/ 1<sup>st</sup> Defendant

Vs

1. V.Lakshmi
2. Murugan
3. Appayee
4. Joseph Gunaseelan
5. V.S.Ravichandran
6. M/s. Adhithyan Electronics
7. Madhu Fancy Stores
8. Thyagarajan
9. Mrs.Padma
10. Ponnurengam
11. Mrs.Meenakshi
12. Mrs. Mangai ... Respondents/Plaintiff & Defendants 2 to 12

PRAYER: Appeal filed under Section 96 C.P.C., against the order and decretal order dated 01.02.2020 in I.A.No. 75 of 2017 in O.S.No. 225 of 2014 on the file of the III Additional District Judge, Thiruvallore at Poonamallee.



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For Appellant : Ms. AL.Gandhimathi

For 1<sup>st</sup> Respondent : Mr. K.S.Madhavan

For RR 2 to 12 : No appearance

#### JUDGMENT

This Appeal suit has been filed by the first respondent / first defendant in I.A.No. 75 of 2017 in O.S.No. 225 of 2014 now pending on the file of the III Additional District Court, Thiruvallur at Poonamallee, questioning the order dated 01.02.2020.

2. O.S.No. 225 of 2014 had been filed by the first respondent herein/plaintiff, seeking a declaration that a registered sale deed dated 31.07.2013 said to have been executed by A.Swarnam / her mother in favour of the first defendant / her brother and registered as Document No. 4797 of 2013 on the file of the Sub Registrar Office, Virugambakkam, as null and void and for partition of the suit property by metes and bounds into two equal shares and to allot one such share to herself and for consequential reliefs and for costs.

3. The property which was the subject matter of the suit, was land and building measuring a total extent of 2276 sq.ft., in Plot No. 7, in Survey Nos. 113/4, 113/10, 113/11, 113/11A and 113/11B in Thiruvamali Nagar, Kaikkankuppam Village, Maduravoyal, Chennai.

4. The plaintiff and the first defendant are sister and brother. It was stated in the plaint in O.S.No. 225 of 2014 that the property had been purchased by their father Arumugham by registered sale deed dated 10.12.1979. The family was in possession of the property. The father died on 27.07.1981. The legal heirs were his wife/mother of the plaintiff and the daughter/plaintiff and the son/first defendant. The mother A.Swarnam died on 03.07.2014. The plaintiff came to know that she had executed a settlement deed dated 31.07.2013 settling her undivided 1/3<sup>rd</sup> share to the first defendant. Claiming right of partition and a declaration that the settlement deed should be declared as null and void, the plaintiff had instituted the said suit. The plaintiff has also impleaded as 2<sup>nd</sup> to 12<sup>th</sup> defendants, the tenants in portions of the said property.

5. The first defendant had filed a written statement denying the claim of the plaintiff for a share in property. He stated that he had joined employment at a very young age doing



part time work and saved money and with the contribution of that particular amount, the property had been purchased in the name of the father. He further stated that after the death of the father, he had put up construction. He therefore claimed that the plaintiff can claim share only in the land and not over the building. He claimed that the mother had executed a settlement deed in his favour and that it was valid and binding on the plaintiff. He further claimed that he had given in marriage the plaintiff to a respectable family and had borne the wedding expenses. He disputed the claim of the plaintiff for a share in the property.

6. On the basis of the above pleadings, the parties went to trial. The trial Judge had framed the following issues for consideration:-

(i) Whether it is true that the defendants had contributed towards the consideration for the purchase of the property and whether he had put up the superstructure;

(ii) Whether the settlement deed dated 31.07.2013 in favour of the first defendant is binding on the plaintiff?;

(iii) whether the plaintiff is entitled to partition and separate possession?; and

(iv) to what other reliefs?

7. During the course of trial, the plaintiff examined herself as PW-1 and marked Exs. A-1 to A-11. These included the exchange of legal notices as Exs. A-1 to A-6, the settlement deed executed by the mother in favour of the first defendant as Ex.A-7, the sale deed for the property as Ex.A-8, the death certificates of the parents and the legal heirship certificate as Exs. A-9 to A-11. The first defendant examined himself as DW-1 and also examined 5 other witnesses including the witnesses to the settlement deed. He marked Exs. B-1 to B-50. The property tax receipts, the water tax receipts and the electricity cards were marked Ex.B-1 to B-13, the passbook of the father was marked as Ex.B-14, the original of the settlement deed was marked as Ex.B-15. The defendant had also summoned the officials from the Sub Registrar Office and through him Ex.C-1 was marked, namely, the settlement deed dated 31.07.2013.

8. On the basis of the oral and documentary evidence, the learned III Additional District Court, Thiruvallore at Poonamallee, by Judgment dated 01.06.2016 held that there was no evidence to prove that the first defendant had contributed amounts towards the purchase of the land or for construction of building. It was also held that the settlement deed executed by



the mother was binding on the plaintiff. It was finally held that the plaintiff was entitled to an undivided 1/3<sup>rd</sup> share alone in the suit property and that the first defendant was entitled to the remainder undivided 2/3<sup>rd</sup> share of the suit property.

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9. Thereafter, the plaintiff filed I.A.No. 75 of 2017, under Order 26 Rule 13 CPC to pass a final decree in accordance with the preliminary decree by appointing an Advocate Commissioner to inspect the suit property, measure the suit property and divide the same and allot 1/3<sup>rd</sup> undivided share to the plaintiff.

10. A counter affidavit was filed by the first defendant stating that since the Registration District / Sub District, had not been mentioned, the final decree cannot be passed on the basis of the invalid preliminary decree. It was also stated that the measurement on the southern side was given as 36.9 feet in the plaint but given as 39.6 feet in the decree. It was stated that the application should be dismissed.

11. The trial Court had appointed an Advocate Commissioner to examine the manner in which the property has to be divided and directed that such exercise has to be done with the help of surveyor. Accordingly, Mr.R.Harikrishnan, Advocate was appointed as Advocate Commissioner and he had filed a report on 31.01.2018 and a further report dated 17.09.2019. Objections to the report were filed by the first respondent on 05.11.2019. Additionally his advocate had also filed written submission on 23.01.2020.

12. In the report of the Advocate Commissioner, he had stated that he had taken assistance of K.Natarajan, B.E.F.I.E.F.I.V Chief Engineer (PWD) retired, to assist him to inspect the property, assess the value of the property and suggest feasibility of the division of the property. He stated that the said engineer had about 40 years of experience in construction and in evaluation of buildings. The Advocate Commissioner had proceeded to inspect the building and the first defendant had also given his suggestions. The Advocate Commissioner had given a detailed description of the physical features of the property along with a sketch. He had stated as follows:-

"a. The suit property is building situated in a corner plot abetting Readhakrishnan Salai and thirumalali Nagar.

b. The suit property is building has got ground floor and first floor in bricks cement mortar plastered and white washed.



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c. The roof of the suit property is RCC slab both in ground floor and first floor.

d. In the ground floor there are about 6 shops facing the eastern side Radhakrishnan Salai road including 1<sup>st</sup> Respondent portion and there is a staircase to go to first floor.

e. In the suit property there is old well on the south west side in the ground floor.

f. In the suit property the shops in the ground floor have been numbered has 1 to 8 in the rough sketch.

g. The plaintiff portion is in first floor and rented portion in first floor have also be marked in rough sketch.

h. In the second floor adjacent to head room there is a small 150 sq.ft. AC sheet rented portion.

i. There is over head water tank and sintex tank are in terrace.

j. The flooring in first floor and AC sheet roofing in second floor is of ordinary cement.

k. The age of the building as on date for the entire floor is about 32 years. This is type 1 buildings and all the basic amentias like water supply, electricity and sanitation are available.

#### SUGGESTION:

The building can be partitioned on the plaintiff side along with 5 and 6 shops in ground floor with a partition wall both in ground floor and first floor and the area can be demarcated after assessing the measurements at site and the party should agree to the proposal, this can be done with both parties consent."



13. He had also given the valuation of the property by measuring the plinth area of the ground floor and the plinth area of the first floor and had also taken up the cost of construction and then, determined the total cost of building. He had then deducted depreciation of 1/3<sup>rd</sup> for 32 years and had given the total net cost of the building at Rs.54,00,000/-. He then proceed to determined the land cost and obtained the guideline value from the Sub Registrar Office at Virugambakkam. The guideline value was Rs.2680/- per sq.ft. He then determined that the total land value of the property was Rs.60,99,680/- and rounded it to Rs.61,00,000/-. The Commissioner stated that therefore the total cost of land and building was Rs.1,15,00,000/-.

14. Subsequently, there has been further progress in the case and the final decree had also been passed on 01.02.2020. The learned III Additional District Judge, Poonamallee, had stated in the final decree order that she had considered the objections filed by the first defendant and also the reports of the Advocate Commissioner and that, the objections raised do not observe any consideration. In view of the sketch prepared by the engineer as well as the report by the Advocate Commissioner, it was found that the building is divisible. The entire issues had been examined in detail and it was finally stated as follows:-

"1. That in Ex.C2 plan prepared by the Engineer for the ground floor shown in the Northern portion towards east-west to an extent of 32.6 feet and southern portion to an extent of 36 feet east-west and western portion 22.2 feet towards north-south and eastern side to an extent of 22.2 feet towards north-south is allotted to the petitioner.

2. That in Ex.C3 plan prepared by the engineer for the first floor shown in the Northern portion towards east-west to an extent of 32.6 feet and southern portion to an extent of 36 feet east-west and western portion 22.2 feet towards north-south and eastern side to an extent of 22.2 feet towards north-south is allotted to the petitioner.

3. In the ground floor and first floor in between the portions dividing the 1/3<sup>rd</sup> share of the petitioner and the remaining 2/3<sup>rd</sup> share a common wall shall be built at the cost of petitioner.



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4. That Exs.C1 and C6 that is Advocate Commissioner's Report, Engineer's Report and Sketch prepared by the Engineer and the Advocate Commissioner shall form part and parcel of the final decree.

5. That there is no order as to costs.

6. For deposit of NJS two months time is granted."

15. Subsequently, the final decree had also been engrossed on non judicial stamp paper and has also been registered in the office of the Sub Registrar, Virugambakkam.

16. The plaintiff has also filed E.P.No. 1 of 2021 for delivery of possession and the same is pending before the trial Court.

17. The plaintiff has also filed I.A.No. 98 of 2018 seeking mesne profits. She had tendered evidence as PW-1 and the matter is posted for her cross examination.

18. The first defendant in the suit has now filed the present appeal suit challenging the final decree as passed by the Trial Court. The learned counsel for the appellant stated that the Advocate Commissioner had been appointed to divide the property with the help of a surveyor but the Advocate Commissioner had taken the assistance of an Engineer. It was also stated that the engineer had measured the property and that the Advocate Commissioner had not measured property. It was stated that the Advocate Commissioner had only reproduced the report of the Engineer and it was therefore stated that the final decree should be interfered with and set aside.

19. The learned counsel for the first respondent/plaintiff however stated that the final decree had passed dividing the property into 1/3<sup>rd</sup> and 2/3<sup>rd</sup> shares in accordance with the preliminary decree. The learned counsel expressed grievance that though the plaintiff was residing in the first floor and was a widow, the first defendant / appellant, her own brother had cut all the amenities including water supply, which has forced the plaintiff to seek refuge with her son-in-law. The learned counsel further stated that the first defendant / appellant is enjoying the entire rental income from the property and the plaintiff has been denied any share in the rental income right from the date of institution of the suit



and that she is living in penury. It was therefore stated that the appeal has been filed only to drag on the proceedings to deny the lawful share of the plaintiff in the property and the accompanying proportionate rental income.

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20. I have carefully examine the records and given careful consideration to the arguments advanced.

21. The Appeal suit has been filed questioning the order in I.A.No. 75 of 2017 whereby the final decree had been passed on 01.02.2020 in O.S.No. 225 of 2014 on the file of the III Additional District Judge, Tiruvallur @ Poonamallee. The said suit had been filed by a sister against her brother seeking partition and separate possession. A preliminary decree was passed that she was entitled to an undivided 1/3<sup>rd</sup> share in the suit property and her brother was entitled to the remainder 2/3<sup>rd</sup> undivided share.

22. Though the Judgment to that effect was passed on 01.06.2016 and nearly 6 years have passed, she is neither able to enjoy or take possession of her undivided 1/3<sup>rd</sup> share nor she is able to enjoy the proportionate rental income from the property. She had become a widow. The water supply to the portion had been cut of. She had been forced to vacate. She is now staying under the shelter offered by her son-in-law.

23. The first defendant her bother is enjoying the entire property and also the entire rental income. He had not filed any appeal against the grant of undivided 1/3<sup>rd</sup> share to the plaintiff. That decree has become final.

24. She then filed an application seeking final decree. A Commissioner had been appointed. In the warrant, it had been stated that the Commissioner should take the assistance of a surveyor. The Commissioner had however sought the assistance of an engineer. He was a retired engineer from the Public Works Department. He had about 40 years of experience in the field of construction and evaluation of buildings. I find infirmity or irregularity in taking the assistance of such a person experienced in matters relating to properties and relating to assessment of the value of properties and in matters relating to measurement of properties. It cannot be said that a surveyor would be more qualified than an engineer. An Engineer has a professional decree and this particular Engineer whose assistance was sought, Mr.K.Natarajan, had qualifications of B.E.F.I.E.F.I.V and is a retired Chief Engineer (PWD). I therefore hold that the revision petition filed on that particular ground has to be rejected.



25. It is clear that the property is divisible in nature. The sketch had been provided. It had been observed by the learned trial Judge that a wall will have to be built, demarking the 1/3<sup>rd</sup> share and 2/3<sup>rd</sup> share. It had also been directed the cost of construction of the wall should be on the plaintiff.

26. I hold that it would only appropriate that the parties are directed to adhere to the directions given in the final decree application. The present appeal is an adventure to further drag and delay the proceedings and deny the lawful share allotted to the plaintiff.

27. I find no reason to interfere with the well considered order of the learned Trial Judge. All factors had been taken into consideration. The relevant portions have been extracted in this order and it is seen that the learned trial Judge was conscious of the fact that the property had a ground floor and a first floor and that there were also tenants and that the division ensured both residential and non residential portions tell to the share of both the parties. It is proper that the final decree is upheld.

28. It is also seen that the Final decree has also been engrossed in Non Judicial Stamp Papers and had also been registered in the office of the Sub Registrar Office, Virugambakkam.

29. The plaintiff has been forced to file an execution petition seeking recovery of possession. She has also been forced to file an Interlocutory Application seeking mense profits.

30. In view of the above reasons, taking into consideration that the suit will have to come to its logical end and should not be frustrated any further by any surreptitious method adopted by the appellant herein, a direction is given to the learned Trial Judge to dispose of E.P.No. 1 of 2021 for delivery of possession and I.A.No. 98 of 2018 for mense profits on or before 31.10.2022 after following due process. A direction is given to the first defendant to share the rental income with the plaintiff from the date of the plaint.

31. The Appeal stands dismissed with costs.



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Consequently, connected Miscellaneous Petition is closed.

MEMORANDUM OF COSTS

AS. 232 OF 2021

Appellant (1<sup>st</sup> Defendant ) Costs

|                                                         | Rs. p |
|---------------------------------------------------------|-------|
| Stamp for Vakalatnama                                   | 10 00 |
| Advocate's fee Fcnot filed                              |       |
| Translation and Printing/Typing charges                 | Nil   |
| To be paid to the Appellant (1 <sup>st</sup> Defendant) | ..... |
| a sum of Rs.10/- (Rupees Ten only)                      | 10 00 |
|                                                         | ..... |
| by the Respondent No.1 (Plaintiff)                      |       |

Sd/-  
Assistant Registrar

//True copy//

Sub Assistant Registrar

vsg

To:

1. III Additional District Judge,  
Thiruvallore at Poonamallee.

2. The Section Officer,  
VR Section,  
Madras High Court, Chennai.

+1cc to Ms. AL.Gandhimathi, Advocate SR.No.24600

+2cc to Mr.K.S.Madhavan, Advocate SR.No.24253

A.S.No. 232 of 2021  
And  
C.M.P.No. 11352 of 2021

PA (CO)  
GMY (06/06/2022)