



S.A.No.1132 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12.10.2022

CORAM

THE HONOURABLE Ms. JUSTICE P.T. ASHA

S.A.No.1132 of 2021

and

C.M.P.No.21760 of 2021

R.Subbaegowder

...Appellant

Vs

1.Smt.Marakkal

2.Smt.Suppathal

3.Smt.Sarasammal

4.Smt.Lakshmi

... Respondents

Prayer: Second Appeal is filed under Section 100 of C.P.C against the Judgement and Decree dated 17.02.2021 made in A.S.No.42 of 2020 on the file of the I Additional District Judge, Coimbatore, confirming the final decree dated 20.07.2020 made in I.A.No.858 of 2014 in O.S.No.744 of 2011 on the file of the Principal Subordinate Judge, Coimbatore.



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For Appellant : Mr.S.Karthikei Balan

For Respondents : No Appearance for R1 to R3

Mr.C.Veeraraghavan [R4]

JUDGEMENT

The respondents/defendants has filed the above Second Appeal challenging the final decree passed in I.A.No.858 of 2014 in O.S.No.744 of 2011 on the file of the Principal Subordinate Judge, Coimbatore.

2. This Second Appeal was admitted on the following Substantial questions of law:

"1. Whether the Courts below are right in accepting the report of the Advocate Commissioner without considering the objections that share was not



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equitably distributed?

2. Whether the Courts below are right in allotting the shares in such a manner that would diminish the value of the property?

3. Whether the Courts below are correct and justified in passing the final decree by ignoring the settled principle and proposition of law that, when the procedure adopted by the Commissioner is flawed and illegal, final decree cannot be passed on the basis of that report?"

3. The brief facts which has culminated in the filing of the second appeal are herein below narrated. The respondents herein as plaintiffs, had filed the suit in O.S.No.550 of 2009 on the file of the District Court at Coimbatore, which was later transferred to the file of the Principal Subordinate Court, Coimbatore and re-numbered as



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O.S.No.744 of 2011, for partition and separate possession of the suit schedule property. The appellant herein had filed O.S.No.578 of 2009 on the file of the Subordinate Court, Coimbatore for declaration that he is the absolute owner of the suit schedule property. The suit property in both the suits were the same. The appellant had claimed an exclusive right to the property on the basis the Will dated 15.07.2005 executed by his father Rangae Gowder. By Judgment and Decree dated 30.07.2014 a partition was granted by the learned Principal Subordinate Judge in O.S.No.744 of 2011 and the suit O.S.No.578 of 2009 was dismissed. Thereafter, the respondents herein initiated the final decree proceedings in I.A.No.858 of 2014 to divide the properties into five equal shares and to allot a share each to the respondents herein.

4. The appellant herein had filed counter *inter-alia* raising a preliminary objection that since he has challenged the judgment and



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decree passed in the above suits in A.S.Nos.1 of 2015 and 2 of 2015 before the learned District Judge, Coimbatore, the final decree proceedings were pre-mature. He would also question the jurisdiction of the Court. However, the learned Principal Judge had appointed a Commissioner who had visited the suit schedule property along with a Surveyor and measured the same and divided the property into five equal shares, leaving a Well and path way in common to the sharers. The appellant had filed his objections to the Commissioner's report and ultimately, the learned Principal Subordinate Judge had passed the final decree.

5. In the meanwhile, during the pendency of the final decree proceedings, the respondents 1 to 3 had filed a memo stating that they do not wish to proceed further with the final decree proceedings, since they had settled the dispute with the appellant and had entered into a compromise with him. They had filed a memo seeking the Court's



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approval for appointing a new counsel. Since their earlier counsel was not willing to accept the compromise that was entered into between the appellant and the respondents 1 to 3 herein.

6. The Principal Subordinate Judge by his judgment and decree dated 20.07.2020 passed the final decree in terms of the Commissioner's Report and Plan and both of these formed part of the decree. Aggrieved by the same, the appellant had filed A.S.No.42 of 2020 on the file of the I Additional District Court, Coimbatore. The learned Judge, on hearing the contention of both parties, ultimately dismissed the First Appeal and confirmed the decree passed by the learned Principal Subordinate Judge. Challenging the same, the appellant is before this Court.

7. The main objection raised in the grounds of appeal is that the Commissioner had not independently valued the building and the trees



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which was also part of the properties in order to partition the property in equal moieties to each of the sharers. The appellant had also contended that the respondents 1 to 3 had relinquished their rights in the property in favour of the appellant and had also filed a memo to that effect. Considering the fact that the appellant was allotted the shares of plaintiffs 1 to 3, the learned Judge ought to have allotted a contiguous area to the appellant under the division now approved by the Court, the 4th respondent / 4th plaintiff's share cut across the appellant's share. They would therefore contend that the Advocate Commissioner had breached the mandate given to him under the provisions of Order 26 Rules 13 and 14 of C.P.C. The Commissioner's Report was flawed and therefore cannot be taken on file. Consequently, the decree passed has to necessarily be set aside.

8. The learned counsel for the appellant had vehemently made his submissions with emphasis on two grounds, one that the



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Commissioner had not valued the trees and building on the suit property individually and therefore, the partition granted is an inequitable one and that the Commissioner who had taken note of the fact that the appellant has been allotted the shares of the respondents 1 to 3 ought to have granted the appellant a single unit covering the shares of himself and respondents 1 to 3. Now, by reason of the final decree based on the Commissioner's Report and plan Exs.C1 and C2, the 4th respondent was allotted sites running between the portions allotted to the appellants. The appellant's property gets divided. He would therefore contend that the final decree passed on this erroneous Commissioner's Report has to be set aside. In support of his contention, the learned counsel for the appellant relied on the decision of this Court in the case of *Abdul Rasheed vs. Abdul Jabbar* reported in **2019 (2) CTC 435**.

9. Per contra, Mr.C.Veeraraghavan, learned counsel appearing



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on behalf of the respondents would submit that the building and most of the usurpers are situated in the portion allotted to the appellant and if really some one has to be aggrieved by the inequitable division, it is the 4th respondent. Since admittedly in the share now allotted to the 4th respondent there are no buildings, bore Well nor very many trees. The portion allotted to the 4th respondent is demarcated as "C" in the Advocate Commissioner's plan.

10. Heard the learned counsel on either side and perused the materials available on record.

11. The primary grievance of the appellant is that there is an inequitable allotment of shares, this argument in the first blush appears to be attractive. However, a perusal of the Judgment passed by the lower appellate Court would show that the majority of the trees are found in the property allotted to the share of the respondents. Further,

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a perusal of the Commissioner's plan Ex.C2 would show that the buildings, bore Well, etc., are situate only in the A and B portion, which falls to the share of the appellant herein. Therefore, the argument that the Commissioner's Report is flawed since there is an inequitable allocation, cannot be raised by the appellant, as most of the usufructs are available to the appellant and if some one should object to it, it is the 4th respondent who has to object to the allotment, however, she has not raised any objection to the same.

12. The next argument which is vehemently put across by the appellant is that he has not been given contiguous land, though pending the final decree proceedings, the respondents 1 to 3 had filed a memo stating that they had settled the disputes with the appellant. However, since they had not produced any documents to show that their share has been released / relinquished in favour of the appellant. Although the memo filed by them on 27.11.2017, would talk about the



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compromise and their decision not to proceed with the appeal, they had however failed to produce the written agreement which would prove that the respondents 1 to 3 had relinquished their right in favour of the appellant. Even in the appellate stage, the document has not surfaced the learned I Additional District Judge to observe in paragraph No.16 of the judgment that there was no document to show that the plaintiffs 1 to 3 have given up their shares.

13. Considering the above, the learned Judge has treated the allotment of shares that has been effected independently. If really there was an agreement, the same could have been produced by the appellant before the Court and in equity he could have requested that an entire contiguous piece of land be allotted to him. That the appellant and the respondents 1 to 3 had not entered into a written compromise is evident from the fact that on 11.08.2022, the appellant and the respondents 1 to 3 have filed a joint memo of compromise into



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this Court, wherein they have stated that they have settled their shares in favour of the 1st plaintiff (however, no settlement deed has been filed) and that they wish to withdraw their claim. Therefore, when the decree was being passed by both the Courts below, the appellant has not shown his right and interest to an undivided 4/5th share. Therefore, no exception can be taken to the judgment and decree of the Courts below and admittedly all the portions that have been allotted are of the same extent and each of them have an access to the path way on the West. The judgment relied upon by the appellant that the mandate of Order 26 Rule 14 and 12 of Order 26 C.P.C., has not been complied with, is without basis. Moreover, the decision relied on by the learned counsel for the appellant is distinguishable on facts and the same is not applicable to the facts of the present case. In the instant case, the major chunk of the usufructs are admittedly situated in the lands allotted to the appellant and other respondents in the Northern portion and the 4th respondent has not raised any objection for the same. I



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therefore see no reason to set aside the judgment and decree of the Courts below and the substantial questions of law also are answered against the appellant.

14. In the result, this Second Appeal is dismissed and the Judgement and Decree dated 17.02.2021 made in A.S.No.42 of 2020 on the file of the I Additional District Judge, Coimbatore, confirming the final decree dated 20.07.2020 made in I.A.No.858 of 2014 in O.S.No.744 of 2011 on the file of the Principal Subordinate Judge, Coimbatore are confirmed. No costs.

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Index : Yes/No
Speaking order/non-speaking order
ssn



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P.T.ASHA, J.,

ssn

To:

1. The I Additional District Judge,
Coimbatore.
2. The Principal Subordinate Judge,
Coimbatore.
3. The Section Officer,
V.R.Section,
High Court, Madras.

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