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CRP.No.1917 of 2017
and S.A.No.891 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.08.2022

PRONOUNCED ON : 08.11.2022

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP.No.1917 of 2017

and

Second Appeal No.891 of 2017

R.Kandasamy Gounder

..Petitioner/Defendant.

..Appellant/defendant

Vs.

R.Natchimuthu Gounder

..Respondent/Plaintiff

PRAYER: Civil Revision Petition filed under Section 115 of CPC praying to call for records pertaining to E.P.No.110/2007 in O.S.No.533 of 2002 on the file of Sub Judge, Tiruppur and to set aside the docket order passed on 14.04.2017.

PRAYER: Second Appeal filed under Section 100 CPC against the judgment and decree dated 01.07.2015 made in A.S.No.82 of 2010 on the file of 2nd Additional District and Sessions Judge, Tiruppur,



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confirming the judgment and decree of the learned Sub Judge,
Tiruppur, in O.S.No.533 of 2002 dated 07.11.2006.

For Petitioner : Mr.M.Velmurugan

For Respondent : Mr.R.Jayaprakash

COMMON JUDGMENT

Civil Revision Petition has been filed by the defendant to set aside the order passed in E.P.No.110 of 2007 dated 14.04.2017 on the file of Sub Judge, Tiruppur.

2. The docket order dated 16.06.2017 reads as follows:-

“Item I possession Delivered on 27.04.2017 at 3.30 p.m.

Item II possession not delivered the property in Coimbatore jurisdiction. “

3. The suit in O.S.No.533 of 2002 was filed by the respondent/plaintiff and the defendant is the younger brother of the plaintiff. The plaintiff and defendant were in joint possession of plaint



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schedule properties. In spite of repeated personal demands and notices, the defendant has not come forward to have the properties partitioned by metes and bounds. Hence, the suit was filed by the plaintiff/respondent for partition in respect of plaint schedule properties.

4. On 01.08.2003, the trial court set the defendant exparte and passed a preliminary decree to divide the suit schedule properties into two and to put the plaintiff in possession in his allotted share.

5. The defendant filed I.A.No.146 of 2005 in O.S.No.533 of 2002 for restoration of the suit and for appointment of Advocate Commissioner to divide the suit properties into two equal shares.

6. Based on the Advocate commissioner's report, final decree was passed by dividing the suit property into two and one such share was allotted to the plaintiff.



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7. The plaintiff preferred E.P.No.110 of 2007 and possession was delivered. The defendant filed E.A.No.245 of 2015 praying to stay all the further proceedings including the recording of the purported delivery of possession till the disposal of the accompanying application filed under Section 47 of CPC.

8. The contention of the revision petitioner/defendant is that he never disputed the division of the suit properties; convenience and enjoyment of the properties as per the actual possession and enjoyment was ignored while dividing the property and the respondent with an intention to give hardship, got divided the suit property through exparte and commissioner never approached the defendant with proper division of suit properties as per the convenience of both the parties.

9. As against the final decree passed in O.S.No.533 of 2002, whereby, the suit property was divided into two equal shares and that



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the plaintiff was allotted one such share, as per the Commissioner's plan and report, A.S.No.82 of 2010 has been filed by the defendant.

The said first appeal has been dismissed by the learned 2nd Additional District and Sessions Judge, Tiruppur, by judgment dated 01.07.2015. Aggrieved by the same, the unsuccessful defendant filed Second Appeal before this court.

10. The learned counsel for the appellant/defendant would submit that the following are the substantial questions of law involved in this second appeal:-

(1) Whether the trial court had passed a decree in accordance with law ?

(2) Whether the trial court had rightly appreciated the commissioner report C1 and C2?

(3) Whether the appellate court had rightly confirmed the judgment and decree in O.S.No.533 of 2002 ?

In my considered opinion, these questions are all only on facts and there is no question of law requiring this Second Appeal to be discussed.

11. The contention of the appellant/defendant is that the



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Advocate Commissioner was appointed by trial court without hearing the defendant and no opportunity was granted to him. The defendant submits that his application to condone the delay and to set aside the exparte decree, has not been considered by the trial court.

12. Another contention raised is that he has not been given sufficient time and opportunity to raise his objections to the Advocate Commissioner's report. However, final decree has been passed stating both sides have no objection. Therefore, the decree passed in favour of the plaintiff is not sustainable.

13. It is also contended that the trial court erred in granting the relief of injunction restraining the defendant/appellant from preventing the respondent's access to "A" through "C" as marked in Ex.X.2 and X.3 even though such relief had not been sought for.

14. The suit has been decreed in favour of the plaintiff/deeree



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holder. On the basis of the preliminary decree, appointment of advocate commissioner was sought to divide the suit properties into two equal shares by metes and bounds. Accordingly, Advocate Commissioner was appointed and the commissioner given plan and the partition is right of way in the 'C' schedule to have ingress and egress to his property. Accordingly, final decree has been passed by the trial court. Based on the decree, the decree holder sought for execution of the decree. In that stage, only with an intention to protract the execution proceedings, E.A., has been filed by the defendant and objected to execution proceedings. The said E.A., has been filed by the defendant in the year 2015 raising his objections to the decree that too after the appeal in A.S., which has been rejected by the lower appellate court. In such circumstances, the Executing Court has recorded that "Item 1 possession delivered on 27.04.2017 at 3.30 p.m., Item II possession not delivered the property is Coimbatore jurisdiction." When the lower appellate Court has justified and affirmed the decree granted in favour of the plaintiff on the pleadings



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and the evidence in the case, in respect of taking delivery within the boundaries, the learned counsel appearing for the revision petitioner/defendant cannot dispute the same. It is certainly not open to the judgment debtor to claim that the delivery is bad. Once a decree is passed, it is not open to the defendant to raise a question again before the executing Court. The Executing Court, certainly cannot go beyond the decree and that is a settled law. In such view of the matter, revision petition filed against execution of decree, has no merits.

15. It is at that point of time, S.A.No.891 of 2017 has been filed before this court against the dismissal of the appeal suit filed by the defendant, whereby, the first appellate court confirmed the decree and judgment passed by the trial court.

16. The second appeal and revision petition are pending before this court since 2017. By this common judgment, both the matters are finally disposed of, holding that there is no perversity in the decree and judgment of the courts below.



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17. In the absence of any erroneous findings in the concurrent judgments passed by the courts below, this court cannot interfere with the findings of the facts in the case on hand. The present Second appeal is against the concurrent findings recorded by both the Courts, after appreciating the oral as well as documentary evidence. Hence, interference with such findings of facts is impermissible and therefore, the present appeal is not required to be entertained and called for any interference.

18. In the result, second appeal and civil revision petition stand dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

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Index :Yes/No

Internet:Yes/No

Speaking order/Non-speaking order

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To

- 1.The learned Sub Judge, Tiruppur.
2. The learned 2nd Additional District and Sessions Judge, Tiruppur,
- 3.The Section Officer, V.R.Section, High Court of Madras.

J.NISHA BANU, J.

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